

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

Not Restricted

S ECI 2019 4682

WATPAC CONSTRUCTION PTY LTD (ACN 010 462 816)

Plaintiff

v

COLLINS & GRAHAM MECHANICAL PTY LTD (ACN 097 469 282)
as Trustee for the CGM Unit Trust (ABN 59 390 232 267) & ANOR

Defendants

JUDGE: Digby J
WHERE HELD: Melbourne
DATE OF HEARING: 12 February 2020
DATE OF JUDGMENT: 30 September 2020
CASE MAY BE CITED AS: Watpac Construction v CGM
MEDIUM NEUTRAL CITATION: [2020] VSC 637

ADMINISTRATIVE LAW - CONSTRUCTION AND ENGINEERING - Judicial Review - Application for certiorari quashing adjudication determination - Challenge to adjudication determination - Adjudicator's jurisdiction - Existence of a valid reference date under Subcontract - Whether Adjudicator compliantly valued part of the adjudication application - Claim for summary judgment - Claim for return of money paid under mistake of fact claim - Money claim for restitution - Money had and received - Return of security - *Building and Construction Industry Security of Payment Act 2002* (Vic), ss 9, 16, 23 and 48.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr B Reid	Maddocks
For the First Defendant	Mr C Young SC with Mr W Stephenson	Holman Fenwick Willan

HIS HONOUR:

Outline of proceeding and applications

1 These reasons for judgment replace reasons for judgment in this proceeding handed down on 30 September 2020, as a result of confirmation on 6 October 2020 that parts of the contract relied upon by the plaintiff in relation to the below cross application in relation to the Torquay and Bannockburn Projects was relied upon in error and did not form part of those Contracts.¹

2 This judgment concerns:

(a) Casey Hospital Expansion Project

The trial of the plaintiff's Originating Motion dated 11 October 2019 for judicial review of an Adjudication Determination dated 18 September 2019 in relation to the Casey Hospital Expansion Project;

(b) Torquay Project and Bannockburn Project

The first defendant's application dated 19 November 2019 for summary judgment in relation to sums asserted as payable under Contracts in relation to Projects at Torquay and Bannockburn; and

(c) Bannockburn Project

The plaintiff's claim by cross-application dated 28 March 2020 in substance for an order for the return of an amount paid by mistake to the first defendant in

¹ This revised Judgment replaces the reasons for judgment provided to the parties via email on 30 September 2020 at 6.46pm. On Monday 5 October 2020 at 5.58pm an issue was raised by the Court with the parties in relation to the reasons for judgment of 30 September 2020, and specifically as to whether in relation to the first defendant's cross-claims, argument had proceeded on an incorrect definition of cl 1.1, 'Progressive Payment Claim Reference Date' under the Torquay and Bannockburn Contracts (Contracts). The plaintiff's solicitors were requested to confirm whether in its written submissions of 3 February 2020, at paragraph [12] and following, it had referred to and relied upon the incorrect version of cl 1.1 and definition of 'Progress Payment Claim Reference Date'. On Tuesday 6 October 2020 at 2.27pm the plaintiff's solicitors confirmed that paragraph [12] and following of their written submissions dated 3 February 2020, erroneously referenced the incorrect definition of the term 'Progressive Payment Claim Reference Date, being the definition contained in the separate Casey Hospital Contract (CB48) and the subject of the plaintiff's judicial review application, rather than the definition contained in the Torquay and Bannockburn Contracts the subject of the first defendant's cross-application (Cross-claim CB104). On Tuesday 6 October 2020 at 4.14pm parties were advised in light of the above confirmation, the reasons for Judgment provided on 30 September 2020 would be revised.

relation to the Bannockburn Project.

General Background

Subcontract - Casey Hospital Expansion Project

3 The plaintiff is the head contractor in relation to a construction project known as the Casey Hospital Expansion Project (the Project). The first defendant is a mechanical services subcontractor to the plaintiff on that Project.

4 In about August 2018 the plaintiff and the first defendant entered into a major works subcontract (the Subcontract) in respect of the Project, under which the first defendant undertook the design and construction of mechanical services (Works) for a lump sum price of \$10.16 million (excl GST).²

5 The scope of the Project included the addition of more than 130 new beds, four new operating theatres, a day surgery unit, new central sterilising supply department, refurbishment and expansion works to pharmacy, pathology, back of house, upgraded kitchen, teaching and training facilities and additional car parking to the existing Casey Hospital.

September 2019 Adjudication Determination under the SoP Act - Casey Hospital Expansion Project

6 On 18 September 2019, the second defendant (the Adjudicator),³ determined an adjudication application made by the first defendant under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (SoP Act), deciding that in relation to the first defendant's progress payment claim dated 25 July 2019 (July 2019 Payment Claim)⁴ Watpac Construction Pty Ltd (the plaintiff) was obliged to pay Collins & Graham Mechanical Pty Ltd (the first defendant) the sum of \$823,153.18 (incl of GST) (\$748,321.07 excl GST) (September 2019 Adjudication Determination).⁵

² CB282-501.

³ By email dated 21 October 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.

⁴ CB591.

⁵ CB2315-2416.

- 7 The Adjudicator's September 2019 Adjudication Determination:
- (a) found that the due date for payment of an adjudicated amount was 8 August 2019;⁶
 - (b) found that the due date for payment of 8 August 2019, arose prior to the effect of a 'Take Out Notice' (also dated 8 August 2019) issued under the Subcontract by the plaintiff;⁷
 - (c) confirmed the Adjudicator's acceptance of appointment as Adjudicator in respect of the adjudication application on 28 August 2019 notwithstanding that the Royal Institution of Chartered Surveyors was not one of the three (3) authorised nominating authorities specified by cl 37.6 and Schedule 1 of the Subcontract; and
 - (d) found that cl 5.6 of the Subcontract, read together with the relevant Items of Schedule 1 of the Subcontract, was in the nature of a 'pay when paid' provision. Accordingly the Adjudicator determined that \$530,000 of retention moneys, claimed by the plaintiff as a deduction under the Subcontract in respect of the first defendant's July 2019 Payment Claim, was not contractually deductible by the plaintiff and should be paid to the first defendant.

Summary of proceedings and applications

Plaintiff's judicial review proceeding

- 8 By Originating Motion for Judicial Review dated 11 October 2019 and Summons on Originating Motion dated 21 October 2019 the plaintiff seeks relief including a declaration that the September 2019 Adjudication Determination is void, alternatively, an order or judgment in the nature of *certiorari* quashing the September 2019 Adjudication Determination.

⁶ Ibid [47(c)] and [48].

⁷ Ibid [51].

Originating Motion for Judicial Review - Summary of Grounds

9 The plaintiff's Originating Motion dated 11 October 2019 relies upon the following grounds to impugn the September 2019 Adjudication Determination:

(a) **Ground 1**

The Adjudicator committed jurisdictional error, or erred in law, in determining that the Subcontract made no express provision for the date on which the progress payment in issue became due and payable. In so determining the Adjudicator incorrectly applied s 12(1)(b) of the SoP Act and wrongly determined that the date for payment of the progress payment under the Subcontract was 8 August 2019.

(b) **Ground 2**

The Adjudicator committed jurisdictional error or erred in law by finding that the date for payment was 8 August 2019 and also erred in finding that cl 38.5 of the Subcontract did not affect the first defendant's entitlement to payment of the July 2019 Payment Claim because the plaintiff's contractual Take Out Notice was issued later on 8 August 2019 and after the accrual of the first defendant's entitlement to the July 2019 Payment Claim.⁸

(c) **Ground 3**

The Adjudicator committed jurisdictional error, or erred in law, in determining that the Adjudication Application had been validly commenced notwithstanding that application was referred by the first defendant to an invalid 'Authorised Nominating Authority'.

(d) **Ground 4**

The Adjudicator committed jurisdictional error, or erred in law, rendering the September 2019 Adjudication Determination invalid, because the Adjudicator failed, pursuant to s 23 of the SoP Act, to compliantly determine the amount of the progress payment to be paid to the first defendant, and wrongly

⁸ Ibid [50]-[52].

decided that cl 5.6 of the Subcontract was a 'pay when paid' provision and also wrongly decided that past 'back charges', earlier set off against the first defendant, should be reversed.

Ground 3 abandoned

10 In the course of argument at the trial of the plaintiff's Originating Motion, the plaintiff abandoned reliance upon Ground 3 above.⁹

The first defendant's cross-claim under Contracts for the Torquay and Bannockburn works

11 By Summons dated 19 November 2019 issued in this proceeding the first defendant also seeks judgment, by way of cross-claim, under s 16(2)(a)(i) of the SoP Act, and pursuant to s 61 of the *Civil Procedure Act 2010* (Vic) (CPA) and r 22 of the *Supreme Court (General Civil Procedure) Rules 2015* (Rules), against the plaintiff in the total sum of \$116,009.63 (inc GST) together with interest and costs, in relation to Projects at Torquay and at Bannockburn, in the State of Victoria, undertaken pursuant to Contracts dated 21 March 2017 between the first defendant and the plaintiff (the Contracts).

12 The first defendant seeks payment of \$116,009.63 (incl GST) (\$32,648.41 - Torquay Project and \$83,361.22 - Bannockburn Project) on the following grounds asserted by the first defendant:

- (a) the parties entered into the Contracts within the meaning of s 4 of the SoP Act. Each of the Contracts required the first defendant to carry out construction work or supply related goods and services in the State of Victoria;
- (b) on 18 March 2019, the first defendant issued payment claims, pursuant to the SoP Act, under each of the Torquay and Bannockburn Contracts, claiming the sum of \$32,648.41 and \$83,361.22 respectively;
- (c) the plaintiff did not issue a payment schedule in response to either of the above payment claims within the time required under s 15(4) of the SoP Act,

⁹ T3.8-13.

or at all;

- (d) the plaintiff has failed to pay the first defendant the claimed amounts;
- (e) pursuant to s 16(2)(a)(i) of the SoP Act, the first defendant is entitled to recover the claimed amounts in this Court and the first defendant also seeks to recover the amounts of the said Payment Claims as debts due and recoverable under s 16 of the SoP Act; and
- (f) the plaintiff has no real prospect of successfully defending the claims.

The plaintiff's cross-application - return of money paid by mistake

13 By cross-application dated 8 April 2020 the plaintiff seeks an order that the first defendant repay to the plaintiff a sum of \$83,361.22 (incl GST) which the plaintiff asserts it paid by mistake to the first defendant on 26 March 2020.¹⁰

14 The plaintiff's claim for repayment of the sum of \$83,361.22 paid by mistake relates to the same sum in issue under the first defendant's cross-claim for payment in respect of the Bannockburn Contract.

