AustLII
**Supreme Court of Victoria**
**Green Suburban Pty Ltd v Vita Built Pty Ltd [2018] VSC 330 (28 June 2018)**
Last Updated: 29 June 2018

| IN THE SUPREME COURT OF VICTORIA | Not Restricted |
|---|---|

AT MELBOURNE

COMMERCIAL COURT

TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

S ECI 2018 00124

BETWEEN:

**GREEN SUBURBAN PTY LTD (ACN 151 542 602)** Plain

AND

**VITA BUILT PTY LTD (ACN 256 579 434)** First Defend

**KEVIN MOORE** Second Defend

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| JUDGE: | Kennedy J |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 18 June 2018 |
| DATE OF JUDGMENT: | 28 June 2018 |
| CASE MAY BE CITED AS: | Green Suburban Pty Ltd v Vita Built Pty Ltd |
| MEDIUM NEUTRAL CITATION: | [2018] VSC 330 |

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**BUILDING** CONTRACTS — ***Building and Construction Industry Security of Payment Act 2002*** (Vic) — Payment claim issued after termination of contract— No 'reference date' to support payment claim — Absence of reference date meant payment claim invalid such that adjudication determination also invalid — Adjudication determination quashed by consent for jurisdictional error.

COSTS — Whether plaintiff ought to obtain costs order where error made by adjudicator —where hearing dates and filing of material necessitated following opposition – Order for costs made with small discount.

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| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Plaintiff | Mr A J Ritchie | Boutique Lawyers |
| For the First Defendant | Mr I Hristovski | Patten Robins Lawyers |
| For the Second Defendant | No appearance | --- |

HER HONOUR:

1 This is an application for judicial review by an owner of a property in relation to an adjudication determination dated 14 May 2018 (**relevant determination**) made pursuant to s 23 of the ***Building*** *and Construction Industry Security Payment Act 2002* (Vic) (**Act**). This application was supported by a number of affidavits.[1]

2 The second defendant (**Adjudicator**) indicated that he did not intend to take any active role in the proceeding and would abide by the decision of the Court, but would want to be heard if any order for costs was sought against him.[2]

3 After initially opposing the application, Counsel for the first defendant (the builder/contractor) appeared and indicated that his client consented to the orders quashing the adjudication on the basis that the Adjudicator had no jurisdiction to make the order, given no reference date had arisen under the Act.[3]

4 However, given the nature of the remedies sought (and in the absence of a joint memorandum), the issue was whether the Court was satisfied that any of the four grounds relied upon by the plaintiff were established. There was also an issue as to the appropriate costs order.

**Background**

5 The plaintiff, Green Suburban Pty Ltd (**Green Suburban**), is a developer/owner of properties. The first defendant, Vita Built Pty Ltd (**Vita Built**), is a domestic builder.

6 By a contract entered into between Green Suburban and Vita Built on 31 August 2016 (**Contract**), Vita Built agreed to construct 16 townhouses with a basement carpark at a property located at 84-88 Whittens Lane, Doncaster. The contract price was $8,140,000 including GST, with a practical completion date of 24 November 2017.

7 Clause N4.1 and Item 26 of Schedule 1 provided that the 'reference' date for submitting progress claims was the 24th of the month. A series of progress claims were thereby delivered and paid for between November 2016 and February 2018.

8 On 5 February 2018, Vita Built made a payment claim under the Act for $120,311 (with a reference date of 24 January 2018). However, this payment claim was not paid, with the result that, pursuant to the scheme set out in the Act, there followed an adjudication determination, adjudication certificate, and County Court judgment. This Court was advised, however, that the amount of this judgment has now been paid and this matter is not the subject of this current application.[4]

9 On 14 February 2018, Green Suburban served a notice of default and of immediate termination, citing Vita Built's failure to comply with a creditor's statutory demand which constituted an 'insolvency event' pursuant to clause (d) of the definitions of 'insolvency event' contained in cl S.[5] Counsel for Vita Built accepted that Green Suburban validly terminated the Contract on 14 February 2018.[6]

10 The last time that Vita Built attended the Doncaster site was also on 14 February 2018, so no works were performed thereafter.

