

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL COURT  
TECHNOLOGY, ENGINEERING & CONSTRUCTION LIST

Not Restricted

S ECI 2018 0108

THE NUANCE GROUP (AUSTRALIA) PTY LIMITED  
(ACN 068 215 341)

First Plaintiff

- and -

SHAPE AUSTRALIA PTY LIMITED (ACN 003 861 765)

First Defendant

THOMAS JONES

Second Defendant

MAX TONKIN

Third Defendant

ADJUDICATE TODAY PTY LTD (ACN 109 605 021)

Fourth Defendant

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JUDGE: Digby J  
WHERE HELD: Melbourne  
DATE OF HEARING: 14 June 2018  
DATE OF JUDGMENT: 29 June 2018  
CASE MAY BE CITED AS: Nuance Group v Shape Australia  
MEDIUM NEUTRAL CITATION: [2018] VSC 362

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BUILDING - Adjudication - Whether an Adjudicator has determined the adjudicated amount in accordance with the *Building and Construction Industry Security of Payment Act 2002* (Vic), s 23 - Adequacy of the Adjudicator's Reasons and the basis for the amount decided.

BUILDING - Review Adjudication - Effect of Review Adjudication - *Building and Construction Industry Security of Payment Act 2002* (Vic), s 28B and 28I.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M G Roberts QC	Piper Alderman
For the First Defendant	Mr I G Roberts SC	Turttons Lawyers

HIS HONOUR:

**Precis of the Matter**

- 1 The plaintiff, The Nuance Group (Australia) Pty Ltd (also known as Dufry) ('Nuance'), seeks to have the second defendant's, Thomas Jones ('the Adjudicator'), Adjudication Determination quashed on the basis that the Adjudicator has fundamentally failed to determine the amount of the first defendant's, SHAPE Australia Pty Limited ('Shape'), progress payment to be paid as required by s 23 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('the SOP Act').
- 2 The plaintiff also seeks to quash a subsequent Review Determination, which reviewed the Adjudication and determined that the Adjudicated Amount should be reduced by the deduction of certain excluded amounts.
- 3 The Review Determination is sought to be quashed because it cannot be validly based on an Adjudication Determination which is itself invalid.

**Nuance's Application**

- 4 By Summons on Originating Motion dated 22 May 2018, Nuance seeks the following relief:
  1. Until the final determination of this proceeding, or further order, the first defendant by itself, its servants or agents is restrained from relying on the terms of s 28O, 28P, 31-41 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) or otherwise to:
    - (a) request an Adjudication Certificate based upon the Adjudication Determination 2018ADJTVICA041 made by the second defendant on 13 April 2018 or the Review Determination 2018ADJTVICA041R made by the third defendant on 11 May 2018;
    - (b) seek judgment in the Adjudicated Amount referred to in the Adjudication Determination 2018ADJTVICA041 made by the second defendant on 13 April 2018 or the Adjudicated Amount referred to in the Review Determination 2018ADJTVICA041R made by the third defendant on 11 May 2018;
    - (c) enforce the Adjudication Determination 2018ADJTVICA041 made by the second defendant on 13 April 2018 or the Review Determination 2018ADJTVICA041R made by the third defendant on 11 May 2018;
    - (d) otherwise seek recovery of the Adjudicated Amount.

2. Until the final determination of this proceeding, or further order, the fourth defendant, by itself, its servants or agents is restrained from providing an Adjudication Certificate under s 28Q in respect of the Adjudication Determination 2018ADJTVICA041 made by the second defendant on 13 April 2018 or the Review Determination 2018ADJTVICA041R made by the third defendant on 11 May 2018.

By way of Final Relief:

3. The Adjudication Determination of the second defendant made on or about 13 April 2018 under the *Building and Construction Industry Security of Payment Act 2002* (Vic) be quashed;
4. The Review Determination of the third defendant made on or about 15 May 2018 under the *Building and Construction Industry Security of Payment Act 2002* (Vic) be quashed.
5. The first defendant pay the plaintiff's costs of these proceedings.
6. Such further or other relief as the Court sees fit.

5 At the hearing of this trial Nuance and Shape appeared at and participated at trial.

6 The Adjudicator and the third defendant Max Tonkin ('the Review Adjudicator') and the fourth defendant Adjudicate Today Pty Ltd ('Adjudicate Today') neither appeared nor took any active role in relation to the trial. By letter dated 30 May 2018, the Adjudicator, the Review Adjudicator and Adjudicate Today advised the Court that they did not intend to appear at the trial and will abide the decision of the Court.

### Background facts

7 In summary, the relevant background facts are as follows:

- (a) By a Construction Contract entered on or about 8 July 2016 ('the Contract'), Nuance contracted with Shape to have Shape demolish, refurbish and fit out an existing retail duty-free space located at Melbourne International Airport, Terminal 2 on the Departures Level.
- (b) The initial contract price for the relevant scope of works under Contract was \$13.8 million (excluding GST) including demolition, metalworks, partitions and doors, ceilings, floor tiling, structural steel, electricalworks,

mechanicalworks, fire services and audio visualworks.

