

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

Not Restricted

S ECI 2019 0833

LEVI PTY LTD trading as iBuild Building Solutions (ACN 152 048 210)

Plaintiff

v

Z&H BUILDING DEVELOPMENT PTY LTD
as Trustee for the Wang Family Trust (ACN 120 886 884)

First Defendant

and

LOU STOJANOVSKI (in his capacity as Adjudicator appointed under
s 20(1) of the *Building and Construction Industry Security of Payment Act*
2002 (Vic))

Second Defendant

JUDGE: Digby J
WHERE HELD: Melbourne
DATE OF HEARING: 16 May 2019
DATE OF JUDGMENT: 24 September 2019
CASE MAY BE CITED AS: Levi v Z&H Building Development
MEDIUM NEUTRAL CITATION: [2019] VSC 633

ADMINISTRATIVE LAW - Judicial review - Relief in the nature of *certiorari* - Whether adjudication determination is vitiated by jurisdictional error - Whether a payment claim was served in relation to a reference date which accrued more than three months' earlier - Whether the Adjudicator correctly determined a reference date to 28 December 2018 - Whether certain work performed was able to be lawfully claimed - *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*, r 56 - *Building and Construction Industry Security of Payment Act 2002 (Vic)* ss 14(5)(b), 28O, 28R, 29, 31-41 - *Building Act 1993 (Vic)*, s 37H(2).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr T Greenway	AIF Lucas & Co
For the First Defendant	Ms K Weston-Scheuber	Level Playing Field

HIS HONOUR:

Application

1 By Originating Motion and Summons dated 27 February 2019, Levi Pty Ltd (plaintiff), seeks orders quashing the Adjudication Determination dated 14 February 2019¹ (Adjudication Determination) made by the second defendant, Mr Lou Stojanovski,² (Adjudicator), on the grounds that:

(a) Ground 1

Contrary to s 18(3)(c) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (*SoP Act*) the adjudication application filed with the Authorised Nominating Authority on 21 January 2019 was invalid, as it was not served within ten business days after the first defendant received the payment schedule dated 28 December 2018.

(b) Ground 2

Contrary to s 14(5)(b) of the *SoP Act*, the payment claim dated 28 December 2018 contains claims for progress payments which were the subject of earlier progress claims, each with a reference date under s 9(2) of the *SoP Act* that accrued more than three months earlier.

(c) Ground 3

Alternatively, the Adjudicator erroneously determined 28 December 2018 as the reference date for the December Payment Claim by reason of cls 1.5 and 7.5 of the Contract rather than special condition 2 and the incorporated Stage Payment Schedule.

(d) Ground 4

Contrary to s 37H(2) of the *Building Act 1993* (Vic), the December Payment Claim claimed a payment for works that were performed for the purpose of complying with a written direction given by a registered building surveyor on 24 September 2018.

2 On 20 February 2019 the Adjudicator provided his Adjudication Determination to the plaintiff and Z&H Building Development Pty Ltd (first defendant).

3 The Adjudication Determination relates to the sub-contract between the plaintiff and the first defendant for the manufacture of modular dwellings and onsite work at Brighton East, in the State of Victoria, for the sum of \$680,000 (plus GST).

¹ Adjudication Determination, (First Yin Affidavit, Exhibit 'JY-22' (CB Tab 39)).

² By letter dated 22 March 2019 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.

The plaintiff seeks to set aside the Adjudication Determination.

- 4 By Originating Process dated 27 February 2019, the plaintiff substantially seeks:
- (a) an order by way of *certiorari* to quash the Adjudication Determination;
 - (b) a declaration that the Adjudication Determination is void and unlawful;
 - (c) a final injunction enjoining the first defendant, whether by itself, its servants or otherwise howsoever from:
 - (i) relying upon the terms of ss 28O, 28R, 29 and 31 to 41 of the *SoP Act* with respect to the Adjudication Determination;
 - (ii) requesting an adjudication certificate from the Authorised Nominating Authority under the *SoP Act*;
 - (iii) commencing proceedings to recover the adjudicated amount specified in the Adjudication Determination or any portion thereof, as a debt due in any court of competent jurisdiction; or
 - (iv) commencing proceedings to enforce the Adjudication Determination, obtain judgment in connection with the Adjudication Determination or otherwise take steps to recover the adjudicated amount specified in the Adjudication Determination or any portion thereof.
- 5 In addition to written and oral submissions, the following affidavit material is relied upon by the parties:
- (a) The plaintiff
 - (i) Affidavit of Zhong 'Jackson' Yin sworn 26 February 2019 (First Yin Affidavit) and exhibits thereto;³ and

³ CB Tabs 17-39.

(ii) Second Affidavit of Zhong 'Jackson' Yin sworn 12 April 2019 and exhibits thereto;⁴ and

(b) The first defendant

(i) Affidavit of John Wang affirmed 4 April 2019 (Wang Affidavit) and exhibits thereto;⁵ and

(ii) Affidavit of Shao-Ping Gangur affirmed 4 April 2019 and exhibit thereto.⁶

Background

6 The plaintiff carries on the business of designing and manufacturing modular homes. The first defendant provides engineering and construction services to the building industry.

