

S ECI 2018 0419

THE CAT PROTECTION SOCIETY OF VICTORIA (ACN 004 513 679)

Plaintiff

v

ARVIO PTY LTD (ACN 600 218 380) and JOHN McMULLAN

Defendants

JUDGE: DIGBY J
WHERE HELD: Melbourne
DATE OF HEARING: 25 September 2018
DATE OF JUDGMENT: 10 December 2018
CASE MAY BE CITED AS: Cat Protection Society v Arvio
MEDIUM NEUTRAL CITATION: [2018] VSC 757

ADMINISTRATIVE LAW - Judicial review - Relief in the nature of certiorari - Injunctions - Declarations - Whether Adjudication Determination is vitiated by jurisdictional error - Review of jurisdictional facts - *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*, r 56.

BUILDING CONTRACTS - Adjudication Determination - Reference dates - Nature of payment claim - Whether payment claim is 'final claim' - Significance of a final claim - Where construction contract makes no provision for payment claim - Whether construction contract ousts default statutory provision for reference dates - Where contract is terminated - Whether default statutory provision for reference dates applies if construction contract is terminated - *Building and Construction Industry Security of Payment Act 2002 (Vic)*, ss 9, 14.

WORDS AND PHRASES - 'deposit moneys' - 'de novo hearing' - 'final claim' - 'final payment claim' - 'jurisdictional fact' - 'payment claim' - 'progress claim' - 'reference date' - 'retention moneys'.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr N J Phillpott	Whitelaw Flynn Lawyers
For the First Defendant	Mr B Reid	Colin Biggers & Paisley Lawyers
For the Second Defendant	No appearance ¹	

¹ By email dated 19 July 2018, the second defendant advised the Court he will be bound by the decision in the proceeding but will otherwise take no part provided no costs are sought against him.

HIS HONOUR:

Application for judicial review

- 1 In this proceeding, The Cat Protection Society of Victoria (**the plaintiff**) seeks relief in the nature of certiorari quashing an Adjudication Determination made by Mr John McMullan (**the second defendant**) under the *Building and Construction Industry Security of Payment Act 2002* (**the SOP Act**).² The Adjudication Determination was made in favour of Arvio Pty Ltd (**the first defendant**) pursuant to a payment claim it served under a construction contract (**the Contract**) with the plaintiff.
- 2 The plaintiff also seeks a declaration that the Adjudication Determination is void and seeks injunctive relief enjoining the first defendant from taking steps to enforce this Adjudication Determination or recover the amount identified therein.³
- 3 For the reasons that follow, I have decided that the Adjudication Determination should be quashed and declared void, and that the first defendant should be enjoined from taking steps to enforce the Adjudication Determination.

Background

Construction Contract

- 4 The plaintiff entered into the Contract with the first defendant on or around 15 January 2016.⁴ Under the Contract the first defendant was engaged by the plaintiff to build an animal shelter and veterinary clinic in Greensborough, Victoria.⁵ The total contract price for those works was approximately \$6 million.⁶ Ultimately, however, only work to a value of approximately \$3.5 million was completed by the first defendant,⁷ because, as detailed below, the plaintiff purported to terminate the Contract and shortly thereafter the first defendant also moved to terminate the

² Originating Motion for Judicial Review filed 19 July 2018.

³ Ibid.

⁴ CB13. All references to the Court Book (**CB**) refer to the paginated bundle of documents exhibited as 'IC-1' to the Affidavit of Mr Ian Crook, sworn 18 July 2018, filed in support of the plaintiff's application for judicial review.

⁵ Ibid.

⁶ Ibid.

⁷ DBQS Consulting Pty Ltd, Progress Recommendation No, 28, 19 February 2018 (CB181-83).

Contract.

Dispute and termination of the contract

5 From late 2017, the plaintiff and the first defendant were embroiled in a dispute regarding the works under the Contract and the Contract itself.⁸ The merits of the dispute leading to termination of the Contract do not concern the immediate proceeding.

6 On or about 26 February 2018, the plaintiff purported to bring the Contract to an end by written notice.⁹ On or about 7 March 2018, the first defendant accepted what it claims was the plaintiff's repudiation of the Contract and itself purported to bring the Contract to an end.¹⁰ The first defendant has not performed works at the construction site since this time.¹¹

First defendant's payment claim

7 On or around 24 May 2018, the first defendant served a purported payment claim dated 24 May 2018 on the plaintiff, claiming the sum of \$468,725.37 under the SOP Act.¹² The extent to which that purported payment claim meets the description of a 'final' claim, and the potential legal significance of such characterisation, is a crucial point of dispute between the parties and material to the outcome of this trial.¹³

8 On or about 7 June 2018, the plaintiff provided to the first defendant the plaintiff's payment schedule pursuant to the SOP Act in respect of this purported payment claim. The plaintiff's payment schedule recorded the first defendant's payment claim entitlement as \$nil.¹⁴

First defendant's adjudication application

9 On or about 22 June 2018, the first defendant made an adjudication application in

⁸ Affidavit of Ian Crook, sworn 18 July 2018, [7] (Crook Affidavit).

⁹ CB81-82.

¹⁰ CB83.

¹¹ Plaintiff's Submissions, 24 August 2018 (Plaintiff's Submissions), [4(d) and (e)].

¹² CB18.

¹³ Plaintiff's Submissions, [15]; First Defendant's Submissions, 7 September 2018 (First Defendant's Submissions), [18(c) and (d)].

