

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

Not Restricted

S ECI 2019 0836

MKA BOWEN INVESTMENTS PTY LTD (ACN 600 897 792)

Plaintiff

v

CARELLI CONSTRUCTIONS PTY LTD (ACN 606 840 331)

First Defendant

and

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

Second Defendant

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JUDGE: Digby J  
WHERE HELD: Melbourne  
DATE OF HEARING: 10 May 2019  
DATE OF JUDGMENT: 24 September 2019  
CASE MAY BE CITED AS: MKA Bowen v Carelli Constructions  
MEDIUM NEUTRAL CITATION: [2019] VSC 436

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ADMINISTRATIVE LAW - Judicial review - Relief in the nature of *certiorari* - Whether Adjudication Determination is vitiated by jurisdictional error as a result of a payment claim not served 'on and from' the relevant reference date - Whether an Adjudication Determination is vitiated by jurisdictional error as a result of a failure to determine that a payment claim was made because it was the second payment claim within the one reference date - Adjudication Determination quashed as it was not served on and from the relevant reference date - *Building and Construction Industry Security of Payment Act 2002* (Vic), ss 9(1), 9(2)(a), 14(1), 14(8), 28Q.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr L Connolly	HWL Ebsworth Lawyers
For the First Defendant	Mr N Phillpott	Gadens Lawyers

HIS HONOUR:

**Application**

1 By Originating Motion and Summons dated 27 February 2019, MKA Bowen Investments Pty Ltd (plaintiff) seeks orders quashing the Adjudication Determination dated 15 February 2019<sup>1</sup> (Adjudication Determination) made by the second defendant, Mr Philip Martin<sup>2</sup> (Adjudicator), on the grounds that:

- (a) Ground 1  
The Adjudicator committed jurisdictional error, alternatively acted ultra vires or erred in law, in determining that the payment claim served by the first defendant, Carelli Constructions Pty Ltd, on or about 21 December 2018 (December Payment Claim) was valid in circumstances where it was not served 'on and from' the relevant 'reference date'; and
- (b) Ground 2  
Further, and in the alternative, the Adjudicator committed jurisdictional error, alternatively acted ultra vires or erred in law, in failing to determine that the December Payment Claim was in breach of s 14(8) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (*SoP Act* (Vic)) in circumstances where it was the second payment claim within the one reference date as prohibited by that provision.

2 By its Originating Motion the plaintiff seeks:

- (a) to restrain Carelli Constructions Pty Ltd (first defendant), whether by itself, its servants, or otherwise howsoever from seeking to enforce or take action under the *SoP Act* (Vic) in relation to the Adjudication Determination;
- (b) to restrain the Adjudicator whether by himself, his servants or otherwise howsoever from providing an Adjudication Certificate pursuant to s 28Q of the *SoP Act* (Vic) in respect of the Adjudication Determination;
- (c) a declaration that the Adjudication Determination is unlawful and void; and
- (d) an order in the nature of *certiorari* quashing the Adjudication Determination.

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<sup>1</sup> CB968-CB989.

<sup>2</sup> By letter dated 8 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.

3 In addition to written and oral submissions, the plaintiff relies upon the Affidavit of Paul Graham sworn 27 February 2019, and exhibits thereto.<sup>3</sup>

### **Background**

4 The key non-controversial factual circumstances giving rise to the proceeding are as follows:

- (a) on or about 12 December 2017, the plaintiff entered into a written contract with the first defendant to carry out the design and construction of a 17 apartment complex, including a basement, at 780 Whitehorse Road, Mont Albert, in the State of Victoria, for the contract sum of \$3,598,000 plus GST (Construction Contract);<sup>4</sup>
- (b) pursuant to cl 37.1 and item 33 of Annexure Part A of the Construction Contract, the reference date for making payment claims pursuant to s 9 of the *SoP Act* (Vic) was nominated as the 25th day of each month;
- (c) on 26 November 2018, the first defendant served a payment claim on the plaintiff in the amount of \$39,087.48 (including GST);<sup>5</sup>
- (d) on 21 December 2018, the first defendant served a payment claim on the plaintiff in the amount of \$411,358.36 (including GST) (December Payment Claim);<sup>6</sup>
- (e) in response to the December Payment Claim:
  - (i) on 11 January 2019, the plaintiff replied (to the December Payment Claim) by providing a payment schedule to the first defendant in the sum of \$7,182 (excluding GST) (Payment Schedule);<sup>7</sup>
  - (ii) on 25 January 2019, the first defendant made an Adjudication

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<sup>3</sup> CB34-36 and CB39-989.

<sup>4</sup> CB39-465.

<sup>5</sup> CB474-477.

<sup>6</sup> CB480-483.

<sup>7</sup> CB484-CB499.

Application under the *SoP Act* (Vic) (Adjudication Application);<sup>8</sup>

- (f) on 31 January 2019, the Adjudicator accepted the appointment as adjudicator in relation to the first defendant's Adjudication Application;<sup>9</sup>
- (g) on 4 February 2019, the plaintiff provided an Adjudication Response to the Adjudication Application (Adjudication Response);<sup>10</sup>
- (h) on 7 February 2019, the Adjudicator issued a notice pursuant to s 21(2B) of the *SoP Act* (Vic), which identified matters in the Adjudication Response which, in the Adjudicator's opinion, were not raised in the first defendant's Payment Schedule and the Adjudicator afforded the first defendant an opportunity to respond to matters raised by the plaintiff;<sup>11</sup>
- (i) on 11 February 2019, the first defendant served further submissions in response to the Adjudicator's notice dated 7 February 2019 pursuant to s 21(2B) of the *SoP Act* (Vic);<sup>12</sup> and
- (j) on 18 February 2019, the Adjudicator issued an Adjudication Determination<sup>13</sup> in relation to the Adjudication Application in which he determined that the first defendant was entitled to payment in the sum of \$209,470.04 (including GST).

### **The plaintiff's submissions - Ground 1**

5 The plaintiff's central submissions and primary ground impugn the December Payment Claim because the plaintiff argues that claim was not served in accordance with the provisions of the *SoP Act* (Vic) in circumstances where it was not served 'on and from' the relevant reference date in compliance with s 9(1) of the *SoP Act* (Vic).

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<sup>8</sup> CB516-CB846.

<sup>9</sup> CB851-CB861.

<sup>10</sup> CB863-CB955.

<sup>11</sup> CB959-CB960.

<sup>12</sup> CB962-CB967.

<sup>13</sup> CB972-CB989.

## The key legislative provisions

6 The plaintiff submits that ss 9(1), 9(2)(a) and 14(1) of the *SoP Act* (Vic) prescribe the circumstances in which a person is entitled to serve a payment claim.

7 Sections 9(1), 9(2)(a) and 14(1) of the *SoP Act* (Vic) provide:

### 9. Rights 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. (emphasis added)

(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; ... (emphasis added)

### 14. Payment claims

(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment. (emphasis added)

8 Pursuant to ss 9(1) and 14(1) of the *SoP Act* (Vic), the first defendant may serve a payment claim 'on and from each reference date under a construction contract'.

9 The plaintiff emphasises that in the recent decision in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd*,<sup>14</sup> (*Southern Han*), the High Court of Australia (High Court) held that the existence of a valid reference date is a 'precondition' to the making of a valid payment claim.