7 On or about 28 February 2017, the plaintiff entered into a Head Contract with the Director of Housing for the design, manufacture and transportation of six modular homes to be installed at 226-228 South Road, Brighton East, in the State of Victoria (Head Contract).

8 By sub-contract dated 14 October 2017, the plaintiff and first defendant entered into a sub-contract agreement (Construction Contract) whereby the first defendant would perform certain sub-contract works under the Head Contract as generally described in [3] above and for the sum of \$680,000 (plus GST).⁷

9 On or about 27 August 2018, the first defendant served a payment claim in the sum of \$67,906.03 (August Payment Claim).⁸ The plaintiff asserts that this claimed amount related to the total remaining contract sum, including a

⁴ CB Tab 4.

⁵ CB Tabs 7 and 8.

⁶ CB Tabs 9 and 10.

⁷ First Yin Affidavit, Exhibits 'JY-1' and 'JY-2' (CB Tabs 18 and 19).

⁸ August Payment Claim, (First Yin Affidavit, Exhibit 'JY-11' (CB Tab 28)).

variation.⁹

10 On 5 and 6 September 2018, the first defendant made a further payment claim, based on a reference date of 28 August 2018 (September Payment Claim).¹⁰

11 The September Payment Claim was comprised of the following:

- (a) \$67,906.03, being the total of the remaining contract sum (including a variation); and
- (b) \$17,053.49, being retention moneys withheld under the Construction Contract calculated as 2.5% of the contract sum.

12 On 28 December 2018, the first defendant served a further payment claim on the plaintiff claiming \$101,365.58 (December Payment Claim).¹¹

13 The December Payment Claim sum comprised:

- (a) the claims included in the September Payment Claim; and
- (b) a final retention sum of \$17,000.

14 The plaintiff contends that the December Payment Claim, in the sum of \$101,365.58, included the sums of \$67,906.03 and \$17,053.49 earlier included in the August and September Payment Claims.¹²

15 At approximately 5:45pm on 28 December 2018 by post, the plaintiff provided a Payment Schedule to the first defendant (Payment Schedule) in response to the first defendant's December Payment Claim.¹³

⁹ Wang Affidavit, [31] (CB Tab 7) and August Payment Claim, (First Yin Affidavit, Exhibit 'JY-6' (CB Tab 28)).

¹⁰ September Payment Claims (First Yin Affidavit, Exhibits 'JY-12' and 'JY-13' (CB Tabs 29 and 30)).

¹¹ December Payment Claim (First Yin Affidavit, Exhibit 'JY-16' (CB Tab 33)).

¹² Plaintiff's Submissions, 12 April 2019, [41] and [42] (CB Tab 3) and December Payment Claim (First Yin Affidavit, Exhibit 'JY-16' (CB Tab 33)).

¹³ December Payment Schedule, (First Yin Affidavit, Exhibit 'JY-17' (CB Tab 34)). At First Yin Affidavit, [62] and [63] (CB Tab 17) Mr Yin deposes he posted the payment schedule on 28 December 2018 at 5.45pm and that on 7 January 2019 a copy of the Payment Schedule was emailed to the first

- 16 On 21 January 2019, the first defendant made an adjudication application under s 18 of the *SoP Act* in respect of the plaintiff's Payment Schedule.¹⁴
- 17 On 1 February 2019, the plaintiff provided an adjudication response under s 21 of the *SoP Act* (Adjudication Response).¹⁵
- 18 As a result of the Adjudication Response containing matters not included in the Payment Schedule, on 8 February 2019 the Adjudicator allowed the first defendant to deliver a response pursuant to s 21(2B) of the *SoP Act*.
- 19 The first defendant provided a response to the s 21(2B) Notice on 11 February 2019.
- 20 On 14 February 2019 the second defendant provided his Adjudication Determination dated 14 February 2019 in the sum of \$77,687.92.

Grounds of Appeal

Ground 1 - The adjudication application was not served within 10 business days of the Payment Schedule

- 21 During oral submissions at trial, Counsel for the plaintiff abandoned Ground 1 of the plaintiff's motion.

Ground 2 - Non-compliance with jurisdictional time limit for service of payment claim

Plaintiff's submissions - Ground 2

- 22 The plaintiff's contention is that contrary to s 14(5)(b) of the *SoP Act*, the December Payment Claim contains claims for progress payments which were the subject of earlier payment claims, each with a reference date under s 9(2) of the *SoP Act* that accrued more than three months earlier.

defendant.

¹⁴ Adjudication Application, (First Yin Affidavit, Exhibit 'JY-20' (CB Tab 37)).

¹⁵ Adjudication Response, (First Yin Affidavit, Exhibit 'JY-21' (CB Tab 38)).

