

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

Not Restricted

S ECI 2023 01869

SHUNSHUNLI PTY LTD (ACN 169 613 012)  
AS TRUSTEE FOR THE XINTIANDI TRUST  
(ABN 11 916 705 527)

Plaintiff

v

SEASCAPE CONSTRUCTIONS PTY LTD  
(ACN 083 415 561)

First Defendant

JOHN MCMULLAN

Second Defendant

RIALTO ADJUDICATIONS PTY LTD  
(ACN 118 640 789)

Third Defendant

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|---------------------------------|---|
| <u>JUDGE:</u>                   | Stynes J  |
| <u>WHERE HELD:</u>              | Melbourne   |
| <u>DATE OF HEARING:</u>         | 24 October 2023                                     |
| <u>DATE OF JUDGMENT:</u>        | 6 December 2023                                     |
| <u>CASE MAY BE CITED AS:</u>    | Shunshunli Pty Ltd v Seascape Constructions Pty Ltd |
| <u>MEDIUM NEUTRAL CITATION:</u> | [2023] VSC 725                                      |

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ADMINISTRATIVE LAW – Judicial review – Review of adjudication determination made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether adjudicator considered the plaintiff’s submissions and related material – Whether the adjudicator’s reasons were so inadequate as to render the adjudication determination void – Whether the adjudicator made a bona fide attempt to conduct the adjudication – Whether the adjudicator afforded the plaintiff procedural fairness – *Building and Construction Industry Security of Payment Act 2002* (Vic) ss 21(2B), 23(2)(d), 23(3) – Adjudication determination upheld – *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* (2018) 359 ALR 350, *Argyle Building Services Pty Ltd v Dalanex Pty Ltd (No 2)* [2022] VSC 452, applied.

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APPEARANCES:

Counsel

Solicitors

For the Plaintiff

J A Silver

Best Hooper

For the Defendant

J R Gurr SC

Ward & Co

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HER HONOUR:

**A Introduction**

1 By Originating Motion filed on 5 May 2023, the plaintiff (**'Shunshunli'**) seeks orders to the effect that the adjudication determination made by the second defendant, John McMullan (**'Adjudicator'**), dated 30 April 2023 (**'Determination'**) be quashed or otherwise declared void.

2 The Determination was delivered under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**'SOP Act'**) and was made in respect of a claim for final payment served by the first defendant (**'Seascope Constructions'**).

3 Seascope Constructions served the payment claim (**'Payment Claim'**) on 10 March 2023 seeking the sum of \$197,932.80<sup>1</sup> from Shunshunli. The Adjudicator determined that \$207,612.80 was payable by Shunshunli to Seascope Constructions.

4 Shunshunli says that the amount payable under the Payment Claim is nil. More specifically, it says that:

- (a) prior to the date of the Payment Claim, it had paid to Seascope Constructions a sum well in excess of the adjusted contract sum under the relevant construction contract; and
- (b) that the overpayments should have been regarded as advance payments for the works under that contract and applied against the Payment Claim. I will refer to these as the **'Advance Payments'**.

5 While the total value of the alleged Advance Payments varied across the submissions and evidence,<sup>2</sup> suffice it to say that it was more than adequate to cover the amount

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<sup>1</sup> All amounts are GST-inclusive unless otherwise specified.

<sup>2</sup> The sum identified in the Originating Motion was \$12,258,608.38. By the amended submissions, the sum specified was \$12,353,786.37. By the affidavit of Cary Ho-Fai Chueng affirmed on 5 May 2023 at paragraph 11, and oral submissions, the amount identified was \$12,781,415.23.

claimed in the Payment Claim.<sup>3</sup>

6 Shunshunli challenges the Determination on four grounds:<sup>4</sup>

- (a) **Ground 1:** In contravention of sub-section 23(2)(d) of the *SOP Act*, the Adjudicator failed to consider Shunshunli's material in support of its assertion that it made the Advance Payments to Seascope Constructions.
- (b) **Ground 2:** In contravention of sub-section 23(3) of the *SOP Act*, the Adjudicator did not give adequate written reasons to indicate why the Advance Payments were not taken into account in calculating the adjudicated amount.
- (c) **Ground 3:** The Adjudicator failed to make a bona fide attempt to conduct the adjudication in the following alleged circumstances:
  - A. The [D]etermination is substantially comprised "copying and pasting" of precedent materials from the [Adjudicator's] earlier determinations (to establish his jurisdiction) and the parties' respective submissions, with the [Adjudicator's] short reasons (peppered amongst the copied content) largely directed towards explaining why the [Adjudicator] accepted [Seascope Construction's] submissions.
  - B. In doing so, the [Adjudicator] did not make a bona fide attempt to conduct the adjudication by failing to properly consider [Shunshunli's] material.
- (d) **Ground 4:** The Adjudicator denied Shunshunli procedural fairness by affording Seascope Constructions an opportunity to put on further submissions.

7 Shunshunli relied on the written and oral submissions of its counsel, two affidavits of Cary Ho-Fai Cheung (a business partner of the sole director and shareholder of Shunshunli),<sup>5</sup> and a solicitor's affidavit.<sup>6</sup>

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<sup>3</sup> Transcript of Proceedings, *Shunshunli Pty Ltd v Seascope Constructions Pty Ltd* (Supreme Court of Victoria, Stynes J, 24 October 2023) 34 ("**Trial Transcript**").

<sup>4</sup> Shunshunli abandoned a fifth ground in its Originating Motion (that there was a reasonable apprehension that the Adjudicator was biased) shortly prior to the hearing on 24 October 2023.

<sup>5</sup> Being the affidavit and exhibit of Cary Ho-Fai Cheung affirmed on 5 May 2023 and the affidavit and exhibit of Cary Ho-Fai Cheung affirmed on 22 August 2023 .

<sup>6</sup> Being the affidavit of Sengul Gur affirmed on 30 June 2023 ("**Gur Affidavit**").

8 Seascape Constructions relied on the written and oral submissions of its counsel, and  
a solicitor's affidavit.<sup>7</sup>

## **B Summary of Decision**

9 For the reasons that follow, I have determined that the Adjudicator's Determination  
be upheld:

- (a) In relation to Ground 1: The Adjudicator did not fail to consider Shunshunli's material.
- (b) In relation to Ground 2: The Adjudicator's reasoning was adequate to satisfy the requirement of s 23(3) of the *SOP Act*.
- (c) In relation to Ground 3: The Adjudicator did not fail to make a bona fide attempt to conduct the adjudication.
- (d) In relation to Ground 4: The Adjudicator did not err by serving a notice under s 21(2B) of the *SOP Act* and thereby affording Seascape Constructions an opportunity to put on further submissions. He did not deny Shunshunli procedural fairness by doing so.

## **C Background**

### **C.1 The Contract**

10 On 6 August 2019, Shunshunli engaged Seascape Constructions under a fixed-price  
construction contract ('**Contract**') to construct a four-storey residential building with  
basement car parking, comprising 35 dwellings ('**Works**') at 7-9 Bardia Street,  
Ringwood.

11 Practical completion under the Contract was achieved in December 2022.

12 Shunshunli says that the contract sum, as adjusted by the superintendent, was

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<sup>7</sup> Being the affidavit of Marvin Ward sworn on 9 June 2023.

\$11,875,015.00.

