Security of Payment: Divergences between the eastern states

Michael Heaton QC[1]

Introduction

Divergences have appeared between the Eastern States in relation to what is meant to be uniform or semi-uniform *Security of Payment Acts* operating in each state. In *Lewence Construction Pty Ltd v Southern Han Breakfast Point Pty Ltd*[2] (***Lewence***) special leave to appeal to the High Court was granted on 28 July 2016. There were, in effect, three issues on which leave to appeal was granted. First, whether the reference date is a jurisdictional fact. Second, whether there can be a reference date after a contract is determined where the contract makes no provision for that circumstance. Third, whether *certiorari* lies for non-jurisdictional error of law on the face of the record. The appeal was heard on 12 October 2016. We await the judgment of the High Court. This article notes differences which have emerged between the Eastern States on those issues and one other intertwining issue.

First: Is identification of the reference date a jurisdictional fact?

New South Wales

Lewence held the existence of a reference date under s.8 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**NSW Act**) to support a payment claim is not a jurisdictional fact.[3]

The Court of Appeal considered that the words 'on and from each reference date' do not purport to identify a person, but identify the time on and from which a person who satisfies a description in either s. 8(2)(a) or (b) is entitled to a progress payment. Section 8 appears in Part 2. The words 'a person referred to in s. 8(1)' in s.13(1) refer to a person falling within either s. 8(1)(a) or 8(1)(b). They do not require the claimant who satisfies s. 8(1)(a) or s. 8(1)(b) to also show the reference date has arrived. Further, the words 'or who claims to be entitled to a progress payment' in s. 13(1) make clear that the existence of a dispute as to the entitlement of a person to a progress claim does not preclude the making of a valid payment claim.

The New South Wales Court of Appeal referred to *Kembla Coal & Coke v Select Civil*[4] *stating:*

> *[46] In Kembla Coal & Coke v Select Civil [2004] NSWSC 628, to which the primary judge was not referred in the present case, McDougall J directly addressed the question whether the*

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2 [2015] NSWCA 288.

3 Section 12 and Sch 2 *Building and Construction Industry Payments Act 2004* (Qld) (**Qld Act**); s. 9 *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Vic Act**).

4 [2004] NSWSC 628 at [46].

> *existence of a reference date for the purposes of s 8(1) was a jurisdictional fact. There, Kembla had submitted (and Select had agreed) that it was, but his Honour J disagreed, saying (at [37]):*
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> *It is one thing to say that s 8 of the Act specifies the entitlement to a progress payment as something existing "[o]n and from each reference date under a construction contract." It is quite something else to say that the reference date is thereby made a jurisdictional fact if the matter goes to adjudication. If the payment claim has no reference to a reference date, that may be a valid basis of opposition. But it does not mean that the claimant is anything other than "a person who ... claims to be entitled to a progress payment".*

Ward JA in *Lewence* referred to the Queensland authorities addressing analogous provisions to the effect that the reference date was a jurisdictional issue, but distinguished them. Her Honour said at [51]-[53] as follows:

> *[51] Southern Han also points to various Queensland authorities dealing with analogous provisions. It argues that in John Holland Pty Ltd v Coastal Dredging and Construction Pty Ltd [2012] QCA 150; (2012) 2 Qd R 435 the Queensland Court of Appeal decided the matter on the premise that the existence of a reference date was a matter for the Court to determine and that in BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd [2012] QSC 346 the identification of the reference date was an essential step in determining whether the adjudicator had exceeded his or her jurisdiction (referring to [37], [45]). More recently, in Lean Field Developments Pty Ltd v E & I Global Solutions (Aust) Pty Ltd [2014] QSC 293 Applegarth J considered broadly analogous provisions to those in the present case and said (at [15]):*
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> > *There is no contest that the contract is governed by the Act and that the first respondent carried out "construction work" within the meaning of the Act. The parties also accept that an adjudication decision may be set aside or declared void for jurisdictional error. A jurisdictional error will arise where one of the requirements for a valid payment claim under the Act is not met. One such requirement is that a reference date has arisen under the contract at the time the payment claim is made.*
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> *[52] What must be borne in mind is that the fundamental distinction between ss 8 and 13 of the Act is between the entitlement to a progress payment under the Act (dealt with in the former) and the right or entitlement to make a claim for a progress payment (dealt with in the latter). The consequence of making a valid payment claim is that it then falls to the adjudicator to determine the claim and, absent jurisdictional error, entitlement to such a payment on the particular facts of a particular case is not for the court to determine.*
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> *[53] Thus, s 8(1) provides a statutory entitlement to a progress payment, on and from each reference date under a construction contract, for a person satisfying the description in either (a) or (b), whereas s 13(1) deals with the making of a payment claim and identifies who it is that may validly make a payment claim.*

Ward JA then referred to the judgment of Hodgson JA in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & anor*[5] where his Honour considered that approaching the Act by asking whether an error by the adjudicator in determining whether any of the requirements of the Act is satisfied as a jurisdictional or non-jurisdictional error, cast the net too widely. His Honour considered it preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition in existence for an adjudicator's determination.

Further, at [66] in *Brodyn*, Hodgson JA considered that if there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document

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5 (2004) 61 NSWLR 421; [2004] NSWCA 394 at [54].

complies with all respects with the requirements of the Act generally is, in Hodgson JA's opinion, for the adjudicator to decide.

Ward JA concluded at [60]:

> *[60] I consider that McDougall J was correct in Kembla in concluding that the existence of a reference date to support a payment claim is not a jurisdictional fact or essential pre-condition for the making of a valid payment claim (and hence if there is a dispute about that issue it is for the adjudicator to determine).*

Emmett JA agreed saying at [119]:

> *[119] I have had the advantage of reading in draft form the proposed reasons of Ward JA. I agree with her Honour that, for the reasons proposed, the words "on and from each reference date" specify the time on and from which a payment claim can be made. They do not specify characteristics of the person who is or claims to be entitled to a progress payment. The Contractor was a person who fell within the terms of either s 8(1)(a) or s 8(1)(b) and who claimed entitlement under the Contract to progress payments in the sense contemplated by the Act. Whether that claim was valid, including whether it was valid because it was supported by a reference date, is not a jurisdictional fact.*

Sackville AJA stated:

> *[132] It is a strained interpretation of the introductory words to s 13(1) of the BCI Act ("[a] person referred to in section 8(1) who is or who claims to be entitled to a progress payment") to read them as referring to a claimant who not only satisfies either sub-par (a) or sub-par (b) of s 8(1), but who is also able to show that the relevant reference date under the construction contract has in fact arrived. The very point of the procedure created by Pt 3 of the BCI Act is to establish a mechanism, in the event of a dispute, for an adjudicator to determine precisely that question.*

Queensland

The Queensland cases have been referred to by Ward JA at [51] quoted above. Further, it was accepted in *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd*[6] that the reference date is essential to jurisdiction and Applegarth J proceeded on that basis. At [20] Applegarth J regarded as critical the statutory entitlement to make a payment claim that there was "a reference date under a construction contract".

