



PHHH Investments No 2 Pty Ltd v United Commercial Projects Pty Ltd [2018] VSC 15 (31 January 2018)

Last Updated: 31 January 2018

IN THE SUPREME COURT OF VICTORIA	Not Restricted
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AT MELBOURNE

COMMERCIAL COURT

TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

S ECI 2017 00236

PHHH INVESTMENTS NO 2 PTY LTD
(ACN 602 191 506)

Plaintiff

v

UNITED COMMERCIAL PROJECTS PTY LTD
(ACN 110 860 360)

First Defendant

and

HARRY McIVER

Second Defendant

JUDGE: RIORDAN J
WHERE HELD: Melbourne
DATE OF HEARING: 17 January 2018
DATE OF JUDGMENT: 31 January 2018
CASE MAY BE CITED AS: *PHHH Investments No 2 Pty Ltd v United Commercial Projects Pty Ltd*
MEDIUM NEUTRAL CITATION: [2018] VSC 15

BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether an adjudication determination given after the period permitted under [s 22\(4\)](#) of the Act is invalid – Out of time determination is not invalid – Requirements of [s 22\(4\)](#) of the Act not jurisdictional.BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* (Vic) – Agreement to an extension und [s 22\(4\)](#) of the Act – Whether claimant's offer to agree to an extension of time constituted an implied agreement – No implied agreement for extension of time.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr N J Phillpott	Noble Lawyers
For the First Defendant	Mr N A Andreou	MacPherson Kelley

HIS HONOUR:

1 By Original Process filed 4 October 2017, the plaintiff (PHHH) seeks orders including an order in the nature of certiorari that the adjudication determination ('the Determination') purportedly made by the second defendant ('the Adjudicator') dated 7 August 2017 pursuant to [s 23](#) of the *Building and Construction Industry Security of Payment Act 2002* ('the Act') be quashed.2 PHHH claims that the determination should be set aside on the ground that the Adjudicator committed jurisdictional error or erred in law by making the Determination in excess of the time permitted by [s 22\(4\)](#) of the Act.

3 The claim raises two questions, being:

(a) Did the emailed letter of 25 July 2017 from the solicitors for the first defendant ('United Commercial Projects') to the Adjudicator constitute an implied agreement to an extension of time within the meaning of [s 22\(4\)\(b\)](#) of the Act?(b) If no, is a determination, which is made out of the time prescribed in [s 22\(4\)](#) ('an out of time determination'), void?

4 In summary, for the reasons that follow, I have decided that:

(a) the emailed letter of 25 July 2017 from the solicitors for the first defendant ('United Commercial Projects') to the Adjudicator did not constitute agreement to an extension within the meaning of [s 22\(4\)\(b\)](#) of the Act; but(b) the Determination is valid despite the fact that it was made after the time prescribed in [s 22\(4\)](#) of the Act.**Background**

5 PHHH is the owner of a commercial building at 282–284 Victoria Street, Brunswick ('the Site'), which is the site of a kindergarten and childcare centre.

6 United Commercial Projects is a construction company that undertakes both domestic and commercial construction work in Melbourne.

7 On or about 16 March 2016, PHHH and United Commercial Projects entered into a construction contract under which United Commercial Projects was to perform certain alterations and additions to the Site.

