Ian Street Developer Pty Ltd v Arrow International Pty Ltd [2018] VSC 14 (31 January 2018)

Last Updated: 31 January 2018

IN THE SUPREME COURT OF VICTORIA	Not Restricted

AT MELBOURNE

COMMERCIAL COURT

COMMERCIAL LIST

S ECI 2017 00230

IAN STREET DEVELOPER PTY LTD — Plaintiff

(ACN 606 629 323)

v

ARROW INTERNATIONAL PTY LTD — First Defendant

(ACN 081 136 352)

and

JONATHAN SMITH — Second Defendant

JUDGE:	Riordan J
WHERE HELD:	Melbourne
DATE OF HEARING:	15 and 17 January 2018
DATE OF JUDGMENT:	31 January 2018
CASE MAY BE CITED AS:	*Ian Street Developer Pty Ltd v Arrow International Pty Ltd*
MEDIUM NEUTRAL CITATION:	[2018] VSC 14

BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* (Vic) – Principles of statutory construction considered.

BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether a special purpose vehicle 'in the business of building residences' – Section 7(2)(b) of the Act considered – Whether the Act applies – Plaintiff is 'in the business of building residences'.

BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether the maximum extension of time permitted under s 22(4) of the Act is a further 5 days or a further 15 days – Maximum permitted extension of time is a further 5 days.

BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether an adjudication determination given after the period permitted under s 22(4) of the Act is invalid – Out of time determination is not invalid – Requirements of s 22(4) of the Act not jurisdictional.

BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether a payment claim under s 14 of the Act may include the value of work performed before an earlier reference date – A person entitled to a progress payment, which is calculated by reference to a reference date under s 9 of the Act, may include the value of work performed before the previous reference date.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr N J Phillpott	Noble Lawyers
For the Defendant	Mr B Reid	Thomson Geer

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HIS HONOUR:

The Claim

1 By originating process filed 22 September 2017, the plaintiff ('Ian Street') seeks an order in the nature of certiorari that the adjudication determination ('the Determination') purportedly made by the second defendant ('the Adjudicator') dated 26 July 2017 pursuant to s 23 of the *Building and Construction Industry Security of Payment Act 2002* ('the Act') be quashed.

2 Ian Street claims that the Determination should be set aside on the grounds that the adjudicator fell into jurisdictional error and/or erred in law by:

(a) making the Determination in excess of the time permitted by s 22(4) of the Act (Ground 1);

(b) determining that the plaintiff is 'in the business of building residences' and therefore s 7(2)(b) of the Act did not apply (Ground 2);

(c) determining that the relevant payment claim did not offend ss 14(8) and 14(9) of the Act (Ground 3); and

(d) determining that the relevant payment claim identified claimable work performed between the relevant reference dates and therefore ignored the requirements of ss 9(1) and 14(2)(c) of the Act (Ground 4).

3 In summary, for the reasons that follow, I have decided as follows:

(a) The maximum extension permitted under s 22(4) of the Act is a further 5 days; and the Determination was made outside the prescribed period as extended.

(b) The Determination is valid despite the fact that it was made after the time prescribed in s 22(4) of the Act.

(c) Ian Street was in the business of building residences within the meaning of

s 7(2) of the Act.

(d) Arrow's payment claim was not invalid because a person entitled to a progress payment, which is calculated by reference to a reference date under s 9 of the Act, may include the value of work performed before the previous reference date.

Background

4 The first defendant ('Arrow') is a construction company based in New Zealand and currently has two projects in Australia and 21 projects in New Zealand.

5 Ian Street is a special purpose vehicle established solely for the purpose of developing the site ('the Site') at 20–30 Ian Street, Noble Park, Victoria ('the Project'). Its sole director is Melinda Jane Wilson and its sole shareholder is Mider Enterprises Pty Ltd. Melinda Jane Wilson is the sole shareholder of Mider Enterprises Pty Ltd and there is no record of company officers on the ASIC register.

6 The registered proprietor of the site is a different corporation, Ian Street Land Pty Ltd, and Melinda Jane Wilson is the sole director and Mider Enterprises Pty Ltd is the sole shareholder of Ian Street Land Pty Ltd.

7 By a construction contract dated 7 October 2016 ('the Construction Contract'), Arrow agreed to carry out the works for the construction of 83 apartments with common areas and six ground floor retail tenancies on the Site. The contract sum was $10,250,000 (excluding GST), which consisted of $9,225,000 for domestic building work and $1,025,000 for commercial building work.

8 The superintendent nominated under the construction contract was Mider Opex Pty Ltd. The sole shareholder of Mider Opex Pty Ltd is Anton & Melinda Wilson Pty Ltd whose sole director and shareholder is Melinda Jane Wilson.

9 Clause 42.1 of the Construction Contract provides with respect to Payment Claims, Payment Schedules, Calculations and Time for Payment as follows:

> At the times for payment claims or upon completion of the stages of the work under the Contract stated in Annexure Part A and upon the issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.5, the Contractor shall deliver the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then otherwise due to the Contractor arising out of the Contract. The date upon which the Contractor is entitled submit [sic] a payment claim under this Clause 42.1 is the 'reference date' within the meaning of the Security of Payment Act.

10 Item 46(a) of the Annexure Part A of the Construction Contract states that the 'Times under the Contract for payment claims (42.1)' are the 'Last day of each month'. It is agreed between the parties that the reference dates within the meaning of the Act are on the last day of each month.

Payment Claims Made Under the Construction Contract

11 From November 2016, Arrow undertook and completed the demolition works and the variation and provisional sum works under the construction contract as directed by the superintendent; and made the following claims.

12 The first claim was for the sum of $265,428.27 (excluding GST) and consisted of the following:

(a) On 30 November 2016, Arrow issued a progress claim under cl 42 of the construction contract for the amount of the first claim ('PC1').

(b) On 9 December 2016, the superintendent issued a progress claim valuation in which it scheduled payment of 100 per cent of the amount claimed in PC1.

(c) On 9 December 2016, Arrow issued a tax invoice for the amount claimed in PC1 ('Invoice 1').

13 PC1 and Invoice 1 were not valid progress claims under the Act.

14 The second claim was for the sum of $243,836.66 (excluding GST) and consisted of the following:

(a) On 16 December 2016, Arrow issued a progress claim under cl 42 of the construction contract for the amount of the second claim ('PC2').

(b) On 21 December 2016, the superintendent issued a progress claim valuation in which it scheduled 100 per cent of the second claim for payment.

(c) On 21 December 2016, Arrow issued a tax invoice for the amount of the second claim ('Invoice 2').

15 PC2 and Invoice 2 were not valid progress claims under the Act.

16 On 23 December 2016, Ian Street paid to Arrow an amount of $103,343.70 (excluding GST) without specification but presumably in part satisfaction of Invoice 1 and/or Invoice 2.

17 The third claim was for the sum of $187,464.29 (excluding GST) and consisted of the following:

(a) On 23 January 2017, Arrow issued a progress claim under cl 42 of the construction contract for the third claim ('PC3').

(b) The superintendent did not respond to PC3, but Ian Street's quantity surveyor valued PC3 at 100 per cent of the third claim.

(c) On 3 March 2017, Arrow issued a tax invoice for the third claim ('Invoice 3').

18 PC3 and Invoice 3 were not valid progress claims under the Act.

19 The fourth claim was for the sum of $211,253.00 (excluding GST) and consisted of the following:

(a) On 28 February 2017, Arrow issued a progress claim under cl 42 of the construction contract for the fourth claim ('PC4').

(b) The superintendent did not respond to PC4.

(c) On 14 March 2017, Arrow issued a tax invoice for the fourth claim ('Invoice 4').