13 There was before the Adjudicator, and remains before me, a dispute between the parties as to whether the Contract was varied from a fixed-price contract to a cost-plus arrangement:

- (a) Seascape Constructions says that in around early February 2020, the parties agreed to vary the terms of the Contract to a cost-plus arrangement;
- (b) Shunshunli says that that it never agreed to vary the Contract, and there is no documentation to prove the Contract was varied, to a cost-plus arrangement.

14 Having regard to the grounds of review relied on by Shunshunli, it is not necessary for me to resolve that dispute for the purpose of this proceeding.

15 Shunshunli submitted that it placed material before the Adjudicator showing that between 18 February 2020 and 1 August 2022, it had deposited a total of \$12,353,786.37 in respect of the Works into a bank account in the name of Seascape Constructions (**'Bendigo Bank Account'**).<sup>8</sup> It is common ground that the Bendigo Bank Account was in the name of Seascape Constructions but that both parties had access and were signatories to it.

## C.2 The Payment Claim

16 On 10 March 2023, Seascape Constructions served the Payment Claim, which was a final payment claim, on Shunshunli. Seascape Constructions claimed:

- (a) \$51,095.93 (excluding GST) for the final stage of Works; and
- (b) \$128,842.93 (excluding GST) for 12 approved variations.

17 Shunshunli issued a responsive payment schedule on 23 March 2023 (**'Payment Schedule'**), assessing the amount to be paid under the Payment Claim as nil. Shunshunli did not dispute the Works the subject of the Payment Claim, nor the value

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<sup>8</sup> J Silver, 'Plaintiff's/Principal's submissions', Submissions in *Shunshunli Pty Ltd v Seascape Constructions Pty Ltd*, S ECI 2023 01869, 10 October 2023, [2] and Appendix A (**'Plaintiff's Submissions'**).

claimed. The reasons given in the Payment Schedule for the nil assessment were, in summary, that Shunshunli had paid Seascope Constructions \$12,781,415.23, a sum that exceeded the alleged adjusted contract sum by \$906,400. In particular, paragraphs 6-7 of the Payment Schedule state as follows:<sup>9</sup>

6. The respondent has made payments to the claimant exceeding the adjusted contract sum by \$906,400.23 (including GST). This overpayment exceeds the value of the entirety of the claimed amount, and, for that reason, the respondent is not required to pay the respondent [sic] the claimed amount.
7. The respondent considers that the claimant has been overpaid above and beyond the sum of \$197,932.80 (including GST) now claimed (such that the current claim is valid, but does not require a further payment given past overpayments), because:
  - (a) the Superintendent has certified amounts owing under the Construction Contract over the progress of the Building Works, which have been paid entirely to the respondent [sic], and which stands as the sum owing under the Construction Contract;
  - (b) through the Building Works, the claimant has demanded and the respondent has paid sums additional to those certified by the Superintendent, based on David Sagor's allegation that the certified sums were insufficient to cover the Building Works (which total \$383,593.38);
  - (c) the sums paid were in the nature of an advance, in the expectation that the total amount actually paid would balance with the certified total;
  - (d) despite this expectation, the advance sums exceed the total certified by a considerable sum, such that the claimant has been overpaid. ...

### C.3 The Adjudication and Determination

18 On 6 April 2023, Seascope Constructions submitted an application for adjudication of its Payment Claim. Its application comprised a form, a statutory declaration of David Sagor together with an annexure of documents ('Sagor Declaration'), and submissions.

19 Shunshunli submitted its response to the adjudication application on 17 April 2023,

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<sup>9</sup> Further Amended Court Book 1076, Shunshunli's Payment Schedule dated 23 March 2023 ('Payment Schedule').



which comprised a statutory declaration of Cary Ho-Fai Cheung (**'Cheung Declaration'**) and submissions.

20 On 19 April 2023, the Adjudicator sent a letter to both parties in the following terms:<sup>10</sup>

Pursuant to Section 21(2B) [of the SOP Act], I notify the claimant as follows:

1. In my opinion, the Adjudication Response dated 17 April 2023 included the following reasons for withholding payment that were not included in the Payment Schedule dated 23 March 2023:
  1. The entitlement to the claimed payment under the Contract the subject of the Application for Adjudication. (Paragraphs 3, 5 of the Submissions plus related attachments)
  2. The payments made by the respondent to the claimant. (Paragraphs 6-8 of the Submissions plus related attachments)
  3. The claimed cost-plus arrangement in relation to this Application for Adjudication. (Paragraphs 9-11 of the Submissions plus related attachments)
  4. The effect (if any) of the payment made by the respondent to Earth & Wood. (Paragraphs 12 of the Submissions plus related attachments)"

21 Accordingly, the Adjudicator allowed Seascope Constructions two business days to respond to matters the Adjudicator considered were not included in the Payment Schedule. I will refer to this correspondence as the **'Section 21(2B) Notice'**.

22 Shunshunli objected to the Section 21(2B) Notice, requesting that the Adjudicator withdraw it on the basis that the matters identified were all raised in the Payment Schedule. The Adjudicator rejected this request.

23 On 21 April 2023, Seascope Constructions served its submissions in response to the Section 21(2B) Notice, together with a second statutory declaration of Mr Sagor exhibiting further documents (**'Second Sagor Declaration'**).

24 Shunshunli did not request an opportunity to provide further material in response to Seascope Constructions' further submissions. It says it did not do so because it objected to the issuance of the Section 21(2B) Notice itself and it was not invited to by

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<sup>10</sup> Further Amended Court Book 1473, Letter from John McMullan to Shunshunli Pty Ltd and Seascope Constructions Pty Ltd dated 19 April 2023 (**'Section 21(2B) Notice'**).

the Adjudicator.<sup>11</sup>

25 The Adjudicator delivered the Determination on 30 April 2023. In accordance with s 23(1) of the *SOP Act*, he found that:<sup>12</sup>

- (a) the adjudicated amount was \$207,612.80;
- (b) the date the adjudicated amount became payable was 7 April 2023; and
- (c) the rate of interest payable on that amount in accordance with s 12(2) of the *SOP Act* was 12.18% per annum simple.

**D The relevant provisions of the SOP Act**

26 Section 21(2B) of the *SOP Act* provides as follows:

- (2B) 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—
  - (a) setting out those reasons; and
  - (b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.

27 Section 23 of the *SOP Act* relevantly provides as follows:

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

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<sup>11</sup> Gur Affidavit (n 6), [7].

<sup>12</sup> Further Amended Court Book 1538, Adjudication Determination made by John McMullan on 30 April 2023, p 1 ('**Determination**').

- (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.

...

- (2B) An adjudicator's determination is void –
  - (a) to the extent that it has been made in contravention of subsection (2); ...
- (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. ...

**E Ground 1 – Did the Adjudicator fail to consider Shunshunli's material in support of its assertion that it made the Advance Payments to Seascope Constructions?**

**E.1 Relevant legal principles - The Adjudicator's obligation to consider material**

28 Under s 23(2)(d) of the *SOP Act*, the Adjudicator was required to consider the Payment Schedule together with all submissions (including relevant documentation) that had been duly made by Shunshunli in support of its schedule. The Determination is void to the extent that the Adjudicator failed to do so.

