

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

Not Restricted

S ECI 2020 2193

LAUNCH NO. 4 PTY LTD (ACN 162 686 482)
ATF THE LAUNCH NO. 4 UNIT TRUST

Plaintiff

v

SOUTHSTAR HOMES PTY LTD (ACN 096 297 022)
(ADMINISTRATORS APPOINTED) & ANOR

Defendants

JUDGE: Digby J
WHERE HELD: Melbourne
DATE OF HEARING: 19 May 2020
DATE OF RULING: 19 May 2020
CASE MAY BE CITED AS: Launch No. 4 v Southstar Homes
MEDIUM NEUTRAL CITATION: [2020] VSC 299

ADMINISTRATIVE LAW - Application for judicial review of determination of Adjudicator pursuant to *Building and Construction Industry Security of Payment Act 2002* (Vic) - Application under s 440D of the *Corporations Act 2001* (Cth) and whether leave should be granted to begin and continue proceedings in respect of a company under Administration - Order sought to restrain the successful party to the Adjudication from enforcing an Adjudication Determination or seeking to issue an Adjudication Certificate or enter judgment or filing an Adjudication Certificate as a judgment in any court or serving a notice - Whether applicant required to provide security by way of payment into Court in respect of the sum of the Adjudication Determination - Exercise of discretion - Payment into Court ordered - *Norwood Ponds Operations Pty Ltd v Merrion (4) Pty Ltd* [2020] VSC 77.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr N Andreou	Robert James Lawyers
For the First Defendant	Mr A Morrison	Brixton Legal
For the Second Defendant	No Appearance	

HIS HONOUR:

This application

- 1 By Summons dated 18 May 2020 Launch No. 4 Pty Ltd (the plaintiff) seeks an injunction against Southstar Homes Pty Ltd (Administrators Appointed) (the first defendant) preventing it from relying on or taking steps to enforce payment in relation to an adjudicated amount pursuant to an Adjudication Determination delivered on 8 May 2020 by the second defendant, Mr John McMullan, (the Adjudicator).¹
- 2 On return of the plaintiff's Summons, the substantive matter in issue was which party enjoyed the balance of convenience, in particular in respect of the ancillary question of whether or not the grant of the injunction sought by the plaintiff should be conditional, including upon the plaintiff paying the adjudicated amount into Court pending the outcome of the plaintiff's underlying proceeding by Originating Motion to quash the Adjudication Determination and have it declared void and unlawful.

Background

The parties

- 3 The plaintiff is a developer and the registered proprietor of a property situated at and known as 801 Centre Road, Bentleigh in the State of Victoria.
- 4 The first defendant is a Builder.

The Contract

- 5 On 8 June 2018, the plaintiff and the first defendant entered into an amended AS4902-2000 General Conditions Contract for the design and construction of a development known as the Centrepiece Residences, a multi-level residential and retail development at 801 Centre Road, Bentleigh in the State of Victoria (the

¹ By letter dated 18 May 2020 the second defendant advised the Court he does not intend to take any active role in the proceeding and will abide the decision of the Court, save for any costs order being considered against him.

Contract).

- 6 On 28 March 2020, the first defendant issued a payment claim to the Superintendent under the Contract in the sum of \$865,170.28 (inc. GST) 'PC21'.
- 7 On 30 March 2020, the first defendant issued a second payment claim to the Superintendent under the Contract in the sum of \$673,375.66 (ex GST) 'PC21 Rev 1'.
- 8 On 6 April 2020, the Superintendent issued a payment schedule to the first defendant in response to 'PC21 Rev 1'. The payment schedule assessed the total amount payable by the plaintiff to the first defendant for 'PC21 Rev 1' was the sum of \$740,713.23 (inc. GST).
- 9 On 7 April 2020, Andrew Peter Schwartz and John Brennan Howarth were appointed Administrators to the first defendant.
- 10 On 9 April 2020, the plaintiff exercised its rights pursuant to cl 39.4 of the Contract and served notice that it was taking the whole of the work remaining to be completed out of the hands of the first defendant.
- 11 On 15 April 2020, the Superintendent issued a revised payment schedule 'Rev A' to the first defendant. The scheduled amount was NIL.
- 12 On 17 April 2020, the Administrators served upon the plaintiff a Form 509B notice under s 443B(3) of the *Corporations Act 2001* (Cth) (the Act), notifying of the Administrators' intention to not exercise property rights with respect to the Contract.
- 13 On 22 April 2020, the first defendant made an adjudication application to the authorised nominating authority under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (SoP Act).
- 14 On 24 April 2020, the second defendant accepted his appointment as the Adjudicator.