20 PC4 and Invoice 4 were not valid progress claims under the Act.

21 The fifth claim was for the sum of $116,020.16 (excluding GST) and consisted of a tax invoice for that sum ('Invoice 5'). Invoice 5 was not a valid progress claim under the Act.

Progress Claim Under the Act

22 On 31 May 2017, Arrow issued a progress claim under s 14 of the Act in the sum of $882,608.14 (excluding GST).

23 On 14 June 2017, the superintendent issued a payment schedule under s 15 of the Act in which it scheduled for payment an amount of $0. In accordance with s 15(4)(b)(ii) of the Act, the payment schedule was provided within 10 business days after the payment claim was served.

24 On 28 June 2017, Arrow made an application to RICS Dispute Resolution Centre for adjudication of the Payment Claim under s 18 of the Act. The adjudication application was made within 10 business days of receipt of the payment schedule as required by s 18(3)(c) of the Act. On the same day, the adjudication application was served on Ian Street in accordance with s 18(5) of the Act.

25 On 30 June 2017, RICS Dispute Resolution Centre notified the parties of the appointment of the Adjudicator. On the same day, the Adjudicator notified the parties by email and Express Post that he accepted the adjudication application and was therefore appointed to determine the application pursuant to s 20(3) of the Act.

26 On 5 July 2017, Ian Street served an adjudication response on the Adjudicator and Arrow, which was within five business days of receiving a copy of the adjudication application as required by s 21(1)(a) of the Act.

27 On 7 July 2017, the Adjudicator:

(a) served a notice under s 21(2B) of the Act, stating that Arrow had two business days to lodge a response to the reasons in the adjudication response which had not been included in the payment schedule; and

(b) requested that Arrow agree to an extension of time in which to determine the adjudication application to 31 July 2016 pursuant to s 22(4)(b).

28 On 7 July 2017, Arrow agreed to extend the time for the determination of the adjudication application to 31 July 2017.

29 On 11 July 2017, Arrow served its response to the s 21(2B) notice on the Adjudicator and Ian Street, which was within two business days as provided by that subsection.

30 On 16 July 2017, the Adjudicator requested additional information from Ian Street pursuant to s 22(5). On 17 July 2017, Ian Street served its response to the request, and on 18 July 2017, Arrow commented on that response.

31 On 28 July 2017, the RICS Dispute Resolution Centre informed Ian Street and Arrow that the Adjudicator had made the Determination and it would be released to the parties on payment of the adjudicator's fees. On 1 August 2017, the Adjudicator's fees were paid by Arrow and the Determination was served on the parties.

32 The Adjudicator determined that Ian Street was liable to pay Arrow $381,446.78 (exclusive of GST) plus interest and 50 per cent of the Adjudicator's fee.

33 On 11 August 2017, the RICS Dispute Resolution Centre issued an adjudication certificate in the amount of $402,152.78.

34 On 12 September 2017, Arrow entered judgment against Ian Street in the County Court of Victoria in the sum of $405,638.30 (including interest up to and including 12 September 2017) plus costs of $918.00.

The Statutory Scheme

35 The purpose and object of the Act are set out in ss 1 and 3 of the Act and, in summary, are to provide a statutory right for builders to recover progress payments due under a construction contract by establishing a procedure in which disputed claims are referred to an adjudicator for determination.

36 Section 3 of the Act provides:

> (1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
>
> (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.
>
> (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—
>
> (a) the making of a payment claim by the person claiming payment; and
>
> (b) the provision of a payment schedule by the person by whom the payment is payable; and
>
> (c) the referral of any disputed claim to an adjudicator for determination; and
>
> (d) the payment of the amount of the progress payment determined by the adjudicator; and
>
> (e) the recovery of the progress payment in the event of a failure to pay.
>
> (4) It is intended that this Act does not limit—
>
> (a) any other entitlement that a claimant may have under a construction contract; or
>
> (b) any other remedy that a claimant may have for recovering that other entitlement.

37 The right to progress payments is established by s 9(1) of the Act, which provides:

> On and from each reference date under a construction contract, a person—
>
> (a) who has undertaken to carry out construction work under the contract; or
>
> (b) who has undertaken to supply related goods and services under the contract—
>
> is entitled to a progress payment under this Act, calculated by reference to that date.

The reference date referred to in s 9 (1) is defined in s 9(2) but, relevantly, in the present case, it is the last day of each month.

38 The procedure for recovering progress payments is established under pt 3 of the Act and, relevantly, s 14 provides with respect to claims:

> (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
>
> (2) A payment claim—
>
> (a) must be in the relevant prescribed form (if any); and
>
> (b) must contain the prescribed information (if any); and
>
> (c) must identify the construction work or related goods and services to which the progress payment relates; and
>
> (d) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount); and
>
> (e) must state that it is made under this Act.
>
> ...
>
> (8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
>
> (9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

39 A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claims relates; or

(b) the period of three months after the reference date referred to in s 9(2) of the Act that relates to that progress payment —

whichever is the later.[1]

40 The person who is served with the payment claim may reply to the claim by providing a payment schedule to the claimant which:

(a) must identify the payment claim to which it relates; and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make ('the scheduled amount'); and

(c) must identify any amount of the claim that the respondent alleges is an excluded amount; and

(d) must be in the relevant prescribed form (if any); and

(e) must contain the prescribed information (if any).[2]

41 The respondent must provide the payment schedule within 10 business days after the payment claim is served, or earlier if required by the construction contract.[3]

42 The claimant may apply for adjudication of a payment claim if:

(a) the scheduled amount in the payment schedule is less than the claimed amount;

(b) the respondent fails to pay the scheduled amount; or

(c) the respondent fails to provide a payment schedule and does not pay the whole or part of the amount claimed.[4]

43 The adjudication application must be made to an authorised nominating authority within 10 business days after the claimant receives the payment schedule.[5]

44 The adjudicator accepts an adjudication application by serving a notice of acceptance on both the claimant and the respondent.[6] If the claimant does not receive an adjudicator's notice of acceptance of the appointment within four business days after the application is made, it may withdraw the application and make a new application.[7]

45 If the respondent has provided a payment schedule within the time specified in ss 15(4) or 18(2)(b),[8] the respondent may lodge with the adjudicator a response to the adjudication application within:

(a) five days after receiving a copy of the application; or

(b) two business days after receiving notice of the adjudicator's acceptance of the application –

whichever time expires later.[9] If the adjudication response is not made within the time prescribed in s 21(1), the adjudicator is not permitted to consider it.[10]

46 If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant:

(a) setting out those reasons; and

(b) stating that the claimant has two business days after being served with the notice to lodge a response to those reasons with the adjudicator.[11]

47 After the expiration of the period in which the respondent may lodge an adjudication response, the adjudicator is to determine the adjudication application as expeditiously as possible and in any case:

(a) within ten business days after the date on which the adjudicator accepted the appointment; or

(b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees (and such agreement must not be unreasonably withheld).[12]

48 Pursuant to s 22(5) of the Act, the adjudicator has additional powers to request further written submissions from either party, set deadlines for further submissions and comments by the parties, call a conference of the parties and carry out an inspection.[13]

49 With respect to the adjudicator's determination, s 23 of the Act provides:

> (1) An adjudicator is to determine—
>
> (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount); and
>
> (b) the date on which that amount became or becomes payable; and
>
> (c) the rate of interest payable on that amount in accordance with section 12(2).
>
> (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only—
>
> (a) the provisions of this Act and any regulations made under this Act;
>
> (b) subject to this Act, the provisions of the construction contract from which the application arose;
>
> (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;
>
> (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
>
> (2A) In determining an adjudication application, the adjudicator must not take into account—
>
> (a) any part of the claimed amount that is an excluded amount; or
>
> (b) any other matter that is prohibited by this Act from being taken into account.
>
> (2B) An adjudicator's determination is void—
>
> (a) to the extent that it has been made in contravention of subsection (2);
>
> (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.
>
> (3) The adjudicator's determination must be in writing and must include—
>
> (a) the reasons for the determination; and
>
> (b) the basis on which any amount or date has been decided.
>
> (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined—
>
> (a) the value of any construction work carried out under a construction contract; or
>
> (b) the value of any related goods and services supplied under a construction contract—
>
> the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work or the goods and services the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous determination.