Originating Motion for Judicial Review - Casey Hospital Expansion Project

Summary Chronology - September 2019 Adjudication Determination

15 In summary the chronology of key events relevant to the plaintiff's challenge to the September 2019 Adjudication Determination is as follows:¹¹

- (a) on 25 July 2019, the first defendant issued the July 2019 Payment Claim¹² under the SoP Act, seeking payment of \$1,747,476.07 (excl GST) pursuant to the terms of the Subcontract;
- (b) on 8 August 2019, the plaintiff issued:
 - (i) a payment schedule in response to the July 2019 Payment Claim

¹⁰ Plaintiff Submissions, 8 April 2020, [9].

¹¹ CB154-229; CB2423-2428.

¹² CB591.

(August 2019 Payment Schedule),¹³ scheduling a negative amount of -\$1,903,718.20; and

- (ii) a notice (at 4.02pm AEST) purporting to take the Casey Hospital Expansion Project Works under the Subcontract out of the hands of the first defendant, pursuant to cl 38.5 of the Subcontract (Take Out Notice);¹⁴
- (c) on 19 August 2019, the first defendant issued a Termination Notice¹⁵ in response to the plaintiff's Take Out Notice, disputing the validity of the Take Out Notice and terminating the Subcontract based on the plaintiff's alleged repudiatory conduct;
- (d) on 5 September 2019 the plaintiff provided its response to the Termination Notice;¹⁶
- (e) on 18 September 2019, the Adjudicator made the September 2019 Adjudication Determination under s 23 of the SoP Act.¹⁷

The Adjudicator determined that the first defendant was entitled to payment of \$823,153.18 (incl GST) (\$748,321.07 excl GST);

- (f) on 3 October 2019, judgment was entered against the plaintiff in favour of the first defendant in the amount of \$862,227.54 (including interest and fees) pursuant to s 28R of the SoP Act.¹⁸

First defendant's July 2019 Payment Claim did not make a claim for return of retention money

16 The first defendant's July 2019 Payment Claim was for contract work and the

¹³ CB595.

¹⁴ CB58.

¹⁵ CB71.

¹⁶ CB83-87.

¹⁷ CB2315-2416.

¹⁸ CB2553-2554; On 21 October 2019 the County Court of Victoria stayed execution of the Judgment of 3 October 2019. The Judgment has not been set aside; Affidavit Kyriakos Ioulianos, 19 November 2019, [10]-[11] (CB2548). Neither the plaintiff nor the first defendant made submissions in relation to these facts.

provision of associated goods and services; no claim was made by the first defendant for any reduction or return of security by way of cash retention under the Subcontract.

17 The plaintiff's August 2019 Payment Schedule¹⁹ responding to the July 2019 Payment Claim included a deduction item in the sum of \$530,000.00 described in Appendix 3 of the Payment Schedule as follows: '\$530,000.00 is the maximum retention that can be held on this Payment Claim for the purpose of a retention calculation for this Payment Claim'.

18 Accordingly, the issues raised by the plaintiff in relation to the September 2019 Adjudication Determination, including the Adjudicator's decision that the plaintiff was not entitled to deduct the sum of \$530,000.00 in respect of retention under the Subcontract, were not in respect of any claim by the first defendant for recovery of retention moneys. Rather the first defendant's payment claim was for the value of construction work and associated goods and services and in response the value of that payment claim was reduced by the plaintiff to the extent of \$530,000.00 on the basis of the plaintiff's asserted right to effect that deduction on account of retention under the Subcontract.

Previous adjudications

19 Prior to the September 2019 Adjudication Determination there had been two applications for adjudication made by the first defendant under the Subcontract:

- (a) on 13 July 2019, an Adjudication Determination was made pursuant to s 23 of the SoP Act pursuant to an application made by the first defendant dated 21 June 2019 in relation to the first defendant's May 2019 payment claim;²⁰
- (b) on 9 August 2019, an Adjudication Determination was made pursuant to s 23 of the SoP Act in respect of an adjudication application made by the first defendant dated 23 July 2019 in relation to the first defendant's June 2019

¹⁹ CB595 at CB602.

²⁰ CB502-551.

payment claim.²¹

September 2019 Adjudication Determination - procedural steps in the Adjudication

- 20 On 22 August 2019 the first defendant submitted its Adjudication Application (Adjudication Application)²² under s 18 of the SoP Act to the Royal Institution of Chartered Surveyors.
- 21 On 27 August 2019, the Royal Institution of Chartered Surveyors issued to the plaintiff and first defendant a 'Notice of Nomination to parties'.
- 22 On 28 August 2019, the Adjudicator accepted the Adjudication Application from the first defendant.
- 23 On 30 August 2019, the plaintiff issued an Adjudication Response (Adjudication Response).²³
- 24 On 2 September 2019, the Adjudicator issued a notice under s 21(2B) of the SoP Act with respect to alleged reasons for withholding payment relied upon in the Adjudication Response but which the Adjudicator had considered were not identified in the August 2019 Payment Schedule.²⁴
- 25 On 4 September 2019, the first defendant provided further submissions to the Adjudicator in response to the s 21(2B) Notice.²⁵
- 26 On 4 September 2019, the Adjudicator issued a request under s 22(5) of the SoP Act for further submissions on matters raised in the first defendant's further submissions.²⁶
- 27 On 5 September 2019, the plaintiff provided further submissions to the Adjudicator

21 CB5552-590.

22 CB96-153.

23 CB1223-1282.

24 CB2143-2144.

25 CB2145-2284.

26 CB2285.

SC:

in response to the s 22(5) Notice.²⁷

28 On 9 September 2019, the first defendant provided further submissions to the Adjudicator.²⁸

29 On 18 September 2019, the Adjudicator issued the September 2019 Adjudication Determination.²⁹

Grounds of appeal

Ground 1: No due date for payment - Subcontract made express provision for payment

30 The plaintiff claims the Adjudicator committed jurisdictional error, or alternatively erred in law, in determining that the Subcontract made no express provision for the date on which the progress payment, the subject of the Adjudication, became due and payable and therefore s 12(1)(a) of the SoP Act did not apply.

31 Further, the plaintiff claims that the Adjudicator, incorrectly applied s 12(1)(b) of the SoP Act in support of his finding that the due date for payment of the first defendant's progress payment under the Subcontract was 8 August 2019.

Plaintiff's submissions

32 The Adjudicator erred in holding that the July 2019 Payment Claim submitted by the first defendant sought the payment of an 'adjudicated amount' as distinct from a contractual amount and consequently the first defendant's claim for that 'adjudicated amount' was not in respect of a payment schedule amount under the Subcontract.³⁰

²⁷ CB2286-2308.

²⁸ CB2309-2314.

²⁹ CB2315-2416.

³⁰ Plaintiff Submissions, 17 December 2019, [4] and [5]; The Adjudicator found that: (a) because there is no amount payable to the first defendant in the payment schedule issued under the Subcontract by the plaintiff (as required by cl 36.4 of the Subcontract), it is the adjudicated amount which the plaintiff is required to pay to the first defendant and because the Subcontract does not make express provision for the due date for payment of an adjudicated amount, (b) the due date for payment was 8 August 2019 (fixed by s 12(1)(b) of the SoP Act) and (c) the due date for payment had accrued prior to the plaintiff's Take Out Notice taking effect (see the September 2019 Adjudication Determination, [47(c)], [48], [50] and [52]).

33 The plaintiff argues that the Adjudicator made inconsistent findings in that his findings and conclusions referred to in the last preceding paragraph above were inconsistent with [53] and [55] of the September 2019 Adjudication Determination in which the Adjudicator held that the subject payment claim complied with s 14(1) of the SoP Act, determinations which the plaintiff submits recognised that its claim was a claim for a progress payment of a contractual amount for work undertaken under the Subcontract.³¹ The plaintiff's submission is that the first defendant's July 2019 Payment Claim was not seeking payment for an 'Adjudicated Amount'.

34 The plaintiff also submits that because the Adjudicator found that there had been both a valid payment claim (the first defendant's July 2019 Payment Claim), and also found that the plaintiff had provided a valid payment schedule (the plaintiff's August 2019 Payment Schedule) the Adjudicator was bound to apply either cls 36.4(a) or 36.4(b) of the Subcontract.

35 In essence the plaintiff submits that cl 36.4 of the Subcontract predicates a payment entitlement either by the plaintiff as Head Contractor to the first defendant as Subcontractor, or payment by the first defendant to the plaintiff in accordance with the plaintiff's determination in the August 2019 Payment Schedule as to the amount payable by it to the first defendant or by the first defendant to the plaintiff.

36 Further, the plaintiff submits that cl 36.3 of the Subcontract informs the amount to be determined by the plaintiff in its cl 36.4 payment schedule. Clause 36.3 of the Subcontract provides in essence for the plaintiff to issue a payment schedule to the first defendant within 10 business days of receipt of the subcontractor's payment claim under cl 36.1 or cl 36.8. Clause 36.3 includes the requirement that the plaintiff's payment schedule determines the money due under the Subcontract from the plaintiff as Head Contractor to the first defendant as Subcontractor.

37 The plaintiff submits that because pursuant to cl 36.4 the plaintiff issued the August 2019 Payment Schedule determining that the first defendant must pay the plaintiff

³¹ Plaintiff Submissions, 17 December 2019, [7].

an amount of \$1,903,718.20,³² and as a result of cl 36.4 providing that such a payment must be made by the plaintiff within three days of issue of the payment schedule, the date for payment in relation to the first defendant's July 2019 Payment Claim was 13 August 2019.³³

38 The plaintiff submits that the Adjudicator erroneously characterised the amount sought by the plaintiff in the Adjudication Application as an amount in the nature of an 'Adjudicated Amount' rather than for work undertaken pursuant to the Subcontract and concluded that because cl 36.4 of the Subcontract was silent as to 'Adjudicated Amounts', s 12(1)(b) of the SoP Act applied.³⁴

39 The plaintiff submits that the Adjudicator has erred by in substance equating the outcome of the Adjudication in relation to the first defendant's payment claim with the first defendant's claim for a progress payment under the Subcontract, rather than, as he was required to do, determining when the first defendant's progress payment under the construction contract fell due and payable in accordance with the terms of the Subcontract. In this regard the plaintiff submits that:

Rather than determining when a progress payment under a construction contract becomes due and payable in accordance with the terms of the Subcontract, the Adjudicator, incorrectly, considered that the relevant enquiry he was to make for determination of a "due date for payment" in accordance with section 12 of the Act, was the timing of the payment of "an adjudicated amount" – being an amount he had yet to determine. A breach of section 12 of the Act is jurisdictional.³⁵

40 On the basis of the submissions outlined above the plaintiff asserts that the September 2019 Adjudication Determination is void and that the Court should make a declaration to that effect or alternatively make an order in the nature of *certiorari* quashing the September 2019 Adjudication Determination.

³² CB595-620, Plaintiff's August 2019 Payment Schedule.

³³ Plaintiff Submissions, 17 December 2019, [18]; CB2315-2416, September 2019 Adjudication Determination, [47(b)].