11 On 3 April 2018, Vita Built made a payment claim, which became the subject of the relevant determination. It was attached to an email that stated: 'Please find the Retention Claim invoice attached'. The due date was said to be 10 April 2018 and the details given were as follows:

> VB019 88 Whittens Lane, Doncaster
> Retention Claim (Due to contract termination)

12 The total amount excluding GST was said to be $172,244.00; with the total amount including GST given as $189,468.40.

13 In the absence of a payment claim schedule, the Adjudicator made the relevant determination on 14 May 2018 for the amount of $189,468.40 including GST. He found, inter alia, that a reference date of 24 March 2018 existed to support the relevant payment claim.

14 On 31 May 2018, Green Suburban's solicitors wrote to Vita Built requesting an undertaking not to enforce the relevant determination in circumstances where the grant of an adjudication certificate was otherwise imminent. In so doing, the solicitors set out the jurisdictional error relied upon as being the absence of a reference date and also cited the High Court decision of *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (***Southern Han***).[7] However, that request was refused later that day in correspondence which highlighted that Green Suburban had had the opportunity to contest the matter during the process of adjudication and had chosen not to. Further, that the judgment debt would be pursued.

15 In the result, this judicial review proceeding was issued on 1 June 2018 and, on the same day, Green Suburban's application for injunctive relief was also heard. On that day, Lyons J made orders that Vita Built be restrained from taking any step to enforce, or take any action in relation to the relevant determination. More particularly, it was restrained from taking any step to issue an adjudication certificate under s 28Q of the Act in relation to the relevant determination. The proceeding was also listed for an expeditious hearing on 18 June 2018, with orders for exchange of further affidavits and submissions.

**The Act**

16 The Act is designed to ensure prompt payment of progress payments to subcontractors and suppliers.[8] It establishes a scheme which includes the making of a payment claim; the provision of a payment schedule by the person by whom the payment is payable; the referral of claims to adjudicators for determination; and the recovery of progress payments in court in the event of a failure to pay.[9]

17 Part 2 of the Act is headed 'Rights to progress payments'. A 'progress payment' means a payment to which a person is entitled under s 9 and includes the 'final payment' for construction work carried out under a construction contract (see definition of 'progress payment' in s 4, at part (a)).

18 The material parts of s 9 read:

> (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
> ...

19 Sub-sections 9(2)(b)–(d) then make provision if the contract makes no express provision with respect to a reference date.

20 Section 10 makes provision for the amount of progress payment to which a person is entitled, which is to be the 'amount calculated in accordance with the terms of the contract' where there is express provision in the contract (s 10(1)(a)).

21 Part 3 of the Act is entitled 'Procedure for recovering progress payments' and commences with s 14, which relevantly provides:

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

(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or
(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment— whichever is the later.

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

(a) the period determined by or in accordance with the terms of the construction contract; or
(b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

...

(8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

22 It should further be noted that a claim referred to in s 14 is defined as a 'payment claim' (see definition in s 4).

23 As explained in *Southern Han* (in relation to the equivalent NSW provisions),[10] the service of a payment claim triggers the procedure set out in Pt 3 of the Act.

24 Insofar as the present case is concerned, in the absence of a payment schedule, the respondent became liable to pay the 'claimed amount' to the claimant (s 15). The claimant was then able to make an adjudication application in relation to the payment claim (ss 16(2) and 18(1)(b)).

25 The jurisdiction of an adjudicator is then set out in s 23, which provides in part:

(1) An adjudicator is to determine—

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ***adjudicated amount***); and
(b) the date on which that amount became or becomes payable; and

(c) the rate of interest payable on that amount in accordance with section 12(2).

**Note**

The adjudicated amount may be added to under section 45(8).

(2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only—

(a) the provisions of this Act and any regulations made under this Act;
(b) subject to this Act, the provisions of the construction contract from which the application arose;

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

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

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

...

**Grounds**

***Ground 1***

26 Ground 1 read as follows:

The Adjudicator fell into jurisdictional error, or alternatively, made an error on the face of the record in finding that there was a reference date of 24 March 2018 supporting the first defendant's purported payment claim made 3 April 2018 when no such reference date existed under the relevant construction contract.

27 This was the primary ground relied upon by Counsel for Green Suburban.[11]

*Relevant reasons*

28 In the reasons provided to substantiate the relevant determination decision (**Reasons**), the Adjudicator cited the Contract which, in his view, satisfied the requirements of a construction contract for the purposes of the Act. He also cited the fact that the payment claim was issued on 3 April 2018. The Reasons continued:

19. The Contract provides that a Reference Date is generated on the "24th of the month".
1. On or about 14 February 2018, the Respondent, via James Partners Lawyers' served a Notice of Default purportedly terminating the Contract.
2. Clauses Q6 to Q9 of the Contract, contemplates payment to the Contractor post termination. As such, in my opinion, and I so determine, that pursuant to s.14(4)(b) of the Act, reference dates continue to accrue post termination for a period of three months.

c. A Reference Date was generated on 24 March 2018.
d. The Payment Claim was issued on 3 April 2018.