Victoria

In Victoria, *Saville v Hallmarc Construction Pty Ltd*[7] was heard on 7 May 2015 and the decision was handed down on 27 November 2015, two months after the decision in *Lewence*. The Victorian Court of Appeal held that identification of a reference date was a jurisdictional fact.

Warren CJ and Tate JA with whom Kaye JA agreed said at [97]:

> *[97] Here, Saville's right to a progress payment was dependent upon the fixing of a reference date. In turn this required a characterisation of whether the first payment claim was a final payment claim or not. If it was not (as the adjudicator found) the requirement under s 9(2)(b) applied and required a calculation of the reference date as a date occurring 20 business days after the commencement of construction work under the construction contract. If it was (as the judge found) the requirement under s 9(2)(d) applied and the reference date*

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6 [2013] QSC 269.

7 [2015] VSCA 318.

> *was relevantly the date immediately following the day that construction work was last carried out under the construction contract. These matters involved questions of evaluation in relation to the scope of the construction contract and the timing of work undertaken within that scope. In our view, the need for evaluation by the adjudicator, by reference to the evidence, does not preclude the fixing of a reference date under s 9(2) from being a jurisdictional fact and thus reviewable.*

The Court of Appeal in Victoria dealt with the concept of what constituted a jurisdictional fact being an event, fact or circumstance which, as Dixon J observed in *Parisienne Basket Shoes Pty Ltd v Whyte*,[8] *is* 'made a condition upon the occurrence or exercise of which the jurisdiction of a court shall depend.'[9] Further, at [62] Warren CJ and Tate JA drew the distinction between jurisdictional fact and errors of fact within jurisdiction stating:

> *[62] Errors made with respect to a jurisdictional fact are thus to be distinguished from, relevantly, errors of fact-finding made by an administrative tribunal within the course of an enquiry properly embarked upon. Errors made within jurisdiction (non-jurisdictional errors) are unreviewable in a proceeding for judicial review save where the error amounts to an error of law on the face of the record. As the High Court observed in Refugee Review Tribunal; Ex parte Aala:*
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> > *The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly). The former kind of error concerns departures from limits upon the exercise of power. The latter does not.*

There is therefore difference between New South Wales on the one hand and Queensland and Victoria on the other on this point.

I consider the Victorian Court of Appeal has moved along traditional lines of reasoning. The New South Wales Court of Appeal has put the Security of Payment Legislation in a special category following the judgment of Hodgson JA in *Brodyn*. In *Lewence* at [55] the Court of Appeal referred to the judgment of Hodgson JA in *The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd*[10] at [49]:

> *In my opinion, an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator's determination within the meaning of the Act.*

Western Australia

In Western Australia where the legislation is somewhat different, it has been held jurisdiction depends upon the existence of a 'payment dispute' within the meaning of the Act: see *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation.*[11]

We therefore await the judgment of the High Court in the appeal of *Southern Han* in *Lewence.* The principal written submissions of the parties to the High Court did not refer to *Saville* or *Laing O'Rourke.*

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8 (1938) 59 CLR 369.

9 Ibid 391.

10 [2005] NSWCA142.

Saville was, however, mentioned in the transcript of 12 October 2016.

Second: Reference Dates – 'calculated by reference to that date' s.9(1)(VIC) compared with s.8 NSW and s.12 QLD.

It is clear from the judgment of MacDougall J in *Broadview Windows Pty Ltd v Architectural Project Specialists Pty Ltd*[12] at [36]-[51] that where s. 8(2)(b) is applicable there continue to be reference dates under the Act up to the time limit in s. 13(4)(b) irrespective of whether work has ceased or the contract determined, and successive claims can be made for the same work. Further, because there is a new reference date in respect of each claim, there would be no breach of s. 13(5) NSW Act, or its equivalents s. 14(8) Vic Act and s. 17(5) Qld Act.

MacDougall J first relied upon the judgment of Hodgson JA in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor*[13] in particular where Hodgson JA said:

> *[63] However, s.8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s.8(2)(a) if the contract so provides but not otherwise; while s.8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits in s.13(4): reference dates cannot support the serving of any payment claims outside these limits.*
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> *[64] In my opinion, as submitted by Mr. Fisher for Dasein, this view is supported by s.13(6), which indicates that successive payment claims do not necessarily have to be in respect of additional work; and especially by s.13(3)(a), which provides for inclusion in payment claims of amounts for which the respondent is liable under s.27(2A). Losses and expenses arising from suspension of work could arise progressively for a substantial time after work has ceased on a project, and s.13(3)(a) expressly contemplates that further payment claims for these losses and expenses may be made progressively.*

Both Mason P and Giles JA agreed with the judgement of Hodgson JA.

Thus in considering s. 8(2)(b) the New South Wales Court of Appeal held the concept of a 'reference date' is not tied to the performance of work in any given month. It probably also follows that if the contract does not provide under s. 8(2)(a) for work in the month to which the reference date relates, the reference date will not be tied to the performance of work in any given month, and if there is no other contractual restriction as to reference dates ceasing on termination or cessation of work they will continue to accrue to the limit set out in s. 13(4).

MacDougall J also referred to the Court of Appeal decision in *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd*[14] saying that, in that case, Hodgson JA, with whom on this point the other members of the Court agreed, dealt with s. 13 briefly at [36]. MacDougall J stated that his Honour repeated the view expressed by him in *Brodyn. Falgat* was decided after *Brodyn* but before *Dualcorp.*

MacDougall J also relied upon the comment of Hammerschlag J in the *Olympia Group Pty Ltd v Tyrenian Group Pty Ltd*[15] where Hammerschlag J said:

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11 [2016] WASCA 130 at [97] per Martin CJ.