³⁴ CB2315-2416, September 2019 Adjudication Determination, [47(b)]; Plaintiff Submissions, 17 December 2019, [21] and [22]; Plaintiff's Submission T19.9-16; T23.6-12 as to approach available to Adjudicator.

³⁵ Plaintiff Submissions, 17 December 2019, [25].

First defendant's submissions

41 The first defendant submits that the Adjudicator correctly found that:

- (a) the Subcontract did not make express provision for the due date for payment in circumstances where:
 - (iii) a payment schedule certified a sum owing to the principal (Watpac); and
 - (iv) an amount to be paid by the principal (Watpac) was determined to be owing in a later Adjudication Determination.
- (b) accordingly, the first defendant submits that the default position provided for in s 12(1)(b) of the SoP Act applied, and the date for payment was therefore 10 Business Days after the payment claim was made, namely on 8 August 2019.

42 The first defendant submitted that:

The Adjudicator was correct in determining that neither of Watpac's interpretations of the Subcontract should be accepted. The Adjudicator's determination is quite straightforward, and entirely correct. He determined that:

- (a) Clause 36.4(a) applies where Watpac issues a payment schedule "*where it is to make payment of an amount to CGM*"³⁶;
- (b) Clause 36.4(b) applies to circumstances where CGM is required to make payment to Watpac³⁷; and
- (c) the contract makes no provision of the due date for payment by Watpac to CGM in circumstances where Watpac issues a payment schedule certifying a sum owing by CGM and an adjudicator later determines that either nil or a positive sum is owing from Watpac to CGM.³⁸

43 The first defendant submits that s 23 of the SoP Act requires the Adjudicator to determine the amount (if any) payable by the plaintiff to the first defendant and the date on which that amount becomes due and payable. The first defendant submits that the amount which is the subject of s 23 of the SoP Act is not addressed in cl 36.4

³⁶ CB2267-2268, [47].

³⁷ CB2267-2268, [47].

³⁸ First Defendant Submissions, 31 January 2020, [23].

of the Subcontract. In this regard the first defendant submits that 'that amount' referred to in s 23 of the SoP Act cannot be a reference to the amount referred to in the plaintiff's 'payment schedule' because the August 2019 Payment Schedule sets out an amount payable by the first defendant to the plaintiff and not an amount payable by the plaintiff to the first defendant.

44 The first defendant submits that cl 36.4(a) of the Subcontract is inapplicable because the plaintiff's August 2019 Payment Schedule did not determine '... an amount payable by Watpac to the subcontractor'.

45 Similarly, the first defendant submits that cl 36.4(b) of the Subcontract is inapplicable because it operates only to provide a payment date where 'the Subcontractor must pay to Watpac the amount assessed' pursuant to a payment schedule issued by the plaintiff. Accordingly, cl 36.4(b) has an operation limited to where the first defendant is obliged to make payment to the plaintiff, and not where, as the first defendant submits in this case, the plaintiff has scheduled an amount owed to it by the first defendant which was subsequently overturned by an adjudication determination.

46 The first defendant submits on the basis of the above that cl 36.4 of the Subcontract was relevantly inapplicable and therefore the Adjudicator was justified and correct in determining that the relevant due date for payment should be calculated in accordance with s 12(1)(b) of the SoP Act.

47 The first defendant also submits that if the Adjudicator was in error (which the first defendant denies) the Court should nevertheless refuse relief because the consequence would only sound in a different amount of interest to which the first defendant is entitled and as a result is insignificant and insufficient to justify the Court granting the remedy in *certiorari* on discretionary bases.³⁹

Considerations - Ground 1

48 Section 12 of the SoP Act provides:

³⁹ Ibid [29]-[33].

12. Due date for payment

- (1) A progress payment under a construction contract becomes due and payable-
 - (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or
 - (b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.
- (2) Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with subsection (1) at the greater of the following rates-
 - (a) the rate for the time being fixed under section 2 of the Penalty Interest Rates Act 1983; or
 - (b) the rate specified under the construction contract.

49 The Subcontract provides as follows in cl 36.1:

36.1 Timing of Payment Claims

The Subcontractor must submit claims for payment ("each a payment claim) to Watpac:

- (a) on each relevant Progressive Payment Claim Reference Date for Work Under the Subcontract completed to the date specified in Schedule 1; and
- (b) on the Final Payment Reference Date.

An early payment claim shall be deemed to have been submitted on the date the Subcontractor was entitled under the Subcontract to submit it.

The Subcontractor must not include in any payment claim, and will otherwise have no Entitlement in relation to, an amount:

- (c) in respect of Defects or any part of the Work Under the Subcontract or the Subcontract Works that contains a Defect; or
- (d) in respect of which the Subcontractor is not entitled to payment, including in respect of any claim or Entitlement barred under a provision of the Subcontract or in respect of which the Subcontractor has not satisfied a condition precedent (including clause 39.4) or a claim or Entitlement in respect of which the Subcontractor has provided, is deemed or taken to have provided, or is required to provide, a release (including under clause 36.10).

50 Clause 36.3 of the Subcontract provides:

36.3 Payment Schedules

Within 10 Business Days of receipt of a payment claim under clause 36.1 or clause 36.8, Watpac may issue a payment schedule to the Subcontractor. A payment schedule will set out:

- (a) the payment claim (if any) to which the payment schedule relates;
- (b) Watpac's determination of:
 - (i) the moneys due from Watpac to the Subcontractor; and
 - (ii) if Watpac determines that no moneys are due from Watpac to the Subcontractor, Watpac's determination of the moneys due from the Subcontractor to Watpac; and
- (c) if the amount referred to in paragraph (b)(i) is less than the amount claimed in the relevant payment claim, the reasons for the difference,

and, if it is less because of the withholding of payment for any reason, the reasons for withholding payment.

Watpac may issue a payment schedule whether or not the Subcontractor makes (or is entitled to make) a payment claim.

Watpac may, in any payment schedule, correct any error in, or otherwise modify, any previous payment schedule.

51 Clause 36.4 of the Subcontract provides:

36.4 Payment

If Watpac, in its payment schedule (including the final payment schedule under clause 36.9), determines an amount as payable by:

- (a) Watpac to the Subcontractor, Watpac must (subject to clauses 36.13 and 36.14) pay the Subcontractor the amount assessed within the period stated in schedule 1 (or where the Subcontractor does not make a payment claim and Watpac nevertheless issues a payment schedule, within 30 Business Days of the payment schedule); or
- (b) the Subcontractor to Watpac, the Subcontractor must pay Watpac the amount assessed within 5 days of the issue of the payment schedule.

To the maximum extent permitted by Law, notwithstanding any other provision of the Subcontract, the Subcontractor is not entitled to submit a payment claim and shall have no Entitlement to any payment under the Subcontract in respect of Defects or any part of the Work Under the Subcontract or the Subcontract Works that contains a Defect.

52 Schedule 1 of the Subcontract states as follows:

Time for payment: The later of:
(clause 36.4(a))

1. [insert]; and
[If nothing stated in paragraph 1 above, the first working day on or after the 38th day from the end of the month in which the payment claim was submitted.]
2. the date that the Subcontractor has complied with the clauses referred to in Schedule 7.

53 Schedule 7 of the Subcontract identifies subcontractor obligations under numerous Subcontract clauses.

54 The plaintiff and the first defendant do not contest that by combined operation of cl 36.1 and the relevant cross-referenced Item in Schedule 1, the Subcontract fixes the 25th day of each month as the Progressive Payment Claim Reference Date. The main controversy between the parties under Ground 1 is in relation to the date on which a progress payment under the Subcontract or the SoP Act becomes due and payable.

The Operation of Clause 36 – Payment

55 The Subcontract provides in cl 36.3 that in response to the first defendant's claims for payment under cl 36.1(a):

Within 10 Business Days of receipt of a payment claim under cl 36.1 or 36.8, Watpac may issue a payment schedule to the subcontractor.

56 Clause 36.3 also provides that if issued by the plaintiff, a payment schedule will set out the plaintiff's determination of the moneys due from the plaintiff to the Subcontractor.

57 Clause 36.4 of the Subcontract provides that the plaintiff's obligation to make payment to the first defendant as Subcontractor, is applicable only if the plaintiff in its payment schedule determines an amount as payable by it to the first defendant.

58 Only if such an amount is determined by the plaintiff as payable by the plaintiff to the first defendant does cl 36.4(a) engage with Schedule 1 of the Subcontract to provide a date on which payment becomes due.

59 Where the plaintiff by its payment schedule determines an amount is payable to the Subcontractor, the Subcontract expressly 'provide(s) for the date on which a progress payment becomes due and payable'.⁴⁰

Adjudicator's reasoning and determination in relation to the Subcontract payment provisions

60 By his Adjudication Determination dated 18 September 2019 the Adjudicator determined that the relevant date for payment under the Subcontract was 8 August 2019. The Adjudicator reasoned that:⁴¹

47. Similar to the two previous adjudication determinations:

- (a) Clause 36.4(a) of the contract applies when Watpac issues a payment schedule where it is to make payment of an amount to CGM, the payment schedule amount. In that case the payment would be due, *'the first working day on or after the 38th day from the end of the month in which the payment claim was submitted'*. If clause 36.4(a) was to apply, the due date for payment would be 9 September 2019; however,

⁴⁰ CB42, Originating Motion, Ground 1; CB282-501-Subcontract, cl 36.4(a) and Schedule 1.

⁴¹ CB2325-2326; September 2019 Adjudication Determination, [47].

- (b) Watpac in its payment schedule, has determined that an amount is payable by CGM to Watpac, accordingly 36.4(b) of the contract would apply and that *would provide the due date for payment as being by 13 August 2019; however,*
- (c) In this instance, there is (or will be) an adjudicated amount that is either nil or is a positive figure (the adjudicated amount has not yet been determined) that the respondent is to pay to the claimant. As it is not a payment schedule amount (as required by clause 36.4 of the contract), it is an adjudicated amount and the contract does not make an express provision for the due date for payment (as required by s 12(1)(a) of the Act).
- (d) Accordingly, s 12(1)(b) of the Act would apply, this provides for the due date for payment being 10 business days after the payment claim was made (25 July 2019 + 10 business dates) 8 August 2019 (in accordance with the previous adjudicator(s) timing).

61 In my view the Adjudicator was correct in his conclusions that:

- (a) clause 36.4(a) of the Subcontract applies only if and when the plaintiff issues a payment schedule pursuant to which the plaintiff has determined that an amount is payable to the first defendant;
- (b) clause 36.4(b) of the Subcontract applies only in circumstances where the Subcontractor is required to make a payment to the plaintiff; and
- (c) the Subcontract makes no provision for the date on which the Subcontractor's claim becomes due and payable where the plaintiff issues a payment schedule which does not determine an amount payable by the plaintiff to the Subcontractor;
- (d) in the above circumstances s 12(1)(a) of the SoP Act is inapplicable, however s 12(1)(b) of the Act applies to fix the date when the first defendant's progress payment entitlement becomes due and payable;
- (e) the application of s 12(1)(b) of the SoP Act fixes 8 August 2019 as the date when the progress payment under this Subcontract becomes due and payable.

