SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2014 0132

GREGORY PAUL SAVILLE (trading as CHINA SOURCING SERVICES) — Appellant

v

HALLMARC CONSTRUCTION PTY LTD (ACN 071 149 758) — Respondent

JUDGES:	WARREN CJ, TATE and KAYE JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	7 May 2015
DATE OF JUDGMENT:	27 November 2015
MEDIUM NEUTRAL CITATION:	[2015] VSCA 318
JUDGMENT APPEALED FROM:	[2014] VSC 491 (Vickery J)

ADMINISTRATIVE LAW – Judicial review – Adjudication determination under *Building and Construction Industry Security of Payment Act 2002* – Reference date as a jurisdictional fact – Whether adjudication determination reviewable for jurisdictional error – Judicial review of matters not confined to straightforward calculation of time or where determination is arbitrary, capricious or otherwise irrational – *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 applied; *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 applied – Adjudicator fixed wrong reference date.

CONTRACT – Building contract – Adjudication determination under *Building and Construction Industry Security of Payment Act 2002* – Scope of works under the contract – Pre-contractual negotiations – Source of the construction contract – Whether payment claim served out of time – Adjudication determination invalid.

PRACTICE AND PROCEDURE – Application to adduce further evidence – Evidence available and in applicant's possession before trial – Unclear that adducing evidence would produce different result – *Refaat v Barry* [2015] VSCA 218; *Clark v Stingel* [2007] VSCA 292, considered.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr M Clarke	Vic Bar Pro Bono Scheme
For the Respondent	Mr M A Robins QC with Mr A Rollnik	Kliger Partners

WARREN CJ
TATE JA:

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Introduction and summary

1 This is an appeal from an application for judicial review of an adjudication determination under the *Building and Construction Industry Security of Payment Act 2002* ('the Act'). It primarily concerns the question of whether the appellant,[1] Gregory Saville ('Saville'), was out of time when he purported to serve a first payment claim under the Act and whether the judge was correct in holding that a determination by an adjudicator that Saville was within time was void.[2] The appeal also raises the question of the scope of the

[1] There was no requirement for leave to appeal. The Notice of Appeal was filed on 22 October 2014 before the civil appeal reforms took effect on 10 November 2014. The civil appeal reforms impose a requirement for leave to appeal in almost all matters: see *Supreme Court Act 1986* s 14A.

reviewability of a decision by an adjudicator appointed under the Act.

2 In summary, on 28 February 2013, Saville, trading in the name of China Sourcing Services — KBL Studio ('CSS'),[3] entered into a construction contract with the respondent, Hallmarc Construction Pty Ltd ('Hallmarc'), dated 7 February 2013, for the supply and installation of joinery by Saville for a development comprising 134 residential apartments at 1148 Nepean Highway, Highett, being constructed by Hallmarc ('the construction contract'). Although the construction contract contemplated a more formal document being executed at a later time, it was not in dispute that this did not occur. On 21 February 2014 Saville served on Hallmarc a payment claim dated 17 February 2014 ('the first payment claim'), purportedly under the construction contract.[4] After Hallmarc failed to provide a payment schedule, Saville applied for adjudication of the payment claim by an adjudicator, Philip Martin of Adjudicate Today Pty Ltd, ('the adjudicator') who delivered an adjudication determination dated 28 April 2014 ('the adjudication determination') finding that Saville was entitled to payment of $46,328.10 including GST. In particular, the adjudicator found that the first payment claim was not out of time under the Act. He determined that the reference date was after 25 November 2013.[5] The adjudicator relied on an invoice dated 25 November 2013 from JMP Carpentry 'for repair being made to the wardrobes that form part of [Saville's] scope of work' as indicating that work under the construction contract was carried out as of that date. The first payment claim was thus treated by the adjudicator as having been made within the period of three months required under the Act.[6] Following the adjudication determination, Saville served a second payment claim dated 16 May 2014 ('the second payment claim') for further work, but this had not been the subject of adjudication at the time the application for judicial review was brought by Hallmarc.

3 The judge, Vickery J, held that the adjudicator erred in holding that the reference date

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2 *Hallmarc Construction Pty Ltd v Saville* [2014] VSC 491, [28] ('Reasons').

3 We refer to 'Saville' throughout rather than CSS.

4 The first payment claim was for $64,075.61. After Saville issued a notice of intention to apply for adjudication, Hallmarc issued a payment schedule proposing a payment of $Nil to Saville.

5 The term 'reference date' is defined under s 9(2) of the Act. See [7] below.

6 Section 14(4)(b) of the Act. See [11] below.

under the Act was after 25 November 2013. He held that the appropriate reference date under the Act was 1 October 2013. This had the effect that the first payment claim was made more than three months after the reference date and was thus invalid and the adjudication determination was void. It followed that the second payment claim was also out of time. Saville now seeks to appeal the finding that the adjudication determination was void. He also seeks to adduce further evidence in support of the appeal.

4 For the reasons that follow, we would dismiss the appeal and refuse the application to adduce further evidence.

5 We consider that the fixing of the reference date by the adjudicator is reviewable. Furthermore, we consider that the judge did nor err in concluding that the reference date fixed by the adjudicator under the Act was wrong and that as a consequence the adjudicator ought not to have assumed jurisdiction and the adjudication determination is of no legal effect. We also consider that the reasons given by the judge, in the circumstances, were adequate.

The statutory scheme

6 The role of an adjudicator, and the matters which he or she is to determine, are set out in s 23 of the Act. In particular, the adjudicator is required to consider the requirements of the Act and the provisions of the contract from which the application arose:

> **23 Adjudicator's determination**
>
> (1) An adjudicator is to determine—
>
> (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the *adjudicated amount*); and
>
> (b) the date on which that amount became or becomes payable; and
>
> (c) the rate of interest payable on that amount in accordance with section 12(2).
>
> **Note**
>
> The adjudicated amount may be added to under section 45(8).
>
> (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only —

(a) the provisions of this Act and any regulations made under this Act;

(b) subject to this Act, the provisions of the construction contract from which the application arose;

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

7 Central to this dispute is the date upon which any entitlement to payment can be calculated. Section 9 of the Act deals with progress payments. It relevantly provides:

9 Rights to progress payments

(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) who has undertaken to supply related goods and services under the contract —

is entitled to a progress payment under this Act, calculated by reference to that date.

(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 —

(i) a date on which a claim for a progress payment may be made; or

(ii) a date by reference to which the amount of a progress payment is to be calculated —

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or

(b) subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after —

(i) construction work was first carried out under the contract; or

(ii) related goods and services were first supplied under the contract; or

(c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that —

(i) construction work was last carried out under the contract; or

(ii) related goods and services were last supplied under the contract; or

(d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following —

(i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or

(ii) the issue under the contract of a certificate specifying the final amount payable under the contract *a final certificate*; or

(iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that —

(A) construction work was last carried out under the contract; or

(B) related goods and services were last supplied under the contract.

8 The term 'construction work' is defined by s 5 in the following terms:

5 Definition of *construction work*

(1) In this Act, *construction work* means any of the following work —

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not);

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for the purposes of land drainage or coast

protection;

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;

(d) the external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;

(e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including —

(i) site clearance, earth-moving, excavation, tunnelling and boring; and

(ii) the laying of foundations; and

(iii) the erection, maintenance or dismantling of scaffolding; and

(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and

(v) site restoration, landscaping and the provision of roadways and other access works;

(f) the painting or decorating of the internal or external surfaces of any building, structure or works;

(g) any other work of a kind prescribed for the purposes of this subsection.

9 The phrase 'related goods and services' is defined by s 6 in the following terms:

6 Definition of *related goods and services*

(1) In this Act, *related goods and services*, in relation to construction work, means any of the following goods and services —

(a) goods of the following kind —

(i) materials and components to form part of any building, structure or work arising from construction work;

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;

(b) services of the following kind —

(i) the provision of labour to carry out construction work;

(ii) architectural, design, surveying or quantity surveying services in relation to construction work;

(iii) building, engineering, interior or exterior decoration or landscape advisory or technical services in relation to construction work;

(c) goods and services of a kind prescribed for the purposes of this subsection.

10 Section 12 provides the due date for payment of a payment claim:

(1) A progress payment under a construction contract becomes due and payable —

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

(2) Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with subsection (1) at the greater of the following rates —

(a) the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983*; or

(b) the rate specified under the construction contract.

11 The time for serving payment claims is governed by s 14(4) and (5):

(4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within —

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

(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment —

whichever is the later.

(5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within —

(a) the period determined by or in accordance with the terms of the construction contract; or

(b) if no such period applies, within 3 months after the reference date

referred to in section 9(2) that relates to that progress payment.

The construction contract

12 To determine the reference date under s 9(2) involves making a finding about when either a specific item of construction work was carried out or a specific item of related goods and services was supplied 'under the contract'. It is necessary therefore to examine what the construction contract required of the parties.

13 Both the adjudicator and the judge determined that there was a construction contract for the purposes of the Act 'being the signed letter of acceptance dated 7 February 2013 and the signed or initialled attached documents'.[7] The letter was written on Hallmarc letterhead and signed by Charbel Sarkis ('Sarkis'), a contract administrator with Hallmarc. The relevant portions of the letter were in the following terms:

> We confirm our verbal acceptance of your offer to carry out the following works in accordance with the attached scope of works and Joinery spreadsheet — REV D dated 01/02/2013:
>
> - Supply only of Kitchen, bathroom & ensuite vanities, laundry doors & troughs, desks, shelving, and Linen press doors & internal carcasses: $507,030.00 + GST including shipping, duty and site delivery.
> - Containers unload delivery into each apartment and unpack: $32,360.00 + GST.
> - Supply and installation of Robes: $298,258.00 + GST.
>
> No variation works are to be commenced without written consent from Hallmarc Construction.
>
> As agreed, Hallmarc is prepared to pay the factory directly in line with the pro forma invoice, however we consider this to be a payment made on behalf of China Sourcing Services — KBL Studio and you will remain the principle [sic] contractor.
>
> Prior to despatch, we require your assurance that you believe the goods leaving China meet our requirements and can be satisfactorily installed upon arrival to site.
>
> Upon arrival to site, Hallmarc will inspect that all delivered joinery is in good conditions prior [to] releasing any cheques, including cheques released directly to KBL Studio. Hallmarc will not pay for any defective or damaged goods until they are satisfactorily repaired or replaced.
>
> Please ensure that all required joinery will arrive on time to avoid applying liquidated damages in accordance with our agreement.

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7 Adjudication determination 5.2. See Reasons [1].

Payment terms to be 60 days from despatch from factory.

…

A copy of the draft contract will be available shortly; in the meantime, we would be pleased if you would countersign the reverse side of a copy of this letter and return it for our records.

14 The attached 'Joinery Scope of Works' included the following:[8]

SCOPE

1. Supply bathroom and ensuite vanities to all apartments with selected finish to doors & drawers as documented.

2. Supply kitchen cabinets to all apartments with selected finish to doors & drawers as documents.

3. Supply cutlery trays and bins to kitchens.

4. Supply templates for benchtops.

5. Supply laundry doors where laundry is located in a bathroom.

6. Supply laundry trough joinery as per drawings.

7. Supply desks and shelving for study areas as per drawings.

8. Supply linen cupboards door and internal carcasses as per drawings.

9. Supply and Install robes.

10. Supply covering plugs to all exposed screw heads used to fix joinery items to wall.

11. Organise custom clearance and local container delivery.

12. Organise container unload, delivery to each apartment and unpack.

13. Note:

    - In addition to requirements of the documentation, details and level of finish to be in accordance with completed Display Suite.

GENERAL:

1. Provide all set out requirements from primary grid lines and datums to complete the works.

2. Supply all required statutory certification upon completion of the works.

3. Ensure compliance with all relevant Australian Standards and other codes as required.

4. Supply all access equipment (scissor, hoist, mobile scaffold) required to

[8] The underlined words reflect handwritten annotations made by Saville. Italics as in the original.

complete this component of the work. Hallmark to supply above. KBL to cover cost of forklifts used for unload.

5. Coordination with other trades and attendance at site meetings (as necessary).

6. All materials handling by contractor even where supplied by Hallmarc.

7. Protect and clean all finished surfaces, fixtures and fittings until practical completion is achieved. Responsibility of joinery installer to do this.

8. Allow to place trade rubbish into bins supplied by Hallmarc. Materials and waste to be placed in bin at completion of works every day (*Note: all rubbish from materials supplied by Hallmarc to be also removed and placed in bin by contractor).*

9. Deliver a clean installation at handover. Relevant to wardrobe installation.

10. Site Amenities supplied by Hallmarc.

11. Supply all required statutory certification upon completion of works.

12. Ensure compliance with all relevant Australian Standards and other codes as required.

13. Provide all necessary equipment, materials and labour that may not be specified but are required to deliver a functioning and statutory compliant installation.

15 The attachment also set out various occupational, health and safety requirements that are not relevant to this dispute.

16 Saville and Sarkis signed the reverse of the letter on 28 February 2013, and initialled the attachments, which Saville had annotated in handwriting. As mentioned, although the letter contemplated a more formal contract being executed in due course, such a step was not taken. Neither the adjudicator nor the judge mentioned any additional or oral component of the construction contract beyond this letter and its attachments.