29 At paragraph [21] of the Reasons, the Adjudicator determined that the payment claim satisfied the requirements as a construction contract for the purposes of the Act and concluded that all the relevant notices and claims had been submitted in accordance with the times stipulated in the Act. He opined that he had jurisdiction to determine the adjudication application (at [21]) and concluded that Vita Built was entitled to a payment of $189,468.40 including GST together with interest and adjudicator's fees.

*Relevant provisions in the Contract*

30 It is true that cl Q6 and cl Q9 of the Contract make provision for payment 'post termination' as stated in the Reasons, but in limited circumstances.

31 Thus pursuant to cl Q6, where the Contract has been terminated under cl Q1 or cl Q2, the owner '*will not be bound to make any further payment to the contractor unless an obligation to pay arises under clause Q9*'. (It was not in dispute that the termination was made pursuant to cl Q2 in the present case on the basis of an 'insolvency event'.)

32 Clause Q9 provides for the issue of a certificate of a total amount payable following the completion of an assessment by an architect of the cost to the owner of completing the works under cl Q8.

33 Pursuant to cl Q9, the architect must calculate total amounts owing to the contractor which include the contract price as adjusted (cl Q9.2) and the amount of any security by cash retention (cl Q9.4). He/she must then compare this with amounts owing to the owner, which include the cost to the owner of completing the works and amounts of any liquidated damages (cl Q9.3). Clause Q9.5 then provides for the issue of a certificate showing the total amount owing to the owner or the contractor as the case may be.

34 It is therefore the certificate issued pursuant to cl Q9 which gives rise to a payment obligation in the post-termination period, with cl Q10.3 providing for the balance owing on such certificate to be paid within a 7day period of the delivery of the certificate and tax invoice (being the period prescribed in Item 10 of Schedule 1).

*Submissions*

35 In written submissions,[12] Green Suburban highlighted that, pursuant to cl Q6, there was no obligation to make any further payments under the Contract unless an obligation arose under cl Q9. Relevantly, no obligation had arisen under cl Q9 yet, given that no certificate had been issued by the architect.

36 It follows that there were no further 'reference dates' (as defined by s 9(2)(a) of the Act) after the date of termination, such that there was no reference date of 24 March 2018 as found by the Adjudicator.

37 In oral submissions, Green Suburban emphasised that the reference by the Adjudicator to s 14(4)(b) of the Act was misconceived, given that the provision did not *create* reference dates, but rather a limit on the period in which progress payments can be brought.

38 Counsel further cited *Southern Han* for the proposition that in order for there to be a valid payment claim under s 14, there must be a reference date under s 9.[13] Absent this, an adjudicator cannot have jurisdiction. Again, there was no such date here, given that the final computation work under cl Q9 had not yet been done.

39 Counsel for Vita Built generally agreed with Green Suburban's submissions about the reference date; more particularly accepting that the reference date had not yet arisen, and certainly had not arisen at the time of the relevant determination, in circumstances where the final computation (including allowance for a retention amount) had not yet taken place.[14]

*Analysis*

40 I accept the submissions from the parties to be correct based on the decision in *Southern Han*.

41 In *Southern Han*, cl 37.1 of the relevant contract provided for progress claims to be made on the 8th day of each month for work done to the 7th of each month. Clause 39.2 then provided that, in the event of a substantial breach of the contract, the owner (**Southern Han**) was entitled to give the builder (**Lewence**) a 'show cause notice'. In the event that Lewence failed to show reasonable cause, cl 39.4 allowed Southern Han to take the work remaining to be completed out of Lewence's hands and to 'suspend payment' until it became due and payable pursuant to a certification process provided for in cl 39.6.

42 Following service of a show cause notice, on 27 October 2014, Southern Han purported to exercise its rights under cl 39.4 to take the work remaining out of Lewence's hands. However, Lewence treated that notice as a repudiation and, on 28 October 2014, purported to accept that repudiation and terminate the contract. Lewence then, on 4 December 2014, purported to serve a payment claim for work carried out up to 27 October 2014 (in circumstances where there had already been a payment claim served on about 8 October 2014).