62 I do not accept the reasoning in sub-paragraph (c) above of the Adjudicator's reasoning (extracted from [47] of the September 2019 Adjudication Determination) as

relevant or correct. This component of the Adjudicator's reasoning and conclusions does not however impugn those critical parts of the Adjudicator's reasoning in subparagraphs (a) to (e) of the last preceding paragraph, which conclusions I uphold on the proper operation of cl 36 and Schedule 1 of the Subcontract outlined above.

63 Accordingly, in my view, the plaintiff's submission extracted at [38] above does not establish any error by the Adjudicator including in relation to the Adjudicator's ultimate conclusion and determination as to the application of s 12(1)(b) of the SoP Act fixing 8 August 2019 as the date on which the first defendant's July 2019 Payment Claim was payable.

64 For the reasons outlined above, I therefore reject the plaintiff's assertion that the Adjudicator was wrong to conclude that the Subcontract had no express provision for the date on which a progress payment became due and payable where the plaintiff's August 2019 Payment Schedule under the Subcontract did not determine an amount was payable to the first defendant. I also reject the plaintiff's companion assertion that cl 36.4 of the Subcontract provided a due date for payment of progress claims where no payment is determined in the Subcontractor's favour by the plaintiff.

65 I consider that the Adjudicator was correct to conclude and determine that because in the applicable circumstances the Subcontract did not provide the date on which the first defendant's progress payment for construction work and related goods and services became due and payable, the resultant position was that the date on which the relevant progress payment became due and payable was fixed, pursuant to s 12(1)(b) of the SoP Act, at 8 August 2019.

Conclusion - Ground 1

66 Accordingly, Ground 1 of the plaintiff's Originating Motion fails.

Observations in relation to clause 38.5 - Take Out Notice

67 Although, as noted below in relation to Ground 2, it is accepted by the parties that

failure by the plaintiff on Ground 1 above renders it unnecessary for the Court to deal with and determine Ground 2 of the plaintiff's Originating Motion, I add the following in relation to the plaintiff's now redundant argument that the plaintiff's Take Out Notice of 8 August 2020, together with the effect of cl 38.5 of the Subcontract, brought an end to any entitlement the first defendant may otherwise have had to payment of its July 2019 Payment Claim.⁴²

68 It is accepted by the parties in this matter that cl 36.1 of the Subcontract establishes a Reference Date in relation to the subcontractor's claims for payment for the purposes of ss 9 and 14 of the SoP Act. Sections 9 and 14 of the SoP Act establish an entitlement to a progress payment under the Act in respect of construction work undertaken and supply of related goods and services under relevant construction contracts, calculated by reference to each reference date under the construction contract.

69 The calculation of the amount of the progress payment to which a contractor is entitled, including interest, is arrived at in accordance with the provisions of the SoP Act including ss 10, 11, 12 and 23 of the Act, in conjunction with any relevant provision of the construction contract.

70 The enlivenment of a contractor's entitlement to a progress payment under the SoP Act gives rise to an accrued right to the amount of progress payment (if any) and interest (if any) to be determined by an Adjudicator pursuant to s 23 of the SoP Act and in accordance with the provisions of the Act.

71 Contractual provisions which purport to exclude, modify or restrict the operation of the SoP Act are rendered void and of no effect by s 48 of the Act.

72 The Subcontract provides in cl 38.5 as follows:

38.5 Watpac May Terminate Subcontract or take Work under the Subcontract out of Subcontractor's Hands

If an act of default under clause 38.4 occurs, Watpac may, by written notice to

⁴² Plaintiff submits that first defendant has not and cannot challenge the validity of the Take Out Notice, T32.1-11.

the Subcontractor, do either of the following:

- (a) terminate the Subcontract; or
- (b) take all or any part of the Work Under the Subcontract out of the hands of the Subcontractor.

If Watpac has exercised its right to take all or any part of the Work Under the Subcontract out of the hands of the Subcontractor it may then, by further written notice:

...

If Watpac has exercised its rights under this clause 38.5 to terminate the Subcontract or take all or any part of the Work Under the Subcontract out of the hands of the Subcontractor:

...

- (g) Watpac shall not be obliged to make any further payment to the Subcontractor (whether pursuant to a payment schedule or otherwise) until all of the following conditions are satisfied: ...

73 I consider that cl 38.5, and in particular cl 38.5(g), of the Subcontract is rendered ineffective by s 48 of the SoP Act, to exclude, modify or restrict the first defendant's rights and entitlements under the Act, including pursuant to ss 9, 12 and 23(1)(b) of the Act.

74 I also consider that any attempt by the plaintiff to deploy cl 38.5 of the Subcontract to deny the first defendant's entitlements under the SoP Act to payment in relation to the first defendant's July 2019 Payment Claim would be void and ineffective as a result of the operation of s 48 of the SoP Act.

75 I also observe that the practical effect of the above is as the first defendant has submitted, that is even if the plaintiff was correct in its assertion as to the date for payment of the first defendant's July 2019 Payment Claim under the Subcontract (13 August 2019) which I have rejected.⁴³

Ground 2: Take notice and or operation of cl 38.5 - no due date for payment

76 The plaintiff claims that the Adjudicator committed jurisdictional error, or alternatively erred in law, by concluding on the basis of the Adjudicator's incorrect determination that the due date for payment was 8 August 2019, cl 38.5 of the Subcontract had no effect on the first defendant's entitlement to payment with respect to the July 2019 Payment Claim, because 'the claimant had accrued a right to

⁴³ Plaintiff Submissions, 17 December 2019, [18], only a small amount of interest ultimately turns on whether 8 August 2019 or 13 August 2019, is the applicable date.

payment at 8 August 2019'.⁴⁴

77 Ground 2 of the plaintiff's Originating Motion is predicated on the Adjudicator erroneously finding that 8 August 2019 was the due date for payment of the plaintiff's July 2019 Payment Claim and thereby also wrongly concluding that the plaintiff's 8 August 2019 Take-Out Notice (issued after 4.00pm AEST) under cl 38.5 of the Subcontract was ineffective to suspend all payment entitlements to the first defendant after 4.00pm on 8 August 2019.

78 As earlier alluded to in paragraph [66] above, given my conclusions and decision in relation to Ground 1 above I do not consider it necessary to deal with and decide Ground 2 of the plaintiff's Originating Motion for Judicial Review. This is because the Adjudicator has correctly found that the Subcontract made no express provision for the date on which the first defendant's July 2019 Payment Claim became due and payable, consequently s 12(1)(b) of the SoP Act applied so as to fix the date of 8 August 2019 as the date for payment of the first defendant's July 2019 Payment Claim.

79 Further, I note that during argument at trial, both the plaintiff and the first defendant submitted that if the plaintiff was unsuccessful on Ground 1, it was unnecessary for the Court to determine Ground 2 of the plaintiff's Grounds.⁴⁵

Conclusion - Ground 2

80 For the above reasons it is not necessary to further consider and determine Ground 2 of the plaintiff's Originating Motion.

Ground 3: Adjudication application not validly commenced

81 The plaintiff claims that the Adjudicator committed jurisdictional error, or alternatively erred in law, in determining that the Adjudication Application had been validly commenced in circumstances where, on the plaintiff's assertion, the body to which the first defendant submitted its Adjudication Application was not an

⁴⁴ CB2315-2416, September 2019 Adjudication Determination, [50].

⁴⁵ T31.20-T32.1.

authorised nominating authority under the SoP Act.

82 However, as noted above, in the course of argument at trial the plaintiff abandoned Ground 3 of its Originating Motion.⁴⁶

Ground 4: Valuation of the Work

83 The plaintiff claims that the Adjudicator committed jurisdictional error, or alternatively erred in law because, in relation to the September 2019 Adjudication Determination, the Adjudicator did not undertake the task of determining the amount of progress payment to be paid to the first defendant as required by s 23 of the SoP Act.

84 Further, the plaintiff claims that the September 2019 Adjudication Determination was not a valid determination pursuant to s 23 of the SoP Act because the Adjudicator failed to compliantly determine the amount of the progress payment to be paid to the first defendant, wrongly deciding that the provisions of cl 5.6 of the Subcontract were ‘pay when paid’ provisions and because the Adjudicator failed to sever the ‘pay when paid’ provisions of the Subcontract and further wrongly deciding that past ‘Back Charges’ earlier set off against the first defendant should be reversed.

Plaintiff’s submissions

85 The plaintiff submits that the Adjudicator erred in failing to conclude that he was empowered to sever unenforceable parts of the Subcontract (cl 5.6 of the Subcontract) and erred in failing to then proceed to value the first defendant’s July 2019 Payment Claim pursuant to s 23(2) of the SoP Act.

86 The plaintiff submits that ‘at least’ two of the nine completion criteria in Schedule 1 of the Subcontract were obligations which remained incomplete at the date of the July 2019 Payment Claim.

87 Further, the plaintiff submits that the Subcontract Works did not achieve Substantial

⁴⁶ T3.11-13.

Completion as defined by the Subcontract, for example in respect of the Project:

- (a) fifteen (15) percent of the design documentation was not completed;⁴⁷
- (b) the demolition works were incomplete;⁴⁸
- (c) the temporary media works had not commenced;⁴⁹
- (d) duct work was incomplete;⁵⁰
- (e) pipework was incomplete.⁵¹

88 The plaintiff argues that the Adjudicator should have found that the Subcontract Works were incomplete and did not satisfy the Substantial Completion criteria under the Subcontract and found that because the Works were incomplete, the defects liability period under the Subcontract had not commenced.

89 The plaintiff further submits that because the Adjudicator wrongly considered that he was not able to sever 'pay when paid' provisions of the Subcontract, the Adjudicator linked the first defendant's completion obligations, and its obligations to rectify defects, under the Subcontract to the Head Contract.⁵² The plaintiff contends that in this way the Adjudicator also failed to properly consider the provisions of the Subcontract as required by s 23(2)(b) of the SoP Act and thereby wrongly determined that retention moneys in the sum of \$530,000 could not be deducted from the first defendant's payment claim entitlements.⁵³

90 The plaintiff also submits that in relation to previous claims determined in earlier adjudications in respect of 'Back Charges':⁵⁴

⁴⁷ CB1283-1304, [24].

⁴⁸ Ibid [25].

⁴⁹ Ibid [29].

⁵⁰ Ibid [32].

⁵¹ Ibid [35] and [42].

⁵² T34.1-13.

⁵³ Plaintiff Submissions, 17 December 2019, [63]; CB2315-2416, September 2019 Adjudication Determination, [502], [546]-[553] and [559].

⁵⁴ Plaintiff Adjudication Response, [304]-[305].