- 15 On 8 May 2020, the Adjudicator made the Adjudication Determination.
- 16 The Adjudicator determined the adjudicated amount in the sum of \$222,570.70 (inc. GST) (adjudicated amount) plus interest and adjudication costs.
- 17 The work under Contract that was taken out of the first defendant's hands has been given to MC Building Pty Ltd.
- 18 The total cost to complete the construction is estimated by the plaintiff to be \$3,060,085.28 (plus GST). This does not include the rectification of defects.
- 19 The plaintiff claims that after taking into account the expected cost of the completion by a replacement builder of the remaining works, which have been taken out of the first defendant's hands, the plaintiff will be entitled to certification by the Contract Superintendent of approximately \$1.5 million, net.
- 20 By Originating Motion for Judicial Review dated 15 May 2020 the plaintiff seeks an order by way of *certiorari* to quash the Adjudication Determination and a declaration that the Adjudication Determination is void and unlawful, and ancillary orders.

Preliminary issue - Application of s 440 of the Act (proceedings against the company and its property)

- 21 As outlined in the above background facts and circumstances, Administrators were appointed in relation to the first defendant on 7 April 2020 and on 17 April 2020 the Administrators served notice, in Form 509B pursuant to s 443B(3) of the Act, of their intention not to exercise property rights in relation to the first defendant's design and construct Contract of 8 June 2018.
- 22 In this context the plaintiff seeks leave pursuant to s 440D of the Act, if required, to begin and proceed with its application for the abovementioned injunction and to continue its judicial review proceeding commenced by Originating Motion dated 15 May 2020.
- 23 Section 440D of the Act provides as follows:

Stay of Proceedings

- (1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:
 - ...
 - (d) with the administrator's written consent; or
 - (e) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
- (2) Subsection (1) does not apply to:
 - (a) a criminal proceeding; or
 - (b) a prescribed proceeding.

24 Section 440D falls within Part 5.3A of the Act. That Part provides a regime for company administration. The purpose of this regime is described in s 435A of the Act:

Object of Part

The object of this Part is to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence - results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

25 'Property' is defined in s 9 of the Act as:

'property' means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action, and:

- (a) in Part 5.3A (administration) - has a meaning affected by section 435B; and; ...

26 Mr Andreou of Counsel for the plaintiff submits that this proceeding is not a proceeding 'against' the first defendant but rather a proceeding which seeks to invoke the supervisory jurisdiction of the Supreme Court to ensure that the Adjudication Determination was made in accordance with law.

27 The plaintiff submits that there is no cause of action against the first defendant in this proceeding and submits that the first defendant is merely a party interested in maintaining the Adjudicator's decision.

28 The plaintiff also acknowledges that the term 'property' as defined by s 9 of the Act

relates to 'any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action', but asserts that the Adjudication Determination is not caught. The plaintiff submits that the Adjudication Determination is not 'property' of the first defendant within the meaning of the Act.

29 Mr Morrison, Counsel for the first defendant, outlined his client's position in summary as follows:

- (a) the first defendant's position is not to consent to leave being granted to the plaintiff pursuant to s 440D of the Act;²
- (b) the operation of s 440D of the Act was engaged both by the present Originating Motion being a proceeding in a Court against a company, and also by the proceeding in relation to the first defendant's property.

Conclusion - Application of s 440 of Act (proceedings against the company and its property)

30 I reject the plaintiff's submissions that the present proceeding is not one against the company and that the present proceeding is not one in relation to any of the company's property.

31 In my view the first defendant is an entity against whom the plaintiff's present proceeding has begun and is sought to be continued.

32 The first defendant is not merely a party interested in maintaining the Adjudicator's decision. The adjudication is a determination in relation to a dispute between the first defendant and the plaintiff under the SoP Act and the present proceeding is a review of the Adjudication Determination which decided the outcome of that proceeding in the first defendant's favour.