- (c) Shape issued payment claim no. 13 dated 2 March 2018 for the amount of \$3,533,233.84 ('the payment claim') which included a mixture of claims, including claims that had been certified and paid, claims for dispute variations which were not certified for payment and not paid and claims in relation to liquidated damages that had been certified and deducted.
- (d) On 2 March 2018, Nuance responded to the payment claim with a payment schedule in which it identified \$nil as being payable.
- (e) Shape thereafter, on 19 March 2018, initiated an adjudication application for a reduced amount of \$2,243,105.55 ('the Claimed Amount') which was referred to the Adjudicator.
- (f) On or about 27 March 2018, Nuance submitted its adjudication response ('the Adjudication Response').
- (g) On or about 28 March 2018, Turttons Lawyers, acting for Shape, sent a letter to the Adjudicator requesting an opportunity to respond to the Adjudication Response.
- (h) On or about 1 April 2018, Piper Alderman sent a letter to the Adjudicator regarding the scope of the further written submissions submitted by Shape.
- (i) On or about 5 April 2018, Adjudicate Today invited Shape in accordance with s 21(2B) of the SOP Act to provide further written submissions.
- (j) On or about 6 April 2018, Shape submitted its further submissions in response to the Adjudicator's notice dated 5 April 2018.
- (k) On or about 10 April 2018, Piper Alderman received an email from Adjudicate Today which enclosed a notice in which the Adjudicator requested, amongst other things:

- (i) an extension of time in accordance with s 22(4)(b) of the SOP Act an extension of time until 13 April 2018 to determine the adjudication application;
  - (ii) in accordance with s 21(2B) of the SOP Act, that Nuance provide any further written submissions in reply to Shape's further submissions dated 6 April 2018.
- (l) Further, on or about 10 April 2018, Piper Alderman were copied into an email from Turttons Lawyers which consented to the Adjudicator's requests.
  - (m) On or about 11 April 2018, Nuance submitted its further submissions in accordance with the Adjudicator's invitation.
  - (n) On 13 April 2018, the Adjudicator issued an Adjudication Determination in the amount of \$1,400,007.12 ('the Adjudicated Amount').
  - (o) On 24 April 2018, Nuance made an application for review of the Adjudication Determination on the basis that the Adjudicated Amount appeared to at least include and exclude an amount. That application was referred to the Review Adjudicator.
  - (p) On or about 30 April 2018, Shape submitted its response to the review application.
  - (q) On or about 1 May 2018, Piper Alderman sent an email to Adjudicate Today regarding the contents of Shape's submissions in response to the Review Application.
  - (r) On or about 2 May 2018, Piper Alderman received a letter from Adjudicate Today that the Review Adjudicator had been appointed as review adjudicator to the Review Application.
  - (s) On or about 9 May 2018, Piper Alderman received a letter from Adjudicate Today which requested a further extension of time for the Review

Adjudicator to complete his review determination in accordance with s 28I(10)(b) of the SOP Act.

- (t) On 15 May 2018, the Review Adjudicator issued an Adjudication Review for an amount in the sum of \$1,216,715.72.
- (u) The Review Adjudicator found, amongst other things, that whilst the Adjudication Amount included excluded amounts, those excluded amounts were not in the nature of liquidated damages and also found that nine items of work, in the nature of contested variations, constituted excluded amounts, had been included in the Adjudicated Amount.
- (v) Nuance points out that Shape will be in a position to obtain an adjudication certificate or judgment by about 23 May 2018, should the Plaintiff not be granted injunctive relief in respect of the Review Determination.
- (w) Piper Alderman currently holds the sum of \$1,328,250.00 in trust which it holds on behalf of Nuance. The money was remitted on trust as a precondition to seeking the Review Application in accordance with s 28A and s 28B of the SOP Act.<sup>1</sup>
- (x) Nuance also submits that based on the Review Determination amount (and taking into account the amount already paid by Nuance to Shape) as well as Nuance potentially being liable for 100% of the Adjudicator's fees (\$8,140.00) and 50% of the Review Adjudicator's fees (\$5,610.00), the amount of \$1,176,328.59 may be payable to Shape pending the outcome of these proceedings (excluding any adverse costs order made in favour of Shape in respect of these proceedings). In his Affidavit of 22 May 2018 at paragraph [41], Mr Coleman, solicitor for Nuance, provides an undertaking in substance to establish, maintain and not deal with the amount of \$1,176,328.59 (revised in Mr Coleman's Affidavit affirmed 25 May 2018 to \$1,165,108.15), until further of the Court.

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<sup>1</sup> Affidavit of Timothy Coleman, 22 May 2018, [39].

- (y) The disputes between the parties as to what is ultimately payable under the Contract have been referred to Mr R Manly QC, for final determination, pursuant to a contractual dispute resolution mechanism.

**Nuance's Position**

- 8 Nuance asserts that both the Adjudication Determination and the Review Determination should be quashed. Nuance also submits that in the event of those Determinations being quashed there should be no remitter to the Adjudicator or the Review Adjudicator because:
- (a) the Adjudicator is *functus officio* as the SOP Act requires the performance of the Adjudicator's functions with specified time frames which have expired and the SOP Act does not contain a mechanism that allows for the extension of the specified time frames;
  - (b) the power of an adjudicator under s 24 of the SOP Act to correct a mistake in a determination is not sufficiently broad to allow a fresh determination to be made, as would be required in the present case;
  - (c) the issues in dispute between the parties would most effectively, completely, promptly and economically be resolved by the matter to be determined in accordance with the contract dispute resolution provisions should Shape be so minded:
    - (i) the Review Adjudicator has no power under the SOP Act to correct the defects in the original determination. He is bound by the findings of fact made by the Adjudicator. His role is limited to identifying whether the Adjudicated Amount includes an excluded amount and, if so, severing that amount from the Adjudicated Amount if such severance is possible;
    - (ii) here the failings of the Adjudicator meant that the necessary findings of fact had not been found. Accordingly, the Review Adjudicator,

having found that the Adjudicated Amount did include excluded amounts, he should have simply concluded that he was not in a position to be able to determine the Adjudicated Amount and declined to do so.