- 23 At the outset of its argument, the plaintiff noted that there is no provision in the Construction Contract which stipulates a period within which a payment claim is required to be served. The plaintiff therefore contends in substance that a payment claim may be served at any time up to three months after that claim's reference date determined in accordance with the *SoP Act*. In this regard the plaintiff acknowledges that s 14(4) of the *SoP Act* provides that a payment claim (of the type referred to in s 14(4)) may be served within the period of three months after 'the reference date referred to in section 9(2) that relates to that progress payment'.¹⁶
- 24 The plaintiff also acknowledges that s 14(8) of the *SoP Act* provides that a claimant cannot serve more than one payment claim in respect of each reference date under the Construction Contract.
- 25 The plaintiff submits that to adopt an alternative construction of the abovementioned sections of the *SoP Act* would lead to 'a revivification' of each payment claim every time an unpaid amount was included in a subsequent payment claim which, in the plaintiff's submission, would render the jurisdictional time limits in ss 14(4) and (5) of the *SoP Act* otiose.
- 26 The plaintiff further asserts that any failure on the part of an Adjudicator to require compliance with s 14(4) (providing for the times within which progress payment claims may be served) or s 14(5) of the *SoP Act* (which provides for the time within which a payment claim in respect of a progress claim for a final, single or one-off payment) gives rise to jurisdictional error.¹⁷
- 27 The plaintiff also points out in the subject Adjudication, the Adjudicator determined that the contractual reference date was the 28th of each month.
- 28 The plaintiff contends that the reference dates for the payment claims were:

¹⁶ *SoP Act*, s 14(4)(b) (for progress payment claim) and s 14(5)(b) (for final payment claim).

¹⁷ *Hallmarc Construction Pty Ltd v Saville & anor* [2014] VSC 491.

- (a) 28 July 2018 in relation to the sum of \$67,906.03 claimed in the August Payment Claim;
- (b) 28 July 2018 in relation to the sum of \$67,906.03 claimed in the September Payment Claim; and
- (c) 28 August 2018 in relation to the sum of \$17,053.49 claimed in the September Payment Claim.

29 The plaintiff contends that the last date in relation to which the first defendant had a statutory entitlement to include the sum of \$67,906.03 in a payment claim was 28 October 2018, and the plaintiff also contends that the first defendant's statutory entitlement to claim \$17,053.49 expired on 28 November 2018.

30 The plaintiff submits that an Adjudicator was required under s 23(1)(a) of the *SoP Act* to determine the amount of the progress payment (if any) to be paid by the plaintiff to the first defendant.

31 The plaintiff submits that the first defendant's right to serve a payment claim in respect of a progress payment was extant only for the period of three months after the reference date in respect of that progress payment, and accordingly, the sum of \$84,959.52 (being \$67,906.03 and \$17,053.49) should be excluded from the first defendant's December Payment Claim. On the plaintiff's case once this amount is excluded from the December Payment Claim, the first defendant's entitlement to a progress payment is limited to \$17,000 at its highest.

32 Notwithstanding the plaintiff's submissions, the Adjudicator determined that the amount claimed be reduced by \$23,677.66. The plaintiff submits that even if the \$17,000 was validly included in the December Payment Claim (which the plaintiff denies), the first defendant is not entitled to any adjudicated amount.

33 The plaintiff's reply submissions¹⁸ also argue that:

- (a) *Ian Street Developer Pty Ltd v Arrow International Pty Ltd*,¹⁹ (*Ian Street Developer*) is distinguishable from the present case including because in *Ian Street Developer* only the ultimate payment claim was valid; there was not a series of payment claims in issue and the decision in that case focused on whether relevant work was performed subsequent to the previous reference date;
- (b) the language in ss 9 and 14 of the *SoP Act* is materially different to the equivalent Act in New South Wales;
- (c) the *SoP Act* links the concept of progress claims to the progress payment calculated to a specific reference date, and by force of that link and scheme, progress payments which are more than three months' old are excluded from forming part of a payment claim under the *SoP Act*.

First defendant's submissions - Ground 2

34 The first defendant contends that s 14(9) of the *SoP Act* does not support the plaintiff's argument. Moreover, s 14(9) of the *SoP Act* specifically permits it to include in a payment claim an amount that has been the subject of a previous claim, if that amount has not been paid, without any limitation on the right to do so.

35 The first defendant also relied on the decision of *Ian Street Developer* in which Riordan J considered the validity of a payment claim which incorporated three previous progress claims, which were not valid payment claims under the *SoP Act*. In that case the payment claim in question was served on 31 May 2017, and the dates of the previous progress claims incorporated in the 31 May 2017 claim were 30 November 2016, 21 December 2016, and 23 January 2017. The plaintiff argued in that case that the 31 May 2017 payment claim was invalid because it

¹⁸ Plaintiff's Reply Submissions, 30 April 2019 (CB Tab 1).

¹⁹ (2018) 54 VR 721.

was served more than three months after the reference date in relation to the three earlier progress claims.

36 The first defendant referred to Riordan J's conclusion in *Ian Street Developer* that there was no basis for limiting the entitlement under a payment claim to work performed after the prior reference date.²⁰

37 The first defendant also relied on the judgment of Stevenson J in *Pinnacle Construction Group Pty Ltd v Dimension Joinery & Interiors Pty Ltd*.²¹ In that decision his Honour considered the validity of a payment claim pursuant to a contract which provided for such claims to be made on the 15th day of each month. There the claimant submitted a payment claim on 12 December 2017, with a claimed reference date of 15 November 2017. The claim in *Pinnacle Construction* was for the balance of unpaid amounts, namely unpaid invoices dated 20 February, 18 March, 18 April, 18 May and 25 May 2017, which had all been expressed as payment claims.²²

38 The plaintiff challenged the Adjudication Determination on the basis that there was no valid reference date in relation to the 12 December 2017 payment claim.