33 The first defendant is a party to the proceeding because the plaintiff has proceeded

² The first defendant raised a formal issue namely that the plaintiff had no application on foot seeking leave under s 440D of the Act. The Court ruled that the plaintiff's written and oral submissions constituted adequate notice and an adequate application for leave under s 440 of the Act, T20.4-15.

against the first defendant and because the first defendant seeks to maintain its present entitlement to the adjudicated amount arising from the Adjudication Determination in its favour.

34 Further, as earlier observed, the plaintiff seeks interlocutory and final relief directly against the first defendant in this proceeding.

35 The plaintiff's Notice of Motion seeks interlocutory and final injunctions enjoining the first defendant in relation to the Adjudication Determination and orders for costs, and further, such orders against the defendants as the Court may deem fit.

36 At this stage of the proceeding it cannot be concluded with any certainty whether the relief presently sought by the plaintiff against the first defendant, including final injunctive relief, will be ultimately superfluous as the plaintiff contends.

37 Accordingly, in my view, this proceeding falls within the language and intent of s 440D of the Act as a proceeding against the first defendant company in administration.

38 Further this proceeding also targets, in a relevant way, the property of the first defendant and is in a real and substantive sense a proceeding 'against' the first defendant company. In my view, for these reasons, *MG Corrosion Consultants Pty Ltd v Gilmour*³ and *Young v Sherman*⁴ do not assist the plaintiff in its assertions that s 440D of the Act is inapplicable.

39 The first defendant's entitlement to the adjudicated amount determined by the subject Adjudication Determination is in my view property in the nature of a chose in action which also falls comfortably within the definition '... thing in action', in s 9 of the Act.

40 For the above reasons I consider that the plaintiff's present proceeding is relevantly against the first defendant and in relation to its property.

³ (2012) 30 ACLC 233, [21].

⁴ (2002) 20 ACLC 149, [74].

Leave to proceed under s 440D of the Act to bring a proceeding against the first defendant or in relation to its property

41 Further, I consider that, to the extent necessary in the circumstances, the plaintiff should be granted leave *nunc pro tunc* to begin this proceeding and proceed, subject to further order, because:

- (a) the present proceeding is essentially defensive in nature, that is, a proceeding in which the plaintiff seeks to have the Adjudication Determination in the first defendant's favour quashed and declared void and unlawful so as to defend against being required to pay the adjudicated amount;⁵
- (b) the plaintiff's application for leave pursuant to s 440D of the Act has been made very early in this proceeding;
- (c) it is conceded by the first defendant that a serious dispute arises between the parties in relation to the validity of the Adjudication Determination and that that dispute constitutes a serious issue to be tried for the purposes of the plaintiff's application for injunctive relief;
- (d) it is the first defendant which voluntarily appointed the Administrators in this instance;
- (e) the plaintiff will clearly suffer potential disadvantage and prejudice if leave under s 440D of the Act is not granted, including being precluded from prosecuting what may be successful grounds of review in respect of the Adjudication Determination;
- (f) on present submissions and materials it appears unlikely that the Administrators will be unreasonably distracted from their statutory duties because they are responding to this proceeding and further the limited nature of the plaintiff's present application, confined as it is by the restricted grounds available to challenge an Adjudication Determination, is also

⁵ T21.8-11; the first defendant's submission accepts the essentially defensive nature of the plaintiff's application.

unlikely, contrary to the first defendant's submission, to result in the Administrators having to incur very substantial unnecessary legal costs in responding to the plaintiff's claims in this proceeding;

- (g) I also consider that in this matter because the plaintiff is not a creditor but rather a debtor to the first defendant, the grant of leave under s 440D of the Act is unlikely, contrary to the plaintiff's submission, to subvert the statutory purpose of Pt 5.3A of the Act;
- (h) the outcome of the SoP Act adjudication proceeding is interim in nature and the first defendant's substantive rights and entitlements will thereafter remain to be finally determined. Those rights and entitlements are in this way unaffected by the outcome of this proceeding, however the plaintiff may by reason of s 440 and/or s 553C of the Act not ultimately be able to rely upon its statutory right of set off against the first defendant's claims because the first defendant remains under administration and is not 'an insolvent company that is being wound up'.