12 [2015]NSWSC 955.

13 (2004) 61 NSWLR 421; [2004] NSWCA 394 at [63].

14 (2006) 23 BCLR 292.

15 [2010] NSWSC 319 at 32.

> *So far as abuse of process point is concerned I propose to follow what was said by the Court of Appeal in Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd [2006] NSWCA 259. In the judgment of Hodgson JA at para 36 his Honour said that the Act permits successive payment claims to be made for the same work. This disposes of the first plaintiff's submission.*

In Falgat at [36] Hodgson JA said:

> *[36] In my opinion the primary judge was in error in relation to s. 13 of the Act. I adhere to the view I expressed in Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394 at [62]-[66], to the effect that after cessation work there continued to be reference dates in respect of which successive payment claims can be made, up to the twelve month limit under s. 13(4)(b), and that s. 13 (6) permits successive payment claims to be for the same work. Mr Rudge SC for Equity did not seek to submit to the contrary, and accepted that there was a reference date at or about the end of November 2004 in respect of which a further payment claim, claiming the same amount could have been served.*

MacDougall J concluded in *Broadview* at [49]-[52] as follows:

> *[49] In the present case, it is submitted for APS that, because of the view expressed by Hodgson JA in Brodyn and in Falgat as to the proper operation of s 8(2)(b), there were successive "reference dates" under the contract notwithstanding that work had finished. In my view, that submission must be correct. Hodgson JA expressly contemplated that reference dates did not necessarily cease "on termination of a contract or cessation of work": at least, for the purposes of s 8(2)(b).*
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> *[50] It follows, in my view, that even though no work was done under the construction contract in this case from, at the latest, 31 August 2014, reference dates continued to accrue under s 8(2)(b).*
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> *[51] In the present case, the first payment claim nominated as its reference date 31 October 2014, and the second payment claim nominated as its reference date 31 January 2015. On the face of the documents, they were not both referable to the one reference date. And as I have said, applying the reasoning of the Court of Appeal in Brodyn and Falgat in relation to s 8(2)(b), it cannot be the case that reference dates "stopped" simply because no further construction work was done.*
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> *[52] In those circumstances, the only relevant limitation is that set out in s 13(4)(b). That prohibition does not arise in this case.*

In *Broadview* MacDougall J referred to *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*[16] and the view expressed by Allsop P at [8]–[14] that where a payment claim is served in defiance of s. 13(5)[17] it is a nullity. MacDougall J noted that the fundamental question in terms of s. 13(5) is whether a claimant has served more than one payment claim in respect of each 'reference date' under the construction contract. MacDougall J noted Allsop P came to the view in *Dualcorp* that the claimant had done precisely that, referring to the judgment of Allsop P in *Dualcorp* at [8] to [14] as follows:

> *The fundamental question, in terms of s 13(5) is whether a claimant has served more than one payment claim in respect of each "reference date" under the construction contract. Allsop P came to the view in Dualcorp, that the claimant in that case, Dualcorp, had done precisely that. This is apparent from what his Honour said at [12]. The full content of that paragraph, I set out in context (in this case, from [8] to [14]):*
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> *[8] As can be seen from the Act, s 13(5) a claimant is limited to one payment claim in respect of*

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16 (2009) 74 NSWLR 190.

17 Section 14(8) Vic Act; s.17(5) Qld Act.

each reference date. Section 13(6) permits, however, inclusion in another payment claim (necessarily by reference to another reference date) of an amount that has been the subject of a previous claim. Amongst other usual and uncontroversial examples, this permits the submission of cumulative payment claims by reference to later reference dates, which include an amount the subject of a previous claim. In such circumstances, if there has been an adjudication, s 22(4) will apply to require the same value to be given to such work, subject to the qualification in that subsection.

[9] Here, Dualcorp, after undertaking the works, left the site in November 2007. It claimed to have substantially completed the works under the contract in November 2007.

[10] A payment claim was made on 29 January 2008 attaching six invoices, four of which were dated 24 January 2008 and two of which were dated 29 January 2008. The relevant reference date was not identified on the claim or invoices.

[11] On 3 March 2008, Dualcorp purported to serve a second payment claim annexing the same invoices and claiming the same amount. Again, no reference date was identified on the documentation.

[12] Whether or not this was a final claim or a progress claim does not matter. The claim represented by the six invoices must have been in respect of only one reference date – either 15 December 2007 or 15 January 2008, if pursuant to Annexure A, Item 11 or the reference date pursuant to the operation of cl 8.13, if a final payment claim. In either case, there must have been one reference date under the contract or the last day of the month as provided for by the Act, s 8(2)(b).

[13] I see no warrant under either the contract or the Act, s 8 for permitting a party in Dualcorp's position to create fresh reference dates by lodging the same claim for the same completed works in successive payment claims. That is not the intended operation of the last phrase of s 8(2)(b) ("and the last day of each subsequent named month").

[14] Here, the work had been done; Dualcorp, the subcontractor, had left the site; it claimed payment by six invoices; six weeks later it repeated that claim by reference to the same invoices and, in my view, in respect of the same reference date. Dualcorp was prevented from serving the second payment claim. The terms of s 13(5) are a prohibition. The words "cannot serve more than one payment claim" are a sufficiently clear statutory indication that a document purporting to be a payment claim that is in respect of the same reference date as a previous claim is not a payment.

MacDougall J stated at [27]:

Whatever may have been the basis for his Honour's conclusion at [12], what is crystal clear is that in his view, there was only one "reference date", in respect of which each of the payment claims in question had been served. It was that state of affairs that, in his Honour's view, triggered the prohibition contained in s 13(5) of the Security of Payment Act.

MacDougall J distinguished *Dualcorp* by stating at [48]:

The decision of Allsop P in Dualcorp may be distinguished. His Honour there proceeded on the express and stated assumption that both payment claims were related to the one "reference date.

Thus the position in New South Wales would appear to be as follows:

(a) Reference dates continue to accrue under s.8(2)(b) even when work ceases or the contract terminates;
(b) The concept of a reference date is not tied to the performance of work in any given month unless the contract so requires it.
(c) Provided there is a new reference date the Act permits successive payment claims for the same work, distinguishing *Dualcorp* on the basis there was only one reference date.