29 It is for the moving party (here, Shunshunli) to establish the extent to which the Determination is void.<sup>13</sup>

30 To determine whether or not the Adjudicator considered particular submissions in a

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<sup>13</sup> *Argyle Building Services Pty Ltd v Dalanex Pty Ltd (No 2)* [2022] VSC 452, [7], [179] (Delany J) (*'Argyle'*).

way the *SOP Act* requires, the whole of the content and tenor of an adjudication may be examined. Inference is permissible. The question is not to be approached solely by reference to the presence or absence of explicit statements referring expressly to the submissions.<sup>14</sup>

31 The obligation to ‘consider’ something has been described as requiring that it be given attention, or looked at on its merits,<sup>15</sup> or requiring an active process of intellectual engagement. As stated by McDougall J in the decision of *Laing O’Rourke*:<sup>16</sup>

In my view, the obligation to consider matters imposed by [the equivalent section in the NSW legislation to s 23(2)] should ... [require] an active process of intellectual engagement. It may be thought that this imposes a substantial burden on adjudicators. That may be so; but there are at least two reasons why, even if that is correct, it does not justify reading down the statutory obligation to “consider”. The first is that adjudicators are not forced to accept nomination. They may decline nomination; or they may accept only on the condition that they are given some longer period of time than ten working days to produce their determination. The second reason is that the outcome of the adjudicators consideration may have very significant consequences.

32 However, the phrase ‘active process of intellectual engagement’ may be regarded as an unnecessary gloss on the concept of consideration.<sup>17</sup> In a recent decision of the New South Wales Court of Appeal, the Court warned that an attempt to articulate, using other language, what is required by the verb ‘consider’, will usually be misconceived, and made the following relevant observations:<sup>18</sup>

[62] ...In a practical sense, the problem for a party challenging a determination is not to identify whether the mental process undertaken by the adjudicator was “active”, “intellectual” or “genuine”, but rather to identify a basis on which it could be said that consideration did not occur. The mental processes of the adjudicator will be entirely opaque, except to the extent that they are revealed in his or her reasons. However, as already noted, the failure to identify a particular claim or response in reasons will not of itself demonstrate that the adjudicator failed to consider it. That is so for a number of reasons.

[63] First, reasons are not necessarily, or even usually, a comprehensive

<sup>14</sup> *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152, [20] (Barrett J), quoted in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2010] QSC 95, [12] (Martin J).

<sup>15</sup> *Laing O’Rourke Australia Construction Pty Ltd v H & M Engineering & Construction Pty Ltd* [2010] NSWSC 818, [38]–[39] (McDougall J) (*‘Laing O’Rourke’*); *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* (2020) 4 QR 410, [35(e)] (Bond J).

<sup>16</sup> *Laing O’Rourke* (n 15) [38]–[39] (McDougall J).

<sup>17</sup> *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWCA 215, [54]–[55] (Payne JA with whom Ward ACJ and Basten AJA agreed) (*‘Ceerose’*).

<sup>18</sup> *Ceerose* (n 17) [62]–[66] (Payne JA with whom Ward ACJ and Basten AJA agreed).

statement of all aspects of a decision-maker's thinking. Even judicial reasons, which are expected to be more comprehensive and detailed than those of an administrative decision-maker, are not required to deal with all the evidence or all the submissions. A process of selection is undertaken: that is a necessary part of the process and not merely a concession to judicial frailty.

[64] Secondly, the scope of the reasons will inevitably reflect the practical circumstances under which the adjudicator is operating. Section 21(3)(a) of the Security of Payment Act requires the adjudicator to determine an adjudication application "as expeditiously as possible and, in any case ... within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application". One of the matters which the adjudicator is to consider is the "adjudication response" filed by the respondent to the claim. The adjudication response may be lodged five business days after receiving a copy of the application, or two business days after receiving notice of the adjudicator's acceptance of the application, whichever is later: s 20(1). Thus, unless time is extended by the parties, the adjudicator may have as few as eight business days to determine the application by reference to the adjudication response.

[65] Thirdly, it is not unusual for the material supplied to an adjudicator to run into hundreds and even thousands of pages (as it did in this case). It is inevitable that, in accordance with this statutory scheme, an adjudicator will spend more time on some items within a claim than on others. The reasons may reflect such choices or they may not. It would, however, be entirely rational for an adjudicator to spend little time on an item of, say, \$3,000 in a total claim of over \$1m, both in considering submissions and in preparing reasons.

[66] Fourthly, there is a question as to what specific inference is to be drawn from the absence of reference to a particular submission or contention in a set of reasons. There are a range of possible explanations, only one of which is that the material was not considered. Another is that the claim was readily seen to be well-founded and the submissions to the contrary as lacking in substance. However, the latter would be a good reason to omit reference to the issue in the reasons. If the submission had been misunderstood, the facts mistaken or the law wrongly identified, that might explain absence from the reasons of something expected to be addressed, but not lack of consideration. Of course, the duty to consider a submission is separate from the absence of any duty to deal with it correctly, whether in law or in fact. The point is rather that an unreviewable error may explain why the reasons do not advert to a particular matter.

## E.2 Submissions

### E.2.1 *Shunshunli's submissions*

33 Shunshunli's written and oral submissions were lengthy and extended to matters that were not relevant to the grounds of review now advanced.<sup>19</sup> I do not propose to set

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<sup>19</sup> A significant part of the submissions were directed to the Adjudicator's findings in relation to how the

them out in detail. Relevant to this ground of review, and in summary, Shunshunli submitted that:

- (a) based on the Payment Schedule, the Adjudicator was required to determine if there was some basis in contract or otherwise for Seascope Constructions to be paid. This determination must be made having regard to Shunshunli's submissions that it had made the Advance Payments;<sup>20</sup>
- (b) read as a whole, the Determination does not consider Shunshunli's argument that it made those Advance Payments;<sup>21</sup>
- (c) rather, the Adjudicator seems to accept that the matter can be resolved by accepting Seascope Constructions' argument that the Contract was varied from a fixed-price agreement to a cost-plus agreement;<sup>22</sup>
- (d) even if the Contract was varied to a cost-plus agreement, the Advance Payments could not be disregarded. It was necessary for the Adjudicator to work out which payments into the Bendigo Bank Account were for work done by Seascope Constructions.<sup>23</sup> It was for Seascope Constructions to prove that those payments were not for work done, and it failed to do so.<sup>24</sup> In the absence of any identification by Seascope Constructions of payments from the Bendigo Bank Account that were applied other than to the Works or the approved variations, the Adjudicator should not have simply dismissed Shunshunli's argument in relation to the Advance Payments;<sup>25</sup>
- (e) none of the six issues identified by the Adjudicator as requiring his consideration concerned the Advance Payments;<sup>26</sup> and

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parties operated under the Contract, whether there was evidence in support of the sums claimed in the Payment Claim, and Shunshunli's contention that 'there was no path for the Adjudicator to find for the Contractor in the manner he did'.

<sup>20</sup> Plaintiff's Submissions (n 8) [23].

<sup>21</sup> Plaintiff's Submissions (n 8) [24].

<sup>22</sup> Plaintiff's Submissions (n 8) [24].

<sup>23</sup> Trial Transcript (n 3) 18.

<sup>24</sup> Trial Transcript (n 3) 19.

<sup>25</sup> Trial Transcript (n 3) 64.

<sup>26</sup> Plaintiff's Submissions (n 8) [33].