9 Nuance submits that the Adjudicator did not determine the amount of the progress claim as required.

10 Nuance submits that for the Adjudication Determination to be valid the Adjudicator must comply with the basic and essential requirements of the SOP Act.

11 More specifically Nuance submits that s 23(1) of the SOP Act requires the Adjudicator to determine the amount of the progress payment, if any, to be paid by Shape to Nuance.

12 Nuance submits that the task of the Adjudicator requires him or her to, at a minimum, determine whether the construction work the subject of the relevant claim has been performed and determine the value of that work.

13 Nuance's submission is that here, the Adjudicator failed to undertake this task and that such a failure amounted to a failure to comply with the basic and essential requirements of the SOP Act and also resulted in jurisdictional error.

14 Nuance's argument is that the Adjudicator failed to determine the performance of the claimed construction work and its value. Nuance contends that rather than determining the performance of the claimed work and its value, the Adjudicator commenced the process of calculating the Adjudicated Amount by taking the amount claimed by Shape and then determining the Adjudicated Amount simply by deducting from the amount claimed by Shape, the claims that the Adjudicator found to be *excluded amounts*.

15 Nuance submits that the Adjudicated Amount cannot be arrived by adopting the process of calculation adopted by the Adjudicator. Specifically Nuance submits that the Adjudicator fell into jurisdictional error by starting with the claimed amount and



then determining whether the respondent had established a sufficient basis to withhold payments in respect of each item.

- 16 Nuance also submits that the Adjudicator failed to provide adequate reasons and thereby contravened s 23(3) of the SOP Act.
- 17 Nuance supports its argument in relation to the Adjudicator's inadequate reasons by contending that the Adjudication Determination does not contain sufficient reasoning on its face to allow parties to determine how the Adjudicated Amount was calculated.
- 18 Further Nuance submits that these matters were confirmed by the Review Adjudicator. In this regard Nuance submits that the Review Adjudicator acknowledges that he can only in instances 'infer' the reasoning of the Adjudicator and that the Adjudicator's determinative reasoning cannot be ascertained on the face of the Adjudication Determination.
- 19 Nuance also submits that the parties' contentions concerning the Adjudication Determination, which includes speculation as to how the Adjudicated Amount was arrived at and the Review Adjudicator's conclusions, confirm the Adjudicator's failure to determine whether the construction work, the subject of the claim, had been performed and its value.
- 20 Nuance submits that these matters demonstrate that the inadequacy of the reasoning and calculation of the Adjudicator in the Determination Adjudication.
- 21 Nuance also argue that the Review Adjudicator fell into jurisdictional error.
- 22 Nuance contends that the Review Adjudicator in the course of his Review Determination made new findings constituted by the Review Adjudicator's calculations at pages 8 and 9 of the Adjudication Review.
- 23 Nuance submits that these calculations are impermissible because they amount to the Review Adjudicator impermissibly adopting a different method of calculation to

the one used by the Adjudicator.

24 Nuance submits that thereby the Review Adjudicator fell into jurisdictional error in the process of the Review Adjudicator attempting to sever excluded amounts from the Adjudicated Amount.

25 Nuance also submits that although the Review Adjudicator purported to sever certain excluded amounts, there were insufficient reasons in the Adjudication Determination to allow the Review Adjudicator to identify such amounts.

26 Nuance submits that the Review Adjudicator fell into jurisdictional error when he calculated the Adjudicated Amount in a way which purported to re-evaluate the findings made by the Adjudicator.

27 Nuance submits that the Review Adjudicator should have found in the circumstances that the Adjudicator had failed to make the necessary findings of fact regarding the underlying elements and that it was not possible, within the constraints imposed on the Review Adjudicator, to sever excluded amounts. Nuance submits that this should have resulted in there being no excluded amounts being severed from the Adjudicated Amount, by the Review Adjudicator.

28 Nuance submits that this in turn would have resulted in a review finding for the Adjudicated Amount of \$nil.<sup>2</sup>

29 Further, Nuance submits that in the Review Adjudicator awarding Shape a further sum of \$17,683.57 for interest also amounts to the Review Adjudicator recalculating the interest payable to Shape, a function beyond the Review Adjudicator's jurisdiction.

30 Finally, in response to Shape's contention that Nuance has by commencing a review determination waived or elected not to thereafter challenge the earlier Adjudication, Nuance submits that its initiation of the review adjudication neither constituted a waiver nor an election which effects its entitlement to pursue the relief it does in this

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<sup>2</sup> Affidavit of Timothy Coleman, 22 May 2018, [37].

proceeding.

31 Nuance also contends that it is not open for the Court to remit matters back to the Adjudicator for decision nor back to the Review Adjudicator.

### Shape's Submissions

32 Shape submits that the Adjudicator can have regard to the relevant parties' agreements and acceptance of certain relevant items as part of the Adjudication process. This contention as appears to be common ground between Shape and Nuance.