¹⁴ CB77.

respect of the purported payment claim and payment schedule to Rialto Adjudications Pty Ltd.¹⁵

10 In this application the first defendant stated:

On 24 May 2018, Arvio served a final payment claim under the Act on the Society.¹⁶

11 On or around 25 June 2018, the second defendant accepted an appointment as the Adjudicator to determine the adjudication application.¹⁷

12 The plaintiff filed and served an adjudication response on or around 29 June 2018.¹⁸ In this adjudication response, the plaintiff contended that, while the Contract provided for a final payment claim, the contractual requirements for making such a claim had not been satisfied, such that the payment claim was invalid for want of a reference date.¹⁹

13 The first defendant filed and served a further submission to the Adjudicator on or around 4 July 2018.²⁰ In this further submission, the first defendant stated:

While the phrase [final payment claim] appears on the face of the Payment Claim, and while it could indicate Arvio's intention to not make any further claims under the Act, it does not import some special legal significance, and the Payment Claim complies with section 14 of the Act.²¹

Adjudication Determination

14 The Adjudication Determination was completed on or around 10 July 2018 and released to the parties the following day.²² The Adjudicator determined that the payment claim was supported by a reference date and that plaintiff was liable to pay the first defendant the sum of \$210,145.77.²³

¹⁵ CB1.

¹⁶ CB4.

¹⁷ Plaintiff's Submissions, [4(i)].

¹⁸ CB129.

¹⁹ CB132.

²⁰ CB152.

²¹ CB154.

²² CB189.

²³ Ibid.

Overview of the judicial review application

15 The plaintiff now applies for judicial review of the Adjudication Determination. The plaintiff submits that the Adjudication Determination should be quashed on the grounds that the Adjudicator committed a jurisdictional error, or erred in law, by:

- (a) finding that the SOP Act permits a claimant to serve a payment claim following termination of the Contract;²⁴
- (b) finding there was a reference date sustaining the payment claim on which the Adjudication Determination was based when there was no such reference date in the Contract;²⁵
- (c) including an excluded amount in the determination as defined in s 10B of the SOP Act;²⁶ and
- (d) failing to value the purported payment claim.²⁷

16 In response to each of these grounds, the first defendant submits that:

- (a) the SOP Act does not *ipso facto* prohibit a claimant from serving a payment claim following termination of the relevant construction contract;²⁸
- (b) the reference date 26 February 2018 contended for by the first defendant throughout the adjudication process is a valid reference date arising prior to termination of the construction contract;²⁹
- (c) it was open to the Adjudicator to make a finding that Variation 18 is a claimable variation and, accordingly, not an excluded amount;³⁰ and
- (d) the Adjudicator otherwise fulfilled his obligations under the SOP Act when

²⁴ Plaintiff's Submissions, [5(a)].

²⁵ Ibid [5(b)].

²⁶ Ibid [5(c)].

²⁷ Ibid [5(d)].

²⁸ First Defendant's Submissions, [5(a)].

²⁹ Ibid [5(b)].

³⁰ Ibid [5(c)].

valuing the construction work claimed by the first defendant.³¹

17 In the alternative, if found that the Adjudicator erred in holding that Variation 18 is a claimable variation or erred in his valuation of a particular item of construction work, the first defendant submits that any amounts so determined can be severed from the adjudicated amount.³²

Grounds 1 and 2

18 The parties' written and oral submissions addressed ground one and ground two together. Both grounds are raised in relation to the existence of a valid reference date for the first defendant's payment claim dated 24 May 2018.

19 The first ground concerns a discrete question of law, namely whether a reference date can accrue in respect of a construction contract which has been brought to an end.

20 The second ground concerns whether a reference date has accrued in the instant case, having regard to the Contract and the operation of the SOP Act. This second ground involves questions of both fact and law.

Adjudicator's reasons on a reference date

21 In relation to the first of the two grounds above, the plaintiff challenges the following legal and factual conclusions reached in the Adjudication Determination. The Adjudicator relevantly concluded:

59. In my view, the above authorities are to the effect that the Victorian Act permits a claimant to deliver a payment claim under the Act following termination of the relevant contract.³³

62. The substantive issue, here, is the effect of *Southern Han* relating to the particular provisions of the NSW Act, specifically, the extent (if any) to which *Southern Han* may not apply, here, having regard to specific, different, provisions of the Victorian Act.³⁴

66. In my view, in relation to whether, in this case, there is a relevant reference date, the additional express reference date provisions

³¹ Ibid [5(d)].

³² Ibid [6].

³³ CB203.

³⁴ CB208.

applying to ‘final payment’ under the Victorian Act suggest, to me, that, in this case, I should follow the reasoning of Vickery J in *Gantley*, rather than seek to apply the conclusions drawn from *Southern Han*.³⁵

69. In this case, I find the following:
1. The payment claim is a claim for a ‘final payment’.
 2. The Contract makes no express provision with respect to the time for making such a final payment claim.
 3. There is no defects liability period that applies.
 4. There is no final certificate that applies.
 5. The reference date is the day that construction work was last carried out under the contract, namely 26 February 2018.³⁶
70. For the reasons set out above, I determine that the reference date in respect of the payment claim dated 25 May 2018 was the day that construction work was last carried out under the Contract, namely 26 February 2018.³⁷

Submissions – Grounds 1 and 2

22 The plaintiff submits:

- (a) that cl 25.1(c) of the Contract made express provision for a reference date for a final payment claim,³⁸ and that the SOP Act does not offer a ‘freestanding’ reference date where the construction contract makes express provision for a reference date;³⁹
- (b) considered objectively, the payment claim in question was a ‘final’ payment claim for the purpose of the parties’ Contract,⁴⁰ with this being corroborated by the nature of the sums claimed in the builder’s payment claim by the first defendant builder in the adjudication application;⁴¹ and
- (c) in this case, there was no reference date provided for in the contract for a final payment claim at the time the payment claim was served given the Contract was terminated and s 9(2)(d) of the SOP Act is inapplicable.⁴²

³⁵ CB209.
³⁶ CB210.
³⁷ Ibid.
³⁸ Plaintiff’s Submissions, [15].
³⁹ Ibid [11]–[12].
⁴⁰ T5.23–31; T19.24–T20.20.
⁴¹ T6.25–T7.9.
⁴² Plaintiff’s Submissions, [21].