- (f) if the Adjudicator had considered Shunshunli's reason for withholding payment on the basis that it made the Advance Payments, he may not have reached the conclusion that the entire Payment Claim was paid in advance, but he also would not have found for Seascope Constructions outright.<sup>27</sup>

### E.2.2 Seascope Constructions' submissions

34 Seascope Constructions submitted, in summary, that:

- (a) on a proper reading of the Determination, considered as a whole, it is apparent that the Adjudicator properly considered Shunshunli's material in relation to the alleged Advance Payments;<sup>28</sup>
- (b) that the Adjudicator did not accept that material as a proper basis for rejecting the Payment Claim is not a valid basis for overturning the Determination;<sup>29</sup> and
- (c) it was not for Seascope Constructions to prove that payments to the Bendigo Bank Account were not for work done. It was a matter that could have been attended to by Shunshunli in circumstances where both parties had access to the Bendigo Bank Account and both were able to identify what payments were made from it.<sup>30</sup>

### E.3 Consideration

35 Shunshunli, by its grounds of review, did not dispute or challenge:

- (a) that the Works the subject of the Payment Claim were performed;
- (b) the value of those Works; and
- (c) that it would be liable to pay the amount claimed, but for the Advance

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<sup>27</sup> Plaintiff's Submissions (n 8) [37].

<sup>28</sup> J Gurr, 'First Defendant's Further Amended Outline of Submissions', Submissions in *Shunshunli Pty Ltd v Seascope Constructions Pty Ltd*, S ECI 2023 01869, 23 October 2023, [17] (**First Defendant's Submissions**).

<sup>29</sup> First Defendant's Submissions (n 28) [18].

<sup>30</sup> Trial Transcript (n 3) 94.

Payments it alleges it paid to Seascope Constructions.

36 Importantly, Shunshunli did not challenge the Adjudicator's findings that the Contract had been varied in relation to the payment obligations.

37 The issue raised for my determination by Ground 1 is very narrow: did the Adjudicator fail to consider Shunshunli's materials in support of its submission that the Advance Payments were made to Seascope Constructions and should be applied against the Payment Claim? Having regard to the Determination, for the reasons set out below, it is plain to me that the Adjudicator did consider those materials as required under s 23(2)(d) of the *SOP Act*.

38 At paragraph 61 of the Determination, the Adjudicator listed the documents that he considered for the purpose of the adjudication, comprising:<sup>31</sup>

(a) Seascope Constructions' application for adjudication dated 6 April 2023. Relevantly, that application included:

(i) the Payment Claim;

(ii) the Payment Schedule;

(iii) the Sagor Declaration by which Mr Sagor declared, amongst other things:<sup>32</sup>

(1) in early 2020, the parties agreed to amend the Contract to a cost-plus arrangement and to open a joint bank account, to which they would both have access, for the cost-plus arrangement; and

(2) pursuant to that agreement, the parties opened the Bendigo Bank Account; and

(iv) Seascope Constructions' submissions addressing, among other things, Seascope Constructions' response to the reasons given in the Payment

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<sup>31</sup> Determination (n 12) p 10.

<sup>32</sup> Further Amended Court Book 1500, Sagor Declaration.



Schedule for a nil assessment. Relevantly, Seascope Constructions denied the assertion that it had been overpaid and submitted that Shunshunli had failed to provide evidence or sufficient particulars to substantiate the alleged payments, and had failed to acknowledge the cost-plus arrangement and the fact that the parties had established a joint bank account;<sup>33</sup>

(b) Shunshunli's response to the adjudication application dated 17 April 2023, comprising:

(i) Shunshunli's submissions by which it:<sup>34</sup>

(1) identified what it saw as the critical issue for the Adjudicator, being the alleged Advance Payments. Shunshunli submitted that as it had paid Seascope Constructions the sum of \$12,781,415.23 (excluding GST), it could not be required to pay the claimed amount;

(2) disputed the existence of a cost-plus arrangement noting the absence of any documentary evidence in support of it; and

(3) relied on payments made by Shunshunli into the Bendigo Bank Account to prove that the alleged Advance Payments were made to Seascope Constructions;

(ii) the Cheung Declaration by which Mr Cheung:<sup>35</sup>

(1) denied any variation to the Contract to a cost-plus arrangement had occurred; and

(2) exhibited, among other things, the bank statements of the

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<sup>33</sup> Further Amended Court Book 1407, 'Claimant's Submissions', Seascope Constructions' submissions for adjudication dated 6 April 2023 ('**Seascope Constructions' Adjudication Submissions**').

<sup>34</sup> Further Amended Court Book 1435, 'Respondent's Submissions', Shunshunli's submissions for adjudication dated 17 April 2023 ('**Shunshunli's Adjudication Submissions**').

<sup>35</sup> Further Amended Court Book 1438, Cheung Declaration.

Bendigo Bank Account;

- (c) Seascope Constructions' response to the Section 21(2B) Notice, dated 21 April 2023, comprising:
- (i) submissions addressing, amongst other things, the alleged Advance Payments.<sup>36</sup> Seascope Constructions submitted, in summary, that:
- (1) the Advance Payments did not constitute an overpayment in circumstances where:
- (A) the payments were made into the Bendigo Bank Account by Shunshunli to pay both Shunshunli's subcontractors and Seascope Constructions' subcontractors in accordance with the cost-plus arrangement;
- (B) Shunshunli was actively involved in the sourcing, organising and paying of its own trades and suppliers in addition to those engaged by Seascope Constructions, and that payments were made out of the Bendigo Bank Account in accordance with the cost-plus arrangement;
- (C) Shunshunli had access to and control over the Bendigo Bank Account in accordance with the cost-plus arrangement; and
- (D) the amounts paid and required to be paid by Shunshunli represent the value of all of the Works undertaken in respect of the project and are in accordance with the cost-plus arrangement; and
- (2) Shunshunli failed to set out how or when it paid Seascope Constructions the value of the Works claimed under the Payment

<sup>36</sup> Further Amended Court Book 1490, 'Claimant's Submissions Under Section 21(2B)'.

Claim. It was submitted that:

The Principal has simply produced a bundle of bank statements of the [Bendigo Building Account] to say that it has already paid the Contractor amounts without divulging what the alleged payments made previously for the Claimed Amount were and or when the alleged payments occurred. It is not for the Adjudicator to conduct an entire reconciliation of what the Principal alleges it has paid in respect of the Project, particularly noting that such an assessment would be impossible on the current evidence and documents produced by the Principal.

(ii) the Second Sagor Declaration.<sup>37</sup>

39 In short, the materials the Adjudicator said he considered clearly raised the issue of the Advance Payments. Specifically, those materials raised:

- (a) the dispute between the parties as to whether the Contract was varied from a fixed-price contract to a cost-plus arrangement;
- (b) the payments made by Shunshunli into the Bendigo Bank Account; and
- (c) Shunshunli's reliance on those payments to support its submission that Seascope Constructions had been paid over and above the adjusted contract sum.

40 Then, at paragraph 68 of the Determination, the Adjudicator listed the six issues that he considered arose on the parties' submissions:<sup>38</sup>

Issue 1: the validity of the Payment Claim

Issue 2: the claimed cost-plus arrangement in relation to this Application for Adjudication

Issue 3: the effect (if any) of the payment made by the respondent to Earth & Wood

Issue 4: the proper assessment of the Contract Works claimed in the Payment Claim

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<sup>37</sup> Further Amended Court Book 1500, Statutory Declaration of David Sagor sworn on 21 April 2023 ('**Second Sagor Declaration**').