Conclusions - leave to proceed under s 440D of the Act

- 42 For the above reasons I grant leave, to the extent necessary to the plaintiff, *nunc pro tunc*, to begin and to proceed, subject to further orders, with this proceeding against the first defendant.

Injunction Application

Serious Issues to be Tried

- 43 The plaintiff submits that the Adjudication Determination is void or invalid for jurisdictional error because the Adjudicator, the second defendant, erroneously determined that there was an available reference date for the claimant to make a payment claim under the Act in circumstances where there was no available reference date as required by s 9(2)(d) of the SoP Act. As a consequence the plaintiff submits that the first defendant's payment claim of 28 March 2020 was invalid.

44 The plaintiff also submits that a serious issue arises as a result of the first defendant's voluntary administration and whether the intervention of that administration, and the removal by the plaintiff of the works from the hands of the first defendant, results in Pt 3 of the SoP Act no longer being available to the first defendant because it will no longer perform construction work and will no longer make payment claims under the SoP Act.

First defendant concedes the existence of serious issues to be tried

45 During the early course of argument in this matter, the first defendant appropriately and helpfully conceded that the plaintiff's material and above submissions gave rise to a serious issues to be tried in this proceeding.

Balance of Convenience and whether orders should be conditional upon payment into court of the adjudicated amount – plaintiff's arguments

46 The plaintiff submits that because the first defendant will be able to obtain a certificate under the SoP Act and utilise the enforcement machinery of that Act, if the plaintiff is ultimately unsuccessful in its application for judicial review, the first defendant will not be prejudiced and therefore the balance of convenience favours the grant of an injunction.

47 The plaintiff contrasts the position where it is successful in its judicial review, yet it is at this point forced to pay the adjudicated amount. The plaintiff submits that it would in such circumstances be deprived of the opportunity to 'argue later' as to its entitlement to the payment claim in issue because the Administrators of the first defendant will be able to deploy statutory mechanisms to prevent the plaintiff from commencing a substantive proceeding to recover the payment claim in issue, or to set it off against the plaintiff's money claims.⁶

48 The plaintiff also submits that the Affidavit of Michael Kokkinos, affirmed 15 May 2020, estimates that the plaintiff is likely to be entitled to at least a nett of \$1.5 million once the works taken out of the first defendant's hands are completed by an

⁶ Refer to s 440D and s 553C of the Act.

alternative Builder and the costs of completion are taken into account in accordance with the contract terms.

49 The plaintiff acknowledges that the usual course in applications of the present type in the context of a judicial review of an Adjudication Determination is that the court requires security by way of payment into court of the unpaid adjudicated amount under challenge.⁷ The plaintiff also notes that the Court nevertheless retains a discretion in the matter which is to be exercised upon evaluation of all relevant factors.

50 The plaintiff submits that, for the following reasons, the Court should exercise its discretion so as not to require the plaintiff to pay the adjudicated amount into Court in this instance:

- (a) the first defendant is in voluntary administration and the work under the contract has been taken out of its hands. Further, the Administrators have by Notice under s 443B(3) of the Act in Form 509B disclaimed property in the subject Building Contract. Therefore the first defendant will not hereafter be carrying out construction work under the Contract or making any further payment claims under the SoP Act;
- (b) in the circumstances the underlying objectives of the SoP Act are no longer relevant because there is no cash flow to be preserved in relation to a company in administration which has by Notice under s 443B(3) of the Act in Form 509B, disavowed the building contract concerned;
- (c) the voluntary administration of the first defendant effects, or is likely to effect, statutory impediments to the plaintiff ever being able to 'argue later' its entitlement to the payment claim in issue;
- (d) the building contract terms agreed by the parties provide for suspension of payment to the first defendant in the present circumstances, pursuant to cls

⁷ *Norwood Ponds Operations Pty Ltd v Merrion (4) Pty Ltd & Anor* [2020] VSC 77.