33 Shape's submissions are in outline that:

- (a) The Adjudicator performed the basic and essential function required of him by the SOP Act. He determined the dispute as constituted by the payment claim and the payment schedule, having regard to the submissions made and materials provided by the parties.
- (b) In respect of the undisputed items that were agreed by the parties, the Adjudicator was not required:
  - (i) to separately identify each such agreed items in his determination;
  - (ii) to make a determination in respect of those items that differed from the parties' agreement.

I note that Shape's more detailed arguments seeking to explain and justify the Adjudication Determination are addressed below under the heading Considerations.

- (c) The Adjudicator discharged his obligations to:
  - (i) give reasons for his determination of the payment claim;
  - (ii) provide the basis on which he determined the Adjudicated Amount.

- (d) To the extent that the Review Adjudicator made new findings as to the quantification of the claim:
- (i) the findings were in Nuance's favour;
  - (ii) the Review Adjudicator was prohibited by s 28I(3) of the SOP Act from taking into account 'any excluded amount', however had Nuance included in its Review Application the items identified by the Review Adjudicator as excluded amounts, the findings by the Review Adjudicator would have been open to him;
  - (iii) even if Nuance is correct and the Review Adjudicator exceeded his jurisdiction, rendering the review determination void, the Adjudicator's Determination is nevertheless unaffected;
- (e) It would be permissible to remit issues to the Adjudicator or the Review Adjudicator (as applicable) if the Court considered it appropriate;<sup>3</sup> and
- (f) By its application for a review pursuant to s 28B of the SOP Act, Nuance has either conceded that the Adjudicator had carried out his basic and essential role, or alternatively elected to treat the Adjudicator as having done so, other than in respect of 'excluded amounts' under the SOP Act, and Nuance is bound by that election.

### Considerations

34 Nuance's primary contention is that the Adjudicator has failed to undertake the task required of him pursuant to s 23 of the SOP Act. Whether or not that contention is correct depends upon the requirements of the SOP Act in respect of the Adjudicator's role and obligations under the Act, and particularly s 23.

35 Whether Nuance's primary contention is established also depends upon the

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<sup>3</sup> During the course of argument on 14 June 2018, it was common ground between the parties that any question as to whether or not it is permissible to remit issues to the Adjudicator or the Review Adjudicator is to be deferred and to be the subject of further submission, if necessary, after judgment on the principal issues referred to above; see T31.20-T32.11 and T58.12-15.

Adjudicator's determination in this particular instance.

### The Relevant Provisions of the SOP Act

36 Section 23(1) of the SOP Act requires an Adjudicator to determine the amount of a relevant progress claim, if any, to be paid by the respondent to the claimant.

37 Section 23 of the SOP Act provides as follows:

- 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).<sup>4</sup>
- (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only—
- (a) the provisions of this Act and any regulations made under this Act;
  - (b) subject to this Act, the provisions of the construction contract from which the application arose;
  - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;
  - (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
  - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (2A) In determining an adjudication application, the adjudicator must not take into account—
- (a) any part of the claimed amount that is an excluded amount; or
  - (b) any other matter that is prohibited by this Act from being taken into account.
- (2B) An adjudicator's determination is void—
- (a) to the extent that it has been made in contravention of subsection (2);
  - (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.
- (3) The adjudicator's determination must be in writing and must include—
- (a) the reasons for the determination; and
  - (b) the basis on which any amount or date has been decided.
- (4) If, in determining an adjudication application, an adjudicator has, in

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<sup>4</sup> The adjudicated amount may be added to under s 45(8).

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.<sup>5</sup>

38 Section 23(3) of the SOP Act includes a requirement that an Adjudication Determination must be in writing and include the reasons for the Determination and the basis on which any amount has been decided.

39 Also of particular relevance to the scheme and requirements of the SOP Act in respect of the Adjudicator's Determination of the 'adjudicated amount' are ss 9, 11, 14 and 15 of the SOP Act:

(a) Section 9 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<sup>6</sup> ...

(b) Section 11 provides -

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<sup>5</sup> Underlining added.

<sup>6</sup> Ibid.

- 11 Valuation of construction work and related goods and services
- (1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued –
- (a) in accordance with the terms of the contract; or
  - (b) if the contract makes no express provision with respect to the matter, having regard to–
    - (i) the contract price for the work; and
    - (ii) any other rates or prices set out in the contract; and
    - (iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and
    - (iv) if any of the work is defective, the estimated cost of rectifying the defect.
- (2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued –
- (a) in accordance with the terms of the contract; or
  - (b) if the contract makes no express provision with respect to the matter, having regard to–
    - (i) the contract price for the goods and services; and
    - (ii) any other rates or prices set out in the contract; and
    - (iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and
    - (iv) if any goods are defective, the estimated cost of rectifying the defect.<sup>7</sup> ...

(c) Section 14 provides –

- 14 Payment claims
- (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
- (2) A payment claim–
- (a) must be in the relevant prescribed form (if any); and
  - (b) must contain the prescribed information (if any); and
  - (c) must identify the construction work or related goods and services to which the progress payment relates; and
  - (d) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount); and
  - (e) must state that it is made under this Act.
- (3) The claimed amount –
- (a) may include any amount that the respondent is liable to pay the claimant under section 29(4);
  - (b) must not include any excluded amount.

