Court of Appeal
Supreme Court

New South Wales

Case Name:	Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation)
Medium Neutral Citation:	[2019] NSWCA 11
Hearing Date(s):	29 and 30 October 2018
Decision Date:	12 February 2019
Before:	Leeming JA at [1]; Payne JA at [44]; White JA at [45]; Sackville AJA at [46]; Emmett AJA at [262].
Decision:	1. Direct the parties to file agreed short minutes of order within fourteen days giving effect to these reasons for judgment and dealing with the costs of the proceedings in this Court and the Equity Division. 2. To the extent that there is disagreement as to the proposed short minutes of order or costs, direct Seymour to file and serve its proposed short minutes of order (including on costs), together with written submissions in support (not to exceed five pages) within fourteen days. 3. Ostwald to file and serve its proposed short minutes of order (including on costs), together with written submissions in support (not exceeding five pages) within a further fourteen days.
Catchwords:	EQUITY – rectification of building contract – whether adjudication application under the Building and Construction Industry Security of Payment Act 1999 (NSW) (Security of Payment Act) made within time – answer depends on the date under the contract for the making of a progress payment – whether the primary Judge was correct to order rectification of the contract

by changing the due date for payment – whether the evidence supported the finding that the parties had a common intention, at the time the contract was executed, that the date for payment should be otherwise than as recorded in the contract.

BUILDING AND CONSTRUCTION – adjudication application invalid because made out of time – whether the contractor entitled to institute summary proceedings under s 16(2)(a)(i) of the Security of Payment Act to recover unpaid portion of the scheduled amount as a debt – whether adjudication application, although a nullity, had a factual existence that had legal consequences – whether the invalid adjudication constituted an election between inconsistent statutory remedies so as to preclude summary proceedings to recover the debt.

BUILDING AND CONSTRUCTION - contractor in liquidation – whether the Security of Payment Act, as a matter of construction, is capable of operating for the benefit of a contractor which has gone into liquidation in insolvency – where Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247; (2016) 337 ALR 452 decides that equivalent Victorian legislation is not available to a contractor in liquidation – whether Victorian Court of Appeal decision is clearly wrong and should not be followed.

Legislation Cited:

Bankruptcy Act 1966 (Cth)
Corporations Act 2001 (Cth)
Judiciary Act 1903 (Cth)

Corporations Regulations 2001 (Cth)

Building and Construction Industry Security of Payment Act 1999 (NSW)
Building and Construction Industry Security of Payment Amendment Act 2002 (NSW)
Building and Construction Industry Security of Payment Amendment Act 2013 (NSW)
Interpretation Act 1987 (NSW)
Supreme Court Act 1970 (NSW)

Building and Construction Industry Security of Payment Act 2002 (Vic)
Interpretation of Legislation Act 1984 (Vic)

Cases Cited:

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570; [2008] HCA 57
Alqudsi v Commonwealth of Australia (2015) 91 NSWLR 92; [2015] NSWCA 351
Arnold v Britton [2015] AC 1619; [2015] UKSC 36
Australian Gypsum Ltd v Hume Steel Ltd (1930) 45 CLR 54; [1930] HCA 38
Bell Group NV (in liq) v Western Australia (2016) 260 CLR 500; [2016] HCA 21
Brodyn Pty Ltd v Dasein Constructions Pty Ltd [2004] NSWCA 1230
Cardinal Project Services Pty Ltd v Hanave Pty Ltd (2011) 81 NSWLR 716; [2011] NSWCA 399
Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101; [2009] UKHL 38
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190
Cherry v Steele-Park (2017) 96 NSWLR 548; [2017] NSWCA 295
Duncan v New South Wales (2015) 255 CLR 388; [2015] HCA 13
Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247; (2016) 337 ALR 452
Falgat Constructions Pty Ltd v Equity Australia Corporation Ltd (2005) 62 NSWLR 385; [2005] NSWCA 49
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22
Fitzgerald v Masters (1956) 95 CLR 420; [1956] HCA 53
Fowler v Fowler (1859) 4 De G&J 250; 45 ER 97
Fox Entertainment Precinct Pty Ltd v Centennial Park and Moore Park Trust [2004] NSWSC 214; (2004) 11 BPR 21,629
Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603; [2009] NSWCA 407
Gammage v The Queen (1969) 122 CLR 444; [1969] HCA 68

GJ Coles & Co Ltd v Retail Trade Industrial Tribunal (1986) 7 NSWLR 503
Greenaways Australia Pty Ltd v CBC Management Pty Ltd [2004] NSWSC 1186
Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico [2004] NSWSC 344
Gye v McIntyre (1991) 171 CLR 609; [1991] HCA 60
Harris v Smith [2008] NSWSC 545
Hiley v Peoples Prudential Assurance Co Ltd (1938) 60 CLR 468; [1938] HCA 40
J Cummins Pty Ltd v F & D Bonaccorso [2015] NSWCA 200
JLF Bakeries Pty Ltd (in liq) v Baker's Delight Holdings Ltd [2007] NSWSC 894; 64 ASCR 633
Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd [2007] NSWSC 554
Knight v Victoria (2017) 261 CLR 306; [2017] HCA 29
Kuru v State of New South Wales (2008) 236 CLR 1; [2008] HCA 26
Lambert v Weichelt (1954) 28 ALJ 282
Lavender v Director of Fisheries Compliance, Department of Industry Skills and Regional Development [2018] NSWCA 174
Lazarus v Independent Commission Against Corruption (2017) 94 NSWLR 36; [2017] NSWCA 37
Leung v Minister for Immigration and Multicultural Affairs (1997) 79 FCR 400; [1997] FCA 1313
Mainteck Services Pty Ltd v Stein Heurtey SA (2014) 89 NSWLR 633; [2014] NSWCA 184
Maralinga Pty Ltd v Major Enterprises Pty Ltd (1973) 128 CLR 336; [1973] HCA 23
Marley v Rawlings [2015] AC 129; [2014] UKSC 2
McHugh Holdings Pty Ltd v Newtown Colonial Hotel Pty Ltd (2008) 73 NSWLR 53; [2008] NSWSC 542
Minister for Immigration and Ethnic Affairs v Bhardwaj (2002) 209 CLR 597; [2002] HCA 11
Miwa Pty Ltd v Siantan Properties Pty Ltd [2011] NSWCA 297
Mobis Parts Australia Pty Ltd v XL Insurance Company SE [2018] NSWCA 342
National Australia Bank Ltd v Clowes [2013] NSWCA 179; 8 BFRA 600
New South Wales v Kable (2013) 252 CLR 118; [2013]

HCA 26
Newey v Westpac Banking Corporation [2014] NSWCA 319
Paul Michael Pty Ltd v Urban Traders Pty Ltd [2010] NSWSC 1246
Pelechowski v The Registrar, Court of Appeal (1999) 198 CLR 435; [1999] HCA 19
Petelin v Cullen (1975) 132 CLR 355
Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ 1429; [2011] 1 WLR 770
Plaintiff S297/2013 v Minister for Immigration and Border Protection (2015) 255 CLR 231; [2015] HCA 3
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4; (2018) 351 ALR 225
Pukallus v Cameron (1982) 180 CLR 447; [1982] HCA 63
Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd [2004] NSWSC 116; 20 BCL 276
RJ Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390
Rojo Building Pty Ltd v Jillcris Pty Ltd [2007] NSWSC 880
Romaldi Constructions Pty Ltd v Adelaide Interiors Linings Pty Ltd (No 2) [2013] SASCFC 124
Ryledar Pty Ltd v Euphoric Pty Ltd (2007) 69 NSWLR 603; [2007] NSWCA 65
Samm Property Holdings Pty Ltd v Shaye Properties Pty Ltd, [2017] NSWCA 132; 345 ALR 633
Sargent v ASL Developments Ltd (1974) 131 CLR 634 at 641; [1974] HCA 40
Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) [2018] NSWSC 412
Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liquidation) [2018] NSWCA 139
Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) (No 2) unrep, 20 April 2018
Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd [2005] NSWSC 1152
Silvia v Brodyn Pty Ltd [2007] NSWCA 55
Simic v New South Wales Land and Housing Corporation (2016) 260 CLR 85; [2016] HCA 47
Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd (2016) 260 CLR 340; [2016] HCA

	52 Sparks v Hobson; Gray v Hobson [2018] NSWCA 29; 361 ALR 115 Sportsbet Pty Ltd v New South Wales (2012) 249 CLR 298; [2012] HCA 13 State of New South Wales v Kable (2013) 252 CLR 118; [2013] HCA 26 Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52 United Telecasters Sydney Ltd v Hardy (1991) 23 NSWLR 323 Veolia Water Solutions v Kruger Engineering (No 3) [2007] NSWSC 459 Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9 Wilson v Wilson (1854) 5 HL Cas 40; 10 ER 811 Wyllie v Tarrison Pty Ltd [2007] NSWCA 184
Texts Cited:	D Hodge QC, Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake (2nd ed, Sweet & Maxwell, 2016) F Dawson, “Interpretation and Rectification of Written Agreements in the Commercial Court” (2015) 131 LQR 344 MGR Gronow and S Maiden, McPherson’s Law of Company Liquidation, 5th ed Thomson Reuters P Davies, “Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction” [2016] CLJ 62 Review of Security of Payment Laws (December 2017)
Category:	Principal judgment
Parties:	Seymour Whyte Constructions Pty Ltd (Appellant) Ostwald Bros Pty Ltd (In liquidation) (First Respondent) Doron Rivlin (Second Respondent) Adjudicate Today Pty Limited (Third Respondent)
Representation:	Counsel: Mr M Christie SC / Mr D Hume (Appellant) Mr S Robertson / Mr AW Smith (First Respondent) Submitting appearance (Second and Third Respondents) Solicitors: K&L Gates (Appellant)

	King & Wood Mallesons (First Respondent) Dentons Australia (Second and Third Respondents)
File Number(s):	2018/136405
Decision under appeal:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity – Technology and Construction List
Citation:	[2018] NSWSC 412
Date of Decision:	5 April 2018
Before:	Stevenson J
File Number(s):	2017/348623

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the decision]

These proceedings arose out of a claim for progress payments under a Works Contract between the appellant (**Seymour**) as Contractor and the first respondent (**Ostwald**) as Subcontractor. Ostwald agreed on specified terms to perform road works on the Pacific Highway. The head contractor was the New South Wales Roads and Maritime Services.

Ostwald served a progress payment claim on Seymour for $6,351,066.08 pursuant to s 13(1) of the *Building and Construction Security of Payment Act 1999* (NSW) (**Security of Payment Act**). Seymour responded by providing a payment schedule pursuant to s 14 of the *Security of Payment Act,* stating that it proposed to pay $2,505,237.58 as a progress payment (**Scheduled Amount**).

Ostwald then purported to make an adjudication application under s 17(2)(a)(ii) of the *Security of Payment Act* (**Adjudication Application**). An Adjudication subsequently determined that the amount due to Ostwald was $5,074,218.27 (**Adjudication Amount**).

Seymour commenced proceedings in the Equity Division claiming that the Adjudication Determination was invalid because Ostwald made the Adjudication Application outside the time limit specified by the *Security of Payment Act*. Ostwald filed a cross-claim seeking rectification of the Works Contract to alter the dates on which Seymour was required to make progress payments. It was common ground that if the claim for rectification succeeded, Ostwald's Adjudication Application was made within the time prescribed by the Security of Payment Act, but if the Works Contract was not rectified the Adjudication Application had been made out of time and the Adjudication Determination was invalid.

In the alternative Ostwald claimed the unpaid Scheduled Amount of $2,505,237.58 as a statutory debt pursuant to s 16(2)(a)(i) of the Security of Payment Act.

After the proceedings commenced the creditors of Ostwald resolved pursuant to s 439C(c) of the Corporations Act, that it should be wound up.

The primary Judge held that:

(i) rectification should be ordered and therefore the Adjudication Determination was valid;

(ii) if, contrary to (i), the Adjudication Determination was invalid Ostwald could seek recovery of the Scheduled Amount in summary proceedings as a debt due to it pursuant to s 16(2)(a)(i) of the *Security of Payment Act*;

(iii) the *Security of Payment Act* continued to apply notwithstanding that the winding up of Ostwald had commenced;

(iv) but the Court had no option except to stay any judgment obtained by Ostwald following the Adjudication Determination until the parties' rights were determined in the liquidation by an account of their mutual dealings pursuant to s 553C of the *Corporations Act 2001* (Cth).

On the appeal, the issues were:

(i) whether the primary Judge erred in rectifying the Works Contract so as to alter the due date for payment (with the consequence that Ostwald's Adjudication Application was made within time);

(ii) if yes to (i), whether Ostwald was precluded from suing to recover the unpaid amount pursuant to s 16(2)(a)(i) of the *Security of Payment Act*, Ostwald having purported to make an Adjudication Application under s 16(2)(a)(ii), albeit out of time;

(iii) if no to (ii), was the Act as a matter of construction incapable of applying to a builder or subcontractor which had gone into liquidation in insolvency, as was held by the Victorian Court of Appeal in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247; 337 ALR 452.

The Court, allowing the appeal, held (per Sackville AJA, Leeming, Payne, White JJA and Emmett AJA agreeing):

(i) The primary Judge erred in finding that the common intention of the parties on the date of execution of the Works Contract was that Seymour should have 30 days from the end of the relevant month in which to pay Ostwald, rather than an earlier date specified in the Works Contract. The Adjudication Application was therefore served out of time and the Adjudication Determination was invalid.

Simic v New South Wales Land and Housing Corporation (2016) 260 CLR 85; [2016] HCA 47 applied.

(ii) The Adjudication Determination being invalid, Ostwald was entitled to seek recovery of the Scheduled Amount pursuant to s 16(2)(a)(i) of the *Security of Payment Act*. Although the Act provided alternative remedies for a claimant, the making of an invalid Adjudication Application did not preclude Ostwald from pursuing the summary statutory alternative available to it.

New South Wales v Kable (2013) 252 CLR 118; [2013] HCA 26 at [52] (Gageler J) followed.

(iii) An entitlement to a progress payment under s 8(1) of the *Security of Payment Act* does not depend on the claimant actually continuing to perform work under a contract. Accordingly, notwithstanding the winding up of Ostwald, the *Security of Payment Act* continued to apply to its claim and it was entitled to pursue its claim for the Scheduled Amount to judgment.

Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247; (2016) 337 ALR 452 not followed.

JUDGMENT

1 **LEEMING JA:** I agree with Sackville AJA's reasons and proposed orders. What follows is by way of elaboration rather than qualification, expanding on the questions of principle arising under the *Building and Construction Industry Security of Payment Act 1999* (NSW) in this capably argued appeal and cross-appeal. I shall use the same abbreviations and assume familiarity with the matters contained in his Honour's judgment.

2 The dispositive issues, as refined during the hearing, were:

(1) did the primary judge err in rectifying the Contract so as to alter the due date for payment (with the consequence that Ostwald's Adjudication Application was made within time)?

(2) if yes to (1), then was Ostwald precluded from suing to recover the unpaid amount pursuant to s 16(2)(a)(i), Ostwald having purported to make an adjudication application under s 16(2)(a)(ii), albeit out of time?

(3) if no to (2), then was the Act as a matter of construction incapable of applying to a builder or subcontractor which had gone into liquidation in insolvency, as had been held in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247; 337 ALR 452?

Should the Contract have been rectified?

3 As Sackville AJA explains, there were internal inconsistencies in the contractual documentation, including in two bespoke provisions directed to the time for payment. Special Condition 9.1 required payment within 15 business days, while Item 21 of the Particulars required (because of the way its boxes had been filled out) payment within 30 days of the end of the month of claim. Although the Contract gave priority to the Special Conditions, there is some force in the proposition that the something had gone awry in Special Condition 9.1 and Item 21.

4 Before the primary judge, Ostwald had contended both for rectification in equity, and also as a matter of construction, but with the emphasis heavily on the former. His Honour ordered rectification in equity, and did not address the submissions on construction.

5 Sometimes it is clear on the face of a written contract that something has gone wrong with the language. In such cases, two quite different approaches may, in principle, be available as a matter of Australian law. It is vital to distinguish between the doctrines at common law and in equity.

Rectification by construction

6 At common law, if the error is clear, and it is also clear what a reasonable person would have understood the parties to have meant, then the mistake may be corrected as a matter of construction. This is old law. Lord St Leonards said in *Wilson v Wilson* (1854) 5 HL Cas 40 at 66-67; 10 ER 811 at 822:

> "Now it is a great mistake if it is supposed that even a Court of Law cannot correct a mistake, or error, on the face of an instrument: there is no magic in words. If you find a clear mistake, and it admits of no other construction, a Court of Law, as well as a Court of Equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes - without, I say, going into those cases at all, both Courts of Law and of Equity may correct an obvious mistake on the face of an instrument without the slightest difficulty."

7 Examples may be found in linguistic errors, such as "inconsistent" being read as "consistent" in *Fitzgerald v Masters* (1956) 95 CLR 420; [1956] HCA 53, or conceptual errors, such as "lessor" being read as "lessee" in *McHugh Holdings Pty Ltd v Newtown Colonial Hotel Pty Ltd* (2008) 73 NSWLR 53; [2008] NSWSC 542. The language of a contract is not read like a computer program, such that any slip is fatal.

8 Two conditions are necessary in order to correct the contractual language in this manner: (a) that the literal meaning of the contractual words is an absurdity and (b) that it is self-evident what the objective intention is to be taken to have been: see *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633; [2014] NSWCA 184 at [117]-[119], approving *National Australia Bank Ltd v Clowes* [2013] NSWCA 179; 8 BFRA 600, where it was stated at [34]:

> "Where both those elements are present ... ordinary processes of contractual construction displace an absurd literal meaning by a meaningful legal meaning."

9 Likewise, in the United Kingdom, the court must be satisfied both as to the mistake and the nature of the correction: *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429; [2011] 1 WLR 770 at [21] (Lord Neuberger); *Arnold v Britton* [2015] AC 1619; [2015] UKSC 36 at [78] (Lord Hodge).

10 The court must be satisfied of those matters to a high level of conviction. To use the language of Dixon CJ and Fullagar J in *Fitzgerald v Masters* at 426-427, it must be "clearly necessary in order to avoid absurdity or inconsistency". As this Court said in *Miwa Pty Ltd v Siantan Properties Pty Ltd* [2011] NSWCA 297 at [18], the test of absurdity is not easily satisfied. Any question of absurdity or inconsistency must be identified according to established principles, by reference to the text of the agreement as understood in its factual and legal context: *Wyllie v Tarrison Pty Ltd* [2007] NSWCA 184 at [46]; *Newey v Westpac Banking Corporation* [2014] NSWCA 319 at [85]. Courts which are asked to delete, insert or rewrite part of a contract because of what is said to be an obvious error should bear steadily in mind that imperfections and infelicities and ambiguities in contractual language commonly reflect the give and take of negotiations, or the parties' appreciation that some obscurities are incapable of resolution. As Lord Hoffmann explained, the court does "not readily accept that people have made mistakes in formal documents": *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101; [2009] UKHL 38 at [23].

11 Although something had arguably gone wrong in the drafting of Special Condition 9.1 and Item 21 of the Particulars, it by no means followed that, as a matter of construction, the Contract could be construed so that Ostwald's Adjudication Application was made within time.