8 On 15 June 2017, United Commercial Projects served on PHHH a payment claim under [s 14](#) of the Act in respect of certain work conducted at the Site.9 On 29 June 2017, PHHH served a payment schedule under [s 15](#) of the Act in which it scheduled for payment an amount of \$0. In accordance with [s 15\(4\)\(b\)\(i\)](#) of the Act, the payment schedule was provided within 10 business days after the payment claim was served.10 On 13 July 2017, United Commercial Projects made an adjudication application under [s 18](#) of the Act with respect to the payment claim to RICS Dispute Resolution Service, an authorised nominating authority under the Act. The adjudication application was made within 10 business days of receipt of the payment schedule, as required by [s 18\(3\)\(c\)](#) of the Act. On the same day, the adjudication application was served on PHHH in accordance with [s 18\(5\)](#) of the Act.11 On 14 July 2017, RICS Dispute Resolution Service appointed the Adjudicator under [s 20](#) of the Act.12 On 17 July 2017, the Adjudicator notified the parties by email that he accepted the adjudication application and was therefore appointed to determine the application pursuant to [s 20\(3\)](#) of the Act.13 On 20 July 2017, PHHH served an adjudication response on the Adjudicator and United Commercial Projects, which was within five business days of receiving a copy of the adjudication application as required by [s 21\(1\)\(a\)](#) of the Act.14 On 24 July 2017, the Adjudicator served a notice under [s 21\(2B\)](#) stating that United Commercial Projects had two business days to lodge a response to the reasons in the adjudication response, which had not been included in the payment schedule.15 By letter dated 25 July 2017 to the Adjudicator, United Commercial Projects' solicitors requested that the Adjudicator request further submissions from United Commercial Projects pursuant to [s 22\(5\)](#) of the Act on the basis that it ought to respond to certain matters in the adjudication response. The letter also suggested an extension of time, stating:**Extension of time**

The Claimant understands that the Adjudicator may require further time to accommodate the further submissions and the Claimant is happy to agree to a reasonable request for same.

The Claimant confirms that it has copied the Respondent into this correspondence.

If the Adjudicator requires any further information please contact the writer.

16 On 26 July 2017, the solicitors for United Commercial Projects sent further submissions in response to the [s 21\(2B\)](#) notice.17 By letter dated 26 July 2017, the Adjudicator gave the parties a notice pursuant to [s 22\(5\)](#) of the Act in accordance with the request of United Commercial Projects on 25 July 2017. In the same letter, he also requested an extension of time to make the Determination, stating, 'pursuant to [Section 22\(4\)\(a\)](#) [sic] the adjudicator request [sic] an extension of time to close of business Monday 7th August 2017 at the latest to hand down the determination'. Neither party received this letter.18 On 27 July 2017, the Adjudicator served a second notice under [s 22\(5\)](#) of the Act requesting further submissions from PHHH in response to the submissions of United Commercial Projects dated 26 July 2017. On 1 August 2017, PHHH served the requested further submissions.19 By email of 3 August 2017 to RICS Dispute Resolution Service (copied to the solicitors for PHHH), the solicitors for United Commercial Projects stated that their client had not received the [s 22\(5\)](#) notice dated 26 July 2017 and made a number of suggestions, including that 'the adjudicator request any further extension of time required, noting that [s 22\(4\)\(b\)](#) allows up to an additional 15 business days to make a determination'.20 By emailed letter of 4 August 2017 to the Adjudicator (copied to the solicitors for United Commercial Projects), the solicitors for PHHH stated that the last day on which the Adjudicator could have determined the application under [s 22\(4\)\(a\)](#) was 31 July 2017. The letter further stated:

[I]f you were to now make a (purported) determination, that determination would be invalid and of no effect.

21 On 7 August 2017, RICS Dispute Resolution Service emailed the parties advising that the Adjudicator had made a determination.

22 By email of 11 August 2017 to RICS Dispute Resolution Service (copied to the solicitors for PHHH), the solicitors for United Commercial Projects stated that their client had 'previously consented to the Adjudicator having an extension of time to make a determination in this matter' and that 'for the avoidance of doubt we confirm on behalf of the Claimant that the Claimant consents to the Adjudicator's request for an extension of time (to make a determination on 7 August 2017 in respect of the Adjudication proceedings)'.

23 On 14 August 2017, the Determination dated 7 August 2017 was released to the parties after the Adjudicator's fees were paid.

The Statutory Scheme

24 The purpose and object of the Act are set out in [ss 1 and 2](#) of the Act and, in summary, are to provide a statutory right for builders to recover progress payments due under a construction contract by establishing a procedure in which disputed claims are referred to an adjudicator for determination.

25 [Section 3](#) of the Act provides:

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

26 The right to progress payments is established by [s 9\(1\)](#) of the Act, which provides:

On and from each reference date under a construction contract, a person—

- who has undertaken to carry out construction work under the contract; or
 - who has undertaken to supply related goods and services under the contract—
- is entitled to a progress payment under this Act, calculated by reference to that date.