## The relevant reference date under the Construction Contract

10 The plaintiff submits that the *SoP Act* (Vic) only operates in respect of contractual

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<sup>14</sup> (2016) 260 CLR 340, [2].

rights as between the parties<sup>15</sup> and that cl 37 of the Construction Contract specifies the circumstances in which the first defendant is entitled to make a payment claim.

11 Pursuant to cl 37.1 and item 33 of Annexure Part A of the Construction Contract, the 'reference date' for making payment claims was nominated as the 25th day of each calendar month.

12 The plaintiff submits that prior to the service of the December Payment Claim, the first defendant had served a payment claim on 26 November 2018,<sup>16</sup> and had thereby served another earlier payment claim in respect of the 25 November 2018 reference date.

13 In the result the plaintiff argues that in breach of s 14(8) of the *SoP Act* (Vic) the first defendant served more than one payment claim in respect of the 25 November 2018 reference date and the plaintiff further submits that thereby the Adjudicator erred in failing to recognise and determine that the December Payment Claim was served in breach of s 14(8) of the *SoP Act* (Vic) and was thereby invalid.

14 The plaintiff submits that the first defendant made an application which it was not entitled to make under the *SoP Act* (Vic). The plaintiff submits that the Adjudicator erred in his Adjudication Determination because although the first defendant and the Adjudicator wrongly proceeded upon that basis, the December Payment Claim was not served in accordance with the *SoP Act* (Vic) in respect of the 25 December 2018 reference date.<sup>17</sup>

**The December Payment Claim was not served 'on and from' the relevant reference date**

15 The plaintiff submits that because the December Payment Claim was served by the first defendant on 21 December 2018,<sup>18</sup> it was not served 'on and from' the reference date of 25 December 2018 simply by reason of the relationship between those dates

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<sup>15</sup> (2016) 260 CLR 340, [66]-[71].

<sup>16</sup> CB474-CB477.

<sup>17</sup> CB521, [12]; CB977.

<sup>18</sup> CB480-CB483.

and the language of s 9(1) of the *SoP Act* (Vic).

### **The effect of the deeming provision in clause 37.1 of the Construction Contract**

16 Clause 37.1 (paragraph 3) of the Construction Contract provides that:

An early payment claim shall be deemed to have been made on the date for making that payment claim in accordance with Item 33.

17 The plaintiff submits that the deeming provision in cl 37.1 of the Construction Contract should be viewed consistently with the decisions of other courts in which the effect of terms very similar to cl 37.1 have been considered. In this respect, the plaintiff relies on the decisions of the High Court in *Southern Han*,<sup>19</sup> the New South Wales Court of Appeal in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd*<sup>20</sup> (*All Seasons*) and Doyle J (of the Supreme Court of South Australia) in *The Trustee for Allway Unit Trust trading as Westside Mechanical Contracting Pty Ltd v R&D Air-Conditioning Pty Ltd & Ors*<sup>21</sup> (*Westside Mechanical*).

18 The plaintiff observes that the deeming provision in the Construction Contract is in very similar terms to the contractual provisions in *All Seasons*, in which that construction contract provided:

An early progress claim shall be deemed to have been made on the date for making that claim.<sup>22</sup>

19 In *All Seasons*, Leeming and Payne JJ (with whom White JA agreed, although his Honour added certain additional observations) followed the reasoning of the High Court in *Southern Han* in determining that such a deeming provision cannot operate in the context of the security of payment legislation to cure the premature service of a payment claim.<sup>23</sup>

20 The plaintiff's submissions point out that the New South Wales Court of Appeal recognised that there were sound policy reasons for not allowing a deeming

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<sup>19</sup> (2016) 260 CLR 340, [2].

<sup>20</sup> [2017] NSWCA 289.

<sup>21</sup> [2018] SASC 46, [135]-[144].

<sup>22</sup> [2017] NSWCA 289, [2].

<sup>23</sup> [2017] NSWCA 289, [32]-[36].

provision to cure a failure to comply with the strict timelines imposed by the security of payment legislation:

Further, we do not think that the applicant's construction promotes the purpose of the Act. There is sound reason, given the consequences for both parties of engaging the regime established by the Act, for there to be certainty as to precisely when a payment claim has been served. It is easy to see the scope for confusion that could arise if the applicant's construction were accepted. The Act requires people dealing with a builder's accounts to be very concerned to respond to "payment claims" within 10 business days. On the applicant's construction, it would be necessary to have regard not merely to when a document styled a 'payment claim' is received, but also the terms of the particular contract. That is not enhanced by a construction which may give rise to debate as to the effect of a deeming provision on a notice which, at the time it was sent, could not have been an actual payment claim. Not lightly would we conclude that the time-critical regime established by the Act involving as it does a series of exchanges of claims and responses is engaged by the deemed or notional service of a document, rather than actual service.<sup>24</sup>

21 The plaintiff's submissions also point out that the above approach in *All Seasons* was recently followed in *Westside Mechanical*.<sup>25</sup>

22 The plaintiff complains that at 5.1 of the Adjudication Determination, the Adjudicator erred in deciding not to follow the decision in *All Seasons* and concluding that as a result of the 'deeming provision' in cl 37.1 of the Construction Contract that the 'reference date is the deemed date for making the payment claim being 25 December 2018'.

23 The plaintiff submits that the Adjudicator appears to have reached the above view on the basis of a decision of Vickery J in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd & Ors*<sup>26</sup> (*Metacorp*).

24 The plaintiff argues that reliance on *Metacorp* is misconceived, in particular because:

- (a) *Metacorp* was decided prior to the High Court decision in *Southern Han*;
- (b) in *Southern Han*, the High Court determined that it is critical to have regard to the temporal aspect of s 9(1) of the *SoP Act* (Vic) which turns on the existence

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<sup>24</sup> [2017] NSWCA 289, [41].

<sup>25</sup> [2018] SASC 46, [135]-[144].

<sup>26</sup> (2010) 30 VR 141.

- of a reference date under a construction contract, which reference date is in turn a precondition to the making of a valid payment claim;
- (c) the New South Wales Court of Appeal decision in *All Seasons* closely follows the reasoning in *Southern Han*; and
  - (d) to the extent *Metacorp* is inconsistent with *Southern Han* and *All Seasons*, the *Metacorp* decision was handed down before the above, subsequent superior court decisions, and should not be followed.

25 Accordingly, on the plaintiff's submissions, the December Payment Claim was served prematurely and did not validly invoke the operation of the *SoP Act* (Vic) depriving the Adjudicator of jurisdiction.