Rectification in equity

12 In Australia, a contract may be rectified in equity where it is shown that there was at the time the document was executed, a common intention which, through a common mistake, was not reflected in the document: *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 346 and 350-351;

[1973] HCA 23; *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85; [2016] HCA 47 at [46] and [103]. Recent authorities from the United Kingdom must be read with care, because the doctrine has diverged, although not relevantly for the purposes of this appeal.

13 Equity insists on a high standard of proof. This is regularly expressed by a requirement of "clear and convincing proof" or "convincing proof". Campbell JA considered this in detail in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; [2009] NSWCA 407 at [451]-[461]; see further the decisions collected in *Newey v Westpac Banking Corporation* [2014] NSWCA 319 at [170] and *J Cummins Pty Ltd v F & D Bonaccorso* [2015] NSWCA 200 at [7], and also *Mobis Parts Australia Pty Ltd v XL Insurance Company SE* [2018] NSWCA 342 at [11]. In *Simic*, Kiefel J, with whom French CJ agreed in this respect, said at [41] that the common intention must be "proved to a high standard" and cited Lord Chelmsford's statement in *Fowler v Fowler* (1859) 4 De G & J 250 at 265; 45 ER 97 at 103 that a person seeking to rectify a deed must establish the alleged intention "in the clearest and most satisfactory manner". It has been explained that the insistence on a high standard of proof reflected a centuries old concern on the part of Chancery lest the integrity of written agreements be undermined. Equity recognised that it would not enforce an agreement where the defendant admitted the mistake, and to that exception were added cases where the mistake was proven by clear and convincing evidence equal to an admission: F Dawson, "Interpretation and Rectification of Written Agreements in the Commercial Court" (2015) 131 LQR 344 at 347. Rectification, no differently from *non est factum* and other principles which detract from the objective theory of contractual interpretation "must necessarily be kept within narrow limits": *Petelin v Cullen* (1975) 132 CLR 355 at 359; [1975] HCA 24. If unchecked they would cause "serious mischief": *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at [46]-[47].

14 It has been said, of the position in the United Kingdom, that there has been an "explosion" of claims for rectification in equity, and that it is attributable to the increasing complexity of commercial and other written contracts, the tendency for successive drafts to be composed using a "cut and paste" style of word-processing, their increasing length and complexity, and the richness of

accessible electronic records of negotiations: see D Neuberger, foreword to D Hodge QC, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, Sweet & Maxwell, 2016), p ix. This may also be, in part, a consequence of the changes introduced by what was said, obiter, in *Chartbrook* at [48]-[67]. But that does not reflect the law in Australia: *Simic* at [19], [48]-[49].

15 The doctrines at law and in equity remain conceptually distinct, as French CJ noted in *Simic* at [18] and [20], and as Kiefel J stated at [48], doubting a suggestion in *Chartbrook* that consistency of approach was warranted between rectification and construction. Conceptually, there is a world of difference. The requirements of *ex facie* absurdity or inconsistency and clarity as to what the parties must be taken to have intended ensure that rectification by construction remains an aspect of determining the objectively manifested legal meaning of contractual words, and accommodates the truth that sometimes, even in a formal legal document, the parties will make mistakes which are nonetheless readily identified and corrected. On the other hand, rectification in equity turns on the discrepancy between the written instrument and a separately proven contrary common intention, which was intended to have been incorporated into the instrument, such that it is unconscientious for a party to insist on performance in accordance with the written instrument. Rectification in equity is a departure – albeit one which is narrowly circumscribed by the insistence on cogent proof – from the objective theory of contract.

16 Any assimilation of the two doctrines would also confront very large obstacles in terms of their practical operation. Without being exhaustive, the following differences may be noted.

(1) First, a court may not have jurisdiction to make an order for rectification in equity (cf *Cherry v Steele-Park* (2017) 96 NSWLR 548; [2017] NSWCA 295 at [139]).

(2) Secondly, and very commonly, evidence (for example, as to the parties' subjective intentions) may be admissible in equity but not at common law: see *Cherry v Steele-Park* at [57]-[58].

(3) Thirdly, different defences may be available to a claim for equitable rectification. For example, rectification will not be decreed if to do so would prejudice the rights of a bona fide third party: see the decisions noted by Brereton J (as his Honour then was) in *Harris v Smith*

[2008] NSWSC 545 at [49]). A right to rectification in equity is a classic example of a "mere equity" which may be defeated by a later equitable interest acquired without notice of it.

(4) Fourthly, equitable rectification may in an appropriate case be ordered on terms, as noted in *Marley v Rawlings* [2015] AC 129; [2014] UKSC 2 at [40].

17 Enough has been said to establish that, as Lord Neuberger said in *Marley v Rawlings* at [40], the question is "by no means simply an academic issue of categorisation"; see further P Davies, "Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction" [2016] CLJ 62.

18 In the present case, the parties' submissions were confined to rectification in equity. It was made clear during the hearing that if Ostwald sought to rely upon construction, a notice of contention would be required (transcript, 29 October 2018, pp 63-64). None was put forward, even after an adjournment.

19 As Sackville AJA explains, in the absence of any evidence from the officers of Ostwald who executed the contract on its behalf, and of evidence explaining how Special Condition 9.1 came to be incorporated, some time after the exchange of written drafting proposals, and including changes not otherwise explained in the evidence, the high standard of proof for rectification in equity was not made out.

Was Ostwald precluded from suing for the statutory debt?

20 Subsection 16(2) of the Act provides that, in circumstances which it was accepted obtained, that the claimant:

> "(a) may:
>
> (i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
>
> (ii) make an adjudication application under section 17 (1) (a) (ii) in relation to the payment claim, and
>
> (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract."

21 Again, as Sackville AJA explains, it was accepted that s 16(2)(a)(i) and (ii) provided a claimant with two mutually exclusive alternatives where there had been a failure to pay a scheduled amount. The issue was whether Ostwald,

having purported to apply for adjudication but having done so invalidly, because it was outside the time limits applicable to s 16(2)(a)(ii), was capable of enforcing the debt pursuant to s 16(2)(a)(i). Did Ostwald's out of time purported exercise of one of the statutory alternatives preclude it from exercising the other?

22 Seymour Whyte submitted that Ostwald was prevented from enforcing the debt pursuant to s 16(2)(a)(i), either as a matter of statutory construction, or else as a matter of election at common law.

23 In many areas of law, it can be difficult to identify whether the answer to an issue is one of "common law" or of statutory construction. One reason for this was explained by Windeyer J in *Gammage v The Queen* (1969) 122 CLR 444 at 462; [1969] HCA 68. Referring to the law of homicide, he said that "[i]ts growth, elaboration and development over centuries has been the result of the work of Parliament as well as of courts and of the great and authoritative writers." The same may be said of much private law (consider the law of partnership, or marine insurance, or contributory negligence, or any other area where statute has intervened and the intervention has itself become subject to a body of judge-made law). But there is another reason why Windeyer J's statement that "it is misleading to speak glibly of the common law in order to compare and contrast it with a statute" is presently applicable. The rights conferred by the Act are not of any great antiquity, but they are intimately connected with the parties' rights at common law, based, primarily, on their contract. Because the Act is framed with a close regard to modifying extant rights, liabilities, powers and privileges under a construction contract, it can be quite unclear whether the source of a particular entitlement is statute or contractual. Often, it is both. For example, while every payment claim and every payment schedule is, in a sense, a creature of the Act, their content and timing are determined by the terms of the parties' contract.

24 Although grounds 2(a) and (b) of Seymour Whyte's appeal distinguished between common law and statutory sources of its claimed entitlement to prevent Ostwald suing on the statutory debt, and to my mind identifying that

source is far from straightforward, it is clear that Ostwald was not prevented from enforcing the s 16(2)(a)(i) debt.

No election at common law

25 Election at common law only applies if there are inconsistent legal rights. "[I]t is this concurrent existence of inconsistent sets of rights which explains the doctrine; because they are inconsistent neither one may be enjoyed without the extinction of the other and that extinction confers upon the elector the benefit of enjoying the other, a benefit denied to him so long as both remained in existence": *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641; [1974] HCA 40 (Stephen J, with whom McTiernan ACJ agreed). The same point was made in *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570; [2008] HCA 57 at [58]:

> "The doctrine of election is long established at common law. As Jordan CJ pointed out in *O'Connor v SP Bray Ltd*, '[s]ince the days of the Year Books it has been recognised that you cannot have the egg and the halfpenny too'. If, then, something happens which gives rise to the existence of two alternative rights, and one of those rights is satisfied, the other is no longer available" [citation omitted].

26 It is accepted that the out of time adjudication application was invalid; it must follow that there was no inconsistency such as to give rise to an occasion for election at common law.

No election as a matter of construction

27 Seymour Whyte's submissions as a matter of construction must also be rejected. Seymour Whyte submitted that "s 16(2)(a)(ii) is engaged by the making of an adjudication application *in fact*, even if that adjudication application is vitiated by jurisdictional error", thereby precluding the recovery of the statutory debt.

28 Seymour Whyte relied on Gageler J's analysis in *State of New South Wales v Kable* (2013) 252 CLR 118; [2013] HCA 26 at [52]. Speaking of a purported but invalid law, and a thing done in the purported but invalid exercise of a power conferred by law, Gageler J said that both remained "at all times a thing in fact". He continued:

> "The thing is, as is sometimes said, a 'nullity' in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no

> existence at all or that it is incapable of having legal consequences. The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law" [citation omitted].

29 The fact that a decision is beyond jurisdiction, and may be said to be a "nullity", is not determinative of its status for the purposes of further legal analysis. The law of contempt supplies an example. An inferior court's order beyond jurisdiction is a nullity, in the sense that the failure to obey it cannot be a contempt: *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 335; *Pelechowski v The Registrar, Court of Appeal* (1999) 198 CLR 435; [1999] HCA 19 at [27]-[28], [55] and [71]. However, an order beyond jurisdiction may also be the subject of proceedings seeking judicial review in the Supreme Court's supervisory jurisdiction, or indeed an appeal (consider for example an appeal from the District Court upheld on the basis of a denial of procedural fairness).

30 But the question is one of construction. Seymour Whyte's submission is that Ostwald made an adjudication application in fact, albeit out of time, such that it was invalid to engage the suite of rights under Division 2 of Part 3 of the Act, but was sufficient to preclude the alternative right under s 16(2)(a)(i). There is no reason to construe the statute in so capricious a manner. Why would not only the substantive rights under Division 2 of Part 3 be unavailable because the application was lodged out of time, but also the alternative rights under s 16(2)(a)(i) be precluded as well? Seymour Whyte submits that, as happened here, a claimant might persevere with taking steps down both alternative paths. But that is no reason to reach the construction for which Seymour Whyte contends, which denies to the claimant *both* alternatives.

31 The reality of the situation is that there may be, as here, a dispute as to which of the two alternative rights enjoyed by a claimant is available. In the present case, I would infer that both sides had reasonably arguable positions as to whether the Adjudication Application had been lodged in time. The position would only become clear following the determination of a court, which would not occur within the very tight timeframes required under the statutory regime. There is no reason to construe the Act, which after all is beneficial legislation providing additional valuable (albeit interim) rights to claimants, so that *both*

alternative rights are lost in the event that a claimant turns out to be wrong in its view as to the availability of one of them.

Did the Act apply once a liquidator was appointed?

32 The primary judge considered that the decision of the Victorian Court of Appeal in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* was clearly wrong, principally since it had failed to have regard to the definition of "claimant". The Victorian Court of Appeal had accepted Multiplex's submission that the Act did "not apply once a person seeking payment had been placed into liquidation": at [58]; see also at [89]-[90] and [191].

33 When the appeal was heard in this Court, Seymour Whyte accepted that aspects of *Façade* were wrong. As Sackville AJA has explained, Seymour Whyte was correct to take that course. Seymour Whyte also adopted a narrower approach. Accepting that companies may be wound up for a variety of reasons aside from insolvency, including on the just and equitable ground in the case of, say, a deadlocked board and membership, it contended that the Act only ceased to apply when a company was being wound up *in insolvency.* Even so, once it is appreciated that a liquidator is empowered to, and may wish, to continue to trade, so as to sell (or at least, to investigate whether it might be possible to sell) the company's business as a going concern, it is clear that the central premise in *Façade* – that the making of a winding up order *ipso facto* meant that the company ceased to trade – is incorrect.

34 I respectfully agree with Sackville AJA that the reasoning in *Façade* as to construction is plainly wrong and should not be followed.

The consequences of rejecting the reasoning as to construction in Façade

35 The Victorian Court of Appeal reached its conclusion as a matter of construction (see at [90]), noting expressly that it was "strictly unnecessary for us to consider the issue of constitutional inconsistency" (at [91]). However, the Court then took the further step of addressing, elaborately, the argument advanced under s 109 of the Constitution, concluding that it "also provides independent additional support for the narrow construction we have adopted": at [189].

36 In this Court, although full submissions based on s 109 were advanced, ground 3(b) was abandoned in oral submissions in reply. That occurred after Ostwald explained, by reference to fresh evidence, why the constitutional point could not be run for the first time on appeal. Seymour Whyte accepted that a floating charge granted by Ostwald had crystallised prior to the commencement of its winding up, and that Ostwald had insufficient assets to satisfy its secured creditors and priority creditors, such that no issue under s 553C of the *Corporations Act 2001* (Cth) could arise.

37 It is well settled that the High Court will not unnecessarily determine a constitutional question: *Lambert v Weichelt* (1954) 28 ALJ 282 at 283. That has been followed on numerous occasions by the High Court, including by all seven members of the High Court in *Duncan v New South Wales* (2015) 255 CLR 388; [2015] HCA 13 at [52] and *Knight v Victoria* (2017) 261 CLR 306; [2017] HCA 29 at [32]-[33].

38 In many cases, the same approach will apply in this Court: see for example *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36; [2017] NSWCA 37 at [71]-[72] and *Lavender v Director of Fisheries Compliance, Department of Industry Skills and Regional Development* [2018] NSWCA 174 at [68] and [76]. However, telling against declining to resolve constitutional points is the general proposition that intermediate courts of appeal should consider all grounds of appeal, in part because of the possibility of a further appeal: *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12]. Further, it may also be desirable for an intermediate court of appeal to go further than is necessary, bearing in mind the effect of the reasoning which remains. Even if the appeal be allowed on a non-constitutional ground, other trial courts will not be free to disregard the reasoning at first instance: see *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29; 361 ALR 115 at [35]-[40]. Thus a more nuanced approach may be required: see for example *Alqudsi v Commonwealth of Australia* (2015) 91 NSWLR 92; [2015] NSWCA 351 at [124]-[125].

39 The present case is different again. Ground 3(b) has been abandoned. In that unusual circumstance, I do not think it is right to express a view, one way or the

other, as to the correctness of the constitutional aspect of the reasoning in *Façade.* But the point was fully argued in this Court, and will doubtless recur. For the purposes of New South Wales courts, it is appropriate to state that the constitutional analysis in *Façade* is inapplicable to the *Building and Construction Industry Security of Payment Act 1999* (NSW). The Victorian Court of Appeal considered that the "roll back" provisions in ss 5E, 5F and 5G of the *Corporations Act 2001* (Cth) had no application: at [187]. In accordance with Ostwald's persuasive submission, a different analysis obtains in New South Wales.

40 The New South Wales Act commenced in March 2000, prior to the commencement of the *Corporations Act 2001* (Cth) (in July 2001), both of which preceded the commencement of the Victorian Act on 31 January 2003. The difference in timing matters. Speaking generally, much of the New South Wales Act, including the key provisions relating to the right to adjudication and the enforcement of an adjudicator's determination, are not materially altered from the form they took in July 2001 (although it is true that an adjudicator's determination could not at that time be filed as a judgment). It follows that the provisions of the New South Wales Act are apt to be "pre-commencement (commenced) provisions" within the meaning of s 5G(12) of the *Corporations Act*, and that any analysis of the interaction between the *Corporations Act* and the New South Wales Act must have regard to s 5G.

41 Although the "roll back" provisions are complex, their general force is to the effect that where State legislation co-existed with the Corporations Law prior to July 2001, then broadly speaking State legislation should continue to operate after the commencement of the *Corporations Act 2001* (Cth).

42 It follows from the foregoing that the reasoning of Young CJ in Eq in *Brodyn Pty Ltd v Dasein Constructions Pty Ltd* [2004] NSWSC 1230 at [82]-[84] concerning s 109, on which the Victorian Court of Appeal relied, is likewise materially incomplete. It may be noted that (a) Young CJ in Eq's reasoning was distinguished by McDougall J in *Veolia Water Solutions v Kruger Engineering [No 3]* [2007] NSWSC 459 at [11]-[26], (b) that there was an appeal: *Silvia v Brodyn Pty Ltd* [2007] NSWCA 55 in which Hodgson JA, with whom Ipp and

Basten JJA agreed, while dismissing the appeal, expressed a different view as to the operation of s 553C of the *Corporations Act* at [46].

43 Thus, in a New South Wales case where the point arises, it will be necessary to examine the operation of s 5G upon the impugned provisions of the Act.

44 **PAYNE JA:** I have had the privilege of reading the decision of Sackville AJA in draft. I agree with his Honour's reasons and the orders he proposes. I also agree with the additional observations of Leeming JA.

45 **WHITE JA:** I agree with Sackville AJA. I also agree with the additional observations of Leeming JA.

46 **SACKVILLE AJA:** These proceedings arise out of a claim for progress payments under a Works Subcontract (No CW01) dated 6 September 2016 (**Contract**) between the appellant (**Seymour**) as Contractor and the first respondent (**Ostwald**) as Subcontractor. Ostwald, now in liquidation, agreed on terms specified in the Contract to perform certain road works on the Pacific Highway near Grafton. The head contractor was New South Wales Roads and Maritime Services (**RMS**).

The proceedings

47 Ostwald served a progress payment claim on Seymour for $6,351,066.08 pursuant to s 13(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Security of Payment Act**).[1]

48 Seymour responded by providing a payment schedule pursuant to s 14 of the Security of Payments Act, stating that it proposed to pay $2,505,237.58 by way of progress payments (**Scheduled Amount**). Ostwald then made what it said was an adjudication application under s 17(2)(a)(ii) of the Security of Payment Act (**Adjudication Application**). The Adjudicator subsequently issued an adjudication determination pursuant to s 22 of the Security of Payment Act (**Adjudication Determination**) which determined that the amount due by Seymour to Ostwald was $5,074,218.27 (**Adjudicated Amount**). Seymour has paid neither the Scheduled Amount nor the Adjudicated Amount.

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[1] Relevant provisions of the Security of Payment Act are set out at [71]-[91] below.

49 Seymour commenced proceedings in the Equity Division claiming that the Adjudication Determination was invalid on the ground that Ostwald made the Adjudication Application outside the time limit specified in the Security of Payment Act. Seymour joined the Adjudicator as the second defendant and the person appointed as nominating authority under the Security of Payment Act as the third defendant. Both filed submitting appearances.

50 Seymour required leave pursuant to s 440D(1)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**) to commence the proceedings as the directors of Ostwald had previously resolved to appoint administrators. Ball J granted Seymour leave on condition that Seymour not enforce any orders made in its favour without leave. His Honour noted that Seymour gave the usual undertaking as to damages and also undertook to pay the Adjudicated Amount into court.