Submissions made to the adjudicator

17 Before the adjudicator, Saville made submissions on the fixing of the reference date. He supported his submission that the reference date was after 25 November 2013 either on the basis that JMP Carpentry was working on behalf of Saville as a subcontractor (and in effect as its agent in performing its obligations under the construction contract) and the relevant payments made by Hallmarc to JMP Carpentry were therefore paid on behalf of Saville to its subcontractor,[9] or, more generally, on the basis that the scope of the construction

contract included some form of supervisory or project management role which required Saville to oversee contractors such as JMP Carpentry as they carried out general rectification and re-installation work on all joinery, and not merely on wardrobes. This was in effect how Saville framed his further written submissions to the adjudicator (dated 22 April 2014) on how the reference date should be identified.

18 There is some uncertainty as to what the adjudicator took into account. On 17 April 2014 the adjudicator called for further submissions from the parties on the reference date.[10] However, in the adjudication determination he said:

> The Claimant [Saville] provided additional submissions regarding the contract in its submissions on 22 April 2014. These submissions were not requested and have not been duly made in accordance with the provisions of the Act so have not been considered when making this determination.[11]

19 It is unclear whether the adjudicator considered that the additional submissions regarding the contract were not relevant to the question of the reference date. If so, that was an erroneous assumption. He went on to say:

> The Claimant [Saville] and the Respondent [Hallmarc] provided further submissions in addition to those requested or permitted to be considered under the provisions of the Act. I have not considered the submissions made by the parties that were not in accordance with the Act. These include the Claimant's email of 23 April 2014 and the submissions made in addition to those requested by me on 17 April 2014.[12]

20 In his further written submissions Saville referred to an email exchange of 21 February 2013. Those submissions said:

> By further email on 21 February 2013 … Sarkis further agreed (as had previously been proposed by me) that Hallmarc would make payment of KBL authorised contractors on its behalf, as is verified took place by the invoices provided.

21 The email exchange said to evidence the arrangement formed part of the material that Saville seeks to introduce as further evidence on the appeal. While we deal with the

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9 The notion of 'agency' was used loosely by the parties and at times appeared to be used to describe the alleged relationship between Saville and Hallmarc as the agent of Saville when Hallmarc paid Saville's subcontractors on Saville's behalf as opposed to the relationship between Saville as the principal and JMP Carpentry as his agent for the discharge of Saville's contractual obligations (including allegedly the rectification of defects).

10 See [30] below.

11 Adjudication determination 5.2.

12 Ibid 5.7.

application to adduce further evidence below, it is important for the email exchange to be referred to in its proper place within the narrative. The email exchange evidenced an arrangement made between Saville and Sarkis (Hallmarc) before the construction contract was signed by Saville, for Hallmarc to engage subcontractors to perform unpacking on behalf of Saville and take the cost of that unpacking out of the allowance to Saville for unloading in the construction contract:

> Hi Charbel [Sarkis],
>
> Given that we will get the labour for the container unpack from EVS and Hallmarc have an account with EVS and we have an allowance for unload, could the labourers be booked out to Hallmarc and the cost taken out of the allowance? This will be simpler than trying to bill Hallmarc now for the labour as and [sic] we are unsure of the actual cost for this stage.
>
> Regards,
>
> Greg Saville.

The reply was in the following terms:

> That's fine Greg.
>
> We will be paying EVS (or relevant contractor) on behalf of you, therefore you will still be responsible of [sic] any damage if it will occur to the delivered joinery.
>
> Kind regards,
>
> Charbel Sarkis.

22 The handwritten annotation by Saville to item 4 under the heading 'General' of the 'Joinery Scope of Works' annexure,[13] which refers to 'KBL' (CSS) covering the 'cost of forklifts used for unload', is consistent with this arrangement.

23 In his further written submissions to the adjudicator, Saville described the arrangement for Hallmarc to pay Saville's subcontractors directly:

> It was agreed with Hallmarc that it would make payments directly to contractors for convenience as many contractors were common to Hallmarc and CSS also being involved in installation of Hallmarc's own joinery under separate contract with Hallmarc …

24 Saville also directed the adjudicator's attention to the 25 November 2013 invoice from

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[13] See [14] above.

JMP Carpentry (for the sum of $8,333) and asserted that the works in it included rectification to works carried out by CSS (and thus, implicitly, works within the scope of the construction contract). Saville wrote:

> The works described on the invoice clearly include rectification works for defects including checking of mirror robe doors and desk repairs being works that Hallmarc has claimed against CSS for alleged defects. … The invoice from JMP Carpentry relied upon by Hallmarc proves that physical construction works under the relevant contracts were clearly carried out at least until 26 November 2013.

25 On the question of whether the scope of the construction contract extended to project management, it was submitted by Saville to the adjudicator that his contractual obligations extended to supervising the rectification of any defects in the joinery supplied by him. Saville relied upon the statement in the construction contract that 'Hallmarc will not pay for any defective or damaged goods until they are satisfactorily repaired or replaced'.[14]

26 In his further written submissions to the adjudicator, Saville contended that the construction contract included technical services by way of project management which

> involved checking of Hallmarc designs and drawings and in many instances noting and correcting errors, liaising with client and factory planning of production, checking of production lists and schedules, liaising with factory and co-ordination of production and delivery, administration and performance of installation works and administration and approval of contractors (both factory and installers) including rectification works and/or checking of payments made to subcontractors being correct.

27 In dealing with the JMP Carpentry invoice of 25 November 2013, the adjudicator did not set out the basis upon which work performed by that company related to Saville's contractual obligations. In other words, when fixing the reference date under s 9(2) he did not explicitly consider the question of agency or make any determination about whether the arrangements for unpacking extended to any other subcontract work such as installation or to rectification and repair work generally. Rather, he appeared to consider that it was not in contest that the JMP Carpentry invoice of 25 November 2013 was for work done under the construction contract. This was raised as an issue on the appeal.[15]

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14 See [13] above.

15 See [104] below.

The adjudicator's determination

28 The adjudicator determined that the first payment claim was a progress claim and not a final claim. In doing so he accepted Saville's argument that he had carried out work under the construction contract but had not completed his work, and rejected Hallmarc's contention that Saville's work was complete by 30 September 2013.

29 The adjudicator determined the reference date having regard to s 9(2)(b) of the Act,[16] which uses the date 20 business days after the previous reference date, and which calculates the first reference date using the date when construction work was *first* carried out under the contract, or when related goods and services were *first* supplied under the contract. (As discussed below,[17] this stands in contrast to the approach taken by the judge who determined that the first payment claim was a final claim and thus that the reference date was to be calculated in accordance with s 9(2)(d)[18] (relevantly, the date immediately following the day that construction work was last carried out under the contract) and not s 9(2)(b) of the Act.)

30 In his binding determination, the adjudicator made what the judge described as 'findings and ruling on his jurisdiction to embark upon the adjudication and made a binding Adjudication Determination under the Act'.[19] Those findings and ruling included the following:

> The Claimant [Saville] and the Respondent [Hallmarc] signed a letter of acceptance from the Respondent on or about 28 February 2013 for the Claimant to supply joinery items and unload them on delivery into each apartment and to supply and install robes for an amount of $921,421.80 including GST.
>
> …
>
> The Claimant has carried out but not completed the contract work. The Claimant submitted a payment claim on 21 February 2014. The Respondent submits that this is a final claim as the Claimant supplied and completed its work by 30 September 2013 so that the subject payment claim must be a final claim. I do not accept the Respondent's submission. It is for the Claimant to decide if the claim is a final claim and it has not done so as set out in the Claimant's reply to the request for further submissions. I determine that the subject payment claim is a progress claim and as such section 9(2)(b) of the Act applies in relation to the reference date.

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16 See [7] above.

17 See [42]–[44] below.

18 See [7] above.

19 Reasons [7].

> *Further submissions were requested in relation to the reference date*. The Respondent submits that the reference date is 30 September 2013 being the day that the Claimant completed its work. *The Claimant refers to an invoice of 25 November 2013 for repair being made to the wardrobes that form part of the Claimant's scope of work. The Respondent does not contest this submission and as such I determine that contract work was being carried out on 25 November 2013.* The claim for this work arises from a reference date after this date.
>
> I determine that the reference date is a date determined under section 9(2)(b) of the Act calculated from the date that work commenced and being after 25 November 2013. The Respondent submits that the payment claim was served outside the period provided in the Act. The Act requires at section 14(4)(b) a payment claim in respect of a progress payment (other than in respect of the progress payment that is a final, single or one-off payment) may be served only within the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment.
>
> The reference date is after 25 November 2013 and the payment claim was served on 21 February 2014 which is within the 3 month period.[20]

31 The adjudicator also held that the valid time for payment was 23 March 2014. He arrived at this date on the basis of the lack of objection by Hallmarc to the date for payment claimed by Saville, concluding that Hallmarc 'agreed with the due date for payment as stated in the Claimant's notice in not objecting at the time and providing a payment schedule'.[21]

32 The adjudicator proceeded to consider the claimed amount including the invoices to which Saville had referred. He determined that the scope of work under the construction contract included project management of the works. He said:

> The contract scope of work includes the Claimant's project management of the works. The Respondent concedes in the payment schedule that the contract sum allowed for a reasonable amount for project management/sourcing and expenses.[22]

33 He therefore found that Saville's claim for the sourcing/project manager fee and expenses was not a variation of the construction contract and so allowed that claim. However, he found that the claim by Saville for additional work (some rectification work) was a variation to the contract that had not been authorised by Hallmarc and so could not be claimed. He also rejected the claims for additional time spent in China, and interest on outstanding payments.

34 As mentioned, the adjudication determination was that Saville was entitled to payment

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20 Adjudication determination 5.2-5.3 (emphasis added).

21 Ibid 5.1.

22 Ibid 5.5.2.

of $46,328.10. The sum ordered was $53,606.52 inclusive of interest and costs of the adjudicator.

The judge's reasons

35 The judge made declarations that both the first and second payment claims did not comply with the mandatory requirements under ss 9 and 14 of the Act and were invalid. He also declared that the adjudication determination, which was founded on the first payment claim, was void. He ordered that the adjudication determination be quashed. He found that Saville is out of time to serve any further payment claims or any final payment claim under the construction contract, pursuant to the Act. He noted that the only relief potentially remaining available to Saville is to commence proceedings in an appropriate jurisdiction.

36 The judge supported the orders he made by accepting new evidence beyond that considered by the adjudicator.[23] He held that, on this basis, the adjudicator was mistaken and had committed a jurisdictional error in his assumption of jurisdiction:

> Taking into account the new evidence presented at the trial which was relevant to the jurisdictional issue, I am satisfied that Mr Martin, the Adjudicator appointed under the Act, was mistaken in his *assumption of jurisdiction* in this case. As such, he fell into jurisdictional error, in the sense described in *Craig*. The error was that, for the purposes of the time limit running under the Act for the service of the First Payment Claim, the reference date was found by the Adjudicator to be after 25 November 2013, when this was not the case.[24]

37 The judge did not further characterise the jurisdictional error as an error of jurisdictional fact or otherwise but it would appear from his characterisation of the adjudicator as having been 'mistaken in his *assumption of jurisdiction*'[25] that he considered that the adjudicator had made an erroneous finding of fact on which his jurisdiction to embark on the adjudication depended; that is, he had erred with respect to a jurisdictional fact. This appears to be confirmed by the declaration the judge ultimately made that:

> [T]he Adjudication Determination made by the Second Defendant, Mr Martin, which was *founded* on the First Payment Claim, is void.[26]

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23 He did this on the basis of *Craig v South Australia* (1995) 184 CLR 163, 176 and *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535.

24 Reasons [9] (emphasis added).

25 Ibid.

38 The judge accepted affidavit evidence by a director of Hallmarc, Joseph Italiano ('Italiano'), and by Sarkis (relevantly, an affidavit sworn by Sarkis on 16 July 2014) that the work that was done relevantly to the 25 November 2013 invoice was not done on Saville's behalf but was done solely for Hallmarc. It was thus not work performed under the construction contract. It could not therefore extend the work carried out by, or on behalf of, Saville, beyond the date of 30 September 2013. His Honour said:

> In relation to the work done pursuant to the invoice of 25 November 2013, which was relied upon by the Adjudicator to make a finding that this was the last date when Mr Saville performed work under the Construction Contract, it is to be noted that the Construction Contract did not require Mr Saville to review or assess the invoices of installation contractors engaged by the Plaintiff to install the joinery or rectify defects in the joinery supplied.
>
> With regard to the work done evidenced by the 25 November invoice, Mr Joseph Italiano, a director of Hallmarc, gave evidence to the following effect, which I accept:
>
> > I am informed by Charbel Sarkis and verily believe that, there were various defects in the joinery supplied and installed by the First Defendant, such that the Plaintiff itself engaged other contractors directly to rectify defective of joinery and installation. *This was instituted solely by the Plaintiff and was not done pursuant to any agreement or arrangement between the Plaintiff and any of the First Defendant 'Kbl Studio' or 'China Sourcing Services'*.[27]

39 The judge went on to say:

> Further, Mr Charbel Sarkis, a contract administrator employed by Hallmarc, gave unchallenged evidence before this Court that:
>
> > Various Items of the joinery supplied by the First Defendant were defective and required additional work by the joinery contractors engaged by the Plaintiff to install the joinery. For example, an email to me from Marc McAlpine from Max Joinery & Installations Pty Ltd dated 8 October 2013 sets out various defects identified in the joinery provided by the First Defendant.
> >
> > Accordingly, the Plaintiff itself engaged joinery contractors after the First Defendant had left the site to rectify defects in the joinery supplied by the First Defendant.
> >
> > One of the contractors engaged by the Plaintiff to perform rectification work was JMP Carpentry. In September 2013 I called Jake Panozzo from JMP and engaged him to undertake joinery works on hourly rate basis. On 25 October 2013 and on **25 November 2013**, JMP Carpentry rendered invoices to the Plaintiff for work that it performed on the Project which invoices were paid by the Plaintiff on 30 October 2013 and 6 December 2013 respectively.[28]

40 The judge found that the construction contract did not provide for the issue of any

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26 Reasons [30] (emphasis added). Declaration 1(b) of the Orders made 7 October 2014.

