

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

Not Restricted

S ECI 2018 2136

VALEO CONSTRUCTION PTY LTD (ACN 139 755 801)
as Trustee for Valeo Construction Trust

Plaintiff

v

TILING EXPERT (VIC) PTY LTD (ACN 602 396 609)
and PHILIP MARTIN

Defendants

JUDGE: Digby J
WHERE HELD: Melbourne
DATE OF HEARING: 26 March 2019
DATE OF JUDGMENT: 9 May 2019
CASE MAY BE CITED AS: Valeo Construction v Tiling Expert
MEDIUM NEUTRAL CITATION: [2019] VSC 291

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

BUILDING CONTRACTS - Whether settlement agreement was a genuine resolution of
matters in dispute and whether such agreement amounted to contracting out of the *Building*
and Construction Industry Security of Payment Act 2002 (Vic), ss 9, 14, 21(2B), 23(2), 48.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr B Reid	Giannakopoulos Solicitors
For the First Defendant	Mr N Phillpott	Oldham Construction Lawyers

HIS HONOUR:

Application

- 1 By Originating Motion dated 5 November 2018 the plaintiff, Valeo Construction Pty Ltd (Valeo), seeks judicial review of an Adjudication Determination made by the second defendant, Mr Philip Martin (the Adjudicator),¹ on 23 August 2018 (the Adjudication Determination) under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (SOP Act).
- 2 By its Originating Motion Valeo seeks:
 - (a) to restrain the first defendant, Tiling Expert (Vic) Pty Ltd (Tiling Expert), whether by itself, its servants, or otherwise howsoever from seeking to enforce or take action under the SOP Act in relation to the Adjudication Determination;
 - (b) to restrain the Adjudicator whether by himself, his servants or otherwise howsoever from providing an Adjudication Certificate 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.
- 3 In addition to written and oral submissions, the following Affidavit material is relied upon by the parties:
 - (a) Valeo:
 - (i) Affidavit of Dimitrios Tzouvelis sworn 1 November 2018, and exhibits thereto;² and
 - (ii) Affidavit of Tom Tziouvelis sworn 2 November 2018, and exhibits

¹ By letter dated 13 November 2018, 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.

² CB69-399.

thereto.³

(b) Tiling Expert:

(i) Affidavit of Mohammadi Nazari affirmed 18 December 2018.⁴

Background

The Contract

4 It is common ground between the parties that pursuant to the relevant construction contract dated 16 August 2017,⁵ Tiling Expert carried out work and reached practical completion on 21 December 2017.⁶

5 The construction contract for tiling and associated works at 178 Victoria Avenue, Albert Park, in the State of Victoria, provided that:

(a) Tiling Expert could serve Valeo with payment claims on the 25th day of each calendar month (cl 12 and schedule 7);

(b) the defects liability period for works commenced on the date of practical completion (cl 6);

(c) the defects liability period commenced at 4.00pm on the date of practical completion and ran for 12 months (cl 9 and schedule 5); and

(d) practical completion is defined as the date on which Valeo is issued with a certificate of practical completion for the entire project.⁷

6 Tiling Expert made claims for payment for works it alleged it had performed on:⁸

(a) 21 December 2017, by a contractual claim which it described as a 'balance of contract final claim not invoiced'; and

3 CB400-550.

4 CB551-554.

5 CB124-CB147; CB118, [2]; CB215, [1].

6 CB118, [3]; CB222, [38].

7 CB98, [cl 1].

8 CB215, [3] and [5].

(b) 4 July 2018, purportedly under the SOP Act notwithstanding the settlement agreement entered into by the parties on about 5 February 2018.

The February 2018 Settlement Agreement

7 Leading up to about January 2018, the parties were in a protracted dispute about construction contract related issues, both in respect of the subject construction contract and also in relation to other contracts and the works thereunder.⁹

8 On or about 5 February 2018, an agreement was reached between the parties to resolve matters in dispute including in relation to the subject construction contract for tiling and associated work at 178 Victoria Avenue, Albert Park.

9 The resolution of the disputes between the parties on 5 February 2018 is referred to and reflected in Valeo's email dated 7 February 2018 (February 2018 Settlement Agreement).¹⁰

10 Valeo's email to Tiling Expert dated 7 February 2018 states:¹¹

Hi Michael,

In response to below and further to previous correspondence and communication provided to you, I am writing to confirm our agreement as per our meeting at Valeo Head Office on Monday 5/2/18 @ 7.30am.

We have assessed each one of your current claims, contract sum balances, retention withheld, as well as variations submitted and applied relevant back charges delay costs and damages applicable to your trade works. In summary, as expressed to you, we do not believe you are owed in the vicinity of the below due to these offsets against your contract which you have been advised.

Although due to our long standing relationship and in good faith we have agreed on a figure of **\$120,000.00 including GST in total**, due and payable to you **over the 4 projects** listed below (which I have set out each separately below). We have also agreed that \$60,000 of this amount will be paid to you as a first instalment this month (I discussed I will try and resolve this for you within 1 week, but most likely by end of month). The remaining \$60,000 will

⁹ The several construction contracts in respect of which Valeo and Tiling Expert were in dispute concerned works at High Street Northcote, Springvale Road Nunawading, 178 Victoria Avenue Albert Park, Sussex Street, Brighton and Wellington Road Box Hill.

¹⁰ CB216-CB218, [10]-[16].

¹¹ CB475.

deeds described as 'Deed of Release - Practical Completion' (the Deed).¹⁵

15 In this proceeding, and also before the Adjudicator, Tiling Expert submitted that the Affidavit material identifies the following factual matrix regarding the alleged settlement:

- (a) from September 2017 until January 2018, the parties were in negotiation with respect to outstanding payments, alleged defective works, alleged incomplete works and alleged delays on the part of Tiling Expert;¹⁶
- (b) on or about 5 February 2018, the parties met to discuss the issues, at which point they agreed that all matters between them would be settled on the basis that Valeo would pay Tiling Expert the total sum of \$120,000 by way of five instalments;¹⁷
- (c) on or about 7 February 2018, Valeo sent Tiling Expert an email to 'formalise' the agreement reached on 5 February 2018.¹⁸ The same email identified that the \$120,000 would be paid to Tiling Expert by way of a \$60,000 first instalment before the end of the month, and thereafter by four equal monthly instalments of \$15,000.¹⁹ On 26 February 2018 the parties executed the Deed dated 12 February 2018 to that effect;²⁰
- (d) Valeo paid the \$60,000 instalment to Tiling Expert,²¹ but failed to make any subsequent instalment payments pursuant to the Deed;²² and
- (e) on or about 9 April 2018, Tiling Expert demanded payment of the outstanding instalments from Valeo, failing which it put Valeo on notice that agreement to

15 CB232 being the Deed which formally reflected the February 2018 Settlement Agreement in relation to the 178 Victoria Avenue, Albert Park tiling project.