51 Ostwald filed a cross-claim seeking rectification of the Contract to alter the dates on which Seymour had to make progress payments. It was common ground that if the claim for rectification succeeded, Ostwald's Adjudication Application was made within the time prescribed by the Security of Payment Act, but if the Contract was not rectified the adjudication application had been made out of time and the Adjudication Determination was invalid. In the alternative Ostwald claimed the unpaid Scheduled Amount of $2,505,237.58 as a statutory debt pursuant to s 16(2)(a)(i) of the Security of Payment Act.

52 After the proceedings commenced the creditors of Ostwald resolved pursuant to s 439C(c) of the *Corporations Act*, that it should be wound up.

53 The primary Judge (Stevenson J) held that:[2]

1. this was a clear case where rectification of the Contract should be ordered;

2. the Adjudication Application was therefore made within time and the Adjudication Determination was valid;

3. even if, contrary to the second holding, the Adjudication Determination was invalid, Ostwald was entitled to seek recovery of the unpaid Scheduled Amount as a debt due to it pursuant to s 16(2)(a)(i) of the Security of Payment Act;

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[2] Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) [2018] NSWSC 412 (Primary Judgment).

4. the Security of Payment Act on its proper construction continued to apply notwithstanding that the winding up of Ostwald had commenced;

5. but the Court had no option except to stay any judgment obtained by Ostwald following the Adjudication Determination until the parties' rights were finally determined in the liquidation by an account of their mutual dealings as required by s 553C of the *Corporations Act*.

54 The primary Judge also refused a late application by Seymour to amend its Technology and Construction List Statement (**List Statement**). Seymour wished to contend that certain provisions of the Security of Payment Act are inconsistent with s 553C of the *Corporations Act* and are therefore invalid to the extent of the inconsistency by virtue of s 109 of the Constitution.[3] His Honour declined to entertain the argument.

55 Following a separate hearing and judgment on costs[4] the primary Judge made the following orders and notation (original numbers retained):

> "5. Order that the 'Works Subcontract' (Subcontract Number: CW01) in which [Ostwald] is described as the 'Subcontractor' and [Seymour] is described as the 'Contractor' ('Subcontract') is rectified by deleting clause 9.1[5] of the 'GC 21 Special Conditions – All Subcontracts' forming part of the Subcontract.
>
> 6. Order that a copy of order 5 of these orders be endorsed on the Subcontract.
>
> 7. Order that any judgment obtained by [Ostwald] arising from filing of an adjudication certificate in relation to the adjudication determination dated 6 November 2017 be stayed until further order in these proceedings or in the proceedings in which any judgment is obtained with a view that, unless otherwise ordered, the stay will remain in effect until an account is taken of the kind contemplated by s 553C of the Corporations Act 2001 (Cth) as between [Ostwald] and [Seymour] in respect of their mutual dealings.
>
> 8. Order that the Further Amended Summons is otherwise dismissed.
>
> 9. Order that the moneys paid into Court by [Seymour] on 17 November 2017 (plus interest accrued thereon) are to be repaid to [Seymour] by electronic transfer to the following account:
>
> …

---

[3] Section 109 of the Constitution provides that when a State law is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former, to the extent of the inconsistency, be invalid.

[4] Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) (No 2) unrep, 20 April 2018.

[5] Clause 9.1 of the Special Conditions to the Contract specified the time within which amounts due to Ostwald were to be paid: see [94] below.

> 10. Subject to the other specific orders as to costs made in these proceedings … order that [Seymour] pay 75% of [Ostwald's] costs of these proceedings (including the cross-claim).
>
> THE COURT NOTES THAT [Seymour] undertakes to lodge a proof of debt in the winding up of [Ostwald] within 28 days and, if [Seymour] does not lodge such a proof of debt, the stay granted in order 7 will cease and this undertaking will expire."

The Court was informed that Seymour lodged a proof of debt within the 28 day period. The proof of debt was not in the appeal papers.

56 Since the primary Judge concluded that the Adjudication Determination was valid and that Ostwald could file an adjudication certificate as a judgment for debt pursuant to s 25(1) of the Security of Payment Act, his Honour did not make orders on Ostwald's cross-claim for the unpaid Scheduled Amount as a statutory debt.

57 Seymour's notice of appeal contains the following grounds:

> "1. The primary judge erred in holding that:
>
> (a) the parties had a common intention at the time of executing the contract that Seymour … had 30 days from the end of the month in which Ostwald … served a payment claim to make payment; and
>
> (b) the contract between Seymour … and Ostwald … should be rectified to reflect that common intention.
>
> 2. The primary judge erred in failing to hold that:
>
> (a) Ostwald … could not pursue rights under s 16(2)(a)(i) of the Act in circumstances where it had in fact made an adjudication application under s 17(1)(a)(ii) of the Act in relation to its payment claim;
>
> (b) Ostwald … could not pursue rights under s 16(2)(a)(i) of the Act in circumstances where it had elected to make an adjudication application and to pursue that application to a determination.
>
> 3. The primary judge erred in failing to hold that Part 3 of the Act or, in the alternative, ss 24(1), 25(1) and/or 25(4) is not or are not available to a company in liquidation:
>
> (a) as a matter of construction of the Act; or
>
> (b) by reason of s 109 of the *Constitution*."

58 It can be seen that:

- Ground 1 challenges the first and second holdings (set out at [53] above);
- Ground 2 challenges the third holding;

- Ground 3 challenges the fourth holding; and also seeks to rely on the constitutional argument notwithstanding that the primary Judge refused Seymour leave to amend in order to advance the argument at the trial.

59 Ostwald filed with leave an amended notice of cross-appeal. Ground 1 challenges the decision of the primary Judge to stay any judgment obtained by Ostwald as the result of filing an adjudication certificate. Ostwald says that his Honour should have held that Seymour had neither pleaded nor proved that it was entitled to the benefit of a set-off of the kind contemplated by s 553C of the *Corporations Act.*

60 Ground 2 of the amended cross-appeal is enlivened only if this Court sets aside the order for rectification of the Contract and concludes that the Adjudication Application was "void". In that case Ostwald contends that the primary Judge should have ordered that Seymour pay $2,505,237.58 plus interest, since his Honour correctly held that it was open to Ostwald to seek recovery of the unpaid Scheduled Amount in curial proceedings brought pursuant to s 16(2)(a)(ii) of the Security of Payment Act.

61 Seymour filed a notice of contention in respect of the cross-appeal. It contends that the primary Judge:

> "in the exercise of discretion in the interests of justice, [should] have stayed any judgment arising from the filing of any adjudication certificate until an account is taken, pursuant to s 553C of the *Corporations Act 2001* (Cth), of the amounts due from Ostwald to Seymour … in respect of their mutual dealings under the contract."

62 Seymour has filed a notice of contention in respect of the cross-appeal seeking to support the stay granted by the primary Judge on an alternative basis. Seymour contends that the primary Judge, in the exercise of discretion and in the interests of justice, should have stayed any judgment arising from the filing of an adjudication certificate until the account required by s 553C of the *Corporations Act* is taken.

63 On 22 June 2018, Seymour was granted leave *nunc pro tunc* pursuant to s 500(2) of the *Corporations Act* to commence its appeal against the decision of the primary Judge.[6]

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[6] Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liquidation) [2018] NSWCA 139. The Court assumed, without deciding, that leave was necessary.

64 Seymour gave notice of a constitutional issue to the Attorneys-General of the Commonwealth, States and Territories as required by s 78B of the *Judiciary Act 1903* (Cth). None sought to intervene in the proceedings.

Narrowing of issues

65 There were numerous twists and turns in the course of argument. Much time was devoted to the constitutional contention and, consequently, to the interaction between the provisions of the Security of Payment Act and s 553C of the *Corporations Act*. Ostwald's oral submissions included a close analysis of the complex provisions of Part 1.1A of the *Corporations Act*, which deals with the interaction between Corporations legislation and State and Territory laws (matters overlooked in Seymour's submissions).

66 In the course of argument Mr Robertson, who appeared with Mr Smith for Ostwald, tendered without objection a Mortgage Debenture dated 9 June 2006 between Ostwald and Australia and New Zealand Banking Group Ltd (**ANZ**). Other material in the appeal books indicated that ANZ's charge had crystallised on 15 August 2017, by virtue of the service of a garnishee notice by the Australian Taxation Office on Seymour. This was before 25 August 2017, the date (as the parties agreed) that the winding up of Ostwald is taken to have commenced.[7] There was also material in the appeal books suggesting that Ostwald had insufficient assets to satisfy ANZ's security interest and priority creditors. This raised a question as to whether there was mutuality in the relevant sense for the purposes of s 553C(1) of the *Corporations Act* between Seymour and Ostwald.

67 By reason of these and other matters Mr Christie informed the Court that Seymour did not propose to rely on any argument based on s 553C of the *Corporations Act* and did not press the constitutional contention.

68 After some discussion, Mr Robertson gave an undertaking to the Court on behalf of Ostwald that it would:

> "not take steps for the enforcement of judgments pursuant to the Adjudicator's determination or any judgment which this Court may make or sought in the amended cross-appeal without first giving 14 days notice to [Seymour]."

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[7] Being the date on which the administration of Ostwald began: Corporations Act, ss 513B(b), 513C; see [110] below

The Court noted that Seymour gave the usual undertaking as to damages.

69 Ostwald's undertaking may provide Seymour with the opportunity, if so advised, to seek orders restraining enforcement of any judgment obtained by Ostwald for the unpaid Adjudication Amount or other relief. That may require Seymour to put on evidence establishing that it at least has an arguable claim against Ostwald based on its rights under the Contract preserved by the Security of Payment Act.[8]

70 Mr Christie pressed Ground 3(a) of the notice of appeal, which contends that Part 3 of the Security of Payment Act, on its proper construction, is not available to a company in liquidation. If this contention is accepted it would prevent Ostwald relying on the Adjudication Determination (if valid) and would also prevent Ostwald from pursuing the alternative route of curial proceedings to recover the unpaid portion of the Scheduled Amount as a debt.

Legislation

Security of Payment Act

71 The Security of Payment Act was enacted in 1999 and has been adopted with variations in other Australian jurisdictions (although not all).[9] The legislation has given rise to numerous questions of construction and many authorities have explained the legislative scheme.[10] It is necessary to repeat the exercise for the purposes of this appeal.

72 The High Court has on two occasions quoted the explanation of the original design of the Security of Payment Act given by the responsible Minister when introducing amending legislation in 2002:[11]

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[8] Security of Payment Act, s 32(1), (2), (3); Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico [2004] NSWSC 344 at [27]-[32] (Einstein J); Veolia Water Solutions v Kruger Engineering (No 3) [2007] NSWSC 459 (Veolia) at [72]-[92] (McDougall J).

[9] Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (Probuild Constructions) [2018] HCA 4; (2018) 351 ALR 225 at [3] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). The New South Wales Legislation has been amended on several occasions, notably by the Building and Construction Industry Security of Payment Amendment Act 2002 (NSW) and the Building and Construction Industry Security of Payment Amendment Act 2013 (NSW). The legislation in force in the various Australian jurisdictions has recently been examined in the Review of Security of Payment Laws (December 2017) (Murray Report).

[10] See, for example, Probuild Constructions at [4]-[18]; Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd (Southern Han) (2016) 260 CLR 340; [2016] HCA 52 at [3]-[19] per curiam.

[11] New South Wales, Legislative Assembly, Parl Deb, 12 November 2002 at 6542. (Hon Morris Iemma MLA), quoted in Southern Han at [4] and Probuild Constructions at [39].

> "The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid."

The Minister went on to say that cash flow was the "lifeblood of the construction industry" and that the Government was:

> "determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act."

73 Section 3(1) of the Security of Payment Act states that the object of the legislation is:

> "to ensure that any person who undertakes to carry out construction work … under a construction contract is entitled to receive and is able to recover, progress payments in relation to the carrying out of that work…"

The means by which the Act ensures that a person is entitled to receive a progress payment "is by granting a statutory entitlement to such a payment regardless of whether the relevant contract makes provision for progress payments" (s 3(2)).

74 Section 3(3) provides as follows:

> "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 progress payment so determined."

75 Section 4(1) defines "progress payment" to mean:

> "a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):
>
> (a) the final payment for construction work carried out … under a construction contract, or
>
> (b) a single or one-off payment for carrying out construction work … under a construction contract, or
>
> (c) a payment that is based on an event or date (known in the building and construction industry as a 'milestone payment')."

76 Section 5(1) defines “construction work” to mean any of various activities identified in the provision, such as the construction, alteration or extension, demolition of buildings or structures.

77 Part 2 of the Security of Payment Act creates “Rights to progress payments”. Section 8 provides as follows:

> “(1) 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) …
>
> is entitled to a progress payment.
>
> (2) In this section, ***reference date***, in relation to a construction contract, means:
>
> (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or
>
> (b) …”

78 In the circumstances of the present case the amount of a progress payment to which a person is entitled in respect of a continuation contract is to be the amount calculated in accordance with the terms of the contract (s 9(a)).

79 Section 11(1) provides that, subject to s 11 and any other law, a progress payment is to be made in accordance with the applicable terms of the contract. “Due date” in relation to a progress payment is defined in s 4(1) to mean the due date for the progress payment as referred to in s 11.

80 The procedure referred to in s 3(3) of the Security of Payment Act is set out in Part 3 (“Procedure for recovering progress payments”). Section 13(1) provides that:

> “A person referred to in section 8(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.”

The payment claim must indicate, among other things, “the amount of the progress payment that the claimant claims to be due (the **claimed amount**)” (s 13(2)(b)). A payment claim may be served (relevantly) only within the period

determined in accordance with the contract (s 13(4)(a)). Service by a claimant on the respondent of a payment claim for a claimed amount is therefore the trigger for the procedure set out in Part 3.[12]

81 Section 14 deals with the payment schedule as follows:

> "(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.
>
> (2) A payment schedule:
>
> (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***).
>
> (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
>
> (4) If:
>
> (a) a claimant serves a payment claim on a respondent, and
>
> (b) the respondent does not provide a payment schedule to the claimant:
>
> (i) within the time required by the relevant construction contract, or
>
> (ii) within 10 business days after the payment claim is served,
>
> whichever time expires earlier,
>
> the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates."

82 Section 15 deals with the case where a respondent does not provide a payment schedule and fails to pay the claimed amount on or before the due date. In the present case Seymour provided a payment schedule in response to Ostwald's payment claim. Thus s 15 does not apply.

83 Section 16 prescribes the consequences where a respondent provides a payment schedule but does not pay the scheduled amount. Section 16 provides as follows:

> "(1) This section applies if:
>
> (a) a claimant serves a payment claim on a respondent, and
>
> (b) the respondent provides a payment schedule to the claimant:

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[12] Southern Han at [14].

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served,

whichever time expires earlier, and

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and

(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may:

(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17 (1) (a) (ii) in relation to the payment claim, and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

…

(4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the scheduled amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract."

84 Division 2 of Part 3 is headed "Adjudication of disputes". Section 17 relevantly provides as follows:

"(1) A claimant may apply for adjudication of a payment claim (an ***adjudication application***) if:

(a) the respondent provides a payment schedule under Division 1 but:

(i) …, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) …

(3) An adjudication application:

(a) must be in writing, and

…

(d) in the case of an application under subsection (1) (a) (ii)—must be made within 20 business days after the due date for payment

…"

The expression "adjudication application" is defined in s 4(1) to mean "an application referred to in section 17".

85 The adjudication is to determine the amount of the progress payment (if any) to be made by the respondent to the claimant (the **adjudicated amount**), the date on which the adjudicated amount became or becomes payable and the rate of interest payable (s 22(1)).

86 Section 23(2) provides that if an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before the relevant date. The "relevant date" is five business days after the adjudicator's determination is served on the respondent, unless the adjudicator determines a later date (s 23(1)).

87 Section 24 prescribes the consequences of the respondent not repaying the adjudicated amount:

"(1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 23, the claimant may:

(a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section, and

(b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work … under the construction contract."

88 Section 25 provides as follows:

"(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator's determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings."

89 Section 27(1) states that a claimant may suspend the carrying out of construction work under a construction contract if at least two business days have passed since the claimant has given notice of intention to do so, for example pursuant to s 24(1)(b).

90 Section 32 preserves rights under the construction contract:

"(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings."

91 Section 34 states that the provisions of the Act have effect despite any provision to the contrary in any contract.

Corporations Act

92 Section 553C of the *Corporations Act* provides as follows:

"(1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being

wound up and a person who wants to have a debt or claim admitted against the company:

> (a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and
>
> (b) the sum due from the one party is to be set off against any sum due from the other party; and
>
> (c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.

(2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent."

The Contract

93 The Contract was executed on 6 September 2016. It consisted of a number of documents including:

- the "Formal Instrument of Agreement",
- the "Special Conditions" and
- the "Subcontract Conditions".

Clause 1.2 of the Formal Instrument of Agreement stated that in the event of inconsistency the Special Conditions had "priority" over the Subcontract Conditions.

94 Clause 20.4 of the Subcontract Conditions provided that Ostwald was entitled to submit payment claims at the times stated in the Particulars. Special Condition 9.1 stated that:

> "Clause 20.7 of the Subcontract Conditions is replaced with the following clause:
>
> > If the balance of the statement [after deducting the amount in clause 20.6(b) from the amount in clause 20.6(a)] is that an amount is payable to the Subcontractor then the Contractor must, within 15 Business Days after the Contractor receives the payment claim:
> >
> > > (i) pay the GST exclusive assessed amount;
> > >
> > > (ii) upon the Subcontractor giving the Contractor a valid tax invoice, pay the relevant GST."

Clause 20.6 required Seymour to issue within 10 Business Days after receiving a payment claim a statement of the amount Seymour considered was payable to Ostwald (cl 20.6(a)) and any amount Seymour considered was payable by Ostwald to Seymour (cl 20.6(b)).

95 Despite Special Condition 9.1, cl 20.7 of the printed Subcontract Conditions was not deleted or struck out from the executed Contract. This version of cl 20.7 provided as follows:

> "20.7 If the balance of the statement [after deducting the amount In clause 20.6(b) from the amount in clause 20.6(a)] is that an amount is payable to the Subcontractor then the Contractor must, within the time stated in the Particulars after the Contractor receives the payment claim and upon the Subcontractor giving the Contractor a valid tax invoice:
>
> (a) pay the GST exclusive assessed amount;
>
> (b) pay the relevant GST."

96 The definition clause of the Subcontract Conditions (cl 33) defined "Particulars" to mean the document in "Annexure A so described and contained within the Subcontract". Annexure A was in chart form and comprised 25 Items. Items 21, 23 and 24 are reproduced below:

	Due date for payment (clause 20.7)	☐ 30 daysafter the Contractor receives the payment claim. or ☑ Within 30 days of the end of the month of claim. Select whichever is applicable. If nothing stated: • If the head contract for the Project is the New South Wales Government GC21 (Edition 2) General Conditions of Contact (GC21): 15 Business Days; • otherwise, 25 Business Days.
	Head Contract Conditions - GC21	Is the head contract for the Project the New South Wales Government GC21 (Edition 2) General Conditions of Contract (GC21)? Yes ☑ No ☐ If YES, the GC21 Special Conditions - All Subcontracts in

		Annexure C will apply. If YES, complete Items 24 and 25 of these Particulars.
	Head Contract Conditions - GC21	If the head contract for the Project is GC21: Is the Subcontract valued at or above $100,000? Yes ☑ No ☐ If YES, the GC21 Special Conditions - Specified Subcontracts in Annexure C will apply. If YES, complete Item 25 of these Particulars.