<sup>38</sup> Determination (n 12) [68], p 12.

Issue 5: the proper assessment of the Variations claimed in the Payment Claim

Issue 6: the amount payable in respect of the Payment Claim

41 In relation to Issue 2, he found that, amongst other things:<sup>39</sup>

- (a) the Contract dated 6 August 2019 was a fixed-price contract;
- (b) from around May 2020, the parties, by agreement, changed the way the Contract was to be operated, and varied the amount payable under the Contract, such that Seascope Constructions would receive an agreed margin plus the cost of insurances, and the project costs were to be paid from the Bendigo Bank Account. Significantly, he determined that the parties operated as follows:
  - (i) Shunshunli sourced multiple trade contractors and suppliers throughout the construction of the project.
  - (ii) Payments for the project were made from a joint bank account created for the project, into which the funds were deposited by Shunshunli, and out of which all payments were made, including payments both direct to Seascope Constructions, and direct to the trade contractors and suppliers sourced by Shunshunli.
  - (iii) The amount paid each month by Shunshunli to Seascope Constructions was \$51,95.98 (excluding GST). I note that this finding was not supported by evidence and was erroneous. However, as Shunshunli did not dispute that, but for the Advance Payments, it would be liable to pay Seascope Constructions the sum claimed in the Payment Claim,<sup>40</sup> the error is not material to this proceeding.
  - (iv) Each of the amounts paid out of the joint bank account accorded with the assessment undertaken by the financier's quantity surveyor,

<sup>39</sup> Determination (n 12) [111]-[128], p 22-24.

<sup>40</sup> Originating Motion for Judicial Review filed on 5 May 2023, paragraph G of the Particulars to Ground 1.

including the amounts comprising the Payment Claim, namely \$51,095.98 (excluding GST) in respect of the Works and \$128,842.93 in respect of approved variations.

- (v) The total of the amounts payable by Shunshunli under the Contract is to be assessed on the basis of:
- (1) the pre-agreed fee to be paid to Seascope Constructions, namely an agreed margin of \$220,000 (excluding GST) plus the cost of insurances; plus
  - (2) the actual costs paid to the listed trade contractors and suppliers approved by the financier's quantity surveyor each month.

42 The Adjudicator concluded that the substantive effect of the changed arrangement was that the Contract was no longer a fixed-price contract. Specifically, Seascope Constructions was no longer responsible for costs over-runs.<sup>41</sup>

43 His findings in relation to the form and operation of the Contract largely aligned with the submissions of Seascope Constructions. While Shunshunli submitted that these findings are unfounded,<sup>42</sup> it does not, by its grounds of review, seek to challenge any of them.

44 In relation to issue 4 identified by the Adjudicator, being 'the proper assessment of the Contract Works claimed in the Payment Claim', the Adjudicator determined that the amount payable in respect of the Works was the sum in fact claimed, in the amount of \$51,095.98 (excluding GST). Importantly, he recorded that the value of the Works in that sum was not disputed by Shunshunli.<sup>43</sup>

45 Similarly, in relation to Issue 5, being 'the proper assessment of the Variations claimed in the Payment Claim', the Adjudicator determined the amount payable in respect of the claimed variations was the sum in fact claimed, in the amount of \$128,842.93

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<sup>41</sup> Determination (n 12) [128], p 24.

<sup>42</sup> Plaintiff's Submissions (n 8) [17].

<sup>43</sup> Determination (n 12) [143], [152], p 27-28.

(excluding GST). Again, he noted that the value was not disputed by Shunshunli.<sup>44</sup>

46 Finally, in relation to Issue 6, being 'the amount payable in respect of the Payment Claim', the Adjudicator:<sup>45</sup>

- (a) summarised the parties' submissions and referred to the materials relied on by Shunshunli in relation to the Advance Payments. His summary of those submissions shows that the Adjudicator understood the opposing cases that were being advanced;
- (b) reiterated his finding that the parties, by agreement, changed the way the Contract was to be operated; and
- (c) determined that the amount to be paid in respect of the Payment Claim comprised the value of Works since 9 May 2022 (which was not disputed) plus the value of the approved variations (which was not disputed).

47 Having regard to the whole of the Determination, it is readily apparent that the Adjudicator had regard to the following matters:

- (a) the parties' dispute as to whether or not the Contract had been varied to a cost-plus arrangement; and
- (b) the payments made into the Bendigo Bank Account (the alleged Advance Payments) pursuant to that arrangement, and how the funds in that account were applied. He found that payments out were directed to both Seascope Constructions and to the trade contractors and suppliers sourced by Shunshunli.

48 It is clear from his conclusion (that Shunshunli was to pay the amount of the Payment Claim) that the Adjudicator was not satisfied that the payments into the Bendigo Bank Account (the last of which was made in August 2022) constituted Advance Payments for the Works which became the subject of the Payment Claim submitted in March

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<sup>44</sup> Determination (n 12) [155], [175], p 28-40.

<sup>45</sup> Determination (n 12) [177]-[181], p 40-42.

2023.

49 Based on my review of the whole of the Determination, I am satisfied that there was an active process of intellectual engagement by the Adjudicator in relation to Shunshunli's argument that the Advance Payments had been made to Seascope, and that he considered the materials relied on in support of it.

50 Accordingly, this ground of review must fail.

**F Ground 2 - Did the Adjudicator fail to give adequate reasons?**

**F.1 Relevant legal principles - The Adjudicator's obligation to give reasons**

51 The Adjudicator is obliged by s 23(3) of the *SOP Act* to provide reasons. A failure to do so will render the Determination void.<sup>46</sup> The statutory question is whether the Determination includes 'the reasons for the determination'. There is no express requirement that they be adequate.<sup>47</sup>

52 Justice Hammerschlag in *CPB Contractors Pty Ltd v Heyday5 Pty Ltd* stated:<sup>48</sup>

An adjudicator's determination is not a judgment of a court. Often, adjudicators are not lawyers. The Act imposes tight time limits on them and they are regularly, as in this case, called to dispose of complex issues, factual and legal, within those limits. As with arbitrators and their awards (and perhaps, even more so because adjudication determinations do not have the final effect of an arbitrator's award), the procedural behaviour of adjudicators and their adjudication determinations should not be scrutinised with an overcritical or pedantic eye but should be viewed with common sense and without undue legality. Adjudication determinations are to be read as a whole and should not be viewed through the prism of legal concepts or examined with a fine-tooth comb.

53 Further, as stated by McDougall J in *Laing O'Rourke*:<sup>49</sup>

'[I]t is unrealistic to expect that those reasons will treat minutely and in detail with each and every aspect of the parties' submissions and each and every aspect of the evidence. Having said that, adjudicators' reasons should be

<sup>46</sup> *Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd* [2018] VSC 362, [76] (Digby J).

<sup>47</sup> See also *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* (2018) 359 ALR 350, [4] (Basten JA) ('*Cockram*').

<sup>48</sup> [2020] NSWSC 1625, [35], citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 291; *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 735, [47]; *Cockram* (n 48) [17] (Basten JA).