- (a) the amounts of the Back Charges were undisputed between the plaintiff and the first defendant (paragraph [103] of first Previous Determination dated 13 July 2019); and
- (b) the first defendant did not pursue its claims with respect to the Back Charges in its application in relation to the second previous Determination dated 9 August 2019 (paragraph [52] of second Previous Determination).⁵⁵

91 The plaintiff submits that in the circumstances, and in particular because the valuation of the Back Charges has not changed subsequent to the previous determinations of 13 July 2019 and 9 August 2019, the Adjudicator was pursuant to s 23(4) of the SoP Act required to give any relevant work or goods and services, the same value as the value previously determined, subject to the parties to the adjudication being able to satisfy the Adjudicator that the value of the relevant work or goods and services had changed since the previous determination(s).

92 The plaintiff submits that the Adjudicator has erred in undertaking an evaluation of the Back Charges,⁵⁶ valuing the Works in part on the assumption that the first defendant was entitled to recover the amounts that the previous adjudications had determined should be carried over as a negative sum(s) in the calculation of the Adjudicated Amount by adopting a 'nil' allowance for Back Charges in the September 2019 Adjudication Determination.⁵⁷

93 The plaintiff also submits that the Adjudicator had the power to sever unenforceable parts of the Subcontract which were caught by the 'pay when paid' provisions of s 13 of the SoP Act but erroneously failed to do so.⁵⁸

First defendant's submissions

94 The first defendant submits that the plaintiff's attack on the September 2019 Adjudication Determination in Ground 4 in relation to the Adjudicator's valuation of

⁵⁵ Plaintiff Submissions, 17 December 2019, [65].

⁵⁶ Ibid [52(b)].

⁵⁷ Ibid [68]; T43.9-14.

⁵⁸ Ibid [53]-[57]; *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183, [65] approving *Gantley Pty Ltd and Ors v Phoenix International Group and Ors* [2010] VSC 106, [93]-[120].

retention amounts and Back Charges discloses no error of law by the Adjudicator.

95 The first defendant also submits that the plaintiff's position that the Adjudicator should have embarked on a process of analysing not only the General Conditions of the Subcontract but the requirements of a number of technical schedules to the Subcontract, in particular Schedules 1 and 10, to determine which specific provisions were in the nature of 'pay when paid' provisions by reference to s 13 of the SoP Act⁵⁹ is to require an impractical and unnecessary approach by the Adjudicator and also one which is contrary to the intent of the SoP Act which is to provide a quick and efficient determination of disputes concerning payment to a contractor.

96 The first defendant submits that the plaintiff is wrong in its assertion that the Adjudicator could have severed certain elements of the Subcontract. The first defendant submits that the authorities relied upon by the plaintiff relate to the severance of parts of a payment claim to permit the valid portion of that payment claim to be an effective vehicle for the claim, in circumstances where no material change to the substance of the payment claim resulted.⁶⁰

97 The first defendant concedes however that it may be that where an offensive provision exists in the relevant Subcontract which is clearly able to be separated from other enforceable provisions, that offensive provision could be severed. However, the first defendant also submits that in a comprehensive, complex and intertwined set of provisions of the type which exist in the subject Subcontract it is not feasible or appropriate to sever any provision which might fall within from remaining inoffensive provisions of the Subcontract.⁶¹

98 The first defendant also argues that a subsequent adjudicator is only obliged to 'give the work or goods and services the same value as that previously determined' in a prior adjudication, if the value of those works was previously 'determined' in accordance with s 11 of the SoP Act.

⁵⁹ First defendant Submissions, 31 January 2020, [102]-[103].

⁶⁰ Ibid [104]-[108].

⁶¹ Ibid [110].

99 The first defendant points out that the value of the relevant Back Charges which the plaintiff puts in issue has not been determined in accordance with s 11 of the SoP Act in any prior adjudication prior to the September 2019 Adjudication Determination.

100 Further, the first defendant submits that even if it were not the case that the Back Charges included in the September 2019 Adjudication Determination were not the subject of a previous adjudication determination, the question of whether or not Back Charges were or were not the subject of an adjudication prior, is a question of fact and not reviewable in the present context.⁶²

Considerations - Ground 4

101 Section 13 of the SoP Act provides as follows:

13. Effect of *pay when paid* provisions

(1) A pay when paid provision of a construction contract has no effect in relation to any payment for –

- (a) construction work carried out or undertaken to be carried out under the contract; or
- (b) related goods and services supplied or undertaken to be supplied under the contract.

(2) In this section –
money owing, in relation to a construction contract, means money owing for –

- (a) construction work carried out under the contract; or
- (b) related goods and services supplied under the contract;

pay when paid provision of a construction contract means a provision of the contract –

- (a) that makes the liability of one party (the first party) to pay money owing to another party (the second party) contingent on payment to the first party by a further party (the third party) of the whole or any part of that money; or
- (b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or
- (c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

102 The Subcontract provides in cl 5.6 that:

The security (other than the security provided under clause 36.7) shall be reduced at the time and to the amount stated in Schedule 1. The balance of the security (other

⁶² Ibid [119].

than the security provided under clause 36.7) then held by Watpac (and not applied) shall be released and returned to the subcontractor at the time stated in Schedule 1.⁶³

103 Schedule 1 of the Subcontract provides:

Time for Reduction of Security

Security shall be reduced following the later to occur of:

1. The date that is 14 days after the Date of Substantial Completion;
2. The achievement of Practical Completion under the Head Contract;
3. The satisfactory rectification by the Subcontractor of all defects notified to the Subcontractor by Watpac on or before the Date of Substantial Completion, or where there are stages, on or before the last date of Substantial Completion;
4. Receipt of a written notice from the Subcontractor requesting a reduction of Security.

Date of Final Release of Security

1. The expiry of the Defects Liability Period, or where there is more than one Defects Liability Period, after the last of the Defects Liability Period to expire;
2. Satisfactory rectification of all Defects;
3. The subcontractor has complied with all of its other obligations under the Subcontract;
4. Receipt of a written notice from the Subcontractor requesting a reduction of Security;
5. The return of the security under the Head Contract.⁶⁴

It is to be noted that the above requirements [1] to [4] and [1] to [5], total nine requirements.

104 In the September 2019 Adjudication Determination the Adjudicator addressed each of the above requirements of Schedule 1, referred to in cl 5.6 of the Subcontract and concluded in respect of each of the matters under the heading 'Time for Reduction of Security' referred to in numbered paragraphs [1] to [4] (inclusive) and in relation to all the matters under the heading 'Date of Final Release of Security', (referred to in Schedule 1 of the Subcontract and above), that those requirements had either been satisfied, as a matter of factual finding by the Adjudicator, or were in the nature of 'pay when paid' provisions and consequently of no effect in relation to the first defendant's entitlement to payment for construction work or the provision of related goods and services as a result of the operation of s 13(1) of the SoP Act.⁶⁵

105 The Adjudicator provided reasons for so concluding in relation to each of the nine above Schedule 1 matters referred to in respect of 'Time for Reduction of Security'

⁶³ CB282-501.

⁶⁴ Ibid.

⁶⁵ CB2403-2411, September 2019 Adjudication Determination, [525]-[559].

([1]-[4]) and 'Date of Final Release of Security' ([1]-[5]) in his September 2019 Adjudication Determination.⁶⁶

106 In its oral submissions at trial, and its written submissions, the plaintiff did not refute or traverse the nine above conclusions and findings by the Adjudicator in relation to the 'pay when paid' character of the Subcontract Schedule 1, Time for Reduction of Security requirements referred to above, or the Adjudicator's determinations as to which of those requirements had been satisfied by the first defendant as a matter of factual finding. The plaintiff focused on the Adjudicator proceeding to conclude that the existence of a number of Subcontract requirements he considered to be of a 'pay when paid' character resulted in the application of s 13 of the SoP Act impugning the entirety of the clause.

107 For the above reasons I am not satisfied that the plaintiff has established any error on the part of the Adjudicator in relation to the Adjudicator's conclusions and determinations in respect of the nine Schedule 1 matters referred to above which the Adjudicator has either decided were in the nature of 'pay when paid' provisions, and therefore unenforceable by reason of s 13(1) of the SoP Act, or were satisfied on the Adjudicator's factual findings.

108 Further, I also consider that the finding of the Adjudicator in relation to both the matters referred to in paragraphs [103] to [105] above and in respect of the 'Back Charges' in issue not having been determined in the two said prior adjudications,⁶⁷ are substantially in the nature of factual findings by the Adjudicator and therefore not amenable to judicial review in the present context. The Back Charges in question are:

Bearing Test for 200t crane (-\$4,070), 60t mobile for mechanical pipework (-\$3,669.52), 70t mobile (-\$6,881.90) and replacement cable (-\$12,890.35) (Back Charges).

109 In addition, the Adjudicator's determinations referred to in paragraphs [103] to [107]

⁶⁶ Ibid [525]-[559].

⁶⁷ Ibid [493]-[513] refer: [502] and [509].

above, even if incorrect (which I have rejected) do not in my view give rise here to any jurisdictional error by the Adjudicator, and for the above reasons I am not persuaded that the Adjudicator has fallen into any error of law, or otherwise erred, in deciding these matters which fell within his jurisdiction, referred to in paragraphs [103] to [107] above.

110 Finally, I also accept the first defendant's submission that the plaintiff has not identified precisely which of the nine above requirements addressed and decided by the Adjudicator should, on the plaintiff's assertion, result in the severance of provisions of cl 5.6, Schedule 1 or Schedule 10 of the Subcontract nor am I satisfied that the Adjudicator was at law bound to sever particular provisions of the Subcontract

111 Neither does the plaintiff's Originating Motion for Judicial Review sufficiently identify what the plaintiff seeks to have severed, save that it alleges that the Adjudicator incorrectly found that the entirety of cl 5.6 and all the criteria specified in Schedule 1 were void and unenforceable and did not apply the principle of severance.⁶⁸

112 For the above reasons Ground 4 of the plaintiff's Originating Motion is also rejected and given the above bases for rejection it is not in my view necessary to decide whether the Adjudicator was empowered to sever some provision, or provisions, of the Subcontract as the plaintiff urged should be done, ⁶⁹ both because I have concluded that no error by the Adjudicator has been established in relation to the Adjudicator's findings and conclusions referred to in paragraphs [103] to [107] above, and also because the plaintiff has failed to adequately identify precisely which parts of the Subcontract it sought to have severed, and has failed to persuade me that the Adjudicator was obliged to sever. Put another way I am also not persuaded the Adjudicator was not entitled to proceed as he did in his Adjudication Determination in relation to the application of s 13 of the SoP Act in respect of

⁶⁸ CB39-49, [8(d)]; T35-40; T100.23-31.

⁶⁹ *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd* [2020] VSC 414, [73]-[75].

correctly identifying 'pay when paid' stipulations in the Subcontract.

Further, I also accept the first defendant's submission that because of the contractually interrelated nature of the completion related requirements of cl 5.6 and Schedules 1 and 10, any severance, as argued for by the plaintiff, would have done substantial violence to the Subcontract.