39.4 and 39.6 of the Contract, until reconciliation and a certification by the Contract appointed Superintendent, taking into account the costs incurred to have another contractor complete the contract works. The plaintiff asserts that the likely outcome of this reconciliation will be a net amount due to the plaintiff of approximately \$1.5 million;⁸

- (e) the plaintiff also contends that it is the first defendant's conduct referred to in (a) above, which has produced the situation where there is a lack of funds readily available to the plaintiff to make payment into Court, and therefore the Court should not exercise its discretion to insist upon such a payment 'as the price' of the injunction sought by the plaintiff;
- (f) the plaintiff however observes, without prejudice to its position that it should not be ordered to pay any sum into Court in relation to the adjudicated amount, that if such a sum were to be ordered by the Court, the plaintiff would require approximately one month to be in a position to make payment into Court;⁹

Injunctive relief - first defendant's arguments

51 The first defendant concedes that the plaintiff's material and submissions raise serious questions to be tried, however the first defendant submits that the plaintiff's first ground in relation to there being no reference date is not an overly strong ground, because unlike the position in *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd*,¹⁰ in the present case the plaintiff's asserted contractual suspension of payment pursuant to sub-clause 39.4 of the Construction Contract, occurred after the date upon which the first defendant's relevant reference date arose.

52 The sequence of critical events in this regard was:

⁸ Affidavit of Michael Kokkinos 15 May 2020, [24].

⁹ Affidavit of Michael Kokkinos, 15 May 2020, [32].

¹⁰ [2015] NSWSC 502.

- (a) 28 March 2020 - the first defendant/contractor served a payment claim in the sum of \$865,170.28 (inc. GST) for payment in respect of work performed and materials supplied up to 30 March 2020;¹¹
- (b) 7 April 2020 - Administrators appointed to the first defendant;
- (c) 9 April 2020 - the plaintiff/proprietor exercised its rights under cl 39.4 and removed the remaining works from the first defendant/contractor.

53 In relation to the plaintiff's second ground supporting the serious questions to be tried, namely that the first defendant is in voluntary administration, and its Administrators have served notice that it does not intend to exercise property rights in respect of the Contract, from 7 April 2020, deprives the first defendant of the benefit of Pt 3 of the SoP Act, the first defendant concedes that a serious issue arises to be tried.¹²

Balance of convenience and whether the adjudicated amount should be paid into court – first defendant's arguments

54 The first defendant also submits that the authorities place significant weight on the intention of the SoP Act to create a 'pay now, argue later system' which also imposes a statutory allocation of risk upon the plaintiff.

55 The first defendant submits that the plaintiff in seeking injunctive relief also seeks to suspend the effect of an Adjudication Determination and the application of the machinery of the SoP Act, and by doing so seeks in substance to disturb the pay now, argue later scheme of the Act.

56 The first defendant argues that in these matters the balance of convenience ordinarily favours the defendant.¹³ However the first defendant recognises that the plaintiff can, by paying the adjudicated amount into Court, create a balance of convenience in favour of the plaintiff being granted injunctive relief, pending the

¹¹ On 30 March 2020 the first defendant also issued a second payment claim to the Superintendent under the Contract in the sum of \$673,375.66 (ex GST).

¹² *Façade Treatment Engineering Ltd (In Liq) v Brookfield Multiplex Constructions Pty Ltd* [2015] VSC 41.

¹³ *Norwood Ponds Operations Pty Ltd v Merrion (4) Pty Ltd & Anor* [2020] VSC 77, [33].

outcome of judicial review of the Adjudication Determination.¹⁴

57 The first defendant also submits that a factor which should be taken into account in its favour in relation to the balance of convenience here, is the limited time in which it has to obtain payments from debtors in the course of its administration proceeding, a process which will be interfered with and delayed by the injunctive relief which the plaintiff seeks.

58 The first defendant also points out that although the plaintiff has indicated that in a timeframe of less than 30 days it will have difficulties obtaining funds to pay the adjudicated amount into Court, if required to do so, the plaintiff has not submitted that such a requirement will stultify its present proceeding. Rather the plaintiff has, without prejudice to its primary position that no payment into Court should be made, in substance sought extra time in which to pay into Court, if such a requirement is imposed.

59 The first defendant contends that here there is no special reason to disturb the ordinary approach taken by the Court in applications of this type and in respect of judicial review of Adjudication Determinations under the SoP Act.