#### **The first defendant's submissions - Ground 1**

26 The first defendant rejects the plaintiff's argument that its December Payment Claim was submitted prematurely.

27 The first defendant submits that the plaintiff's reliance upon the judgment in *All Seasons* is 'problematic'. The first defendant notes that, prior to the decision in *All Seasons*, Vickery J in *Metacorp* considered the meaning of the words 'entitled to a progress payment under a construction contract' in s 14(1) of the *SoP Act* (Vic); his Honour stated in *Metacorp*:

provided that a person makes a claim to be entitled to a progress payment, and that claim is made bona fide, the claimant is permitted to serve its payment claim pursuant to s. 14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served.<sup>27</sup>

28 The first defendant's reliance upon Vickery J's statements in *Metacorp* is founded in particular upon his Honour's judgment in the following paragraphs:

101. In contrast, under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons 'who claim to be entitled' to a progress payment, in addition to those who may actually be so entitled. In my view, provided that a person

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<sup>27</sup> [2010] VSC 199, [101].

makes a claim to be entitled to a progress payment, and that claim is made bona fide, the claimant is permitted to serve its payment claim pursuant to s. 14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served. (emphasis added)

102. A payment claim which is delivered shortly prior to its reference date, even a few days before, would not, in the usual case, evidence lack of bona fides on the part of the person making the claim because the work carried out in respect of which the claim is made in all likelihood would have been done, or substantially completed.<sup>28</sup>

29 Further, the first defendant submits that for this Court to prefer the decision in *All Seasons* in relation to this aspect of the parties' argument, rather than following *Metacorp*, would require a finding that *Metacorp* was wrong in relevant respects.<sup>29</sup>

30 In this regard, the first defendant also submits that it is relevant that the New South Wales Court of Appeal in *All Seasons* did not consider Vickery J's judgment in *Metacorp*. The first defendant also submits that this Court should consider the alternative arguments in relation to this issue highlighted by White JA in *All Seasons*.<sup>30</sup>

31 In *All Seasons*, in his Honour's separate judgment, White JA observed:

50. Secondly, as the argument was advanced before the primary judge and on appeal, it was common ground that in s 8(1) the phrase "on and from each reference date" was to be understood as "on and after each reference date" and not "on and with effect from each reference date". As s 8(1) provides for a contractor's entitlement to a progress payment to arise "on and from each reference date under a construction contract", it would be arguable that the phrase "on and from each reference date" is to be understood as meaning "on and with effect from each reference date", rather than "on and after each reference date". The applicant did not advance this construction.

51. As presently advised, such a construction would not appear to me to be inconsistent with the High Court's decision in *Southern Han*. In *Southern Han* there was no reference date. The sentence in para [61] of the High Court's decision in *Southern Han* that is emphasised in Leeming and Payne JJAs' judgment at [13] is a paraphrase of s 8(1). I do not understand the High Court in that sentence to have expressed any view as to whether a claim for a progress payment could be made only on and after a reference date or whether it could be made by a

<sup>28</sup> [2010] VSC 199, [101] and [102].

<sup>29</sup> CB25-26, [9].

<sup>30</sup> [2017] NSWCA 289, [50] and [51].

contractor claiming to be entitled to a progress payment on and with effect from a reference date; whether the claim is made before or after the reference date. That question did not arise in Southern Han. Although raised from the Bench in the course of the respondent's oral submissions, it was not raised in the applicant's argument.<sup>31</sup> (emphasis added)

32 The iterations of the first defendant's argument on this aspect, in summary, are as follows:

- (a) the first defendant is a person referred to in s 9(1) of the *SoP Act* (Vic) who, as at 21 December 2018, claimed to be entitled to a progress payment;
- (b) the first defendant is a person referred to in s 9(1) of the *SoP Act* (Vic) because it is a person who has undertaken to carry out construction work under a contract;
- (c) by reason of the matters in (b) above, pursuant to s 9(1) of the *SoP Act* (Vic), the first defendant is entitled to a progress payment under the *SoP Act* (Vic) on and from each reference date;
- (d) the phrase 'on and from each reference date' in s 9(1) of the *SoP Act* (Vic), properly construed, is to be understood as meaning 'on and with effect from each reference date';<sup>32</sup>
- (e) the first defendant's entitlement to a reference date and consequently, a progress payment, cannot be in dispute;
- (f) the first defendant's premature service of the December Payment Claim did not affect the entitlement to a reference date under the *SoP Act* (Vic).<sup>33</sup> This is because, as is supported by Vickery J in *Metacorp*, the first defendant claimed to be entitled to a progress payment on 25 December 2018 notwithstanding the premature service of same on 21 December 2018;

<sup>31</sup> [2017] NSWCA 289, [50] and [51].

<sup>32</sup> This matter was not considered by the High Court in *Southern Han* as identified by White JA in *All Seasons* at [50].

<sup>33</sup> The first defendant does not understand the plaintiff to be making this submission, however, it is not apparent from the Submissions filed on 16 April 2019.

- (g) *Southern Han* does not address whether the premature service of a payment claim makes that payment claim invalid;<sup>34</sup>
- (h) there is no inconsistency between the decisions of *Metacorp*, *Southern Han* and *All Seasons*;
- (i) the deeming provision in cl 37 of the Construction Contract does not affect the entitlement the first defendant has to a progress payment. The first defendant's position is that the deeming provision in cl 37.1 only affects service, namely to regularise premature service as occurring on the reference date under the Construction Contract. The first defendant accepts that its entitlement to a progress payment is determined by the Construction Contract and the *SoP Act* (Vic);<sup>35</sup> and
- (j) the deeming provision in cl 37.1 of the Construction Contract is not liable to be struck down by operation of the *SoP Act* (Vic) and should be construed in a way which gives it some work to do. The first defendant submits that the deeming provision in cl 37.1 brings about service of a progress payment claim 'on a later date therefore has the effect of serving the progress payment on the reference date'.

### **Considerations - Ground 1**

33 In my view on the proper construction of ss 9(1) and 14(1) of the *SoP Act* (Vic), the first defendant's December Payment Claim was an invalid claim because it was served before the relevant reference date of 25 December 2018. Accordingly, the Adjudication Determination made on 18 February 2019 upholding part of the first defendant's December Payment Claim is void because it lacked jurisdictional foundation and should be quashed.

34 It is well established that the correct starting point for the analysis of a statutory provision is the text of the provision itself so as to ascertain the intent of the enacting

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<sup>34</sup> See such identification by White JA in *All Seasons*, [51].

<sup>35</sup> CB27, [14].

Parliament.<sup>36</sup> Sections 9(1) and 14(1) are set out at paragraph [7] above.

35 Given that the word 'on' in the phrase 'on and from each reference date' in s 9 of the SoP Act above clearly relates to a particular date, in my view there is strong reason to conclude the word 'from' in the same phrase was intended by the legislature to refer to the period of time following that date. In my view, with great respect to White J, there is no justification for the importation of the words 'with effect' into the phrase 'on and from each reference date'.

36 In my view the natural and ordinary meaning of the words of ss 9(1) and s 14(1) of the *SoP Act* (Vic), considered in their context and together with the scheme and purpose of that Act, make it plain that pursuant to s 9(1); 'on and from each reference date' an eligible person, 'is entitled to a progress payment ... calculated by reference to', each reference date under the construction contract, and that pursuant to s 14(1) of the *SoP Act* (Vic) such a person may serve a payment claim on the person who under the construction contract is liable to pay.

37 In my view, the language of ss 9(1) and 14(1), in their context, taking into account the scheme and purpose of the *SoP Act* (Vic), support an interpretation of the words 'on and from each reference date under the construction contract ...' of s 9(1) of the *SoP Act* (Vic), read in conjunction with the text and ordinary meaning of ss 9(2)(a)(i) and (ii) and s 14(1) of the *SoP Act* (Vic), as authorising the service of a compliant progress claim, only on and from each relevant reference date, and not before the date of the applicable reference date.