Note: Section 10(3) provides that a progress payment must not include an excluded amount.<sup>8</sup> ...

<sup>7</sup> Underlining added.

<sup>8</sup> Ibid.

(d) Section 15 provides –

15 **Payment schedules**

- (1) A person on whom a payment claim is served (the respondent) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule –
- (a) must identify the payment claim to which it relates; and
  - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount); and
  - (c) must identify any amount of the claim that the respondent alleges is an excluded amount; and
  - (d) must be in the relevant prescribed form (if any); and
  - (e) must contain the prescribed information (if any).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If –
- (a) a claimant serves a payment claim on a respondent; and
  - (b) the respondent does not provide a payment schedule to the claimant –
    - (i) within the time required by the relevant construction contract; or
    - (ii) within 10 business days after the payment claim is served;
- whichever time expires earlier –
- the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.<sup>9</sup>

40 That task of determining the amount of relevant progress payment to be paid to the claimant, as observed by Vickery J in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*,<sup>10</sup> at a minimum requires a determination as to whether the construction work the subject of the claim has been performed and its value.

41 In relation to undertaking the required evaluation process under s 23 of the SOP Act, Vickery J also recognised that:

- (a) in assessing the value of a claim, the adjudicator is entitled to draw any necessary inference from the absence of controverting material from the respondent, including an inference that no credible challenge can be made to the value of the claim advanced by the claimant; and
- (b) an adjudicator is not required to act as an expert building valuer by bringing a personal expert opinion to the valuation assessment but is required to consider and assess the valuation evidence presented in

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<sup>9</sup> Underlining added.

<sup>10</sup> [2015] VSC 631, [76].



the course of the adjudication, and arrive at a rational assessment of value on the basis of that evidence.<sup>11</sup>

- 42 In *Illawarra Retirement Trust v Denham Constructions Pty Ltd*,<sup>12</sup> McDougall J stated at [71] that what is to be determined in the context of a relevant determination under the New South Wales equivalent of the SOP Act, is the dispute constituted by the payment claim and the payment schedule.
- 43 In this matter the parties recognise and accept that the Adjudicator in undertaking the statutorily required task of determining the adjudicated amount determines the dispute constituted by the payment claim and the payment schedule submitted by the parties pursuant to ss 14 and 15 of the SOP Act, considered in the context of the materials presented to the Adjudicator, including any relevant amounts which are accepted by the parties as not being in dispute.
- 44 The requirement imposed by the SOP Act upon the Adjudicator, and in particular s 23 of the Act, to determine the extent and the value of construction work and the supply of related goods and services, is sufficiently clear on the language of s 23, in particular ss 23(1) and 23(2) and more particularly s 23(2)(c) and (d), read together with the SOP Act as a whole, which mandate consideration by the Adjudicator of the payment claim and the payment schedule.
- 45 The intent of the SOP Act to impose such a requirement, amongst others, on the Adjudicator is consistent with and supported by the provisions in s 14(2) of the Act requiring identification in the payment claim of claimed construction work or related goods and services, and the provisions in s 15(2) and (3) requiring the payment schedule to indicate what amounts the respondent proposes to pay and why the scheduled amount is less than the claimed amount and why the respondent proposes to withhold and the provisions of s 11, which require the valuation of work carried out by reference to certain contractual terms and if applicable rates or prices.
- 46 Further, s 23(4) of the SOP Act appears to be predicated on the Adjudicator

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<sup>11</sup> *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, [82] and [96].

<sup>12</sup> [2015] NSWSC 1173.

determining the value of items of construction work, and items related goods and services, in a manner enabling a subsequent adjudication determination to give the same value to those parts of the work as previously determined, unless the Adjudicator concerned is satisfied that the value of the work, or goods and services, has changed since the previous determination.

47 These provisions reflect a legislative intent that under the SOP Act the Adjudicator's role is to include the determination of the adjudicated amount by ascertaining whether the claimed construction work and any provision of related goods and services has been carried out, and undertaken as the case may be, and by ascertaining the value of that work and any related goods and services.

48 Section 9 of the SOP Act also supports the above construction of s 23 of the Act. Section 9 provides that progress payments under the Act will be calculated in relation to specific items of construction work carried out, or to be carried out, or specific items of related goods and services supplied or to be supplied under the contract. This is consistent with the overall scheme of the SOP Act, including ss 9, 11, 14, 15 and 23 which contemplate that progress claims will identify relevant construction work and related goods and services and the amount said to be due to the claimant in respect thereof and contemplate that the corresponding responsive payments schedule to be provided by the respondent will define what items in the payment claim are disputed.

49 It is appropriate to bear in mind that the Adjudicator's core function is to determine what amount of the claimant's progress payment (if any) is to be paid to the claimant and to do so in writing within a very tight time-frame, including with reasons for the determination and the basis on which any amount or relevant date has been decided.<sup>13</sup>

50 Save as provided in s 23 of the SOP Act, which includes a prohibition on the Adjudicator taking into account what are defined as 'excluded amounts' and which

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<sup>13</sup> SOP Act, s 23.  
SC:

includes certain clear requirements as to what the Adjudicator has to consider and how the Adjudicator is to approach the valuation of certain previously determined valuations, the Adjudicator may determine the amount of the progress payment to be paid by the respondent to a payment claim as the Adjudicator considers appropriate.