39 Stevenson J held that there was no provision in the relevant Construction Contract which stipulated that the entitlement to submit claims was confined to the 15th day of each month in which it had performed construction work.

40 The first defendant also contends that in the present case additional work was carried out by it on 29 November 2018 and 18 December 2018 in the nature of rectification works, thus triggering a further reference date on 28 December 2018.²³

41 Finally, the first defendant submits that the interpretation of s 14(9) of the *SoP Act*

²⁰ (2018) 54 VR 721 at 752, [111].

²¹ [2018] NSWSC 894.

²² [2018] NSWSC 894, [4]-[7].

²³ Wang Affidavit, [25]-[30] (CB Tab 7).

contended for by the plaintiff does not advance the object and purpose of the *SoP Act*, which the first defendant submits is to provide a prompt interim entitlement to progress payments for subcontractors who carry out sub-contract work.

42 The first defendant contends that if the plaintiff's interpretation was correct, then s 14(9) of the *SoP Act* would cease to have any operation after three months of the reference date for the initial payment claim arising. The first defendant contends that a party in the plaintiff's position would only have to withhold payment for a period of three months from the first reference date in order to defeat any subsequent claims made under the *SoP Act* for payment of an unpaid amount, in turn limiting the operation of s 14(9) of the *SoP Act* in a way that is not warranted.

Considerations - Ground 2

43 I reject the plaintiff's contention that the first defendant's December Payment Claim cannot lawfully include the sum of \$84,959.59 (which sum is in part made up of the amount of \$67,906.03 also included the August Payment Claim, and also again included in the September Payment Claim) and the sum of \$17,053.49 (being a part of the retention sum which was included in the September Payment Claim).

44 I reject the plaintiff's argument that s 14(4)(b) of the *SoP Act* bars the inclusion of the above amounts in the first defendant's December Payment Claim (that is the amounts of \$67,906.03 and \$17,053.49 earlier included, as explained above, in the first defendant's August Payment Claim and September Payment Claim) because these monetary claims were the subject of earlier payment claims, each with a reference date under s 9(2) of the *SoP Act* which accrued more than three months before the December Payment Claim.

45 I reject the plaintiff's contention referred to in the last preceding paragraph because on its proper construction, s 14 of the *SoP Act* only restricts the period within which a payment claim, including a payment claim in the nature of a

final, single or one-off payment, may be served. In relation to these types of payment claim, unless the Construction Contract otherwise provides, the service of such claims must occur within three months after the reference date referred to in s 9(2)(a)(i) of the *SoP Act*, determined by the terms of the Construction Contract or as stipulated in s 9(2)(a)(ii) of the *SoP Act*.

46 Further, in my view ss 14(4)(b) and 14(5)(b) of the *SoP Act* do not prohibit a specific item of construction work which has been carried out, or a specific item of related goods and services which has been supplied, being claimed by inclusion in a 'payment claim' even though that 'payment claim' was made three months or more after the reference date (as defined by s 9(2) of the *SoP Act*) for the payment claim which is the vehicle for the relevant item of construction work or related goods and services.

47 Accordingly, a claim for an item of work and/or a claim for an item of goods and services, may be included again and again as components of successive payment claims, provided the payment claim for a progress payment is itself valid and timely pursuant to the *SoP Act*.

48 Further, acceptance of the plaintiff's construction of s 9(1) of the *SoP Act* would have the effect of coupling specific work, and/or supply of related goods and services, to a particular reference date, and would thereby confine a claimant's entitlement to a progress payment for that work, to the reference date in respect of which such entitlements were first claimed.

49 In my view the operation of the *SoP Act* argued for by the plaintiff in this respect fails to differentiate between a progress payment entitlement arising under s 9(1) of the *SoP Act* at a relevant reference date, for work undertaken, or the supply of related goods and services, in respect of which a person referred to in s 9(1) of the *SoP Act* is entitled to a progress payment, and the prescribed time frames within which a payment claim may be made, as regulated by s 14 of the *SoP Act*.

50 Section 14(1) of the *SoP Act* entitles such a person to serve a payment claim on the

person who may be liable to pay such a payment claim.

51 On and from a relevant reference date under the Construction Contract, as defined in s 9 of the *SoP Act*, a person entitled to a progress payment may, pursuant to s 14 of the *SoP Act*, serve a payment claim, as outlined above, and although a claimant cannot serve more than one payment claim in respect of each reference date, as prescribed by s 14(8) of the *SoP Act*, such a claimant may under s 14(9) of the *SoP Act* include in subsequent payment claims an amount that has been the subject of a previous payment claim, if that amount remains unpaid.

52 In my view it is clear on the above basis that entitlements for items of construction work and for related goods and services may be the subject of a number of successive progress claims even if those items have been earlier claimed, so long as they remain unpaid and providing the claimant serving the subsequent payment claim is a person referred to in s 9(1) of the *SoP Act*.