97 It can be seen that the lower of the two boxes in Item 21 of the Particulars was ticked. Item 21 in that form, when read with the original cl 20.7 in the Subcontract Conditions, indicated that the due date for payment under the Contract was within 30 days of the end of the month in which Seymour received the payment claim. By contrast, cl 20.7, as substituted by Special Condition 9.1, required Seymour to pay "the balance of the statement" within 15 business days after Seymour received the payment claim.

98 If the lower box in Item 21 had not been ticked there would have been "nothing stated". Since the head contract for the Project was the New South Wales Government GC 21 (confirmed by Items 23 and 24), subject to the operation of cl 20.7 as substituted by Special Condition 9.1, the time for payment would have been "15 Business Days". It is not entirely clear whether that meant 15 business days after Seymour received the payment claim or 15 business days after the end of the month in which the payment claim was made. Evidence given by Mr Millar on behalf of Seymour, to which reference is made later,[13] suggests that the effect of not ticking the second box would have been to require payment within 15 business days of receipt of the payment claim.

99 As appears from the Particulars reproduced above, the "Yes" box in Item 23 was ticked. The consequence was that "All Subcontracts in Annexure C will apply". Since Special Condition 9.1 formed part of Annexure C, the effect of

[13] See at [131] below.

ticking the box in Item 23 was to incorporate Special Condition 9.1 as a term of the Contract. As Mr Robertson acknowledged in argument in this Court, ticking the "Yes" box in Item 23 created an inconsistency with the ticked second box in Item 21.

Background facts

100 On 28 July 2017, Ostwald served a payment claim on Seymour pursuant to s 13(1) of the Security of Payment Act. As noted above, the claim sought payment of $6,351,066.08.

101 On 11 August 2017, in response to the payment claim, Seymour served a payment schedule pursuant to s 14(1) of the Security of Payment Act. Seymour stated in compliance with s 14(2)(b) that it proposed to pay Ostwald the Scheduled Amount ($2,505,237.58).

102 On Seymour's case the date on which the progress payment became due and payable for the purposes of s 11 of the Security of Payment Act was 15 business days after Seymour received the payment claim, in accordance with cl 20.7 of the Subcontract Conditions (as substituted by Special Condition 9.1). The due date was therefore 18 August 2017.

103 On 24 August 2017, Seymour terminated the Contract. Clause 24 of the Contract allowed Seymour to do so without cause.

104 On the following day, 25 August 2017, the directors of Ostwald resolved to appoint administrators.

105 On Ostwald's case the Contract was to be rectified by removing Special Condition 9.1. On this basis, the original cl 20.7 of the Subcontract Conditions gave effect to Item 21 of the Particulars. Item 21 required Seymour to pay Ostwald within 30 days of the end of the month in which it received Ostwald's payment claim. Accordingly, on Ostwald's case the due date for payment was 30 August 2017, being 30 days after the end of the month in which Seymour received the payment claim.

106 On 27 September 2017, Ostwald served the Adjudication Application on Seymour. On Seymour's case the Adjudication Application was served too late, since the time specified by s 17(3)(d) of the Security of Payment Act for served

expired on 15 September 2017, being 20 business days from the due date for payment (18 August 2017). On Ostwald's case the Adjudication Application was served within time, as the last date for service was 27 September 2017, being 20 business day from the due date for payment (30 August 2017).

107 On 6 November 2017, the Adjudicator issued the Adjudication Determination for the Adjudicated Amount ($5,074,218.27).

108 Seymour commenced the Equity Division proceedings on 17 November 2017. On the same day Ball J granted Seymour leave to proceed against Ostwald.[14]

109 On 23 November 2017, the administrators of Ostwald reported to creditors that in their opinion Ostwald was insolvent and that no funds would be available to pay out unsecured creditors. The administrators recommended that Ostwald be placed in liquidation.

110 On 30 November 2017, the creditors of Ostwald resolved, pursuant to s 439C(c) of the *Corporations Act*, that Ostwald be wound up. The primary Judge accepted the agreed position of the parties that by reason of ss 513B(b) and 513C(b) of the *Corporations Act* the winding up of Ostwald is taken to have commenced on 25 August 2017, the date the administration commenced.[15] This is also common ground on the appeal.

111 On 11 December 2017, Ostwald filed its cross-claim in the Equity Division proceedings.

112 The hearing before the primary Judge took place on 8 and 13 March 2018 and the Primary Judgment was delivered on 5 April 2018. The separate hearing on costs took place on 18 April 2018 and the costs judgment was delivered on 21 April 2018. The orders made by the primary Judge were entered on 2 May 2018.

Rectification: Ground 1 of the appeal

113 Mr Christie SC, who appeared with Mr Hume for Seymour, placed Ground 3 of the notice of appeal at the forefront of his argument. It is, however, convenient to commence with Ground 1, which challenges the primary Judge's conclusion

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[14] See at [50] above.

[15] Primary Judgment at [18].

that the Contract should be rectified by deleting Special Condition 1. It is common ground that unless the Contract is rectified, Ostwald's Adjudication Application was served outside the time specified by s 17(3)(d) of the Security of Payment Act. In that event Ostwald accepts, on the authority of *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*,[16] that compliance within the time limit specified in s 17(3)(d) of the Security of Payment Act is an essential condition for a valid adjudication application and that Ostwald's Adjudication Application did not comply with that essential condition.

Primary Judgment

114 The primary Judge noted that Ostwald's case was that cl 20.7 of the Subcontract Conditions was inserted into the Contract by Special Condition 9.1 as a result of the mutual mistake of the parties. Ostwald submitted that the terms of the Contract, as executed, did not reflect the parties' common intention that Seymour should have 30 days from the end of the month following receipt of the payment claim to make the payment.[17]

115 The primary Judge stated the relevant principles by reference to the judgment of Kiefel J in *Simic v New South Wales Land and Housing Corporation*[18] (**Simic**). No complaint is made about his Honour's statement of the law.

116 As his Honour observed, Ostwald relied on the evidence of Mr McHugh, a civil engineer it engaged to negotiate the terms of the Contract. Mr McHugh gave evidence as to his negotiations with Mr Demani, Seymour's Commercial Manager. Mr McHugh was not cross-examined, while Mr Demani did not give evidence.

117 The primary Judge found that on 18 August 2016, Mr Demani prepared a final version of a "Departures Table". This document set out in chart form each party's negotiating position in the proposed terms of the Contract including what became Item 21 of the Particulars. The Departures Table recorded that Ostwald had requested that the due date for payment be within ten business days of the end of the month in which the claim was made. Seymour's first

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16 (2010) 78 NSWLR 393; [2010] NSWCA 190 (Chase Oyster Bar).

17 Primary Judgment at [39].

18 (2016) 260 CLR 85; [2016] HCA 47 at [41], [42], [103], [104]; Primary Judgment at [56]-[58].

response to this request was "Departure Not Accepted". Seymour's "Final Response" on Item 21 was as follows:

> "Payments are made in line with [Seymour's] payment sums. This is 30 days from end of month of claim. Non-negotiable."

118 The primary Judge accepted Mr McHugh's unchallenged evidence that the following exchange with Mr Demasi took place at the meeting on 18 August 2016:

> "Mr McHugh: If we can't have 10 days, can we have 28? Why isn't that reasonable?
>
> Mr Demasi: The 30 days is non-negotiable, payments are made in line with Seymour Whyte's payment runs. This is 30 days from end of month claim".

His Honour accepted Mr McHugh's evidence that he was not aware after 18 August 2016 of any further negotiations between the parties and that:

> "[g]iven [his] role in the contract negotiations, [he] would expect to be made aware of any further discussions on the issue."

119 The primary Judge considered that this was a "clear case where rectification should be ordered by deletion of cl 9.1 of the Special Conditions".[19] His Honour gave the following reasons for this conclusion:[20]

> "60 I am comfortably satisfied that the actual and common intention of the parties was that Seymour Whyte have 30 days from the end of the month in which Ostwald served a payment claim to make payment.
>
> 61 Further, I am satisfied that the written agreement does not reflect the agreement because of a common mistake.
>
> 62 Mr Demasi told Mr McHugh that Seymour Whyte required '30 days from end of month' and that this was 'non-negotiable'. This is reflected in the Departures Table, which provides a vivid insight into the parties' negotiations. Mr McHugh, the person responsible for negotiations, conducted no further negotiations on this topic. The inference is irresistible that Ostwald accepted that Seymour Whyte meant what it said: the matter was not negotiable.
>
> 63 The particulars to the Subcontract Conditions confirm the common intention of the parties, as does Seymour Whyte's 'Provider Establishment Request Form'."

120 The primary Judge found that under the Contract as rectified the due date for payment of the payment claim was 30 August 2017.[21] As Seymour did not pay Ostwald the amount referred to in the payment claim or the Scheduled Amount

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19 Primary Judgment at [66].

20 Primary Judgment at [60]-[63].

21 Primary Judgment at [68].

by the due date, s 16(1) of the Security of Payment Act was enlivened. Ostwald was therefore entitled to proceed under s 16(2)(a)(ii) by making the Adjudication Application.[22] It had done so on 27 September 2017, within the time specified in s 17(3)(d) (being 20 business days after 30 August 2017). The Adjudication Application was therefore valid.[23]

Principles

121 There is no dispute as to the principles to be applied in a suit for rectification of a contract. They were recently restated by the plurality in *Simic*:[24]

> "103 Rectification is an equitable remedy, the purpose of which is to make a written instrument 'conform to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately'. For relief by rectification, it must be demonstrated that, **at the time of the execution of the written instrument sought to be rectified**, there was an 'agreement' between the parties in the sense that the parties had a 'common intention', and that the written instrument was to conform to that agreement. Critically, it must also be demonstrated that the written instrument does not reflect the 'agreement' because of a common mistake. Unless those elements are established, the 'hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties' cannot be displaced.
>
> 104 The issue may be approached by asking – what was the actual or true common intention of the parties? There is no requirement for communication of that common intention by express statement, but it must at least be the parties' actual intentions, viewed objectively from their words or actions, and must be correspondingly held by each party." (Emphasis added.)

122 As Kiefel J explained in *Simic*, the focus in a rectification suit is on "the common intention of the parties up to the time the relevant instrument was made". That intention must be proved by admissible evidence to a high standard.[25] Her Honour quoted a passage from the judgment of Lord Chelmsford LC in *Fowler v Fowles*[26] that has been cited in other High Court authorities.[27] A fuller version of that passage is as follows:[28]

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22 Primary Judgment at [73]-[75].

23 Primary Judgment at [77]-[78].

24 Simic at [103]-[104] (Gageler, Nettle and Gordon JJ).

25 Simic at [41], [42].

26 (1859) 4 De G&J 250; 45 ER 97.

27 Australian Gypsum Ltd v Hume Steel Ltd (1930) 45 CLR 54; [1930] HCA 38 at 64 (Rich, Starke and Dixon JJ); Maralinga Pty Ltd v Major Enterprises Pty Ltd (1973) 128 CLR 336; [1973] HCA 23 at 349 (Mason J); Pukallus v Cameron (1982) 180 CLR 447; [1982] HCA 63 at 457 (Brennan J).

28 (1859) 4 De G&J 250 at 265; 45 ER 97 at 103; see also Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603; [2009] NSWCA 407 at [451]-[458], [511] (Campbell JA, Allsop P and Giles JA agreeing on these issues).

> "It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to shew exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement."

123 In *Fox Entertainment Precinct Pty Ltd v Centennial Park and Moore Park Trust*[29] Barrett J, after referring to Lord Chelmsford's statement, observed that:

> "The insistence upon a high degree of proof in this area is a recognition of two realities: first, that persons who take the trouble to record their agreement in writing (particularly when they are, as here, assisted by lawyers) must generally be presumed to intend their written bargain to prevail over what they have not written; and, second, that it is easy for one such party, upon becoming dissatisfied after the event with some element of the written compact, to seek to brand it as inaccurate."

124 In *Samm Property Holdings Pty Ltd v Shaye Properties Pty Ltd*,[30] McColl JA emphasised that "the type of intention that is relevant to rectification of a contract is the subjective intention – sometimes called the actual intention of the parties".[31] That is why evidence of the parties' subjective states of mind may be very important.[32]

Reasoning

125 An odd feature of Ostwald's case before the primary Judge and this Court is that it seeks to rectify the Contract by removing a provision (Special Condition 9.1) for which it contended during its negotiations with Seymour. Despite its negotiating stance, Ostwald submitted in this Court that the evidence "overwhelming[ly]" supported the inference drawn by the primary Judge that the parties' common intention at the date of execution of Contract was that the due date for payment was to be that recorded in Item 21 of the Particulars – that is, within 30 days of the end of the month in which Seymour received Ostwald's payment claim. Mr Robertson essentially relied on the reasoning of the primary Judge to support this submission.

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[29] [2004] NSWSC 214; (2004) 11 BPR 21,629 at [30]; see also Franklins Pty Ltd v Metcash Trading Ltd at [459]-[460].

[30] [2017] NSWCA 132; 345 ALR 633.

[31] Samm Property Holdings Pty Ltd v Shaye Properties Pty Ltd at [114] (Gleeson JA and Sackville AJA agreeing).

[32] Ryledar Pty Ltd v Euphoric Pty Ltd (2007) 69 NSWLR 603; [2007] NSWCA 65 at [182] (Tobias JA (Mason P and Campbell JA agreeing)); at [272] (Campbell JA, Mason P agreeing).

126 A second unusual feature of this case is that the evidence relevant to the question of rectification was not disputed at the trial. The primary Judge's finding did not depend on any credit-based assessment of evidence as to the parties' common intention at the time the Contract was executed.[33] It is common ground that the principles governing appellate review of his Honour's finding are those stated in *Warren v Coombes*.[34]

127 The Contract was signed on behalf of Ostwald by Mr Matthew Ostwald, in his capacity as a director of the company, and Mr O'Brien, as company secretary. The evidence upon which Ostwald principally relied to support its case for rectification was given by Mr McHugh. As has been noted, neither Mr Ostwald nor Mr O'Brien gave evidence while Mr McHugh was not required for cross-examination.

128 At the relevant times, Mr McHugh was Ostwald's General Manger for Engineering. In his affidavit Mr McHugh said he was "responsible for tendering for projects and pre-contract negotiations". He also said that he:

> "was directly involved, as the main point of contact at Ostwald, in the negotiation of the Subcontract with Seymour Whyte. My counterparts, and the primary people I dealt with at Seymour Whyte, were Michael Demasi, they Seymour Whyte Commercial Manager, and Will MacDonald, the Seymour Whyte Operations Manager."

129 The principal difficulty facing Ostwald is that in the absence of evidence from the officers authorised to execute the Contract on its behalf, there was no evidence that at the time of execution of the Contract the relevant officers intended that Seymour should have 30 days from the end of the month in which Ostwald served a payment claim to make a payment. Nor was there any direct evidence explaining how Special Condition 9.1, which provided for a payment period of fifteen business days from receipt of a claim, came to be inserted into the Contract as executed. The absence of evidence as to the parties' reasons for including cl 9.1 is particularly significant since the terms of cl 9.1 departed from the positions of both Seymour (30 days from end of month) and Ostwald (28 days from payment claim) as recorded in the Departures Table.

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[33] Compare Samm Property Holdings Pty Ltd v Shaye Properties Pty Ltd at [120]-[124].

[34] (1979) 142 CLR 531; [1979] HCA 9 at 551 (Gibbs ACJ, Jacobs and Murphy JJ).

130 Mr McHugh was involved in the negotiations of the Contract but he did not say that he was authorised to conclude a final and binding agreement with Seymour. Nor did he say that his involvement with the negotiating process was such that he knew that Mr Ostwald and Mr O'Brien accepted and intended that the thirty day period should be included in the Contract. The most Mr McHugh could say was that he would have expected to have been made aware of any further discussions that may have taken place in relation to the payment period after he and Mr Demani prepared the "final version" of the Departures Table on 18 August 2016. Whatever Mr McHugh's expectations may have been, there was no evidence as to what discussions, if any, took place between Ostwald's decision-makers and Seymour's representatives concerning payment terms during the 18 days between preparation of the Departures Table and execution of the Contract.

131 The primary Judge did not refer to the unchallenged evidence of Mr Millar who was Seymour's Group Commercial Manager in 2016. Mr Millar explained that he had instructed lawyers to prepare a pro forma subcontract that would be compliant with the requirements of the New South Wales Government GC 21 head contract in force at the time. Mr Millar also explained that the GC 21 head contract in force since 2014 had required payment to subcontractors within 15 business days. While there was no direct evidence as to why Special Condition 9.1 was incorporated in the Contract, Mr Millar's evidence provides a rationale for its inclusion.

132 Both the primary Judge and Mr Robertson placed considerable emphasis on the recording in the Departures Table that Seymour's requirement of "30 days from end of month of claim" was "Non-negotiable". Yet at least two significant issues on which Seymour's position was recorded in the Departures Table as "Non-negotiable" or "No further discussion are entertained" were dealt with differently in the executed Contract.[35] Given these changes, no inference is

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[35] The Departures Table recorded that Seymour's insistence that Ostwald had to bear the costs of any materials testing was "Non-negotiable". As executed, however, the Contract provided that Seymour would pay for "conforming tests only". Similarly, the Departures Table recorded that Seymour would entertain no further discussions on the clause providing for liquidated damages of $20,000 per day for delays in completion. Clause 16.7 and Particular 17 of the Contract reduced liquidated damages to $12,500 per day, a 37.5 per cent reduction from the figure in the Departures Table.

available that the Departures Table necessarily recorded Seymour's last word on a particular issue.

133 Mr Robertson relied on four additional matters to support Ostwald's rectification case. The first was the pro forma "Provider Establishment Form" sent by Seymour to Ostwald on 6 September 2016, the day the Contract was signed. The Form recorded that "Stated Payment Terms are 30 Days from Month End **unless otherwise arranged**" (emphasis added). In view of the last three words it is difficult to see how this advances Ostwald's case. The Contract did provide otherwise.

134 The second matter was evidence that Seymour had often, but not always, paid Ostwald 30 days from the end of the month the payment claim was received. The evidence did not demonstrate an invariable practice by Seymour and in any event could not establish that Ostwald's representatives executed the Contract under a misapprehension as to its terms.

135 Thirdly, Mr Robertson pointed out that the Contract as executed included the ticked box in Item 21 of the Particulars showing that the due date for payment was "Within 30 days of the end of the month of claim". But the express provisions of the Formal Investment Instrument of Agreement gave priority to Special Condition 9.1 over Item 21. Contrary to Mr Robertson's submission, the evidence is quite consistent with the box in Item 21 having been ticked in error.