Considerations

Injunction Application

60 In summary, to obtain the injunctive relief it seeks, the plaintiff must demonstrate:¹⁵

- (a) the existence of a serious issue or issues in dispute;
- (b) a sufficient likelihood of success at trial in respect of one or more of those issues, evaluated on the material available at the time of the application;¹⁶
- (c) as part of the evaluation of such sufficiency, the required likelihood of success at trial may be informed by the relative extent to which the balance of

¹⁴ *Raw Build Pty Ltd v JBK Industries Pty Ltd & Anor* [2016] VSC 547.

¹⁵ *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, [19], [65]-[72].

¹⁶ *Ibid* [65].

convenience favours the grant of the injunction sought;

- (d) the applicant will suffer injury for which damages would not be an adequate remedy;¹⁷ and
- (e) the balance of convenience favours the grant of the injunction.

Serious Issues to be Tried

61 The plaintiff identifies two issues which it argues form the basis of the serious issues to be tried. Principally it argues that the Adjudicator has erred and acted beyond jurisdiction on the basis of his error in concluding that there was a relevant reference date available in relation to the plaintiff's payment claim. Additionally the plaintiff argues that Pt 3 of the SoP Act does not apply to a defendant which is in voluntary administration and not able to perform the Contract works, and has by its Administrators eschewed property in the building contract.

62 The plaintiff argues that it has a strongly arguable case to be tried that there is no relevant reference date which can be identified in the circumstances and says that on the first issue its case is analogous to the decision of Justice Ball at first instance, in *Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd*.¹⁸

63 On the basis of the plaintiff's arguments on both above issues the first defendant, Builder, concedes that there are serious questions to be tried, but refutes that the serious issue to be tried is of any particular strength. The first defendant points out that, unlike *Southern Han*, here the Builder has based its payment claim on an accrued reference date, that is a reference date which arose and was referenced in the 28 March 2020 payment claim before the plaintiff invoked cl 39.4 and cl 39.6 of the Contract and therefore prior to the works being taken out of the hands of the Builder, and prior to the event of the appointment of Administrators on 7 April 2020 or the said property notice from the Administrators.

¹⁷ In *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, Gleeson and Crennan J characterised this as a separate consideration from consideration of the balance of convenience [19]. But other courts have considered it when assessing the balance of convenience.

¹⁸ [2015] NSWSC 502.

64 In my view, on these presently presented facts and arguments there is, as the first defendant concedes, at least an arguable case as to the plaintiff's asserted serious issues to be tried, although in my view, on the bases referred to in the last preceding paragraph, those issues are no stronger than arguable.

65 Although the works have been taken away from the first defendant, Administrators have been appointed to the Builder and those Administrators have issued a Form 509B Notice on or about 7 April 2020 communicating that the Administrators of the first defendant do not intend to exercise property rights in respect of the building Contract from 7 April 2020. At this interlocutory stage I accept as no more than arguable, that these events, which postdate the first defendant's 28 March 2020 payment claim, result (as the plaintiff argues) in the SoP Act being inapplicable to that payment claim, which is primarily in issue.

66 There will be no further progress claims submitted by the first defendant and as the plaintiff submits, in the current circumstances, there is no longer any need under the SoP Act to preserve cash flow. However, these observations appear to have force only after the time of the first defendant's 28 March 2020 payment claim; they are unlikely to apply to accrued entitlements under the Act.

67 Both because of the plaintiff's abovementioned concession and because I am independently so satisfied, the plaintiff has established that there are serious issues to be tried in this matter.

68 However, I also consider that, for the above reasons, the first defendant is also able to identify both an arguable accrued reference date for its 28 March 2020 payment claim, and therefore a right to make that payment claim, prior to the plaintiff invoking the operation of cl 39.4 including cl 39.6 of the Building Contract to take the remaining works from the first defendant and suspend payment to it and prior to the appointment of the Administrators to the first defendant and service of their property notice.

69 Therefore the plaintiff's reliance upon special circumstances arising because the

SC:

agreed Building Contract provisions which authorise the suspension of progress payments and the fact that the first defendant is no longer performing the works, has gone into Voluntary Administration and has eschewed the Contract are more than neutralised by the first defendant's relatively strong argument that its relevant payment claim entitlement had accrued by 28 March 2020, before the above events relied upon by the plaintiff.