53 It is the payment claim, rather than an item or amount claimed in a payment claim in respect of which, by operation of s 14(4) of the *SoP Act*, there is a stipulated claim service time limit of 3 months after the reference date fixed by s 9(2) of the *SoP Act* in relation to that payment claim.

54 The above construction is consistent with the scheme of the *SoP Act*, including in particular ss 14(8) and 14(9), which expressly recognise that although only one payment claim is permitted for each reference date under the Construction Contract, a payment claim may include amounts claimed in a previous payment claim, if such amount remains unpaid.

55 The above construction also promotes the purpose and object of the *SoP Act*, namely to provide for entitlements to progress payments for those carrying out construction work, or the supply of related goods and services, under the Construction Contract and to ensure such persons recover progress payments in relation to their labour and supply.

56 Section 14(4) of the *SoP Act*, read together with s 14(9), in the context of the *SoP Act*, including its scheme, purpose and object, which seek to bring about prompt payment in relation to the carrying out of work and the supply of goods and services under a Construction Contract, in my view render it sufficiently clear that although, for obvious practical reasons, a payment claim (subject to the terms of the Construction Contract) is required to be made within three months of its reference date, a claimant may include in a payment claim an amount which has formed part of a previous payment claim, if that amount remains unpaid. This I consider to be the ordinary meaning of the language employed in s 14(4)(b) and s 14(9) of the *SoP Act*.

57 Section 14(4)(b), s 14(8) and s 14(9) of the *SoP Act* provide as follows:

14. Payment claims

- (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.
- (8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
- (9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

58 The prohibition in s 14(8) of the *SoP Act* that a claimant may not serve more than one payment claim in respect of each reference date under the Construction Contract does not impinge on the interpretation of s 14(4) and s 14(9) of the *SoP Act* referred to above.

59 Here, in accordance with the *SoP Act*, in particular s 9(1) and s 14(1), the claimant in August, September and December 2018 served payment claims which

included unpaid amounts that had been the subject of a previous claim, and remain unpaid.

60 In my view, for the reasons outlined above, the first defendant was entitled to serve its December Payment Claim, with the constituent claims which were in that payment claim, and therefore the plaintiff should fail on Ground 2.

Ground 3 - Invalid determination of the reference date

Plaintiff's submissions - Ground 3

61 In summary, the plaintiff's core contention is that the Adjudicator erroneously determined 28 December 2018 as the reference date for the December Payment Claim whereas the first defendant's December Payment Claim was in the nature of a final payment claim and by reason of cls 7.7 and 1.6 of the Construction Contract, the earliest that such a 'final payment clam' could be submitted was 'on the date of actual (practical) completion', a date which the plaintiff submits the Adjudicator failed to consider or determine.²⁴

62 The plaintiff contends that a reference date is a precondition for a valid payment claim and constitutes a jurisdictional fact.²⁵ The plaintiff also submits that by the Adjudicator fixing the reference date of 28 December 2018, the Adjudicator erred in the determination of that jurisdictional fact.²⁶

63 The plaintiff submits that the December Payment Claim was a final payment claim because it was in style and substance a 'final balancing of account between the contracting parties' or 'simply the last of the payment claims' because it claimed 100% of the contract price, including retentions.²⁷

64 The plaintiff submits, however, that the sub-contract works did not reach actual

²⁴ CB Tab 3, [54]. Refer to argument at T8.11-23 and T40.4-24 reliance by the plaintiff on Special Condition 2 of the Construction Contract, not argued by the plaintiff.

²⁵ *Southern Han Breakfast Point Pty Ltd (in Liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340.

²⁶ *Saville v Hallmarc Construction Pty Ltd* [2015] VSCA 318, [97]-[99].

²⁷ *Mackie Pty Ltd v Counahan & Anor* [2013] VSC 694.

(practical) completion by 28 December 2018 because works were not completed in accordance with cl 5.1.1 of the Construction Contract and because they did not comply with the *Building Act 1993* (Vic) (*Building Act*).²⁸

65 The plaintiff submits that the first defendant's obligations were unambiguous²⁹ and the first defendant's entitlement to serve the December Payment Claim only accrued when the works were complete and compliant with the *Building Act*.

66 The plaintiff submits therefore, that actual (practical) completion had not occurred and the first defendant's right to the final progress payment had not accrued; the plaintiff adds that a payment claim without a reference date is invalid.³⁰

67 The plaintiff also contends that the first defendant failed to comply with a written direction of a Registered Building Surveyor, dated 24 September 2018, and that therefore for that reason also, actual (practical) completion did not occur.

68 The plaintiff further submits that the Adjudicator concluded that the first defendant was entitled to the second retention sum but made no finding or mention of the reference date which founded that entitlement.³¹ The plaintiff submits that because the Adjudicator struck down cls 1.10 and 1.11 of the Construction Contract by reason of s 13 of the *SoP Act*, the Construction Contract contained no term which determined a reference date and therefore s 9(2)(d)(i) of the *SoP Act* applied. The plaintiff submits that in the circumstances s 9(2)(d)(i) of the *SoP Act* fixed a reference date for final payment, being the expiry of the defects liability period under the Construction Contract. The plaintiff submits that 'period' is twelve months from the date of the final completion of the Construction Contract. Accordingly, the plaintiff submits, the December

²⁸ Construction Contract, cl 5.1.3.