23 The substance of the plaintiff's submission is that, if the subject payment claim was a claim for a 'final payment', then the reference date could not be when construction work was 'last carried out under the contract' because the express contractual mechanism for the determination of a reference date for final payment found in cl 25.1(c) ousts the SOP Act's default provision for a reference date. The plaintiff argues that, on the present facts, that express contractual mechanism for a final payment was not engaged because the trigger date for Practical Completion had not occurred by the time the Contract was terminated, on either parties' case in that regard. Accordingly, the absence of a reference date means the first defendant's payment claim is invalid and the resulting Adjudication Determination should be quashed.

24 In response, the first defendant submits that:

- (a) the plaintiff's description and attempted characterisation of the first defendant's payment claim as 'final' is legally inconsequential.⁴³ The first defendant submits that its description of its claim simply reflects the fact that, in these circumstances, the plaintiff's termination of the Contract meant that this payment claim was the last claim that could be issued under the Contract. In this practical respect the first defendant contends that its payment claim dated 24 May 2018 was issued to provide a 'final balancing of account' between the contracting parties;⁴⁴ and
- (b) the subject payment claim dated 24 May 2018 was in fact a 'regular' progress claim for work performed up to 26 February 2018.⁴⁵ This is because, among other reasons, the payment claim claimed work performed under the Contract for the period ending 26 February 2018,⁴⁶ and the payment claim does not seek payment for the unpaid balance of the contract price.⁴⁷

⁴³ First Defendant's Submissions, [13]-[18].

⁴⁴ First Defendant's Submissions, [16]; reference to *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 [181] (Vickery J).

⁴⁵ First Defendant's Submissions, [35], [42].

⁴⁶ *Ibid* [35(c)].

⁴⁷ *Ibid* [35(d)].

25 The first defendant submits that the payment claim dated 24 May 2018 was not a 'final claim' under cl 25.1(c) of the Contract. The first defendant maintains that its payment claim of 24 May 2018 is supported by the provision for a reference date for 'claims for Progress Payments' in cl 25.1(a) of the Contract.

26 However, the first defendant by its written submissions dated 7 September 2018 also submits as follows in relation to its payment claim of 24 May 2018:

51. Pursuant to clause 25.1 (a) of the Contract, Arvio was entitled to make a claim for a Progress Payment under the Contract on 26 February 2018, because an interval of "not less than 5 business days" had elapsed since 7 February 2018.

52. Applying section 9(2)(a) of the Act, a reference date had accrued to Arvio on 26 February 2018, being a date on which it was entitled to make a progress claim.

27 The first defendant also submits that it was entitled to make a claim under cl 25.1(a) because 'not less than 5 business days' elapsed since the last claim was made on 7 February 2018. Accordingly, the adjudicator did not err in finding that there was an applicable reference date to support the first defendant's payment claim of 24 May 2018.

Considerations - Grounds 1 and 2

Nature of the reviewing Court's task

28 In *Southern Han Breakfast Point Pty Ltd (In Liquidation) v Lewence Construction Pty Ltd (Southern Han)*,⁴⁸ the High Court of Australia (**the High Court**) clarified that the occurrence of a reference date was a precondition to making a valid payment claim.⁴⁹

29 In turn, the validity of the payment claim is a precondition to the Adjudicator's jurisdiction to make a determination.⁵⁰

30 This trial addressed the plaintiff's Originating Motion for Judicial Review.⁵¹ In this

⁴⁸ (2016) 260 CLR 340.

⁴⁹ Ibid 361 (Kiefel, Bell, Gageler, Keane and Gordon JJ).

⁵⁰ *Building and Construction Industry Security of Payment Act 2002* (Vic), s 18(1).

⁵¹ The parties in this matter both described the Court's approach to matters going, potentially, to jurisdiction, as in the nature of a hearing 'de novo'; T22.19-26; T90.21-24; First Defendant's Submissions

regard I note the following observation by Gaudron J as to the Court's power to review and determine the existence of jurisdictional facts in *Corporation of the City of Enfield v Development Assessment Commission (City of Enfield)*:⁵²

Where the legality of an executive or administrative decision or of action taken pursuant to a decision of that kind depends on the existence of a particular fact or factual situation, it is the function of a court, when its jurisdiction is invoked, to determine, for itself, whether the fact or the factual situation does or does not exist. To do less is to abdicate judicial responsibility.⁵³

31 The point was explained further by Warren CJ and Tate JA in *Saville v Hallmarc Construction Pty Ltd*:⁵⁴

If an issue amounts to a jurisdictional fact it is reviewable by a superior court to determine if the decision maker was correct in finding that the pre-condition of its jurisdiction was satisfied and thus that its statutory power was enlivened. Moreover, it is reviewable, in effect, de novo, that is, by reference to the evidence available to the reviewing court.⁵⁵

32 The power to review the existence of jurisdictional facts has been recognised as a qualification to the principle that judicial review does not entail reconsideration of the 'merits' of an administrative decision.⁵⁶ The existence of relevant jurisdictional facts determines the underlying legality of the power and processes that are presently subject to judicial review.

33 In this context the Court is required to determine for itself the validity of the payment claim. One of the elements of a valid payment claim under the SOP Act is the occurrence of a reference date. Accordingly, in determining the validity of the subject payment claim, it is necessary to determine whether in fact the reference date that is asserted by the first defendant exists.