16 CB403-CB411, [8]-[23].

17 CB412-CB413, [24]-[25]); CB553, [11].

18 CB413-CB414, [26]); CB553, [11].

19 CB211, Exhibit 'DT-5'.

20 CB490-CB491, Exhibit 'TT-17'.

21 CB416, [32]; CB553, [14].

22 CB417, [35] and [37]; CB553, [14] and [15].

settle would be at an end.²³

- 16 In this proceeding and before the Adjudicator, Valeo also submitted that:
- (a) there was an agreement on or around 5 February 2018 between the parties to resolve the matters then in dispute between them. Tiling Expert in its Adjudication Application dated 31 July 2018 described this as a Deed and that Valeo had agreed to pay to it the sum of \$120,000;²⁴
 - (b) the resolution of the dispute between the parties consisted of a settlement reached on 5 February 2018 and which was reduced to writing on 7 February 2018;²⁵
 - (c) the document formally entered into by the parties was one of five deeds entered into by the parties to give effect to the settlement agreement²⁶ in relation to the construction contract and the works performed pursuant to it, and is a Deed executed by Tiling Expert on 26 February 2018.²⁷

17 Tiling Expert, in its Adjudication Application dated 31 July 2018, described the Deed as a Deed under which Valeo had agreed to pay to it the sum of \$120,000.²⁸

Grounds of Appeal

18 Tiling Expert contends that Valeo submits that the Adjudication Determination is infected by jurisdictional error based on four grounds, as follows:

(a) The settlement and denial of natural justice -

(ii) Ground 1

The Adjudicator committed a jurisdictional error, alternatively erred in law, in determining that the Deed 'is not a genuine attempt to resolve the dispute and does not prevent a payment claim being made by Tiling Expert for what it considers to be the outstanding amount';

²³ CB347-CB362.

²⁴ CB119, [7] and [8(f)].

²⁵ CB216-218, [10]-[16].

²⁶ CB218, [19].

²⁷ CB232-CB235.

²⁸ CB119, [7] and [8(f)].

and

(iii) Ground 4

The Adjudicator failed to afford Valeo natural justice by not requesting further submissions from it in response to Tiling Expert's s 21(2B) submissions;

(b) The reference date -

(i) Ground 2

The Adjudicator committed jurisdictional error, alternatively erred in law, by determining that a further reference date arose after 25 December 2017; and

(ii) Ground 3

The Adjudicator committed jurisdictional error, alternatively erred in law, in determining that the claimable works were performed by Tiling Expert, and thus, Tiling Expert was entitled to a further reference date.

Grounds 1 and 4 - The settlement and denial of natural justice

19 For the reasons which follow I consider that this matter is able to be disposed of by determining Ground 1 alone.

20 Further, the determination of Ground 1 in relation to the Adjudicator's finding that the February 2018 Settlement Agreement was 'not a genuine resolution of the dispute' and 'not a final resolution of the dispute', also has the consequence that Valeo's claims of jurisdictional error in Grounds 2 and 3 are made out. In essence this is because the Adjudicator erred in his findings referred to above and, absent the Adjudicator's errors, the parties February 2018 Settlement Agreement precluded Tiling Expert from making a progress claim under the construction contract after it entered into the February 2018 Settlement Agreement. Tiling Expert could therefore not make a progress claim which complied with the SOP Act on 4 July 2018 as it purported to do and, as a result, the Adjudicator was devoid of jurisdiction under the Act.

Valeo's Submissions - Ground 1

21 Valeo submits²⁹ that the basis of the Adjudicator's findings appear to be that the Adjudicator determined:³⁰

- (a) the Deed is not a final resolution of the dispute being subject to the qualifications at cl 3 of the Deed; and
- (b) there is no evidence that any money paid by Valeo is for the payment amount included in the Deed.

22 Valeo points out that at part 5.7 of the Adjudication Determination the Adjudicator stated:

I have determined that the Deed prepared by the Respondent and signed by the Claimant was not a genuine attempt to resolve the dispute. Even though the Claimant signed the Deed, I am not satisfied that the Claimant agreed with the valuation of the deductions included in the Deed for the rectification of defects.

23 Valeo submits that this enquiry by the Adjudicator was misguided, and that the relevant enquiry which the Adjudicator should have made was in relation to the February 2018 Settlement Agreement. Valeo points out that the Adjudication Determination makes no finding in relation to the parties' agreement made in early February 2018 prior to the formal execution of the Deed.

24 Further, Valeo submits that the Deed entered into as a result of the February 2018 Settlement Agreement was genuine and is:

- (a) clear from its terms;
- (b) evidenced as such by the manner in which it was negotiated and came into existence, and by factual circumstances including that subsequent to the settlement agreement,

(iii) by email dated 4 April 2018, Tiling Expert complained that,

²⁹ CB18, [12].

³⁰ CB394-CB395, part 5.6.

we were expecting our first payment instalment of \$15,000 to be deposited into our account at the end of March.

(iv) Tiling Expert's contemporaneous email on 9 April 2018, complains the agreement had not been followed, stating, 'as you know we had a deal... '.

Valeo observes that this demand is consistent with the payment terms of the Deed.

25 Valeo submits that it should be inferred that Tiling Expert provided a copy of the same to its own solicitor and presumably obtained legal advice on its terms. The terms of the Deed were provided to Tiling Expert's solicitor and advice appears to have been provided in relation thereto as referred to in Tiling Expert's email of 19 February 2018.³¹

26 Valeo submits that the February 2018 Settlement Agreement and subsequent Deed was entered into by the parties as a means of resolving payments to, and alleged defects in, the works performed by Tiling Expert for Valeo across five work sites. No claim under the SOP Act had been made at the time the parties entered into the February 2018 Settlement Agreement. Further, Valeo notes that the claim made by Tiling Expert on 21 December 2017 was expressly characterised as the 'final claim' to be made under the construction contract.

27 It follows, Valeo contends, that it can be inferred that as at early February 2018 the parties were not contemplating that Tiling Expert would be able to make any further claim under the SOP Act. Further, as at the time of Tiling Expert's 'final claim' on 21 December 2018, Tiling Expert had no further work to complete and it had invoiced under the contract for all work performed.

28 Valeo's submissions emphasise that cls 2 and 3 of the Deed relating to the Albert Park tiling works expressly state that Tiling Expert would not be entitled to make

³¹ CB358.

any further claims for works under the subcontract. Therefore, Valeo submits, no further reference date could arise pursuant to the subcontract or by virtue of the express terms of the Deed.³²

29 In respect of Tiling Expert's reliance upon s 48 of the SOP Act to argue that the February 2018 Settlement Agreement and the Deed is void, Valeo relies on *Fitzroy Shopfitting and Building Pty Ltd v Solene Investments Pty Ltd*,³³ (*Fitzroy Shopfitting*), in which Judge Anderson of the County Court of Victoria, after discussing authorities including *Beba Enterprises Pty Ltd v Gadens Lawyers*³⁴ (*Beba*) referred to below and another decision of his Honour in *Simtec Group Pty Ltd v Ascot Building Pty Ltd*,³⁵ (*Simtec*) stated:

...if the parties by their words and conduct have shown that their agreement was not directed to the exclusion, modification or restriction of the operation of the Act but rather the genuine resolution of a dispute, the parties should be bound by their agreement and section 48 would have no application.³⁶

30 Valeo also relies upon the Court of Appeal of Victoria's decision in *Beba*.³⁷ In *Beba* the appellant, as a non-associated third party payer, was not precluded from entering into an agreement with the client by which it waived its rights to have the client's legal costs reviewed. In *Beba*, Ashley JA made the following observations:

...Nor would it do much for the administration of justice if agreements settling costs issues (whether solely relating to costs, or part of a wider resolution), entered into in apparent good faith, could be at risk of being partly set aside at the instance of the payer, the other party then being at risk, in some cases, of having to repay some part of moneys already received and paid to the party's legal practitioner.³⁸

31 Valeo argues that the February 2018 Settlement Agreement and subsequent formal Deed could not be said to be directed to the 'exclusion, modification, or restriction of the operation of the Act', but rather, it was a genuine attempt to resolve the dispute.

32 CB232-234.

33 [2016] VCC 1352, [28].

34 [2013] VSCA 136.

35 [2016] VCC 1127.