²⁹ *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184, [52]-[62].

³⁰ *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289, [32]; Plaintiff's Submissions, 12 April 2019, [56] (CB Tab 3).

³¹ Adjudication Determination, [16]-[19] (First Yin Affidavit, Exhibit 'JY-22' (CB Tab 39)).

Payment Claim was premature and therefore invalid.

First defendant's submissions - Ground 3

69 The first defendant refers to the plaintiff's submissions at trial and highlights that those submissions omitted to refer to and rely on 'Special Condition 2' and/or the 'Incorporated Stage Payment Schedule' in its contentions about the dates for making progress claims,³² and it also highlights that the plaintiff argues that the Adjudicator failed to consider or determine whether actual (practical) completion had occurred.³³

70 The first defendant asserts that the plaintiff erroneously assumes that the December Payment Claim was a 'final payment claim'.

71 The first defendant observes that a 'final payment claim' is not defined in the *SoP Act*, however has been referred to as a 'final balancing of account' between the parties.³⁴

72 The first defendant also submits that the inclusion of a claim for a retention sum is not determinative of whether a claim is a final payment claim.

73 The first defendant submits that the December Payment Claim was not a 'final balancing of account' between the parties because although work on the project was substantially complete by June 2018, there remained minor issues and minor work items in the nature of defective work which had not been rectified.³⁵

74 The first defendant submits that the plaintiff's assertions about the first defendant's failure to comply with the *Building Act*,³⁶ amount to an impermissible attempt to advance an argument about defective work at this trial which is

³² Originating Motion, 27 February 2019, [3(b)] (CB Tab 13).

³³ Plaintiff's Submissions, 12 April 2019, [58] (CB Tab 3); see also footnote [24].

³⁴ Plaintiff's Submissions, 12 April 2019, [51] (CB Tab 3); *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248.

³⁵ Wang Affidavit, [41] (CB Tab 7).

³⁶ Plaintiff's Submissions, 12 April 2019, [55] (CB Tab 3).

confined to the question of whether the Adjudicator committed reviewable error.

- 75 The first defendant notes the plaintiff's reliance on cls 1.6³⁷ and 7.7 of the Construction Contract to establishing a reference date for a payment claim that requires the achievement of practical completion. The first defendant also notes the plaintiff's contention is that actual practical completion was not achieved and therefore no reference date arose by reason of practical or actual completion.
- 76 The first defendant also contends that the Adjudicator correctly found that Special Condition 2 was invalid as a 'pay when paid' provision and therefore the reference dates under the Construction Contract are as set out in cls 1.5 and 7.5 of the Construction Contract.
- 77 The first defendant also notes that cl 7.5 provides that payment claims shall be submitted on, or after, the specific dates, or at the expiry of the intervals specified in cl 1.5, which makes specific reference to the 28th day of the month.
- 78 The first defendant submits that because the December Payment Claim was not a final payment claim and the applicable reference date for that claim was 28 December 2018; therefore that payment claim was not required to comply with cls 1.6 and 7.7 of the Construction Contract.
- 79 The first defendant submits that the plaintiff's argument depends upon an interaction between s 9(2)(d)(i) of the *SoP Act* and the 'defects period' in the Construction Contract which operates by reference to practical completion of the Construction Contract.
- 80 The first defendant further contends that to the extent that the abovementioned interaction argued for by the plaintiff makes liability to pay the first defendant contingent upon the operation of another contract, that circumstance contravenes

³⁷ The first defendant notes that it believes that the plaintiff's reference to cl 1.5 of the Construction Contract is intended to be a reference to cl 1.6; see First Defendant Submissions, 23 April 2019, [23] (CB Tab 2).

s 13 of the *SoP Act* and renders the plaintiff's argument that the first defendant's December Payment Claim was a 'final claim', unsustainable.

Considerations - Ground 3

81 I also reject the plaintiff's arguments in relation to Ground 3. In my view the Adjudicator was not in error in deciding that 28 December 2018 was the relevant reference date fixed by the Construction Contract for the first defendant's December Payment Claim, nor was the Adjudicator in error deciding that the reference date of 28 December 2018 provided a valid basis for the first defendant's service of its December Payment Claim.

82 I do not accept the plaintiff's contention that the first defendant's December Payment Claim was a claim in the nature of a final payment claim. In my view that submission should be rejected because the December Payment Claim was a claim which the Adjudicator found, as a matter of fact, was made at a time when certain defective and incomplete works remained to be rectified and completed by the first defendant.³⁸

83 Further, the Adjudicator concluded and found the first defendant's December Payment Claim was in the nature of a 'payment claim' in distinction to a 'final payment claim'.

84 In the circumstances, including those factual circumstances highlighted in the preceding paragraphs and also below,³⁹ I do not consider that the first defendant's December Payment Claim was a final payment claim under the Construction Contract or a claim in the nature of a final balancing of account between the parties simply because the first defendant's 'payment claim' of 28 December 2018 referred to items of work being '% complete to date' - '100%'.⁴⁰

³⁸ Adjudication Determination, [29] and [65] (First Yin Affidavit, Exhibit 'JY-22' (CB Tab 39)); Wang Affidavit, [41] (CB Tab 7).