Conclusion - Ground 4

113 For the above reasons Ground 4 of the plaintiff's Originating Motion fails.

First defendant's Cross-Application

114 The first defendant's cross-application dated 19 November 2019 seeks summary judgment against the plaintiff pursuant to s 61 of the CPA and r 22 of the Rules.

115 As outlined above, the first defendant's summary judgment claim is based on its asserted entitlement under s 16(2)(a)(i) of the SoP Act in respect of:

- (a) the Torquay Payment Claim dated 18 March 2019 under the Torquay Contract, claiming the sum of \$32,648.41 (incl GST);
- (b) the Bannockburn Payment Claim dated 18 March 2019 under the Bannockburn Contract, claiming the sum of \$83,361.22 (incl GST).

116 The plaintiff has not issued a payment schedule in response to the first defendant's Torquay Payment Claim or its Bannockburn Payment Claim (collectively, the Payment Claims) within the time specified in s 15(4) of the SoP Act.

117 On the above bases, the first defendant submits that the amounts it claims in respect of the Payment Claims are debts which are due and recoverable under s 16 of the SoP Act.

118 The first defendant submits that the test to be applied on an application of this nature is outlined in *John Beever v Roads Corporation* in the following passages:⁷⁰

56. Notwithstanding that it is intended to be resolved expeditiously, and

⁷⁰ [2018] VSC 635, [56]-[63].

gives rise to only interim entitlements which are subject to allowance and restitution in future civil proceedings,⁷¹ the claim and procedure for entering judgment under s 16(2)(a)(i) of the SOP Act is treated analogously to any other civil claim to which the CPA applies. That is to say, the plaintiff can apply for 'summary judgment' under s 61 of the CPA on its claim under s 16(2)(a)(i) of the SOP Act, and the plaintiff should succeed on such an application if the defendant's defence to that claim has 'no real prospect of success'.

57. I see no justification for displacing one of the regimes under consideration in favour of the other. The two statutes, namely the SOP Act and the CPA, and the regimes which they establish, although fulfilling different functions, are capable of being construed in a harmonious manner and operating in a complementary way.
58. Section 16(2)(a)(i) of the SOP Act gives rise to a substantive cause of action. Like many other causes of action, statutory or otherwise, s 16(2)(a)(i) sets parameters for what can be argued by the parties in relation to an application for judgment under s 16 of the Act. These parameters are limited by s 16, and in particular s 16(4)(b).
59. Sections 61 and 63 of the CPA, and r 22 of the SC Rules, provide a procedural mechanism and a test to determine whether summary judgment may be entered in respect of a cause of action.
60. In my view, the Court of Appeal's use of the term 'summary' in *Façade* does not amount to it holding, nor does it necessarily suggest, that an application for judgment under s 16(2)(a)(i) is attended by identical considerations to an application for summary judgment under s 61 of the CPA.
61. If an applicant such as the plaintiff in this proceeding applies for 'summary judgment' under s 16(2)(a)(i) of the SOP Act, the applicant must however demonstrate that the defendant's case in defence to the application has no real prospect of success. That is the summary judgment test established by the provisions of the CPA. The application will be brought via r 22 of the SC Rules. In this setting the onus is on the applicant as the moving party.⁷²
62. If the plaintiff's application for summary judgment is unsuccessful, there may as is the case with any other civil claim if the applicant's claim is pursued, be a trial as to whether the requirements of s 16(2)(a)(i) of the SOP Act have been satisfied. If judgment is entered on a successful application under s 16 of the SOP Act the outcome will nevertheless be of an interim nature.
63. Accordingly, if the plaintiff applies for 'summary judgment' under s 16 of the SOP Act, the Court should apply the test referred to in s 61 of the CPA and follow and apply the procedure and approach prescribed in r 22 of the SC Rules in determining whether the

⁷¹ SoP Act, s 47(3).

⁷² This accords with the approach taken by Judge Woodward in *SJ Higgins Pty Ltd v The Bays Healthcare Group Inc* [2018] VCC 805.

requirements of s 16 of the SOP Act have been satisfied and whether a defendant's defence(s), here based on one or more of the limited challenges identified below in relation to s 16 of the SOP Act, have any real prospect of success.⁷³

119 The first defendant further submits that on such an applications for final judgment the Court should first determine whether the Payment Claims are valid and that no payment schedule was delivered. If the questions are answered in the affirmative, *'there is by operation of s 16(2)(a)(i) of the SoP Act a present right to recover the unpaid portion of the payment as a debt due'*.⁷⁴

120 The first defendant submits that once the jurisdictional prerequisites of s 16(2)(a)(i) of the SoP Act have been established, the first defendant must also demonstrate that the plaintiff's defences to the application, based on one or more of the limited challenges identified in relation to s 16 of the Act, have no real prospect of success.

Background - first defendant's cross-applications

121 On 17 March 2017 the first defendant and the plaintiff entered into both the Torquay Contract and the Bannockburn Contract.⁷⁵

122 There is no issue between the parties that the Contracts are construction contracts as defined by s 4 of the SoP Act and that the work carried out pursuant to the Contracts is construction work within the meaning of s 6(1) of the SoP Act.

123 There is however dispute as to the Date for Substantial Completion under the Contracts in respect of both the Torquay and the Bannockburn Contracts and as a result as to the expiration of the defects liability periods under the Contracts.⁷⁶

⁷³ *SJ Higgins Pty Ltd v The Bays Healthcare Group Inc* [2018] VCC 805, [27]-[29].

⁷⁴ See in this regard *SJ Higgins Ltd v The Bays Healthcare Group* [2018] VCC 805, [28].

⁷⁵ Affidavit of Anthony Collins, 19 November 2019, Exhibits 'AC-1' (CB39) and 'AC-2' (CB179).

⁷⁶ T104.5-10; T105-T11.22; Plaintiff's Affidavits of Alistair Crosby, 6 December 2019 (Torquay Project) including at [6]-[18] and [19]-[20] and Alistair McCraw, 4 December 2019 (Bannockburn Project) including at [7]-[18] and [19]-[20]. The plaintiff asserts Substantial Completion on 23 November 2017 and 13 December 2017 for the Torquay and Bannockburn Contracts respectively and the first defendant on 23 December 2017 and mid-January 2018 for the Torquay and Bannockburn Contracts respectively. The plaintiff asserts the Defects Liability Periods expired no later than 22 November 2018 (Torquay Project) and 12 December 2018 (Bannockburn Project); Plaintiff's Affidavits of Alistair Crosby, 6 December 2019, [20] and Alistair McCraw, 4 December 2019, [20] and the first defendant's Affidavits of Anthony Collins, 19 November 2019, [16] and Anthony Collins, 11 December 2019, [8] and [9].

124 There is therefore an issue between the parties as to when Substantial Completion was achieved for each of the Contracts. In relation to this aspect the first defendant notes that the plaintiff returned half of the retention moneys held as security under each of the Contracts in the first week of July 2018.⁷⁷

125 The involved factual controversy between the parties in relation to the achievement of practical completion under the Torquay and the Bannockburn Contracts which is reflected in the affidavit material referred to in the footnote to paragraph [123] was not the subject of an application by either party for cross-examination and in the present setting is not able to be finally or satisfactorily resolved. These practical completion issues and their potential impact on the operation of cl 1.1 (Definition 'Progressive Payment Claim Reference Date') and the existence of contractual reference dates asserted by the first defendant, potentially militate against the first defendant's case that it is entitled to summary judgment, including because the plaintiff's defences to its s 16 SoP Act claims enjoy no real prospect of success.

126 On 18 March 2019 the first defendant issued the Payment Claims by email.⁷⁸

127 The date for service of a payment schedule in response to each of the Payment Claims was, pursuant to s 15 of the SoP Act, on the first defendant's submission, on 1 April 2019.

128 There is no issue that the plaintiff has not provided a payment schedule to the first defendant in respect of the Payment Claims.

Relevant Reference Date

First defendant's submissions

129 The first defendant submits that pursuant to s 9 of the SoP Act and by reason of the operation of cls 5.1, 5.6 and Schedule 1 of the Contracts, in the circumstances outlined below, the first defendant is able to recover the retention sum established pursuant to the Contracts by submitting a claim for that sum on the date set out in

⁷⁷ Cross-claim CB34; Affidavit of Anthony Collins, 19 November 2019, [18].

⁷⁸ Affidavit of Anthony Collins, 19 November 2019, Exhibits 'AC-5' and 'AC-6'.

Schedule 1 to the Contracts. The first defendant submits that date constituted the reference date for the return of the balance of the retention sum.⁷⁹

130 Clause 5.6 of the Contracts provides as follows:

The security (other than security provided under clause 36.7) shall be reduced at the time and to the amount stated in Schedule 1. The balance of the security (other than security provided under clause 36.7) then held by Watpac (and not applied) shall be released and returned to the Subcontractor at the time stated in Schedule 1.

131 Schedule 1 of the Contracts provides for the Date of final release and return of security (clause 5.6), as follows:

Security shall be finally released and returned following the later to occur of:

1. expiry of the Defects Liability Period, or where there is more than one Defects Liability Period, after expiry of the last Defects Liability Period to expire;
2. satisfactory rectification of all Defects;
3. the Subcontractor has complied with all of its other obligations under the Subcontract;
4. receipt of a written notice from the Subcontractor requesting the release of security; and
5. the return to Watpac of Watpac's security under the Head Contract.

132 The first defendant submits that the affidavit material filed in relation to its cross-application establishes that the events specified in paragraphs [1], [2] and [3] of the last preceding paragraph had occurred prior to 18 March 2019.⁸⁰ The first defendant also submits that the occurrence of these events is not contested.⁸¹

133 The first defendant submits that event [4] above 'receipt of a written notice from the Subcontractor "requesting the release of security"' was constituted by the first defendant's Payment Claims dated 18 March 2019.⁸²

134 Each payment claim of 18 March 2019 was despatched under cover of a letter stating:

- (a) Please see attached letter requesting payment of FINAL 50% Retention on the

⁷⁹ First defendant Submissions, 18 December 2019, [21] and [22].

⁸⁰ Ibid [23].

⁸¹ Ibid [23]; Plaintiff Submissions, 3 February 2020, [22] and [25] to [27] submits that satisfaction of cl 5.6 [1] to [4] irrelevant because no relevant reference date could arise in any event.

⁸² Affidavit of Anthony Collins, 19 November 2019, Exhibits 'AC-5' and 'AC-6'.

above project; and

- (b) We wish to advise that the date for our 12 months defects liability period has ended. We therefore request the release of the final 50% of cash retention being held.

135 On the above bases the first defendant also submits that:

- (a) the covering letters of 18 March 2019 issued by the first defendant in relation to its Payment Claims are each a, 'written notice from the Subcontractor requesting the release of security', contemplated by event 4;
- (b) event 4 referred to above is the last of the relevant Contracts cl 5.6 events; and
- (c) the reference date for each of the Payment Claims was enlivened on 18 March 2019 when the first defendant made its payment claims for return of security.⁸³

136 The first defendant concedes that there is controversy between the first defendant and the plaintiff in the affidavit materials filed in relation to the first defendant's Payment Claims as to when:

- (a) substantial completion was achieved; and
- (b) the defects liability periods under the Contracts expired.