38 Such a construction is strongly indicated by the words of s 9(1) of the *SoP Act* (Vic), which prescribes the date after which an entitlement to a progress payment arises

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<sup>36</sup> *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1, [24]. It has also been established that the object of interpreting the text of a statute is to ascertain the intention of the enacting Parliament. In *Project Blue Sky Inc & ors v Australian Broadcasting Authority* (1998) 194 CLR 355 [69], the High Court stated that:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole".

under the *SoP Act* (Vic). Furthermore, s 9(1) expressly provides in relation to a person's entitlement to a progress payment under the *SoP Act* (Vic), that such entitlement is to be calculated by reference to the date on or from which such progress payment entitlement arose.

39 Section 9(2)(a)(i) and (ii) of the *SoP Act* (Vic) (subject to other matters referred to in s 9(2) which are not presently material) defines the reference date in s 9(1) of the *SoP Act* (Vic) to mean the date on which the contract stipulates that a claim for a progress payment may be made, or the date by reference to which the amount of the progress claim is to be calculated.

40 Section 14 of the *SoP Act* (Vic) entitles a person who is referred to in s 9(1) of the *SoP Act* (Vic) to serve a payment claim on the person who is, or may be, liable to pay that payment claim, and s 14(4) of the *SoP Act* (Vic) also limits the time within which a payment claim may be served to three months after the reference date fixed by s 9(2) of the *SoP Act* (Vic).

41 However, although s 14 of the *SoP Act* (Vic) does not expressly provide that a person entitled to a progress payment may not serve a payment claim before the reference date which gave rise to that person's entitlement to a progress payment, the operation of the provisions of the *SoP Act* (Vic) outlined above give rise to a clear statutory implication that such an untimely payment claim would not be compliant with the *SoP Act* (Vic). In particular ss 9(1) and (2) and s 14(1) of the *SoP Act* (Vic) contemplate progress payment claims on the basis of an entitlement to a progress payment on and from each reference date, because under ss 9(1) and 9(2)(a) and (b) of the *SoP Act* (Vic), it is the occurrence of a reference date (established by means of the operation of the terms of the construction contract or the operation of the *SoP Act* (Vic)) which triggers the entitlement to make a progress payment claim by a claimant who is, or who claims to be, entitled to a progress payment.<sup>37</sup>

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<sup>37</sup> Section 9(2) (a)(ii) of the *SOP Act* enables the progress payment claim to be made by establishing a reference date arising by means of the construction contract providing for a date at which the amount of a progress payment under the construction contract is to be calculated.

42 Therefore, under the scheme of the *SoP Act* (Vic), a progress payment claim is to be made on and from the reference date which triggers that person's entitlement to a progress payment, although I observe that a claimant may include in a payment claim an amount that has been the subject of a previous claim if that amount has not been paid.<sup>38</sup>

43 If it were otherwise, for example if a payment claim was ambulatory in the sense that it could be submitted before its relevant reference date, the operation of the *SoP Act* (Vic) would give rise to uncertainty and confusion. In such circumstances a progress payment claim might be submitted without identifying an applicable reference date; a progress payment claim might be submitted a lengthy period of time before the reference date later asserted as applicable by the claimant and by way of a further example the receipt of progress payment claims by the respondent party might well occur in circumstances where the respondent party was uncertain about what reference date was to be asserted by the claimant as the date by reference to which the respondent was required to respond. Further, usually such a response is to be provided within only ten business days under s 15(4) of the *SoP Act* (Vic). These possibilities, and likely many others, are antithetical to the clearly ascertainable, expeditious and effective operation of the *SoP Act* (Vic).

44 Furthermore, both the High Court in *Southern Han*, and the New South Wales Court of Appeal in *All Seasons*, have clarified the meaning and operation of provisions of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (*SoP Act* (NSW)), analogous in the relevant above respects to s 9(1) and s 14(1) of the *SoP Act* (Vic).

45 In *Southern Han*<sup>39</sup> the High Court has stated that:

**The need for a reference date**

44. There is no dispute between the parties that service of a payment claim under s 13(1) of the Act is an essential precondition to taking subsequent steps in the procedure set out in Pt 3 of the Act. There is

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<sup>38</sup> SOP Act, s 14(9).

<sup>39</sup> (2016) 260 CLR 340.

accordingly no dispute that, unless a payment claim answering that description is served, there can be no adjudication application and hence no adjudication within the jurisdiction conferred by s 22 of the Act. That shared understanding of the relationship between s 13(1) and s 22 is undoubtedly correct.

...

55. Lewence relies on the parenthetic explanation in the language in which the proposed action in the discussion paper was formulated to support its argument that the reference in s 13(1), as substituted by the Amendment Act, to “[a] person referred to in section 8(1)” is simply to a person who has undertaken to carry out construction work or supply related goods and services under a construction contract. Lewence argues that that reading is confirmed by the further reference in s 13(1) to the person being a person “who is or who claims to be entitled to a progress payment”. Those additional words, Lewence argues, show that a reference date need not have arisen and that the person need do no more than claim that a reference date has arisen.

56. Lewence also places reliance on the object of the Act stated in s 3(1), as also substituted by the Amendment Act, as being “to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments”. The absence of any mention of a reference date in that statement of statutory object, Lewence argues, is indicative of the irrelevance of a reference date both to the entitlement to receive a progress payment and to the ability to recover a progress payment.

57. The considerations on which Lewence relies are not compelling. The statement of the object of the Act in s 3(1) cannot be read as excluding qualifications to the entitlement to receive a progress payment or to the ability to recover a progress payment that are embedded in the detail of the substantive provisions of the Act. And the significance of the discussion paper published in the course of the review of the Act which preceded the Amendment Act lies less in the precise language it used to formulate the clarification it proposed to s 13 than in the precise reason it gave for proposing that clarification. The reason was limited to ensuring that a person on whom the Act conferred an entitlement to a progress payment was to be able to make a valid payment claim even though it may ultimately be proved that no payment was due under the construction contract.

...

59. Within Pt 2 an important distinction is drawn between a progress payment to which a person is entitled and the amount of the progress payment to which that person is entitled. Cast in the present tense, s 8(1) makes clear that a person who meets the description of a person who has undertaken to carry out construction work or supply related goods and services under a construction contract is immediately by force of that provision “entitled to a progress payment” on and from each reference date under the construction contract. Cast in the future

tense, in contrast, s 9 makes clear that the amount of a progress payment to which the person is so entitled is not fixed by force of that section but “is to be” ascertained in the manner prescribed by that section, and quantifies the amount of the progress payment to which a person is entitled by force of s 8(1). Section 9 in that way anticipates the procedure for recovery of a progress payment set out in Pt 3. Under that procedure, in the event of a dispute between a claimant and a respondent, the ascertainment of the amount, if any, of the progress payment to be recovered is committed to the jurisdiction of an adjudicator to determine under s 22.