50 If the adjudicator does not determine the application in the time allowed by s 22(4) of the Act, the claimant may:

(a) withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and

(b) make a new adjudication application under s 18.[14]

Principles of Statutory Interpretation

51 The Court of Appeal recently considered the principles of statutory construction in *Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd*.[15] I summarise the approach adopted by the Court of Appeal as follows.

52 The primary object of statutory construction is to construe the relevant provision so that its legal meaning is consistent with:

(a) the language of the relevant provision, being the text; and

(b) the legislative purpose of the statute.[16]

The legal meaning is 'the meaning that the legislature is taken to have intended the provision to have'.[17] It may or may not be the same as the literal meaning.[18]

53 Accordingly, in statutory construction, the focus is on the text and the legislative purpose as follows:

(a) The primacy of the text has been emphasised by the High Court.[19] It has been said that the process of statutory interpretation starts and ends with the text.[20]

(b) To ascertain the legislative purpose, the Court first considers the text of the relevant provision in its context.[21] The context means:

(i) the whole of the Act or other instrument;

(ii) the existing state of the law;

(iii) the mischief that the statute was intended to remedy;[22] and

(iv) the history of the legislative scheme and extrinsic materials.[23]

54 If the literal meaning of the text is consistent with the identified legislative purpose, the literal meaning will be accepted as the legal meaning.

55 If after exhausting this approach, the Court considers the text to be ambiguous, it can only then have reference to parliamentary debates or other extrinsic material to assist in resolving the ambiguity.[24] Of course, such material cannot displace the meaning of the statutory text.[25]

56 However, if the literal meaning conflicts with the identified legislative purpose, a departure from the literal meaning may be justified. The resultant tension was described by Francis Bennion in 'Statutory Interpretation':

> Consideration of the enactment in its context may raise factors that pull in different ways. For example, the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.[26]

57 Examples of conflicts between the literal meaning and the identified legislative purpose, which have justified departure from the literal meaning, have included the following:

(a) The literal meaning would conflict with other provisions of the statute.

(b) The literal meaning is inconsistent with the purpose of the statute.

(c) The literal meaning is incapable of practical application.

(d) Adoption of the literal meaning would lead to a result that is absurd, unreasonable or anomalous.[27]

58 If it is determined that such a conflict exists, the approach to reconciliation of the conflict is as follows:

(a) First, if an alternative construction is to be adopted as the legal meaning, it is necessary that the alternative construction is 'reasonably open'[28] and 'consistent with the language in fact used by the legislature'.[29] This is necessary because 'the task remains the construction of the words the legislature has enacted'.[30] 'The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions'.[31]

(b) Section 35(a) of the *Interpretation of Legislation Act 1984* provides that a construction that would promote the purpose underlying the Act is to be preferred to a construction that would not.

(c) If the inconsistency between the literal meaning and the legislative purpose is the result of 'simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision', an alternative construction, which is consistent with the legislative purpose, may be more 'readily' adopted.[32]

(d) After the identification of an alternative construction, the legal meaning will be determined by balancing:

(i) the strength of the literal meaning as against the alternative construction; and

(ii) the extent to which these meanings are consistent with the promotion of the legislative purpose.

59 This balancing exercise has been explained by High Court as follows:

(a) 'If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces the fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.'[33]

(b) '[I]nconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which ... is reasonably open and more closely conforms to the legislative intent'.[34]

60 With respect to interpreting a provision as if it contained additional words, guidance has been provided by the plurality of the High Court in *Taylor v Owners—Strata Plan No 11564*.[35] Their Honours stated that 'the task remains the construction of the words the legislature has enacted. ... any modified meaning must be consistent with the language in fact used by the legislature.'[36] The plurality said that whether an interpretation of a provision, as if it contained additional words, is justified involves a judgment of matters of degree, and explained:

> That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills 'gaps disclosed in legislation' or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'.[37]

Ground 1 — Is the Determination void because it was made not within the time prescribed by s 22(4)?

61 Ground 1 raises two questions:

(a) Did the adjudicator determine the adjudication application within the time prescribed by s 22(4)?

(b) If no, is a determination, which is made out of the time prescribed in s 22(4) ('an out of time determination'), void?

Submissions on behalf of Ian Street

62 It was submitted on behalf of Ian Street that the Adjudicator did not determine the adjudication application within the time required by s 22(4) of the Act because the purported extension to 31 July 2017 was beyond the power conferred under s 22(4)(b) of the Act.

63 Counsel for Ian Street argued that, on a proper construction of s 22(4)(b) of the Act, time can only be extended by a maximum five business days because '15 business days after that date' was a reference to 15 business days after the acceptance by the adjudicator of the application. It was submitted that this construction should be accepted for the following reasons:

(a) The words 'that date' in s 22(4)(b) should be read as referring to 'the date on which the acceptance by the adjudicator of the application takes effect' contained in s 22(4)(a). As a result, the 15 days are calculable from the date of acceptance by the adjudicator of the application.

(b) The Act imposes strict timeframes, and the time limit imposed in s 22(4)(a) is only 10 business days. It is inconsistent for s 22(4)(b) of the Act to increase the time limit by 15 days or 150 per cent.

(c) A strict time requirement is consistent with the object of the Act set out in s 3 and with the strict time limits throughout the Act.[38]

(d) In *SSC Plenty Road v Construction Engineering (Aust)*,[39] Vickery J said:

> Strict time constraints limit the time within which an adjudicator is to deliver a determination, provided by s 22(4), namely within 10 days of the adjudicator accepting nomination or within a shortly extended period of 15 days agreed to by the claimant.
>
> ...
>
> The Adjudicator accepted the adjudication application on 29 July 2015 in accordance with s 20(2), and delivered the Adjudication Determination on 21 August 2015 within the limit of the extension period prescribed by the Act, which was 15 days.[40]

64 Accordingly, it was submitted that the Adjudicator did not make his determination within time and the failure to make the Determination within time constituted a jurisdictional error. In this respect, the reasoning of Tobias AJA in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd*[41] should be preferred to the reasoning of McDougall J in *MPM Constructions Pty Ltd v Trepcha Constructions Pty Ltd*.[42]

Submissions on behalf of Arrow

65 It was submitted on behalf of Arrow that s 22(4)(b) of the Act should be construed as providing that, with the agreement of the claimant, an adjudicator may have up to 25 days after the date on which the adjudicator accepts the adjudication application. It was submitted that this is the proper construction for the following reasons:

(a) The date referred to in s 22(4)(b) is the date calculated under para (a). The date calculated under para (a) is the date 'within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect ...'.

(b) In *SSC Plenty Road v Construction Engineering (Aust)*, Vickery J said that the relevant determination was made 'within the limit of the extension period prescribed by the Act, which was 15 days'.[43]

(c) Although there are strict timeframes throughout the Act, s 22(4) is intended to protect claimants in circumstances where the adjudicator is unable to meet the deadline prescribed under para (a).

(d) *Cardinal Project Services*[44] and *MPM Constructions*[45] are distinguishable because they do not concern a request for an extension of the period within which an adjudicator was obliged to determine an adjudication application.