(d) The only limit on such reference dates or claims is s.13(4)(b).[18]
(e) Where there is a new reference date s. 13(5)[19] will not be breached where a second or subsequent claim is made for the same amount in respect of the same work.

The further inference to be drawn where s. 8(2)(a) is applicable, and hence s. 13(4)(a) or (b) is applicable depending on which is the later period within which the payment claim may be served, is that the above propositions would apply subject to any limitation thereon imposed by the construction contract.

Victoria

In Victoria in *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd*[20] and *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd*,[21] Vickery J applied a factual analysis to ascertain the applicable reference date to which the particular payment claim related: see at [70]-[73] and [84]-[88] in *Commercial & Industrial*. This is a different approach to that adopted by McDougall J in *Broadview*. It is not, however, dissimilar to the approach of Allsop P in *Dualcorp.* Vickery J found that s. 14(8) was breached in both *Jotham* and *Commercial & Industrial.*

In *Jotham* at [37] Vickery J stated:

> *[37] In order for the adjudication process to be effectively invoked:*
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> *(a) Section 14(4) of the Act identifies that the payment claim must be served on respondent within three months of the reference date with respect to the progress payment claimed; and*
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> *(b) If the right to a progress payment has accrued, s 14(8) prohibits service of a further payment claim, for the same [progress payment] reference date under the construction contract. It follows that a further claim in breach of s 14(8) cannot invoke jurisdiction of the adjudicator if it is for the same reference date.*

Then at [40]-[47] Vickery J stated:

> *Cooperative's Submission on s 14(9)*
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> *[40] It was submitted by Cooperative, however, that s 14(9) does not operate to prevent a claimant for a progress claim including in a current payment claim an amount that has been the subject of a previous claim if the amount has not been paid, and this is so whether the current payment claim is a new payment claim which has not been claimed before, or is merely a full repetition of a previous payment claim. In other words, provided that a previous payment claim has not been paid, it can be claimed afresh pursuant to s 14(9). No other criterion is required to be satisfied for s 14(9) to operate, so it was said.*
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> *[41] Thus it was put by Cooperative that s 14(9) does not prevent the 25 January Payment Claim from being made, merely because it was the subject of previous payment claims.*
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> *Analysis of s 14(9)*
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> *[42] The operation of s 14(9) has not been specifically considered in previous case law.*
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> *[43] On a plain reading s 14(9) provides that, if another and earlier payment claim has been made, but the amount of that earlier claim has not been paid, the unpaid amount may be included in a later and different payment claim which covers different construction work or the supply of different goods and services, calculated by reference to a different reference*

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18 Section 14(4)(b) or s. 14(5)(b) Vic Act.

19 Section 14(8) Vic Act; s. 17(5) Qld Act.

20 [2013] VSC 552 (**Jotham**).

21 [2015] VSC 426 (**Commercial & Industrial**).

date under the construction contract.

[44] This construction provides consistency with s 14(8).

[45] On the other hand, if the construction contended for by Cooperative was to be accepted, it would give rise to a manifest inconsistency between ss 14(9) and 14(8). It would, in effect, enable a claimant to serve more than one payment claim in respect of each reference date under the construction contract. This in turn would render s 14(8) otiose.

[46] Further, the construction which I have found serves to advance the purpose of the Act. To permit multiple payment claims to be made in respect of the same work (or goods or services) arising from the same contractual reference date, via the mechanism of s 14(9), would be completely inconsistent with the underlying objective of the Act, which is to provide an enforceable right to progress payments supported by an expeditious and efficient means for enforcement of those rights. It would cause the parties to expend needless time and be put to unnecessary expense.

[47] If more than one payment claim was permitted to be made, it would also open up the prospect of there being more than one adjudication application for any particular payment claim made in respect of each reference date under the relevant construction contract. Such a regime would clearly not be in the interests of maintaining or promoting the core objective of the legislation.

Then at [52]-[54] his Honour said:

[52] In this case the 25 January Payment Claim was for the sum of precisely $105,514.75, which was the same as the total figure made in the Three Original Payment Claims. The irresistible inference is that by serving the 25 January Payment Claim, Cooperative has served more than one payment claim in respect of each relevant reference date under each relevant construction contract.

[53] Consequently, there has been a breach of s 14(8) in relation to the 25 January Payment Claim.

[54] The terms of s 14(8) impose a prohibition on the service of such a claim. A breach of the section has the consequence that any purported payment claim which is sought to be served in contravention of the prohibition is invalid.

This analysis is, in my view, very similar to that undertaken by that by Allsop P in *Dualcorp.* It is a factual analysis to ascertain the applicable reference date. This is different to the analysis MacDougall J would undertake which is simply to ascertain whether there are further reference dates up to the time limit in s. 13 (s.14(4) Vic Act). In New South Wales if there are further reference dates it is unnecessary to ascertain the reference date to which it is said the payment claim or the work carried out to engage the payment claim relates.

In *Commercial & Industrial* Vickery J said at [94]-[98]:

[94] Absent the application of s 14(9), the terms of s 14(8) provide for a prohibition. They indicate a clear statutory intention that what may be advanced by a claimant as a payment claim that is in respect of the same reference date as a previous claim, is not to be treated as a payment claim made under the Act, and is invalid.

[95] The scheme of the Act is such as to render it impermissible to claim only some part of the work performed in relation to a particular reference date, only to make a further claim for further work at a later time, where the further work performed and claimed for is in respect of the same earlier reference date.

[96] If such conduct was to be permitted, a claimant could serve more than one payment claim in respect of each reference date for different items of work, resulting in the potential for multiple payment claims being made in respect of each reference date, each requiring individual assessment by a respondent on construction projects. Further, and contrary to a

key objective of the Act, this may in turn result in multiple adjudication applications being made in relation to different parts of what is in effect, or should be, the same payment claim.

[97] Section 14(8), when read with the exception in s 14(9), is designed to address this mischief and should be given a construction which supports its statutory purpose. The privileges conferred on claimants by the Act are appropriately addressed with the balancing facility provided by s 14(8).

[98] It follows that an adjudication determination founded upon an invalid payment claim, is also an invalid exercise under the Act. A payment claim served in contravention of s 14(8) is incapable of providing a jurisdictional basis for a valid adjudication conducted under s 23 of the Act.