Entitlement to payment under the SOP Act

34 The phrase 'Progress Payment' is defined in s 4 of the SOP Act:

'Progress Payment' means a payment to which a person is entitled under

[11].

⁵² (2000) 199 CLR 135.

⁵³ Ibid 158–59 (Gaudron J).

⁵⁴ (2015) 47 VR 177.

⁵⁵ Ibid 199 [59] (Warren CJ and Tate JA).

⁵⁶ *Cabal v Attorney-General* (2001) 113 FCR 154, 166–67 (Weinberg J).

section 9 and includes (without affecting that entitlement) –

- (a) the final payment for –
 - (i) construction work carried out under a construction contract; or
 - (ii) related goods and services supplied under the contract; or
- (b) a single or one-off payment for –
 - (i) construction work carried out under a construction contract; or
 - (ii) related goods and services supplied under the contract; or
- (c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment");

Note: The amount of a Progress Payment is calculated in accordance with sections 10, 10A, 10B and 11.

35 Section 9 of the SOP Act states in relevant part:

9 Right to Progress Payments

(1) On and from each reference date under a construction contract, a person

- (a) who has undertaken to carry out construction work under the contract; or
- (b) who has undertaken to supply related goods and services under the contract –

is entitled to a Progress Payment under this Act, calculated by reference to that date.

(2) In this section, 'reference date', in relation to a construction contract, means-

- (a) a date determined by or in accordance with the terms of the contract as-
 - (i) a date on which a claim for a Progress Payment may be made; or
 - (ii) a date by reference to which the amount of a Progress Payment is to be calculated-

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

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

- (i) construction work was first carried out under the contract; or
- (ii) related goods and services were first supplied under the contract; or

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

- (i) construction work was last carried out under the contract; or
- (ii) related goods and services were last supplied under the contract; or

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

- (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
- (ii) the issue under the contract of a certificate specifying the final amount payable under the contract a final certificate; or
- (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that-
 - (A) construction work was last carried out under the contract; or
 - (B) related goods and services were last supplied under the contract.⁵⁷

36 These provisions make it clear that the SOP Act contemplates three types of payment claim, namely, regular Progress Payment claims, single or one-off payments, and ‘final’ payments.

37 Sections 14(4) and (5) of the SOP Act also provide in relevant part:

- (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.

38 Accordingly, as provided above by ss 9 and 14, in certain circumstances, the SOP Act determines the time within which certain types of claims may be submitted.

Contractual provision for reference dates

39 The entitlement to a Progress Payment under the SOP Act, whether regular, final, one-off or single, accrues on a ‘reference date’ either established by the relevant Contract

⁵⁷ *Building and Construction Industry Security of Payment Act 2002 (Vic), s 9(2)(d).*

or, in defined circumstances, the SOP Act..

40 The effect of a contractual provision for reference dates was explained as follows by the High Court in *Southern Han*, in relation to s 8(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the NSW Act**):

The reference date for which s 8(2)(b) provides is applicable only where a construction contract contains no express provision for determining a date for making a contractual claim to be paid the whole or a relevant part of the contracted amount. Absent an express contractual provision for determining a reference date, s 8(2)(b) operates of its own force to provide a reference date for the purpose of s 8(1). In so applying, s 8(2)(b) fulfils the statutory promise in s 3(2) of granting a statutory entitlement to a Progress Payment regardless of whether the relevant construction contract makes provision for Progress Payments. The provision does not, however, alter the nature of a Progress Payment in respect of which a claim can be made.⁵⁸

41 Section 8(2) of the NSW Act is to the same effect as s 9(2) of the SOP Act.

42 In *Vanguard Development Group Pty Ltd v Promax Building Developments Pty Ltd (Vanguard)*,⁵⁹ Kennedy J made the following observations as to the above passage from *Southern Han* in relation to the SOP Act:

...although the Court made reference to the s 3(2) objects provisions (which made provision for the grant of a 'statutory entitlement' to make a progress claim) the Court makes clear that the 'freestanding' reference date is applicable only where the contract contains 'no express provision for determining a date for making a contractual claim'. In so applying, s 8(2)(b) (equivalent to the Victorian ss 9(2)(b)–(d)) fulfils the statutory promise of granting a statutory entitlement regardless of the contract. This provision however does not 'alter the nature of a Progress Payment in respect of which a claim can be made.'⁶⁰

43 The provisions referred to above in ss 9 and 14 of the SOP Act, which set default reference dates in relation to payment claims, generally operate where the contract which is applicable makes no express provision for such a claim. That has occurred here.

44 The parties' Contract in issue provided for reference dates and claims. In particular, the parties have agreed that cl 25.1 of the Contract governs their right to make claims

⁵⁸ (2016) 260 CLR 340, 363 [71] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

⁵⁹ [2018] VSC 386, [85].