36 [2016] VCC 1352, [28].

37 [2013] VSCA 136.

38 Ibid [79].

The settlement was not to diminish or curtail any rights under the SOP Act, but rather the parties were compromising their rights in relation to the work, the quality of work, defects and payments that they had, or may have had, as at 5 February 2018.³⁹

32 Valeo's Adjudication Response dated 8 August 2018, its letter to the Adjudicator dated 15 August 2018 and the Affidavit of Tom Tziouvelis, detail the circumstances which give rise to the formation of the settlement agreement and the subsequent execution of the relevant Deed.⁴⁰

33 Valeo also points out that the Adjudicator makes findings at part 5.6 of the Adjudication Determination which Valeo argues exceed the Adjudicator's powers by reason of s 23(2) of the SOP Act and that such findings are thereby rendered void by operation of s 23(2B) of that Act. Section 23(2)(b) of the SOP Act provides:

- (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only-
 - ...
 - (b) subject to this Act, the provisions of the construction contract from which the application arose;

34 Valeo submits that the only finding the Adjudicator should have concerned himself with was whether the February 2018 Settlement Agreement was a genuine resolution of the dispute. The Adjudicator however determined that the Deed was not a 'final resolution of the dispute'. Valeo submits that this 'final resolution' finding differs from whether there was a 'genuine resolution of the dispute' as the Adjudicator seeks to interpret the entire settlement agreement through the prism of his construction of cl 3 of the Deed. If such a finding was open to the Adjudicator, Valeo submits that it was made both without calling for any submissions on that issue and without reference to the February 2018 Settlement Agreement reached on 5 February 2018, confirmed in the Valeo email of 7 February 2018, and formalised in the Deed which was executed later.

³⁹ CB232-234 and CB475.

⁴⁰ CB211-227, CB366-372 and CB400-421.

35 Valeo also submits that the Adjudicator's findings that the Deed was not a genuine attempt to resolve the dispute presupposes and gives uppermost importance to the Deed as the settlement document between the parties to settle their dispute. For the following reasons Valeo contends that such an assumption is factually incorrect:

- (a) settlement between the parties was consistent with the agreement made on 5 February 2018, which was reduced to writing on 7 February 2018;
- (b) the parties' entry into the Deed was consequential upon the settlement agreement; and
- (c) the parties freely entered into the Deed and subsequently acted consistently with the terms of the February 2018 Settlement Agreement reflected in the terms of the Deed.

36 Valeo submits that by the Adjudicator focusing on and determining that the Deed, and not the February 2018 Settlement Agreement, was the touchstone for determining whether the 'agreement' was 'not a genuine attempt to resolve the dispute' constitutes a material error. Valeo submits that the Adjudicator committed an error in that the enquiry made by the Adjudicator was misguided. The relevant inquiry the Adjudicator should have made was in relation to the February 2018 Settlement Agreement. The Deed was entered into to give effect to the settlement. There is no finding made within the Adjudication Determination concerning the February 2018 Settlement Agreement. Hence, Valeo contends that the Adjudicator made the wrong enquiry and went beyond what he was to validly determine under the provisions of s 23(2) of the SOP Act.

37 In response to the Adjudicator's notice dated 9 August 2018, pursuant to s 21(2B) of the SOP Act, Tiling Expert provided further submissions to the Adjudicator dated 13 August 2018.⁴¹

⁴¹ CB347-352.

38 Valeo complains that Tiling Expert's further submissions allege that the Deed had been signed by Tiling Expert under duress, whereas previously Tiling Expert had alleged that the February 2018 Settlement Agreement had not been honoured and was seeking payment from Valeo under the February 2018 Settlement Agreement.

39 On 15 August 2018, Valeo, on its own initiative, provided further submissions to the Adjudicator in response to Tiling Expert's further submissions. At part 5.10 of the Adjudication Determination,⁴² the Adjudicator stated that Valeo's response to Tiling Expert's further submissions was not considered when making his Determination. Valeo submits that the Adjudicator's act or omission gives rise to Ground 4.

40 The Adjudicator, at paragraph 3 of part 5.6 of the Adjudication Determination,⁴³ states 'The Respondent has provided no evidence that it paid the monetary amount nominated in the Deed'.

41 Valeo submits however that, contrary to the Adjudicator's findings, there was evidence to demonstrate that money had been paid by Valeo under the Deed.

42 Valeo's submissions dated 4 February 2019 also contend that -

29. Contrary to the Adjudicator's finding, there was evidence to establish that money paid by Valeo is for the payment amount included in the Deed, namely:

- (a) The amount of \$48,165.16: excluding GST was included within the Deed as the sum due to Tiling Expert was following negotiations held on 5 February 2018, and reflected in the emails included in the Adjudication Response dated 8 August 2018 at Annexure A being:
 - (i) Email from Tiling Expert to Valeo dated 29 January 2018 at 11.31am; (CB229-CB230)
 - (ii) Email from Valeo to Tiling Expert dated 7 February 2018 at 9.26pm; (CB228-CB229)
 - (iii) Email from Tiling Expert to Valeo dated 12 February 2018 at 10.50am; (CB231)

⁴² CB397.

⁴³ CB64.

- (iv) Email from Tiling Expert to Valeo dated 19 February 2018 at 1.11pm; (CB356)
 - (v) Email from Valeo to Tiling Expert dated 19 February 2018 at 1.13pm; (CB357)
 - (vi) Email from Valeo to Tiling Expert dated 26 February 2018 at 2.59pm; (CB359)
- (b) The Deed was one of 5 deeds for concerning works undertaken by Tiling Expert for Valeo. All of the work sites on which Tiling Expert was undertaking work for Valeo, were settled by Valeo agreeing to pay to Tiling Expert the sum of \$120,000 +GST. The Adjudicator appears to have misunderstood this fact and not interpreted the Deed in its proper context. That is, it was never agreed between the parties that there would be an instalment of \$48,165.16. This number was one of five used by the parties for each job site, to derive the settlement figure of \$120,000 +GST;
- (c) The email of 7 February 2018 provided that payment terms were that \$60,000 would be paid by the end of February and then 4 payments of \$15,000 would be made at the end of each following month commencing on 30 March 2018;
- (d) Valeo paid Tiling Expert the sum of 60,000 plus GST on 1 March 2018.⁴⁴

30. For the reasons set out above, there was a clear basis for the Adjudicator to make a finding that the sum of \$60,000.00 was paid pursuant to the settlement agreement of 5 February 2018, which said payment reflected in the quantum referred to in the Deed.

43 Valeo submits that accordingly, there was a clear basis for the Adjudicator to make a finding that the sum of \$60,000 (plus GST) was paid in accordance with the February 2018 Settlement Agreement.

Valeo's Submissions - Ground 4

44 Valeo submits that the Adjudicator failed to afford natural justice to it by not inviting it to make further submissions in response to new allegations that Tiling Expert raised in its submissions dated 13 August 2018 raising duress in relation to the execution of the Deed and by not considering Valeo's further submissions that were provided to the Adjudicator on 15 August 2018.

⁴⁴ CB291, [24].

45 Valeo contends that, given Tiling Expert raised the new grounds referred to in the last preceding paragraph, the Adjudicator was obliged to give Valeo an opportunity to respond, either pursuant to the rules of natural justice or pursuant to s 22(5)(a) of the SOP Act.

It is not necessary to deal with Ground 4

46 I do not however consider that it is necessary for me to address Ground 4, beyond recording that I have not done so for the reasons set out in paragraphs [54] and [56] below.