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

27 The procedure for recovering progress payments is established under [r 1.3](#) of the Act and, relevantly, [s 14](#) provides with respect to claims:

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

28 A payment claim may be served only within:

- the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claims relates; or
- the period of three months after the reference date referred to in [s 9\(2\)](#) of the Act that relates to that progress payment—

whichever is the later.^[1]

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

- must identify the payment claim to which it relates; and
- must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount); and
- must identify any amount of the claim that the respondent alleges is an excluded amount; and
- must be in the relevant prescribed form (if any); and
- must contain the prescribed information (if any).^[2]

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

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

- the scheduled amount in the payment schedule is less than the claimed amount;
- the respondent fails to pay the scheduled amount; or
- the respondent fails to provide a payment schedule and does not pay the whole or part of the amount claimed.^[4]

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

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

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

- five days after receiving a copy of the application; or
- two business days after receiving notice of the adjudicator's acceptance of the application—

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

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

- setting out those reasons; and
- stating that the claimant has two business days after being served with the notice to lodge a response to those reasons with the adjudicator.^[11]

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

- within ten business days after the date on which the adjudicator accepted the appointment; or
- within any further time, not exceeding 15 business days after that date, to which the claimant agrees (and such agreement must not be unreasonably withheld).^[12]

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

38 With respect to the adjudicator's determination, [s 23](#) of the Act provides:

- (1) An adjudicator is to determine—
- the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount); and
 - the date on which that amount became or becomes payable; and
 - the rate of interest payable on that amount in accordance with [section 12\(2\)](#).
- (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only—
- the provisions of this Act and any regulations made under this Act;
 - subject to this Act, the provisions of the construction contract from which the application arose;
 - 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;
 - 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;
 - the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(2A) In determining an adjudication application, the adjudicator must not take into account—

- (a) any part of the claimed amount that is an excluded amount; or
- (b) any other matter that is prohibited by this Act from being taken into account.

(2B) An adjudicator's determination is void—

- (a) to the extent that it has been made in contravention of subsection (2);
 - (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.
- (3) The adjudicator's determination must be in writing and must include—

- (a) the reasons for the determination; and
 - (b) the basis on which any amount or date has been decided.
- (4) If, in determining an adjudication application, an adjudicator has, in accordance with [section 11](#), determined—
- (a) the value of any construction work carried out under a construction contract; or
 - (b) the value of any related goods and services supplied under a construction contract—

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work or the goods and services the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous determination.

39 If the adjudicator does not determine the application in the time allowed by [s 22\(4\)](#) of the Act, the claimant may:

- (a) withdraw the application, by notice in writing served on the adjudicator or the authorised nominating authority to whom the application was made; and
- (b) make a new adjudication application under [s 18](#).^[14]

Submissions on behalf of PHHH

40 Counsel for PHHH submitted that, at the time the Adjudicator purported to make the Determination, he lacked the required jurisdiction under the Act and therefore committed a jurisdictional error for the following reasons:

(a) The object of the Act, contained in [s 3](#), is the establishment of the referral of any disputed claim to an adjudicator for determination. The Act includes a considerable number of strict requirements on both claimants and respondents, including the imposition of strict time limits, including:

- (i) A payment claim must be served by the claimant within three months from the accrual of the reference date.^[15]
 - (ii) A respondent must serve a payment schedule within 10 business days of service of a payment claim.^[16]
 - (iii) A claimant may only refer a disputed payment claim to adjudication within 10 business days after receipt of a payment schedule.^[17]
- The time requirement in [s 22\(4\)](#) is another strict time requirement.

(b) The above contention is supported by Tobias AJA in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd*.^[18] Tobias AJA's reasoning is consistent with the framework of the Act, because, as counsel for PHHH expressed it, it provides some protection to the respondent in an otherwise 'heavily claimant-favourable Act'.

(c) The decision of Hammerschlag J in *Mt Lewis Estate Pty Ltd v Metrick Homes Pty Ltd*.^[19] on this question was obiter, because he had already determined that the adjudication determination was invalid.

(d) The fact that, under [s 28](#) of the Act, the claimant has a unilateral right to withdraw the adjudication application if the determination is not made within the prescribed time, supports the proposition that the time limit is a jurisdictional requirement.