70 Accordingly, balancing the positions of both the plaintiff and the first defendant in relation to the strength of their arguments as to the asserted serious issues, I consider the first defendant's arguments to be stronger and therefore to be a factor informing the balance of convenience in the first defendant's favour.

71 A further factor of more weight in the first defendant's favour is the existence of an Adjudication Determination not yet successfully impugned, which until quashed or displaced, creates an incumbency in the first defendant as to its immediate (effectively) entitlement to be paid the adjudicated amount.¹⁹

72 Absent the existence of sufficient contradictory factors, the scheme and object of the SoP Act warrant the application of the usual approach referred to in *Norwood Ponds Operations Pty Ltd v Merrion (4) Pty Ltd*²⁰ (*Norwood Ponds*) which is that as a balancing condition for the issue of an injunction suspending and deferring the respondent's entitlement to recover an adjudicated amount, there should be security provided in respect of that amount by a plaintiff wishing to prosecute a challenge to the Adjudication Determination.

73 The plaintiff says that if it is unsuccessful in the judicial review which it has launched to challenge the Adjudication Determination there will be no prejudice to the first defendant which can, in those circumstances in due course, obtain a certificate under the SoP Act and move to enforce the Adjudication Determination.

74 The plaintiff submits that on the basis of the estimate of Mr Kokkinos, in his

¹⁹ SoP Act, s 34M: the adjudicated sum is payable on the date determined by the Adjudicator.

²⁰ [2020] VSC 77, [12]-[19] and [36]-[38].

Affidavit of 15 May 2020, it is likely that at the point the Contract Superintendent certifies upon completion of the works by another contractor, the plaintiff will be owed approximately \$1.5 million net by the first defendant due, due largely to the costs of having an alternative builder complete the remaining works.

75 However, I weigh this estimate and sum lightly in the balance because it is largely based on projections of costs to complete by Mr Kokkinos, and is no more than an undetailed assertion at this time.

76 The plaintiff also submits that if however it were forced to pay the adjudicated sum at this stage, it will not be able to 'argue later' under the normal scheme of the SoP Act regime because the first defendant will be able to prevent the plaintiff from commencing substantive proceedings by deploying legislative mechanisms of the type earlier mentioned.

77 In my view, this argument by the plaintiff does not provide a reliable basis for the exercise of the discretion in the way the plaintiff seeks. This is because, at this stage, it is not at all clear that the future scenario will preclude the plaintiff being able to have its entitlements under the Building Contract taken into account and/or recovered. The plaintiff's argument represents at best a potentiality or risk, but given the attendant uncertainties I do not consider that this probability should be weighed heavily in favour of the plaintiff.

78 The plaintiff also submits that it is no fault of the plaintiff that the actions of the first defendant, namely entering voluntary administration and the issue of the Form 509B property notice reference, have put the plaintiff in a position where it does not have access to sufficient funds to immediately make payment of the adjudicated sum if ordered to do so, as a condition of the injunction it seeks on this application.

79 However, the plaintiff's submissions include a submission, made without prejudice to its primary position that it should not have to make a payment into Court, that recognises that within approximately one month it expects that it would be in a position to make payment into court in the sum of the adjudicated amount.

80 This leads to the conclusion, in my view, that if an order were to be made requiring the plaintiff, as a condition of the injunction it seeks, to provide the adjudicated amount within approximately 30 days of today, then the present material effect of the first defendant's conduct on the plaintiff's ability to promptly obtain funds to provide the security sought by the first defendant, will be alleviated and will not prejudice the plaintiff's ability to pay the adjudicated amount into Court, or risk stalling the plaintiff's judicial review.

81 The plaintiff does not submit, as highlighted by the first defendant, that the provision of security sought will, if the plaintiff is provided sufficient time to obtain those funds, stultify the plaintiff's ability to progress the judicial review which it has launched.

82 On the other hand, the non-provision of security as a condition of the injunction sought by the plaintiff will, in my view, give rise to a likely potential prejudice to the first defendant. It will at least have the potential in all likelihood to delay recovery of the sum to which the first defendant is presently entitled, namely to the adjudicated amount and may well give rise to a risk of non-recovery. Accordingly, I consider that the risk of prejudice in this matter favours the first defendant.