Tiling Expert's Submissions - Ground 1

47 Tiling Expert contends however that the agreement between the parties must be a genuine resolution and must be complied with by the parties.

48 Tiling Expert submits that the agreement reached on 5 February 2018 was not effective between the parties. Tiling Expert's primary submission in this regard is that because Valeo did not comply with the terms of the February 2018 Settlement Agreement there was no genuine resolution of the parties' disputes.⁴⁵ Tiling Expert submits that Valeo failed to pay the sums due and payable, leaving a balance of \$60,000 of the overall settlement sum of \$120,000, which related to all projects the subject of the February 2018 Settlement Agreement.

49 In relation to the February 2018 Settlement Agreement and the Deed, coupled with Valeo's failure to make part payment, Tiling Expert contends that it 'accepted Valeo's actions as a repudiation of the agreement and brought it to an end'.⁴⁶ Tiling Expert submits therefore that as at the date of its payment claim in July 2018, there was no agreement to settle, no relevant exclusionary clauses and, as a consequence, the reference dates accrued in favour of Tiling Expert.⁴⁷

⁴⁵ CB42-CB43, [11]-[13] and T79.11-14; T79.26-28; T81.21-28.

⁴⁶ CB42, [12].

⁴⁷ CB42, [12].

50 In support of its assertion that it brought the February 2018 Settlement Agreement to an end Tiling Expert, in its submissions of 19 February 2019,⁴⁸ relies upon Exhibit 'DT-9' to the Affidavit of Dimitrios Tzouvelis.⁴⁹ By that communication Tiling Expert asserts that it put Valeo on notice that the February 2018 Settlement Agreement would be at an end if Valeo did not pay the settlement instalments.⁵⁰

51 Tiling Expert also argued that Judge Anderson's decisions in *Simtec* and *Fitzroy Shopfitting* and the Court of Appeal of Victoria's statements in *Beba* all ultimately required the existence of a genuine resolution of the subject dispute in relation to an accord and satisfaction, or other relevant compromise agreement, to found the conclusion that the prohibition in the legislation in question was not in those cases based principally on public policy conditions intended to render such a resolution void or ineffective. However here, Tiling Expert argued there was no genuine resolution of the dispute.⁵¹

52 Tiling Expert also argues in summary that, by reason of Valeo's breach in relation to the payment of instalments agreed as part of the February 2018 Settlement Agreement:

- (a) it can be inferred Valeo did not enter into a genuine resolution of the subject disputes⁵² because it can be inferred from Valeo's conduct subsequent to February 2018, namely that Valeo did not pay all the agreed instalments under the February 2018 Settlement Agreement, that Valeo was not genuine in its agreement to resolve the relevant disputes;
- (b) Valeo expressed an intention to no longer be bound by the terms of the agreement reached on 5 February 2018, and that Tiling Expert, by its conduct, accepted Valeo's actions as a repudiation of the agreement and brought it to

48 CB41, [6(e)].

49 CB347.

50 CB42, [12].

51 T76.1-4.

52 CB42, [12].

an end;

(c) Tiling Expert contends that it had brought the settlement agreement to an end by the date of its payment claim of 4 July 2018. The communications from Tiling Expert to Valeo relied upon by Tiling Expert as constituting its acceptance of Valeo's repudiatory conduct and terminating the February 2018 Settlement Agreement are within Exhibit 'DT-9' to the Affidavit of Dimitrios Tzouvelis;⁵³

(d) the agreement reached on 5 February 2018 was not a genuine resolution of the dispute because Valeo did not comply with it. Tiling Expert's contention is that the fact that Valeo has refused to comply with the terms of the February 2018 Settlement Agreement amounts to a clear indication that the resolution of the dispute was not genuine.⁵⁴

53 Tiling Expert's Submissions – Ground 4 Valeo asserts it was denied natural justice by the Adjudicator because the Adjudicator failed to request further submissions from Valeo and/or take into account its unsolicited submission.

It is not necessary to deal with Ground 4

54 I do not however consider that it is necessary for me to address Ground 4, beyond recording that I have not done so because:

(a) the Adjudicator did not make a finding or rely on any case put by Tiling Expert that the February 2018 Settlement Agreement, and/or the Deed, had been signed under financial duress and that therefore, on that basis, the agreement and Deed was for that reason not a genuine attempt to resolve the relevant disputes between the parties as they existed at that time or were void or ineffective for that reason;

(b) the Adjudicator did not rely on duress to conclude that the Deed was void or

⁵³ CB41-CB42, [6(e)] and [12].

⁵⁴ CB43, [13].

ineffective; and

(c) before me Tiling Expert did not seek to argue or press the argument summarised in (a) above.

Ground 4 - Conclusion

55 I consider that the dispositive effect of the above decision in relation to Ground 1 of Valeo's Originating Motion and the consequence that, setting aside the Adjudication Determination, the February 2018 Settlement Agreement precluded Tiling Expert making a further payment claim under the construction contract and resulted in no applicable reference date arising thereafter, render it unnecessary to further address Ground 4.

56 Further, it is unnecessary for me to deal with Ground 4 of Valeo's appeal, save to add that it also follows from my decision in relation to Ground 1 of Valeo's Originating Motion that for the above reasons the Adjudicator committed jurisdictional error by determining that a further reference date arose after 25 December 2017. The Adjudicator also erred in law and committed jurisdictional error in determining that the claimable works were performed by Tiling Expert and thus, Tiling Expert was entitled to a further reference date.

57 In this matter each of the errors expressly referred to in the last two preceding paragraphs spring from and are inextricably intertwined with the Adjudicator's error of law in deciding that the February 2018 Settlement Agreement and the Deed was not a final resolution of the dispute.

Grounds 2 and 3 - The reference date

58 Grounds 2 and 3 are as follows:

Ground 2

The Adjudicator committed jurisdictional error, alternatively erred in law, by determining that a further reference date arose after 25 December 2017; and

Ground 3

The Adjudicator committed jurisdictional error, alternatively erred in law, in determining that the claimable works were performed by Tiling Expert, and

thus, Tiling Expert was entitled to a further reference date.

59 The Adjudicator determined that the relevant reference date was 25 May 2018. Moreover, he was satisfied that Tiling Expert had performed work after 23 May 2018, and that therefore pursuant to the terms of the contract, a reference date accrued on the 25th day of each month, and in the Adjudicator's view on 25 May 2018.

Grounds 2 and 3 - Conclusion

60 For the reasons outlined in relation to Ground 1, I consider that the Adjudicator erred in law in his determination and findings in relation to the existence of a reference date of 25 May 2018 and the performance of relevant work by Tiling Expert after 28 May 2018.

Considerations

Ground 1

The Adjudicator committed a jurisdictional error, alternatively erred in law, in determining that the Deed is not a genuine attempt to resolve the dispute and does not prevent a payment claim being made by Tiling Expert for what it considers to be the outstanding amount.

61 The question and related decision by the Adjudicator in respect of the application of the SOP Act in this matter, hinged on the Adjudicator's finding as to the existence of a jurisdictional fact, namely that there was, in the circumstances, a reference date of 25 May 2018 under the construction contract.

62 The Adjudicator's findings which purported to found his jurisdiction were inextricably intertwined with, and predicated upon the Adjudicator's findings of mixed fact and law in relation to the February 2018 Settlement Agreement, formalised in the Deed executed on 26 February 2018.

63 The Adjudicator's finding that the February 2018 Settlement Agreement was 'not a genuine attempt to resolve the dispute' nor 'a final resolution of the dispute' between the parties allowed the Adjudicator to then find that there was a valid

payment claim made under the SOP Act by Tiling Expert in 2018 which also allowed the Adjudicator to identify a reference date under the construction contract in May 2018.