41 With respect to the contention that there had been 'implicit agreement' to the extension, it was submitted on behalf of PHHH that the contention should be rejected for the following reasons:

- (a) At the time of the letter dated 25 July 2017 from United Commercial Projects, the Adjudicator still had six days by which to make the determination and therefore it is unclear why an extension of time would be required.
- (b) The word 'agreement' should be interpreted in accordance with its ordinary meaning and United Commercial Projects could not agree to a proposal which was not requested until the following day.
- (c) The letter of 25 July 2017 does not constitute an agreement but rather it makes a suggestion.

Submissions on behalf of United Commercial Projects

42 It was submitted that, as a matter of statutory construction, the time requirement in [s 22\(4\)](#) of the Act should be construed as 'directory', for the following reasons:

- (a) The time limit imposed by [s 22\(4\)](#) is not an essential preliminary to the exercise of an adjudication function, but rather regulates the exercise of the adjudication function which has already been conferred on the adjudicator.
- (b) The Act specifically provides for the consequences of a late adjudication determination, but does not provide that it is a nullity. In these circumstances, before finding that a provision constitutes a jurisdictional requirement, it is necessary to find a very strong indication elsewhere in the Act.
- (c) The absence of any reference in the Act to the process by which the adjudicator would make an application for an extension of time under [s 22\(4\)\(b\)](#) indicates that the time period within that section is not fundamental to jurisdiction.
- (d) Section 22(4A) provides an objective standard by which the claimant's refusal to agree to an extension of time must be assessed. If an adjudication determination was late in such circumstances, the intention of the legislature is not to invalidate such a determination simply because the claimant did not agree.
- (e) Significant public inconvenience would result from the invalidity of late adjudication determinations. In *Montreal St Railway Co v Normandin*,^[20] the Privy Council said:

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

(f) The other time limits, referred to by PHHH, such as for the service of payment claims, are prerequisites for the jurisdiction and highlight the difference with the time limit under [s 22\(4\)](#).

43 With respect to the contention that there had been 'implicit agreement' to the extension, it was submitted as follows:

(a) By letter dated 25 July 2017 to the Adjudicator, the solicitors for United Commercial Projects stated:

The Claimant understands that the Adjudicator may require further time to accommodate the further submissions and the Claimant is happy to agree to a reasonable request for same.

(b) By letter dated 26 July 2017 to the parties, the Adjudicator requested an extension of time until 7 August 2017 to make his determination. This letter was not received by either of the parties.

(c) The word 'agrees' in the context of [s 22\(4\)\(b\)](#) is equivalent to the concept of consent. The communications demonstrate that United Commercial Projects had consented to the determination being made after the 10 business days.

Was there an Implied Agreement?

44 I do not accept the contention of United Commercial Projects that the letter of 25 July 2017 constituted the claimant agreeing to the extension of time to 7 August 2017, as requested in the Adjudicator's unreceived letter of 26 July 2017, within the meaning of [s 22\(4\)\(b\)](#).

45 Section 22(4) provides

Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case—

- (a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or
- (b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees.

46 The word 'agrees' in [s 22\(4\)\(b\)](#) is an ordinary English word, which should be afforded its ordinary meaning.

47 The letter of 25 July 2017 relevantly stated:

Extension of time

The Claimant understands that the Adjudicator may require further time to accommodate the further submissions and the Claimant is happy to agree to a reasonable request for same.

The Claimant confirms that it has copied the Respondent into this correspondence.

If the Adjudicator requires any further information please contact the writer.

48 In my opinion, the letter states that the present intention of United Commercial Projects is to agree to a reasonable request by the Adjudicator for an extension of time. In my opinion, it does not purport to agree to an extension without a request; and did not commit United Commercial Projects to agreeing to any request, particularly if it was considered unreasonable.

49 I am not to be understood as saying that a claimant may not be able to unilaterally agree, in advance, to an adjudicator having further time under the sub-section; but the letter of 25 July 2017 does not purport to do so. Unsurprisingly, the letter appears to have prompted the Adjudicator to make an extension request in his letter of 26 July 2017 (which was not received at the time).