⁶⁰ Ibid [85] (citations omitted).

under the SOP Act.⁶¹

45 Clause 25.1 of the Contract provided that:

25.1 Subject to the work done and materials used being in accordance with the Contract, the Contract Sum shall be paid by the Proprietor to the Contractor as follows:

- (a) On the dates or at the intervals specified in Sub-clause 1.11 the Contractor may make claims for Progress Payment for the value of materials supplied and work done by the Contractor under this Contract.
- (b) The Proprietor shall pay to the Contractor the amounts claimed or invoiced by the Contractor within the period or by the date specified in Sub-clause 1.12.
- (c) Upon Practical Completion, the Proprietor shall pay to the Contractor the unpaid balance of the Contract Price – as that Contract Price may be adjusted pursuant to this Contract.
- (d) If and to the extent that the Proprietor is entitled, under Clause 26, to retain an amount from a particular payment, then that amount may be withheld from that payment; all in accordance with and subject to the provisions of Clause 26.⁶²

46 The Contract also made clear provision for the timing of Progress Payment claims:

Clause 1.11	Dates or intervals for submitting subsequent payment claims	at intervals of not less than 5 business days	Reference to 25.1(a)
Clause 1.12	Due dates for making progress or other payments	No later than 7 business days following service of the relevant payment claim	Reference to 25.1(b)

Analysis of the Contract

47 Clause 25.1(a) of the Contract entitles the first defendant to make Progress Payment claims for the value of the materials supplied and work done by the first defendant under the Contract. Such claims could be made at intervals of not less than five business days pursuant to cl 1.11 of the Contract.

48 In my view, cl 25.1(a) of the Contract clearly makes express provision for regular Progress Payment claims in respect of the value of the subject matter defined in cl 25.1(a) and, in so doing, informs the application of ss 9(2)(a)(i) of the SOP Act. The

⁶¹ T3.4–8.

⁶² CB26–27 (emphasis added).

effect of cl 25.1(a), read with cl 1.11, is to make available a contractual reference date at intervals of more than five business days of prior claims for Progress Payment claims.

49 By contrast, cl 25.1(c) of the Contract makes provision for a discrete and separate payment entitlement. Clause 25.1(c) fixes the date by reference to which the Contractor's entitlement to payment of the amount payable under that clause is to be calculated. Unlike cl 25.1(a), cl 25.1(c) is only triggered upon Practical Completion of the Works. Further, cl 25.1(c) is also the sole and specific express provision which allows the first defendant to make claims for the unpaid balance of the contract price and for the resultant amount to be adjusted pursuant to the relevant terms of the Contract.

50 Upon Practical Completion, cl 25.1(c) also entitles the first defendant to be paid half the amount held in the Retention Fund at this point in time.⁶³ As the first defendant recognised:

It should be noted that the obligation in clause 25.1(c) arises automatically upon Practical Completion being reached. That is to say, Arvio is not required to submit a final claim in order to become entitled to a final payment under the Contract.⁶⁴

51 This entitlement arises as a result of cl 25.1(c) obliging the proprietor to pay the contractor the unpaid balance of the Contract price upon Practical Completion, and by operation of cl 26.4 which also obliges the specific payment of one half of the Retention Fund to the contractor shortly after Practical Completion. Such a claim would, when able to be made, be supported by s 9(2)(a)(ii) of the SOP Act which establishes a reference date in respect of a date by reference to which the amount of a progress payment is to be calculated. The occurrence of practical completion is such a date pursuant to cl 25.1(c) of the Contract, and a payment made by the Proprietor thereunder is a progress payment as defined by cl 4 of the SOP Act, and thereby any Contractor's claim for payment under cl 25.1(c) is a progress payment claim under

⁶³ Contract, cl 26.4 (CB27).

⁶⁴ First Defendant's Submissions. [32].

that specific clause.

52 It is to be noted that nothing in cls 25.1(c) or 26.4 precludes the contractor making a claim on the proprietor for payment in respect of the entitlements which arise thereunder upon Practical Completion.

53 Conversely and further, the plaintiff/proprietor is arguably able to access the unpaid balance and the retention fund under cls 25.1(c), 25.1(d), 26.5 and 28 of the Contract for a lack of due performance by the first defendant.⁶⁵

54 To this end, the Contract makes a separate provision for return of the unpaid balance following expiry of the Defects Liability Period. The relevant clauses of the Contract state:

24. Defects Liability

24.1 The Defects Liability Period commences on the Date of Practical Completion specified in Sub-clause 22.8.

24.2 Whenever called upon in writing by the Proprietor before the expiry of the period specified in Sub-clause 1.9, the Contractor shall, within a reasonable time, attend on and rectify or make good, at no cost to the Proprietor, all

- defective items of materials and/or of workmanship supplied by the Contractor under this Contract; and
- defects or damage caused by such defective items.

25. Payments

25.1 Subject to the work done and materials used being in accordance with the Contract, the Contract Sum shall be paid by the Proprietor to the Contractor as follows:

(c) Upon Practical Completion, the Proprietor shall pay to the Contractor the unpaid balance of the Contract Price - as that Contract Price may be adjusted pursuant to this Contract.

(d) If and to the extent that the Proprietor is entitled, under Clause 26, to retain an amount from a particular payment, then that amount may be withheld from that payment; all in accordance with and subject to the provisions of Clause 26.

26. Retention

26.5 On expiry of the Defects Liability Period and the completion of any work that may be required to be executed by the Contractor pursuant to Clause 24, the Proprietor shall pay to the Contractor the balance of the Retention Fund retained pursuant to this clause.

28. Limitations on the Use of Retention or Other Security

28.1 The moneys held by way of retention (and any securities held in lieu of

⁶⁵ Contract, cls 26.3 and 26.5 (CB26-27).

retention) are at all times held by the Proprietor on trust for the Contractor; for the express and exclusive purpose to act as security for the Contractor's due performance of his obligations under the Contract.

28.2 These cash or other securities may not be used by the Proprietor unless or until:

- the Contractor has failed or refused to comply with a bona fide obligation after being directed to do so in writing; and
- the Proprietor has served on the Contractor a written notice advising that, unless it complies within a further 10 working days, the Proprietor will
 - engage others to carry out the work in question at the Contractor's expense; and
 - use the retention fund or other security for this purpose to the extent required; and
- at the end of the stipulated 10 working days the Contractor has failed or refused to comply with the Notice.