64 Both the Adjudicator's conclusions and decisions in relation to the February 2018 Settlement Agreement and the existence of a reference date of 25 May 2018 are, in my view, in error and fatal to the Adjudication Determination which Valeo challenges.⁵⁵

65 The Adjudication Determination dated 23 August 2018, insofar as is relevant, states:

5.6 Deed

The Respondent submits in the adjudication response that the parties reached a settlement on or about 5 February 2018, which was later formalised in a deed on 12 February 2018 (Deed), where the Claimant agreed to accept a sum of \$48,165.16 excluding GST in full and final settlement of its rights and claims under the contract. The Respondent considers that the Claimant has compromised all of its rights to claims made under the contract and the Act.

The Claimant advises that it entered into the Deed as it was experiencing cash flow difficulties at the time and signed the deed as a means to receive some payment to ease those difficulties.

The Respondent portrays the Deed as an agreement for a full and final settlement for the work. The Deed includes a monetary amount payable but makes it subject to conditions as Part 3 of the Deed regarding any monies owed by the Claimant to the Respondent and the rectification of defects. The Respondent has provided no evidence that it paid the monetary amount nominated in the Deed. The Respondent has sought to pursue additional rectification costs in the adjudication response.

The Claimant submits that it entered into the Deed under duress to receive some payment for the amount it considered outstanding while experiencing financial stress.

The Respondent refers to the judgement in *Fitzroy Plumbing and Building Pty Ltd v Solene Investments Pty Ltd* [2016] VCC 1352 (*Fitzroy*) to support its proposition that parties may enter an agreement to end disputes without offending section 48 of the Act. The Claimant submits that *Fitzroy* does not apply as it is not a genuine resolution of the dispute and the Respondent has not made the payment anticipated in the Deed.

⁵⁵ *Southern Han Breakfast Points Pty Ltd (In Liq) v Lewence Constructions Pty Ltd* [2016] HCA 52 at [60] and [61]; *Westbourne Grammar School v Gemcan Constructions Pty Ltd* [2017] VSC 645 at [59]-[63] and [75] and [76].

I agree with the Claimant that the Deed is not a final resolution to the dispute being subject to qualifications at clause 3 of the Deed. There is no evidence that any money paid by the Respondent is for the payment amount included in the Deed. I determine that the Deed is not a genuine attempt to resolve the dispute and does not prevent a payment claim being made by the Claimant for what it considers to be the outstanding amount.

5.7 Defects

...

I have determined that the Deed prepared by the Respondent and signed by the Claimant was not a genuine attempt to resolve the dispute. Even though the Claimant signed the Deed, I am not satisfied that the Claimant agreed with the valuation of the deductions included in the Deed for the rectification of defects. In the adjudication response, the Respondent notes that in signing the Deed, the Claimant acknowledged the amount for the deductions/backcharges but does not go so far as to submit that the Claimant agreed with the value of the deductions/backcharges.

The Respondent has included a list of further deductions at appendix H of the adjudication response without substantiating that these charges relate to the defect rectification of the Claimant's work or work being undertaken on behalf of the Claimant in accordance with the provisions of the contract. The Respondent has not identified any direction issued for the Claimant to carry out the work.

I accept that there were defects in the Claimant's work but do not accept that the Respondent is entitled to deduct an unsubstantiated amount in relation to any of those defects. The Respondent has not complied with the provisions of the contract where it considered rectification of the Claimant's work was necessary.

I determine that the Respondent is not entitled to withhold an amount from the progress payment for the rectification of defects. (underlining added)

66 In particular the Adjudicator's reasons for concluding that the 'Deed' is not a final resolution of the dispute were articulated in the following passages underlined above:

I agree with the Claimant that the Deed is not a final resolution to the dispute being subject to qualifications at clause 3 of the Deed. There is no evidence that any money paid by the Respondent is for the payment amount included in the Deed. I determine that the Deed is not a genuine attempt to resolve the dispute and does not prevent a payment claim being made by the Claimant for what it considers to be the outstanding amount.

...

I have determined that the Deed prepared by the Respondent and signed by the Claimant was not a genuine attempt to resolve the dispute. Even though the Claimant signed the Deed, I am not satisfied that the Claimant agreed

with the valuation of the deductions included in the Deed for the rectification of defects. In the adjudication response, the Respondent notes that in signing the Deed, the Claimant acknowledged the amount for the deductions/backcharges but does not go so far as to submit that the Claimant agreed with the value of the deductions/backcharges.

67 The February 2018 Settlement Agreement, as recorded in the parties' formal Deed of Release - Practical Completion executed on 26 February 2018, provided the following in cls 2 and 3 respectively:⁵⁶

2. PAYMENT CLAIM AT PRACTICAL COMPLETION

The parties further acknowledge and agree that the amount due and payable to the Trade Contractor in respect of the Trade Contractor's Payment Claim at Practical Completion of the Works is calculated as follows:

Adjusted Contract Price	\$454,864.62 (Excl. GST)
Less Previous Payments	\$406,699.46 (Excl. GST)
Less Retention Monies (2.5% Defects Liability Period)	\$0.00 (Excl. GST)
Balance due to Trade Contractor At Practical Completion	\$18,165.16 (Excl. GST)

3. RELEASE AND PAYMENT OF RETENTION MONIES

The Trade Contractor agrees that Valeo will be entitled to retain the Retention Monies in the amount of \$0.00 (Excl of GST) which are held by Valeo pursuant to Clause 15 of the Trade Contract for the purposes of applying the Retention Monies towards the payment owed by the Trade Contractor to Valeo in respect of the Payment Claim at Practical Completion of the Works or at the expiration of the Defects Liability Period (particulars of which are set out in Clause 2 above).

The Trade Contractor releases and forever discharges Valeo from all and/or any claims, actions, demands, proceedings, judgement, damages, losses, costs, debts, liens, expenses, obligations or liability however arising and whether present, unascertained, immediate, future or contingent including all statutory claims which the Trade Contractor now has or may hereafter have against Valeo arising from, incidental to or in connection with the Trade Contract, the Works or the Retention Monies.

The Trade Contractor acknowledges and agrees that:

- (a) the Trade Contractor will not be entitled to receive any portion of the Retention Monies at Practical Completion of the Works or at the expiration of the defects liability period if the contractor is in breach of

⁵⁶ CB232-233.

the Trade contract or is owing monies to Valeo Construction Pty Ltd;

- (b) nothing in this Deed releases the Trade Contractor from any obligations or liabilities under the Trade Contract in relation to rectification of defects during the defects liability period pursuant to Clause 9 of the Trade Contract or in relation to defective works generally; and
- (c) Valeo may plead this Deed as an absolute bar to any proceeding brought by the Trade Contractor arising out of any matter the subject of the release in Clause 3 of this Deed.

The February 2018 Settlement Agreement was a final resolution of the parties' relevant disputes

68 I consider that the Adjudicator erred in law on the face of the Adjudication Determination in holding that the Deed was 'not a final resolution to the dispute' between the parties and 'not a genuine attempt to resolve the dispute' between Valeo and Tiling Expert.

69 In my view the Adjudication Determination identifies no proper basis upon which it was open to conclude that the February 2018 Settlement Agreement formally reflected in the Deed was other than a binding agreement reflecting the genuine and effective resolution of the relevant disputes between Valeo and Tiling Expert in respect of both the contractual disputes and differences which had arisen under and in relation to the subject construction contract, and also certain other contracts between the parties. In this respect the Adjudicator's findings exhibit errors of law.⁵⁷

70 The Adjudicator's findings and conclusions in that regard at parts 5.6 and 5.7 of the Adjudication Determination⁵⁸ are unfounded, wrong in law and cannot be sustained for reasons, including the following.