43 The High Court held that – contrary to the finding of Ward JA in the New South Wales Court of Appeal –there was no reference date of 8 November 2014 on either of the two hypotheses put forward by the parties.[15] In the case of a valid exercise of rights on 27 October 2014 (put forward by Southern Han), cl 39.4 provided for a suspension of *all* rights to payment until completion of the final certification process. This included rights to make progress claims for work carried out up to the time of the work being taken out of its hands. It followed that there could be no reference date of 8 November 2014. In the case of an acceptance of repudiation and termination on 28 October 2014 (put forward by Lewence), Lewence's rights under the contract were limited to those which had already accrued. However, the right to make a progress claim under cl 37.1 of the contract in relation to work carried out to 27 October 2014 had not accrued as at 28 October 2014, since it only accrued on 8 November 2014. Again, therefore, there was no reference date in circumstances where the contract had been terminated before that time.

44 First, then, I accept there was no reference date to support the payment claim here, drawing on the reasoning in *Southern Han*. Thus, following termination of the Contract on 14 February 2018, the rights to progress payments were completely suspended under cl Q6 of the Contract until completion of the process provided for in cl Q9. It follows that no reference date of 24 March 2018 could arise under the Contract as stated by the Adjudicator in circumstances where the process under cl Q9 had not been completed. The Adjudicator's reference to s 14(4)(b) was also incorrect insofar as he relied on it to support a reference date of 24 March 2018. I accept the plaintiff's submission that s 14(4)(b) does not create reference dates (but only a time limit for the bringing of progress payments). Rather, the concept of a 'reference date' is dealt with in s 9(2) as set out above.

45 Second, I accept that, pursuant to *Southern Han*, the existence of *a reference date* within the meaning of s 9 is a precondition to the making of a valid payment claim under s 14 of the Act. This is because s 14 grants the entitlement only to 'a person referred to in s 9(1)', and s 9(1) grants such entitlement only on and from each reference date.[16]

46 Finally, consistent with *Southern Han*, I accept that the service of a payment claim under the equivalent provision of s 14 is an essential precondition to the subsequent steps taken under Part 3 of the Act, i.e. that there can be no adjudication application and hence '*no adjudication within the jurisdiction conferred by [s 23]*' in the absence of the service of a payment claim.[17]

47 It follows that, as there was no reference date of 24 March 2018 or otherwise to support the payment claim, the purported payment claim of 3 April 2018 was invalidly made, and the Adjudicator had no jurisdiction to make the relevant determination.

48 For this reason, the relevant determination should be quashed.[18]

***Ground 2***

49 This ground was as follows:

Alternatively, the Adjudicator fell into jurisdictional error or, alternatively, made an error of law on the face of the record in finding that the first defendant's purported payment claim was valid when, in fact, it was served in breach of s 14(8) of the Act and was invalid.

50 In written submissions, Green Suburban stated that because the purported claim was for retention held in respect of work that had been the subject of prior payment claims, it breached s 14(8) of the Act which provided that a claimant cannot serve more than one payment claim 'in respect of *each reference date* under the construction contract' (emphasis added).

51 However, in oral submissions Counsel clarified that ground 2 was not pursued if there was a valid termination finding (which meant that there was no reference date of 24 March 2018 in any event).[19]

52 Counsel for Vita Built submitted that, assuming a claim under cl Q9 could be made, the issue of s 14(8) did not arise given that the claim was for retention which did not involve a duplication of claims.

*Analysis*

53 There is merit in the submissions of Vita Built to the effect that a claim for retention does not involve a duplication of claims. However, given that I have found that there was a valid termination (with no reference date of 24 March 2018), the ground was not pursued and does not arise for consideration.

***Ground 3***

54 Ground 3 was as follows:

Further or alternatively, the Adjudicator fell into jurisdictional error or, alternatively, made an error of law on the face of the record in finding that the purported payment claim satisfied the requirements of s 14(2)(c) of the Act.

55 Green Suburban cited the decisions of *Gantley Pty Ltd v Phoenix International Group Pty Ltd*[20] and *Mackie Pty Ltd v Counahan*[21] and submitted that, as a final claim, the claim ought define the work to which the claim related by including a statement of account which set out with sufficient clarity precisely what was claimed and how the claim had been calculated.