28.3 Any dealings the Proprietor may have with the retention fund (or any other agreed security) that is inconstant with the above limitations will constitute a fundamental breach of the Proprietor's obligations under the Contract. Such a breach will, without prejudice to any of his other rights or remedies, entitle the Contractor to determine his employment pursuant to the relevant provisions of Clause 21.⁶⁶

55 This Contract does not, however, define or describe such a claim as a 'final claim', a 'final payment claim' or in any way refer expressly to a claim for final payment. Instead, under cls 24, 25.1(d), 26.5 and 28 of the Contract, after Practical Completion relevant entitlements may accrue to both the plaintiff and first defendant, including in relation to defective and incomplete work, and materials to which the first defendant has not attended.⁶⁷

56 In my view, in summary, the subject Contract provides:

- (a) expressly for Progress Payment claims, as defined, within the specific intervals referred to in cls 25.1(a) and 1.11 of the Contract; and
- (b) expressly for entitlements 'upon Practical Completion' under cl 25.1(c), for the first defendant to be paid the unpaid balance of the contract price, subject to any adjustment to be made under the Contract at that time; and

⁶⁶ CB25-27.

⁶⁷ This reflects a common regime to be seen in a number of standard form Contracts such as AS 4000 (cl 37.4); AS 4902-2000 (cl 37.4); AS 2124-1992 (cl 42).

- (c) various entitlements under cls 24, 25.1(d), 26.5 and 28 of the Contract after Practical Completion, including in relation to defective and incomplete work, and materials to which the first defendant has failed to attend.⁶⁸

57 While the Contract remained on foot the first defendant's progress payment claim entitlements under cl 25 subsisted. *Southern Han* and *Vanguard* make clear that, following termination, no new reference dates accrued under the Contract per se. However, any accrued right in the Contractor to make a progress payment claim would subsist.

The claim made 24 May 2018 was not a Progress Payment claim under cl 25.1(a) of the Contract

58 The first defendant's final payment claim of 24 May 2018 stated:

Dear Sir,

This is a payment claim made under the *Building and Construction Industry Security of Payment Act 2002*. It is the final payment claim for the purposes of that Act.

The claimed amount is **\$468,725.37** (including GST), which consists of the items listed in the table below.

Item	Amount (inc GST)
Annexure A - Construction work identified in the claims sheet at Sub-total-\$131,675 exc gst	\$144,842.50
Annexure A - Variation 16, concrete works previously approved by DBQS but remain unpaid \$16,832 exc gst	\$18,515.20
Annexure A - Variation 18, cost increases, \$39,980 exc gst	\$43,988.56
Annexure A - <u>Return of retention moneys, \$66,824.38 exc gst</u>	\$73,506.82
Annexure B -Preliminaries - site hire costs identified in the spreadsheet at \$30,826.91 exc gst	\$36,992.29
<u>Return of deposit moneys wrongly deducted from claims 112 and 117 2 x \$68,581.818 exc gst</u>	\$150,880.00
Total	\$468,725.37

Payment is due within 7 business days from the date of this claim.

Yours faithfully
Arvio Pty Ltd⁶⁹

⁶⁸ Ibid.

⁶⁹ CB38. (Underlining added).

59 As outlined above, the first defendant has resiled from its initial position that the description ‘final payment claim for the purposes of that Act’ has any legal significance.⁷⁰ In its submissions before this Court, the first defendant now asserts that the payment claim dated 24 May 2018 was a Progress Payment claim supported by a reference date under cl 25.1(a) of the Contract.⁷¹

60 The first defendant points to, inter alia, the following features of the payment claim in submitting that it was a ‘progress claim for work it performed up and until 26 February 2018’:

- (a) it claimed for work performed under the Contract for the period ending 26 February 2018;⁷² and
- (b) it did not (expressly) seek payment for the unpaid balance of the contract price.⁷³

61 The authorities indicate that the meaning of the payment claim is determined objectively.⁷⁴ The Court should ascertain the meaning that the documentation would convey to a reasonable person having the background knowledge that should reasonably be ascribed to the parties at the time the document was served.⁷⁵ The parties’ background knowledge is deemed to include experience in the building industry and a familiarity with the specific construction project and any issues regarding payment.⁷⁶

62 It is I consider significant that the first defendant’s claim dated 24 May 2018:

- (a) was expressed to be a final payment claim for the purposes of the SOP Act;

⁷⁰ First Defendant’s Submissions [10(a)].

⁷¹ Ibid [10(b)], [11], [44] and [51].

⁷² Ibid [35(c)].

⁷³ Ibid [35(d)].

⁷⁴ *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 [10]; *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) VR 112, 123–24.

⁷⁵ *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2011) 210 CLR 181, 188 [11 (Gleeson CJ, Gummow and Hayne JJ)]; *Wilson v Anderson* (2002) 213 CLR 401, 418 [8] (Gleeson CJ).

⁷⁶ *Mackie Pty Ltd v Counahan* [2013] VSC 694 [46], [55].

- (b) included a claim for return of retention moneys (\$73,506.82);
- (c) included a claim for the return of deposit moneys (\$150,880.00); and
- (d) appears to claim the unpaid balance of the Contract Sum, subject to adjustments at the time of the claim, taking into account that only part of the works was completed prior to the Contract being terminated in late February/early March 2018.