27 Ibid [10]–[11] (emphasis added).

28 Ibid [12] (emphasis as in original).

final certificate or any defects liability period. He rejected the view that when JMP Carpentry was engaged in rectifying defects it was performing any contractual obligation of Saville's as its agent or subcontractor. He said:

> I find that late in 2013, Hallmarc directly engaged its own contractor, JMP Carpentry, to attend to rectification works on its own behalf. I reject the contention advanced by Mr Saville that JMP Carpentry was engaged by Hallmarc as Mr Saville's agent. [29]

41 The judge noted that as the construction contract did not itself provide for the calculation of reference dates under the Act, rectification periods, final claims or time for payment for Saville's claims, the default provisions under the Act applied, including, as mentioned, those for the calculation of reference dates under s 9(2)(b) and (d)[30] and the determination of the time within which Saville had to serve any valid payment claims under s 14(5)(b).[31]

42 By contrast with the adjudicator, the judge held that the first payment claim was a final payment claim.[32] He relied on statements contained in the payment claim served by Saville on Hallmarc, which he found 'in form and in substance [was] couched as a final claim'.[33] The judge noted that the first payment claim said:

> A final payment to CSS is claimed herewith for work under contract and contract variations.[34]

43 It also provided:

> CSS hereby gives notice that as CSS has received no further verified claims for rectification it considers that Hallmarc requires no further supply or rectification, and that performance of the contract by CSS is therefore complete and that any further liability of CSS for rectification ceases as of today.

44 The judge therefore applied s 9(2)(d) of the Act which provides that the reference date is the date immediately following the day when construction work was *last* carried out under

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29 Ibid [14].

30 See [7] above.

31 See [11] above.

32 Reasons [20]. He also considered the second payment claim to be a final payment claim. He said that they 'were both claims which sought a "final balancing of account" between the contracting parties as described by Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, [17]'.

33 Reasons [20].

34 Ibid.

the contract, or when related goods and services were *last* supplied under the contract.[35]

45 He found that the last day on which Saville had performed work under the construction contract, or provided related goods or services, was 30 September 2013. He based this finding upon the affidavit evidence of Italiano and Sarkis. He said:

> Mr Joseph Italiano, a director of Hallmarc, gave evidence to the following effect:
>
> > I am informed by Charbel Sarkis, the Plaintiff's contract administrator for the Project and verily believe that:
> >
> > a) Goods were last despatched from the factory and delivered to the Project Site in August 2013.
> >
> > b) The First Defendant ceased performing work under the Construction Contract on 30 September 2013, being the date on which he last attended the Project site to clean up and remove his tools and materials.
> >
> > To my knowledge, after 30 September 2013, the First Defendant has not supplied any joinery to the Plaintiff, installed any Joinery at the Project, attended to rectification of any defects in the joinery supplied or installed by him at the Project or attended the Project site at all. To my knowledge, after that date, no subcontractors nor any other servants or agents of the First Defendant, 'Kbl Studio' or 'China Sourcing Services' ever returned to the site or provided to the Plaintiff any related goods or services, nor was any construction work undertaken by them, under the Construction Contract.
>
> Mr Charbel Sarkis, a contract administrator employed by Hallmarc, gave evidence that:
>
> > [In] September 2013, the First Defendant was last on site to undertake final cleaning of the basement where his goods and tools were stored throughout construction. No subcontractors nor any other servants or agents of the First Defendant, 'Kbl Studio' or 'China Sourcing Services' ever returned to the site or provided to the plaintiff any related goods or services, nor was any construction work undertaken by them, under the Construction Contract after that date.
> >
> > In particular, I say that the First Defendant did not supply or install any joinery or rectify any defects in joinery supplied or attend the Project site after 30 September.
>
> I accept the evidence that the last date on which Mr Saville last undertook construction work, or provided related goods or services, under the Construction Contract was 30 September 2013.[36]

46 Having determined that the last day on which Saville carried out construction work under the construction contract was 30 September 2013, he found that the reference date, being the date immediately following that date, pursuant to s 9(2)(d)(iii),[37] was 1 October 2013. He held that the service of the first payment claim (21 February 2014) was not

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35 See [7] above.

36 Reasons [17]–[19].

37 See [7] above.

undertaken within the time provided by s 14(5)(b) of the Act, namely within three months after 1 October 2013 (that is, the reference date referred to in s 9(2)(d)(iii)). The last day for valid service of a payment claim was 1 January 2014. It followed that Saville's purported service of the first payment claim was almost seven weeks in excess of the mandatory time limit.

47 The judge concluded:

> In *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd & Ors* the Court emphasised that, while the Act is intended to provide for the rapid determination of progress claims under construction contracts, without the parties becoming weighed down in lengthy and expensive litigation or arbitration (which would tend to suggest that excessive technicality in the construction of its provisions should be avoided), nevertheless the clear time limits in the Act which are mandatory need to be strictly observed in order to properly balance the relevant competing interests. In this regard, the Court said:
>
> > [T]he Act gives very valuable, and commercially important, advantages to builders and subcontractors. It alters the balance of power in favour of those parties in relation to progress payments in a significant way. In recognition of this position, the availability of the rights conferred by the Act are governed by, and depend upon, the observance of clear specifications of time and the other requirements expressed in the Act, either in mandatory terms or as defined prohibitions. These provisions are to be found at each stage of the regime for enforcement of the statutory right to progress payments. Such provisions, in accordance with the legislative purpose expressed in the text of each, call for strict observance.
>
> I have found that the last date on which Mr Saville last undertook construction work, or provided related goods or services, under the Construction Contract was 30 September 2013. The date immediately following was 1 October 2013, when time under s 14(5)(b) of the Act began to run. This meant that [the] payment claim in respect of a final payment could be served only within three months of 1 October 2013, which is 1 January 2014.
>
> Accordingly, the First Payment Claim being served on 21 February 2014 and the Second Payment Claim being served on 16 May 2014 were both hopelessly out of time.
>
> It follows from these findings that both purported First and Second Payment Claims failed to comply with the mandatory requirements under ss 9 and 14 of the Act, and were invalid.
>
> It also follows that the Adjudication Determination made by the Second Defendant Mr Martin, which was founded on the First Payment Claim, is void.
>
> It further follows that Mr Saville is out of time to serve any further Payment Claims or any Final Payment Claim under the Construction Contract, pursuant to the Act. His only remedy is to seek recourse for any payment he claims may be due to him in proceedings in a Court of the appropriate jurisdiction, should he be so advised to pursue such proceedings.[38]

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[38] Reasons [24]–[29] (citations omitted).

48 In summary, the foundation of the judge's reasoning was that the work performed referable to the invoice of 25 November 2013 was work performed solely for Hallmarc and did not reflect either construction work undertaken by Saville, or the supply of related goods and services by Saville, or on his behalf, pursuant to the construction contract. The reference date fixed by the adjudicator (after 25 November 2013) was thus in error. The first payment claim and the adjudication application made out of time were therefore void. The adjudicator was mistaken in his assumption of jurisdiction. These matters were directly challenged on appeal, as was the scope of reviewable error with respect to the adjudication determination.

The grounds of appeal

49 The grounds of appeal relied on by Saville are:

1. The judge erred in finding that the adjudication was mistaken in determining as a fact that Saville last performed work under the construction contract on 25 November 2013 was a reviewable error of law in an application for judicial review or on certiorari.

2. The judge erred in finding that the adjudication was mistaken in determining as a fact repairs being carried out to wardrobes in November 2013 form part of Saville's scope of work under the construction contract was a reviewable error of law in an application for judicial review or on certiorari.

3. The judge erred in finding that the adjudication was mistaken in determining the respondent was not entitled under the construction contract to take work out of the hands of Saville was a reviewable error of law in an application for judicial review or on certiorari.

4. The judge erred in finding that the adjudication was mistaken in determining as a fact the due date for payment of the claim sent on 21 February 2014 was 23 March 2014, was a reviewable error of law in an application for judicial review or on certiorari.

5. The judge erred in finding that the adjudication was mistaken in determining as a fact Saville's scope of work included the supply of joinery items including organising, co-ordinating and checking goods before delivery to Hallmarc, unloading the containers, and supply and installing the wardrobes.

6. The judge erred in finding that the adjudication was mistaken in determining as a fact, Hallmarc had taken work that was within Saville's scope of work out of his hands and completed the work without his agreement.

7. The judge failed to deal with the substantial point raised by Saville that the letter dated 7 February 2013 was not the sole repository of the agreement between Saville and Hallmarc or to assign reasons for rejection or exclusion of the point raised.

8. The judge erred in failing to deal with or explain or assign reasons for

excluding or rejecting evidence contained in specified paragraphs of various of Saville's affidavits[39] as to installation work performed between 30 September and 25 November 2013, as to the documents and discussions constituting the agreement between the parties, as to the works the subject of invoices rendered by JMP Carpentry, and as to reconciliation sheets referring to those invoices.

9. The primary judge erred in failing to consider and apply or to explain the exclusion of the principle enunciated in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd,*[40] raised and relied upon by Saville, that a reviewable error relating to the validity of the adjudication is limited to straightforward calculations of time or determinations that are arbitrary, capricious and irrational.

50 It is noteworthy that the grounds of appeal do not place in issue the character of the first payment claim, the payment claim served on 21 February 2014, as a final payment claim. It follows that s 9(2)(d) of the Act is the critical provision for the disposition of the appeal.

The notice of contention

51 Hallmarc has filed a notice of contention raising the following grounds for affirming the judge's decision:

1. If, as Saville contends (but which contention Hallmarc disputes), it was not open for the judge to prefer, and the judge in fact wrongly preferred, Hallmarc's evidence to Saville's evidence on the question of the date when Saville last performed work under the construction contract, then Hallmarc contends that Saville's evidence in this regard, namely:

   (a) Saville affidavit sworn 21 May 2014, in particular [141], [143], [144] & [147]; and

   (b) Saville affidavit sworn 16 July 2014, in particular [10], [63], [67], [108], [129], [131] & [134]–[142],

   was inadmissible and ought to have been excluded on the grounds set out in Hallmarc's notice of objection to evidence dated 23 July 2014, but which objection the judge failed to expressly rule upon or address in the course of his Honour's judgment.

2. Insofar as Saville seeks to rely upon evidence of antecedent negotiations between the parties in order to add to, vary, depart or resile from the terms of the written contract executed by the parties on 28 February 2013, then such evidence was inadmissible and ought to have been excluded on the basis of authorities such as *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*;[41] *Brambles Holdings Ltd v Bathurst City Council*;[42] *Ambridge*

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39 These are particularised in the Amended Notice of Appeal and each paragraph is dealt with below.

40 (2010) 78 NSWLR 393, [102].

41 (1982) 149 CLR 337, 352 (Mason J).

Investments Pty Ltd (in liq) (rec apptd) v Baker;[43] *FAI Traders Insurance Co Ltd v Savoy Plaza Pty Ltd*[44] and *Lederberger v Mediterranean Olives Financial Pty Ltd*,[45] which authorities were expressly relied upon in Hallmarc's Outline of Submissions in Reply dated 5 August 2014, but which objection the judge failed to expressly rule upon or address in the course of his Honour's judgment.

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42 (2001) 53 NSWLR 153, 163–5 (Heydon JA).

43 [2010] VSC 59, [160], [198]–[200] (Vickery J).

44 [1993] 2 VR 343, 350 (Brooking J, Nathan and Eames JJ agreeing).

45 (2012) 38 VR 509, 516–9 [23]–[29] (Nettle and Redlich JJA and Beach AJA).

The issues

52 It is convenient to consider the grounds of appeal as raising the following issues:

(1) The scope of reviewable error by the adjudicator;[46]

(2) The scope of works under the construction contract;[47]

(3) The source of the construction contract.[48]

53 At the hearing of the appeal, there was considerable reliance placed upon the question of the extent of reviewable error with respect to the adjudicator's determination. It is useful to start with an examination of this issue.

(1) The scope of reviewable error by the adjudicator

54 Saville contends that the judge erred in finding that the determination by the adjudicator that Saville last performed work under the construction contract on 25 November 2013 was a reviewable error of fact in an application for judicial review or an application for certiorari. In other words, he submits that the judge was wrong to characterise the date on which Saville last undertook work as a 'jurisdictional fact'; that is, a fact which is 'an essential preliminary or a condition precedent'[49] to the assumption of jurisdiction.