60. That distinction drawn in Pt 2, between a present entitlement to a progress payment and the future ascertainment of the amount of the progress payment to which that present entitlement relates, explains the two-part description in s 13(1) of a person who is able to make a payment claim so as to trigger the procedure for recovery set out in Pt 3. The first part of the description – “[a] person referred to in section 8(1)” – refers to a person whom s 8(1) makes “entitled to a progress payment”. The second part of the description – “who is or who claims to be entitled to a progress payment” – neither contradicts nor qualifies the first part of the description. The second part of the description rather recognises, consistently with s 9, that the amount of the progress payment to which that person is entitled might ultimately be ascertained, according to the procedure set out in Pt 3, to be less than the amount that the person claims to be due and might even be ascertained according to that procedure to be nothing.

46 In *Southern Han*, the High Court considered the *SoP Act* (NSW), which corresponds, in relevant respects, with the *SoP Act* (Vic).<sup>40</sup> The High Court highlighted the important distinction between a *progress payment* to which a person is entitled (s 8 of the *SoP Act* (NSW) and s 9(1) of the *SoP Act* (Vic)) and the *amount* of the progress payment to which that person is entitled (referred to in s 9 of the *SoP Act* (NSW) and s 10 of the *SoP Act* (Vic)).

47 The High Court also observed in *Southern Han* that by force of s 8(1) of the *SoP Act* (NSW) (s 9(1) of the *SoP Act* (Vic)), a person who has undertaken to carry out construction work or to supply related goods and services under a construction contract is immediately ‘entitled to a progress payment’ on and from each *reference date* under the construction contract.

48 The High Court also noted that the amount of the progress claim to which the

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<sup>40</sup> The following sections of the New South Wales *SoP Act* are equivalent in their substantive relevant parts, to the sections (in bold) of the Victorian *SoP Act*, s 8(1) (**s 9(1)**), 59 (**s 10(1)**) and s 13(1) (**s 14(1) and (2)**).

claimant under the construction contract is entitled is not fixed by s 8 of the *SoP Act* (NSW) but is to be ascertained by reference to the relevant reference date, and the provisions of s 9 of the *SoP Act* (NSW) (equivalent in substance to ss 9 and 10 of the *SoP Act* (Vic)) and ultimately in the event of disputes in the amount determined by an Adjudicator as provided for in the *SoP Act* (NSW).

49 Further, relevantly to the present issues in *Southern Han*, the High Court stated:

61. The construction of s 13(1) consonant with the structure of the Act is accordingly that advanced by *Southern Han*. The description in s 13(1) of a person referred to in s 8(1) is of a person whom s 8(1) makes entitled to a progress payment. Section 8(1) makes a person who has undertaken to carry out construction work or supply related goods and services under a construction contract entitled to a progress payment only on and from each reference date under the construction contract. In that way, the existence of a reference date under a construction contract within the meaning of s 8(1) is a precondition to the making of a valid payment claim under s 13(1).

62. That construction of s 13(1) affords to s 13(1) an operation that is harmonious with s 13(5). Section 13(1) operates to require that each payment claim be supported by a reference date and s 13(5) operates to require that each reference date support no more than one payment claim. Section 13(5) has been held to produce the result that “a document purporting to be a payment claim that is in respect of the same reference date as a previous claim is not a payment claim under the [Act]”. Section 13(1) correspondingly produces the result that a document purporting to be a payment claim that is not in respect of a reference date is not a payment claim under the Act. The document is ineffective in either case to trigger the procedure established by Pt 3.

50 Accordingly, the High Court has clarified,<sup>41</sup> amongst other things, that an entitlement to a progress payment under the *SoP Act*:

- (a) is enlivened by an undertaking to carry out construction work or supply related goods and services under the construction contract;<sup>42</sup>
- (b) arises on and from each reference date under the construction contract; and<sup>43</sup>
- (c) can be made by the person entitled to serve a payment claim in the form and within the periods prescribed in s 13 of the *SoP Act* (NSW) (s 14 of the *SoP Act*

<sup>41</sup> By reference to the *SoP Act* (NSW).

<sup>42</sup> (2016) 260 CLR 340, [59].

<sup>43</sup> (2016) 260 CLR 340, [59] and [61].

(Vic)).

51 As earlier observed, the relevant substantive language of ss 9 and 14 of the *SoP Act* (Vic) are, in relation to the questions raised in the present case, congruous with ss 8 and 13 of the *SoP Act* (NSW).

52 In *All Seasons*,<sup>44</sup> the New South Wales Court of Appeal stated in relation to the *SoP Act* (NSW) as follows:

11. The essential operation of the Act, relevantly for this appeal, and as established by *Southern Han*, is as follows. First, s 8 gives rise to an entitlement to a progress payment on the part of persons who have undertaken to carry out construction work. The entitlement under s 8 is stated to be “on and from each reference date”.

12. Secondly, s 8(2) defines “reference date” to mean “a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made...”. If no express provision is made in the contract, the reference date is the last date of the named month in which construction work was first carried out, and the last day of each subsequent named month.

13. Section 13 permits a person who is entitled under s 8(1) and who is entitled or who claims to be entitled to a progress payment to serve a payment claim. *Southern Han* confirmed that it is not sufficient for a person to have undertaken to carry out construction work or to supply related goods and services under a construction contract in order to be entitled under s 8(1); it is also necessary to have regard to the temporal aspect of s 8(1), which turns on the reference date. Thus the High Court said at [61]:

The construction of s 13(1) consonant with the structure of the Act is accordingly that advanced by *Southern Han*. The description in s 13(1) of a person referred to in s 8(1) is of a person whom s 8(1) makes entitled to a progress payment. **Section 8(1) makes a person who has undertaken to carry out construction work or supply related goods and services under a construction contract entitled to a progress payment only on and from each reference date under the construction contract.** In that way, the existence of a reference date under a construction contract within the meaning of s 8(1) is a precondition to the making of a valid payment claim under s 13(1). (emphasis added.)

...

32. The ultimate question is whether the 12 July 2016 claim engaged the statutory regime in Part 2 of the Act on 20 July 2016, it being accepted that it could not do so before that time. Section 8(1) is clear. It is

<sup>44</sup> [2017] NSWCA 289.

authoritatively determined by Southern Han that the entitlement of a person to a progress payment only arises "on and from each reference date". At the time that the applicant's 12 July 2016 claim was sent to the respondent, it had no entitlement to a progress payment.

33. We would accept the applicant's submission that, as between the parties, its claim dated 12 July 2016 was "deemed" to have been made on 20 July 2016. We note that cl 37 does not refer in terms to service; it refers instead to making a claim. However, we proceed on the basis, favourably to the applicant, that nothing turns on this.

...

36. That is to say, the legislative regime turns upon two things: the reference date, only "on and from" which date a person may have an entitlement to a progress payment, and the service of a payment claim by a person so entitled.

...

38. Thus the provisions to which the applicant refers are directed to extending the last date in which a payment claim may be served, and the ways in which it may be served, rather than altering the basal notion of service of a payment claim by a person entitled on and from each reference date. If anything, the fact that the Act expressly picks up the parties' agreement as to the last day on which a payment claim may be served, and as to the manner by which it may be served, but says nothing about the consequences of agreement as to the early service of a purported payment claim, tells against the applicant's construction.