51 However, the adjudicator's determination must, as explained above, undertake the task of determining whether claimed construction work (including the provision of related goods and services) have been performed and must value that work, and goods and services, and must do so in writing, including reasons, and the basis on which any amount determined has been decided.

52 In my view given the purposes and objects of the SOP Act set out in ss 2 and 3 thereof, and the considerable expedition with which the Adjudicator is required to produce his or her determination, bare reasons which render the Adjudicator's determination comprehensible will suffice.<sup>14</sup>

#### Shape's Submissions Seeking to Explain the Adjudicator's Determination

53 Shape sought to argue that the Adjudicator's Determination<sup>15</sup> reflected that he rejected Shape's claim for Contentious Contract Adjustments (claimed in the amount of \$998,684.70) and Local Area Variations (claimed in the amount of \$24,244.00) on the basis that the Contract provided for in an express agreed mechanism for the resolution of such disputes. Further Shape observed that the parties do not take issue with the Adjudicator's rejection of these claims.

54 Shape submitted that of the claims in the form in which they arose for adjudication (before GST and interest) the following claims were in dispute:

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<sup>14</sup> *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, [99], [100] and [107].

<sup>15</sup> Affidavit of Timothy Coleman, 22 May 2018, Exhibit 'TJC-12'.

TABLE 1

No.	Description	Amount Claimed
1.	Original Contract Sum. The Adjudicator noted and had regard to the relevant original Contract Sum. The parties do not take issue with this item.	\$13,800,000.00
2.	Approved Adjustments (excluding interest and Local Area Variations). These variations and adjustments which had been claimed and assessed by the Superintendent during the course of the Works are included in the adjudication application at Tab 5 (Exhibit TJC-2). Each of the component variations was approved by Nuance. <sup>16</sup> There was no issue between the parties in relation to these items and their quantum. This is asserted to be reflected in the Positive Contract Adjustments Register in the sum of \$2,258,157.12.	\$2,258,157.12
3.	Approved and paid Local Area Variations	\$190,890.17
4.	Approved but unpaid Local Area Variations	\$65,291.94
5.	Contentious Contract Adjustments	\$998,684.70
6.	Contentious Local Area Variations	\$24,244.00

55 Nuance payment schedule certified and adjusted contract sum of \$14,967,393.62. It also responded by its payment schedule that it rejected Shape’s payment claim, and that nil was payable to the Contractor, Shape.<sup>17</sup>

56 Shape submitted that the sum of \$14,967,393.62 was explained by the addition of Nuance’s approved interest, in the sum of \$116,736.50, as referred to in Nuance’s payment schedule<sup>18</sup> together with Nuance’s quantification of its right to liquidated damages in the sum of \$1,207,500 as an amount withheld from earlier progress claims.<sup>19</sup>

57 Shape submitted that in the result the following sums comprised the \$14,967,393.62 which the payment schedule certified as the adjusted contract sum:

<sup>16</sup> Adjudication application, Shape Bundle, Tab 4, pp841-842 and Tab 5, pp844-857 (Affidavit of Timothy Coleman, 22 May 2018, Exhibit ‘TJC-2’).

<sup>17</sup> CB615.

<sup>18</sup> Affidavit of Timothy Coleman, 22 May 2018, Exhibit ‘TJC-4’, p52; Adjudication application (10.15), Shape Bundle, Tab 25, pp1583-1589 (Affidavit of Timothy Coleman, 22 May 2018, Exhibit ‘TJC-2’).

<sup>19</sup> Affidavit of Timothy Coleman, 22 May 2018, Exhibit ‘TJC-4’, p53; Adjudication application [7.1]; Shape Bundle, Tab 10, pp916-21.

TABLE 2

No.	Description	Amount
1.	Original Contract Sum.	\$13,800,000.00
2.	Approved Positive Contract Adjustments	\$2,258,157.12
3.	Interest assessed and approved by Nuance	\$116,736.50
4.	Nuance's claim for liquidated damages	-\$1,207,500.00
5.	Total	\$14,967,393.62

58 Shape then submitted that the Local Area Variation referred to as Items 3 and 4 in Table 1 above had been approved and agreed by Nuance through its Superintendent and that the parties do not contend that any of these items were in dispute.

59 Shape further submitted that at the adjudication on a fair and reasonable understanding of the materials before the Adjudicator, the only items which it would appear were not the subject of agreement and approval at the Adjudication, were Items 5 and 6 in Table 1 above which the Adjudicator rejected.

60 Shape submitted that the Adjudicator therefore proceeded within jurisdiction and appropriately by taking the items which were agreed between the parties as disclosed in the Original Contract Sum and the adjustments to that sum reflected in Table 1.

61 In that setting and by that process Shape submitted that the Adjudicator determined an amount in the sum of \$1,400,007.12.