71 Before addressing those reasons I note that having decided that the Adjudicator erred in his findings relegating the February 2018 Settlement Agreement and the Deed, it is unnecessary and not appropriate in the context of this proceeding in respect of an Adjudication Determination which is itself interim in nature, to finally

⁵⁷ CB394-396, parts 5.6 and 5.7.

⁵⁸ CB394-395.

determine the enforceability of the parties' February 2018 Settlement Agreement and I do not do so. However I observe that Valeo's communication of 7 February 2018, confirming the parties' agreement of 5 February 2018 at Valeo's Head Office, subsequently formalised as reflected in the Deed executed on 26 February 2018, provide clear and unrefuted evidence of the parties' relevant settlement. Indeed Tiling Expert's submissions dated 19 February 2019 at paragraph [6] accept the existence and the terms of this early February 2018 Settlement Agreement and Tiling Expert accepts that Valeo paid \$60,000 thereunder.

72 Further, in my view, the parties' intentions to be bound by the settlement agreement and terms of the Deed and the genuineness of that settlement agreement and the Deed entered into as a consequence are, as submitted by Valeo, strongly supported by:

- (a) the terms of the Deed;
- (b) the factual matrix in relation to the negotiation of the Deed and including the manner in which the settlement and the Deed were considered,⁵⁹ including subsequent to the settlement agreement reached on 5 February 2018; and
- (c) the relatively contemporaneous communications confirming the settlement which Tiling Expert sent to Valeo, for example:
 - (v) Tiling Expert's email of 4 April 2018, which complained that Tiling Expert was expecting its first payment instalment of \$15,000 under the February 2018 Settlement Agreement to be deposited into Tiling Expert's account at the end of March 2018; and
 - (vi) Tiling Expert's contemporaneous email on 9 April 2018⁶⁰ wherein Tiling Expert complains that the agreement has not been

⁵⁹ The Deed; Valeo's email to Tiling Expert dated 7 February 2018, CB228; the Deed, CB232-CB233; Tiling Expert received legal advice in relation to the said Deed, CB358.

⁶⁰ CB520.

followed and that 'as you know we had a deal...'

73 I consider that the Adjudicator fell into error in concluding as he did at part 5.7 of the Adjudication Determination that:

I have determined that the Deed prepared by the Respondent and signed by the Claimant was not a genuine attempt to resolve the dispute. Even though the Claimant signed the Deed, I am not satisfied that the Claimant agreed with the valuation of the deductions included in the Deed for the rectification of defects.

Was the February 2018 Settlement Agreement a genuine final resolution of the parties' disputes

74 Tiling Expert's contention is that the agreement reached on 5 February 2018 was not a genuine resolution of the dispute because Valeo did not comply with it. In *Fitzroy Shopfitting*,⁶¹ Judge Anderson, after discussing authorities including *Beba*⁶² and another decision of his Honour in *Simtec*,⁶³ stated:

In my view, the policy considerations raised by the Court of Appeal are relevant in the present case. Notwithstanding the special nature of the *Building and Construction Industry Security of Payment Act 2002* (Vic), and the clear and direct wording of section 48, if the parties by their words and conduct have shown that their agreement was not directed to the exclusion, modification or restriction of the operation of the Act but rather the genuine resolution of a dispute, the parties should be bound by their agreement and section 48 would have no application.⁶⁴

75 Tiling Expert argues that Valeo did not comply with the terms of the Deed in that it failed to pay all of the settlement sum, leaving a balance of \$60,000 outstanding.

76 On this argument Tiling Expert argues that the fact that Valeo refused to comply with the terms of the agreement is a clear indication that the resolution of the dispute was not genuine, and that the settlement agreement is therefore void by reason of the application of s 48 of the SOP Act.⁶⁵ Tiling Expert's argument is that the lack of genuine resolution by Valeo is to be inferred from Valeo's eventual breach of certain

61 [2016] VCC 1352.

62 [2013] VSCA 136.

63 [2016] VCC 1127.

64 [2016] VCC 1352, [28].

65 CB43, [13].

payment terms of the settlement agreement.

77 In my view however there is no valid basis identified by the Adjudicator for his conclusion that '... the Deed prepared by the Respondent and signed by the Claimant was not a genuine attempt to resolve the dispute'. The Deed clearly recorded what had been agreed. In face of this Tiling Expert's only arguments before the Adjudicator, and in this trial, were that the covenants of the Deed had not been honoured in some respects by Valeo and that such asserted breaches by Valeo somehow reflected upon the genuineness of the settlement agreement and effected the settlement agreement ab initio, and resulted in the repudiation of the settlement agreement by Valeo.

78 In my view, the analysis of whether or not the parties had entered into a binding settlement agreement which resolved contractual claims, including potential progress claims under a construction contract, is to be undertaken as at the time the February 2018 Settlement Agreement in issue is entered into.

79 I consider that the Adjudicator had no proper basis upon which to lawfully conclude that either party did not, by means of the February 2018 Settlement Agreement and Deed, genuinely intend to finally resolve their disputes and differences under the construction contract in respect of all Tiling Expert's rights and entitlements, encompassing Tiling Expert's entitlements to payment for, and claims in respect of, the works, including in relation to progress claims.⁶⁶ Both parties' submissions make that clear.⁶⁷

80 At trial Tiling Expert's only potentially relevant argument in relation to Valeo's lack of genuine intent to settle relevant disputes by means of the February 2018 Settlement Agreement, was based on Valeo's failure to ultimately honour parts of that agreement from which Tiling Expert contended an inference could be drawn that at the time of entering into the subject settlement agreement Valeo was

⁶⁶ See *Fitzroy Shopfitting* [2016] VCC 1352.

⁶⁷ CB17, [7]-[10]; CB41, [6(a)-(e)].

disingenuous, thereby depriving the February 2018 Settlement Agreement of the character of a bilaterally genuine resolution.

81 I am satisfied that there is no cogent or proper basis upon which the Adjudicator could have found that on or about 5 February 2018 Valeo was disingenuous in entering into the subject settlement agreement. Nor do I consider, save in respect of the qualification at the end of this paragraph, that even if it were the case (which is not made out, nor open to be made out before the Adjudicator here) that Valeo was somehow disingenuous in relation to that agreement at the time of entering into it, that without more giving rise to actionable conduct sufficient at law to justify declaring the settlement agreement void or modifying that agreement, Valeo's want of intent to genuinely resolve the relevant disputes is material. However, it may be that such disingenuousness, if established at the time of the making of a relevant agreement, could be material in relation to whether such an agreement was void by reason of s 48 of the SOP Act. In my view there is no basis upon which to so decide in this matter.

82 Neither does the Adjudication Determination reflect any basis upon which the Adjudicator could find that he was not satisfied that Tiling Expert agreed with the valuation of the deductions included in the Deed for the rectification of defects.

83 In short no cogent evidence, factor, circumstance or reasoning is identified by the Adjudicator to underpin his finding that there was any lack of a genuine attempt by the parties to resolve the dispute at the time at which the February 2018 Settlement Agreement was made. Nor for the same reasons the Adjudicator's finding that there was 'not a final resolution to the dispute' between the parties is not underpinned.

84 Further, Tiling Expert did not argue at trial that the February 2018 Settlement Agreement and Deed did not record the final resolution to the dispute because that agreement was subject to qualifications at cl 3 of the Deed.