³⁹ Reasons for Judgment, [82], [83] and [90].

⁴⁰ December Payment Claim (First Yin Affidavit, Exhibit 'JY-16' (CB Tab 33)), it can be inferred of the physical works.

Such a statement is not in itself, in my view, sufficient to render the first defendant's claim, construed objectively and not in an overly technical or unduly critical way, a final payment claim under the Construction Contract.

85 In this regard neither the Construction Contract nor the *SoP Act* define 'final payment claim' and the language, content and mode of submission and context of the December Payment Claim do not in my view establish that it was a final payment claim, either under the terms of the Construction Contract, or by reason of s 9(d) of the *SoP Act*. The first defendant's December Payment Claim was headed and described 'Payment Claim', and in my view there is no proper basis to conclude that the Adjudicator erred in treating the December Payment Claim as a payment claim served in relation to a reference date of 28 December 2018, under cls 1.5 and 7.5 of the Construction Contract.

86 It is to be noted that before the Adjudicator the plaintiff's Adjudication Response to the first defendant's December Payment Claim by way of its 'Payment Schedule',⁴¹ far from seeking to characterise the first defendant's December Payment Claim as a Final Payment Claim, asserted that, as at 28 December 2018, the Project works are not yet complete, including because roof flashing, lightweight external cladding, pressure flashing and floor tile grout works were defective or had not been completed and because of the absence of an Inspection Report from the Building Surveyor.

87 Further, at trial, in its endeavour to argue that 'actual practical completion' had not been achieved by the first defendant and as a consequence the date for service of any final payment claim by the first defendant had not arrived when the December Payment Claim was served on 28 December 2018, the plaintiff recognised and asserted that the sub-contract works under the Construction Contract had not reached actual practical completion, and were not complete at

⁴¹ December Payment Schedule, (First Yin Affidavit, Exhibit 'JY-17' (CB Tab 34)).

December 2018.⁴²

88 Furthermore, in my view s 9(2)(d)(i) of the *SoP Act* is of no application. This is because, consistent with the Adjudication Determination dated 14 February 2019 (at Adjudication Determination page 2 (bullet points one and two), and paragraphs [15], [25], [29] and [65]), and for the reasons outlined above, the December Payment Claim served by the first defendant was in the nature of a payment claim and not a final payment claim and none of the matters required to satisfy s 9(2)(d) of the *SoP Act* are made out.

89 Consequently, pursuant to cl 7.5 of the Construction Contract, the December Payment Claim was submitted in accordance with cl 1.5 of the Construction Contract, which specifies the 28th of the month as the reference date.

90 Further, the Adjudicator's observations and findings in the Adjudication Determination, to the effect that at the date of the December Payment Claim certain work was defective and incomplete, including at [29] and [65],⁴³ and the Adjudicator's observations and conclusions at [25] that the Construction Contract is vague in relation to required milestones [25] also support the Adjudicator's finding that the December Payment Claim was timely and valid as a payment claim.

91 For the above reasons the Adjudicator did not erroneously determine that by reason of cls 1.5 and 7.5 of the Construction Contract, and for the above reasons, the December Payment Claim was not required to comply with cls 1.6 and 7.7 of the Construction Contract.⁴⁴

⁴² Plaintiff's Submissions, 12 April 2019, [54]-[56] and [58] (CB Tab 3); Insofar as the plaintiff seeks to establish the state of the work at December 2018 by reliance on a Direction dated 24 September 2018 issued under the *Building Act 1993* (Vic), the relevant factual findings by the Adjudicator do not give rise to reviewable error in this proceeding in relation to that fact.

⁴³ Refer also Adjudication Determination, [65] Item 'Deduction Incomplete Pressure Flashing' (First Yin Affidavit, Exhibit 'JY-22' (CB Tab 39)).

⁴⁴ The plaintiff abandoned any argument based on Special Condition 2 and the incorporated Stage Payment Schedule, see T40.15-24.

Retention claim

92 The first defendant notes that cl 1.9 of the Construction Contract provides that the maximum amount to be withheld from each progress payment, by way of cash retention, is 5% of the amount otherwise to be paid to the Principal Contractor, here the plaintiff.

93 The first defendant also notes that cl 1.10 of the Construction Contract provides that the amount of retention is to be reduced by one half on the date of actual (practical) completion of the Head Contract and notes that cl 1.11 of the Construction Contract provides for release of the balance of retention moneys on the date of final completion of the Head Contract. The first defendant argues that because these provisions of the Construction Contract render the first defendant's right to payment of retention moneys contingent upon the operation of another contract, namely the Head Contract, they are in substance 'pay when paid' provisions and thereby of no effect.⁴⁵

94 The first defendant submits that the Adjudicator correctly found that the provisions of the Construction Contract referred to above 'make the liability to pay money owing, or the due date for payment of money owing, contingent or dependent upon the operation of another contract', namely the Head Contract between the plaintiff and the proprietor. The first defendant also notes that the plaintiff makes no challenge in these proceedings to that finding by the Adjudicator.