39. Further, the applicant's construction sits awkwardly in light of s 13(5). Subsection 13(5) imposes a prohibition upon the service of more than one payment claim in respect of each reference date. On 12 July 2016, the applicant had already served a payment claim in respect of 20 June 2016, and it was not entitled to a progress payment in respect of the 20 July 2016 reference date. Prima facie, it was in contravention of s 13(5). The applicant seeks to escape that consequence by relying on the deeming provision, such that its purported payment claim of 12 July 2016 is taken to have been served on 20 July 2016. But just as we doubt that the proper construction of the Act permits a deemed service which did not occur in fact to engage s 13(1), so too we doubt that the contravention of s 13(5) by the actual service of a purported payment claim can be avoided by a deeming provision.

40. The applicant's answer to this is, as noted above, to submit that the 12 July 2016 claim was not a payment claim when it was received, but became a payment claim on 20 July 2016.

41. Further, we do not think that the applicant's construction promotes the purpose of the Act. There is sound reason, given the consequences for both parties of engaging the regime established by the Act, for there to be certainty as to precisely when a payment claim has been served. It is easy to see the scope for confusion that could arise if the

applicant's construction were accepted. The Act requires people dealing with a builder's accounts to be very concerned to respond to "payment claims" within 10 business days. On the applicant's construction, it would be necessary to have regard not merely to when a document styled a "payment claim" is received, but also the terms of the particular contract. That is not enhanced by a construction which may give rise to debate as to the effect of a deeming provision on a notice which, at the time it was sent, could not have been an actual payment claim. Not lightly would we conclude that the time-critical regime established by the Act involving as it does a series of exchanges of claims and responses is engaged by the deemed or notional service of a document, rather than actual service.

53 Here the first defendant also argues that the law in Victoria prior to the decision in *All Seasons*, was that which was enunciated by Vickery J in *Metacorp* and that neither *Southern Han* nor *All Seasons* properly understood, sought to interpret the language in the New South Wales security of payment legislation which is analogous to s 9(1) and s 14(1) of the *SoP Act* (Vic).

54 In *Metacorp*, it was alleged that the claimant had failed to enliven jurisdiction under the *SoP Act* (Vic) on the basis that it served the subject payment claim on the respondent on 24 October 2009 in circumstances where the relevant reference date was 25 October 2009.<sup>45</sup> In Vickery J's decision, analysis of the *SoP Act* (Vic) included focus on the introductory words of s 14(1) of the *SoP Act* (Vic), in particular, 'entitled to a progress payment under a construction contract'.

55 In *Metacorp*, Vickery J stated:

75. In the present matter, the reference date under s 9 of the Act is determined by reference to the provisions of the contract dealing with the time when claims for progress payments can be made. It was common ground that the reference date under the contract was the 25th of each month, and for the month of October 2009, this fell on Sunday, 25 October 2009.

76. It was also common ground that payment claim 15 was sent by email to the superintendent the day before, on 24 October 2009. I accept that the email attaching payment claim 15 was in fact transmitted on Saturday, 24 October 2009.

77. It was then submitted by *Metacorp* that, as there was no entitlement under the contract to a progress claim as at 24 October 2009 in respect of the month of October, *Andeco* was not entitled to serve a payment

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<sup>45</sup> (2010) 30 VR 141, [75]-[78].

claim purportedly pursuant to s 14 of the Act. This was so, it was put, because service of a payment claim pursuant to s 14(1) is predicated on a claimant establishing a present entitlement to a progress payment under the construction contract, prior to service of a statutory payment claim. In other words, it was submitted that as a precondition to being entitled to serve a payment claim the claimant must be, in the words of s 9(1) of the Act, “entitled to a progress payment under this Act ...”

...

97. Metacorp, in the trial before me, placed reliance on *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* (“*Walter Construction*”). In that case the plaintiff as head contractor sought summary judgment against the defendant as principal in respect of the unpaid portion of the amount claimed by the plaintiff in a payment claim dated 20 December 2002. The payment claim in question was purportedly made pursuant to the New South Wales equivalent of the Victorian Act, namely, the Building and Construction Industry Security of Payment Act 1999 (NSW) (“the NSW Act”). The defendant opposed the application and asserted that there were a number of triable issues in relation to the payment claim. One of the triable issues relied upon was that the payment claim was premature. The written contract provided that the payment claim for the month of December 2002 should be made on 28 December 2002. [20] However, Nicholas J found that an oral agreement had been concluded resulting in it being agreed by the parties that the payment claim for the month of December should be made on 20 December instead of 28 December. [21] Accordingly, the payment claim in contention being served on 20 December 2002 was not found to be in breach of s 13(1) of the NSW Act (the equivalent to s 14(1) of the Victorian Act). However, in obiter, his Honour went on to consider the position in the event that the due date for making a payment claim remained as 28 December 2002. As to this the court said, following a detailed analysis: [22] “It follows that, but for the agreement to change the date to 20 December 2002, I would conclude that the plaintiff was not entitled to make the statutory claim.” In other words, the payment claim being served on 20 December 2002 was premature, because as at that date, the plaintiff was not entitled to payment of the payment claim and the precondition for valid service under s 13(1) of the NSW Act had not been met.

98. However, on close analysis, there is in my view a critical point of distinction between s 13(1) of the NSW Act and s 14(1) of the Victorian Act. Section 13(1) of the NSW Act was in the following terms in December 2002:

- (1) A person who is entitled to a progress payment under a construction contract (the “claimant”) may serve a payment claim on the person who under the contract is liable to make the payment.

Whereas s. 14(1) of the Victorian Act as it presently stands provides:

- (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

The words “or who claims to be entitled” have been added to the text of s. 14(1) of the Victorian Act, as they have also been added to s. 13(1) of the NSW Act.

99. Nevertheless, it is clear that the terms of s 13(1) under consideration in *Walter Construction* were in the pre-amended form. [25] In my view, this makes a considerable difference to the reasoning employed in that case.
100. I would accept that the relevant reasoning in *Walter Construction*, and indeed the argument advanced by Metacorp in this case, as to the invalidity of a prematurely served payment claim, if the legislation remained as it was in New South Wales in 2002 in relation to s 13(1). Under this regime, the trigger that commenced the process which led to the statutory rights of a claimant under the Act was, as it is now, the service of a payment claim. However, as the legislation then stood, this could only be done by a person who “is entitled to a progress payment under a construction contract”. In other words, an actual entitlement at law to the payment claim at the relevant time needed to be established.
101. In contrast, under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons “who claim to be entitled” to a progress payment, in addition to those who may actually be so entitled. In my view, provided that a person makes a claim to be entitled to a progress payment, and that claim is made bona fide, the claimant is permitted to serve its payment claim pursuant to s 14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served.
102. A payment claim which is delivered shortly prior to its reference date, even a few days before, would not, in the usual case, evidence lack of bona fides on the part of the person making the claim because the work carried out in respect of which the claim is made in all likelihood would have been done, or substantially completed.
- ...
105. I am satisfied on the evidence that Andeco was a person who claimed to be entitled to a progress payment within the meaning of s 14(1) of the Act at the time when it sent payment claim 15 to Metacorp’s superintendent on 24 October 2009. It was therefore entitled to serve its payment claim on that day.
106. It might be thought that a difficulty arises from the construction of s 14(1) of the Act which I have found in the event that a payment claim is delivered prematurely. At first glance, such a difficulty arises because time begins to run from the perspective of the respondent to a

payment claim from the date of service of the payment claim. Section 15(4) of the Act provides that if a claimant serves a payment claim on a respondent and the respondent does not provide a payment schedule to the claimant within the time required by the relevant construction contract or within 10 business days after the payment claim is served (whichever time expires earlier), the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates. Does this mean that a respondent served with a premature payment claim has time running against it from the date of physical service, regardless as to when this might be, which it ignores at its peril?