55 A jurisdictional fact is an event, fact, or circumstance which, as Dixon J observed in *Parisienne Basket Shoes Pty Ltd v Whyte*,[50] is 'made a condition upon the occurrence or exercise of which the jurisdiction of a court shall depend.'[51]

56 In *City of Enfield v Development Assessment Commission*,[52] the High Court described

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46 Grounds 1, 2, 3, 4 and 9.

47 Grounds 5, 6 and 8(a), (c), (d) and (f).

48 Grounds 7 and 8(b) and (e).

49 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 385 (Starke J). See also Windeyer J in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 399 who described a jurisdictional fact as a 'condition of jurisdiction'. See further *R v Blakeley; Ex parte Association of Architects of Australia* (1950) 82 CLR 54.

50 (1938) 59 CLR 369.

51 Ibid 391.

52 (2000) 199 CLR 135 ('*Enfield*').

a 'jurisdictional fact' as the criterion that must be satisfied before a statutory power is enlivened:

> The term 'jurisdictional fact' (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion.[53]

57 This understanding was further reflected in *Gedeon v Commissioner of the New South Wales Commission*:[54]

> The expression 'jurisdictional fact' … is used to identify a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question. If the criterion be not satisfied then the decision purportedly made in exercise of the power or discretion will have been made without the necessary statutory authority required of the decision maker.[55]

58 In *Gedeon*, the Court illustrated the meaning of 'jurisdictional fact' by reference to an observation by Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*[56] in which an industrial body could not begin to deal with the issue of rates of remuneration unless it first determined that the rates were anomalous:

> The concept appears from the following passage in the reasons of Latham CJ in *R v Connell; Ex parte Hetton Bellbird Collieries Ltd*:
>
> > 'The subject matter with which the Industrial Authority deals is, inter alia, rates of remuneration. There is power to deal with this subject matter in respect of rates of remuneration which existed on the specified date only if the authority is satisfied that the rates in question are anomalous. Unless this condition is fulfilled, the authority cannot act — it is a condition of jurisdiction.'[57]

59 If a matter amounts to a jurisdictional fact it is reviewable by a superior court to determine if the decision maker was correct in finding that the pre-condition of its jurisdiction was satisfied and thus that its statutory power was enlivened.[58] Moreover, it is reviewable, in effect, de novo, that is, by reference to the evidence available to the reviewing court. This was confirmed in *Enfield*:[59]

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53 Ibid 148 [28].

54 (2008) 236 CLR 120 ('*Gedeon*').

55 Ibid 139 [43].

56 (1944) 69 CLR 407, 429–30.

57 (2008) 236 CLR 120, 139 [44] (citations omitted).

58 Putting to one side jurisdictional errors in failing to find that a jurisdictional fact exists leading to a failure or refusal to assume jurisdiction.

59 (2000) 199 CLR 135.

> where the question is whether the decision-maker has erred as to the jurisdictional facts … that question has to be answered by the court in which it is litigated upon the evidence before that court.[60]

60 Where the jurisdictional fact is the existence of a fact, the reviewing court can determine on the balance of probabilities whether the fact exists.

61 An assumption of jurisdiction when the statutory conditions precedent for the exercise of that jurisdiction are not satisfied is a jurisdictional error resulting, relevantly, in the decision becoming a nullity[61] as 'a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all'.[62]

62 Errors made with respect to a jurisdictional fact are thus to be distinguished from, relevantly, errors of fact-finding made by an administrative tribunal within the course of an enquiry properly embarked upon. Errors made *within* jurisdiction (non jurisdictional errors) are unreviewable in a proceeding for judicial review[63] save where the error amounts to an error of law on the face of the record.[64] As the High Court observed in *Refugee Review Tribunal; Ex parte Aala*:[65]

> The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.[66]

63 Saville submits that the finding made by the adjudicator fell within the scope of facts which he was empowered to determine that are not capable of review. Saville relies upon

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60 Ibid 146 [22].

61 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 ('*Bhardwaj*'). The judge described the adjudication determination as 'void': Reasons [28]. See [37] above.

62 *Bhardwaj* (2002) 209 CLR 597, 616 [53].

63 *Enfield* (2000) 199 CLR 135, 153–4 [44]. Whether such an error is subject to a right of appeal depends upon the relevant legislation.

64 *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338; *Hockey v Yelland* (1984) 157 CLR 124.

65 (2000) 204 CLR 82 ('*Aala*').

66 Ibid 141 [163].

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd[67] and the following remarks of Basten JA:

> [102] The opinion of the Tribunal that its jurisdiction was engaged cannot be arbitrary, capricious or irrational and must be an opinion open to a reasonable person correctly understanding the meaning of the law under which authority is conferred … . Although … the Court may be slow to intervene where authority depends upon a matter of 'opinion or policy or taste' …, that will not be so where authority depends upon a straightforward calculation of time, as in the present case.[68]

64 Saville further argues that the reasoning of Basten JA was adopted by Vickery J in another case involving a dispute under the Act, *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd*,[69] when he said:

> It is well established in the case law, including for example *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture* [*(No 2)*][70] … that errors of fact in the usual case, where the question in issue is referred by the empowering statute to a tribunal to determine, are not regarded as errors of law, which are capable of review on an application on certiorari. In other words an adjudicator charged with the making of an adjudication determination under the Act is entitled to make an error of fact and not have that decision reviewed judicially. This is sometimes described as the 'power to make a wrong decision'.[71]

65 The circumstances in *Chase Oyster Bar* involved a straightforward miscalculation of time under s 17(2)(a) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the NSW Act'). The NSW Act establishes a regime comparable to that created under the Act. Section 17 of the NSW Act provides:

> **17 Adjudication applications**
>
> (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) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or
>
> (ii) the respondent fails to pay the whole or any part of

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67 (2010) 78 NSWLR 393 ('*Chase Oyster Bar*').

68 Ibid 417 [102] (citations omitted).

69 [2013] VSC 535 ('*Sugar Australia*').

70 (2009) 26 VR 172 ('*Grocon*'). *Grocon* is also a decision of Vickery J.

71 *Sugar Australia* [2013] VSC 535, [9] (citations omitted).

the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless:

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

66 Chase Oyster Bar Pty Ltd ('Chase') and Hamo Industries Pty Ltd ('Hamo') contracted for Hamo to carry out fitout work for Chase at the Chase Oyster Bar in Chatswood Chase, a large shopping centre in Chatswood, Sydney, New South Wales. Hamo made a number of payment claims. The payment claim at issue was served on Chase on 31 December 2009. Chase did not provide a payment schedule in response to the relevant payment claim. The due date for payment of the claimed amount was 13 January 2010. Chase's failure to provide a payment schedule meant that it became liable to pay the claimed amount to Hamo on the due date but did not do so. Hamo sought to make an adjudication application. Pursuant to s 17(2)(a) of the NSW Act Hamo could not apply for an adjudication unless it notified Chase, within 20 business days after 13 January 2010, of its intention to apply for adjudication. Hamo did not give notice of its intention to apply for adjudication until 11 February 2010, which is outside the 20 business days period allowed for under the NSW Act. An adjudicator was appointed and made a determination concluding that Hamo was entitled to the claimed amount, together with interest. He found that Hamo's notice pursuant to s 17(2)(a) of the NSW Act had been given within the time required.

67 Questions were removed into the New South Wales Court of Appeal specifically to consider whether determinations made by adjudicators are subject to the supervisory jurisdiction of the Supreme Court and amenable to orders in the nature of certiorari. The New South Wales Court of Appeal (Spigelman CJ, Basten JA and McDougall J) held that

determinations made by adjudicators are reviewable by the Supreme Court for jurisdictional error and that an incorrect finding that s 17(2)(a) had been complied with is vitiated by jurisdictional error.[72] It held that in the circumstances of the case the adjudication application had not been made in compliance with s 17(2)(a) of the NSW Act, McDougall J describing the finding of compliance by the adjudicator to be 'plainly wrong'.[73] The Court further held that the determination of the adjudicator made in the absence of a valid adjudication application is invalid. The reasoning differed amongst the judges, an issue to which we will return. Suffice it to say here that McDougall J held that the giving of notice in time under s 17(2)(a) is a jurisdictional fact.[74]

68 Saville submits that the circumstances in *Chase Oyster Bar* involved a straightforward calculation of time and compliance with s 17(2)(a) was reviewable because of that. By contrast, he submits, in the present case, the determination made by the adjudicator that the reference date was after 25 November 2013 was not a straightforward calculation of time but rather was a matter that depended upon evaluation and opinion involving, having regard to the evidence before him, making findings on the following issues, none of which Saville claims are capable of review:

(1) when work was last performed under the construction contract;

(2) what work was carried out between 30 September 2013 and 25 November 2013;

(3) whether the work fell within the scope of works under the construction contract.

69 Furthermore, Saville claims the judge did not consider whether the opinion of the adjudicator was arbitrary, capricious or irrational, or an opinion open to a reasonable person,

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72 The Court held that insofar as *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 ('*Brodyn*') held that an order in the nature of certiorari was not available to quash or set aside a decision of an adjudicator under s 17(2)(a) of the NSW Act, it was in error. (Vickery J had already held that *Brodyn* did not apply in Victoria: *Grocon* (2009) 26 VR 172, 195–99 [85]–[102].) The Court also held that an ouster clause in the NSW Act did not preclude judicial review, especially in the light of *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 ('*Kirk*').

73 *Chase Oyster Bar* (2010) 78 NSWLR 393, 420 [121].

74 Ibid 440 [222]. In the context of the Act see also *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2015] VSC 233 [81]–[88] (Vickery J).

and that, in any event, the adjudicator's opinion as to the date on which Saville last performed work under the contract was reasonably open to him and was not arbitrary, capricious or irrational.

70 In response, Hallmarc submits that its case before the judge, and on appeal, is that the first payment claim was a final payment claim and was served outside the mandatory time period stipulated by s 9(2)(d) of the Act. Accordingly, the first payment claim did not constitute a valid payment claim under the Act and could not found a valid jurisdictional basis for an adjudication under the Act. It submits that the judge, having accepted this submission, did not have to consider all the other challenges raised by Saville. Hallmarc argues that it was common ground at trial that Saville last attended the construction site or directly provided construction goods or services to Hallmarc on 30 September 2013 and that the basis for Saville's insistence that the work carried out by JMP Carpentry was performed as his agent never rose above bare and inadmissible assertion. It was a question of fact as to who engaged that subcontractor and on what basis, and only Hallmarc's witnesses gave direct evidence about such matters. Saville did not seek to cross-examine either Sarkis or Italiano on this or in any other respect. Hallmarc submits that Saville did not put before the judge any admissible evidence of an express agency relationship. Moreover, having left the site by 30 September 2013, Hallmarc submits Saville was in breach of the construction contract and he cannot now avail himself of his own wrongdoing by claiming that the necessary rectification works were performed by JMP Carpentry as his agent where there is no evidence of such an agency.

71 The issue of whether JMP Carpentry was acting as Saville's agent is a central factual question going to the validity of the first payment claim under the Act and the adjudicator's jurisdiction. Hallmarc submits that this is a paradigm example of a matter of jurisdictional error which was open to the judge to consider by way of judicial review. In support, Hallmarc also points to observations made by Vickery J in *Sugar Australia* approving remarks of Basten JA in *Chase Oyster Bar*:

> Critically, an adjudicator is given no express power in s 23 of the … Act, or anywhere else in the Act, to decide facts which may go to his or her jurisdiction.

In *Chase Oyster Bar*, Basten JA determined that the power to determine compliance with the jurisdictional requirements which work to confer jurisdiction on the adjudicator is not given to the adjudicator. Further, the Court is not bound by any finding that these requirements have been met.

Basten JA said in this regard:

> The power to determine compliance with the essential requirements of an Adjudication Application could lie with the authorised nominating authority (to whom the application is made), the adjudicator (to whom the application is referred) or the Court exercising its supervisory jurisdiction.
>
> The structure of the Act might suggest that it would be inappropriate to refer an invalid Adjudication Application to an adjudicator; there would then be an implied obligation on the authorised nominating authority to consider the validity of the application made to it. Arguably the duty to refer an application to an adjudicator (see s 17(6)) is limited to a valid Adjudication Application. However, as no party before this Court argued for that construction, it may be put to one side.
>
> The second possibility is that power to determine the validity of an Adjudication Application lies with the adjudicator. In a practical sense, there is much to recommend the view that the adjudicator is able to determine whether the application complies with provisions such as s 17(2)(a), as the adjudicator sought to do in the present case. However, there are factors which support a contrary view. First, s 22(1), identifying that which the adjudicator is to determine, makes no reference to the validity of the Adjudication Application. Secondly, s 22(2), limits the matters which the adjudicator is entitled to consider to the Act, the provisions of the construction contract, the payment claim, the payment schedule, submissions in support of either and the results of any inspection. In a provision which renders the consideration of any other material impermissible, the absence of any reference to the circumstances in which the Adjudication Application was made is highly significant.
>
> Thirdly, the descriptions of the matters to which payment claims and payment schedules must relate and hence (at least implicitly) the matters to which the submissions in support can properly refer, do not expressly identify any aspect of the circumstances in which the Adjudication Application was made.
>
> For these reasons, the proper construction of the *Security of Payment Act* is that it does not permit the adjudicator to determine the validity of the Adjudication Application. The challenge in the present case must therefore be determined on the basis of facts found by the Court.[75]

These observations of Basten JA were expressly adopted by McDougall J in *Chase Oyster Bar*.[76]

72 Vickery J went on to say in *Sugar Australia* that: (1) an adjudicator is not permitted under the Act to finally determine the validity of an adjudication application; and (2) any challenge to the assumption of jurisdiction by an adjudicator must be finally determined by a court on judicial review. He sought to explain earlier comments he had made in *Grocon*:

> In the light of *Kirk* and *Chase Oyster Bar*, the statements referred to in paras [115]–

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75 *Chase Oyster Bar* (2010) 78 NSWLR 393, 416–17 [97]–[101].