95 Ultimately, the first defendant argues that because the retention related provisions of the Construction Contract are of no effect, the inclusion of a claim for a retention sum in the December Payment Claim cannot itself be relevant to whether that claim was a 'final payment claim'. Further, the first defendant argues that, in any event, a claim for retention money need not have a reference date independent of the reference date for a relevant payment claim itself.

⁴⁵ SoP Act, s 13.

96 In my view, for the reasons I have earlier expressed, including that the inclusion of a claim for \$17,000 for return of retention moneys is not itself determinative of the status of the payment claim in which such a claim is included, and further by reason of the matters referred to in the last two preceding paragraphs, in the particular circumstances of this matter⁴⁶ the first defendant's December Payment Claim is not a final payment claim under the Construction Contract.

First defendant's alternative argument on final payment claim

97 The first defendant argues in the alternative that, in the event the Court finds that the December Payment Claim was a final payment claim, then the claim complies with all the requirements for a final payment claim.

98 For the reasons I have earlier outlined, I do not consider that the first defendant's December Payment Claim was in the nature of a final payment claim. Accordingly, I need not deal with the first defendant's alternative argument at paragraphs [31] to [36] of its Submissions dated 23 April 2019.

Ground 4 - no contractual entitlement to be paid for rectification works

Plaintiff's submissions - Ground 4

99 Under this Ground, the plaintiff's core contention is that contrary to s 37H(2) of the *Building Act*, the December Payment Claim claimed a payment for works that were performed for the purpose of complying with a written direction given by a Registered Building Surveyor on 24 September 2018.

100 The plaintiff's submissions in relation to Ground 4 rely on s 37H(2) of the *Building Act* which provides:

A builder to whom a direction to fix building work is given must not request or receive from the person for whom the building work was originally carried out (or any agent of that person) any payment for or in respect of any costs arising from anything done for the purpose of complying with the direction.

⁴⁶ Adjudication Determination, [16]-[19] (First Yin Affidavit, Exhibit 'JY-22' (CB Tab 39)).

101The plaintiff contends that the December Payment Claim sought \$17,000 in relation to rectification works required by the plaintiff's Written Direction, dated 24 September 2018, to Fix Building Work.⁴⁷ Those directed works included:

1. Waterproof the light weight external cladding to the shared accommodation units in accordance with the approved manufacturer's detail.
2. Demonstrate why the 'pressure flashing' under the projecting eaves to the shared accommodation units provides an acceptable alternative to lapping the wall cladding over a soaker flashing to the roof cladding, or remove the wall cladding and lap it over the soaker flashing.
3. Remove and re-grout floor tile grout to joints to wet areas that are visibly cracked.

102The plaintiff submits that the operation of s 37H(2) of the *Building Act* negates the first defendant's contractual right to payment in relation to such works.

103In the above circumstances the plaintiff submits that the first defendant had no entitlement to a progress payment under s 14 of the *SoP Act* in respect of the said sum of \$17,000 and therefore the Adjudicator had no jurisdiction under ss 18 and 23 of the *SoP Act*.⁴⁸

First defendant's submissions - Ground 4

104The first defendant points out that a written direction was issued on 24 September 2018 to fix certain flashing, and that flashing was rectified by the first defendant in November and December 2018.⁴⁹

105The first defendant notes in its submissions that the Adjudicator found that although the above works were referred to in the payment claim, the Adjudicator also found that the amount of \$17,000 that was claimed by the first defendant was claimed in relation to retention moneys and not for the carrying out of any

⁴⁷ First Yin Affidavit, Exhibit 'JY-6' (CB Tab 23).

⁴⁸ *Tagara Builders Pty Ltd v AP & L Services Pty Ltd & Ors* [2015] SASC 30, [34].

⁴⁹ First Defendant Submissions, 23 April 2019, [38] (CB Tab 2) and Wang Affidavit, [39] and [40] (CB Tab 4).

work which had been directed.⁵⁰

106The first defendant submits that the Adjudicator's finding referred to in the last preceding paragraph was a factual finding of the Adjudicator that should not be the subject of a judicial review application.

Considerations

107Because, as a matter of unreviewable fact, the Adjudicator found that the component of the first defendant's claim in the sum of \$17,000 was a claim for retention moneys, and was not a claim for carrying out the work directed by the Registered Building Surveyor pursuant to the *Building Act*,⁵¹ the Adjudication Determination should not be reviewed, or upset, in relation to this finding and entitlement.

108Put another way, on the facts found, the plaintiff's Ground 4 is beyond the scope of this judicial review and does not identify any relevant error on the part of the Adjudicator. Therefore Ground 4 must fail.

Decision

Ground 2

109For the above reasons the plaintiff should fail.

Ground 3

110For the above reasons the plaintiff should fail.

Ground 4

111For the above reasons the plaintiff should fail.

⁵⁰ Adjudication Determination, [40] and [65] (First Yin Affidavit, Exhibit 'JY-22' (CB Tab 39)).

⁵¹ Adjudication Determination, [19], [40] and [65] (First Yin Affidavit, Exhibit 'JY-22' (CB Tab 39)).

Orders

112 Accordingly, I shall order that the plaintiff's Originating Motion and Summons dated 27 February 2019 be dismissed.

113 I shall hear the parties, if necessary, as to the final form of orders, including as to costs.