66 It was submitted by Arrow that the Determination is not invalid, even if it was given out of time, for the following reasons:

(a) The approach adopted by McDougall and Hammerschlag JJ in *MPM Constructions*,[46] *Cranbrook School v JA Bradshaw Civil Contracting Pty Ltd*[47] and *MT Lewis Estate Pty Ltd v Metricon Homes Pty Ltd*,[48] should be accepted over the decision of Tobias AJA in *Cardinal Project Services*,[49] which provides no clear guidance as to whether the time limits set out in s 22(4) are jurisdictional.

(b) The time limits set out in s 22(4) are to be properly construed as a procedural condition for the exercise of a statutory power or authority and therefore not jurisdictional.

Did the adjudicator determine the adjudication application with the time prescribed by s 22(4)?

67 Section 22(4) of the Act is capable of two meanings in that 'that date' in para (b) could refer to either:

(a) the date expressly mentioned in para (a) being 'the date on which the acceptance by the adjudicator of the application takes effect'; or

(b) the date 10 business days later, by which time the adjudicator is required by para (a) to determine an adjudication application.

68 Having regard to the text, I consider that:

(a) Ian Street's construction is supported by the fact that the only date expressly referred to in para (a) is the earlier date; and

(b) Arrow's construction is supported by the fact that it provides for 'further time, not exceeding 15 business days' and Ian Street's construction only allows for five days of further time.

69 I do not consider that either interpretation can be said to better promote the object of the Act. On one hand, the object of the Act is for the determinations to be made expeditiously. On the other hand, the provision for an extension of time only provides for a maximum extension subject to the agreement of the claimant.

70 The legislative history of s 22(4) of the Act was that it was originally enacted in the following form:

> Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case—
>
> (a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or
>
> (b) within any further time to which the claimant and the respondent may agree.

71 The original s 22(4) was amended by s 22(2) of the *Building and Construction Industry Security of Payment (Amendment) Act 2006* by substituting a new s 22(4)(b), the effect of which was to add the words 'not exceeding 15 business days after that date', after the words 'further time' and to remove the need for the respondent to agree to the further time.[50]

72 The 2006 amendments followed a review of the 2002 Act by the Building Commission at the direction of the Minister for Planning. For the purpose of assisting the Building Commission to finalise recommendations for the amendment of the 2002 Act, the Minister appointed a working group ('the Security of Payment Working Group') composed of representatives from key sectors of the industry, which was chaired by Tony Robinson MP.[51] In its report to the Minister, the Security of Payment Working Group noted that the New South Wales legislation may be amended to allow an adjudicator to extend the time for making a determination by an extra 5 days (making a total of up to 15 days). However, it recommended that 'an adjudicator should not be limited to an extension of 5 days, rather, it is recommended that the Act give adjudicators discretion to nominate a reasonable period for making the determination, which must be approved by the claimant.'[52]

73 In the Government Response to the Recommendations of the Security of Payment Working Group dated June 2006, the Building Commission supported the above recommendation 'in principle', but stated:

> [I]t is not accepted that adjudicators should have discretion to determine any length of time, as an extension to the standard 10 day period for making a determination. As the Victorian scheme was designed to provide fast resolution of disputes and prompt payment to claimants, it is preferable to limit the extension of time available to adjudicators to a maximum of 5 extra days (making a total of 15 business days).'[53]

74 On the other hand, the explanatory memoranda to the Building and Construction Industry Security of Payment (Amendment) Bill 2006 explains that cl 22 'substitutes s 22(4)(b) of the Principal Act. This enables the time for the adjudicator to make a determination to be extended by up to a further 15 days on the agreement of the claimant.'[54]

75 The contradictory nature of the extrinsic material means that it is of no real assistance in resolving the competing constructions of s 22(4) of the Act and, in any event, it is subject to the primacy of the text.[55]

76 I have had regard to the whole of the Act and in particular s 28I, which was a provision that was also introduced by the *Building and Construction Industry Security of Payment (Amendment) Act 2006*. Section 28I is in div 2A of pt 3 of the Act, which provides for a procedure by which a respondent or a claimant may, respectively, review an adjudication determination on the ground that the adjudicated amount included an 'excluded amount' or wrongly found that an amount claimed was an 'excluded amount'. In my opinion, the following tables show the similarities between the structure of s 28I and ss 22 and 23 of the Act.

77 In this respect, comparison may be made between those provisions which provide first for the earliest time the determination or review may be made.

Section 22(1)	Section 28I(1)
An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.	A review adjudicator is not to determine an adjudication application until after the end of the period within which any party to the adjudication review may make a submission in accordance with section 28E.

78 Secondly, comparison may be made between the provisions which provide for the matters that the adjudicator must consider.

Section 23(2)	Section 28I(2)
In determining an adjudication application, the adjudicator must consider the following matters and those matters only— (a) the provisions of this Act and any regulations made under this Act; (b) subject to this Act, the provisions of the construction contract from which the application arose; (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim; (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule; (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates	In determining an adjudication review application, the review adjudicator must consider the following matters and those matters only— (a) the provisions of this Act and any regulations made under this Act; and (b) the provisions of the construction contract from which the application arose; and (c) the information provided by the authorised nominating authority under section 28H.[56]

79 Thirdly, comparison may be made between the provisions which provide for the matters that the adjudicator or review adjudicator must not consider, and the consequence of considering any of those matters.

Section 23(2A)–(2B)	Section 28I(3)–(4)
(2A) In determining an adjudication application, the adjudicator must not take into account— (a) any part of the claimed amount that is an excluded amount; or (b) any other matter that is prohibited by this Act from being taken into account. (2B) An adjudicator's determination is void— (a) to the extent that it has been made in contravention of subsection (2); (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.	(3) In determining an adjudication review application, the review adjudicator must not take into account— (a) any excluded amount; or (b) any other matter that is prohibited by this Act from being taken into account. (4) A review adjudicator's determination is void— (a) to the extent that it has been made in contravention of subsection (2); or (b) if it takes into account any amount or matter referred to in subsection (3), to the extent that the determination is based on that amount or matter.

80 Fourthly, comparison may be made between the provisions which provide for the form of the determination or review determination.

Section 23(3)	Section 28I(7)
The adjudicator's determination must be in writing and must include— (a) the reasons for the determination; and (b) the basis on which any amount or date has been decided.	A review determination must be in writing and set out the reasons for the review determination in that determination

81 Fifthly, comparison should be made between the provisions which provide for the timing of the determination of the adjudication or review adjudication, and the procedures for extensions of time.

Section 22(4)–(4A)	Section 28I(10)–(11)
(4) Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as	(10) The review adjudicator must complete the adjudication review and provide a copy of the review

possible and, in any case— (a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or (b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees. (4A) A claimant must not unreasonably withhold their agreement under subsection (4)(b).	determination to the authorised nominating authority that appointed him or her— (a) within 5 business days after his or her appointment; or (b) within any further time, not exceeding 10 business days after that appointment, to which the applicant for the adjudication review agrees. (11) An applicant must not unreasonably withhold their agreement under subsection (10)(b).

82 In particular, the tables above highlight the similarity of the structure of the time requirements between ss 22(4) and 28I(10) of the Act. Section 28I(10) unambiguously contemplates that the time can only be extended to a total of 10 days from the date of appointment, and not by 10 days from the expiration of the period set by s 28I(10)(a).

83 In my opinion, a reading of the text, in its legislative context, indicates that the legislative intention was that s 22(4)(b) of the Act permits the extension of the determination of the adjudication application (with the claimant's agreement) for a further time, which does not exceed 15 business days from the date of the adjudicator's acceptance (being 5 days after the expiry of the period provided in para (a)). In particular, I consider this construction 'has a powerful advantage in ordinary meaning and grammatical sense'[57] for the following reasons:

(a) The meaning of s 22(4) must be determined 'by reference to the language of the instrument viewed as a whole'.[58] Sections 22(4) and 28I(10) are cognate sub-sections of the Act, which should be read consistently unless the context requires a different result.[59] The adopted construction provides a reading of the provision in issue consistent with the manner in which s 28I(10) is expressed.