However, the first defendant submits that these controversies are immaterial and irrelevant because the last of the required cl 5.6 and Schedule 1 events was the notices requesting release of security constituted by the 18 March 2019 Payment Claims.⁸⁴

137 The first defendant also submits that there is no direct evidence as to event [5] referred to above in relation to Contract cl 5.6 (the return to the plaintiff of the plaintiff's security under the Head Contract). The first defendant submits that no

⁸³ First defendant Submissions, 18 December 2019, [34].

⁸⁴ Ibid [35].

positive case is advanced by the plaintiff in respect of event [5].

138 Further, the first defendant submits that event [5] is in the nature of a 'pay when paid' provision within the meaning of s 13(2) of the SoP Act and is therefore of no effect.

139 The first defendant submits that the Payment Claims were submitted on the relevant reference date, and that there is no scope to argue that they were served out of time.⁸⁵

140 The first defendant also submits that the Payment Claims were properly served, received by the plaintiff and responded to by the plaintiff on 16 August 2019.⁸⁶

141 The first defendant further submits in relation to service of the Payment Claims that, although the Contracts at cl 6.2 provide that notices are to be served by the first defendant by post or delivered by hand, service by email is not expressly excluded and has been held to be effective if served by means not specified in the construction contract, but received by the intended recipient.⁸⁷

142 Further, the first defendant observes that s 50 of the SoP Act does not prohibit or exclude email as a means of service.⁸⁸

143 The first defendant also points out that it is cl 36 of the Contracts which makes provision for Progress Claims for work completed under the Contracts and for a claim to be made upon the Final Payment Reference Date.⁸⁹

144 The first defendant notes that the Contracts do not provide an entitlement in the first defendant to make a payment claim, pursuant to cl 5.6 or Schedule 1 of the Contracts upon the last of the cl 5.6 events to occur (under cl 36 of the Contracts) nor is there an express right in the Contracts for the first defendant to make the Payment Claims.

⁸⁵ First defendant Submissions, 18 December 2019, [37]-[38].

⁸⁶ Affidavit of Anthony Collins, 19 November 2019, Exhibits 'AC-8'; First defendant Submissions, 18 December 2019, [39]-[46], especially [41].

⁸⁷ *Torbey Investments Corporated Pty Ltd v Ferrara* [2017] NSWCA 9, [34].

⁸⁸ *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd & Ors* [2010] VSC 199, [166]-[167].

⁸⁹ Contract, cl 36.1; Cross-claim CB79.

The first defendant however submits that it is entitled to make a claim for return of retention, pursuant to cl 5.6, read together with Schedule 1 of the Contracts and s 9 of the SoP Act.⁹⁰

145 Accordingly, the first defendant submits that the Contracts do not provide a date for payment for a claim by the first defendant for the final tranche of the retention sum, and that even if cl 36 of the Contracts was relevant (which the first defendant submits it is not), cl 36 only applies to the extent that the plaintiff issues a payment schedule, which it did not do.⁹¹

146 The first defendant also supports the submission referred to in the last preceding paragraph by noting in substance that the Final Payment Reference Date under the Contracts is generally defined by the requirement for Substantial Completion and makes no reference to a claim for the final tranche of the retention sum at, or following, the expiry of the final defects liability period.⁹²

147 The first defendant submits on the basis of the above that under the Contracts the default position (there being no express right in the Contracts for the first defendant to make Payment Claims for the final tranche of retention) is that s 12 of the SoP Act applies and provides the due date for payment and that the due date for payment was 1 April 2019.⁹³

148 The first defendant also claims interest under s 12 of the SoP Act and notes that the plaintiff is precluded by the operation of s 16(4)(b) of the SoP Act from bringing any cross-claim or raising any defence under the Contracts as to why it has not made payment of the amounts detailed in the Payment Claims.

Plaintiff's submissions

149 The plaintiff puts in issue whether the first defendant's Payment Claims are valid payment claims under the SoP Act,⁹⁴ and submits that there is no reference date

⁹⁰ First defendant Submissions, 18 December 2019 [20]-[22] and [48]; and T86.1-31.

⁹¹ Ibid [52].

⁹² Ibid [50]-[53].

⁹³ Ibid [52]-[53].

⁹⁴ Plaintiff Submissions, 3 February 2020, [38], [39], [41] and [42]; ; First defendant submissions T85.21-

available in relation to either of the first defendant's purported Payment Claims and accordingly the first defendant has no entitlement to recover the claimed amounts pursuant to s 16(2)(a)(i) of the SoP Act.⁹⁵

150 The plaintiff observes that the Torquay Contract and Bannockburn Contract are identical in all relevant respects and notes that the Contracts make express provision for the determination of reference dates for the making of progress claims for the purposes of s 9(2)(a) of the SoP Act.⁹⁶

151 The plaintiff submits that cl 36.1 of the Contracts provides for a regime applicable to the first defendant's submission of claims for payment under the Contracts. However, the plaintiff further submits that the first defendant's 18 March 2019 purported Payment Claims were issued well after the point in time by which the parties agreed payment claims must be submitted under the Contracts.⁹⁷

152 The plaintiff submits that there is no Progressive Payment Claim Reference Date or Final Payment Reference Date applicable to either of the first defendant's claims.

153 Accordingly, the plaintiff submits that no relevant reference date exists in respect of the first defendant's Payment Claims and that the first defendant's Payment Claims are not valid payment claims under the SoP Act.

T86.21; Plaintiff submissions T103.17-30.

⁹⁵ Plaintiff Submissions, 3 February 2020, [2], [3] and [4] to [42]; T104-T105.24; I refer to the below emails in relation to the above matter relating to Clause 1.1 'Progressive Payment Claim Reference Date' in the Torquay and Bannockburn Contracts. In light of the error in the plaintiff's submissions which has now been confirmed by the plaintiff, his Honour has asked me to inform the parties that he intends to correct / revise his Reasons for Judgment provided on 30 September 2020. Subject to the matters referred to below, his Honour has also asked me to inform the parties that he expects to provide corrected / revised Reasons for Judgment in this matter, by 4.30 pm tomorrow. His Honour also directs that in the event that the first defendant and/or the plaintiff wish to file and serve any short supplemental submissions, confined to the applicable cl 1.1 definition of 'Progressive Payment Claim Reference Date' in the Torquay and Bannockburn Contracts and confined to 2 pages in length, such further short confined submissions are to be filed by 12.00 noon tomorrow, 7 October 2020. Finally, his Honour expects to receive the parties' proposed final form of orders and any necessary associated orders, including as to costs, and (in the absence of agreement) any brief related submissions as to proposed orders or costs, by 4.15pm Thursday, 8 October 2020.

⁹⁶ Ibid [10] and [11].

⁹⁷ Ibid [11]; Refer footnote [75] above; T103.30-T105.24.

Considerations – first defendant’s cross-application

Availability of a reference date

154 Section 9(1) of the SoP Act provides that ‘on and from’ each reference date under a construction contract, a person who has undertaken to carry out construction work under the contract or to supply related goods and services under the contract is entitled to a progress payment under the SoP Act, calculated by reference to that date.

155 Section 9(2)(a) of the SoP Act defines ‘reference date’ as meaning:

- (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.

156 It is to be noted that s 9 of the SoP Act is centrally concerned with:⁹⁸

- (a) progress payment claims for items of construction work carried out (or to be carried out) and items of related goods and services supplied;
- (b) the date on which a claim for a progress payment may be made.

157 The remaining provisions of s 9(2) of the SoP Act provide a default mechanism for determining an applicable reference date ‘if the contract makes no express provision with respect to the matter’ and in the following circumstances:

- (a) where the claim is for a progress payment (s 9(2)(b));
- (b) where the claim is for a ‘single or one-off payment’ (s 9(2)(c)); and
- (c) where the claim is for a ‘final payment’ (s 9(2)(d)).

158 Section 14(2) of the SoP Act establishes requirements for a valid payment claim

⁹⁸ *Punton’s Shoes Pty Ltd v Citi-Con (Vic) Pty Ltd & Anor* [2020] VSC 514, [75]-[85] and [94]-[100].

under the Act, including that such a payment claim:

- (a) identify the construction work or related goods and services to which the progress payment relates; and
- (b) indicate the amount of the progress payment that the claimant claims to be due; and
- (c) state that it is made under the SoP Act.

159 Section 14(4) of the SoP Act provides that a payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within:

- (a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or
- (b) the period of 3 months after the reference date referred to in s 9(2) of the SoP Act that relates to that progress payment -

whichever is the later.

160 Sections 14(4) and 14(5) of the SoP Act provide that a payment claim in respect of a progress payment, of the specified types may be served only within:

- (a) the period determined by or in accordance with the terms of the construction contract; or
- (b) if no such period applies, within 3 months after the reference date referred to in s 9(2) of the SoP Act that relates to the progress payment.

161 Sections 9(1), 9(2), 14(4) and 14(5) of the SoP Act each relate to claims for progress payments under a construction contract.

Relevant provisions of the Contracts

162 The provisions of the Torquay Contract and Bannockburn Contract are identical in all relevant material respects in relation to the determination of reference dates.

163 Clause 36.1 of the Contracts makes express provision for the determination of
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reference dates in respect of the making of claims for payment for Work Under the Contract, for the purposes of s 9(2)(a) of the SoP Act which refers to the date on which a claim for progress payment may be made.

164 Clause 36.1 of the Contracts provides that the first defendant must submit claims for payment to the plaintiff:

- (a) on each 'Progressive Payment Claim Reference Date' for work under the Contracts completed to the date specified in Schedule 1; and
- (b) on the 'Final Payment Reference Date'.

165 'Work under the Subcontract' is defined in cl 1.1 of the Contracts to mean 'work which the Subcontractor is or may be required to carry out and complete under the Subcontract and includes Variations, the rectification of Defects and the provision of construction plant and temporary works'.

166 As earlier noted, the first defendant eschews any reliance upon cl 36.1 of the Contracts or the existence of a relevant Progressive Payment Claim Reference Date or a relevant Final Payment Reference Date.

167 The Contracts also provide in cl 1.1 Definitions::

Progressive Payment Claim Reference Date means the date specified in Schedule 1 of each month (up until the Date of Substantial Completion or, where there are Stages, the last Date of Substantial Completion) in respect of which the Subcontractor has:

- (a) provided to Watpac Lodgement Documentation dated, and completed, no earlier than the date of submission of the relevant Lodgement Documentation (which must be no earlier than the date specified in Schedule 1); and
- (b) complied with the clauses listed in Schedule 7.