136 The inference that the box was ticked in error is considerably strengthened by the fact that the box in Item 23 was also ticked, thereby expressly incorporating Special Condition 9.1 into the Contract. As Mr Robertson accepted, the ticking of both boxes created an internal inconsistency in the Contract which was resolved by the provisions conferring priority on the Special Conditions. In these circumstances, the ticking of the box in Item 21 provides no support for Ostwald's contention that the parties executed the Contract under the mutual mistaken belief that the time for payment was 30 days from the end of the month in which the payment claim was received.

137 Fourthly, Mr Robertson relied on the failure of Mr Demasi to give evidence. Seymour explained Mr Demasi's evidence on the ground that he was not an employee at the date of the trial. Regardless of whether Mr Demasi's absence

was adequately explained, his absence could not fill the gaps in Ostwald's evidence.

138 The primary Judge erred in finding that the evidence established that the common intention of the parties on the date of execution of the Contract was that Seymour should have 30 days from the end of the month in which the payment claim was served to pay Ostwald. It follows that Ostwald did not make the Adjudication Application within the period specified by s 17(3)(d) of the Security of Payment Act.[36]

Ground 2: "fork in the road"

139 Seymour's written submissions identified the issue presented by Ground 2 in the notice of appeal to be:

> "whether a claimant can make an adjudication application and pursue it to a determination and then, in the circumstance that the adjudication application is found to be invalid, sue for the statutory debt under s 16(2)(a)(ii) [of the Security of Payment Act]."

This issue was described by the primary Judge, with encouragement from the parties, as the "fork in the road" point.

Primary Judgment

140 Since the primary Judge concluded that the Adjudication Application was made within time and as there was no other challenge to the validity of the Adjudication Determination, his Honour did not need to deal with Ostwald's alternative contention that if the Adjudication Application was lodged out of time Ostwald could institute court proceedings under s 16(2)(a)(i) to recover the unpaid portion of the Scheduled Amount. Nonetheless his Honour correctly addressed the contention against the possibility that on appeal his finding that the Adjudication Determination was made within time might be held to be erroneous.

141 The primary Judge rejected Seymour's argument that the Adjudication Application, although a legal nullity, had a factual existence that could produce legal consequences, including constituting an election between inconsistent statutory remedies. On that argument Ostwald had made an adjudication application for the purposes of s 16(2)(a)(ii) of the Security of Payment Act and

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[36] See at [106] above.

was precluded thereafter from pursuing the alternative afforded by s 16(2)(a)(i) of court proceedings to recover the unpaid portion of the scheduled amount.

142 His Honour reasoned as follows:[37]

> "116 the question here is whether the words 'adjudication application' in s 16(2)(a)(ii) should be construed as including a document purporting to be an adjudication application, but which does not satisfy the requirements specified in s 17(3), and which thus does not satisfy the definition of 'adjudication application' in s 4.[38]
>
> 117 In my opinion, the answer to this question must be 'no'. Otherwise, there would be attributed to Parliament the intention that a term, defined in the Act, should take on a different and more expansive meaning than is stated in that definition. That cannot have been the intention of Parliament.
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> 118 The gloss Seymour Whyte seeks to place on s 16(2)(a)(ii) would amount to a rewriting of that definition.
>
> 119 I do not see this as an alarming consequence or one unlikely to have been contemplated by Parliament. It would merely mean that, on the assumption I am making for the purposes of this part of the judgment, Ostwald did not make an adjudication application as it had intended, and may now enforce payment of the amount that Seymour Whyte indicated in its payment schedule it proposed to make.
>
> 120 For these reasons, had the adjudication determination been void by reason of the failure of Ostwald to make its adjudication application in time, I would have found it open to Ostwald to go down the other 'fork in the road' and seek recovery of the unpaid scheduled amount under s 16(2)(a)(ii)."

Seymour's submissions

143 Seymour accepted that if Ostwald's rectification case was rejected, both the Adjudication Application and the Adjudication Determination were "nullities". Nonetheless Seymour submitted that Ostwald's actions in making the Adjudication Application precluded it from seeking to recover the Scheduled Amount as a debt due to it pursuant to s 16(2)(a)(i) of the Security of Payment Act. Seymour advanced two alternative arguments in support of the submission.

144 Seymour's principal contention is that under s 16(2)(a) of the Security of Payment Act a claimant who lodges a payment claim can choose between making an adjudication application or applying for a court order. But once a claimant chooses to make an adjudication application, the alternative statutory pathway is no longer available. This is the case, so Mr Christie argued, even if

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37 Primary Judgment at [116]-[120].

38 See at [84] above.

the adjudication application is vitiated by a jurisdictional error. Seymour's alternative submission is that as Ostwald, made an adjudication application in fact, it elected at common law not to pursue curial proceedings under s 16(2)(a)(i) of the Security of Payment Act.

145 The starting point for Seymour's principal contention is that s 16(2)(a) of the Security of Payment Act provides two "exclusive alternatives" to a claimant where a respondent fails to pay the whole or any part of the scheduled amount. Under the statutory scheme the claimant may choose either to recover the unpaid portion as a debt (s 16(2)(a)(i)) or make an adjudication application (s 16(2)(a)(ii)), but not both.

146 The next step in Seymour's argument is that a claimant who lodges an adjudication application out of time "make[s] an adjudication application" for the purposes of s 16(2)(a)(ii) of the Security of Payment Act, notwithstanding that the adjudication application is a legal nullity and that any adjudication determination is liable to be set aside in judicial review proceedings. It is enough that the adjudication application is in fact made. Once that is done the claimant has chosen one of the two exclusive alternatives and cannot pursue the other.

147 Mr Christie pointed to authorities indicated that legislation, as a matter of construction, may apply to acts which have been done in fact but which are devoid of legal effect. He submitted that s 16(2)(a) of the Security of Payment Act is such a provision. Thus a claimant who lodges an adjudication application out of time has made an adjudication application for the purposes of s 16(2)(a)(ii). This construction, so Mr Christie argued, promotes certainty and avoids the risk of a multiplicity of adjudicative and curial proceedings and consequent delays and expense.

148 Seymour's election argument rests on Ostwald's conduct in filing the Adjudication Application, failing to withdraw the Adjudication Application notwithstanding that the jurisdictional defect was identified obtaining the Adjudication Determination. By acting in this way, so it was submitted, Ostwald pursued a remedy inconsistent with its entitlement under s 16(2)(a)(i) of the Security of Payment Act to pursue curial proceedings. Ostwald therefore

elected to make the Adjudication Application in lieu of court action to recover a debt.

Ostwald's submissions

149 Ostwald submitted that once it is accepted that the Adjudication Application was a legal nullity (having been made out of time), it necessarily follows that Ostwald had not "ma[d]e an adjudication application under section 17(1)(a)(ii)" within the meaning of s 16(2)(a)(ii) of the Security of Payment Act. Ostwald had therefore not irrevocably chosen one path in the "fork in the road" created by the use of the word "or" in s 16(2)(a). It was entitled to pursue its claim for the unpaid portion of the Scheduled Amount in the manner provided by s 16(2)(a)(i).

150 Mr Robertson contended that Seymour's approach would mean that there would be no consequences for a respondent who refused to pay a claimant in accordance with a payment schedule, should the claimant unsuccessfully attempt to make an adjudication application. Such an approach would hinder the statutory objective of preserving the cash flow of contractors and subcontractors performing work under construction contracts.

Reasoning

Exclusive alternatives

151 There was no dispute between the parties that s 16(2)(a) of the Security of Payment Act provides, in Mr Christie's words, two "exclusive alternatives" to a claimant where the respondent fails to pay the whole or any part of the scheduled amount. Despite the parties' consensus on this point, it assists in evaluating the competing arguments to explain why s 16(2)(a) should be construed in this way.

152 Section 16(1) of the Security of Payment Act applies if:

- a claimant serves a payment claim on the respondent (s 16(1)(a));
- the respondent provides a payment schedule to the claimant within the specified time (s 16(1)(b));
- the payment schedule indicates a scheduled amount the respondent proposes to pay (s 16(1)(c)); and

- the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date (s 16(1)(d)).

These conditions were satisfied in the present case.

153 Both parties therefore accepted that once Seymour failed to pay the Scheduled Amount by the due date Ostwald was entitled either to:

- institute proceedings to recover the unpaid portion of the Scheduled Amount from Seymour as a debt due to Ostwald (s 16(2)(a)(i)); or
- make an adjudication application (s 16(2)(a)(ii)),

but could not pursue both (whether at the same time or consecutively).

154 There is a strong textual foundation for this construction of s 16(2)(a). The use of the word in s 16(2)(a) "or" indicates that the two remedies made available to a claimant where the conditions in s 16(1) are satisfied are intended to be true alternatives.

155 There is an obvious reason why the legislation contemplates that the remedies are alternative and not cumulative. The summary curial proceedings provided for in s 16(2)(a)(i) allow recovery of the unpaid portion of the scheduled amount. In these proceedings the respondent is not entitled to bring any cross-claim or raise any defence in relation to matters arising under the construction contract (s 16(4)). By contrast, an adjudication application requires the adjudicator to determine the amount of the progress payment to be made to the claimant having regard to specified matters, including submissions made by the respondent.[39] As McDougall J has observed,[40] it would be extraordinary if a claimant, having lodged an adjudication application and proceeded to an adjudication which upholds the respondent's defences, can then seek to enforce the unpaid portion of the scheduled amount by instituting curial proceedings pursuant to s 16(2)(a)(i).

156 This construction of s 16(2)(a) receives further support from the legislative history. As originally enacted in 1999, s 16(2) of the Security of Payment Act provided only one remedy for a claimant in the circumstances specified in s 16(1), namely the remedy now provided in s 16(2)(a)(i). The current version

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[39] Security of Payment Act, ss 21(1), 22(2)(d).

[40] Rojo Building Pty Ltd v Jillcris Pty Ltd [2007] NSWSC 880 at [56], [62]. The observations concerned s 15(2) but apply equally to s 16(2).

of s 16(2) was inserted into the Security of Payment Act by the *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW).[41]

157 The *Explanatory Note* to the 2002 Bill stated that the objects included the following:

> "(c) to provide claimants with the option of having their payment claims adjudicated under the Act rather than having to take court action to recover the amount owing."

The *Explanatory Note* explained that the new s 16(2):

> "provides that, if the respondent provided a payment schedule in response to a payment claim but fails to pay the scheduled amount on time, the claimant may **either** take legal action in a court to recover the scheduled amount **or** make an adjudication application in relation to the payment claim." (Emphasis added.)

158 The *Explanatory Note*, although not decisive on the question of statutory construction, indicates that the new remedy available to a claimant was intended to be a true alternative to the pre-existing curial remedy.

159 Finally, it should be noted that this construction of s 16(2)(a) is consistent with the observation of the High Court in *Southern Han* that:[42]

> "as an alternative to commencing recovering proceedings for an unpaid portion [of a scheduled amount] in a court of competent jurisdiction, the claimant can make an application for adjudication of the payment claim."

Consequences of non-compliance with statutory requirements

160 The acceptance by both parties that the Adjudication Application and the Adjudication Determination were "invalid" or were "legal nullities" was based on the authority of this Court in *Chase Oyster Bar*. It is important to bear in mind that very considerable care needs to be exercised in using words like "nullity" or "void".[43] It is therefore necessary to consider what *Chase Oyster Bar* decided.

161 The claimant in *Chase Oyster Bar* served a payment claim on the respondent, but the respondent failed to provide a payment schedule in response. The claimant then made an adjudication application. Under s 17(2)(a) of the Security of Payment Act an adjudication application "cannot be made" unless

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41 Schedule 1 [27]. This Act also inserted the current s 16(4): Schedule 1 [28].

42 Southern Han at [16].

43 New South Wales v Kable (2013) 252 CLR 118; [2013] HCA 26 at [21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

the claimant has notified the respondent within 20 business days of the due date for payment of the claimant's intention to apply for an adjudication determination. The claimant gave notice well outside the 20 day period. Nonetheless the adjudicator made a determination in the claimant's favour.[44]

162 The Court held that in the exercise of its supervisory jurisdiction it had power to determine that the adjudication application had not been made in conformity with s 17(2)(a) of the Security of Payment Act and that the determination of the adjudicator was therefore "invalid". The Court further held that it had power to grant relief in the nature of *certiorari* setting the determination aside.[45]

163 The following propositions (among others) can be drawn from the judgments:

(i) The supervisory jurisdiction of the Court under s 69 of the *Supreme Court Act 1970* (NSW) can be invoked with respect to the exercise of statutory powers, whether or not the decision-maker is a public officer. Thus the supervisory jurisdiction extends to a determination made by an adjudicator under the Security of Payment Act.[46]

(ii) An adjudicator does not have jurisdiction to determine an "application" that has been made outside the time limit specified by s 17(2)(a). Therefore an adjudicator who purports to make an adjudication determination in such circumstances commits a jurisdictional error.[47]

(iii) Such a determination is invalid and may be quashed by an order in the nature of *certiorari*.[48]

164 The question arising in the present case as to whether an adjudication application made outside the 20 business days specified in s 17(3)(d) of the Security of Payment Act is invalid is not identical to the issue determined in *Chase Oyster Bar*. The Court there placed considerable emphasis on the "mandatory import" of the language in s 17(2)(a), which states that an adjudication application "cannot be made unless" the notification is made within the prescribed period. Section 17(3)(d) uses somewhat different language in

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[44] Chase Oyster Bar at [117]-[119], [189].

[45] Chase Oyster Bar at [108].

[46] Chase Oyster Bar at [3] (Spigelman CJ), at [70], [71], [103] (Basten JA), at [261] (McDougall J).

[47] Chase Oyster Bar at [33]-[56] (Spigelman CJ), at [96] (Basten JA), at [222] (McDougall J).

[48] Chase Oyster Bar at [2] (Spigelman CJ), at [66], [108] (Basten JA), at [261] (McDougall J).

that it provides that an adjudication application "must be made" within the prescribed period. However, both parties accepted that despite the differences in the statutory language, the reasoning in *Chase Oyster Bar* applies to an adjudication application made outside the period prescribed in s 17(3)(d). For that reason they accepted that the Adjudication Application and the Adjudication Determination were invalid. I am content to proceed on that basis.

165 Characterising a determination affected by jurisdictional error as invalid does not necessarily mean that the determination has no legal consequences. In *Chase Oyster Bar* Basten JA quoted[49] a passage from a Federal Court judgment which was expressly approved by Gleeson CJ in *Minister for Immigration and Ethnic Affairs v Bhardwaj* as follows:[50]

> "There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for a discretionary reason. In some circumstances the particular statute in pursuance of which the purported decision was taken may indicate that it is to have effect even though it is invalid or that it will have effect until it is set aside."

Basten JA therefore contemplated that an adjudication determination affected by jurisdictional error, although liable to be set aside by the Supreme Court in its supervisory jurisdiction, can have consequences for the parties.

166 McDougall J made observations in *Chase Oyster Bar* directly relevant to the issue raised by Ground 2 in the Notice of Appeal. His Honour said this:[51]

> "216 …. A claimant who has received neither payment schedule nor payment of the claimed amount is given alternative rights. It may sue for a debt (s 15(2)(a)(i)). If it does so, it has the benefit of the limitations, on the respondent, set out in s 15(4)(b). Alternatively, the claimant may make an adjudication application (s 15(2)(a)(ii)). The second, or alternative, right may be lost for non-compliance with s 17(2)(a). **But that does not mean that the first is also lost**. It follows that, even if (which I assume without deciding) s 15(2)(a) contains some notion of inconsistent alternative remedies, and thus of election, there can be no prohibition on suing to recover the claimed amount as a debt where an adjudication has not been made (because it cannot be made). (Emphasis added.)

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[49] Chase Oyster Bar at [93].

[50] (2002) 209 CLR 597; [2002] HCA 11 at [12] quoting Leung v Minister for Immigration and Multicultural Affairs (1997) 79 FCR 400; [1997] FCA 1313 at 413 (Finkelstein J).

[51] Chase Oyster Bar at [216]-[217].

> 217 Put shortly, even if the door to adjudication is closed, the door to judgment remains open; and the ability of the respondent to bar access through that door to judgment is limited."

167 These observations reflect the reasoning of Bergin J in *Kell & Rigby Pty Ltd v Guardian International Properties Pty Ltd*,[52] In that case the contractor filed an adjudication application but failed to give the notice required by s 17(2)(a) of the Security of Payment Act. The adjudicator refused to proceed with the adjudication. The contractor then sought summary judgment against the principal pursuant to s 15(2)(a)(i).[53]

168 Bergin J rejected the principal's contention that the contractor was precluded from bringing curial proceedings because it had elected to pursue the adjudication option. Her Honour referred to the principle stated by McHugh J in *GJ Coles Ltd v Retail Trade Industrial Tribunal* as follows:[54]

> "One of the basic doctrines of common law jurisprudence is the failure to perform a *mandatory* condition imposed by statute invalidates the doing of any act dependant on the fulfilment of that condition. In so far as such an act imposes duties or creates rights, the effect of non-fulfilment of the condition is that the act is totally incapable of creating legal consequences. For legal purposes, the act has no effect and may be disregarded. Administrative and constitutional law provide many illustrations of this basic doctrine." (Emphasis in original.)

169 Bergin J was satisfied that:[55]

> "the absence of the word 'valid' before the words 'adjudication application' in s 15(2)(a)(ii) of the Act does not mean that the legislature intended that a party could make an invalid application. This is particularly so having regard to the rights that are triggered when an adjudication application is made, including the right of the respondent to receive notice of the intention to make the application and the right of the respondent to have the fresh opportunity to file a payment schedule.
>
> I am of the view that the adjudication application was a nullity by reason of the plaintiff's failure to comply with the mandatory condition imposed by s 17(2) of the Act. Accordingly the act of filing and serving that document was incapable of creating legal consequences, including the legal consequence of the making of an election under s 15(2) of the Act."

170 The consequences of an adjudication determination being "invalid" by reason of a jurisdictional error were considered in a different context by this Court in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd.*[56] In that case an

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52 [2007] NSWSC 554 (Kell & Rigby).

53 Kell & Rigby at [1]-[9].

54 (1986) 7 NSWLR 503 (GJ Coles) at 525.

55 Kell & Rigby at [24]-[25].

adjudicator purportedly made a determination on 8 January 2010. Seven months later, on 6 August 2010, the Supreme Court made a declaration by consent that the determination was "void and of no effect". The basis for the declaration was not made clear. On 9 August 2010, the claimant purported to withdraw the adjudication application and on 12 August 2010 purported to lodge a second adjudication application.[57] The question was whether the second application was out of time and whether the second adjudication determination was therefore invalid.

171 Section 26(2) of the Security of Payment Act permitted a claimant to withdraw an adjudication application if the adjudicator "fail[ed] to determine the application" within ten business days of accepting the application. Section 26(2) also permitted the claimant to make a new application, but s 26(3) required a new application to be made within five business days after the claimant became entitled to withdraw the previous adjudication application.

172 The Court unanimously held that an adjudicator who issues an invalid determination "fails to determine the application" within the ten day period specified in s 26(2).[58] The issue on which the Court divided was whether the five day period for the lodgement of a new application commenced on the expiration of the ten day period within which the adjudicator had to make a (valid) determination, or whether the period commenced from the date the Court declared the purported adjudication determination to be void.