<sup>49</sup> *Laing O'Rourke* (n 16) [73] (McDougall J)].

sufficiently detailed to enable parties to understand that their contentions, as advanced in the payment claim and payment schedule, and relevant material in support, have been considered, and to understand the process of reasoning that led to the particular conclusion.;

54 It has been held by the New South Wales Court of Appeal in relation to this requirement that:

- (a) any failure by an adjudicator to consider, and record in their reasons their consideration of, the consistency and probative value of evidence, does not necessarily amount to an error of law or jurisdictional error;<sup>50</sup> and
- (b) relevantly, 'if the conclusion cannot be challenged as legally erroneous, the reasoning cannot be challenged as legally inadequate to justify the conclusion'.<sup>51</sup>

## F.2 Submissions

### F.2.1 *Shunshunli's submissions*

55 Shunshunli contended that if it is found that the Adjudicator *did* consider Shunshunli's argument with respect to the Advance Payments, then his reasons as to why the Advance Payments were not taken into account in calculating the adjudicated amount were inadequate. Shunshunli submitted, in summary and relevant to the ground advanced, that:<sup>52</sup>

- (a) the Adjudicator's reasons 'decline to explain how the Adjudicator concluded that either part or all of the Advance Payments were explicable by the alleged cost-plus agreement';
- (b) simply preferring Seascope Constructions' position over Shunshunli's is not enough. In circumstances where Seascope Constructions 'argued that it had other bases to receive the advanced monies, but not having quantified those itself, the Adjudicator had to rationally identify the sum of those other bases,

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<sup>50</sup> *Health Care Complaints Commission v Sultan* [2018] NSWCA 303, [166] (Meagher JA).

<sup>51</sup> *Cockram* (n 47) [17] (Basten JA).

<sup>52</sup> Plaintiff's Submissions (n 8) [42]-[49].



absent which [Shunshunli] cannot understand why it lost'; and

- (c) the Adjudicator's findings were not supported by a path of reasoning:

The most that can be said is the Adjudicator adopted [Seascope Constructions'] submissions, without assessing [Shunshunli's] position on its merits. In [Shunshunli's] submission, the Adjudicator had to assess its argument (for example, by the Adjudicator considering the Bendigo Bank Account statements, and reconciling the supporting invoices with the amounts paid), not discard it in a coin toss.

### F.2.2 *Seascope Constructions' submissions*

56 Seascope Constructions submitted, in summary, that:<sup>53</sup>

- (a) as a minimum, an adjudicator is required to determine whether the construction work identified in the relevant payment claim as been carried out, and what its value is.<sup>54</sup> That is precisely what the Adjudicator has done.
- (b) Shunshunli did not dispute that the Works the subject of the Payment Claim had been performed and completed by Seascope Constructions;
- (c) in relation the Adjudicator's reasons contained in the Determination:
- (i) his assessment of the variations claimed in the Payment Claim – and the reasons in support of that assessment – are primarily (though not exclusively) set out at paragraphs 155 to 176 of the Determination. No submissions are advanced as to the alleged inadequacy of those reasons; and
- (ii) his assessment of the amount payable in respect of the Payment Claim – and the reasons in support of that assessment – are primarily (though not exclusively) set out at paragraphs 177 to 182 of the Determination. No submissions are advanced as to the alleged inadequacy of those reasons; and

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<sup>53</sup> First Defendant's Submissions (n 28) [25]-[32].

<sup>54</sup> Referring to comments made by Vickery J in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631 at [81].

- (d) the Adjudicator's acceptance of some (but not all) of Seascape Constructions' submissions does not constitute a proper basis for quashing the Determination.

### F.3 Consideration

57 This ground of review requires me to consider whether the Determination included 'the reasons for determination' as required by s23(3)(a) of the *SOP Act*, specifically, the Adjudicator's reasons for why the Advance Payments were not taken into account in calculating the adjudicated amount.

58 The main purpose of the *SOP Act* is to provide for prompt payment to the person who carries out construction work. To facilitate that purpose, the *SOP Act* sets up a form of adjudication that provides for a speedy but interim resolution of disputes in relation to progress claims.<sup>55</sup>

59 Consistent with the intention of *SOP Act*, the Determination was produced within a tight timeframe. I note:

- (a) the adjudication application was made on 6 April 2023;
- (b) the adjudication response was provided on 17 April 2023;
- (c) the Section 21(2B) Notice was issued on 19 April 2023;
- (d) the response to the Section 21(2B) Notice was provided on 21 April 2023; and
- (e) the Determination was delivered on 30 April 2023.

60 In my view, for the reasons that follow, I am satisfied that the Adjudicator complied with the requirements of s 23(3) of the *SOP Act*. In forming that view, I have been mindful of the tight time frame imposed on the Adjudicator and have taken care not to scrutinise the Determination with an overcritical or pedantic eye. In summary:

- (a) the conclusions of the Adjudicator as to the critical issues are not challenged as

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<sup>55</sup> The resolution is 'interim' because nothing done in an adjudication affects any right that a party may otherwise have under the relevant contract.

legally erroneous (in fact, no conclusions of the Adjudicator are challenged as legally erroneous), and it was not suggested that they could be. Therefore, the reasoning cannot be challenged as legally inadequate to justify the conclusion;<sup>56</sup>

(b) in any event, the Adjudicator *did* give reasons that were sufficiently detailed to enable the parties to understand that their contentions, as advanced in the Payment Claim, Payment Schedule and relevant material in support, had been considered. They were also sufficient to enable the parties to understand the process of reasoning that led to the particular conclusions.

61 It is the role of the Adjudicator to determine the amount of the progress payment (if any) to be paid by the respondent. Shunshunli raised only one defence to its obligation to pay the progress payment – that the Advance Payments had been made to Seascope Constructions and they exceeded the adjusted contract sum under a fixed-price contract.

62 The first critical issue that arose for the Adjudicator’s determination was whether or not the Contract had been varied from a fixed-price contract to a cost-plus arrangement.

63 As set out in relation to Ground 1, the first critical conclusion reached by the Adjudicator was that the parties had agreed to vary the Contract from a fixed-price contract to an arrangement whereby Seascope Constructions was no longer responsible for cost over-runs. There is no ground of review advanced that challenges this conclusion as legally erroneous.

64 Further, and in any event, the Adjudicator set out his reasons for his conclusion in the Determination at paragraphs 104 to 128. In those paragraphs, he:

- (a) identified the issue;
- (b) summarised the submissions of the parties and the materials they relied on;

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<sup>56</sup> Cockram (n 47) [17] (Basten JA).

- (c) recorded the parties' agreement that the Contract dated 6 August 2019 was a fixed-price contract;
- (d) noted the dispute between the parties as to whether it was subsequently varied;
- (e) set out his conclusions about how the parties operated between February 2020 and August 2022, and his conclusion that the parties had agreed to vary the amount payable under the Contract; and
- (f) provided three reasons for his conclusions at paragraphs 117 to 120. In relation to each reason, he identified a relevant fact supported by the materials before him and then explained how that fact supported his conclusions.

65 In my view, the inclusion of that reasoning in the Determination is adequate to satisfy the requirement in s 23(3) of the *SOP Act*. Further and contrary to the submissions of Shunshunli, it is apparent from that reasoning that the Adjudicator did not simply adopt Seascope Constructions' position, but rather considered each party's position and sought to substantiate his conclusions by reference to the materials before him.