63 In my view, the payment claim made on the plaintiff/proprietor on 24 May 2018, about two months after the plaintiff purported to terminate the Contract, and it appears about two months after the Work ceased, does not fall within the ambit of cl 25.1(a) of the Contract, for reasons including that:

- (a) the first paragraph of the covering letter making the claim for payment states that the attached document contains a 'final payment claim' for the purposes of the SOP Act. The first defendant's submissions seek to disavow the significance of this phrase. In evaluating this aspect I consider that it is appropriate not to take an overly technical or unduly critical interpretation of the payment claim documentation.⁷⁷ However, notwithstanding that approach, it tells against the first defendant's arguments now that earlier, both vis-à-vis the proprietor and in turn the Adjudicator, the first defendant contended that its 24 May 2018 claim was in the nature of, and was submitted as, a final payment claim;
- (b) the claimed total \$468,725.37 demonstrates that the first defendant sought 'more than just work performed in the preceding period'.⁷⁸ The plaintiff described the claim for \$468,725.37 as a 'full-blown attempt to seek a final balance of account'.⁷⁹ This, in my view, is the likely approach taken by the first defendant, particularly given that the Contract had been brought to an end well

⁷⁷ *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 [11].

⁷⁸ T5.17-18.

⁷⁹ T9.7-11.

before the Payment Claim was submitted, and the work on site appears to have ceased well before 24 May 2018. In these circumstances it would be most unlikely the first defendant Contractor would not claim all it could;

- (c) the purported 'final payment claim' comprises specific claims for 'return of retention moneys' and for 'return of deposit moneys'. Plainly these amounts are not contemplated by the Contract as forming part of an interim claim for Progress Payment during the course of the ongoing construction project contemplated under cl 25.1(a). Further, cl 25.1(a) does not entitle the Contractor to claim such sums;⁸⁰ and
- (d) as outlined above, in both its claim presentation letter to the plaintiff and in its adjudication application, the first defendant asserted that its claim of 24 May 2018, presented about two months after the cessation of the works and the communication of 26 February 2018 purporting to terminate the contract, was a final payment claim for the purposes of the SOP Act.

64 The first defendant's specific claims for the return of retention and deposit moneys, and its apparent claim for the unpaid balance of the Contract sum subject to adjustments, are plainly not what the parties contemplated and agreed would be included in Progress Payment claims under cl 25.1(a). These particular amounts cannot, in my view, be described as claims 'for the value of materials supplied and work done by the Contractor under this Contract', being the words which delimit the subject matter of valid Progress Payment claims under the Contract.

65 By contrast, I consider that the first defendant's specific claims for the return of retention and deposit moneys, and its apparent claim for the unpaid balance of the Contract sum subject to adjustments in its final payment claim dated 24 May 2018, in substance and effect constituted a purported claim by the first defendant under cl 25.1(c) of the Contract, as it appears the first defendant intended its claim for payment

⁸⁰ T5.7-31.

to be received and addressed, both by the plaintiff recipient and by the Adjudicator.⁸¹

66 Accordingly, the first defendant's submission that the payment claim dated 24 May 2018 was made under cl 25.1(a) of the Contract or is in the nature of a Progress Payment claim in respect thereof, should be rejected.

No reference date under cl 25.1(c)

67 To the extent that the payment claim falls within the provision for claims under cl 25.1(c) of the Contract, there was no relevant reference date under cl 25.1(c) on 24 May 2018 because Practical Completion had not at that point been achieved by the Contractor.

68 I restate that cl 25.1(c) of the Contract provides:

- (c) Upon Practical Completion, the Proprietor shall pay to the Contractor the unpaid balance of the Contract Price – as that Contract Price may be adjusted pursuant to this Contract.⁸²

69 The plaintiff purported to terminate the Contract on 26 February 2018.⁸³ Similarly, the first defendant purported to accept the plaintiff's alleged repudiation of the Contract and itself terminate the Contract on 7 March 2018.⁸⁴ There is little doubt that, at 7 March 2018 by the latest, the Contract was at an end and the parties' rights and obligations thereunder discharged, save as to their accrued rights and entitlements under the Contract and at common law⁸⁵ and independently under the SOP Act.

70 Whether termination of the Contract was justified is not for determination in this proceeding. What is most significant in this matter is that, at the time the Contract was terminated, the first defendant had not achieved Practical Completion. The first defendant does not contradict that fact.

71 Clause 25.1(c) makes clear that Practical Completion must occur before the first defendant is entitled to be paid under that clause, including in respect of the unpaid

⁸¹ *Vanguard* at [85] and [98].

⁸² CB26 (emphasis added).

⁸³ CB81–82.

⁸⁴ CB83.

⁸⁵ *McDonald v Dennys Lascelles Limited* (1933) 48 CLR 457, 476–77 (Dixon J).

balance of the Contract Price. Upon the first defendant achieving Practical Completion to the Works, cl 25.1(c) establishes a date by reference to which the amount of the relevant progress payment to the contractor is to be calculated. Absent Practical Completion there was no available reference date under cl 25.1(c) of the Contract for the first defendant to have made this final payment claim on 24 May 2018.

Possibility for final claims after termination

72 Further to my above references to the effect of the termination of the Contract, I observe that the joint judgment of the High Court in *Southern Han* the following observations were made:

On the hypothesis that Lewence accepted Southern Han's repudiation and terminated the Contract on 28 October 2014, the effect of termination was that Lewence and Southern Han were both discharged from further performance of the Contract and that Lewence's rights under the Contract were limited to those which had then already accrued under the Contract except in so far as the Contract is properly to be interpreted as stipulating to the contrary. 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. Had the Contract not then been terminated, the right would have accrued only on 8 November 2014.⁸⁶

73 The significance of this observation was also noted by Kennedy J in *Vanguard*:

...the Court found no freestanding right arose on the facts in *Southern Han*. In particular, even if there was a common law termination, the Court found that no right to a payment had already accrued 'under the Contract'.