(b) Section 22(4)(b) refers to 'that date', which would ordinarily be read as a reference to the date expressly referred to in the immediately preceding paragraph (ie 'the date on which the acceptance by the adjudicator of the application takes effect'). By comparison, and on a plain reading, the 10 days expressed in s 22(4)(a) set a period, rather than any particular date. If the draftsman had intended the 15 days to extend from the period set by para (a), she or he could easily have so stated.

84 Accordingly, the time for the determination of the adjudication application was not validly extended to 31 July 2017, and upon that construction of s 22(4) it is common ground that the Determination was made after the time prescribed by s 22(4) of the Act.

Is an out of time determination void?

85 I have found that the Adjudicator failed to determine the adjudication application within the time limit prescribed in s 22(4). This conclusion requires consideration of whether an out of time determination is nonetheless valid, although made in breach of a statutory provision, or is invalid and therefore legally void.

86 The starting point for determining invalidity is *Project Blue Sky*,[60] where the majority said:

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. ... There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.[61]

87 In *MPM Constructions*,[62] McDougall J held that an out of time determination was not invalid for the following reasons:

(a) Invalidity was inconsistent with the object of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the NSW Act') as set out in s 3 of the NSW Act.[63] In particular, his Honour considered it would be anomalous if the result of:

(i) the adjudicator not complying with the time limit; and

(ii) the claimant not withdrawing the application and seeking a new adjudication application within five business days after the expiration of the adjudication time limit;[64]

the claimant would be unable to obtain an adjudication of the disputed claim.[65]

(b) The Act expressly provides for two consequences of non-compliance with the adjudication time limit being that:

(i) the claimant 'may withdraw the application';[66] and

(ii) the adjudicator becomes disentitled to his fees under s 45(5) of the Act.

However, the Act does not provide for an out of time determination to be invalid.[67]

(c) If the effect of an adjudication not being given within the adjudication time limit was that:

(i) any subsequent purported determination was a nullity; and

(ii) the adjudicator would effectively become functus officio.

then there would be no purpose in the Act providing that the claimant may withdraw the application.[68]

88 In *Allpro Building Services Pty Ltd v Micos Architectural Division Pty Ltd*,[69] McDougall J confirmed his view that a determination is valid notwithstanding that it is given out of time. However, his Honour considered that the fact that the determination was valid did not impact on the disentitlement of the adjudicator to his fees under the New South Wales equivalent of s 45(5) of the Act.[70]

89 In *Cardinal Project Services*,[71] the majority held that the period for a claimant to make a new adjudication application, under the New South Wales equivalent of s 28(3) of the Act, when an adjudicator makes a void determination within time, commences to run on the expiration of the time allowed in the New South Wales equivalent of s 22(4) of the Act.[72]

90 In his dissenting judgment, Basten JA held that an out of time determination was not invalid because the statutory scheme 'envisages that delay will affect the claimant adversely and thus confers on it a right to make a further adjudication application ...'.[73] Tobias AJA disagreed with Basten JA on this question because he did not agree that an interpretation that resulted in an out of time determination being ineffective was anomalous.[74] Macfarlan JA gave separate reasons and did not deal with the question.

91 In *Cranbrook School v JA Bradshaw Civil Contracting*,[75] McDougall J noted the difference of opinion between Basten JA and Tobias AJA and confirmed his view that an out of time determination was not invalid. In support of his contention that an interpretation of validity was more consistent with the object of the NSW Act, he said:

> To my mind, it would be quite extraordinary if the legislature intended that a builder or subcontractor who had got through the various hurdles that the [NSW] Act imposes, in the path of obtaining a successful determination, up until the point of receipt of the adjudicator's reasons, should be disqualified from the benefit of a determination in its favour simply because the adjudicator did not comply with the statutory time limit.[76]

92 Additionally, his Honour noted that the primary obligation imposed by the New South Wales equivalent of s 22(4) 'is to determine an adjudication application as expeditiously as possible'.[77] He said that if this requirement was jurisdictional, 'then an adjudicator might act outside jurisdiction if, for example, he or she decided within the 10 business day period but not as quickly as could have been done.' He considered that an 'unlikely proposition'.[78]

93 In *MT Lewis Estate Pty Ltd v Metricon Homes Pty Ltd*,[79] Hammerschlag J considered the view of Tobias AJA, but preferred McDougall J's conclusion that an out of time determination was not invalid. He added to the considerations against invalidity to those identified by McDougall J:

> [U]nder s 31 [of the NSW Act], an adjudicator is exempt from liability for anything omitted to be done in good faith. This would undoubtedly extend to a failure to deliver on time. If the time limit in s 29(4) is a guillotine, the obligation on an adjudicator to deliver a determination, whilst it may have been breached, would come to an end with no redress against her or him unless the failure was not in good faith. The adjudicator would be relieved of the burden of producing, albeit that she or he could not charge for work done. If a later adjudication is nevertheless valid, the adjudicator's duty would continue and the sanction of not being paid is more real. This position is more conducive to the prompt delivery by adjudicators and fulfilment of the overall objects of the Act.[80]

94 In summary, the reasons identified by McDougall J and Hammerschlag J for holding that non-compliance with the time limits for giving an adjudication determination does not invalidate the adjudication determination are as follows:

(a) Invalidity was inconsistent with the object of the Act, set out in s 3 of the NSW Act.

(b) The NSW Act expressly provides two specific consequences of non-compliance with the adjudication time limit; but does not provide for invalidity.

(c) If an out of time determination was a nullity there would be no purpose in providing that the claimant may withdraw the application under s 26(2) of the NSW Act.

(d) Although the NSW Act prescribes strict time limits on the parties, to deprive the parties of the benefit of an adjudication determination after they have completed their submissions would result in inconvenience (and possibly the cost of a further adjudication) to those parties, who were not responsible for the non-compliance.[81]

(e) If s 21(3) of the NSW Act was intended to impose a jurisdictional requirement, then an adjudication determination, which was given within the 10 day period, could still be invalid if it was not given as 'expeditiously as possible'. A requirement to do an act as 'expeditiously as possible' is less likely to be jurisdictional because it does not have a 'rule-like quality which can be easily identified and applied'.[82]

(f) The object of the NSW Act would be better achieved if the adjudicator's duty to make the adjudication determination continued after expiry of the time limit.

95 I agree with McDougall J and Hammerschlag J that a failure to comply with the time limits for determining an adjudication application does not invalidate the adjudication determination for the reasons given by them, referred to above. In my opinion, I can have regard to this reasoning in interpreting the Victorian Act because the relevant provisions are substantially identical.[83] I would also add the following considerations:

(a) Section 22(4) of the Act regulates 'the exercise of functions already conferred on [the adjudicator], rather than impos[ing] essential preliminaries to the exercise of those functions'.[84] This is a strong indicator of an intention that non-compliance does not deprive the adjudicator of his or her jurisdiction.[85]

(b) Section 23(2B) of the Act provides that the adjudicator's determination is void in certain circumstances, arising out of post-appointment conduct, which do not include non-compliance with s 22(4). As Kirby J said in *Berowra Holdings Pty Ltd v Gordon*:

> Where Parliament has enacted a provision in language which holds back from attaching consequences of nullity and voidness to the acts of a person in breach, it requires a very strong indication elsewhere in the Act that this is Parliament's purpose, if the Court is to derive an implication that this is so. This is because of the drastic consequences that can follow conclusions of nullity and voidness in the law.[86]

(c) Section 22(4A) provides that a claimant must not unreasonably withhold consent to an adjudicator's request for an extension of time. If a claimant refuses an adjudicator's request for an extension of time, but nevertheless the adjudicator makes the determination outside the 10 days, but before the claimant withdraws the application under s 28, then the validity of the delivered determination would not be able to be finally determined until after the question of the reasonableness of the claimant's refusal is known. This is another example of why the assessment of compliance with s 22(4) does not have a 'rule-like quality which can be easily identified and applied'.[87]

Ground 2 — Is Ian Street in the business of building residences?