66 The second critical conclusion reached by the Adjudicator was that to be inferred from his reasons as set out in paragraph 48 above; namely, that the payments into the Bendigo Bank Account (the last of which was made in August 2022) were not payments to Seascope Construction for the Works the subject of the Payment Claim submitted in March 2023.

67 Again, that conclusion is not challenged as legally erroneous by any of the grounds of review advanced in this proceeding, and therefore the reasoning in support of it cannot be challenged as legally inadequate to justify it.

68 In any event, the Adjudicator's reasons are sufficiently detailed to reveal the process of reasoning that led to that particular conclusion, specifically and in summary:

- (a) the Contract was varied from a fixed-price contract;
- (b) the Bendigo Bank Account was a joint account into which funds were deposited

by Shunshunli and out of which payments for the project were made, including payments to Seascope Constructions and to trade contractors and suppliers sourced by Shunshunli; and

- (c) he was not satisfied that the payments into the Bendigo Bank Account constituted Advance Payments for the Works the subject of the Payment Claim.

69 Accordingly, this ground of review must fail.

**G Ground 3 - Did the Adjudicator fail to make a bona fide attempt to conduct the adjudication?**

70 Shunshunli contended that the Adjudicator failed to make a bona fide attempt to conduct the adjudication in the following circumstances:

- (a) The determination substantially comprised 'copying and pasting' of precedent materials from the Adjudicator's earlier determinations (to establish his jurisdiction) and the parties' respective submissions, with the Adjudicator's short reasons largely directed towards explaining why he accepted Seascope Constructions' submissions.
- (b) In doing so, the Adjudicator did not make a bona fide attempt to conduct the adjudication by failing to properly consider Shunshunli's material.

**G.1 Submissions**

71 Shunshunli accepted that this ground overlaps with Grounds 1 and 2. It submitted, in summary, that:<sup>57</sup>

- (a) the Adjudicator resolved in favour of Seascope Constructions without a clear path of reasoning leading to that conclusion, instead merely choosing Seascope Constructions' position over Shunshunli's without assessing if it 'stood on its own two legs'; and

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<sup>57</sup> Plaintiff's Submissions (n 8) [75]-[77].

- (b) the consideration of issues by the Adjudicator largely comprised him copying and pasting the parties' submissions, and then paraphrasing what Seascope Constructions submitted, without explaining his process of reasoning.

72 Seascope Constructions submitted, in summary, that:<sup>58</sup>

- (a) the process described by Shunshunli is a process regularly followed by adjudicators, arbitrators and even judges in resolving disputes which come before them; and
- (b) the Adjudicator's acceptance of some (but not all) of Seascope Constructions' submissions does not constitute a proper basis for quashing the Determination.

## G.2 Consideration

73 This ground of review is based on the premise that the Adjudicator did not give adequate reasons and failed to properly consider Shunshunli's materials in relation to the Advance Payments.

74 For the reasons set out above in relation to Grounds 1 and 2, I have determined that the Adjudicator's reasons *were* adequate and that he *did* properly consider the materials in relation to the Advance Payments.

75 Further, in relation to the allegation contained in the Originating Motion that the Adjudicator copied and pasted precedent materials from the Adjudicator's earlier determinations and from the parties' submissions into his Determination, I note the following:

- (a) Shunshunli did not identify the precedent materials which it alleges the Adjudicator copied from his earlier determinations. In any event, I am not satisfied that such an approach, if taken, in any way supports the proposition that the Adjudicator failed to make a bona fide attempt to conduct the adjudication;

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<sup>58</sup> First Defendant's Submissions (n 28) [51]-[54].

- (b) Similarly, copying and pasting the parties' respective submissions throughout the Determination is also an insufficient basis to establish a lack of bona fides. To the contrary, it is a process properly and regularly employed by decision makers to enable parties to understand that their contentions have been considered.

76 In the above circumstances, this ground of review must fail.

#### **H Ground 4 - Did the Adjudicator deny Shunshunli procedural fairness?**

77 Shunshunli contended that the Adjudicator denied it procedural fairness by affording Seascope Constructions an opportunity to put on further submissions pursuant to s 21(2B) of the *SOP Act*.

##### **H.1 Relevant legal principles - The Adjudicator's obligation to serve a notice under s 21(2B)**

78 A payment schedule must indicate the amount of the payment the respondent proposes to make (ie, the scheduled amount).<sup>59</sup> Section 15(3) of the *SOP Act* provides that if the scheduled amount is less than the claimed amount, the payment 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.

79 Section 21(2B) provides that if an adjudication response includes any reasons for withholding payment that were not included in the payment schedule, then the adjudicator 'must serve' a notice on the claimant setting out those reasons and stating the claimant has two business days after being served with the notice to lodge a response to those reasons.

80 The task to be undertaken by an adjudicator under s 21(2B) has been considered recently by Delany J in the case of *Argyle*.<sup>60</sup> His Honour identified the following

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<sup>59</sup> *SOP Act*, s 15(2).

<sup>60</sup> *Argyle* (n 13).

applicable principles:

- (a) The word 'reasons' in s 21(2B) refers to all types of reasons: evidentiary, substantive, factual or legal.<sup>61</sup>
- (b) The task posed for the adjudicator by s 21(2B) is to first determine if the adjudication response includes any reasons for withholding payment that were not included in the payment schedule.<sup>62</sup>
- (c) The need for expedition that underpins the *SOP Act* informs the task to be performed. Having regard to the time constraints, a practical and relatively robust and generous approach is warranted on the part of the adjudicator when determining if new reasons are included in the adjudication response beyond those indicated in the payment schedule. To take too narrow a view of what is new might be to deprive the claimant of a fair opportunity to meet the case against it.<sup>63</sup>
- (d) Expanded, better articulated or further particularised reasons are 'reasons that were not included' in the payment schedule for the purpose of s 21(2B).<sup>64</sup>
- (e) The imperative to afford natural justice requires that the claimant has an opportunity to respond to detailed arguments and facts and evidence relied upon for the first time in the adjudication response.<sup>65</sup>

## H.2 Submissions

### H.2.1 *Shunshunli's submissions*

81 Shunshunli contended that the Adjudicator did not need to issue the Section 21(2B) Notice because the reasons for withholding payment as set out in its response to Seascope Constructions' adjudication application were not new.

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<sup>61</sup> *Argyle* (n 13) [132] (Delany J).

<sup>62</sup> *Argyle* (n 13) [135] (Delany J).

<sup>63</sup> *Argyle* (n 13) [135] (Delany J).

<sup>64</sup> *Argyle* (n 13) [136] (Delany J).

<sup>65</sup> *Argyle* (n 13) [141] (Delany J).