85 It is understandable that Tiling Expert did not seek to support the Adjudicator's conclusion that cl 3 deprived the Deed of finality because, on any view, it is clear

that cl 3 does not so operate, including insofar as cl 2(b) reflects agreement by the parties that certain obligations or liabilities under the Trade Contract in relation to defective work are outside the scope of the settlement agreement.

86 Insofar as 'conduct' in breach of the settlement agreement, post February 2018, is asserted as being capable of reflecting upon whether the parties were genuine in their agreement to settle in early February 2018, I do not consider such conduct to be probative, one way or the other, of that proposition.

87 Put another way, there is no basis identified or explained by the Adjudicator, or in Tiling Expert's submissions in this trial, for an inference to be drawn supporting the proposition referred to in the last preceding paragraph, even accepting which I do not, that here Valeo's breach or breaches of the settlement agreement, if made out, could somehow retrospectively undermine the settlement agreement at the time it was entered into. Indeed the terms of the Valeo email of 7 February 2018, the terms of the Deed itself and the matters referred to at [71], [72], [94] and [95] hereof appear to establish a contrary position.

88 Given the formal execution of the Deed by the parties, and Tiling Expert's affirmations of that agreement in their emails of 4 April 2018 and 9 April 2018 referred to in detail elsewhere in this judgment, the Adjudicator's reference to there being a lack of agreement 'with the valuation of the deductions included in the Deed for the rectification of defects' is at odds with the cases put by Tiling Expert and Valeo, and is not supported by reasoning or the evidence referred to by the Adjudicator, nor argued by the parties at trial.

89 I also observe that the probable consequence of the February 2018 Settlement Agreement was that the agreement made between Valeo and Tiling Expert effected a merger of all Tiling Expert's earlier rights, entitlements and potential claims Tiling Expert had or thereafter may have against Valeo arising from, incidental to, or in connection with the Trade Contract, the works or the retention moneys. The February 2018 Settlement Agreement expressly released all such rights, entitlements

and potential claims and in substance exchanged them for Tiling Expert's entitlements under the Deed.

90 Further, after early February 2018 Valeo part-performed its obligations under the Deed, although it is common ground that Valeo failed to pay \$60,000 of the overall sum of \$120,000 payable in respect of the projects the subject of the February 2018 Settlement Agreement.

91 Accordingly, the February 2018 Settlement Agreement prima facie resulted in Tiling Expert being entitled to be paid thereunder and to enforce the payment and other terms of that settlement agreement and after it was entered into, amongst other things, brought to an end Tiling Expert's entitlement to make any further progress claims under the construction contract.

Tiling Expert's asserted discharge of the settlement agreement

92 Tiling Expert also asserts that it accepted Valeo's repudiation of the February 2018 Settlement Agreement and that the settlement agreement was discharged and terminated.

93 Tiling Expert contends that it had brought the settlement agreement to an end by the date of its payment claim of 4 July 2018. The communications from Tiling Expert to Valeo relied upon by Tiling Expert as constituting its acceptance of Valeo's repudiatory conduct and termination of the February 2018 Settlement Agreement are within Exhibit 'DT-9' to the Affidavit of Dimitrios Tzouvelis;⁶⁸

94 Tiling Expert's emails of 9 April 2018 and 23 April 2018 to Valeo appear to be the particular communication relied upon by Tiling Expert in this regard. Tiling Expert's 9 April 2018 email however includes:⁶⁹

As you know we had a deal, I'm prepared to give Valeo one more chance to pay the instalments as we agreed with the first one overdue payable by the end of this week or the deal is off.

⁶⁸ CB41-CB42, [6(e)] and [12] and CB347-362, Exhibit "DT-9".

⁶⁹ CB360.

I have already been in contact with my Construction Lawyer and he has advised that Tiling Expert is well within its rights to sue Valeo for all the monies invoiced to Valeo from Tiling Expert.

I look forward to your prompt response.

95 Furthermore, approximately two weeks later Tiling Expert's email dated 23 April 2018 to Valeo stated:⁷⁰

I am happy to come back and complete the works but your are also breaking your agreement by holding back our instalments.

Not only did you miss the March payment but we also have our next payment due at the end of this month.

Get your guys to contact me regarding coming back to rectify the works but in the meantime I want the March instalment to be paid and a guarantee that the April one will be paid too.

Can you please accommodate this???

96 In my view however, Tiling Expert's communications dated 9 April 2018 and 23 April 2018, extracted above in their relevant parts, did not effectively accept Valeo's alleged repudiation of the February 2018 Settlement Agreement.

97 Neither of the above communications from Tiling Expert, relied upon by Tiling Expert as accepting Valeo's alleged repudiation and bringing the February 2018 Settlement Agreement to an end are, in my view, effective in that regard. This is because neither communication unequivocally accepts Valeo's repudiatory conduct and neither communication makes it clear that Tiling Expert terminates that agreement.

98 I do not consider that the Tiling Expert communications relied on by it effectively brought the February 2018 Settlement Agreement, formalised in the Deed executed on 26 February 2018, to an end.

Result of Discharge and Termination

99 In the result the Adjudicator had no basis upon which to hold that the February 2018

⁷⁰ CB361.

Settlement Agreement was not on foot.

100 Although I am not hereby intending to finally decide this issue, in the face of the alleged breaches by Valeo of that agreement, Tiling Expert may pursue the enforcement of that agreement including a claim for breach of contract in respect of the unpaid instalments which Valeo, it appears, has failed to pay. Be that as it may, the February 2018 Settlement Agreement, and its agreed releases, prevents Tiling Expert from making any further claims under the subject building contract, including any further progress payment claims. The express and comprehensive releases set out in cl 3 of the Deed extracted above are to that effect.

101 Furthermore even if Tiling Expert had, by its communications dated 9 April 2018 and 23 April 2018, effectively brought the February 2018 Settlement Agreement to an end, the result would likely be that the election by Tiling Expert to treat the February 2018 Settlement Agreement as no longer binding upon it would discharge and terminate that agreement. This would however not result in that agreement being rescinded ab initio, as it might be in other circumstances, for example on the basis of mistakes or misrepresentations.

102 In the present circumstances if Tiling Expert's purported discharge and termination had been effective (which does not appear to be the case) both Valeo and Tiling Expert would have been discharged from the further performance of the contract.

103 However, upon discharge of a simple contract of this kind, both parties remain bound by the contract and are entitled to exercise such rights as have not been divested or discharged and which have at the time of discharge been unconditionally acquired; that is, rights and obligations including those which arise from the partially performed contract. The causes of action which may have accrued as a result of breach of that agreement continue unaffected. Put another way, on successful discharge by Tiling Expert, the February 2018 Settlement Agreement, if upheld in another place, would have only been determined so far as it is executory. Valeo, if established as being in breach, would arguably be liable for damages for

such breach or breaches.⁷¹

104 In such circumstances, Tiling Expert's discharge and termination of the February 2018 Settlement Agreement, for fundamental breach by Valeo, even if such discharge and termination was effective, would not affect the antecedent merger in the February 2018 Settlement Agreement of Tiling Expert's pre-settlement claims and entitlements, including in relation to progress claims under the construction contract and the release by Tiling Expert of potential future claims. Those claims and entitlements are prima facie no longer enforceable after about 5 February 2018 by reason of the February 2018 Settlement Agreement. Such discharge and termination would not affect the releases agreed by Tiling Expert in cl 3 of the Deed.