Submissions on behalf of Ian Street

96 It was submitted on behalf of Ian Street that the Act did not apply to the Construction Contract because s 7(2) relevantly provides as follows:

> This Act does not apply to—
>
> ...
>
> (b) a construction contract which is a domestic building contract within the meaning of the Domestic Building Contracts Act 1995 between a builder and a building owner (within the meaning of that Act), for the carrying out of domestic building work (within the meaning of that Act), other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business.[88]

97 It common ground that s 7(2) of the Act would not apply (and that the Act would therefore apply) if Ian Street was 'in the business of building residences'. It was submitted on behalf of Ian Street that it was not in the business of building residences for the following reasons:

(a) Ian Street is a one off special purpose vehicle incorporated for the sole purpose of entering into a building contract, as a building owner, with the First Defendant (Arrow) for the construction the development at [the Site] comprising of 83 residential apartments and 6 ground floor retail premises (the Project);

(b) Ian Street has never conducted any other business before, including any construction works or developments;

(c) Ian Street has not, nor is it intended that it will, have any involvement in any future developments, other than the Project;

(d) upon completion of the Project, it is intended that Ian Street will pay out any debts that it may have at that time and apply to ASIC to be deregistered under section 601AA of the *Corporations Act 2001*;

(e) Ian Street does not own the land upon which the Project is being constructed – the owner of the land is Ian Street Land Pty Ltd;

(f) Ian Street does not intend to make a profit (or loss) from the Project – it is only intended that Ian Street Land Pty Ltd would make a profit from the Project after it sells the lots in the Land; and

(g) contrary to the finding of the Adjudicator at paragraph 64(c)(iii) of the Determination, the Contract of Sale for lots in the Land (a sample of which is contained at Annexure Part I of the Contract will be between Ian Street Land Pty Ltd as vendor, and a purchaser, and not Ian Street.

98 In particular, Ian Street relied upon the fact that there was no continuous and repetitive business and no intention to make a profit. It relied on the following statement of Vickery J in *Director of Housing v Structx Pty Ltd*:[89]

> The expression 'in the business of building residences...' connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.

Submissions on behalf of Arrow

99 Arrow conceded the adjudicator was in error in paragraph 64(c)(iii) of the Determination in finding that Ian Street would be the vendor of the lots in the Project. However, it contended that Ian Street was nonetheless in the business of building residences because:

(a) Ian Street is solely focused on the development of the site, and had entered into the Construction Contract for $10,250,000;

(b) whether a 'building owner is in the business of building residences' does not depend on 'the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future';[90] and

(c) special purpose vehicles had been held to carry on a business.[91]

Conclusion on ground 2

100 The Act does not define 'the business of building residences'. The words 'the business of building residences' are common English words and are used in their ordinary meaning.

101 In *Hope v Bathurst City Council*,[92] the High Court considered the meaning of the words 'carrying on the business of grazing'. Mason J found that the words denoted that the relevant activities were 'undertaken as a commercial enterprise in the nature of a going concern, that is activities engaged in for the purpose of profit on a continuous and repetitive basis'.[93] His Honour said it was the words 'carrying on' which implied the repetition of acts.[94] It is to be noted in the present case that the Act requires the builder to be 'in', rather than 'carrying on', a business of building residences. Although this difference may be indicative of a legislative intention to de-emphasise any need for repetition, I do not consider that is determinative in this case.

102 For the following reasons, in my opinion, Ian Street was in the business of building residences:

(a) Ian Street was incorporated for the purpose of completing the construction of the Project, including the entry into the Construction Contract for a sum in excess of $10 million with Arrow, and by its officers and agents ensuring that Arrow performed its obligations under the Construct Contract. The sole purpose of Ian Street was to complete the Project for the purpose of the units in the Project being resold by a related corporation Ian Street Land Pty Ltd for a profit.[95] It undertook the Project for at least many months.

(b) The fact that Ian Street itself was not intending to make a profit does not mean it was not in the business of building residences. Ian Street was a special purpose entity and was an integral part of the business structure established to commercialise the Project. In these circumstances, in my opinion, the submission that Ian Street was not in the business of building residences because it was part of a larger commercial structure where the profits would be directed to other entities, defies the commercial reality of the situation.

(c) Counsel for Ian Street did not produce any authority in support of his contention that, for Ian Street to be in business, it must intend to make a profit itself.[96] Such an interpretation would enable the application of the Act to be avoided by the incorporation of special purpose intermediary entities. Such a narrow interpretation would not advance the object of the Act.

(d) Although the fact that the activities are carried on in a continuous and repetitive basis may be consistent with the conduct of a business, it is well recognised that a single venture may constitute a carrying on of the business. In *United Dominions Corporation Ltd v Brian Pty Ltd*, Dawson J said as follows:

> A single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business. Whilst the phrase "carrying on a business" contains an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated, the decision of this court in *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* [1974] HCA 22; (1974) 131 CLR 321 suggests that the emphasis which will be placed upon continuity may not be heavy.[97]

Grounds 3 and 4 — Was the Payment Claim invalid?

Submissions on behalf of Ian Street

103 On behalf of Ian Street, it was submitted (and conceded on behalf of Arrow) that the first payment claim under the Act was on 31 May 2017. Therefore, it was submitted by Ian Street that the adjudicator was wrong to find that the Payment Claim validly included previously valid and unpaid payment claims because there were no previous claims which could be included in the Payment Claim pursuant to s 14(9) of the Act.

104 Further, it was submitted by Ian Street as follows:

(a) The Payment Claim was in breach of s 14(2)(c) of the Act because it did not properly identify what work was performed by the relevant reference date.

(b) The reference dates occurred on the last day of each of the eight months between October 2016 and May 2017 inclusive. Section 14(4) of the Act provides that a payment claim may be served only within three months after the reference date and the Payment Claim could not include PC1, PC2 or PC3 because the reference dates referable to those claims were 30 November 2016, 31 December 2016 and 31 January 2017 respectively. Accordingly, the last day for a payment claim with respect to those claims had expired by 31 May 2017.

(c) The inclusion of PC1, PC2 and PC3 into the Payment Claim resulted in it being impossible to ascertain, with sufficient certainty, the work which could be claimed by reference to the 31 May 2017 reference date.

(d) Arrow's submission that it could include claims referrable to earlier reference dates is inconsistent with:

(i) section 10(1) of the Act, which provides that the amount of a progress payment to which a person is entitled is to be the amount calculated in accordance with the terms of the contract; and

(ii) clause 42 of the Construction Contract, which provides that:

> At the times for payment claims [being the last day of each month] ... the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of the work carried out by the Contractor in the performance of the Contract to that time ...

105 Accordingly, it was argued that cl 42 contemplates that there would be monthly claims and the claims would include the value of the work for that month.

Submissions on behalf of Arrow

106 On behalf of Arrow it was submitted that Ian Street's contentions were premised on the false assumption that the Act:

(a) prohibited a claimant from including in a payment claim under the Act amounts not previously claimed under the Act in circumstances where a progress claim could have been, but was not, made in respect of a previous reference date; and

(b) required a claimant to identify, for the purposes of a payment claim under the Act, the 'reference date' relevant to a specific item of work.

107 On behalf of Arrow, it was submitted:

(a) The effect of s 14(4)(b) of the Act is that Arrow has three months to make a progress claim calculated by reference to 31 May 2017.