82 Shunshunli submitted, in summary, that:<sup>66</sup>

- (a) the issuing of the Section 21(2B) Notice, and the Adjudicator's subsequent consideration of Seascope Constructions' further material put on in response to the Section 21(2B) Notice, denied Shunshunli procedural fairness;
- (b) it was prevented from responding to Seascope Constructions' explanation of the Contract which should have been contained in its original adjudication application;
- (c) despite Shunshunli's protest, the Adjudicator did not invite Shunshunli to make further submissions in response; and
- (d) the denial of procedural fairness is not merely academic - it deprived Shunshunli of a realistic opportunity of a different outcome.<sup>67</sup>

### ***H.2.2 Seascope Constructions' submissions***

83 Seascope Constructions submitted, in summary, that:<sup>68</sup>

- (a) the language in s 21(2B) - 'any reasons' - is deliberately expansive. Any doubt as to whether the reasons included in an adjudication response went beyond those disclosed in the payment schedule should be resolved in favour of the claimant - to do otherwise would risk denying the claimant procedural fairness;
- (b) the fact Shunshunli was not permitted a right of rejoinder (which in any event it did not seek) does not give rise to a denial of procedural fairness; and
- (c) Shunshunli was able to, and did, lead evidence and make submissions in the adjudication as to the contractual arrangements between the parties. That the Adjudicator preferred the case advanced by Seascope Constructions on this

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<sup>66</sup> Plaintiff's Submissions (n 8) [60]-[65].

<sup>67</sup> Referring to the test as articulated in *Nathanson v Minister for Home Affairs* [2022] HCA 26, [32]-[33] (Kiefel CJ, Keane and Gleeson JJ).

<sup>68</sup> First Defendant's Submissions (n 28) [40], [43], [49].

question does not amount to a denial of procedural fairness such as to warrant the Determination being set aside.

### H.3 Consideration

84 Shunshunli's Payment Schedule provides reasons, over eight paragraphs, as to why the scheduled amount was less than the claimed amount, specifically, nil. Relevantly and in summary, those reasons were as follows:<sup>69</sup>

- (a) payments made by Shunshunli to Seascope Constructions totalled \$12,781,415.23 and exceeded the adjusted contract sum by \$906,400.23;
- (b) that overpayment exceeded the value of the entirety of the claimed amount and for that reason Shunshunli was not required to pay Seascope Constructions the claimed amount;
- (c) the sums paid to Seascope Constructions were in the nature of an advance in the expectation that the total amount actually paid would balance with the sum certified by the superintendent; and
- (d) despite that expectation, the advance sums exceeded the total sum certified such that Seascope Constructions had been overpaid.

85 Shunshunli's response to the adjudication application, provided on 17 April 2023, comprised a three-page submission ('**Shunshunli's Adjudication Submissions**') and the Cheung Declaration. The Adjudicator determined that these materials contained four new reasons for withholding payment which were not contained in the Payment Schedule. He identified those four new reasons in the Section 21(2B) Notice.<sup>70</sup> He did not describe the reasons in detail but by reference to paragraphs of Shunshunli's Adjudication Submissions.

86 The first new reason identified by the Adjudicator refers to paragraphs 3 and 5 of the Shunshunli's Adjudication Submissions plus the related attachments. By those

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<sup>69</sup> Payment Schedule (n 9).

<sup>70</sup> Section 21(2B) Notice (n 10).

paragraphs, Shunshunli:<sup>71</sup>

- (a) reiterated its position that having regard to the Advance Payments it 'cannot now be required to pay the claimed amount';
- (b) noted that Seascope Constructions relies on 'an alleged cost-plus arrangement to justify claiming payments';
- (c) denied that it entered any cost-plus arrangement; and
- (d) said further that any such cost-plus arrangement would fall foul of the requirements of the *Domestic Building Contracts Act 1995* (Vic).

87 The dispute between the parties about the contractual arrangements between them is directly relevant to Shunshunli's obligation to pay the claimed amount. The matters raised in paragraphs 3 and 5 of Shunshunli's Adjudication Submissions reveal the existence of that dispute, more particularly Shunshunli's denial of the cost-plus arrangement, and are clearly an expansion and better particularisation of the reasons included in the Payment Schedule. The Adjudicator did not err by serving the Section 21(2B) Notice in relation to those matters, nor did he deny Shunshunli procedural fairness by doing so.

88 The second new reason identified by the Adjudicator refers to paragraphs 6 to 8 of Shunshunli's Adjudication Submissions. By those paragraphs, Shunshunli addresses the payments it alleges it made to Seascope Constructions. Significantly, those paragraphs and materials referred to in them reveal the payments relied on were made into the Bendigo Bank Account. In my view, and recognising that a relatively robust and generous approach is warranted on the part of the Adjudicator when determining if new reasons are included in the adjudication response, the further particularisation of *how* the alleged Advance Payments were said to be made to the Contractor is sufficient to justify a notice under s 21(2B) in relation to those paragraphs. The Adjudicator did not deny Shunshunli procedural fairness by issuing

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<sup>71</sup> Shunshunli's Adjudication Submission (n 34).

the Section 21(2B) Notice in relation to the second new reason.

89 The third new reason identified by the Adjudicator refers to paragraphs 9 to 11 of Shunshunli's Adjudication Submissions. By those paragraphs, Shunshunli addresses Seascope Constructions' submission that the parties varied the terms of the Contract to a cost-plus arrangement. Again, as for the first new reason, the submissions and materials addressing this issue clearly expand on and provide better particularisation of the reasons included in the Payment Schedule. The Adjudicator did not err by serving a notice under s 21(2B) in relation to those matters, nor did he deny Shunshunli procedural fairness by doing so.

90 The fourth and final new reason identified by the Adjudicator refers to paragraph 12 of Shunshunli's Adjudication Submissions. By sub-paragraph 7(e) of the Payment Schedule, Shunshunli relied on the following reason in support of its position that Seascope Constructions had been overpaid, referring to a payment allegedly made to a company known as Earth & Wood:

in addition, [Seascope Constructions] in its claims to-date has not accounted for the deposit payment invoiced by [Seascope Constructions] on 24 September 2019 in the sum of \$522,806.85...

91 By its adjudication application, Seascope Constructions submitted that Shunshunli had misrepresented the payment made to Earth & Wood as being a payment to Seascope Constructions, which it denied. It said that the payment to Earth & Wood should not be treated as a payment under the Contract.<sup>72</sup>

92 By paragraph 12 of Shunshunli's Adjudication Submissions, Shunshunli referred to paragraphs 17 to 19 of the Cheung Declaration. By those paragraphs, Mr Cheung gives evidence of the events relied on to support Shunshunli's position that Mr Sagor of Seascope Constructions had agreed that this payment *was* to be treated as a payment under the Contract, and that Seascope Constructions had issued a payment receipt for this amount confirming it had received payment of it from Shunshunli.

93 In my view, the Adjudicator did not err by serving a notice under s 21(2B) in relation

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<sup>72</sup> Seascope Constructions' Adjudication Submissions (n 33), [42] p 13.

to those matters. It is clear that the reasoning contained in paragraph 7(e) of the Payment Schedule is quite limited, and that the Cheung Declaration better articulated or further particularised why it said the alleged payment to Earth & Wood should be considered a payment under the Contract, and therefore why Shunshunli did not owe Seascope Constructions the claimed amount.

94 For the reasons set out above, I am satisfied that the Adjudicator was obliged to serve a notice under s 21(2B), as he did. Accordingly, he did not deny Shunshunli procedural fairness by doing so, and this ground of review must fail.

### **I Orders**

95 For the above reasons, I propose to order that Shunshunli's application be dismissed.

96 I will hear from the parties as to the form of orders and costs.

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### **CERTIFICATE**

I certify that this and the 33 preceding pages are a true copy of the reasons for judgment of Justice Stynes of the Supreme Court of Victoria delivered on 6 December 2023.

DATED this sixth day of December 2023.



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Associate