107. In my opinion, time does not begin to run against a respondent for the purposes of s 15(4) from the date when a payment claim is physically delivered to it, if this occurs prior to the relevant reference date. This is so because the entitlement to payment, which is conferred by s 9 upon a claimant, only arises "on and from each reference date under a construction contract". In the case of the premature delivery of a payment claim prior to the reference date to which the claim relates, rights under the Act only become enlivened upon the arrival of the relevant reference date. Until then, although delivery of the relevant document may have been undertaken in a physical sense, the service of the document is incapable of having any legal effect under the Act until the occurrence of the reference date. The payment claim at the time of service is not strictly a payment claim. It is a prospective claim for payment. It does not become a payment claim for the purposes of s 15(4) until the arrival of the reference date. On that date the earlier physical delivery of the document will result in the document becoming a valid payment on the reference date. In this event, time will commence to run under the Act from the reference date.
108. Premature delivery of a payment claim under the Act will not therefore necessarily result in non-compliance with the Act, and in this case would not have led to this consequence.
109. In any event, even if the Act could be construed to require service of a payment claim on or after the passing of the relevant reference date, I do not consider that a payment claim which happened to be served prior to a reference date would constitute a breach of one of the basic and essential requirements of the Act such as to give rise to an invalidity in the payment claim.

56 I reject the first defendant's submission outlined in paragraphs [29] and [53] above because in my view the statements extracted above from *Southern Han* and *All Seasons*, in particular as extracted at paragraphs [45], [49] and [52] hereof respectively, explain and clarify the language and operation of the provisions in the *SoP Act* (NSW), which in material respects are analogous to ss 9(1) and 14(1) of the *SoP Act* (Vic) as outlined in the above referenced paragraphs of those judgments, and in my view the High Court and the New South Wales Court of Appeal overrule

*Metacorp* in that regard.<sup>46</sup>

57 Vickery J's judgment in *Metacorp* and in particular his conclusions in relation to the operation of s 9 of the *SoP Act* (Vic) and the meaning of the words 'on and from' in s 9 of the *SoP Act* (Vic) long preceded the High Court's pronouncements highlighted above in *Southern Han* and the recent decision in *All Seasons*.

58 The first defendant argued that *Metacorp* remains good law in Victoria, a proposition asserted on the basis that *Southern Han* and *All Seasons* did not engage in explaining the interpretation of the High Court or the New South Wales Court of Appeal in relation to the words 'on and from' each reference date, employed in s 8(1) of the *SoP Act* (NSW).

59 The first defendant's implied submission was to the effect that the High Court and the New South Wales Court of Appeal, in the extracts cited above, sought to do no more than extract the words of the *SoP Act* (NSW), which did not necessarily contradict Vickery J's reasoned explanation of the construction of ss 9(1) and 15(4) of the *SoP Act* (Vic) in *Metacorp*.

60 In my view, although neither the High Court in *Southern Han* nor the New South Wales Court of Appeal in *All Seasons* simply and succinctly express the effect of the language which is pivotal in this case, namely the words 'on and from each reference date' in s 8(1) of the *SoP Act* (NSW) (also appearing in s 9(1) of the *SoP Act* (Vic)), it is sufficiently clear in light of *Southern Han* and *All Seasons*<sup>47</sup> that s 9 and s 14 of the *SoP Act* (Vic) do not operate so as to permit the valid service of a payment claim prior to the relevant *reference date* which itself establishes a valid foundation for that payment claim to be made under the *SoP Act* (Vic); the statements in *Southern Han* and *All Seasons* in paragraphs [45], [49] and [52] hereof respectively clarify that.<sup>48</sup>

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<sup>46</sup> *Metacorp* [107]-[109].

<sup>47</sup> *Southern Han* paragraphs [41]-[42], [44], [55]-[57] and [59]-[60] and *All Seasons* paragraphs [11]-[13], [32]-[33], [36] and [38]-[41].

<sup>48</sup> *Southern Han*, including at [55], [60] and [61] and *All Seasons*, including at [11], [13], [32], [36], [40] and [41].

61 The first defendant also relies on the separate judgment of White JA in *All Seasons*.<sup>49</sup> The relevant sections of White JA's judgment are extracted at paragraph [31] hereof. In this judgment, his Honour states that "it would be arguable that the phrase 'on and from each reference date' is to be understood as meaning 'on and with effect from each reference date', rather than 'on and after each reference date'".<sup>50</sup>

62 The plaintiff, as earlier outlined, submits that the ordinary meaning of the words 'on and from' is that a payment claim must be submitted 'on or *after*' the occurrence of a reference date.<sup>51</sup>

63 I do not accept the first defendant's argument that the obiter observations of White JA in *All Seasons* at [50] and [51] thereof, identify a preferable construction of s 9(1) of the *SoP Act* (Vic) by analogy, and further I consider that I am bound in that regard, for the reasons I have outlined, by the decision of the High Court in *Southern Han* and the majority in *All Seasons*.

64 In my view for the reasons I have outlined above, there is no justification for implying the inclusion of the words 'with effect' in relation to s 9(1) of the *SoP Act* (Vic) as White JA did in relation to the equivalent s 8(1) of the *SoP Act* (NSW) in *All Seasons*. Likewise in my view, there is insufficient justification on any basis relating to the scheme of Part 2 of the *SoP Act* (Vic), or the provisions of s 14(1), to alter the plain and ordinary meaning of the words 'on and from each reference date' in s 9(1) of the *SoP Act* (Vic) as was decided in *Metacorp*, six years before *Southern Han* and eight years before *All Seasons*.

#### **470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd & Anor**

65 I also reject the plaintiff's contention that by Vickery J's judgment in *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd & Anor*<sup>52</sup> (470 St Kilda Road) at [45]-[47], his Honour departed from his decision in *Metacorp* in relation to when a

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<sup>49</sup> First Defendant's Outline of Submissions, [10]-[11].

<sup>50</sup> [2017] NSWCA 289, [50].

<sup>51</sup> Plaintiff's Outline of Submissions, [16].

<sup>52</sup> [2012] VSC 235.

progress payment claim might be permissibly served in relation to a reference date.<sup>53</sup> I consider that at [45]-[47] of *470 St Kilda Road* Vickery J explained that in his view there was no departure from or material qualification in respect of his earlier conclusions about the permissible timing of a progress payment claim, but rather his Honour departed from his earlier conclusions in *Metacorp* that a payment claim 'must be made bona fide in order to be valid'.

66 Finally, in the above circumstances it is not in my view necessary to express a view about whether Vickery J's interpretation of s 9(1) of the *SoP Act (Vic)* in *Metacorp* was correct. His Honour's interpretation of s 9(1) at [107] hereof does not accord with authority binding on me in *Southern Han* and *All Seasons*. Furthermore, for the reasons I have advanced in paragraphs [33] to [44] of these Reasons, and in my view consistently with the abovementioned binding authorities, I consider the *SoP Act (Vic)* does not contemplate or permit a payment claim to be made under s 14(1) of that Act by a person referred to in s 9(1) of that Act, before each relevant reference date.