173 Macfarlan JA held that a "void determination is no determination at all" and that the clear language of s 26(2) and (3) meant that the claimant had five days from when the adjudicator should have made a valid determination in which to make a new determination.[59] Thus the second adjudication was well out of time. Tobias AJA reached the same conclusion.[60]

174 Basten JA, in dissent, applied his reasoning in *Chase Oyster Bar*[61] and characterized as false the "assumption that a decision made without jurisdiction

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[56] (2011) 81 NSWLR 716; [2011] NSWCA 399 (Cardinal Project).
[57] Cardinal Project at [63]-[66].
[58] Cardinal Project at [14] (Basten JA, at [84] (Macfarlan JA, Tobias AJA agreeing).
[59] Cardinal Project at [83], [86].
[60] Cardinal Project at [111].
[61] See Chase Oyster Bar at [93].

must "be without any legal status or effect".[62] His Honour observed that between the date of an adjudication determination and a subsequent declaratory order no one can be sure as to whether the determination is valid. Accordingly he considered that the determination should be regarded as effective for the purposes of s 26(1)(b) until set aside or declared ineffective by a court to be ineffective.[63]

175 Despite the apparently unqualified observations of McHugh J in *GJ Coles*, a decision affected by jurisdictional error – even a failure to comply with a "mandatory" statutory precondition to the exercise of a power – is not necessarily devoid of legal consequences. In *New South Wales v Kable* Gageler J speaking of an invalid law said:[64]

> "Yet a purported but invalid law, like a thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a "nullity" in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences. The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law. The factual existence of the thing might have led to the taking of some other action in fact. The action so taken might then have consequences for the creation or extinguishment or alteration of legal rights or legal obligations, which consequences do not depend on the legal force of the thing itself."

176 As the passage indicates, legislation may attach consequences to an act or decision that is "invalid" by reason of a jurisdictional error. The issue in the present case is therefore one of statutory construction: accepting that s 16(2)(a) provides "exclusive alternatives" to a claimant in the circumstances identified in s 16(1), does a claimant who lodges an adjudication application outside the period specified in s 17(3)(d) "make an adjudication application under s 17(1)(a)(ii)" for the purposes of s 16(2)(a)(ii) of the Security of Payment Act? The question must be addressed on the basis that compliance with s 17(3)(d) is an essential precondition for a valid adjudication application and valid adjudication determination.

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62 Cardinal Project at [40].

63 Cardinal Project at [50].

64 New South Wales v Kable at [52]; see Plaintiff S297/2013 v Minister for Immigration and Border Protection (2015) 255 CLR 231; [2015] HCA 3 at [32] per curiam.

Construction of s 16(2)(a)(ii)

177 Seymour's contention is that Parliament intended the "adjudication application" in s 16(2)(a)(ii) to refer to an "adjudication application in fact". Mr Robertson pointed out this contention requires "adjudication application" in s 16(2)(a)(ii) to be read as including a purported adjudication application that does not comply with essential statutory conditions for a valid adjudication application.

178 Section 8 of the Security of Payment Act:

> "makes it clear that a person who meets the description of a person who has undertaken to carry out construction work … under a construction contract is immediately by force of that provision 'entitled to a progress payment' on and from each reference date under the contract."[65]

The amount of the progress payment to which a person is entitled is determined by the terms of the contract (s 9(a)). The progress payment is to be made in accordance with the applicable terms of the contract.

179 Part 3 of the Security of Payment Act sets out the procedures by which a claimant may enforce his or her statutory entitlement to a payment. As the High Court has pointed out, the procedures are designed to operate quickly. This is indicated by the "brutally fast" deadlines imposed on the claimant, the respondent and the adjudicator to ensure prompt resolution of payment disputes.[66] Part of the price for creating a series of stringent and inflexible preconditions for the making of valid adjudication applications is that a claimant may unwittingly fail to comply with one of the essential preconditions.

180 The effect of Seymour's submission is that non-compliance with a precondition for a valid adjudication application would deprive the claimant any means of enforcing the statutory entitlement to a progress payment. If, for example, a claimant notified the respondent 21 days after the due date for payment of the intention to apply for an adjudication determination, rather than within the 20 days required by s 17(2)(a), the claimant would be precluded from invoking the summary curial procedure available under s 16(2)(a)(i) of the Security of Payment Act to recover the unpaid portion of the scheduled amount. This would be a surprising result given that the first object of the legislation is:

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65 Southern Han at [59].

66 Probuild Constructions at [40].

> "to ensure that any person who undertakes to carry out construction work … under a construction contract is entitled to receive, and **is able to recover**, progress payments." (Emphasis added.)

The result would also be difficult to reconcile with the intention to "stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers".[67]

181 The statutory language does not suggest that such a result was intended. Section 16(2)(a)(ii) does not refer simply to an "adjudication application" but to an "adjudication application under section 17(1)(a)(ii)". It is true, as Mr Christie submitted, that s 17(1)(a)(ii) does not of itself specify the requirements for a valid adjudication application. But s 17(2) and (3) set out preconditions for a valid adjudication application. The natural reading of s 16(2)(a)(ii) is that it is referring to an application that is made in the circumstances described in s 17(1)(a)(ii) (where the respondent has failed to pay the whole or any part of the scheduled amount) and that complies with the essential conditions set out in s 17 itself.

182 This reading of s 16(2)(a)(ii) is reinforced by the absence of any time limit for a claimant to institute summary curial proceedings pursuant to s 16(2)(a)(i). The absence of any such time limit contrasts with the "brutally fast" time limits applicable to an adjudication application and adjudication determination. Had Parliament wished to prevent a claimant pursuing the summary procedure to recover the unpaid portion of the scheduled amount as a debt outside the time limits applicable to an adjudication application it could have done so readily.

183 It is also necessary to bear in mind that although the Security of Payment Act:

> "does not speak of 'interim' entitlements and payments … the label aptly reflects how the statutory entitlement interacts with any underlying contractual liability …
>
> The clear legislative intention is to ensure that the statutory entitlement can be determined and enforced with minimum delay. The Security of Payment Act defers the final determination of contractual rights to a different forum, in which the consequences of any erroneous determination can and must be taken into account."[68]

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[67] Probuild Constructions at [36], citing the second reading speech for the 2002 legislation amending the Security of Payment Act; see also Southern Han at [4].

[68] Probuild Constructions at [39], [47].

Construing the legislation to allow a claimant who fails to meet a stringent deadline for one mechanism for enforcing an interim entitlement to pursue an alternative statutory mechanism not subject to the same time limits does not detract from the respondent's right to a final determination of contractual rights in a different forum.

184 Mr Christie submitted that to construe s 16(2)(a)(ii) as referring only to a valid adjudication application would create uncertainty in a scheme meant to operate expeditiously and to ensure that each party knows where it stands at any given point in time. However, once the issue is resolved, it does not create any greater uncertainly than that inherent in the statutory scheme. The uncertainty as to applicable time limits in the present case, for example, was created by Ostwald's contention that the Contract should be rectified.

185 In practice, as the latest review of the legislation has concluded, the security of payment regimes (including the Security of Payment Act) are "unduly complex and this has discouraged their usage and caused confusion".[69] In part the confusion is a product of the opportunities available to respondents to challenge the validity of adjudication applications and adjudication determinations by reason of jurisdictional error, as that concept has been interpreted in relation to the Security of Payment Act.[70] Construing s 16(2)(a) to allow a claimant an alternative route to a swift determination of its statutory entitlement if the first route is not validly pursued enhances the stated objectives of the legislation.

186 The primary Judge was therefore correct to conclude that had the Adjudication Determination been invalid by reason of Ostwald's failure to comply with s 17(3)(d) of the Security of Payment Act, he would have held that Ostwald was entitled to seek recovery of the unpaid Scheduled Amount pursuant to s 16(2)(a)(ii). Since I have concluded that the Adjudication Determination was invalid and liable to be set aside, it follows that, subject to Seymour's other arguments, Ostwald was entitled to seek recovery of the unpaid Scheduled Amount by means of its Cross-Claim.

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[69] Murray Report at (xiii).

[70] See, for example, the Murray Report's recommendation that the legislation should abandon use of the expression "reference date": Murray Report at [11.1], Recommendation 14.

Election

187 Since the Adjudication Certificate was invalid and there was no impediment to Ostwald exercising its statutory right to institute proceedings to recover the Scheduled Amount as a debt, no question of election arises.

Ground 3(a): consequences of winding up of Ostwald

Primary Judgment

188 The primary Judge identified three questions arising from the winding up of Ostwald:[71]

(i) Whether the Security of Payment Act continues to apply to Ostwald's payment claim. His Honour identified the

> "particular question [to be] whether Ostwald continues to be a 'claimant' for the purposes of Pt 3 of the [Security of Payment Act]".

(ii) If Ostwald continues to be a "claimant":

> "whether the statutory process for enforcing an adjudication determination as a judgment for debt under ss 24 and 25 should be stayed in light of the mandatory 'set off' procedure under s 553C of the *Corporations Act*, which must operate where a company is in liquidation."

(iii) Whether there is a constitutional inconsistency between the provisions in the Security of Payment Act relating to the filing of an adjudication certificate as a judgment for debt is inconsistent with the setoff procedure laid down by s 553C of the *Corporations Act*.

189 The primary Judge considered it neither necessary nor appropriate to address the constitutional issue. As has been noted, Seymour did not press the constitutional contention on the appeal.

190 The primary Judge accepted that in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd*[72] the Victorian Court of Appeal held that s 9(1) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Victorian Act**) (NSW s 8):[73]

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71 Primary Judgment at [123]-[125].

72 [2016] VSCA 247; (2016) 337 ALR 452 (Façade).

73 Façade at [84].

> "creates an entitlement to progress payments only for persons who have undertaken to, **and continue to**, carry out construction work or supply related goods and services. The term 'the claimant' used throughout Pt 3 is commensurately limited. Consequently, the payment regime in Pt 3 of the [Victorian] Act is not available to companies in liquidation, since such companies cannot carry out construction work or supply goods and services, and thus do not satisfy the requirements for 'a claimant'." (Emphasis added.)

191 His Honour acknowledged that since the legislation in each State was identical in material respects[74] he was obliged to follow the decision in *Façade* unless he concluded that it was "plainly wrong".[75] In his view, however, *Façade* was plainly wrong. In particular, the primary Judge said that, contrary to the reasoning in *Façade*, there is nothing in the text of the legislation to compel the conclusion that "undertake" means not only undertake to carry out construction work but to continue to perform such activities.[76]

192 The primary Judge considered that the Court in *Façade* overlooked that "Claimant" is defined in the Victorian Act to mean "a person who serves a payment claim under section 14 [NSW s 13]."[77] The Court of Appeal had wrongly assumed that a "claimant" must be someone who is or claims to be entitled to a progress payment by reason of having undertaken to carry out construction work. In the primary Judge's view, a person's status as a claimant does not depend on whether that person has undertaken to carry out construction work and also continues to perform such work. A person is a "claimant", his Honour held, if the person has served a payment claim and is or claims to be entitled to a progress payment for construction work undertaken.[78]

193 The primary Judge concluded as follows:[79]

> "155 My opinion … is that the Victorian Court of Appeal erred in its consideration of the text of the statute. Its failure to have regard to the definition of 'claimant' in s 4 of the Victorian Act led it to conclude that 'claimant' was defined in Vic s 14/NSW s 13 which, in turn, led it to conclude that its interpretation of the word 'undertaken' in Vic s 9/NSW s 8 was determinative of the question of who was a 'claimant'.

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74 The numbering of the sections in each Act is slightly different.

75 Primary Judgment at [130].

76 Primary Judgment at [138].

77 Victorian Act s 4. As the primary Judge noted at [143]-[144], the definition in s 4(1) of the Security of Payment Act is to the same effect but expressed in the passive voice: see at [80] above.

78 Primary Judgment [148].

79 Primary Judgment at [155]-[157].

> 156 I do not agree with the Victorian Court of Appeal's interpretation of 'undertaken'. That is, perhaps, a matter about which minds might differ and not, itself, a reason to conclude the Court was 'plainly wrong'. But the Court's failure to consider the definition of 'claimant' in Vic s 4, and its consequent misunderstanding of the definition of 'claimant' leads me to conclude that it was 'plainly wrong' and that I should not follow it.
>
> 157 Accordingly, my conclusion is that Ostwald remains a 'claimant' notwithstanding it has been wound up. The Act, by its terms, continues to apply to Ostwald, notwithstanding that it is in liquidation …"

194 The primary Judge then addressed whether Ostwald, having gone into liquidation before the Adjudication Determination was made, could enforce a judgment obtained by registration of an adjudication certificate issued as a consequence of the Adjudication Determination. Since s 553C of the *Corporations Act* automatically applies to any mutual dealings between a claimant in liquidation and a respondent to a payment claim, the effect is:[80]

> "to substitute for the parties' rights under the contract and for such rights as Ostwald retains by reason of the adjudication determination, the right to have an account taken under s 553C and:
>
> (a) in the case of Ostwald, to recover from Seymour … any amount found following the taking of such accounts to be due by Seymour … to it; and
>
> (b) in the case of Seymour … to be able to prove in the winding up of Ostwald for any amount found to be due by Ostwald to it."

(It will be recalled that in this Court Seymour did not rely on any argument based on s 553C of the *Corporations Act*.[81])

195 His Honour pointed out that s 32(1)(c) of the Security of Payment Act preserves the rights of the parties under the construction contract. Accordingly, cross-claims and defences to the builder's claims are protected as mutual dealings under s 553C of the *Corporations Act*. In his Honour's opinion, it would be wrong if Seymour was required to pay Ostwald's payment claim in full but be left to prove in the liquidation in respect of any cross-claim. In those circumstances his Honour saw:[82]

> "no option but to stay any judgment that Ostwald obtains by reason of filing an adjudication certificate following the adjudication determination until the parties' rights are finally determined by the account that must now be taken under s 553C."

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80 Primary Judgment at [165].

81 See at [67] above.

82 Primary Judgment at [168].

Façade

196 The facts in *Façade* can be stated shortly. Façade, as subcontractor under a construction contract, submitted two payment claims to Multiplex, the principal contractor, in August and September 2012. Multiplex paid part of the first payment claim but did not serve a payment schedule. Multiplex made no payments in respect of the second payment claim and again did not serve a payment schedule. On 10 October 2012, Multiplex served a notice taking the works out of Façade's hands. On 25 October 2012, Façade served a demand on Multiplex for payment of the unpaid claims.

197 The Supreme Court of Victoria made an order for the winding up of Façade on 6 February 2013. Façade commenced proceedings in September 2014 under the Victorian Act seeking to recover the unpaid claims as a debt from Multiplex. During the proceedings Multiplex alleged that Façade was liable to it for completion costs and liquidated damages substantially in excess of Façade's claims.

198 The trial judge was satisfied that Multiplex had multiple claims it intended to advance against Façade. The judge upheld Multiplex's constitutional argument based on what he held was an inconsistency between ss 16(2)(a)(ii) and 16(4)(b) of the Victorian Act (NSW ss 15(2)(a)(i) and 15(4)(b)) and s 533C of the *Corporations Act.* The trial judge did not consider whether, as a matter of construction, the Victorian Act continued to apply after Façade had been placed in liquidation.

199 Façade appealed and Multiplex filed a notice of contention seeking to affirm the trial judge's decision on the basis of the construction argument not addressed by the trial judge. The Victorian Court of Appeal dealt with the construction argument before considering other issues, including the question of s 109 inconsistency.

200 The Court commenced its analysis by referring to the judgment of Young CJ in Eq in *Brodyn Pty Ltd v Dasein Constructions Pty Ltd*.[83] In that case his Honour held that there was a conflict between s 25 of the Security of Payment Act and

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[83] [2004] NSWSC 1230 (Brodyn). Although the Court in Façade did not refer to the appeal in Brodyn, this Court in substance dismissed the appeal: Silvia v Brodyn Pty Ltd [2007] NSWCA 55. However the Court did not need to address the construction or constitutional issues to dispose of the appeal.

s 553C of the *Corporations Act* and that s 553C prevailed.[84] In his view, once a claimant ceased to be a going concern, it no longer needed cash flow and therefore the mischief covered by the Security of Payment Act was not present.[85] Accordingly, his Honour concluded that the Security of Payment Act was only intended to operate when the head contractor and subcontractor were "going concerns".

201 The Court in *Façade* acknowledged that Young CJ in Eq focused on the purposes underlying the legislation rather than on the statutory text and that it was necessary to start with the text.[86] Their Honours considered, however, that in creating a person's entitlement to progress payments s 9(1) of the Victorian Act (NSW s 8(1)):[87]

> "emphasises that person's entitlement to perform actions under the construction contract, rather than, say, the person's status as a party to the contract."

The text therefore "accords importance to the actions of carrying out construction work and supplying related goods and services".

202 This led the Court of Appeal to identify two ways in which s 9(1) could be interpreted:[88]

> "The first is that it is available to any person who has undertaken to carry out construction work or supply related goods and services under a construction contract. The second is that it is only available to a person who not only has undertaken to carry out construction work or supply related goods and services, **but also continues to perform such activities**." (Emphasis added.)

203 Their Honours observed that s 14 (NSW s 13), which provides for the service of payment claims, is available to a "person referred to in s 9(1) who is or who claims to be entitled to a progress payment". Adopting the narrower interpretation of s 9(1) (that is, the second of the alternatives) meant that:[89]

> "the term 'the claimant' is only apt to cover persons who still carry out construction work or who still supply related goods and services pursuant to the construction contract. Consequently, once a winding-up order is made in respect of a builder, such that it only continues to exist for the purpose of being

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[84] Brodyn involved a corporation subject to a deed of company arrangement. However, s 553C applied to the deed: Corporations Act s 444A(5); Corporations Regulations 2001 (Cth) reg 5.3A.06, Sch 8A, cl 5.

[85] Brodyn at [87].

[86] Façade at [74].

[87] Façade at [77].

[88] Façade at [78].

[89] Façade at [79].

> wound up, it would cease to be a claimant for the purposes of Pt 3 of the [Victorian] Act. It would therefore lose the right to issue payment claims under s 14, or recover unpaid amounts pursuant to s 16(2) [NSW s 15(2)]."

204 The Court identified a number of matters supporting the narrower interpretation:

- Section 16(2)(b) (NSW s 15(2)(b)) permits a claimant to serve notice on a respondent who has not produced a payment schedule of the claimant's intention to suspend work. This language contemplates that a claimant is still carrying out construction work.[90]
- Part 3 of the legislation creates an interim regime and provides for a respondent who makes a payment to "claw back" some or all of the payment. But where the claimant is in liquidation any payment made by the respondent enters the general pool of assets for distribution to creditors. The respondent would be unlikely to see much, if anything, returned so that the interim payment, in effect, becomes final.[91]
- The extrinsic materials showed that the driving concern underpinning the legislation centred on the cash flow problems facing contractors within the construction industry. But "cash flow problems cease to be a concern where a company goes into liquidation".[92]

205 The Court noted that the subcontractor relied on observations made by the Queensland Court of Appeal in *RJ Neller Building Pty Ltd v Ainsworth*[93] to the effect that the equivalent Queensland legislation was designed to shift the risk of a subcontractor's insolvency to the head contractor. The Court in *Façade* said that:[94]

> "So much may be accepted. However, once a builder enters into liquidation, it is no longer a question of the *risk* of insolvency; insolvency is a certainty." (Emphasis in original.)