56 In oral submissions, Green Suburban suggested that there might also be an error in the payment claim of 2 February 2018 by reason of the addition of a GST amount to the retention figure which was already inclusive of GST. However, Counsel ultimately accepted that, although it had an independent existence, ground 3 was 'unnecessary'.[22]

57 Counsel for Vita Built suggested that the description was sufficiently clear as it was easy for Green Suburban to work out how the retention was calculated given it was 5% under the Contract.

*Analysis*

58 The real problem with the payment claim is that Vita Built was not entitled to make a claim for the retention amount (as a discrete amount) in the way it sought to do under the Contract, absent the cl Q9 calculation. This appears to be another way of suggesting that no reference date had arisen, which is covered by the finding in relation to ground 1.

59 It is therefore hypothetical to consider whether the claim for retention was sufficiently particularised.

60 Pursuant to cl C2 Green Suburban was entitled to withhold up to 10% of each progress payment until the value equated to 5% of the Contract price. However, consistent with what is contained in Item 8 in Schedule 1, the parties appear to have taken the view that the figure was only 5%. In any event, the better view would appear to be that, consistent with s 14(2)(c), any claim for retention ought to have set out how the relevant figure was arrived at, including the value of the works to which the 5% was applied (if it was 5%).

61 However, given that it is 'unnecessary' to decide ground 3, it is inappropriate to consider this matter further.

***Ground 4***

62 Ground 4 was as follows:

Further or alternatively, the Adjudicator fell into error or, alternatively, made an error on the face of the record in finding that the first defendant's purported payment claim was valid when, in fact, it was served in breach of s 14(5) of the Act and was invalid.

63 In oral submissions, it was clarified that this ground was also not pursued where there was a finding of a valid termination (given, again, the point was that no claim ought be served in the case of termination absent a final calculation under cl Q9).[23]

64 Given the finding of a valid termination, ground 4 therefore does not arise for consideration.

***Conclusion***

65 Ground 1 is established, such that the relevant determination should be quashed.

66 Grounds 2 and 4 do not arise for consideration, and it is unnecessary to consider ground 3.

**Costs**

67 Green Suburban sought an order that Vita Built pay its costs of the proceeding, including the costs of the hearing before Lyons J on 1 June 2018. However, no order for costs was sought against the second defendant Adjudicator.[24] In particular, Green Suburban submitted that:

• the application had been opposed until the Friday, 15 June 2018 immediately prior to the trial date (when Counsel for Vita Built formally advised Green Suburban that it was openly unopposed);

• it was necessary to obtain the injunction given Vita Built's failure to give undertakings; and

• it was Vita Built's bad progress claim which had caused the relevant determination to be made.

68 Vita Built submitted that there ought be no order as to costs. It highlighted that:

• it was only unrepresented until the previous week and was ignorant of the true legal position;

• once legal advice was obtained, a reasonable position was taken on 13 June 2018 to compromise the proceeding in circumstances where nothing further could have been done to avoid this (necessary) hearing; and

• the error remains that of the Adjudicator.

*Analysis*

69 In order to come to a finding on costs, it is necessary to set out the relevant correspondence between 13 and 15 June 2018.

*Correspondence*

70 By letter of 13 June 2018, Vita Built's lawyers wrote asserting that their client was entitled to the return of the retention monies. However, that it was prepared to agree to an order that the relevant determination dated 14 May 2018 be quashed with the parties to pay their own costs of the proceeding. Further, that the offer was open until 12 noon on 15 June 2018 and was made pursuant to the principles in *Calderbank v Calderbank*[25] – and that it may be relied upon for an order for indemnity costs.

71 By letter of 14 June 2018, Green Suburban's lawyers noted that it was not possible for the parties to compromise the proceeding since the parties could not simply agree to orders quashing the Adjudicator's decision, citing and attaching Practice Note SC CL 9 (Judicial Review and Appeals List) (**Practice Note**). This states that where orders are sought to set aside a decision, a joint memorandum must be provided but that the Court may nevertheless require attendance of practitioners. However, the letter stated that their client would be happy to consider any other proposals.

72 Then on 14 June 2018 at 6.58 pm, Vita Built's lawyers noted that the Practice Note applied to the Common Law Division and that if Green Suburban was agreeable to the orders, it should sign them so that they could be submitted to the Court.

73 By email of 15 June 2018, Green Suburban's lawyers noted that the Practice Note reflected the underlying legal position regarding consent judgments in judicial review proceedings.