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<sup>53</sup> Refer: first defendant's submissions, [7] and Vickery J's decision in *470 St Kilda Road* and in particular plaintiff's reply submission at [3] as follows:

3. At paragraphs [6] to [8] of its submissions, the First Defendant submits the Court remains bound by paragraphs [101] and [102] of *Metacorp*. However, the First Defendant has overlooked that Vickery J subsequently determined that those paragraphs were wrongly decided in *470 St Kilda Road Pty Ltd v Reed Constructions Australia Pty Ltd & Anor*. His Honour held:

In *Metacorp* the court was called upon to consider the validity of a payment claim that had been served prematurely, that is before the appointed "reference date" as defined in s 9(2) of the Act. In the course of considering the issue I observed:

...under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons "who claim to be entitled" to a progress payment, in addition to those who may actually be so entitled. In my view, provided that a person makes a claim to be entitled to a progress payment, and that claim is made bona fide, the claimant is permitted to serve its payment claim pursuant to s 14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served.

In the light of the authorities I have cited in these reasons, which were not referred to the court in *Metacorp*, on reflection and with the benefit of full argument on the matter, I am persuaded that I was wrong insofar as it is said in that case that a payment claim, whether served prematurely before the due reference date or served on and from each reference date, must be made bona fide in order to be valid, and I decline to follow myself.

There is no implied precondition to the making of a valid payment claim under s 14 of the Act that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed or that otherwise the claim is made in good faith.

**The first defendant's reliance on cl 37.1 of the Construction Contract**

67 Clause 37.1 of the Construction Contract provides that:

An early payment claim shall be deemed to have been made on the date for making that payment claim in accordance with Item 33.

68 In *All Seasons Leeming and Payne JJ* (with whom White JA agreed) followed the High Court in *Southern Han* in determining that a deeming provision, in very similar terms to cl 37.1 of the subject Construction Contract, could not permissibly operate to render a progress payment claim served before the relevant reference date, compliant and valid.<sup>54</sup>

69 At [41] in *All Seasons*, the Court also recognised sound policy reasons for concluding that a deeming provision, very similar to cl 37.1 in the subject Construction Contract, should not be permitted to cure failure by a potential claimant under the security of payment legislation to comply with the strict requirements and timelines of that legislation:

Further, we do not think that the applicant's construction promotes the purpose of the Act. There is sound reason, given the consequences for both parties of engaging the regime established by the Act, for there to be certainty as to precisely when a payment claim has been served. It is easy to see the scope for confusion that could arise if the applicant's construction were accepted. The Act requires people dealing with a builder's accounts to be very concerned to respond to "payment claims" within 10 business days. On the applicant's construction, it would be necessary to have regard not merely to when a document styled a "payment claim" is received, but also the terms of the particular contract. That is not enhanced by a construction which may give rise to debate as to the effect of a deeming provision on a notice which, at the time it was sent, could not have been an actual payment claim. Not lightly would we conclude that the time-critical regime established by the Act involving as it does a series of exchanges of claims and responses is engaged by the deemed or notional service of a document, rather than actual service.

70 In *Westside Mechanical*<sup>55</sup> Doyle J followed *All Seasons* in relation to the effect of a purported deeming clause directed to rendering timely an otherwise non-compliant progress payment claim under the security of payment legislation in South Australia.<sup>56</sup>

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<sup>54</sup> [2017] NSWCA 289, [32]-[36].

<sup>55</sup> [2018] SASC 46.

<sup>56</sup> [2018] SASC 46, [143].

71 In this case, the first defendant's submission in relation to the deeming provision in the Construction Contract is as follows:

Finally, consideration must be had to the deeming provision contained in clause 37.1 of the Contract. Carelli submits that the deeming provision does not affect the entitlement of Carelli to a progress payment – it agrees that those matters are determined by the Contract and the Act. In the circumstances, the only issue which the deeming provision can address is that of service, the effect of which is to regularise premature service as occurring on the reference date.

72 I note that I understood the first defendant's submission referred to in the last preceding paragraph to accept that if on the proper construction of the *SoP Act* (Vic) a payment claim cannot be valid if served prior to the relevant reference date, then the deeming provisions in cl 37.1 of the subject Construction Contract, is not argued by the first defendant to be capable of affecting that position.

73 I am of the view that the Adjudicator erred in concluding in the Adjudication Determination under review that the progress payment claim in question was effectively deemed to have been made on 25 December 2018. In my view, the Adjudicator's decision in relation to this aspect erroneously relies upon cl 37.1 of the Construction Contract to enable the first defendant to avoid the strict temporal requirements of s 9(1) of the *SoP Act* (Vic), that is to deem the first defendant's payment claim to have been made on the contractually defined reference date, even if the payment claim was served before the contractually defined reference date.

74 In my view to construe cl 37.1 of the Construction Contract as having the effect which the first defendant asserts would contradict the intent and purpose of the *SoP Act* (Vic) which seeks to establish a strict and time critical regime for the submission of the response to and the adjudication of payment claims. Confusion and uncertainty would be likely to arise if by the deeming clause at 37.1 of the Construction Contract the legislative regime established by the *SoP Act* (Vic) was circumvented in the manner clause 37.1 seeks to effect.

75 For these reasons, and in accord with the approach and conclusions referenced to above in *All Seasons*, I consider that cl 37.1 of the Construction Contract is ineffective

to cure what I have decided is non-compliant early service of the first defendant's December Payment Claim.

76 Finally, insofar as the Adjudicator's above conclusion was based upon the decision in *Metacorp*, for the reasons I have earlier outlined, both in relation to the proper construction of the relevant provisions of the *SoP Act* (Vic) and by reason of the binding authority of statements in *Southern Han* and *All Seasons*, the Adjudicator's reliance was erroneous.

### **Ground 2**

77 The first defendant concedes that if the plaintiff succeeds on ground 1, then ground 2 does not need to be considered because the December Payment Claim is invalid for premature service.<sup>57</sup>

78 Because I have decided that Ground 1 is made out and the Adjudication Determination dated 18 February 2019 is void, I do not consider it necessary to further address Ground 2.

### **Decision**

#### **Ground 1**

79 The Adjudicator erred in law in determining that the December Payment Claim was valid in circumstances where it was not served 'on and from' the relevant 'reference date'.

#### **Ground 2**

80 Because I have decided that Ground 1 is made out and the Adjudication Determination dated 18 February 2019 is void, I do not consider it necessary to further address Ground 2.

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<sup>57</sup> First defendant's written submissions, 26 April 2019, [18].

**Orders**

81 For the above reasons I shall order that:

- (a) the Adjudication Determination be quashed.
- (b) the first defendant is restrained from seeking to enforce or take action under the *SoP Act* (Vic) in relation to the Adjudication Determination; and
- (c) the Adjudicator is restrained from providing an Adjudication Certificate pursuant to s 28Q of the *SoP Act* (Vic) in respect of the Adjudication Determination.

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