(b) Arrow made a payment claim in respect of the 31 May 2017 reference date within the three-month limitation imposed by the subsection.

(c) Section 14 sub-ss (8) and (9) do not arise for consideration because there had been no previous payment claims for prior reference dates and no other payment claim for 31 May 2017.

(d) Accordingly, Arrow was entitled to include in the 31 May 2017 Payment Claim a progress claim for all works carried out by it under the Construction Contract up to that date.

108 Further, it was argued that the Payment Claim meets the preconditions for a valid payment claim under s 14(2) because there is no requirement for the claimant to identify in a payment claim made under the Act the day, or even the month, in which the specific item of construction work was carried out.

109 Further, a failure to comply with s 14(2) is not a nullity 'unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made'.[98]

Conclusions on grounds 3 and 4

110 It is well established that a claim to a progress payment under the Act must be calculated by reference to a reference date under a construction contract.[99] Grounds 3 and 4 raise the issue of whether the payment claim is limited to work performed since the previous reference date. The claimant's rights to progress payments are set out in s 9(1) of the Act, which relevantly provides that 'On and from each reference date under the construction contract, a [relevant] person ... is entitled to a progress payment under this Act, calculated by reference to that date.'

111 In my opinion, there is no basis for limiting the entitlement to work performed after the prior reference date. I do not consider there is any basis upon which s 9(1) could be interpreted as if it contained additional words of limitation. Neither do I consider the object of the Act would be advanced by the construction proposed by Ian Street. If such a construction were adopted:

(a) a claimant would lose its rights under the Act if, in any period, it chose not to make a claim because, for example, a limited amount of work had been completed during the period; and

(b) there could be substantial disputes about the precise value of uncompleted works at the time of a prior reference date for the purpose of calculating what work was performed in the period prior to the relevant reference date.

112 In *Commercial & Industrial Construction Group v King Construction Group*,[100] Vickery J rejected a submission that a claim under s 9 of the Act was limited to work done after the preceding reference date. He explained:

> The text 'calculated by reference to [the relevant reference date]' in s 9(1) of the Act simply means that a payment claim for a progress payment made under the Act is to be calculated in respect of work done up to and including the relevant reference date and not beyond it. Payment for all such work is claimable, regardless of whether or not the work had been performed since the preceding reference date or prior to the preceding reference date.
>
> As long as the claimed work had been done or the materials supplied on or before the relevant reference date, the progress claim made under the Act can be calculated by reference to the reference date for the purposes of s 9(1) of the Act. The statutory scheme for the making of valid payment claims provides for no other requirement in relation to the time when the work the subject of the payment claim was performed, or when the materials were supplied.[101]

113 His Honour referred to decisions made with respect to similar provisions in the NSW Act,[102] and the *Building and Construction Industry Payments Act 2004* (Qld),[103] which were to the same effect.

114 I also reject the submission of Ian Street that:

(a) section 10(1)(a) of the Act provides that the amount of a progress payment is to be calculated in accordance with the terms of the contract; and

(b) clause 42.1 of the Construction Contract contemplates progress claims only for the work performed in the previous month.

115 Although cl 42 does contemplate monthly progress claims, it does not purport to require the Contractor to make a claim for all work done in the previous month, nor does it purport to limit the Contractor's entitlement to claim to the value of work carried out in the previous month. On the contrary, the clause states that:

> Claims for payments shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then otherwise due to the Contractor arising out of the Contract.[104]

116 In fact, if a construction contract sought to limit the claimant's entitlement under s 9 of the Act to work carried out for some limited period prior to the reference date, it could well be void under s 48 of the Act.

117 I further reject the submission of Ian Street that Arrow's failure to identify, in the payment claim, the construction work or related goods and services to which the progress payment relates constituted the payment claim a nullity.

118 This submission was essentially that Arrow, in breach of s 14(2)(c), had failed to sufficiently identify the construction work, the subject of its claim, in the Payment Claim and therefore Ian Street was unable to understand the basis of the claim, to which Arrow was limited, being construction work performed in the month prior to the reference date, 30 May 2017.

119 Section 14(2) does require that the payment claim must purport in a reasonable way to identify the work the subject of the claim so that a respondent can understand the basis of the claim.[105]

120 However, counsel for Ian Street properly accepted that, if Arrow was entitled to include all unclaimed work performed prior to the reference date, this argument could not succeed. As I have found that Arrow was so entitled, this argument must fail.

Orders

121 Accordingly, I propose to order that the proceeding be dismissed and the plaintiff pay the first defendant's costs.

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[1] The Act s 14(4).

[2] Ibid s 15(2).

[3] Ibid s 15(4).

[4] Ibid s 18(1).

[5] Ibid s 18(3).

[6] Ibid s 20(1).

[7] Ibid s 28.

[8] Ibid s 21(2A).

[9] Ibid s 21(1).

[10] Ibid s 22(3).

[11] Ibid s 21(2B).

[12] Ibid ss 22(4)–(4A).

[13] Ibid s 22(5).

[14] Ibid s 28.

[15] [2016] VSCA 328 [47]–[55] (Warren CJ, Whelan JA and Riordan AJA).

[16] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 [69] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

[17] Ibid 384 [78].

[18] Ibid.

[19] See examples cited in *Commissioner of State Revenue v EHL Burgess Properties Pty Ltd* [2015] VSCA 269 [56]–[62] and the discussion in *Di Paolo v Salta Constructions Pty Ltd* [2015] VSCA 230 [32]–[48] (Osborn and Kyrou JJA) and *Lowe v The Queen* [2015] VSCA 327; (2015) 48 VR 351, 357–9 [12]–[18] (Warren CJ).

[20] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ). The expression was adopted by the High Court in *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ) and also by the Court of Appeal in *DPP v Walters* [2015] VSCA 303; (2015) 49 VR 356, 358 [2] (Maxwell P and Redlich, Tate and Priest JJA).

[21] This approach 'needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction': see *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214, 235 (Dawson J).

[22] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson,

Toohey and Gummow JJ).

23. [23] Ibid. *Federal Commissioner of Taxation v Consolidated Media Holdings* [2012] HCA 55; (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ). *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297, 306 (Gibbs CJ), 324 and 334 (Aitkin J). For a discussion about the adoption of the view that the Court may refer to extrinsic materials, before any ambiguity is identified, for the purpose of discerning legislative purpose, see Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) [3.4], [3.21]–[3.23].
24. [24] *Saeed v Minister for Immigration & Citizenship* [2010] HCA 23; (2010) 241 CLR 252, 265 [33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), cited in *Di Paolo v Salta Constructions Pty Ltd* [2015] VSCA 230 [36] (Osborn and Kyrou JJA).

[25] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Northern Territory v Collins* [2008] HCA 49; (2008) 235 CLR 619, 642 [99] (Crennan J).

[26] Francis Bennion, *Statutory Interpretation: A Code* (Butterworths, 3rd ed, 1997) 343–4; referred to with approval in *Project Blue Sky* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

[27] *Colonial Range Pty Ltd v CES-Queen (Vic) Pty Ltd* [2016] VSCA 328 [53] (Warren CJ, Whelan JA and Riordan AJA) (citations omitted).

[28] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

[29] *Taylor v Owners—Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531, 549 [39] (French CJ, Crennan and Bell JJ). Although the Court was here referring to a modified meaning as one which added or omitted words, a fortiori, it must also be a requirement whenever a court is to infer that the legal meaning is other than a literal or grammatical meaning.

[30] Ibid.

[31] *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378, 390 [26] (French CJ and Hayne J).

[32] *Taylor v Owners—Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531, 548 [38] (French CJ, Crennan and Bell JJ). The unique nature of the power to correct drafting errors was recognised in *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] UKHL 15; [2000] 1 WLR 586. At 592, Lord Nicholls said 'It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. ... This power is confined to plain cases of drafting mistakes.'