76 *Sugar Australia* [2013] VSC 535, [107]–[110].

[116] of *Grocon*, call for some clarification and qualification.

In *Grocon* it was said:

> With the exception of the case where the basic and essential requirements of the Act for a valid determination are not satisfied, or where the purported determination is not a *bona fide* attempt to exercise the power granted under the Act, if the Act does make the jurisdiction of an adjudicator contingent upon the actual existence of a state of facts, as distinguished from the adjudicator's determination that the facts do exist to confer jurisdiction, in my opinion the legislation would not work as it was intended to. Unnecessary challenges to the jurisdiction of an adjudicator appointed under the Act would expose the procedures to delay, cost and expense. The very purpose of the Act would be compromised.
>
> For these reasons, in my opinion, in order to serve the purposes of the Act, the intention of the legislation is to confer upon an adjudicator the capacity to determine facts which go to his or her jurisdiction, subject to exceptions of the type to which I have referred. It follows that, in making those determinations, the Act confers on adjudicators jurisdiction to make an incorrect decision in relation to such jurisdictional facts which will not be overturned by certiorari.

For the purposes of s 18 of the … Act, it appears to me that the elements of the section which serve to confer jurisdiction on an adjudicator to make a valid determination under s 23, on the proper construction of the Act, do not permit the adjudicator to finally determine the validity of the adjudication application. If there be any challenge to the jurisdiction assumed by the adjudicator it must [be] finally determined on the basis of facts found by the Court on judicial review, in the course of determining whether a jurisdictional error has been exposed which calls for the exercise of the Court's discretion to grant relief in the nature of certiorari and, if necessary, mandamus. The Court may grant relief on such relevant evidence as may be adduced before it, whether or not such evidence was before the adjudicator at first instance. Further, the Court may grant such relief without regard to any determination which may have been made on the issue of jurisdiction by the adjudicator. The Court is obliged to arrive at its own conclusion as to jurisdiction based on the law and on the facts as found by it.

This is not to say that an adjudicator should not make any findings of fact or rulings on law if a question of jurisdiction is raised in the course of determining an adjudication application. Clearly if an adjudicator is presented with material or submissions which bring into question the jurisdiction of the adjudicator, he or she should determine the question and give reasons for the findings of fact or rulings on law. If however the adjudicator's decision on jurisdiction is challenged in Court on judicial review, the Court may deal with the matter afresh and receive additional evidence on the matter if the additional evidence is relevant to the determination of the question.[77]

73 Vickery J acknowledged in *Sugar Australia* that if the view he expressed therein was inconsistent with what he had earlier said in *Grocon* then he did not follow his earlier ruling:

> To the extent that anything inconsistent with this conclusion appears in paras [115]–[116] of *Grocon*, in the light of the later reasoning of the High Court in *Kirk* and of the New South Wales Court of Appeal which followed it in *Chase Oyster Bar*, I do not follow my earlier ruling.[78]

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77 [2013] VSC 535, [111]–[114] (citations omitted).

78 Ibid [115].

74 Hallmarc submits that Saville's written submissions misconstrue what Basten JA said at [102] in *Chase Oyster Bar*.[79] It is plain that these remarks were subject to the broader principles identified in the preceding paragraph of Basten JA's reasons, as is apparent when the paragraphs are read in their entirety:

> [101] For these reasons, *the proper construction of the Security of Payment Act is that it does not permit the adjudicator to determine the validity of the adjudication application*. The challenge in the present case must therefore be determined on the basis of facts found by the Court.
>
> **Challenge to opinion of adjudicator**
>
> [102] *If the last conclusion be wrong*, *and the practical considerations should be considered determinative*, the decision of the adjudicator in respect of the validity of an adjudication application would not be beyond review. The opinion of the Tribunal that its jurisdiction was engaged cannot be arbitrary, capricious or irrational and must be an opinion open to a reasonable person correctly understanding the meaning of the law under which authority is conferred … . Although, as noted by Gibbs J in *Buck v Bavone*, the Court may be slow to intervene where authority depends upon a matter of 'opinion or policy or taste' (at 119), that will not be so where authority depends upon a straightforward calculation of time, as in the present case.[80]

75 Basten JA was thus recognising that, even if the power to determine the validity of an adjudication application lies with the adjudicator (a proposition which he rejected), this would not place the determination beyond review because it could still be reviewed if it was arbitrary, capricious or irrational or where, for example, there were errors with respect to straightforward calculations of time.

76 We agree with Hallmarc that Saville has misconstrued the remarks of Basten JA in *Chase Oyster Bar*.

77 In determining that the Supreme Court had supervisory jurisdiction over the adjudicator in *Chase Oyster Bar*, Basten JA emphasised that the adjudicator was exercising a statutory function; was permitted to have regard only to the matters set out in the statute (which did not include the validity of an adjudication application); and the right to payment to be determined by the adjudicator was a right which was the creation of statute, although the amount might depend upon the contract. An adjudicator, in exercising a statutory function of

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79 See [63] above.

80 *Chase Oyster Bar* (2010) 78 NSWLR 393, 417 [101]–[102] (emphasis added) (citations omitted).

determining the amount of a progress payment and the date on which the amount became payable, would also 'fall comfortably' within the scope of a requirement, if it was applicable, of having a 'duty to act judicially'.[81] The clause that was the most plausible candidate for an ouster clause had no application so as to preclude judicial review for jurisdictional error.

78 Basten JA accepted that compliance with the stipulated time limit in s 17(2)(a) is an essential condition for a valid adjudication application; '[t]he language of the provision ('cannot be made unless') is intractable;[82] neither the structure nor the purpose of the Act suggests a different conclusion'.[83] The only question was who had the power to determine compliance with the essential condition; relevantly, the adjudicator or the Court exercising its supervisory jurisdiction. It was in this context that Basten JA made the remarks referred to by Vickery J in *Sugar Australia*, as extracted above,[84] emphasising that the matters which the adjudicator was to determine under the Act did not include the validity of the adjudication application, and the consideration of other material was rendered impermissible. This led to the conclusion that the validity of an adjudication application was not a matter to be determined by the adjudicator but rather for the Court on review. Basten JA was satisfied that the error was jurisdictional:

> As McDougall J has determined, the adjudicator correctly identified the dates on which various events had occurred. However, the adjudicator's conclusion that the adjudication application was valid depended either on a miscalculation of the period identified in s 17(2)(a), or a misreading of the statute. If the error fell into the former category, the conclusion was one which not only lacked support in, but was inconsistent with, the primary facts as found. If in the latter category, the error involved a misconstruction of the statute in relation to the conferral of authority. On either view, the error was jurisdictional and is one in respect of which the Court can intervene.[85]

79 In our view it is quite wrong to treat the reasoning of Basten JA, as Saville has done, as supporting the narrow proposition that a determination of an adjudicator is only reviewable if it amounts to a straightforward calculation of time or is otherwise arbitrary, capricious or

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81 Ibid 413 [84]. Spigelman CJ was emphatic that no such requirement remains in Australia: Ibid 399–400 [9]–[19].

82 See [65] above.

83 *Chase Oyster Bar* (2010) 78 NSWLR 393, 416 [96].

84 See [71] above.

85 *Chase Oyster Bar* (2010) 78 NSWLR 393, 417 [103].

irrational. Basten JA is clearly endorsing a broader proposition, namely, that the determination of the essential requirements upon which the validity of an adjudication application depends is a matter for the Court, in the exercise of its supervisory jurisdiction. Whether those essential conditions amount to 'jurisdictional facts' in the manner described above was a matter to which Basten JA did not need to have regard.

80 The broader proposition was also supported by McDougall J. As mentioned,[86] he held that the adjudicator's finding that the notice pursuant to s 17(2)(a) had been given within 20 business days of the due date for payment was plainly wrong. He considered that it was relevant to ask whether compliance with s 17(2)(a) was a jurisdictional fact by asking, in accordance with the approach in *Project Blue Sky Inc v Australian Broadcasting Authority*,[87] 'in essence, whether the legislature intended that the presence or absence of the factual condition should invalidate an attempted exercise of power'.[88] In arriving at the conclusion that compliance with s 17(2)(a) was a jurisdictional fact, referred to above,[89] he identified as important the following factors about the NSW Act:

(1) it operates in a 'rough and ready' way to preserve the cash flow to a builder notwithstanding that the builder might ultimately be required to refund the money received and yet have an inability to repay;[90]

(2) it imposes a mandatory regime regardless of the parties' contract with extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses;[91]

(3) at each stage of the regime for enforcement of the statutory right to progress payments, it lays down clear specifications of time and other requirements to be observed, rendering it not difficult to understand 'that the availability of those rights

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86 See [67] above.

87 (1998) 194 CLR 355, 390–1 [93] ('*Project Blue Sky*').

88 *Chase Oyster Bar* (2010) 78 NSWLR 393, 428 [166].

89 See [67] above.

90 *Chase Oyster Bar* (2010) 78 NSWLR 393, 437 [207]–[208].

91 Ibid 437 [208].

should depend on strict observance of the statutory requirements that are involved in their creation';[92]

(4) as adjudication determinations are capable of being filed as a judgment for debt in a court of competent jurisdiction, a respondent to a payment claim should not be at risk of suffering a judgment where a temporal limitation has not been complied with by the claimant;[93]

(5) a claimant has alternative remedies; 'even if the door to adjudication is closed, the door to judgment remains open'.[94]

81 All of these considerations apply also to the Act.

82 McDougall J also relied on specific features of the statutory language. Under s 17(2) it is clear that '[w]here there has been no payment schedule and no payment, an adjudication application "cannot be made unless" the requisite notice is given within the specified time. The words "cannot be made" suggest strongly that, in the absence of notice, there is no right to make an application'.[95]

83 He took the view that the weight of those factors, amongst others, favoured the conclusion that the requirements of s 17(2)(a) are jurisdictional in that they are conditions that must be satisfied for a valid adjudication application to be made. He said:

> Considerations of inconvenience and departure from the statutory scheme do not tell against that conclusion. There are a number of reasons why this is so:
>
> (1) Satisfaction of the condition is a matter peculiarly within the control of the claimant. A requirement to give notice of intention to proceed to adjudication within 20 business days is hardly onerous, particularly in the context of other requirements as to time in the [NSW Act].
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> (2) It is unlikely that investigation, assessment and decision on the s 17(2)(a) jurisdictional fact will be complex. Nor is it something that is likely to involve the particular expertise of adjudicators (beyond an ability to count) or difficult questions of construction.

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92 Ibid 437 [209].

93 Ibid 437–8 [210].

94 Ibid 439 [217].

95 Ibid 438 [211].

> (3) The inconvenience resulting from any challenge (a matter to which attention was directed in the submissions for the Attorney General) is but one side of the coin; on the other side, there is the inconvenience to the respondent of being subjected to adjudication applications even in circumstances where their making is forbidden by the legislation.
>
> (4) The departure from the statutory scheme of speedy but interim resolution is scarcely substantial; on the contrary, as I have shown, the right to the claimed amount remains alive and may be enforced, either through a subsequent payment claim or by an action for debt in which the ability to defend is severely limited.
>
> As I have said, one of the consequences of the regime established by the [NSW Act] is to reallocate, at least on an interim basis, the risk of insolvency as between principal and contractor (or as between contractor and subcontractor). That is a serious matter, as is the attendant overriding of contractual rights, and infringement on freedom of contract. In my view, where there is a statutory condition laid down for initiation of a fundamental part of that process, attention to those consequences suggests that the condition should be regarded as jurisdictional.[96]

84 He also emphasised that 'the fixing of a due date for payment of a progress payment is a mechanical process' requiring 'no more than a calendar, and, perhaps, a pencil, used with an appreciation of the definition of "business day" in s 4'.[97] It stood in contrast to other requirements that depend upon the satisfaction or opinion of an adjudicator involving special expertise.

85 For Spigelman CJ the requirement of compliance with s 17(2)(a) was jurisdictional and thus subject to the supervisory jurisdiction of the Supreme Court. He emphasised that it was an essential preliminary to the decision-making process and occurred within the context of a 'detailed series of time provisions [that] is carefully calibrated to ensure expeditious resolution of any dispute with respect to payments in the building industry'.[98] However, he eschewed a characterisation of the requirement as a 'jurisdictional fact' because of the words used in s 17(2)(a) which portrayed a prohibitive character; 'cannot be made unless' indicating 'a contraction in the content of what would be the power otherwise conferred'[99] or an integer of the right to make an adjudication application under s 17(1).[100] Section 17(2)(a) is not addressed to the adjudicator and it is not a matter which an adjudicator is directed to

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96 Ibid 439–40 [218]–[219].