Their Honours went on to distinguish *Neller* on the ground that the builder in that case was "teetering on the edge" of insolvency, but had not yet fallen over.

206 The Court in *Façade* also rejected the subcontractor's argument that a "narrow" interpretation of the legislation would invite owners or head contractors to find ways of delaying payment until the builder entered into liquidation:[95]

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90 Façade at [80].
91 Façade at [81].
92 Façade at [82].
93 [2009] 1 Qd R 390 (Neller) at [40] (Keane JA, Fraser JA and Fryberg J agreeing).
94 Façade at [86].
95 Façade at [87].

> "the timeframes imposed by the [Victorian] Act are short … The claimant can therefore pursue enforcement within a relatively short period. Of course, delays may occur in enforcement and a builder already in a perilous financial state may enter into liquidation in a matter of months, as was the case here. However, in our view this consideration does not justify construing the legislation so that it confers benefits on companies in liquidation in the manner for which Façade contends. In the usual case, the legislation is designed to help avoid builders going into liquidation. The fact that this goal will not always be achieved, and may sometimes be frustrated, is not a reason for construing the statute so that it has an operation wider than the statutory purpose we have identified."

207 For these reasons the Court concluded that the Victorian Act:[96]

> "does not create an entitlement to progress payments for persons who are in liquidation (that is, persons in respect of whom a winding-up order has been made). This is because such persons no longer carry out construction work or supply related goods and services pursuant to a construction contract. On the construction we adopt, Pt 3 of the [Victorian] Act is not available to persons in liquidation."

208 In view of the Court's construction of the Victorian Act, it was unnecessary for their Honours to consider the issue of s 109 inconsistency. Nonetheless, their Honours proceeded to consider the constitutional question. In brief, their Honours reasoned as follows:

- The taking of the account and the balance produced by s 553C applies automatically at the commencement of the litigation and has the effect that the original claim ceases to exist. Thus only the balance between the claims is admissible to proof or payable to the company, as the case may be.[97]
- Courts in the United Kingdom have given primacy to insolvency law over security of payment legislation when a party to a construction contract is placed in liquidation.[98]
- The practical effect of the summary judgment procedure made available by s 16(2)(a)(i) of the Victorian Act (NSW s 15(2)(a)(i)) on the right of set off conferred by s 553C of the *Corporations Act* is:[99]

  > "direct and significant in that it interferes with the rights made available under the *Corporations Act*. This is so because the [Victorian] Act purports to preclude reliance upon cross-claims or defences, by reason of s 16(4)(b)(i) and s 16(4)(b)(ii), whereas that reliance is protected under Commonwealth law. Cross-claims and defences are protected, where relevant, as mutual dealings under s 553C. Without the protection afforded by s 553C, summary judgment would mean that Façade would receive from Multiplex the full amount of the sum owed under

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96 Façade at [90].

97 Façade at [166].

98 Façade at [174].

99 Façade at [177].

> the relevant payment claims, whereas Multiplex would be left to prove in the liquidation of Façade in respect of its counterclaim."

- If summary judgment had been granted to the subcontractor, any moneys received would have formed part of the fund available for distribution among Façade's creditors. If Multiplex could not rely on its counterclaim as a cross-claim or defence, it would receive only a *pro rata* dividend despite having paid the full amount. This is the very injustice s 553C is designed to avoid.[100]
- Section 16(2)(a)(i) and s 16(4)(b) alter, impair or detract from s 553C of the *Corporations Act*. The test for constitutional inconsistency is therefore satisfied.[101]

209 The Court in *Façade* held that this conclusion was not affected by the "roll-back" provision in Part 1.1A of the *Corporations Act*, since the conditions specified in Part 1.1A were not satisfied.[102]

210 The Court added the following observation:[103]

> "We consider that the finding of inconsistency also provides independent additional support for the narrow construction we have adopted, that is, independent of the text and contextual considerations we examined above. This is because s 6 of the *Interpretation of Legislation Act 1984* (Vic) directs that every Victorian Act is to be construed so as not to exceed the legislative power of the State of Victoria but is to be interpreted as a valid provision to the extent to which it is not so in excess. As we have concluded that s 16(2)(a)(i) and ss 16(4)(b)(i) and 16(4)(b)(ii) of the [Victorian] Act are invalid with respect to their application to a company in liquidation, they ought be construed, alongside the other relevant provisions in pt 3 of the [Victorian] Act as inapplicable to companies in liquidation (that is, persons in respect of whom a winding-up order has been made). The narrow construction, which we adopted above for other reasons, is also to be favoured because it preserves the validity of the [Victorian] Act." (Footnote omitted.)

Seymour's submissions

211 Seymour's written submissions in this Court in substance adopted the reasoning in *Façade* and *Brodyn*. The submissions invited the Court to hold that the primary Judge erred in characterising the Victorian Court of Appeal's construction of the legislation as "plainly wrong". Mr Christie's oral submissions, however, took a very different course. He frankly acknowledged that the reasoning in *Façade* contains significant flaws.

212 First Mr Christie accepted that there was no textual foundation for the Court of Appeal to interpret s 9(1) of the Victorian Act to mean that a person is entitled

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100 Façade at [178].
101 Façade at [179].
102 Façade at [185]-[187].
103 Façade at [189].

to a progress payment only if that person not only "has undertaken to carry out construction work under the contract" but also continues to carry out construction work (or supply related goods or services) pursuant to the contract. Mr Christie placed no reliance on the Court of Appeal's construction of s 9(1) which, in effect, reads words into the provision which are not there. In response to a question from the bench as to whether this concession removed "the very foundation of the Court of Appeal's reasoning", Mr Christie responded:

> "Yes, I see the force in that, your Honour, I see the force in that".

213 Secondly, Mr Christie acknowledged that the Court of Appeal was wrong to say that the term "claimant" in s 14(1) of the Victorian Act (NSW s 13(1)) is apt only to cover persons who still carry out construction work or who still supply related goods and services pursuant to the construction contract.[104] This acknowledgement recognises that the definition of "progress payment" expressly includes "the final payment for construction work carried out … under a construction contract". A builder or subcontractor who has completed all work under the construction contract is entitled by s 8(1) of the Security of Payment Act to the final payment notwithstanding that the builder or subcontractor has completed all construction work. As the High Court noted in *Southern Han*, the definition of "progress payment" makes it clear that the Security of Payment Act is not only concerned with providing a statutory mechanism for receiving payments that occur during the currency of an existing contract. The legislation contemplates that in some circumstances a claim for a progress payment might be made after the contract has expired[105] and therefore might be made after the builder or subcontractor has carried out all construction work under the contract.

214 Thirdly, Mr Christie accepted that the Victorian Court of Appeal was wrong to rely on s 6 of the *Interpretation of Legislation Act 1984* (Vic) to read down the relevant provisions of the Victorian Act to avoid possible inconsistency with s 553C of the *Corporation Act*.[106] Mr Christie correctly recognised that s 6, like its counterparts in other jurisdictions:[107]

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104 Façade at [79]. See at [203] above.

105 Southern Han at [65].

> "does not speak to the situation where the issue is not one of the absence of legislative power, but is one of the extent of inconsistency, by operation of s 109 of the *Constitution*, of a State law made in the exercise of concurrent power".[108]

215 Despite these formidable obstacles, Mr Christie did not abandon his contention that the decision in *Façade* should not be regarded as "plainly wrong". He submitted that the reasoning of the High Court in *Probuild Constructions* demonstrates that the Security of Payment Act can be read subject to restrictions that may not be expressly stated. Since the "fundamental purpose" of the legislation is to ensure the financial survival of builders, so he argued, that purpose is not served once a builder or subcontractor goes into liquidation.

216 Mr Christie identified three matters supporting this contention:

(i) Section 32 of the Security of Payment Act makes it clear that the rights conferred on a claimant are interim only and that payments made by a respondent should be capable of being reversed upon final determination of the parties' contractual rights.

(ii) Parliament must be taken to have been aware that in general a company wound up in insolvency is not a going concern and there will be no return to creditors.

(iii) Parliament must also be taken to have been aware that where a payment is made to a company being wound up in insolvency or which is in fact insolvent ordinarily the interim payment will not be capable of reversal pursuant to s 32 of the Security of Payment Act.

Ostwald's submissions

217 Ostwald's submissions are reflected in part in the concessions made on behalf of Seymour. Ostwald's additional submissions appear sufficiently from the reasoning below.

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106 Façade at [189]. See at [210] above.

107 See, for example, Interpretation Act 1987 (NSW), s 31.

108 Sportsbet Pty Ltd v New South Wales (2012) 249 CLR 298; [2012] HCA 13 at [13] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); Bell Group NV (In Liq) v Western Australia (2016) 260 CLR 500; [2016] HCA 21 at [71] (French CJ, Kiefel, Bell, Keane, Nettle and Gaudron JJ).

Reasoning

The statutory text

218 In the present case, Ostwald served its payment claim on 28 July 2017 and Seymour served its payment schedule on 11 August 2017. On the findings that have been made, the due date for Seymour to pay the Scheduled Amount was 18 August 2017. All these events occurred before 25 August 2017, the date Ostwald's winding up is deemed to have commenced.

219 It would seem that Ostwald was continuing to carry out construction work under the Contract until Seymour terminated the Contract on 24 August 2017. Even on the reasoning in *Façade*, therefore, the payment claim was valid when served and the Scheduled Amount became due and payable on 18 August 2017.

220 I have concluded that Ostwald's Adjudication Application was invalid but that the making of that Application did not preclude Ostwald from seeking to recover from Seymour the unpaid portion of the Scheduled Amount as a debt pursuant to s 16(2)(a)(i) of the Security of Payment Act. The question of statutory construction that arises is therefore whether s 16(2)(a)(i) entitled Ostwald to recover the unpaid Scheduled Amount as a debt in proceedings instituted after the date the winding up is deemed to have commenced.

221 The facts in *Façade* were in substance the same as in the present case, except that the company was wound up by order of the Court and Multiplex (the respondent to Façade's claim) did not serve a payment schedule. Façade brought the summary curial proceedings pursuant to the equivalent of s 15(a)(i) of the Security of Payment Act.

222 Both parties accepted that the decision in *Façade* is directly in point and that this Court, like the primary Judge, is bound to follow *Façade* unless convinced that the Victorian Court of Appeal's construction of the legislation is plainly wrong. As the plurality remarked in *Probuild Constructions* in a slightly different context, it is a "strong thing" for this Court to decline to follow a decision of the intermediate appellate court of another State which is precisely in point.

223 Even though there could be no issue that the payment claims in *Façade* were valid when made, the reasoning depended heavily on the Court's construction

of the equivalent to ss 8 and 13 of the Security of Payment Act.[109] Notwithstanding Mr Christie's concessions in argument, it is appropriate to address the construction of those provisions in the light of the High Court's decision in *Southern Han*.

224 In *Southern Han* the High Court held that the existence of a reference date is a precondition to the making of a payment claim and that service of a valid payment claim under s 13(1) is an essential precondition to taking subsequent steps in the adjudication procedure set out Pt 3.[110] The expression "[a] person referred to in s 8 who is or who claims to be entitled to a progress payment" in s 13(1), therefore means a person:[111]

> "who has undertaken to carry out construction work or supply related goods or services under a construction contract in respect of which a reference date has arisen."

225 The Court in *Southern Han* explained that Pt 2 of the Security of Payment Act draws a distinction between a progress payment to which a person is entitled and the amount of the progress payment to which that person is entitled:[112]

> "59 … Cast in the present tense, s 8(1) makes clear that a person who meets the description of a person **who has undertaken to carry out construction work** or supply related goods and services under a construction contract **is immediately by force of that provision 'entitled to a progress payment'** on and from each reference date under the construction contract. Cast in the future tense, in contrast, s 9 makes clear that the amount of a progress payment to which the person is so entitled is not fixed by force of that section but 'is to be' ascertained in the manner prescribed by that section, and quantifies the amount of the progress payment to which a person is entitled by force of s 8(1). Section 9 in that way anticipates the procedure for recovery of a progress payment set out in Pt 3. Under that procedure, in the event of a dispute between a claimant and a respondent, the ascertainment of the amount, if any, of the progress payment to be recovered is committed to the jurisdiction of an adjudicator to determine under s 22.
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> 60 That distinction drawn in Pt 2, between a present entitlement to a progress payment and the future ascertainment of the amount of the progress payment to which that present entitlement relates, explains the two-part description in s 13(1) of a person who is able to make a payment claim so as to trigger the procedure for recovery set out in Pt 3. The first part of the description – '[a] person referred to in section 8(1)' – refers to a person whom s 8(1) makes 'entitled to a progress payment'. The second part of the description – 'who is or who claims to be entitled to a progress payment' – neither contradicts nor

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109 In this section I shall use the numbering of the Security of Payment Act.

110 Southern Han at [42], [44], [63].

111 Southern Han at [46].

112 Southern Han at [59], [60].

> qualifies the first part of the description. The second part of the description rather recognises, consistently with s 9, that the amount of the progress payment to which that person is entitled might ultimately be ascertained, according to the procedure set out in Pt 3, to be less than the amount that the person claims to be due and might even be ascertained according to that procedure to be nothing." (Emphasis added.)

226 The Court also explained that there is:[113]

> "an important limitation that is implicit in the overall design of the Act, and that has been so from the time of its original enactment. That limitation is that the Act is concerned to provide a statutory mechanism for securing payment of an amount claimed to be payable in partial or total discharge of an obligation to pay for work (or for goods and services supplied) imposed by the contractual force of a construction contract."

227 The language of s 8(1) of the Security of Payment Act, read in the light of the analysis in *Southern Han,* creates an entitlement to a progress payment in an amount to be quantified in accordance with Pt 3 of the Act. A person acquires that entitlement on satisfaction of two conditions:

(i) the person has undertaken to carry out construction work under a construction contract; and

(ii) a reference date under the construction contract has arisen.

228 The progress payment to which a person is entitled as and from the reference date is a payment for work done, or for work undertaken to be done where some element of advance payment has been agreed under the contract.[114] In short, a progress payment is an amount that a contract requires to be paid as part of the total price of construction work.[115]

229 There is nothing in the language of s 8(1) to support an implication that the entitlement to a progress payment cannot arise unless the builder or subcontractor continues to carry out construction work under the contract. Section 8(1) refers to a person who "has undertaken to carry out construction work under the contract". This is a reference to a contractual undertaking, not to the physical performance of work. The analysis of the High Court in *Southern Han* is entirely consistent with this construction of s 8(1).

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113 Southern Han at [66].

114 Southern Han at [67] citing Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd [2004] NSWSC 116; 20 BCL 276 at [34] (Barrett J).

115 Southern Han at [68] citing Co-Ordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385; [2005] NSWCA 228 at [41] (Hodgson JA)

230 The statutory entitlement to a progress payment does not arise until a reference date has arrived. That date is determined by the terms of the contract as that date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out under the contract. The reference date is:[116]

> "a date set by contractual force as a date for making a contractual claim to be paid the whole or part of the contracted amount … [T]he date is … fixed by operation of one or more express provisions of the contract."

A reference date can arise regardless of whether the claimant is actually continuing to carry out construction work under the contract on that particular date (although it may be necessary, in conformity with *Southern Han*, for the contract or at least the contractual entitlement to be paid, to remain in force).

231 There is also nothing in the language of s 13 of the Security of Payment Act which implies that a person can only serve a payment claim at a time when that person is actually carrying out construction work under the contract. As *Southern Han* expressly recognises, a claim may be made even after a contract has expired, for example, in relation to a final payment.

232 Two further points should be noted. First, the text of the Security of Payment Act distinguishes between work undertaken to be carried out and work carried out. Section 8(2), for example, refers to "work carried out or undertaken to be carried out".[117] The reference in s 8(1) to a "person … who has undertaken to carry out construction work" contrasts with the reference in s 15(2)(b) and s 16(2)(b) to a claimant serving notice of intention to suspend "carrying out construction work".[118] This suggests that if Parliament intended s 8(1) to be subject to a requirement that the claimant actually carry out construction work on the reference date it would have said so.

233 Secondly, ss 15(2)(b) and 16(2)(b) of the Security of Payment Act apply where a respondent fails to pay the claimed amount or the unpaid portion of the scheduled amount. Those provisions permit a claimant to serve a notice of the claimant's intention to suspend carrying out construction work. The Court in

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116 Southern Han at [70].

117 See also ss 9(b), 10(1) where the same expression is used.

118 See also ss 11(3) and 27(1) where the same expression is used.

Façade said that the provisions favoured the Court's construction of s 9(1) of the Victorian Act (NSW s 8(1)) because they "[contemplate] a claimant who is still carrying out construction work".[119]

234 It is true that ss 15(2)(b) and 16(2)(b) contemplate that some claimants will be carrying out construction work when the due date for a progress payment arrives and that those claimants may wish to take advantage of the statutory entitlement to suspend construction work. But that does not mean that the provisions contemplate that an entitlement to a progress payment under s 8(1) depends on the claimant actually performing construction work under the contract on the reference date. Nor does it mean that ss 15(2) and 16(2) only permit a claimant to invoke the statutory procedures if on the due date for payment the claimant is carrying out construction work under the Contract.

235 In my opinion Mr Christie was correct to accept that the Victorian Court of Appeal was in error in construing s 9(1) of the Victorian Act (NSW s 8(1)) as creating an entitlement to a progress payment only in a person who continues to carry out construction work under a construction work. With great respect, it follows that the Court was in error in adopting this construction of the provision as the basis for the conclusion that a "claimant" for the purposes of the equivalent to ss 15(2) and 16(2) of the Security of Payment Act must be a person who continues to carry out construction work under a contract.
Mr Christie was also correct to accept that his concession removes the principal basis advanced by the Victorian Court of Appeal for its construction of the legislation.

Implications

236 Mr Christie's attempt to support the decision if not the reasoning in *Façade* rested on implications to be derived from the "fundamental purpose" of the Security of Payment Act to ensure the financial survival of builders. It is a permissible approach to construction to draw implications from the text, structure and evident objectives of the legislation. Thus in *Probuild Constructions*, the High Court considered that the language, structure and purposes of the Security of Payment Act were not consistent with allowing an

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119 Façade at [80].

adjudication determination to be quashed for non-jurisdictional error, even though the legislative text did not explicitly preclude judicial review of such a determination.[120] In *Southern Han* the High Court identified an important limitation implicit in the overall design of the Security of Payment Act.[121]

237 Three matters were identified by the Victorian Court of Appeal that might be said to support an implication to the effect advanced by Mr Christie. The first was that a company in liquidation cannot carry out construction work or supply goods and services under a contract.[122] Accordingly "cash flow problems cease to be a concern when a company enters liquidation".[123]

238 This proposition overlooks the express power conferred on the liquidator of a company to:

> "carry on the business of the company so far as is, in the opinion of the liquidator, required for the beneficial disposal or winding up of that business."[124]

It may not be common for the liquidator of a builder or building subcontractor, in particular, to seek to carry on the business of the company by continuing to perform work under an existing construction contract. But the circumstances in which an insolvent company is placed in liquidation vary greatly. It is possible for a construction company in liquidation to need a progress payment for much the same cash flow reasons as a company "teetering on the edge of insolvency".