Again this analysis does not ask whether there is any further reference date, and, so there would be no breach of s. 14(8) Vic Act. Compare the position in New South Wales.

In *Commercial & Industrial* Vickery J his Honour also rejected the argument that there had to be new work in respect of a further reference date.

Under the heading 'No new work' in *Commercial & Industrial,* Vickery J said at [100]-[101]:

[100] However, in my opinion, the fact that an item of work could have been claimed as part of a payment claim served in respect of an earlier reference date, but was not, is not a bar to it being claimed in a later payment claim made in respect of a later reference date, provided that s 14(8) is not breached. The time when the work is done may be relevant to a determination as to the correct reference date which applies to a payment claim served in respect of that work. However, the time when the work is done is not a factor which per se determines the validity of the payment claim.

[101] 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.

Vickery J then went on to say that the equivalent provisions in New South Wales (s. 8 NSW Act) and Queensland (s. 12 Qld Act) omit the phrase 'calculated by reference to' the relevant reference date, but that it makes no difference to the meaning or operation of the subsection when considered against its counterpart provisions in New South Wales and Queensland, referring to *Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty* Ltd;[22] *Doolan v Rubickon* (QLD) Pty Ltd & Ors[23] and *Spankie & Ors v James Trowse Constructions Pty Ltd & Ors.*[24]

In relation to these three cases Vickery J said in *Commercial & Industrial* at [108]-[110]:

"[108] In Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd Heydon JA concluded that the payment claim in issue was valid, and said at [53]:

> *Accordingly, on the true construction of the Building and Construction Industry Security of Payment Act 1999 it is permissible for a person entitled to a progress payment under a construction contract to serve a payment claim on the person who under the contract is liable to make the payment even though the claim relates to work done in periods prior to the month in which the payment claim is served.*

[109] In Doolan v Rubikcon (Qld) Pty Ltd & Ors Fryberg J held:

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22 [2002] NSWCA 238 at [53].

23 [2008] 2 Qd R 117, 120-122.

24 [2010] QCA 355 at [20].

> *It seems to me that there is a one to one relationship between the claim made and the reference date on which it is made.*
>
> *...*
>
> *That is not to say that the claim must include all work done up to that date. If something is omitted from a claim, notwithstanding that it could have been claimed on a particular reference date, there is no reason why it cannot be claimed on the next reference date. Likewise anything further which gives rise to a claim after the first of such reference dates, may also be included in the next claim.*

[110] In Spankie Fraser JA observed at [20]:

> *Returning to the legislative provisions, there is nothing in the definition of 'reference date' to cut down the broadly expressed entitlement created by s 12. The definition merely identifies the date from which each right to a progress payment accrues. These provisions do not suggest that there is any relationship between a 'reference date' and the time when work under the contract is carried out. In particular, the reference in the definition to work carried out under the contract does not imply that the work the subject of a particular progress payment must have been carried out after a previous reference date."*

The difficulty with reconciling the approaches of MacDougall J and Vickery J is that at [100] in *Commercial & Industrial* Vickery J qualified the applicable circumstances by the proviso that s. 14(8) is not breached. The difficulty is that if you apply the factual analysis which Vickery J applied both in *Jotham* and *Commercial & Industrial* and ignore the approach of MacDougall J in *Broadview* which simply looks to whether there is any further reference date, it would be difficult in Victoria to avoid breach of s. 14(8) as the factual analysis would relate each item of work to a specific reference date rather than applying the proposition that successive payment claims may be made for the same work provided there is a further reference date.

It is also to be noted that at [103]-[104] in *Commercial & Industrial* Vickery J said:

[103] In Jotham, in its analysis of s 14(9) of the Act, the Court said this at [43]:

> *On a plain reading s 14(9) provides that, if another and earlier payment claim has been made, but the amount of that earlier claim has not been paid, the unpaid amount may be included in a later and different payment claim which covers different construction work or the supply of different goods and services, calculated by reference to a different reference date under the construction contract.*

[104] This passage is not to be construed as importing any further requirement for a valid payment claim governed by when the work claimed for was performed or when the materials claimed for were supplied. It is confined to explaining how, in the opinion of the Court, the exception in s 14(9) of the Act is intended to operate.

If the mischief to be avoided and the proviso referred to by Vickery J and the application of s.14(8) Vic Act, s. 13(5) NSW Act and s. 17(5) Qld Act is confined to successive identical claims as in *Jotham, Dualcorp* and *Doolan* when there is no further reference date, then there may not be a significant difference between the states. However Vickery J does not appear to so confine s. 14(8) Vic Act, as appears in *Commercial & Industrial* at [94]-[98] above. I consider the mischief referred to by Vickery J is, in practical terms, overstated.

Further take the situation where a subcontractor does not put in a claim to the contractor until after the relevant reference date relating to that work. Are the subcontractor and the contractor precluded from claiming for that work in the next payment claim on the next reference date? In Victoria the answer may well be yes. In NSW and Queensland[25] the answer is most probably no, because the only limit is the time

[25] See Doolan at 121.

to bring the claim.[26] Thus in New South Wales and Queensland new reference dates continue to accrue and successive claims may be made for the same work and amount and there would be therefore no breach of s.13(5) NSW Act, s. 14(8) Vic Act or s. 17(5) Qld Act.

This highlights some of the difficulties where decisions in respect of similar legislation are divergent in each state. This particular issue is not one which is a question for the High Court, however it is intertwined and overlaps with the third issue to which I now turn.

Third: Can there be a reference date after a contract is determined?

This issue is before the High Court. The question is, in effect, whether a reference date arises after termination of contract where the contract makes no provision for it.

Queensland

In *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd*[27] Peter Lyons J considered that the sub-contract by clause 44 had the effect that the parties rights were subject to the common law upon termination due to repudiation. As a consequence, all rights to make progress claims and any accrual pursuant to the contract ceased and did not survive the date of termination because the terms of the contract did not operate after termination. Further, where a construction contract provides for reference dates and has the effect that no reference date occurs after termination of the contract consequent upon repudiation of it by a party, then no reference date for the purposes of the Qld Act occurs after termination, and no right to a progress payment under s.12 of that Act accrues for a date after termination.