97 Ibid 440 [220].

98 Ibid 406 [47].

99 Ibid 403 [35], quoting *Gedeon* (2008) 236 CLR 120, 139 [46].

100 *Chase Oyster Bar* (2010) 78 NSWLR 393, 403 [35].

determine.[101]

86 Saville relied on those aspects of McDougall J's judgment, mentioned above,[102] that reflect the straightforward calculation of the time period prescribed under the NSW Act for the making of an adjudication application. But when those observations are seen in the context of his Honour's overall reasons, as described above,[103] it is clear that this was only one of several considerations which formed the foundation of his conclusion that compliance with s 17(2)(a) of the NSW Act was reviewable. Other factors of significance included the consideration that the satisfaction of the relevant requirement lay within the control of the claimant; that the requirement occurred in a statutory context with express stipulated time limits which required strict observance in order that the claimant might enjoy the benefit of a regime which places the risk of the claimant's insolvency on the other party; and that the context is one where the claimant nevertheless has alternative remedies and can pursue a claim in court if the door is shut to adjudication.

87 Moreover, it would be wrong to consider that a matter is only reviewable as a jurisdictional fact if there is no element of evaluation or expertise required. As described above, a jurisdictional fact is a 'criterion, satisfaction of which enlivens the power of the decision-maker'.[104] It may consist in a complex of elements, and establishing those elements may require evaluation. For example, in *Enfield*, the jurisdictional fact consisted in the criterion that a proposed development was 'non-complying' under the relevant legislation which in turn depended upon whether the development was for a 'special industry'. A non-complying development required the consent of the Minister and council. The relevant decision maker, the Development Assessment Commission ('the DAC'), had determined that the proposed development was 'general industry' and not 'special industry' and so did not require the consent of the Minister or council. The criterion of 'special industry' was the

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101 Ibid 403 [36]. McDougall J queried whether the distinction is a real one; for him it was not significant that 'the alleged jurisdictional fact is not specified in terms as a condition of an adjudicator's exercise of the statutory function of determining an adjudication application'; rather, it was sufficient for the requirement to be a jurisdictional fact that it is 'a condition, or essential element, of the right to make an application under s 17(1)': Ibid 430 [180]–[182].

102 See [84] above.

103 See [80] and [83] above.

104 See [56]–[57] above.

following:

> '[S]pecial industry' means an industry where the processes carried on, the methods of manufacture adopted or the particular materials or goods used, produced or stored, are likely (a) to cause or create dust, fumes, vapours, smells or gases; or (b) to discharge foul liquid or blood or other substance or impurities liable to become foul, and thereby — (c) to endanger, injure or detrimentally affect the life, health or property of any person (other than any person employed or engaged in the industry); or (d) to produce conditions which are, or may become, offensive or repugnant to the occupiers or users of land in the locality of or within the vicinity of the locality of the land on which (whether wholly or partly) the industry is conducted.[105]

88 The question of whether the criterion was met was clearly a matter of evaluation and assessment.

89 The High Court held that whether the proposed development met the criterion of a 'non-complying development' by reason of being for a 'special industry' was a matter of fact that was not dependent upon the satisfaction or opinion of the DAC[106] and its determination was not binding on the Court. Rather than choosing the opinion or satisfaction of the DAC as the criterion of operation, the legislation 'stipulate[d] in direct terms a precondition which obliges, without certain concurrences, refusal of a grant of consent':[107] the criterion was a jurisdictional fact. The Supreme Court, exercising its supervisory jurisdiction, could decide for itself, on the evidence before it, whether the criterion was satisfied and thus whether the DAC had erred in its determination of the jurisdictional fact.

90 In an industrial context, the jurisdiction of the former Commonwealth Court of Conciliation and Arbitration was dependent upon the existence of an inter-State industrial dispute. It was necessary for the assumption of jurisdiction that a genuine inter-State industrial dispute existed, and the Court's determination of that jurisdictional fact was reviewable. In *Caledonian Collieries Ltd v Australasian Coal & Shale Employees' Federation [No 2]*,[108] the High Court said:

> In *The King v Hibble; Ex parte Broken Hill Pty Co*, Knox CJ, Gavan Duffy J, Powers

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105 The applicable definition was contained in Sch 1 of the relevant regulations. See *Enfield* (2000) 199 CLR 135, 140 n 16.

106 That is, the criterion was not whether the DAC was 'satisfied that a proposed development was a special industry'.

107 *Enfield* (2000) 199 CLR 135, 150 [34].

108 (1930) 42 CLR 558.

> J, Rich J and Starke J said in their joint judgment: — 'It is settled law under the Arbitration Act that a dispute must be real and genuine … Whether it be real and genuine is always a question of fact, and upon proceedings in prohibition the fact must be determined by this Court on its own independent view of the evidence.'[109]

91 In *Rocla Co (Australia) Pty Ltd v Commonwealth*,[110] the High Court treated the facts to be determined by a Women's Employment Board as a condition of its jurisdiction (facts specified in regulations relating in particular to whether the work had usually been performed by males or had been performed by males at any time since the outbreak of war) as analogous to those which the Commonwealth Court of Conciliation and Arbitration depended upon. The Board was assisted by a Committee. The High Court held that neither the Board nor the Committee could give itself jurisdiction when none existed; they could not determine conclusively when the facts upon which their jurisdiction depended were made out. Latham CJ said:

> It may be observed that the authority of the Board, and of a Committee of Reference, depends upon the actual existence of one of the three states specified in reg 6 … Neither the Board nor a Committee can give itself power by its own decision that a particular state of affairs exists. The position is the same as in the case of the Commonwealth Arbitration Court which, under the *Commonwealth Conciliation and Arbitration Act*, has authority to act, when jurisdiction depends upon the existence of an inter-State industrial dispute, only when such a dispute actually exists; the Court cannot give itself jurisdiction by its own decision that such a dispute exists … The awards of the Court are binding upon certain persons, but the provisions of the *Arbitration Act* to this effect (s 29) do not become operative in any case unless the necessary jurisdictional facts actually exist, and the Arbitration Court cannot conclusively determine the question whether they do exist. The position is the same in the case of the Women's Employment Board and a Committee of Reference.[111]

92 The satisfaction of the conditions upon which the jurisdiction of the Commonwealth Conciliation and Arbitration Court depended, and those upon which the jurisdiction of the Women's Employment Board depended, clearly required complex evaluation and assessment.

93 Jurisdictional facts are thus not confined to events or circumstances which can be ascertained mechanically or by means of a straightforward calculation. Depending upon the statute that confers jurisdiction, jurisdictional facts may require evaluation and assessment. The foundation of the objection made by Saville to the reviewability of the reference date

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109 Ibid 577–8 (citations omitted).

110 (1944) 69 CLR 185.

111 Ibid 196–7.

fixed by the adjudicator is unjustified and we reject it.

94 Nor do features of the Act, or features of comparable statutory regimes such as the NSW Act, indicate that the fixing of the reference date is unreviewable. We have already rejected the view that the reasoning in *Chase Oyster Bar* supports the narrow proposition that, in this context, the review of matters that are essential requirements to the assumption of jurisdiction by an adjudicator is restricted to straightforward calculations of time. The assumption of jurisdiction by an adjudicator under the Act may involve, as it does here, matters requiring evaluation just as jurisdictional facts involve evaluation and assessment in other contexts. The jurisdiction of the adjudicator under s 23(1) to determine the amount of the progress payment to be made by Hallmarc to Saville, the date on which the amount became payable and the rate of interest, was dependent upon the validity of the first payment claim. If it was served out of time, it was invalid; it had no legal force or effect and could not ground a jurisdiction under s 23 of the Act that the adjudicator did not otherwise have. In this sense, it was a matter of jurisdiction that was an essential requirement to the adjudicator's determination; it was a jurisdictional fact and reviewable.

95 The considerations identified by the New South Wales Court of Appeal, as described above, indicate that the strict observance of the procedural steps in the statutory scheme, including time limits, was mandated by the legislature as the price by which a claimant can take the benefit of the regime.[112] The observance of certain procedural steps are essential to the assumption of jurisdiction by an adjudicator. An assessment of whether those procedural steps have been observed may require matters of evaluation that travel beyond a mechanical process.

96 Furthermore, although the Act provides a 'rough and ready' regime intended to be swift and conducted without undue formality, Basten JA in *Chase Oyster Bar*,[113] and Vickery J in *Sugar Australia*,[114] have each accepted the proposition that practical considerations and considerations of inconvenience are not determinative when deciding whether a requirement

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112 See [80(3)] above. See also [47] above.

113 See [71] and [74] above.

114 See [72]–[73] above.

in the type of regime created under the Act is jurisdictional.

97 Here, Saville's right to a progress payment was dependent upon the fixing of a reference date. In turn this required a characterisation of whether the first payment claim was a final payment claim or not. If it was not (as the adjudicator found) the requirement under s 9(2)(b)[115] applied and required a calculation of the reference date as a date occurring 20 business days after the commencement of construction work under the construction contract. If it was (as the judge found) the requirement under s 9(2)(d)[116] applied and the reference date was relevantly the date immediately following the day that construction work was last carried out under the construction contract. These matters involved questions of evaluation in relation to the scope of the construction contract and the timing of work undertaken within that scope. In our view, the need for evaluation by the adjudicator, by reference to the evidence, does not preclude the fixing of a reference date under s 9(2) from being a jurisdictional fact and thus reviewable.

98 Moreover, it is significant that the construction contract was not required to comply with any formalities under the Act. An interpretation of its scope was thus not dependent on the specialist expertise that it is necessary for an adjudicator to have to make assessments with respect to documents required under the Act where the assessment is vested by the Act in the adjudicator. In our view, the evaluation required here in relation to the scope of the construction contract, and the finding of facts with respect to the engagement of JMP Carpentry for rectification works in November 2013, were not dependent upon the skill that may be required by adjudicators with respect to assessing whether a progress payment properly 'identif[ies] the construction work or related goods and services to which the progress payment relates'.[117] Such a requirement may well need to be understood by reference to other requirements under the Act, including the requirement that a respondent's payment schedule reveal the respondent's reasons for withholding payment. This suggests that the construction work or related goods or services must be sufficiently identified to

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115 See [7] above.

116 Ibid.

117 Section 14(2) of the Act.

disclose the basis of the claim including, where necessary, the provision of supporting documents. These matters may demand a specialist form of evaluation. This in turn might indicate that a particular requirement imposed under the Act is unreviewable because the relevant elements are, as Basten JA said in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*:[118]

> properly dependent upon the satisfaction or opinion of the adjudicator. … [W]hat is or may be a sufficient identification of matters for the purposes of a claim falls within the specialist experience which a qualified adjudicator is intended to bring to the task and is one which may well require evaluative judgment.[119]

99 We consider that *Climatech* is distinguishable because what is relevantly required for the fixing of a reference date under s 9(2)(d) does not depend upon such specialist evaluation. We consider that the fixing of a reference date under s 9(2)(d) of the Act is reviewable.[120]

100 It remains to consider whether the judge erred in rejecting the reference date fixed by the adjudicator as after 25 November 2013.

(2) The scope of works under the construction contract

101 The fixing of the reference date by the adjudicator turned in part on his finding that the works covered under the construction contract included the supply of joinery items including organising, co-ordinating and checking goods before delivery to Hallmarc, unloading containers, and the supply and installation of wardrobes. He also held that the repair work that was carried out on 25 November 2013, as evidenced by an invoice of 25 November 2013, could be used to fix the reference date.

102 The reasoning engaged in by the adjudicator is set out above[121] but the conclusion was

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118 [2005] NSWCA 229 ('*Climatech*'). This addressed the question of whether delay damages could amount to payments 'for construction work' taking, as an example, that 'construction work' should not be limited to work actually done and could include the cost of a crane that is on site for the duration of a construction contract but may be inoperative for extended periods of time.

119 Ibid [45]. The observation was made with respect to s 13(2) of the NSW Act (the equivalent of s 14(2) of the Act). His Honour also relied upon two other indicia: (1) that the requirement relates to a procedural step in the claim process rather than some external criterion; and (2) the overall purpose of the Act is to provide a speedy and effective means of ensuring that progress payments are made without undue formality. *Climatech* was decided some years before *Chase Oyster Bar* and before doubt was cast on *Brodyn*. See n 72 above.