105 Therefore, even if Tiling Expert had discharged and terminated the February 2018 Settlement Agreement the outcome would in any event be that the February 2018 Settlement Agreement would, absent some proper basis for the Adjudicator on an interim basis, or subsequent Court or Arbitrator deciding the merits of such matters, be effective to preclude Tiling Expert from making any claim under or incidental to the construction contract or the works thereunder, including any claim for payment for the work, including progress payment claims or the like.

106 For the foregoing reasons because there was no basis open to the Adjudicator to hold other than that all relevant rights and entitlements, including progress payment claim entitlements of Tiling Expert, were intended by the parties to be settled by the terms of the February 2018 Settlement Agreement, no reference date could arise after the date of settlement on or about February 2018.

107 For the above reasons Tiling Expert was not entitled to further payment for construction work or supply of related goods and services under the construction contract after 5 February 2018, and for the reasons outlined this position obtains notwithstanding that it may be established that Valeo, in due course, breached the

⁷¹ *McDonald v Dennys Lascelles Ltd* [1933] 48 CLR 457 at 476-477; *Johnson v Agnew* [1980] AC 367 at 392-393.

February 2018 Settlement Agreement and may have done so in a way or ways which amounted to repudiation of that settlement agreement.

108 In my view, for the reasons outlined in the preceding paragraphs, the Adjudicator's conclusions referred to and his related findings are wrong in law. Indeed both the evidence and the parties' submissions before me go the other way and it is notable that Tiling Expert did not seek to argue in support of the above underlined reasons proffered by the Adjudicator to impugn the Deed and the underlying agreement of 5 February 2018 but sought to argue only that Valeo's breaches of the settlement agreement demonstrated that the settlement agreement was not genuine and that Tiling Expert discharged and terminated that agreement.

109 Finally, in relation to this part, it is to be recognised, as earlier touched upon, that the Adjudicator in undertaking the function which the SOP Act empowers, does so by way of an interim determination of the payment claim in issue.

110 In a trial of this nature a Court which subsequently considers and decides whether the Adjudicator has complied with the requirements of the SOP Act and otherwise determined the matters the Adjudicator was empowered to determine according to law, save for questions including in relation to the interpretation of that Act, related questions of law, and the like, decides the relevant grounds raised in that context, and does not ordinarily foreclose the merits of the underlying rights and entitlements in respect of the disputes between the claimant and the respondent.

Building and Construction Industry Security of Payment Act 2002, s 48

111 Finally, in my view, the February 2018 Settlement Agreement, including the Deed, did not contain any terms purporting to effect an 'exclusion, modification or restriction of the operation of the Act'.

112 Section 48 of the SOP Act provides:

48. No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
- (2) A provision of any agreement, whether in writing or not-

SC:

- (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or
 - (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act-
- is void.

113 The parties' agreement to resolve disputes and differences under and in respect of the construction contract (and other tiling contracts between the parties) by agreement entered into in early February 2018 was not in the nature of a relevantly disingenuous agreement⁷² and did not by any provision thereof purport to exclude or modify or restrict, or have the effect of excluding, modifying or restricting, the operation of the SOP Act. Nor did the February 2018 Settlement Agreement attempt to deter any person from taking action under the SOP Act.

114 This is because the February 2018 Settlement Agreement was directed to, and effected, an overall and broad resolution of the disputes and differences between Tiling Expert and Valeo in connection with the construction contract as at 5 February 2018 concerning works by Tiling Expert at 178 Victoria Avenue, Albert Park, and other projects.

115 The February 2018 Settlement Agreement did not exclude or modify or restrict the operation of the SOP Act or have the effect of doing so, nor in my view for that reason is that agreement one which provides for the operation of the SOP Act to be excluded or modified or restricted. Rather, that settlement agreement resolved all relevant construction contract claims asserted by Tiling Expert and removed from contention what might otherwise have given rise to a payment claim by Tiling Expert.

116 Furthermore, here the February 2018 Settlement Agreement's terms resolved and removed any pre-existing or potential Tiling Expert claims and thereby brought about a position in which the SOP Act was inapplicable because there was no entitlement in Tiling Expert to make a payment claim under the SOP Act.

⁷² Refer to [29] and [30] of these Reasons for Judgment.

Accordingly, the operation of the SOP Act does not arise, and therefore the provisions of the settlement agreement cannot be said to have excluded, modified or restricted the operation of the SOP Act in the way prohibited by s 48 of the SOP Act.

117 Furthermore, the language of s 48 of the SOP Act in my view does not reflect Parliament's intention to thereby prevent parties from resolving disputes which they may have in relation to construction contracts to which the SOP Act would otherwise apply.

118 As an example, if it were otherwise a claimant builder asserting a progress payment entitlement, and the respondent party under the relevant construction contract which was arguably obliged to pay all or part of that progress payment claim, may be prevented from effectively resolving such a claim including by agreement to pay part of the claim rather than submitting the claim to the SOP Act regime for determination.

119 I consider it unlikely that Parliament intended s 48 of the SOP Act would operate in a reflexive way so as to inhibit the potential resolution of issues which have arisen between the claimant and respondent, or potential claimant and respondent, under the SOP Act regime. To interpret the SOP Act in a way which brought about such strictures would, I consider, impede the settlement of payment disputes in relation to the work done and/or goods and services undertaken and supplied under a construction contract of the type regulated by the SOP Act.⁷³

120 Finally, given my above findings, and conclusions, I do not consider it necessary to decide whether the Adjudicator exceeded his power by reason of the operation of s 23(2) of the SOP Act in relation to the effect of the Deed on the Adjudication Determination.

⁷³ *Beba Enterprises Pty Ltd v Gadens Lawyers* [2013] VSCA 136, [79]; *Simtec Group Pty Ltd v Ascot Building Pty Ltd* [2016] VCC 1127, [16]-[17]; and *Fitzroy Shopfitting and Building Pty Ltd v Solene Investments Pty Ltd* [2016] VCC 1352, [28].

Conclusion

121 For the reasons referred to above, I find that the Adjudication Determination is founded on errors of law which wholly impugn the subject Adjudication Determination, namely the Adjudicator's findings to the effect that the parties had not by the February 2018 Settlement Agreement wholly resolved their disputes and differences and done so in a way which was not rendered void by s 48 of the SOP Act. That erroneous finding resulted in the Adjudicator concluding that he had jurisdiction in the matter, whereas, as explained above, he did not.

122 In the circumstances referred to and for the above reasons:

- (a) the Adjudication Determination dated 23 August 2018 is declared void and set aside;
- (b) it is unnecessary for me to deal with all the plaintiff's other grounds for appeal, save to the extent I have done so above.

Orders

123 Accordingly, it is ordered that:

1. The Adjudication Determination of the second defendant dated 23 August 2018 is declared void and is set aside.
2. The first defendant, whether by itself, its servants or otherwise, howsoever, is restrained from seeking to enforce or take action under the *Building and Construction Industry Security of Payment Act 2002 (Vic)* in relation to the Adjudication Determination made 23 August 2018.
3. The Adjudicator, whether by himself, his servants, or otherwise howsoever, is restrained from providing an Adjudication Certificate in respect of the Adjudication Determination until further notice.
4. Pursuant to Rule 79.02 of the *Supreme Court (General Civil Procedure) Rules 2015*, the Senior Master of the Supreme Court of Victoria pay out to the plaintiff the money paid into Court by the plaintiff and any interest allocated or received in respect of that amount.
5. The parties are otherwise released from their undertakings provided to the Court and referred to in the Orders made 27 November 2018.
6. The first defendant pay the plaintiff's costs of and incidental to this proceeding on the standard basis to be assessed in default of agreement.

7. Any question as to the first defendant's entitlement to be granted an indemnity certificate is reserved.