*Resolution*

74 I consider that the responsibility for the relevant determination lies equally on both parties. Thus, the relevant (invalid) payment claim was made by Vita Built, in circumstances where the lack of representation of Vita Built is not exculpatory. Green Suburban, however, also failed to participate in the adjudication process to raise the jurisdictional issue it has now raised. The current proceeding thereby needed to be issued by reason of the conduct of both parties.

75 Nevertheless, the appearance before Lyons J on 1 June 2018 was necessitated by reason of the refusal to give undertakings and the general opposition of Vita Built. This also necessitated the filing of extensive affidavits and submissions on the part of Green Suburban in circumstances where a joint memorandum might have avoided a hearing date; and certainly could have avoided two hearing dates.

76 As for the conduct from 13 June 2018, I do not consider that Green Suburban acted unreasonably in rejecting the offer of 13 June 2018 (for each side to bear their own costs) in circumstances where it had already incurred extensive costs by reason of the directions given on 1 June 2018. The approach suggested (a signed consent order) was also problematic, absent preparation of a joint memorandum.

77 I am therefore satisfied that Vita Built ought be responsible for the plaintiff's costs subject to a discount for two reasons. First, for the reasons above, that the filing of this application was necessary given the actions of both parties. Second, I consider that the helpful stance of Counsel for Vita Built at the hearing on 18 June 2018 shortened the hearing time considerably, consistent with the overarching purpose contained in the *Civil Procedure Act 2010* (Vic).

78 The order will therefore be that Vita Built pays the plaintiff's costs of the proceeding, save that:

(a) the costs of the hearing on 18 June 2018 will include the costs of only a 2-hour hearing; and
(b) the costs of and incidental to the filing of the Originating Motion will be excluded.

**Conclusion**

79 The following orders will be made:

(a) The adjudication determination made by the second defendant pursuant to s 23 of the Act dated 14 May 2018 is quashed.
(b) The first defendant pay the plaintiff's costs of the proceeding, including the costs of and incidental to the hearing before Lyons J on 1 June 2018, save that:

(i) the costs of the hearing on 18 June 2018 will include the costs of only a 2-hour hearing; and
(ii) the costs of and incidental to the filing of the Originating Motion will be excluded.

(c) The funds paid to the Senior Master pursuant to the order of Lyons J made on 1 June 2018, and any interest thereon, be released to the plaintiff (or at its direction), but subject to the retention of a sum to cover any taxation liability.

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[1] Affidavits of Ty Sam dated 1 June 2018, 7 June 2018 and 15 June 2018; Affidavit of Theng Hui Tay dated 1 June 2018; Affidavit of Giuseppe Caprara dated 7 June 2018; Affidavit of Jodie Di Pietro dated 7 June 2018.

[2] See letter from Ms Lorraine Djuricin, General Manager of Adjudicate Today Pty Limited dated 5 June 2018 and filed on 7 June 2018.

[3] Transcript of Proceeding (18 June 2018) 1, 3.

[4] Transcript of Proceeding (18 June 2018) 7.

[5] The winding up application was later discontinued: see Affidavit of Giuseppe Caprara dated 7 June 2018, [11].

[6] Transcript of Proceeding (18 June 2018) 14.

[7] [2016] HCA 52; (2016) 260 CLR 340.

[8] Ibid 345–6 [4]; and see also the Act, s 3.

[9] Act, s 3(3).

[10] [2016] HCA 52; (2016) 260 CLR 340, 349–50 [14]-[16].

[11] Transcript of Proceeding (18 June 2018) 8.

[12] Submissions on Behalf of the Plaintiff dated 7 June 2018; Supplementary Submission on Behalf of the Plaintiff dated 14 June 2018.

[13] [2016] HCA 52; (2016) 260 CLR 340, 345 [2].

[14] Transcript of Proceeding (18 June 2018) 26-27.

[15] [2016] HCA 52; (2016) 260 CLR 340, 364–66 [75]–[81].

[16] Ibid 345 [2] and 360-1 [61].

[17] Ibid 356 [44].

[18] And see *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163, 175.

[19] Transcript of Proceeding (18 June 2018) 40.

[20] [2010] VSC 106.

[21] [2013] VSC 694.

[22] Transcript of Proceeding (18 June 2018) 40.

[23] Transcript of Proceeding (18 June 2018) 40.

[24] Transcript of Proceeding (18 June 2018) 4, 5.

[25] [1975] 3 WLR 586.