Peter Lyons J distinguished the passage at [63] in *Brodyn* and the New South Wales legislation, at [39]-[45]:

> *[39] In this context, it is necessary to consider a passage from the judgment of Hodgson JA with whose judgment the other members of the New South Wales Court of Appeal agreed, in Brodyn. His Honour said with reference to s 8(2) of the New South Wales Act, which defines 'reference date':*
>
> > *'However, s 8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s 8(2)(a) if the contract so provides but not otherwise; while s 8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits of s 13(4) (the equivalent to s 17(4), limiting the period within which to make a claim to 12 months after the relevant work was carried out): reference dates cannot support the serving of any payment claims outside these limits.'*
>
> *[40] This passage would appear to support the view that monthly reference dates continue to accrue, at least under the New South Wales Act, for twelve months after the cessation of work, notwithstanding termination of the contract. However, there are differences, which seem to me to be not without importance, between the statutory provisions which identify reference dates, in the legislation in the two States.*
>
> *[41] Thus, s 8(2) of the New South Wales Act commences, 'reference date, in relation to a construction contract …'. The definition in the BCIP Act commences, 'reference date, under a construction contract …'Further, paragraph (b) of s 8(2) of the New South Wales Act*

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[26] Section 13(4)(b) NSW Act; s.17 A(2)(b) or (3)(b) or (c) Qld Act.

[27] [2012] 2 Qd R 90; [2011] QSC 67.

commences with the words 'if the contract makes no express provision with respect to the matter'; whereas paragraph (b) of the definition in the BCIP Act uses a different expression, as noted, relating to whether the contract 'provide(s) for the matter'.

[42] The use of the expression 'under a construction contract' found in the Queensland definition makes it somewhat more difficult to conclude that a reference date occurs after termination. There is then no longer a contract 'under' which there might be a reference date. The conclusion that a reference date does not occur after termination of a contract is, in my view, also consistent with the general nature of the payments for which provision is made by the BCIP Act, that is to say, payments which are of a provisional nature, made over the life of the contract.

[43] The second difference which I have noted between the two definitions is also of significance. The language used in the BCIP Act gives greater primacy to the provisions of the contract dealing with the making of a claim for a progress payment than does the language of the New South Wales Act.

[44] For these reasons, I am not prepared to adopt the statement from the judgment of Hodgson JA in Brodyn as reflecting the effect of the definition of the expression 'reference date' in the BCIP Act.

[45] In my view, the contract provides for reference dates, by both enabling their identification, and by providing in effect that there is no right to make a progress claim after the contract is terminated under clause 44.10, with the consequence that no further reference date of this kind would then accrue.'

Peter Lyons J also referred to the decision of Vickery J in *Gantley Pty Ltd v Phoenix International Group Pty Ltd & Anor*[28] saying at [53]-[54] as follows:

'[53] For a contract to which the Old Act applied, his Honour found that a payment claim might be served after termination of the contract only if the contract expressly or impliedly provided for that to happen, or provided for a reference date subsequent to termination; or if the relevant reference date had arisen prior to termination.

[54] Although obiter, Vickery J also considered the effect of the New Act. His Honour expressed the view that under that Act, where a construction contract has been terminated, a final payment claim may be made. However, it would appear from the general context in which this conclusion is expressed, and in particular from his Honour's discussion of Holdmark, that his conclusion was influenced by provisions found in the New Act which are not found in the BCIP Act. They include specific provision for the occurrence of a reference date for a final payment claim, including the occurrence of such a date independently of the expiry of a defects liability period, or the issue of a final certificate. His Honour was also influenced by the express provision limiting the making of a payment claim for a final payment under the New Act. These provisions are not found in the BCIP Act. In this context, his Honour did not refer to the expression "reference date under a construction contract", in the Victorian equivalent to s 12 of the BCIP Act, which might be thought to limit the statutory right to make a payment claim for a final payment, to cases where the contract remains in existence. For this reason, and because his Honour's observations are obiter and apply to a different statutory context, it seems to me more appropriate to attempt to apply the language of the BCIP Act, than to adopt his Honour's conclusion.'

Peter Lyons J concluded at [55] and [56]:

'[55] Section 12 of the BCIP Act plainly confers a statutory right to a final payment for construction work (or for related goods and services). However it does so "(f)rom each

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[28] [2010] VSC 106; see Judgment of Vickery J at [151]-[189].

reference date under a construction contract". That right leads to a right to make a payment claim under s 17, though a claimant may serve only one payment claim "in relation to each reference date under the construction contract'.

[56] I have previously mentioned the definition of "reference date", and the role accorded to contractual provisions in it. It seems to me to be inconsistent with the statutory language to conclude that a statutory right to a final payment accrues independently of a reference date; or that a reference date occurs after termination, at least where that would be contrary to the effect of the contract. Accordingly, in my view, no reference date occurred in respect of the contract between the parties, after its termination.'

In *McNab NQ Pty Ltd v Walkrete Pty Ltd & Ors*[29] de Jersey J followed *Walton Constructions.*

De Jersey J said at [28] and [29]:

[28] As to whether a 'reference date' (s 12 and schedule 2) can arise, for the purposes of the Act, subsequently to the effectual termination of the relevant contract, I respectfully adopt the reasoning of Lyons J in Walton.

[29] I do not regard the absence, from the instant sub-contract, of an express provision in terms of cl 44.10 of the contract which was before that Judge, as warranting a different conclusion here. That clause equated the rights and liabilities of the parties on termination to the common law situation where a repudiation is accepted. Such a provision does no more than reflect the common law. See also Re Dingjan; ex parte Wagner [1995] HCA 16; (1995) 183 CLR 323, 341.'

De Jersey concluded at [34] that the adjudication was made without jurisdiction because prior to the making of the relevant claim McNab had validly terminated the sub-contract excluding recourse under the Act.

In *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd*[30] the employment of Heavy Plant Leasing was determined pursuant to an express right in the contract on 18 March 2013. On 28 March 2013 HPL purported to serve payment claim under the Qld Act. The matter proceeded to adjudication and the Third Respondent determined in favour of HPL for just over $10 million. The essential issue was whether or not a reference date arose after 18 March 2013.