It follows that the decision of *Southern Han* does not assist Promax. In particular, it does not support the existence of a freestanding (extra) right to a Progress Payment where the contract already makes provision for a date on which a claim for a Progress Payment may be made.⁸⁷

74 In *Vanguard*, the contract in question made express provision for a final payment claim. That may have led her Honour to conclude that the freestanding reference dates under the SOP Act for final claims were not available. However, as explained above and below, the present Contract makes no such express provision. I

⁸⁶ *Southern Han Breakfast Point Pty Ltd (in liquidation) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, 365 [79] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

⁸⁷ *Vanguard Development Group Pty Ltd v Promax Building Developments Pty Ltd* [2018] VSC 386 [88]-[89].

acknowledge that the defendant here sought to distinguish *Vanguard* on that basis.⁸⁸

75 The present Contract does not define or describe such a claim as a final claim or a final payment claim or relating to a claim for final payment. Indeed, as explained above, by cls 24, 25(d), 26.3, 26.4, 26.5 and 28 the Contract appears to contemplate possible further adjustment entitlements subsequent to the expiration of the defects liability period, twelve months or more after the date of Practical Completion, at which time the balance of the Retention Fund would be returned to the Contractor, providing the Contractor had attended to defective and outstanding work. In the event of a failure by the Contractor to properly attend to defective and outstanding work, an adjustment would arguably be able to be made by the proprietor in relation to otherwise refundable Retention Fund moneys, as provided for in cl 28 of the Contract.⁸⁹ Other proprietor adjustments against that sum otherwise payable to the Contractor may also be relevant at, or before, that time.

76 In the absence of an express provision for final payment, s 9(2)(d) of the SOP Act could have applied in these circumstances:⁹⁰

- 9(2)(d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following –
- (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
 - (ii) the issue under the contract of a certificate specifying the final amount payable under the contract a final certificate ; or
 - (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that –
 - (A) construction work was last carried out under the contract; or
 - (B) related goods and services were last supplied under the contract.

⁸⁸ First Defendant's Submissions, [38]–[40].

⁸⁹ This reflects a common regime to be seen in a number of standard form Contracts such as AS 4000 (cl 37.4); AS 4902-2000 (cl 37.4); AS 2124-1992 (cl 42).

⁹⁰ The first defendant has expressly abandoned the application of s 9(2)(d) of the SOP Act. See first defendant's written submissions [10] and [43].

77 The purpose of a claim for final payment was explained by Vickery J in *Gantley Pty Ltd v Phoenix International Group Pty Ltd*:⁹¹

It follows that, in circumstances where a construction contract has been terminated, or otherwise work has ceased under it, a final payment claim may be made within the terms of the New Act so as to provide a "final balancing of account" between the contracting parties.⁹²

78 Ultimately, however, s 9(2)(d) of the SOP Act will be of no assistance to the first defendant in these circumstances. This is for at least two reasons. Firstly, the first defendant now adamantly maintains that the payment claim dated 24 May 2018 was a Progress Payment claim to which the first defendant was entitled pursuant to cl 25.1(a) of the Contract.⁹³ However, as earlier explained, the subject claim made 24 May 2018 is not in the nature of a Progress Payment claim under, or in respect of, that clause. Further the first defendant's reliance on s 9(2)(a) of the SOP Act is also of no avail because there was no reference date which arose or can be determined under the Contract for a claim in the nature of the first defendant's claim dated 24 May 2018 before termination of the Contract. Secondly, the first defendant has now abandoned its arguments, once put before the Adjudicator,⁹⁴ that the default reference dates provision in s 9(2)(d) of the SOP Act were applicable.⁹⁵

79 In this case, the first defendant was limited to the existence of reference dates under cl 25.1(a) of the Contract that accrued before termination on either 26 February 2018 or 7 March 2018. As explained above, the claim made 24 May 2018 did not amount to a Progress Payment claim for the value of the materials supplied and work done by the first defendant. Termination of the Contract before Practical Completion foreclosed the possibility of any claim being made pursuant to a reference date determined under, or by reference to, cl 25.1(c) of the Contract.

80 I also observe that there is nothing in the Contract, whether expressly or by implication, providing that a reference date under the Contract could accrue after and

⁹¹ [2010] VSC 106.

⁹² Ibid [181] (Vickery J).

⁹³ First Defendant's Submissions, [51]–[52].

⁹⁴ CB4.

⁹⁵ First Defendant's Submissions, [10]–[11].

notwithstanding termination.

Disposition – Grounds 1 and 2

81 For the above reasons, I reject the first defendant’s submission that the payment claim dated 24 May 2018 was for a Progress Payment for the value of materials supplied or work done, under cl 25.1(a) of the Contract.

82 Further, for the above reasons, I consider that the first defendant’s claim of 24 May 2018 cannot be sustained by a relevant reference date and the Adjudicator was in error in finding that the first defendant was entitled, either pursuant to the Contract or the SOP Act, to make the subject payment claim after the Contract was brought to an end. The Adjudicator committed a jurisdictional error in finding that there was a reference date in relation to the first defendant’s claim of 24 May 2018.

Grounds 3 & 4

83 As a result of my decision in relation to Grounds 1 and 2, I consider that it is unnecessary to address the other grounds for relief at this point.

Conclusion

84 The plaintiff has succeeded on grounds 1 and 2 of the Originating Motion for Judicial Review.

Orders

85 Accordingly, I will make an order in the nature of certiorari quashing the adjudication determination of the second defendant dated 10 July 2018.

86 I shall await the parties’ proposed final form of orders, including as to costs.

CERTIFICATE

I certify that this and the 26 preceding pages are a true copy of the reasons for Judgment of Digby J of the Supreme Court of Victoria delivered on 10 December 2018.

DATED this thirteenth day of December 2018.

.....
Associate