83 For the above reasons, and for the reasons explained in *Norwood Ponds* for the usual approach taken by the Court in this type of application, I consider that the plaintiff should be required to pay the adjudicated amount into court as a condition of the injunctive relief it seeks. There should however be accommodation of the plaintiff's position as to the timing of any required payment into Court.

84 Accordingly, I shall order that there be payment into court by the plaintiff of a sum equivalent to the adjudicated amount, as a condition of ordering the injunction it seeks and I shall further order that the plaintiff, make such payment on or before the 18 June 2020. In the meantime, that is between now and the hearing of this judicial review, the parties shall progress the interlocutory steps necessary to be in a position to try the serious issues identified by the plaintiff in this proceeding.

Decision

85 For the above reasons I shall grant the injunction sought by the plaintiff to preserve the present status quo until the determination of the plaintiff's judicial review of the subject Adjudication Determination, on condition that by 18 June 2020 the plaintiff makes a payment into Court of the adjudicated amount.

Orders

86 Accordingly upon the following undertakings being provided:

- A. By 4:00pm on 18 June 2020, the plaintiff undertakes to provide to the Senior Master of the Supreme Court of Victoria by a payment into Court, or in another form acceptable to the Senior Master, the amount of \$222,570.70, with such amount to remain as funds paid into Court until further order or as otherwise agreed between the parties.
- B. The plaintiff undertakes to abide by any order the Court may make as to damages in the case.
- C. The first defendant undertakes that until the hearing and determination of this proceeding, or any further order of the Court, the first defendant, by itself, its servants, or agents will not take any step to enforce the Adjudication dated 8 May 2020 including by:
 - (i) requesting pursuant to s 28O of the *Building and Construction Industry Security of Payment Act 2002* (SoP Act) the provision of an adjudication certificate under section 28Q of the SoP Act;
 - (ii) filing any adjudication certificate as judgment for a debt in any court pursuant to s 28R of the SoP Act; or
 - (iii) serving a notice on the plaintiff pursuant to s 28O(1)(b) of the SoP Act.

the Court orders that:

- (a) Subject to Other Matters A and B of these Orders, leave is granted, *nunc pro tunc*, to the plaintiff, pursuant to s 440D of the *Corporations Act 2001* (Cth), to begin and proceed with its Originating Motion in this proceeding.
- (b) Pursuant to Rule 45.05 of the Rules, the plaintiff has leave to:
 - (i) dispense with the requirements of Rules 5.03(1) and 8.02; and
 - (ii) proceed by originating motion in Form 5C.

- (c) The first defendant is restrained from seeking to enforce or take action under the SoP Act in relation to the Adjudication Determination dated 8 May 2020 and any subsequent Adjudication Determination provided to it pending the determination of the matters in the Originating Process dated 15 May 2020 (Originating Process).
- (d) The second defendant is restrained from seeking to enforce or take action under the SoP Act in relation to the Adjudication Determination, pending the determination of the plaintiff's Originating Process.

Exchange of Materials and Submissions

- (e) By 4:00pm on 3 June 2020, the first defendant file and serve any affidavit(s) upon which it intends to rely in the proceeding.
- (f) By 4:00pm on 15 June 2020, the plaintiff file and serve any affidavit(s) in reply.
- (g) By 4:00pm on 22 June 2020, the plaintiff file and serve its submissions (not exceeding 6 pages).
- (h) By 4:00pm on 2 July 2020, the first defendant file and serve its responsive submissions (not exceeding 6 pages).
- (i) By 4:00pm on 9 July 2020, the plaintiff file and serve its reply submissions (not exceeding 3 pages).
- (j) By 4:00pm on 14 July 2020, the plaintiff file and serve a Court Book (numbered sequentially and double-sided) containing all relevant documents filed in the proceeding.

Trial Date

- (k) The proceeding is fixed for trial and set down for hearing on Thursday 6 August 2020 at 10:30am on an estimate of hearing of ½-1 day.
- (l) The parties have liberty to apply.

(m) The parties' costs are reserved.