Applegarth J noted at [21] that usually a reference date will not arise for the purposes of the Act after termination unless the contract expressly provides for one. His Honour then referred to *Walton Construction* and *McNab,* and to what his Honour saw as significant differences between the Queensland definition of reference date and the New South Wales provision as referred to by Peter Lyons J. Applegarth J considered that the expression 'under the contract' s.12 Qld Act supported the general proposition that a reference date is unlikely to arise for the purposes of the Act once the contract has been terminated unless the contract makes express provision for a reference date to arise after termination. Applegarth J did refer to limited circumstances in which legislation of this kind might permit a progress payment to be served after termination, referring to *Gantley Pty Ltd v Phoenix International Group Pty Ltd*[31] in respect of earlier legislation in Victoria.

Applegarth J considered various arguments as to whether the contract was terminated and favoured the view that termination pursuant to clauses in the contract terminated the contract. His Honour noted ultimately that clause 26.5 of the sub-contract did not provide for making of a payment claim in respect of a progress payment to which HPL was entitled under s. 12 of the Act. His Honour said it does not provide for a reference date after termination.

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29 [2013] QSC 128.

30 [2013] QSC 269.

31 [2010] VSC 106 at [171]-[175] in respect of earlier legislation in Victoria.

His Honour considered the position if the contract was not terminated and on foot but considered it only remained on foot for a very limited purpose and any payment made pursuant to clause 26.5 was not a payment under a 'construction contract' within the meaning of the Act. The adjudication determination was therefore void.

These Queensland cases acknowledge that primacy is given to the contract, which may be different to New South Wales and Victoria.

New South Wales

In *Lewence*, ground 2 of the appeal was raised on the basis that if the primary judge was correct in finding the existence of a reference date was a jurisdictional fact, his Honour nevertheless erred in concluding that the impugned payment claim was not supported by a reference date.

Ward JA dealt with this issue at [82] stating:

> *[82] Had it been necessary to determine, I would have concluded that once the contract was terminated the contractual right to make further progressive payment claims under cl 37.1 came to an end. However, the impugned payment claim is made pursuant to a statutory entitlement to do so "[o]n and from each reference date". Termination of the contract does not alter the fact that under the contract a reference date arises on the 8th of each month for work done under the contract up to the 7th of that month. Therefore, I consider that 8 November 2014 was an available reference date to support the making of the impugned payment claim. There not being a contractual provision to preclude the exercise of the statutory right to make a progress payment claim on that date, I would have held that ground 2 of the appeal is made out on that basis.*

Sackville AJA agreed at [152].

There appears to be a different approach between Queensland and New South Wales. In Queensland, for there to be a further reference date, the contract must so provide. Whereas in New South Wales, the reference date arises unless the contract precludes a reference date from occurring.

Broadview Windows applied the statement of Hodgson J in *Brodyn* at [63] to the effect that reference dates will continue to accrue unless the contract provides for them to cease on termination of the contract or cessation of work. Presumably this would be so under s.8(2)(a) and s.8(2)(b).

Victoria

In *Gantley* Vickery J considered that under the old Act, that is, before the amendment on 30 March 2007, a reference date would not arise after termination of the contract. His Honour posited two exceptions, the first being where the construction contract expressly or impliedly provided for a payment claim to be served following termination of the construction contract, the cessation of work under it or made provision for further reference dates within the meaning of the Act beyond the date of termination. The second was where immediately prior to the termination of the construction contract a claimant had an entitlement under the Act to a progress payment pursuant to s. 9 for work done or goods and materials supplied prior to termination, where the relevant reference date had arisen prior to termination, the claimant, retained its right to a progress payment and that was an accrued right. Otherwise his Honour considered there was no right to claim a progress payment after termination.

His Honour then turned to the position under the new Act at [177]-[189] and considered by insertion in the definition of progress payment of a final payment and a single or one-off payment and a milestone payment that, in circumstances where a construction contract has been terminated, or otherwise work has ceased under it, a final payment claim may be made within the terms of the new Act so as to provide a 'final balancing of account' between the contracting parties. His Honour opined that in the case of termination, it may be that s. 9(b)(iii) applies to set the notional reference date for the purposes of serving a final payment claim pursuant to the time limit provided in s.14(5)(b).

Thus there are divergences between the Eastern States on this issue.

This issue overlaps with the second issue, referred to above, particularly where the payment claim is made and a respondent brings into play in s. 13(5) NSW Act, s. 14(8) Vic Act and s. 17(5) Qld Act. Thus we await the judgment of the High Court.

Fourth: Does *certiorari* lie for non-jurisdictional error or law?

Another question for which special leave was obtained in *Lewence* is whether *certiorari* is available for non-jurisdictional error on the face of the record.

In *Brodyn* Hodgson JA at [51] considered the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. His Honour said at [51]:

> *[51] I agree with McDougall J that the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss.3(4), 32. The procedure contemplates a minimum of opportunity for court involvement: ss.3(3), 25(4). The remedy provided by s.27 can only work if a claimant can be confident of the protection given by s.27(3): if the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under s.27 would be prohibitive, and s.27 could operate as a trap.*[32]

His Honour considered at [52] that where determination of a dispute submitted to an adjudicator under the Act requires the adjudicator to consider issues of law, the adjudicator will not fall into jurisdictional error simply because he or she makes an error of law in the consideration and determination of those issues.

His Honour then at [53] set out what he considered to be basic and essential requirements.

In *Lewence* Sackville AJA said at [140]:

> *[140] In order to determine whether a respondent must make a progress payment, it may be necessary to decide whether the reference date has arrived. If so, an adjudicator has the authority to make that decision. If in making the determination, the adjudicator commits an error of law on the face of the record, the determination is subject to judicial review pursuant to s 69 of the Supreme Court Act 1970 (NSW). If the adjudicator's determination is affected by a jurisdictional error, judicial review will also be available.*

It was on the basis of the comment of Sackville AJA that special leave to appeal was granted on this issue.

A recent judgment of Emmett AJA *in Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[33] moved towards the more traditional approach referred to by the Victorian Court of Appeal in *Saville*.

In *Probuild* Emmett AJA said at [56]-[57]:

> *[56] The process of adjudication in Part 3 of the Security of Payment Act involves the exercise of public powers, in that it is a statutory power conferred by legislation. Accordingly, in principle, a determination by an adjudicator is amenable to judicial review under s 69 of the Supreme Court Act and there is no reason why the Court would not have power to quash a determination by an adjudicator that involves an error of law.*

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32 [2004] NSWCA 391.