50 On 11 August 2017, United Commercial Projects, through its solicitors, purported to confirm that it had 'previously consented to the Adjudicator having an extension of time to make a determination'. The letter went on to say:

for the avoidance of doubt we confirm on behalf of the Claimant that the Claimant consents to the Adjudicator's request for an extension of time (to make a determination on 7 August 2017 in respect of the Adjudication proceedings).

Counsel for United Commercial Projects specifically eschewed any reliance on this letter, which was given after the expiration of the period prescribed in [s 22\(4\)](#). However, such an argument may well be available,^[21] and these reasons should not be interpreted as indicating any contrary view.

Is an out of time determination void?

51 Because I have found that there was no extension of time under [s 22\(4\)\(b\)](#), it follows that the Adjudicator failed to determine the adjudication application within the time limit prescribed in [s 22\(4\)](#). This conclusion requires consideration of whether an out of time determination is nonetheless valid, although made in breach of a statutory provision, or is invalid and therefore legally void.

52 The starting point for determining invalidity is *Project Blue Sky Inc v Australian Broadcasting Authority*.^[22] where the majority said:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. ... There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.^[23]

53 In *MPM Constructions*.^[24] McDougall J held that an out of time determination was not invalid for the following reasons:

- (a) Invalidity was inconsistent with the object of the *Building and Construction Industry Security of Payment Act 1992* (NSW) ('the NSW Act') as set out in [s 3](#) of that Act.^[25] In particular, his Honour considered it would be anomalous if the result of:
- (i) the adjudicator not complying with the time limit; and

(i) the claimant not withdrawing the application and seeking a new adjudication application within five business days after the expiration of the adjudication time limit;^[42]

the claimant would be unable to obtain an adjudication of the disputed claim;^[21]

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

(i) the claimant 'may withdraw the application';^[23] and

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

However, the Act does not provide for an out of time determination to be invalid.^[20]

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

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

(ii) the adjudicator would effectively become functus officio.

then there would be no purpose in the Act providing that the claimant may withdraw the application.^[24]

54 In *Alpro Building Services Pty Ltd v Micos Architectural Division Pty Ltd* [21] McDougall J confirmed his view that a determination is valid notwithstanding that it is given out of time. However, his Honour considered that the fact that the determination was valid did not impact on the disentitlement of the adjudicator to his fees under the New South Wales equivalent of s 45(5) of the Act.^[22]

55 In *Cardinal Project Services*,^[23] the majority held that the period for a claimant to make a new adjudication application, under the New South Wales equivalent of s 28(3) of the Act, when an adjudicator makes a void determination within time, commences to run on the expiration of the time allowed in the New South Wales equivalent of s 22(4) of the Act.^[25]

56 In his dissenting judgment, Basten JA held that an out of time determination was not invalid because the statutory scheme 'envisages that delay will affect the claimant adversely and thus confers on it a right to make a further adjudication application ...'.^[26] Tobias AJA disagreed with Basten JA on this question because he did not agree that an interpretation that resulted in an out of time determination being ineffective was anomalous.^[26] Macfarlan JA gave separate reasons and did not deal with the question.

57 In *Cranbrook School v JA Bradshaw Civil Contracting* [22] McDougall J noted the difference of opinion between Basten JA and Tobias AJA and confirmed his view that an out of time determination was not invalid. In support of his contention that an interpretation of validity was more consistent with the object of the NSW Act, he said:

To my mind, it would be quite extraordinary if the legislature intended that a builder or subcontractor who had got through the various hurdles that the [NSW] Act imposes, in the path of obtaining a successful determination, up until the point of receipt of the adjudicator's reasons, should be disqualified from the benefit of a determination in its favour simply because the adjudicator did not comply with the statutory time limit.^[28]

58 Additionally, his Honour noted that the primary obligation imposed by the New South Wales equivalent of s 22(4) 'is to determine an adjudication application as expeditiously as possible'.^[29] He said that if this requirement was jurisdictional, 'then an adjudicator might act outside jurisdiction if, for example, he or she decided within the 10 business day period but not as quickly as could have been done.' He considered that an 'unlikely proposition'.^[29]