[33] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297, 321 (Mason and Wilson JJ).

[34] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

[35] [2014] HCA 9; (2014) 253 CLR 531 (French CJ, Crennan and Bell JJ).

[36] Ibid 549 [39].

[37] Ibid 548 [38] (citations omitted).

[38] See, eg, ss 14(4), 15(4) and 18(3) of the Act.

[39] [2015] VSC 631.

[40] Ibid [85], [88].

[41] [2011] NSWCA 399; (2011) 81 NSWLR 716, 740–1 [115]–[116] ('*Cardinal Project Services*').

[42] [2004] NSWSC 103 ('*MPM Constructions*').

[43] [2015] VSC 631 [88].

[44] (2011) NSWLR 716

[45] [2004] NSWSC 103.

[46] Ibid.

[47] [2013] NSWSC 430.

[48] [2017] NSWSC 1121.

[49] [2011] NSWCA 399; (2011) 81 NSWLR 716.

[50] See [47] above and [81] below.

[51] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 February 2006, 219 (Rob Hulls).

[52] Security of Payment Working Group, 'Review of the Building and Construction Industry Security of Payment Act, Victoria 2002' (Working Group Report, 8 October 2004) 44.

[53] Building Commission, 'Government Response to the Recommendations of the Security of payment Working Group' (June 2006) 24 (emphasis added in underline).

[54] Explanatory Memorandum, Building and Construction Industry Security of Payment (Amendment) Bill 2006 (Vic) 8 (emphasis added in underline).

[55] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ). See also *Northern Territory v Collins* [2008] HCA 49; (2008) 235 CLR 619, 642 [99] (Crennan J).

[56] Section 28H provides for the information referred to in s 23(2)(c)–(e) to be provided to the review adjudicator.

[57] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297, 321 (Mason and Wilson JJ).

[58] Ibid 320; cited with approval in *Project Blue Sky* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

59. [59] *Kline v Official Secretary to the Governor General* [2013] HCA 52; (2013) 249 CLR 645, 659–60 [32] (French CJ, Crennan, Kiefel and Bell JJ); *Registrar of Titles (WA) v Franzon* [1975] HCA 41; (1975) 132 CLR 611, 618 (Mason J). See also *Commissioner for Railways (NSW) v Agalianos* [1955] HCA 27; (1955) 92 CLR 390, 397 (Dixon CJ).

[60] (1998) 194 CLR 355 (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

[61] Ibid 388–9 [91] (McHugh, Gummow, Kirby and Hayne JJ).

[62] [2004] NSWSC 103.

[63] Section 3 of the NSW Act is in substantially similar terms to s 3 of the Act.

[64] Pursuant to s 26(3) of the NSW Act.

[65] *MPM Constructions* [2004] NSWSC 103 [17].

[66] Pursuant to s 26(2) of the NSW Act.

[67] *MPM Constructions* [2004] NSWSC 103 [18], [22].

[68] See the NSW Act s 26(2).

[69] [2010] NSWSC 453.

[70] Ibid [6].

[71] [2011] NSWCA 399; (2011) 81 NSWLR 716 (Basten and Macfarlan JJA and Tobias AJA).

[72] Ibid 721 [14], 736 [84], 739 [105] (Macfarlan JA and Tobias AJA).

[73] Ibid 729 [49].

[74] Ibid 740–1 [115].

[75] [2013] NSWSC 430.

[76] Ibid [63].

[77] Ibid [61], [64].

[78] Ibid [64].

[79] [2017] NSWSC 1121.

[80] Ibid [61].

[81] *Project Blue Sky* (1998) 194 CLR 355, 392 [97]–[98] (McHugh, Gummow, Kirby and Hayne JJ); *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 346 ALR 1, 14 [62] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

[82] See, eg, *Project Blue Sky* (1998) 194 CLR 355, 391 [95] (McHugh, Gummow, Kirby and Hayne JJ); *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 346 ALR 1, 14 [62] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

[83] *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (rec and mgr apptd)* (2017) 320 FLR 259, 276 [84] (Tottle J); *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201, 204 (Burchett J), *Hicks v Minister for Immigration & Multicultural Affairs* [2003] FCA 757 [75]–[76] (French J); Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) [3.36]; cf *Marshall v Director General, Department of Transport* [2001] HCA 37; (2001) 205 CLR 603, 632–3 [62] (McHugh J) cited in *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; (2008) 233 CLR 259, 270 [31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[84] *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 346 ALR 1, 14 [62] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

[85] *Project Blue Sky* (1998) 194 CLR 355, 391 [94] (McHugh, Gummow, Kirby and Hayne JJ).

[86] [2006] HCA 32; (2006) 225 CLR 364, 390 [86].

[87] *Project Blue Sky* (1998) 194 CLR 355, 391 [95] (McHugh, Gummow, Kirby and Hayne JJ); *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30; (2017) 346 ALR 1, 14 [62] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

[88] Emphasis added in underline.

[89] [2011] VSC 410 [28].

[90] *Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd* [2017] VCC 495 [27] (Judge Anderson); cited with approval in *Golets v Southbourne Homes* [2017] VSC 705 [38]–[41] (Vickery J).

[91] *Smith v Anderson* (1880) 15 Ch D 247, 277–8 (Brett LJ); *Re Griffin; Ex Parte Board of Trade* (1890) 60 LJQB 235, 237 (Lord Esher MR); *Ballantyne v Raphael* [1889] VicLawRp 110; (1889) 15 VLR 538 (Hodges J); *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* [1974] HCA 22; (1974) 131 CLR 321 (McTiernan, Menzies and Mason JJ); each cited with approval in *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49; (1985) 157 CLR 1, 15 (Dawson J).

[92] [1980] HCA 16; (1980) 144 CLR 1 (Gibbs CJ, Stephen, Mason, Murphy and Aicken JJ).

[93] Ibid 8-9.

[94] Ibid 8; citing *Smith v Anderson* (1880) 15 Ch D 247, 277–8 (Brett LJ).

[95] Cf *Golets v Southbourne Homes Pty Ltd* [2017] VSC 705 (Vickery J).

96. [96] The only authority referred to on the question was *Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1769 (Judge Anderson) on review from [2017] VCC 1382 (Burchell JR), which decisions were both to the contrary.

[97] [1985] HCA 49; (1985) 157 CLR 1, 15 (citations omitted). See also *Golets v Southbourne Homes Pty Ltd* [2017] VSC 705 [37] (Vickery J).

[98] *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* [2005] NSWCA 409; (2005) 64 NSWLR 462, 475 [36] (Hodgson JA with whom Ipp JA agreed). Also see *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 [33]–[34], [41] (Palmer J); *Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 [44] (Basten JA).

[99] *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52; (2016) 340 ALR 193, 194 [2] and 206–7 [61] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

[100] [2015] VSC 426.

[101] Ibid [101]–[102].

[102] *Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd* [2002] NSWCA 238 [53] (Heydon JA with whom Hodgson JA and Ipp AJA agreed).

[103] *Doolan v Rubikcon (Qld) Pty Ltd* [2007] QSC 168; (2008) 2 Qd R 117, 121 (Fryberg J); *Spankie v James Trowse Constructions Pty Ltd* [2010] QCA 355 [20] (Fraser JA with whom Holmes and Chesterman JJA agreed).

[104] Emphasis added.

[105] *T & M Buckley Pty Ltd v 57 Moss Road Pty Ltd* [2010] QCA 381 [35]–[36] (Philippides J); *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* [2005] NSWCA 409; (2005) 64 NSWLR 462, 475 [38] (Hodgson JA with whom Santow JA (480 [63]) and Ipp JA (484 [76]) agreed). Also see *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 [41] (Palmer J).