62 Shape submitted that although the Adjudicator did not set out his calculation by way of the line items of construction work performed and goods and services provided, notwithstanding this, on a fair and reasonable reading of the Adjudication Determination the adjudication was arrived at by determining the sum of the claimant's entitlements in the nature of the work performed and allowing against that sum the amounts paid. Shape asserts that this reconciliation can be summarised, as Shape has done in Table 3 of its submission, which is set out as follows:

TABLE 3

No.	Description	Amount Claimed
1.	Original Contract Sum.	\$13,800,000.00
2.	Approved Adjustments (excluding interest and Local Area Variations).	\$2,258,157.12
3.	Approved and paid Local Area Variations	\$190,890.17
4.	Approved but unpaid Local Area Variations	\$65,291.94
5.	Contentious Contract Adjustments	\$0.00
6.	Contentious Local Area Variations	\$0.00
7.	Total Adjusted contract sum	\$16,314,339.23
8.	GST	\$1,631,433.92
9.	Total including GST	\$17,945,773.15
10.	Interest as approved by Nuance (\$116,736.50 + GST)	\$128,410.15
11.	Less amount paid (including 3 above) + GST	\$16,674,112.18
12.	Balance owing	\$1,400,071.12

63 Shape's submissions in my view also recognised that the Adjudicator's 'logic' followed a process, in substance, which did not address the line items of the Shape payment claim at Tab 2 of the Adjudication Application.<sup>20</sup> In that part of its payment claim Shape identified a large number of items of construction work and the supply of related goods and services. Rather than addressing the items of construction work and provision of related goods and services in the payment claim, the Adjudicator made adjustments against the value of Shape's total claim of composite amounts which the adjudicator considered should be deducted to reach the adjudicated amount. This is also confirmed by Shape's submission that the Adjudicator undertook the following in the process of reaching his adjudication determination:

- (a) the contract includes a dispute resolution mechanism as described in s 10A(3)(d) of the Act;<sup>21</sup>

<sup>20</sup> See Part B; CB604-607.

<sup>21</sup> Adjudication Determination, [10].

- (b) the claim for contested variations is therefore an excluded amount;<sup>22</sup>
- (c) the claim for the excluded amount is severable so the Adjudicator could proceed to determine the balance of the payment claim;<sup>23</sup>
- (d) the balance of the claim included approved Local Area Variations that the Adjudicator determined were invoiced separately to its monthly claims for a progress payment;<sup>24</sup>
- (e) prior to the reference date Shape had been paid \$190,890.17 (excluding GST) for the Local Area Variations;<sup>25</sup>
- (f) Shape had submitted three additional Local Area Variation claims totalling \$71,821.13 (\$65,291.94 + GST) that had not been paid by the reference date although they were subsequently paid;<sup>26</sup>
- (g) Shape was not entitled to a progress payment for the Local Area Variations in the sum of \$190,890.17 paid before the reference date but was entitled to a progress payment for the Local Area Variations in the sum of \$71,821.13 (including GST) not paid before the reference date;<sup>27</sup>
- (h) Nuance was not entitled to withhold the amount representing liquidated damages because they were time-related costs and therefore an excluded amount under s 10B of the SOP Act;<sup>28</sup>
- (i) Shape was entitled to interest in the sum of \$128,410.15 (\$116,736.50 + GST) that had been approved by Nuance;<sup>29</sup> and
- (j) Shape is therefore entitled to a progress payment of \$1,400,007.12 (at [18]) as

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<sup>22</sup> Ibid [10].

<sup>23</sup> Ibid [11].

<sup>24</sup> Ibid [12].

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid [13].

<sup>28</sup> Ibid [14]-[16].

<sup>29</sup> Ibid [17].

the balance owed.<sup>30</sup>

64 In my view the Adjudicator in this particular instance has failed to undertake the required task of addressing the payment claim and the payment schedule and, considering those parameters of the dispute between the claimant and the respondent as to what claimed work (and items of goods and services provided) had been carried out under the Contract and what the value of that work (and the goods and services provided) was as required for a valid and compliant determination under s 23 of the SOP Act.

65 This is because on the particular idiosyncratic facts and circumstances of this matter, the Adjudication Determination itself establishes that the Adjudicator, rather than undertaking his task in relation to the items of work (and provision of goods and services) asserted to have been undertaken in the payment claim, in light of the response to those items in the Nuance payment schedule, undertook a process of working back from the Shape total claimed amount, by a process, which as the above Shape submissions in my view exemplify, adjusted the claimed amount principally by deducting composite items of the claimant's claims in a way which cannot be comprehended on a fair and reasonable consideration of the Adjudicator's Determination, but can only be inferred and reconstructed in a number of instances.<sup>31</sup>

66 In my view the above outlined submissions by Shape seeking to justify how the Adjudicator proceeded and how he arrived at the Adjudicated Amount,

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<sup>30</sup> Insofar as the reconciliations and determinations reflected in Table 3 above come to a balance owing which is slightly more than the amount determined by the Adjudicator by about \$65, the discrepancy apparent appears to be one created by a typographical error in the Adjudicator typing \$1,400,007.12 rather than \$1,400,071.12. This minor discrepancy is in my view is a di minimus which is of no moment in this case.

<sup>31</sup> The Shape payment claim (CB602-608) read in conjunction with the payment schedule (CB612-615) do not identify items of work which are agreed or items of work which are disputed. The payment claim (CB602-611) and the Adjudication Application (Dufry's Tender Bundle 1 and Bundle 2) do not clarify what payment claim elements are pressed and payment claim elements are abandoned. Nuance's payment schedule disputed the whole of the payment claim (Affidavit of Timothy Coleman, 22 May 2018, Exhibit 'TJC-2' (CB615): the Adjudicator's allowances and adjustments to the Contract Sum and adjustments to the Shape total amount claimed are unclear as reflected in the exhibits to the Affidavit of Timothy Coleman, 22 May 2018, Exhibit 'TJC-2', P616 - Adjudication Materials; 'TJC-13', [8]-[13]; 'TJC-14', [4.6]-[4.11]; 'TJC-18, P186-187); Reasons [51]-[62].



demonstrate the Adjudicator's non-compliant approach to the task he was addressing under s 23 of the SOP Act.