59 In *MT Lewis Estate Pty Ltd v Metricon Homes Pty Ltd*,^[41] Hammerschlag J considered the view of Tobias AJA, but preferred McDougall J's conclusion that an out of time determination was not invalid. He added to the considerations against invalidity to those identified by McDougall J:

[U]nder s 31 [of the NSW Act], an adjudicator is exempt from liability for anything omitted to be done in good faith. This would undoubtedly extend to a failure to deliver on time. If the time limit in s 29(4) is a guillotine, the obligation on an adjudicator to deliver a determination, whilst it may have been breached, would come to an end with no redress against her or him unless the failure was not in good faith. The adjudicator would be relieved of the burden of producing, albeit that she or he could not charge for work done. If a later adjudication is nevertheless valid, the adjudicator's duty would continue and the sanction of not being paid is more real. This position is more conducive to the prompt delivery by adjudicators and fulfilment of the overall objects of the Act.^[42]

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

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

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

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

(d) Although the NSW Act prescribes strict time limits on the parties, to deprive the parties of the benefit of an adjudication determination after they have completed their submissions would result in inconvenience (and possibly the cost of a further adjudication) to those parties, who were not responsible for the non-compliance.^[43]

(e) If s 21(3) of the NSW Act was intended to impose a jurisdictional requirement, then an adjudication determination, which was given within the 10 day period, could still be invalid if it was not given as 'expeditiously as possible'. A requirement to do an act as 'expeditiously as possible' is less likely to be jurisdictional because it does not have a 'rule-like quality which can be easily identified and applied'.^[44]

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

61 I agree with McDougall J and Hammerschlag J that a failure to comply with the time limits for determining an adjudication application does not invalidate the adjudication determination for the reasons given by them, referred to above. In my opinion, I can have regard to this reasoning in interpreting the Victorian Act because the relevant provisions are substantially identical.^[45] I would also add the following considerations:

(a) Section 22(4) of the Act regulates 'the exercise of functions already conferred on [the adjudicator], rather than impos[ing] essential preliminaries to the exercise of those functions'.^[46] This is a strong indicator of an intention that non-compliance does not deprive the adjudicator of her or his jurisdiction.^[42]

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

Where Parliament has enacted a provision in language which holds back from attaching consequences of nullity and voidness to the acts of a person in breach, it requires a very strong indication elsewhere in the Act that this is Parliament's purpose, if the Court is to derive an implication that this is so. This is because of the drastic consequences that can follow conclusions of nullity and voidness in the law.^[47]

(c) Section 22(4A) provides that a claimant must not unreasonably withhold consent to an adjudicator's request for an extension of time. If a claimant refuses an adjudicator's request for an extension of time, but nevertheless the adjudicator makes the determination outside the 10 days, but before the claimant withdraws the application under s 28, then the validity of the delivered determination would not be able to be finally determined until after the question of the reasonableness of the claimant's refusal is known. This is another example of why the assessment of compliance with s 22(4) does not have a 'rule-like quality which can be easily identified and applied'.^[48]

Orders

62 Accordingly, the Determination is valid and the plaintiff's claim for relief fails. I propose to order that the proceeding be dismissed and the plaintiff pay the first defendant's costs.

^[1] The Act s 14(4).

^[2] *Ibid* s 15(2).

^[3] *Ibid* s 15(4).

^[4] *Ibid* s 18(1).

^[5] *Ibid* s 18(3).

^[6] *Ibid* s 20(1).

^[7] *Ibid* s 28.

^[8] *Ibid* s 21(2A).

^[9] *Ibid* s 21(1).

^[10] *Ibid* s 22(3).

^[11] *Ibid* s 21(2B).

^[12] *Ibid* ss 22(4)-(4A).

^[13] *Ibid* s 22(5).

^[14] *Ibid* s 28.

^[15] The Act s 14(4).

^[16] The Act s 15(4).

^[17] The Act s 18(3).

^[18] [2011] NSWCA 399; (2011) 81 NSWLR 716, 740-1 [114]-[116].

^[19] [2017] NSWSC 1121.

^[20] [1917] UKPC 2; [1917] AC 170, 175, cited in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392 [97] (McHugh, Gummow, Kirby and Hayne JJ).