120 It follows that we reject grounds 1, 2, 3, 4 and 9.

121 See [30] above.

based on a belief by the adjudicator that there was no relevant contest between the parties. This is apparent from an extract which, for convenience, is repeated here:

> The Respondent submits that the reference date is 30 September 2013 being the day that the Claimant completed its work. The Claimant refers to an invoice of 25 November 2013 for repair being made to the wardrobes that form part of the Claimant's scope of work. *The Respondent does not contest this submission and as such I determine that contract work was being carried out on 25 November 2013*. The claim for this work arises from a reference date after this date.[122]

103 The adjudicator appears to have reasoned erroneously that because there was no contest that the rectification work JMP Carpentry undertook on 25 November 2013[123] was rectification of defects in matters that fell within the scope of works that Saville was contractually obliged to carry out, there was therefore no contest that the work JMP Carpentry carried out was actually carried out on Saville's behalf. However, there is a distinction to be drawn between the question of whether the repair work performed on 25 November was repair of defects of wardrobes or wardrobe installation where the wardrobes and wardrobe installation formed part of the scope of works that Saville was obliged to carry out under the construction contract, and the separate question of whether the rectification or repair work to those wardrobes or wardrobe installation was actually carried out on Saville's behalf. While there may have been no contest with respect to the former, there was plainly a contest with respect to the latter. The adjudicator was mistaken in thinking that there was no contest as to whether the scope of the works included the repair work carried out on 25 November 2013. The submission by Hallmarc, which the adjudicator records, that 30 September 2013 was the day that Saville completed its works directly contradicted the view that there was no contest between Hallmarc and Saville with respect to the status of the repair work carried out on 25 November 2013. The adjudicator appears to have proceeded on the basis of a mistaken assumption with respect to the dispute upon which he was to adjudicate.

104 Furthermore, given that the repair works of 25 November 2013 were carried out by JMP Carpentry, the adjudicator's conclusion that the repair works formed part of the scope of

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122 Adjudication determination 5.3 (emphasis added).

123 Or work referable to the invoice of 25 November 2013.

works under the construction contract depended upon an anterior conclusion either that there was a legal relationship of agency between JMP Carpentry and Saville or at least a conclusion that Saville carried a responsibility for repair and rectification of joinery and that the rectification work carried out on 25 November 2013 was in fact carried out on Saville's behalf. However, as mentioned above,[124] the adjudicator articulated no legal basis of either kind. It would appear that he was content to rely on what he considered was a matter of no contest which, as we have said, was mistaken.

105 The contest between the parties on the relationship between JMP Carpentry and Saville should have been apparent to the adjudicator from the submissions received by him from Hallmarc in response to the request he made on 17 April 2014 for further submissions on the question of the reference date.[125] Hallmarc's submissions in response to the request on 17 April 2014 included the following statements:

> [20] On page 26 of the Claimant's [Saville's] further submissions, it appears to assert that the performance of rectification work by JMP Carpentry ('JMP') is a basis for calculation of a reference date. *JMP were engaged by the Respondent [Hallmarc] to rectify defective work carried out by the Claimant. JMP were paid by the Respondent for the rectification work performed. Accordingly, the work performed by JMP is irrelevant to the calculation of the reference date*.
>
> [21] In pages 27 to 34 of the Claimant's further submissions, it appears to be asserting that its consideration of material as to the cost incurred by the Respondent in rectifying the defective goods and services supplied by the Claimant is 'technical services' under the Construction Contract, thereby extending the completion of works under the Construction Contract to 14 April 2014.
>
> [22] With respect to the Claimant, that assertion is fanciful, incorrect and a strained construction to attempt to rectify the fact that its Payment Claim served on 21 February 2014 was served out of time.[126]

106 Moreover, the judge had before him the affidavit evidence of Italiano (Hallmarc) that JMP Carpentry had been engaged by Hallmarc and there was no basis for concluding that JMP Carpentry provided works under the construction contract. Italiano had said:

> On page 26 of the First Defendant's [Saville's] further submissions, the

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124 See [27] above.

125 See [30] above.

126 Emphasis added. These submissions do not appear to have been excluded by the adjudicator. See [19] above.

> First Defendant appears to assert that the performance of work by JMP Carpentry ('JMP') and an invoice rendered by JMP to the Plaintiff dated 25 November 2013, is a basis for the calculation of a reference date under the Act. But nowhere did the First Defendant explain how it could possibly be asserted that JMP Carpentry provided construction work or related goods or services under the Construction Contract, when JMP was not engaged by the First Defendant, JMP was not a party to the Construction Contract or referred to therein.
>
> On 23 April 2014, the Plaintiff [Hallmarc] provided further submissions to the Second Defendant [the adjudicator].
>
> …
>
> In the Plaintiff's further submissions to the Second Defendant at paragraph 20, *the Plaintiff unequivocally stated that JMP was engaged by the Plaintiff itself*.[127]

107 There was no doubt that, unlike the adjudicator, the judge was aware that the issue of whether JMP Carpentry's repair work amounted to works performed within the scope of the construction contract, whether as an agent of Saville's or otherwise, was contested. Moreover, as mentioned,[128] in reviewing the adjudicator's determination of the reference date under s 9(2) the judge was entitled to consider the evidence before him and was not limited to that relied upon by the adjudicator.

108 The judge accepted that Hallmarc directly retained JMP Carpentry to rectify defects in joinery supplied and installed by Saville.[129] He also held that the construction contract did not require Saville 'to review or assess the invoices of installation contractors engaged by [Hallmarc] to install the joinery or rectify defects in the joinery supplied'.[130] In other words, he found that Saville had no contractual role to assess or review the invoices of independent contractors directly retained by Hallmarc. He based his conclusion on the unchallenged evidence of Sarkis and Italiano, as referred to above,[131] to the effect that the work done pursuant to the 25 November 2013 invoice was done solely for Hallmarc and not performed under the construction contract. There was no cross-examination of Sarkis and Italiano. We consider that the judge did not err in making the findings he did or arriving at the conclusion, based upon those findings, that the scope of the works under the construction contract did not

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127 Emphasis added.

128 See [36] and [59] above.

129 Reasons [11]. See [38] above.

130 Reasons [10].

131 See [38]–[39] above.

extend to review or repair of joinery work undertaken by contractors engaged by Hallmarc. In making those findings the judge did not deny that the scope of the works extended to Saville supplying and installing wardrobes.[132] Rather, his focus was upon the defective nature of the goods supplied and installed by Saville and the need for repair work to be undertaken by other contractors directly engaged by Hallmarc.[133]

109 Saville also complains that the judge erred in finding that the adjudicator was mistaken in determining as a fact that Hallmarc had taken work that was within Saville's scope of works out of his hands and completed the work without his agreement.[134] However the judge made no such finding.

110 Saville contends[135] that the judge did not explain why he rejected statements made by Saville in his affidavit sworn 16 July 2014[136] and a statement made by him in [4(p)] of his affidavit sworn 30 July 2014 with respect to the installation work carried out between 30 September and 25 November 2013. The statements were to the effect that the installation work under the construction contract required Saville to check and approve the invoices of the subcontractors engaged by Hallmarc on his behalf, which he was not able to do until 11 April 2014 when Hallmarc provided him with copies of the invoices. As mentioned above,[137] the judge held, on the basis of his consideration of the terms of the construction contract, that the construction contract did not require Saville to conduct such a review or assessment. It was not necessary for the judge to identify each paragraph of the affidavits of Saville which he rejected, especially where those paragraphs do little more than reiterate the general position adopted by Saville in his case. Moreover, all but one[138] of these paragraphs of the 16 July 2014 affidavit are the subject of Hallmarc's Notice of Contention on the basis that the material is conclusionary or opinion or comprises submissions or is irrelevant.[139] It is

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132 As ground 5 of the grounds of appeal might suggest.

133 See Reasons [11]. See [38] above.

134 Ground 6 of the grounds of appeal.

135 Ground 8(a) of the grounds of appeal.

136 Specifically [10], [63], [67], [108], [111], [129] and [130] of the affidavit of Gregory Paul Saville sworn 16 July 2014.

137 See [38] above.

138 The Notice of Contention does not include [130].

unnecessary to determine if this is so. All that [4(p)] of the 30 July affidavit does is state that the adjudicator had the JMP Carpentry invoices & remittance advices before him.

111 Saville further submits that the judge failed to explain why he rejected Saville's evidence in [142] of his 21 May 2014 affidavit that the contract 'required of me that staged completion of installation services for wardrobes, that were my particular responsibility were satisfactory and rectified where necessary before it would authorise payment.'[140] Saville exhibited a JMP Carpentry invoice dated 25 October 2013. However, the invoice relates to work performed between 4 October and 25 October 2013 and under 'Job' is listed 'Hallmarc'. On its face it does not establish any agency relationship between Saville and JMP Carpentry. Given that the judge determined that JMP Carpentry did not perform its rectification and repair works on behalf of Saville there was no need for him to specifically address [142] of Saville's affidavit of 21 May 2014.

112 Saville argues that the judge ignored a reconciliation spread sheet showing JMP Carpentry invoices in relation to the rectification and re-installation works performed between 30 September and 25 November 2013.[141] However, the judge had already rejected the premise underlying the proposition for which Saville sought to rely upon the spreadsheet, namely, the proposition that, relevantly, Hallmarc's engagement of independent contractors fell within the scope of works under the construction contract.

113 Saville further submits that the judge ignored two Hallmarc remittance advices relating to the JMP Carpentry invoices, as well as a payment summary.[142] These include remittance advices and a payment summary that were before the adjudicator and which were referred to in [4(p)] in Saville's affidavit of 30 July. It is true that the judge made no reference to these documents in his reasons, but it is unclear what weight or relevance they

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139 For example, [10] includes the assertion that the defects works 'was a factory responsibility if it was actually a liability, at all'; [111] states: '[T]he Adjudicator determined that the work under the contract was not complete and the Payment Claim was a progress claim. He was entitled to do so'; [129] states: 'I have inspected the JMP invoices and I am of the honest belief that they were served and claimed against me as part of the claims for offsets by the plaintiff Hallmarc for completion of wardrobe installation work claimed as part of China Sourcing Services duties under my contract'.

140 Ground 8(c) of the grounds of appeal.

141 Ground 8(d) of the grounds of appeal.

142 Ground 8(f) of the grounds of appeal.

would have; they do not, of themselves, establish the scope of the works under the construction contract. All they show is that Hallmarc paid JMP Carpentry. They do not indicate whether JMP Carpentry was performing contractual obligations of Saville on Saville's behalf.

114 We reject the challenge to the judge's finding on the scope of the works.[143] It follows that there was no error in the judge's determination of the reference date under s 9(2)(d) of the Act as 1 October 2013 with the consequence that the first payment claim (being a final payment claim) was out of time and the adjudicator erroneously assumed jurisdiction. The judge was correct to hold that the adjudication determination is of no legal force or effect.

(3) The source of the construction contract

115 Turning to the challenge made with respect to the source of the construction contract, and the allegation that the judge failed to deal with the substantial point that the letter of 7 February 2013 is not the sole repository of the construction contract, Saville relies on the duty to give reasons described in *Hunter v Transport Accident Commission.*[144] The Court was there dealing with an application under s 93(4)(d) of the *Transport Accident Act 1986*. In that context, Nettle JA made the following observations:

> When a judge decides an application under s 93(4)(d) of the Act the judge is under a duty to provide reasons for his or her decision. Furthermore, while the extent of the reasons will depend upon the circumstances of the case, the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those finding[s] are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion. It should also be understood that the requirement to refer to the evidence is not limited to the evidence that has been accepted and acted upon. If a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and, in giving reasons which deal with the substantial points that have been raised, explain why that evidence or material has been rejected. There may be exceptions. But, ordinarily, where a judge rejects or excludes from consideration evidence or other material which is relevant and cogent, it is simply not possible to give fair and sensible reasons for the decision without adverting to and assigning reasons for the rejection or exclusion of that material. Similarly, while it is not incumbent upon the judge to deal with every argument and issue that might arise in the course of a case, where an argument is substantial or an issue is significant, it is necessary to refer to and assign reasons for the rejection of the argument or the

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143 Grounds 5, 6, and 8(a), (c), (d) and (f).

144 (2005) 43 MVR 130.

> resolution of the issue. Above all the judge should bear steadily in mind that reasons are not intelligible if they leave the reader to wonder which of a number of possible routes has been taken to the conclusion expressed. Failure to expose the path of reasoning is an error of law.[145]

116 Nettle JA went on to say:

> These points are encapsulated in the judgment of Chernov JA in *Barlow v Hollis*. As his Honour there said, the fact that a judge may not mention some matter relevant to the disposition of a s 93(4)(d) application does not necessarily mean that his or her judgment is deficient. For example, matters which are obvious need not be restated, and the element of value judgment involved in the determination of such an application does not always lend itself to the degree of precision in expression that can be achieved in other matters. But interlocutory in nature though these applications have now been determined to be, in reality they are finally determinative of rights. If an application is rejected, it is the end of the road for the applicant. And if the application is successful, it is odds on that the matter will settle. Logic and fairness dictate that the reasons for judgment of such an application should be of a standard which is commensurate with that degree of finality.[146]

117 The particular evidence which Saville alleges the judge failed to provide adequate reasons for rejecting is identified as the evidence of Saville given in [5], [6], [7], [8], [95] and [96] of his affidavit sworn 16 July 2014 with respect to the documents and discussions constituting the construction contract between Saville and Hallmarc[147] and exhibit 'GS-17A' to Saville's affidavit sworn on 30 July 2014 regarding JMP Carpentry invoices accepted in Saville's reconciliation spreadsheet (Exhibit 'GS-15') for works carried out between 30 September to 25 November 2013.[148]

118 In [5], [6], [7], [8], [95] and [96] of Saville's affidavit sworn 16 July 2014 Saville deposes that:

(1) a basic agreement was reached between Saville and Warren Keighran (Hallmarc) on 24 January 2013; a letter was sent by Saville dated 24 January 2013 and emails were exchanged between them on 24 and 25 January 2013;

(2) there was a verbal agreement with Keighran that Saville would be responsible for wardrobe supply only and oversee production and dispatch of the non-wardrobe

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145 (2005) 43 MVR 130, 136–7 [21] (Nettle JA, Batt and Vincent JJA agreeing) (citations omitted).