239 A liquidator may consider it expedient to carry on the company's business with a view to disposing of it or winding it up in the most beneficial manner. To this end, the liquidator may make a payment claim on behalf of the company pursuant to an existing construction contract, perhaps in respect of work completed prior to the commencement of the liquidation. The liquidator may then seek to invoke the statutory procedures for quantifying and enforcing the claim. Receipt of the progress payment could be crucial to the liquidator's endeavours to dispose of the business beneficially, for example by enabling

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120 Probuild Constructions at [48].
121 Southern Han at [66]. See at [226] above.
122 Façade at [84]. See at [207] above.
123 Façade at [82].
124 Corporations Act, s 477(1)(a); MGR Gronow and S Maiden, McPherson's Law of Company Liquidation, 5th ed Thomson Reuters, at [8.2060].

the company to discharge its few remaining obligations under a construction contract, thereby entitling it to a substantial payment under the contract.

240 The second matter the Victorian Court of Appeal thought significant was that once a winding up order is made in respect of a building contractor:

> "it is no longer a question of the **risk** of insolvency; insolvency is a certainty."[125] (Emphasis in original.)

241 A company is insolvent for the purposes of the *Corporations Act* if it is unable to pay its debts as and when they fall due.[126] Even a company wound up on the ground of insolvency[127] may ultimately be found to have a surplus of assets over liabilities. It is therefore not necessarily inevitable that creditors of a company wound up on the ground of insolvency will suffer a shortfall in recovering the moneys due to them. If the Court of Appeal was implying that the creditors of a construction company wound up in insolvency can never ultimately recover the full amounts due to them, that proposition is not correct.

242 Mr Christie did not fully adopt the reasoning of the Court of Appeal on these two matters. But he did submit that Parliament must have been aware of the practical difficulties that generally confront creditors in a winding up in insolvency. That, however, is a tenuous basis on which to imply limitations on statutory language not supported by the text of the legislation.

243 The third matter relied on in *Façade* and adopted by Mr Christie is the interim character of the statutory entitlement. As the High Court observed in *Probuild Constructions*,[128] the Security of Payment Act creates an entitlement that is determined informally, summarily and quickly and then summarily enforced without prejudice to the common law rights of the parties which are to be determined "in the normal manner".

244 The principal provisions that define the nature of a claimant's entitlement to a progress payment are the following:

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125 Façade at [86].

126 Corporations Act, s 95A.

127 Corporations Act, ss 459A, 459P.

128 Probuild Constructions at [44], citing Falgat Constructions Pty Ltd v Equity Australia Corporation Ltd (2005) 62 NSWLR 385; [2005] NSWCA 49 at [22] (Handley JA, Santow JA and Pearlman AJA agreeing).

- Sections 15 and 16 permit the claimant to recover the unpaid portion of the claimed amount or the scheduled amount (as the case may be) as a debt in any court of competent jurisdiction. The respondent is not entitled in the proceedings to bring a cross-claim or raise a defence in relation to matters arising under the construction contract.
- Section 24 enables the claimant to obtain an adjudication certificate if the respondent fails to pay the whole or any of the adjudicated amount by the "relevant date". Section 25 provides for the adjudication certificate to be filed as a judgment for debt in a court. If the respondent commences proceedings to set aside the judgment, the respondent is not entitled in those proceedings to bring a cross-claim, raise any defence in relation to matters under the construction contract or challenge the adjudicator's determination (except for jurisdictional error).
- Section 32 provides that nothing in Part 3 affects the rights of the parties under the construction contract proceedings arising under the contract and nothing done under Pt 3 affects any civil proceedings. However, in any proceedings in relation to a matter arising under a construction contract, the court:

> "(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
>
> (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings."

245 The Court in *Façade* considered that these provisions envisage that a respondent will be able to claim back any amounts paid to the claimant pursuant to Pt 3 of the legislation. If the claimant is in liquidation the respondent will be unlikely to be able to claim back moneys paid in satisfaction of any judgment debt because the moneys will form part of the claimant's pool of assets to be distributed to creditors.[129] Accordingly, the interim nature of the claimant's entitlement supports a construction that denied a claimant the entitlement to lodge a payment claim against a company in the liquidation insolvency.

246 The assumption underlying this argument is that it is unfair to a respondent to permit a claimant company in liquidation to recover its "interim" statutory entitlement in full while relegating the respondent to the status of an unsecured creditor, notwithstanding that s 32 of the Security of Payment Act expressly preserves the parties' contractual rights. Although there is some support in the

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[129] Façade at [81].

authorities for this assumption, its validity is by no means beyond argument. The circumstances of the present case illustrate the point.

247 In response to Ostwald's payment claim served on 28 July 2017, Seymour served a payment schedule stating that it proposed to pay the Scheduled Amount of $2,505,237.58. The due date for payment was 18 August 2017, prior to termination of the Contract and appointment of the administrators to Ostwald. Had Seymour paid the Scheduled Amount on the due date as was its statutory obligation, its only remedy against Ostwald, once it went into liquidation, was to lodge a proof of debt as an unsecured creditor. In that situation, depending on the assets available for distribution, the "interim" payment could well have effectively become final.

248 Seymour's contention is that it would be unfair if it had to satisfy a judgment obtained by the liquidator for Ostwald pursuant to s 16(a)(ii) of the Security of Payment Act when any claim by Seymour against Ostwald would simply be as an unsecured creditor.

249 Seymour is only in a position to advance this contention because it refused to pay the Scheduled Amount, despite stating that it proposed to do so. It is difficult to see how rewarding a head contractor for delaying a progress payment it has stated that it intends to make promotes the objectives of the Security of Payment Act.

250 If, however, enforcement of a judgment for a progress payment would unfairly prevent a respondent from effectively asserting its contractual rights against the claimant, s 553C(1) of the *Corporations Act* provides a mechanism that, within its field of operation, alleviates the unfairness. The High Court stated the rationale for the set-off provision in the context of bankruptcy[130] in *Gye v McIntyre:*[131]

> "the object of set-off in bankruptcy is, in the words of Parke B. in *Forster v. Wilson*[132], 'to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate'. Where there are genuine mutual debts, credits or other dealings, it would be unjust if the trustee in

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130 Section 86 of the Bankruptcy Act 1966 (Cth) is the equivalent provision in bankruptcy to s 533C of the Corporations Act.

131 (1991) 171 CLR 609; [1991] HCA 60 at 618-619 per curiam.

132 (1843) 12 M & W 191 at 204; 152 ER 1165 at 1171.

> bankruptcy could insist upon having 100 cents in the dollar upon the whole of the debt owed to the bankrupt but at the same time insist that the bankrupt's debtor must be satisfied with a dividend of some few cents in the dollar on the whole of the debt owed by the bankrupt to him. It was to prevent such injustice that the 'mutual credits' and 'mutual debts', and later 'mutual dealings', provisions were introduced into bankruptcy legislation … To the extent necessary to achieve that legislative purpose of 'substantial justice' to the parties, it is established by authority that a provision such as s. 86 of the Act should be given 'the widest possible scope'." (Most citations omitted.)

251 White J helpfully summarised the operation of s 553C(1) of the *Corporations Act* in *JLF Bakeries Pty Ltd (in liq) v Baker's Delight Holdings Ltd*, as follows:[133]

> "[17] Where the requirements of the section are satisfied, set-off under s 553C operates automatically … There is authority that the relevant date for determining whether the sum due from one party is to be set off against any sum due from the other party in respect of mutual dealings is the 'relevant date' under s 553 for determining what claims are admissible to proof against the company … That is also the date at which the winding up is taken to have commenced: ss 513B(b) and 513C(b) …
>
> [18] Debts in respect of mutual dealings which may be set off under s 553C(1) include not only debts which are then due, but debts which are contingent and which ultimately mature into pecuniary demands. In *Hiley v Peoples Prudential Assurance Co Ltd* (1938) 60 CLR 468 at 497; (1938) 40 ALR 469 at 498, Dixon J said:
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> > It is enough that at the commencement of the winding up mutual dealings exist which involve rights and obligations whether absolute or contingent of such a nature that afterwards in the events that happen they mature or develop into pecuniary demands capable of set off. If the end contemplated by the transaction is a claim sounding in money so that, in the phrase employed in the cases, it is commensurable with the cross-demand, no more is required than that at the commencement of the winding up liabilities shall have been contracted by the company and the other party respectively from which cross money claims accrue during the course of the winding-up.
> >
> > …
>
> [19] The company will owe or be owed a contingent debt if, as a result of an existing obligation, the company will be liable to pay or be entitled to receive a sum of money on the occurrence of a future event which may happen, not which must happen: *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455 at 459 …" (Some citations omitted.)

252 Sifris J in *Grapecorp Management Pty Ltd (in liq) v Grape Exchange Management Euston Pty Ltd*[134] observed that the effect of the authorities is that:

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133 [2007] NSWSC 894; 64 ASCR 633 at [17]-[18].

134 [2012] VSC 112; 93 ACSR 1 at [66]-[68].

> "[66] … a contingent right or liability will only exist where there is a vested or existing right or obligation out of which, on the happening of a contingency (an event which may or may not occur), there will arise a right to be paid or an obligation to pay, a sum of money, which sum of money may be liquidated or sounding only in damages. The contingency is usually performance of an obligation.
>
> [67] The critical matter therefore is the existing or vested right or obligation as at the date of the winding-up. This well established concept introduces a sufficient state of certainty and recognises that commerce does not stop when a company goes into liquidation …
>
> [68] The policy behind the legislation requires a notional account to be taken as at the commencement of the winding-up. However, account must be taken of activity continuing after such date so far as such activity – eventually sounding in money – is underpinned by pre-liquidation obligations. Post-liquidation debts (and credits) that are entirely fresh transactions are dealt with differently. … However, as the authorities establish, it is proper and just that activity undertaken post-liquidation pursuant to antecedent pre-existing obligations that remain on foot should be brought to account and set off in the manner contemplated." (Citations omitted.)

253 The authorities have recognised that s 25(4) of the Security of Payment Act, which applies in proceedings commenced by a respondent to set aside a judgment based on an adjudication determination, does not prevent a respondent seeking other relief such as a stay of the judgment pending a decision on a proof of debt or a cross-claim.[135] They have also recognised that there is nothing in the Security of Payment Act to prevent a set-off available under s 553C(1) operating to satisfy a judgment obtained by a claimant under Pt 3 of the Security of Payment Act, where the claimant is in liquidation.[136]

254 In the light of these principles, it has generally been accepted that a respondent which can establish that it has a seriously arguable claim arising out of the construction contract may be able to obtain a stay of execution of a judgment obtained under Pt 3 of the Security of Payment Act or equivalent relief (such as an order requiring a claimant to provide security).[137] Such relief ordinarily may be granted only if:

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135 Greenaways Australia Pty Ltd v CBC Management Pty Ltd [2004] NSWSC 1186 at [11] (Barrett J); Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd [2005] NSWSC 1152 at [37] (Barrett J); Veolia at [18], [31] (McDougall J).

136 Veolia at [24].

137 Paul Michael Pty Ltd v Urban Traders Pty Ltd [2010] NSWSC 1246 (Paul Michael) at [5] (White J); Romaldi Constructions Pty Ltd v Adelaide Interiors Linings Pty Ltd (No 2) [2013] SASCFC 124 at [75]-[79] (Blue J, Sulan and Stanley JJ agreeing), compare Neller at [39]-[41].

> "the failure to do so would have the practical effect of making permanent that which … the legislature intended [by the Security of Payment Act] to be only interim."[138]

255 Having regard to the course of argument in the present case, it is not necessary to analyse further the circumstances in which a stay or similar relief might be granted. It is enough to conclude that there are mechanisms available to eliminate or at least minimize the risk of injustice to a respondent seeking to enforce contractual rights against a claimant in liquidation which has the benefit of a judgment obtained under Pt 3 of the Security of Payment Act.

256 Accordingly, in my opinion the Security of Payment Act, as a matter of construction, is capable of operating for the benefit of a builder or sub-contractor which has gone into liquidation in insolvency. To the extent that the Victorian Court of Appeal decided to the contrary in *Façade*, I consider, with the greatest respect, that it was plainly wrong and should not be followed.

Conclusions

257 I have reached the following conclusions:

1. The primary Judge erred in making an order for rectification of the Contract.

2. The Adjudication Application was not made within the period specified in s 17(3)(d) of the Security of Payment Act and was therefore invalid.

3. Ostwald was entitled to institute proceedings against Seymour pursuant to s 16(2)(a)(i) of the Security of Payment Act seeking to recover the unpaid portion of the Scheduled Amount as a debt.

4. The fact that Ostwald's liquidation was deemed to have commenced before it filed its cross-claim seeking judgment against Seymour does not prevent it pursuing that claim to judgment.

258 Ostwald's cross-appeal challenged the primary Judge's conclusion that he had no option but to stay any judgment obtained by Ostwald by filing the Adjudication Certificate. Since the Adjudication Certificate was invalid, Order 7 made by the primary Judge cannot stand.[139]

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138 Veolia at [75]; Paul Michael at [59]-[60].

139 See at [55] above.

259 Since I have concluded that there is no impediment at present to Ostwald obtaining summary judgment against Seymour pursuant to s 16(2)(a)(i) of the Security of Payment Act, an issue would remain as to whether any judgment so obtained should be stayed. In view of the undertaking given to the Court on behalf of Ostwald, it would seem that there is no need to address the question of a stay.

260 The most convenient course is for the parties to agree on short minutes of order giving effect to these reasons for judgment. In the absence of agreement the parties should each file draft short minutes of order together with brief written submissions in support. In the absence of agreement as to costs, the parties' written submissions should also address the question of costs in this Court and in the Equity Division proceedings. Any dispute will be resolved on the papers.

261 The orders I propose are:

1. Direct the parties to file agreed short minutes of order within fourteen days giving effect to these reasons for judgment and dealing with the costs of the proceedings in this Court and the Equity Division.

2. To the extent that there is disagreement as to the proposed short minutes of order or costs, direct Seymour to file and serve its proposed short minutes of order (including on costs), together with written submissions in support (not to exceed five pages) within fourteen days.

3. Ostwald to file and serve its proposed short minutes of order (including on costs), together with written submissions in support (not exceeding five pages) within a further fourteen days.

262 **EMMETT AJA:** A significant question in this appeal concerns the interaction between the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Security of Payment Act**) and the *Corporations Act 2001* (Cth) (**the Corporations Act**). The appeal also raises a question as to the meaning of the phrase "adjudication application" in s 16(2)(a)(ii) of the Security of Payment Act. Finally, there is a question as to whether a building contract between the appellant and respondent should be rectified.

263 By a works sub-contract dated 6 September 2000 (**the Contract**), the first respondent, Ostwald Bros Pty Ltd (in Liquidation) (**Ostwald**), as Sub-contractor, agreed with the appellant, Seymour White Constructions Pty Ltd (**Seymour**), as Contractor, to perform road works near Grafton, New South Wales. Ostwald served a progress payment claim on Seymour pursuant to s 13(1) of the Security of Payment Act. Seymour responded by providing a payment schedule stating the amount it proposed to pay, pursuant to s 14 of the Security of Payment Act (**the Scheduled Amount**). Ostwald then purported to make an adjudication application under s 17(2)(a)(ii) of the Security of Payment Act (**the Adjudication Application**). The Adjudicator then purportedly made an adjudication determination pursuant to s 22 of the Security of Payment Act (**the Adjudication Determination**), which determined an amount due by Seymour to Ostwald (**the Adjudicated Amount**). Ostwald has not been paid either the Adjudicated Amount or the Scheduled Amount.

264 Seymour thereafter commenced proceedings in the Technology and Construction List of the Equity Division claiming that the Adjudication Determination was invalid. The basis for that claim was that Ostwald made the Adjudication Application outside the time limit provided for in the Security of Payment Act. In the meantime, Ostwald went into liquidation and Seymour was granted leave under s 440D of the Corporations Act to continue the proceedings against Ostwald.

265 In addition, Ostwald filed a cross-claim seeking rectification of the Contract. If the claim for rectification were to be successful, Ostwald's Adjudication Application was made within the time prescribed by the Security of Payment Act. However, if the Contract were not to be rectified, the Adjudication Application was made out of time and was therefore invalid. In the alternative, Ostwald sought payment of the Scheduled Amount as a statutory debt under the Security of Payment Act.

266 A judge of the Equity Division (**the primary judge**) concluded that rectification of the Contract should be ordered and that the Adjudication Application was therefore valid. The primary judge also concluded that, if the Adjudication Determination had been invalid, Ostwald was entitled to recover the Scheduled

Amount as a debt due to it under the Security of Payment Act. His Honour also concluded that, on its proper construction, the Security of Payment Act continued to apply notwithstanding the commencement of the winding up of Ostwald. However, his Honour ordered that any judgment obtained by Ostwald be stayed until the rights of the parties were finally determined, in the winding up of Ostwald, by an account of their mutual dealings under s 553C of the Corporations Act.

267 Seymour appealed from the orders made by the primary judge. Ostwald filed a cross-appeal. In its appeal, Seymour contended that the primary judge erred in holding that the Contract should be rectified and erred further in holding that Ostwald could claim payment of the statutory debt in circumstances where it had elected to make an Adjudication Application and to pursue the Adjudication Application to a determination. Seymour also contended that his Honour erred in holding that provisions of the Security of Payment Act are available to a company in liquidation.

268 In its cross-appeal, Ostwald challenged his Honour's decision to stay any judgment obtained by it pursuant to the filing of any Adjudication Certificate. In addition, Ostwald contended that, if the Adjudication Application was void, his Honour should have ordered Seymour to pay the Scheduled Amount plus interest. Seymour filed a Notice of Contention in respect of the cross-appeal seeking to support the stay until the taking of the account required by s 553C of the Corporations Act.

269 I have had the considerable advantage of reading in draft form the proposed reasons of Sackville AJA. I agree with his Honour that the primary judge erred in concluding that the evidence supported a finding that the common intention of the parties was not reflected in the terms of the Contract and in ordering rectification. Accordingly, Ostwald did not make the Adjudication Application within the time specified by the Security of Payment Act and the Adjudication Determination was invalid and liable to be set aside.

270 It follows from that last conclusion that Ostwald was entitled to seek recovery of the Scheduled Amount pursuant to its cross claims, subject to Seymour's contentions in relation to the interplay between the Corporations Act and the

Security of Payment Act. In that regard, the primary judge declined to follow a decision of the Victorian Court of Appeal. I agree with Sackville AJA that, on its proper construction, the Security of Payment Act is capable of operating for the benefit of a builder or sub-contractor notwithstanding that the builder or sub-contractor has gone into liquidation in insolvency. I agree with Sackville AJA, with the greatest respect, that the decision of the Victorian Court of Appeal in question was plainly wrong and should not be followed.

271 I agree with Sackville AJA that the stay order made by the primary judge cannot stand and there would be no impediment for Ostwald obtaining summary judgment against Seymour under the Security of Payment Act. I agree that the orders proposed by Sackville AJA are appropriate.

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