67 Furthermore although my conclusions and findings in the last two preceding paragraphs are interrelated with my findings and conclusions in this paragraph, I am separately satisfied that no sufficiently comprehensible reasons and basis for the amount determined, taking into consideration the Shape payment claim and the Nuance payment schedule, can be understood from the Adjudication Determination.

68 On the contrary it was necessary for Shape to attempt to rely upon a number of separate extraneous documents, created as part of the administration and certification processes under the Contract, to attempt to piece together the asserted rational justification and reconciliation of the Adjudication Determination.

69 The Adjudicator did not however, as he was required to do, determine whether the construction work the subject of the payment schedule had been performed, and whether associated goods and services had been provided, and valued those items.<sup>32</sup>

70 Senior Counsel for Shape valiantly sought to explain and reconcile how his client asserted the Adjudicator had undertaken his determination and had complied with the requirements of s 23 of the SOP Act. It was however only by complex explanation including in several instances by inferring and extrapolating calculations and adjustments that Shape asserted that it could explain how the Adjudicator reached the ultimate adjudicated amount.

71 Even then, Sharp's attempted explanation reflected a process whereby the Adjudicator worked backwards and in my view in substance made it sufficient clear

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<sup>32</sup> That this is so, in my view, is further highlighted when the content of the Adjudication Determination, considered in light of the payment claim schedules submitted by Shape in its payment claim, identified in the Dufry Tender Bundle 1 Adjudication Application; Payment claim (2/3/18) Tab 2. (This document sets out a line item Schedule, including items and disputed valuations of variations or adjustments reflecting a difference/dispute of \$1,939,238.82) which defined the disputed item of construction work and in light of the Payment Schedule (2/3/18) Tab 3, which allowed Nil in respect of overall Shape payment claim. Nuance thereby rejected each line item of the Schedule to the Shape payment claim. In the result by its Adjudication Application dated 19/3/18 Shape claimed \$2,243,105.55 (including GST) through Adjudication.

by the complex attempted rationalisation, reconciliation and attempted explanation for the Adjudicator's workings and conclusions, set out in paragraphs [8]-[23] of Shape's Submissions dated 4 June 2018, that a fair reading of the Adjudicator's Determination itself failed to provide comprehensible reasons in relation to the determination of the adjudicated amount of \$1,400,007.12.

72 For these reasons I find that the Adjudicator has failed to undertake the determinative task required of him under s 23 of the SOP Act and I also find that the Adjudication Determination does not contain sufficiently comprehensible reasons for the determination and the basis upon which it was decided that \$1,400,007.12 was the adjudicated amount.

### Election

73 I reject Shape's contention that by initiating the Review Adjudication Nuance waived its right to thereafter challenge the Adjudication or thereby made an election which now precludes Nuance from impugning the Adjudication.

74 In my view Nuance's initiation of a review of the Adjudication Determination was not inconsistent with the prosecution of its challenge under the SOP Act in relation to the Adjudicator's compliance with the requirement of the SOP Act and in particular s 23 of that Act. Both processes are in the nature of a form of challenge to the Adjudication; one focused on the appropriate exclusion of excluded amounts and the other a challenge going to the fundamental performance of the Adjudicator's tasks.

75 Nuance's initiation of a review adjudication process did not constitute the attempted enforcement of an alternative and inconsistent right to the right it later invoked by approaching the Court on the basis it has done in this trial.

### Decision

76 For the above reasons I find that the Adjudicator has, in this case, failed to compliantly undertake the adjudication determination in accordance with the SOP

Act, and in particular s 23 of that Act. I also find for the above reasons that the Adjudication Determination did not satisfy the requirement that it include reasons for the determination and the basis on which the amount had been decided as required by s 23(3)(a) and (b) of the SOP Act. Accordingly, the subject Adjudication Determination is void and should be quashed.

77 Because a Review Adjudication can only be validly undertaken in relation to a preceding valid Adjudication Determination under the SOP Act, the subject Review Adjudication is, as a result of the findings in the last preceding paragraph, void and of no effect.

78 There is in the circumstances self-evidently, for the above reasons, that no remitters to the Adjudicator in relation to any aspect of the Review Determination would be appropriate.

### Order

79 Accordingly, I order that:

1. The Adjudication Determination of the second defendant made on or about 13 April 2018 under the *Building and Construction Industry Security of Payment Act 2002 (Vic)* be quashed.
2. The Review Determination of the third defendant made on or about 15 May 2018 under the *Building and Construction Industry Security of Payment Act 2002 (Vic)* be quashed.

80 I shall provide the parties with an opportunity to make further submissions, if necessary, in relation to the form of final orders, including as moneys held in trust pursuant to the SOP Act in relation to the Adjudication Review and/or as the moneys referred to in the Affidavit of Timothy Coleman, 23 May 2018, [39]-[41], and in relation to costs.

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CERTIFICATE

I certify that this and the 26 preceding pages are a true copy of the reasons for Judgment of Digby J of the Supreme Court of Victoria delivered on 29 June 2018.

DATED this twenty ninth day of June 2018.

*Catherine Makhtas*  
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Associate  