146 Ibid 137 [22].

147 Ground 8(b) of the grounds of appeal.

148 Ground 8(f) of the grounds of appeal.

joinery in return for a project management fee;

(3) Hallmarc contracted separately with the factory in China for the non-wardrobe joinery by way of a separate contract;

(4) It was agreed that Saville contracted for supply and installation of wardrobes only and to facilitate production, arrange delivery and provide unpacking of all the goods;

(5) As Saville had to remain in China it was agreed that Hallmarc would pay subcontractors 'engaged by way of agency on [Saville's] behalf' as necessary to provide installation of wardrobes and unpacking services, and Hallmarc was to claim the cost of this back from Saville on his approval of the invoices.

119 Saville exhibited the email he sent on 24 January and Keighran's reply on 25 January and a further email response of Saville's on 29 January.

120 The letter of 24 January 2013 clearly consisted of proposed terms of agreement. It raises the issue of oversight of invoices but makes it plain that this is not yet a matter which has been resolved. For example, the letter says:

> *If it is agreed* that Hallmarc pay unpackers and wardrobe installation contractor directly, [Saville] shall oversee and approve such invoices prior to any payment by Hallmarc to ensure that such payments fall within the budget allowance and should they exceed the budget allowance must be approved by [Saville].[149]

121 The two emails are principally concerned with the arrangements proposed by Saville for payment of the manufacturer in China and how to manage the cash flow to ensure quick turnaround. Keighran expresses a preference not to have to pay the factory in China directly and suggests other measures for having cash available to Saville for a quick turnaround.

122 It is clear that these communications amounted to pre-contractual negotiations. Antecedent communications prior to the execution of a written contract form no part of the contract and are inadmissible as to the terms of the contract save as to resolve ambiguity. In the well-known words of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*:[150]

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149 Emphasis added.

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although … if the facts are notorious knowledge of them will be presumed.
>
> It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. *The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself.* The object of the parol evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction ...[151]

123 In our view, the judge construed the construction contract on the basis of the plain and unambiguous terms agreed in the letter of 7 February 2013[152] and he was right to do so. Although the judge made no express reference to the attachment, the 'Joinery Scope of Works', there is nothing to suggest he did not treat this as part of what he described as the 'written construction contract',[153] especially as the first paragraph of the letter of 7 February 2013 makes express reference to the acceptance of Saville's offer to 'carry out the following works in accordance with the attached scope of works and Joinery spreadsheet'.[154] The pre-contractual negotiations, of which the letter of 24 January 2013, and the emails of 24, 25 and 29 January 2013 are evidence, are superseded by, and merged in, the construction contract itself.[155] The same is true of the email exchange of 21 February 2013 that is also sought to be relied upon.[156]

124 The general difficulty faced by the judge is that he had two competing complex narratives of what had occurred between the parties which clearly gave rise to questions of

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150 (1982) 149 CLR 337 ('*Codelfa*').

151 Ibid 352 (emphasis added). Stephen and Wilson JJ agreed with Mason J (at 344 and 392 respectively). See also *Brambles Holdings Ltd v Bathhurst City Council* (2001) 53 NSWLR 153, 163 [24].

152 See [13]–[14] above.

153 Reasons [1].

154 See [13] above.

155 Indeed, this seemed to be conceded on the appeal.

156 See [21] above and [130] below.

credibility yet there was no cross-examination of any witness. The trial was conducted wholly on the basis of a series of opposing affidavits. As Saville chose not to cross-examine Sarkis or Italiano, the judge was entitled to prefer their evidence given that it was not otherwise implausible or logically untenable.

125 Moreover, the judge was mindful that Saville retained his alternative avenue of redress, namely, a proceeding in a court, a factor relied upon in *Chase Oyster Bar*.[157] The judge's disposition of the claim under the Act did not finally resolve the rights of the parties under the construction contract. While the judge's reasons were swift, and an analysis of the conflicting affidavit evidence relied upon (including the documents exhibited) would have enabled Saville more readily to understand why his position was rejected, the judge was placed in a position where he did not have the assistance of oral testimony that had been tested by cross-examination and on the basis of which he could have made fully informed findings of credibility. In the particular circumstances, we consider that his reasons were adequate.[158]

The application to adduce further evidence

126 Saville seeks leave to adduce further evidence on the appeal.

127 He seeks to adduce evidence of an affidavit sworn by Sarkis (Hallmarc) on 23 June 2014 ('the Sarkis 23 June 2014 affidavit'). The Sarkis 23 June 2014 affidavit was not referred to by Saville at trial, nor tendered. It was not included in the Court Book before the judge and not drawn to his attention. It was prepared by Hallmarc's legal representatives and lodged with the adjudicator as an attachment to Hallmarc's adjudication response of 23 June 2014. This occurred in the context of the second adjudication that occurred after the filing of the second payment claim which had not been adjudicated upon at the time the application for judicial review was heard.[159] The judge held that the second payment claim had also been served 'hopelessly out of time'.[160]

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157 Reasons [29]. See [47] above.

158 It follows that we reject grounds 7, and 8(b) and (e).

159 See [2] above.

128 Saville submits that the Sarkis 23 June 2014 affidavit contradicts the evidence in the affidavit Sarkis swore on 16 July 2014, as well as an affidavit of Italiano sworn on the same day, upon which the judge relied.

129 Saville submits that the Sarkis 23 June 2014 affidavit contains the following concessions relevant to Saville's claim that the work carried out by JMP Carpentry on 25 November 2013 was carried out on behalf of Saville:

(1) [32] Hallmarc received invoices from 'labour contractors engaged by the Respondent [Hallmarc] on behalf of the Claimant [Saville]' (this is the description given to exhibit 'CS-20');

(2) [32] Hallmarc received invoices from 'contractors engaged by the Respondent [Hallmarc] to provide labour on behalf of the Claimant [Saville]' (this is the description given to exhibit 'CS-21');

(3) [39] 'One of the contractors engaged by the Respondent [Hallmarc] to perform rectification work was JMP Carpentry' which rendered invoices on 25 October 2013 and 25 November 2013;

(4) [40] 'The Respondent [Hallmarc] paid various local contractors a total of the sum of $243,454.29 for the rectification of defective workmanship performed by the Claimant and for carrying out work that the Claimant [Saville] was required to perform under the Construction Contract but omitted to provide';

(5) [41] The Respondent received invoices from contractors for the costs incurred in respect of performing remedial work and for 'work carried out by the Claimant and work that ought to have been carried out by the Claimant'.

130 The email exchange of 21 February 2013 referred to above,[161] exhibited to the Sarkis 23 June 2014 affidavit, is also relied upon by Saville.

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160 Reasons [26].

161 See [21] above.

131 Saville submits that the further evidence is relevant, of probative value, and combined with the evidence that was before the judge, would have affected the result. He claims that Hallmarc can claim no prejudice given that its legal representatives prepared the document.

132 Hallmarc submits that the application should be refused as the evidence was in Saville's possession before the trial.

133 Furthermore, Hallmarc submits that the evidence does not contradict the evidence given by Sarkis on 16 July 2014 and, fairly considered as a whole, makes it plain that JMP Carpentry was directly engaged by Hallmarc in Hallmarc's own right.

134 The Sarkis 23 June 2014 affidavit describes Hallmarc's engagement of contractors to fulfil Saville's contractual obligations as restricted to unpacking the containers. Sarkis states:

> [31] The Claimant [Saville] was assisted in the unloading and unpacking of joinery delivered to the site by Mario Angelo who was the Claimant's representative on site. The Claimant lacked adequate resources to unpack containers delivered to site and requested the Respondent [Hallmarc] arrange for labour to unpack the containers and agreed that the cost of such labour would be taken from the contract sum.
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> …
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> [32] The Respondent engaged other contractors to provide labour *to unpack the containers.*[162]

135 The bundle of invoices from labour contractors exhibited in support of [32][163] are loosely identified as relating to 'contractors engaged by the Respondent on behalf of the Claimant' but the spreadsheet exhibited[164] distinguishes between labour contractors engaged by Hallmarc on behalf of Saville to unpack the containers as well as details of amounts paid to 'various local contractors … for the rectification of defective workmanship performed by [Saville] and for carrying out work that [Saville] was required to perform under the Construction Contract but omitted to provide'.[165] This work is also referred to in [129(4)]

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162 Emphasis added.

163 'CS-20' and 'CS-21' exhibited to the Sarkis 23 June 2014 affidavit.

164 Within 'CS-20'.

165 Sarkis 23 June 2014 affidavit, [40].

above. While the former category uncontroversially indicates engagement on behalf of Saville, the latter does not. At least on one reading, the latter category does not indicate that labour contractors were engaged by Hallmarc to perform *rectification* work that was to be performed by Saville but rather that labour contractors were engaged by Hallmarc to rectify defective work performed by Saville and other work that was not completed by Saville. The same observation can be made in relation to the statement at [129((5)] above. This reflects the distinction drawn above.[166]

136 The spreadsheet lists invoices under three headings, 'Payment made to China Sourcing Services (CSS)' [Saville]; 'Payment made on behalf of China Sourcing Services (CSS)' [Saville] and 'Costs of Rectification of Defective Work by Saville'. The JMP Carpentry invoices are listed under the third category.

137 Furthermore, in the Sarkis 23 June 2014 affidavit, Sarkis went on to explain that Hallmarc directly engaged joinery contractors to rectify defects in joinery supplied by Saville. He said:

> [37] Various items of the joinery supplied by the Claimant [Saville] were defective and required additional work by joinery contractors engaged by the Respondent [Hallmarc] to install the joinery. …
>
> [38] Accordingly, the Respondent itself engaged various joinery contractors after the Claimant had left the site to rectify defects in the joinery supplied by the Claimant.
>
> [39] One of the contractors engaged by the respondent to perform rectification works was JMP Carpentry. In September 2013 I called Jake Panozzo from JMP and engaged him to undertake joinery works on [an] hourly rate basis. On 25 October 2013 and on 25 November 2013, JMP Carpentry rendered invoices to the Respondent for work that it performed on the Project which invoices were paid by the Respondent on 30 October 2013 and 6 December 2013.[167]

138 The test for success on an application to adduce further evidence on appeal is stringent. In a recent decision, *Refaat v Barry*,[168] this Court[169] made some observations on the question of adducing further evidence on appeal:

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166 See [103] above.

167 See the evidence of Sarkis to substantially the same effect referred to in [39] above.

168 [2015] VSCA 218 ('*Refaat*').

169 Warren CJ, Ashley and Tate JJA.

The Court has power to receive further evidence on questions of fact pursuant to r 64.22(3) of the *Supreme Court (General Civil Procedure) Rules 2005*. In *Clark v Stingel*, the Court described the applicable principles in the following way:

> The principles upon which the Court will give leave to introduce fresh evidence upon an appeal are not in doubt. Leave should be given only if:
>
> - By the exercise of reasonable diligence such evidence could not have been discovered in time to be used in the original trial.
>
> - It is reasonably clear that if the evidence had been available at the trial, and had been adduced, an opposite result would have been produced.
>
> - The evidence proposed to be adduced is reasonably credible.

In *Commonwealth Bank of Australia v Quade*, the High Court observed that '[s]uch a stringent rule … is supported by considerations of both justice and public interest', specifically the public interest in the 'finality of litigation in other than the truly exceptional case'.[170]

139 In our view the test in *Clark v Stingel*[171] has not been satisfied here. The evidence was available and in Saville's possession before trial and it is not at all

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170 *Refaat* [2015] VSCA 218, [76]–[77] (citations omitted).

171 [2007] VSCA 292.

reasonably clear that if the evidence had been adduced at trial an opposite result would have been produced; indeed, as we have sought to explain, the evidence is ultimately supportive of Hallmarc.

140 We would refuse the application for leave to adduce further evidence.

Conclusion on the notice of contention

141 It has proved unnecessary to determine the Notice of Contention.

Conclusion on the appeal

142 We have concluded that the determination by the adjudicator that the reference date was after 25 November 2013 was reviewable for jurisdictional error as a jurisdictional fact.

143 We have also concluded that the judge did not err in finding that the reference date under s 9(2)(d) of the Act was 1 October 2013 on the basis that the work performed pursuant to the 25 November 2013 was not undertaken by Saville nor carried out on Saville's behalf. The last date on which work was carried out by, or on behalf of Saville, was therefore 30 September 2013.

144 It follows that the judge did not err in holding that the first payment claim was served out of time and the adjudicator was wrong to assume jurisdiction. The adjudication determination was of no legal force or effect.

145 The application to adduce further evidence on the appeal should be refused.

146 The appeal should be dismissed.

KAYE JA:

147 For the reasons stated by the Chief Justice and Tate JA, I agree that the appeal should be dismissed.