33 [2016] NSWSC 770 (**Probuild**).

> *[57] However, the provisions of s 69 do not affect the operation of any legislative provision to the extent to which the provision is, according to common law principles and disregarding those provisions, effective to prevent the Court from exercising its powers to quash or otherwise review a decision. Thus, if one can find a clear legislative intention to exclude the availability of judicial review in the case of non-jurisdictional error on the face of the record of a determination made by an adjudicator under the Security of Payment Act, relief under s 69 would not be available to quash the determination. Shade Systems contends that, on the proper construction of the Security of Payment Act, relief under s 69 of the Supreme Court Act is not available to Probuild, even if the Adjudicator made such an error of law.*

Further at [62] Emmett AJA stated:

> *[62] Hodgson JA expressed the opinion that the reasons that he had stated for excluding judicial review on the basis of non-jurisdictional error of law justified the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements of the Security of Payment Act was essential to the existence of a determination. His Honour said that what was intended to be essential was compliance with the basic requirements, a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to that power, and no substantial denial of natural justice that the Security of Payment Act requires to be given. If the basic requirements are not complied with, his Honour said, or if the purported determination is not a bona fide attempt or if there is a substantial denial of the relevant measure of natural justice, a purported determination will be void because there will not then have been satisfaction of the requirements that the legislature has indicated as essential to the existence of a determination.*

In the light of the *Kirk v Industrial Court of New South Wales*[34] and *Chase Oyster Bar*[35] and on His Honour's construction of the Act, Emmett AJA rejected the proposition that non-jurisdictional errors of law on the face of the record were not reviewable.

At [74] Emmett AJA concluded:

> *[74] I do not consider that there is a clear indication or implication to be found in the Security of Payment Act that the jurisdiction conferred by s 69 of the Supreme Court Act is intended to be excluded. It is by no means clear that a claimant who has not been paid the adjudicated amount and who has served a notice of intention to suspend work, and then takes that step, would be liable for any loss or damage from which the claimant would otherwise be protected by s 27(3). In circumstances where the determination is later quashed by the court in the exercise of the jurisdiction conferred by s 69, the inference, if any, that may be drawn from the language of s 27(3) is insufficient to demonstrate an intention to remove the court's jurisdiction. I consider, on balance, that judicial review under s 69(3) is available to quash a determination made by an adjudicator where an error of law that leads to an adjudicated amount that is different from the amount that would have been determined but for the error of law appears on the face of the record.*

His Honour set out the errors committed by the adjudicator at [78]-[79]:

> *[78] In concluding that Probuild had the obligation of proving default on the part of Shade Systems before being entitled to the liquidated damages, the Adjudicator made an error of law. While some default on the part of Probuild could well be an answer to a claim by Probuild for liquidated damages, Shade Systems would have the onus of establishing that default. Merely asserting default is not sufficient. A fair reading of the Adjudicator's reasons indicates that he assumed, wrongly, that the onus was on Probuild to demonstrate that the*

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[34] (2010) 239 CLR 531.

[35] *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190; (2010) 78 NSWLR 393.

failure to achieve practical completion by the date for practical completion was caused by default on the part of Shade Systems. That was an error of law and it appears on the face of the record of the proceedings leading to the Determination.

[79] Had the Adjudicator not made the error of law described above, he may well have allowed the claim by Probuild for liquidated damages, such that the Adjudicated Amount should have been nil. Alternatively, the Adjudicator should have given consideration to the question of whether any fault on the part of Probuild caused the date for practical completion to have passed before practical completion was achieved. I consider that there was an error on the face of the record of the Determination and that, in the circumstances, Probuild is entitled to relief under s 69 of the Supreme Court Act.

Thus Emmett AJA concluded there was an error of law by the Adjudicator and it appeared on the face of the record, such that the proceedings leading to the determination and as a consequence the determination made by the adjudicator should be quashed.

Support for the *Brodyn* approach may be gained from *Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation*[36] at [101] per Martin CJ:

[101] The provisions of the Act which I have identified, read in the context of the evident purpose and objective of the Act, lead inexorably to the conclusion that an adjudicator will not exceed the jurisdiction to make a determination conferred by the Act merely because he or she misconstrues the contract or makes an error in the application of its terms to the facts found. Samsung did not contend otherwise. At the other end of the spectrum, it can also be concluded with confidence that an adjudicator who expressly excluded from consideration the construction contract in respect of which the payment dispute arose, or who took no account whatever of that contract, would exceed the jurisdiction conferred by the Act to determine a payment dispute arising under a construction contract.

Then at [102] Martin CJ went on:

[102] ..... Rather, in cases which do not fall within either of the two categories I have identified (within which categories it can be said with clarity and certainty that jurisdiction has, or has not, been exceeded), the preferable course when judicial review of a determination is sought is to ascertain with as much clarity as possible precisely what the adjudicator has done, and then determine whether his or her actions constitute a determination of the kind for which the Act makes provision. If the answer to that question is in the affirmative, the adjudicator will have acted within the jurisdiction conferred by the Act and any application for judicial review must be dismissed.

[103] However, in this case it is unnecessary to undertake that course because, for the reasons which I will now develop with respect to each of the Adjudicator's determinations, it cannot be concluded that any error made by the Adjudicator was anything other than an error in the construction or application of the construction contract in respect of which the relevant payment dispute arose. As I have noted, Samsung accepts, quite properly, that errors of that kind do not take an adjudicator beyond the jurisdiction conferred by the Act.

This I consider appears to be inconsistent with the analysis of Emmett AJA in *Probuild* and by the Victorian Court of Appeal in *Saville.*

In the written submissions to the High Court in *Lewance*, no reference was made to *Saville* or *Laing O'Rourke.*

It is therefore clear that there are divergences within New South Wales and between the approach in *Brodyn* and the Court of Appeal Victoria in *Saville* and again the approach in Western Australia.

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[36] [2016] WASCA 130.

We therefore await the determination of the High Court.

Conclusion

It is to be hoped the High Court may provide some unifying guidance for the Eastern States on whether a reference date is a jurisdictional fact, whether there can be a reference date after a contract is determined and whether *certiorari* lies for non-jurisdictional error on the face of the record, although a reading of the transcript on 12 October does not suggest any reference to the Queensland or Victorian Acts.