^[21] See *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* [2007] VSCA 121; [2007] 212 FLR 56, 66-8 [32]-[38] (Maxwell P and Neave JA); 91-2 [118] (Nettle JA); 102 [184] (Ashley JA) of 80-5 [84]-[97] (Chernov JA), in which it was held that there was no power to extend time for compliance with the demand under s 459E(2)(a) of the *Corporations Act 2001* (Ch) when the time for compliance had expired. An appeal from this decision was dismissed in *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* [2008] HCA 9; (2008) 232 CLR 314 (Gleeson CJ, Hayne, Crennan and Kiefel JJ, Kirby J dissenting) on grounds arguably peculiar to s 459E(2)(a) of the *Corporations Act 2001* (Ch).

^[22] (1998) 194 CLR 355 (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ) (*Project Blue Sky*).

^[23] *Ibid* 388-9 [91] (McHugh, Gummow, Kirby and Hayne JJ).

^[24] [2004] NSWSC 103.

^[25] Section 3 of the NSW Act is in substantially similar terms to s 3 of the Act.

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

^[27] *MPM Constructions* [2004] NSWSC 103 [17].

^[28] Pursuant to s 26(2) of the NSW Act.

^[29] *MPM Constructions* [2004] NSWSC 103 [18], [22].

^[30] See the NSW Act s 26(2).

^[31] [\[2016\] NSWSC 453](#).

^[32] *Ibid* [6].

^[33] [\[2011\] NSWCA 396](#); [\(2011\) 81 NSWLR 716](#) (Baaston and Macfarlan JA and Tobias AJA).

^[34] *Ibid* 721 [14], 736 [84], 739 [105] (Macfarlan JA and Tobias AJA).

^[35] *Ibid* 729 [49].

^[36] *Ibid* 740–1 [115].

^[37] [\[2013\] NSWSC 430](#).

^[38] *Ibid* [63].

^[39] *Ibid* [61], [64].

^[40] *Ibid* [64].

^[41] [\[2017\] NSWSC 1121](#).

^[42] *Ibid* [61].

^[43] *Project Blue Sky* (1998) 194 CLR 355, 392 [97]–[98] (McHugh, Gummow, Kirby and Hayne JJ); *Forrest & Forrest Pty Ltd v Wilson* [\[2017\] HCA 30](#); [\(2017\) 346 ALR 1](#), 14 [62] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

^[44] See, eg, *Project Blue Sky* (1998) 194 CLR 355, 391 [95] (McHugh, Gummow, Kirby and Hayne JJ); *Forrest & Forrest Pty Ltd v Wilson* [\[2017\] HCA 30](#); [\(2017\) 346 ALR 1](#), 14 [62] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

^[45] *Hamerley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (rec and mgr apptd)* [\(2017\) 320 FLR 259](#), 276 [84] (Tottle J); *La Macchia v Minister for Primary Industries and Energy* [\(1992\) 110 ALR 201](#), 204 (Burchett J); *Hicks v Minister for Immigration & Multicultural Affairs* [\[2003\] FCA 757](#) [75]–[76] (French J); Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) [3.36]; cf *Marshall v Director General, Department of Transport* [\[2001\] HCA 37](#); [\(2001\) 205 CLR 603](#), 632–3 [62] (McHugh J) cited in *Walker Corp Pty Ltd v Sydney Harbour Foreshore Authority* [\[2008\] HCA 5](#); [\(2008\) 233 CLR 259](#), 270 [31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

^[46] *Forrest & Forrest Pty Ltd v Wilson* [\[2017\] HCA 30](#); [\(2017\) 346 ALR 1](#), 14 [62] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

^[47] *Project Blue Sky* (1998) 194 CLR 355, 391 [94] (McHugh, Gummow, Kirby and Hayne JJ).

^[48] [\[2006\] HCA 32](#); [\(2006\) 225 CLR 364](#), 390 [86].

^[49] *Project Blue Sky* (1998) 194 CLR 355, 391 [95] (McHugh, Gummow, Kirby and Hayne JJ); *Forrest & Forrest Pty Ltd v Wilson* [\[2017\] HCA 30](#); [\(2017\) 346 ALR 1](#), 14 [62] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

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