168 Schedule 1 of the Contracts, referred to in cl 1.1 above provides:

Date of expiry of the Defects Liability Period: (clause 1.1)	12 months after the later of: (a) the date of Substantial Completion; and (b) Practical Completion under the Head Contract
---	--

Progressive Payment Claim
Reference Date and submission of
Lodgement Documentation:
(clauses 1.1, 36.14 and 36.15)

The [insert] day of each month.
[if nothing stated, the 27th day of each
month]

169 The clauses referred to in (b) and Schedule 7 of cl 1.1 above, defining Progressive Payment Claim Reference Date, require compliance by the Subcontractor with:

- (a) cl 2.4 (Subcontractor warranties);
- (b) cl 5 (security);
- (c) cl 8.2 (secondary subcontracting);
- (d) cl 16 (insurance);
- (e) cl 23 (construction method statement);
- (f) cl 25 (Subcontractor to provide information);
- (g) cl 36.1 (timing of payment claims);
- (h) cl 36.15 (lodgement documentation);
- (i) cl 41 (health and safety); and
- (j) cl 43 (industrial relations).

170 The Contract cl 1.1 Definition of 'Final Payment Reference Date' provides:⁹⁹

Final Payment Reference Date means the date that is the later of:

- (a) 10 Business Days after the Date of Substantial Completion or, where there are Stages, 10 Business Days after the last Date of Substantial Completion;
- (b) the date on which the Subcontractor has provided to Watpac Lodgement Documentation dated, and completed, no earlier than the date of submission of the relevant Lodgement Documentation (which must be no earlier than 10 Business Days after the Date of Substantial Completion, or where there are Stages, 10 Business Dates after the last Date of Substantial Completion); and
- (c) the date on which the Subcontractor has complied with the clauses listed in clause 7.

171 Assuming that the first defendant's claims for release and return of security comes within the SoP Act (which below I have separately concluded it does not), the first defendant's claimed entitlement to payment of security based on cl 5.6 and Schedule 1 of the Contracts (Schedule 1 'Date for final release and return of security') makes no provision for the time at or within which any claim based on an express or implied cl 5.6 entitlement is to be made. This contrasts with the Contracts' 'Timing of Payment Claims' stipulations in cl 36.1.

172 For the above reasons, I reject the first defendant's assertion that cl 5.6 of the

⁹⁹ CB 186.

Contracts gives rise to a separate and distinct reference date in relation to a 'payment claim' under the Contracts for reduction, or release and return, of security under the Contracts. No provision of the Contracts expressly so provides, and in my view the first defendant has made out no persuasive case that such a reference date can be implied.

173 The sole express provision in the Contracts in relation to claims for progress payment and the determination of reference dates for claims for progress payment for Work completed under the Contracts is to be found in cl 36. Clause 36 of the Contracts is concerned, as is the SoP Act, with payment claims for the value of work under the Subcontract performed by the subcontractor.¹⁰⁰ These express provisions of cl 36 of the Contracts in my view preclude the implication sought to be established by the first defendant because such an implication would be inconsistent with the scheme of the Contracts, and in particular cl 36; neither is it necessary or reasonable given the scheme and express terms of the Contracts.

174 There is an unresolved issue between the parties as to when the Date of Substantial Completion was achieved under the Contracts. That dispute is submitted by the plaintiff to be immaterial because, even on the first defendant's case as to the correct date of Substantial Completion, there was no further Progressive Payment Claim Reference Date or Final Payment Reference Date which could have accrued, and on the first defendant's submissions these unresolved issues are immaterial as to whether or not the Payment Claims are valid, or timely, for the purposes of the SoP Act.¹⁰¹

175 In my view the Dates of Substantial Completion of the Contracts is both relevant and, even accepting the first defendant's asserted dates, fatal to any progress payment claim in relation to a Progressive Payment Claim Reference Date, or Final Payment Reference Date because:

¹⁰⁰ First Defendant Submissions, 18 December 2019, [21].

¹⁰¹ First defendant Submissions, 18 December 2019, [35] and [36]; Plaintiff Submissions, 3 February 2020, [25]-[27].

- (a) the latest of the disputed dates for Practical Completion (on the first defendant's case) is 'middle January 2018' for the Bannockburn Contract;
- (b) cl 1.1 of the Contracts includes in its definition of Progressive Payment Claim Reference Date a stipulation that date is as specified in Schedule 1 of the Contracts, '*up until to the Date of Substantial Completion*';
- (c) the 'Final Payment Reference Date' arises on the later of the events in (a), (b) and (c) of the cl 1.1 definition of that reference date, all of which events have occurred, or at least are not contested as having occurred, by about the end of January 2018;
- (d) the first defendant's payment claims of 18 March 2019, were made over a year after the latest asserted Date of Substantial Completion in 'middle January 2018'.

176 This is because on either the first defendant's or the plaintiff's assertions as to the time of achievement of the Date of Substantial Completion under the Contracts, the first defendant's purported Payment Claims were issued in excess of one year after the Date of Substantial Completion which is stipulated as the end date for any progress payment claim under the Contracts, as provided in the definitions of Progressive Payment Claim Reference Date and Final Payment Claim Reference Date in the definitions of these dates in cl 1.1 of the Contract.

177 Further, the argument that the first defendant's claims for release and return of security can be supported by a reference date arising under s 9(2) of the SoP Act, is also met by the plaintiff's argument that such claims would, in any event be out of time pursuant to s 14(4) or s 14(5)(b) of the Act which requires such a payment claim to be made within three months of a relevant reference date.

178 In this matter and on the evidence as to the Dates of Substantial Completion outlined above, I also consider that the plaintiff has a real prospect of success in establishing that the first defendant's Payment Claims have been made well after three (3)

months of the Dates of Substantial Completion¹⁰² under both Contracts, and therefore are out of time. This is because the relevant Contract cl 1.1 Definitions referred to above limit the time for such claims, by reference to the Date of Substantial Completion in relation to either the Contract's Progressive Payment Claim Reference Date provision or Final Payment Reference Date.

179 Further, in my view the 18 March 2019 Payment Claims are not valid claims for progress payment under the SoP Act.

180 I consider that the first defendant's Payment Claims are claims which do not come within the scope of the SoP Act because the claims made by the first defendant in its 18 March 2019 Payment Claims are not claims in relation to construction work or related supply of goods and services undertaken under the Contracts, but rather are claims in each case for reduction of security pursuant to cl 5.6 of the Contracts.¹⁰³

181 Consequently I am satisfied that, for this further reason, that no reference date was available under the SoP Act to found the first defendant's Payment Claims as required by s 9 of the SoP Act.

182 The formulation of the test to be applied by the Court under s 63 of the CPA, when considering an application for summary judgment under s 61 of the CPA, was elucidated by the Court of Appeal in *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd*¹⁰⁴ (*Lysaght*) as whether the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success. Emphasising that the test is to be applied by reference to its own language, without paraphrase or comparison with the 'hopeless' or 'bound to fail' test essayed by the High Court of Australia in *General Steel Industries Inc v Commissioner for Railways (NSW)*,¹⁰⁵ their Honours observed that it should be understood, however, that the test is to some degree a

¹⁰² Reasons, [122]-[124]; T105-110.

¹⁰³ CB313-334 and CB317-320; 18 March 2019 Payment Claims; *Punton's Shoes Pty Ltd v Citi-Con (Vic) Pty Ltd & Anor* [2020] VSC 514, [75]-[85] and [94]-[114]; above Reasons at [153]-[155] and [158]-[159].

¹⁰⁴ (2013) 42 VR 27.

¹⁰⁵ (1964) 112 CLR 125.

more liberal test than the 'hopeless' or 'bound to fail' test.¹⁰⁶

183 The majority in *Lysaght* stressed that the power to determine a claim or defence, or any part of a claim or defence, summarily should be exercised with caution.¹⁰⁷ Neave J, however also observed that an undue emphasis on caution would run the risk of reinforcing the historical 'hopeless' or 'bound to fail' test and that the Court's power should be exercised consistently with the overarching purposes of the CPA, having regard to the fact that if summary judgment were to be granted, it would deprive the relevant party the opportunity to pursue their claim or defence.¹⁰⁸

184 The test to be applied, as informed by the claim made under s 16(2)(a)(ii) of the SoP Act is therefore, in accord with the text of ss 61 and 63 of the CPA, is whether the applicant for summary judgment has sufficiently established that the respondent's defence or defences, to its claim, have no real prospect of success.¹⁰⁹

185 I am satisfied that for the above reasons the first defendant has failed to establish that for the purposes of ss 61 and 63 of the CPA that the plaintiff's defences to the first defendant's summary judgment claim have no real prospect of success.

186 On the proper construction of the first defendant's Payment Claims and the SoP Act, in particular ss 9(1) and 14(2)(c), I consider, for the reasons earlier outlined, that the first defendant's Payment Claims are non-compliant with, and do not fall within the SoP Act, as generally argued by the plaintiff,¹¹⁰ because the Payment Claims do not claim progress payment entitlements in relation to construction work or the supply of related goods and services as required by the SoP Act, including in ss 9(1), 10(1) and 14(2)(c) of the Act.¹¹¹

187 The first defendant's claim for \$32,648.41 (incl GST) in relation to the Torquay

¹⁰⁶ (2013) 42 VR 27, per Warren CJ and Nettle JA, [29] and [35], Neave JA agreeing.

¹⁰⁷ Ibid [35].

¹⁰⁸ Ibid [41]-[42].

¹⁰⁹ *John Beever v Roads Corporation*, [2018] VSC 635, [56] to [63].

¹¹⁰ Plaintiff Submissions, 3 February 2020, [2] and [3].

¹¹¹ Cross-Claim CB314-316, Torquay Payment Claim; Cross Claim CB318-320, Bannockburn Payment Claim; *Punton's Shoes Pty Ltd v Citi-Con (Vic) Pty Ltd & Anor* [2020] VSC 514, [75]-[85] and [94]-[100].

Contract and its claim for \$83,361.22 (incl GST) in relation to the Bannockburn Contract are claims in respect of security under the Contracts which the first defendant asserts it is entitled to have released and returned, and are not in the nature of claims for construction work or related goods and services.

188 This much is acknowledged by the first defendant in its submissions. The first defendant instead seeks to rely upon cl 5.6 of the Contracts (which relates to reduction of security) as giving rise to 'express or implied' reference dates for the purposes of the SoP Act. The first defendant does not seek to rely upon any express provision of the Contracts as establishing or giving rise to relevant reference dates, including cl 36.1 of the Contracts.

189 Further, the first defendant's claims for reduction of security refer to a security sum which is a composite sum aggregated over many months and claimed in March 2019 in a way which could not be readily addressed, or valued and determined, by the Adjudicator as contemplated under ss 11 and 23 of the SoP Act which require the Adjudicator to value construction work and related goods and services undertaken and supplied by the claimant.¹¹²

190 I have also rejected the first defendant's assertion that cl 5.6 of the Contracts gives rise to a separate and distinct reference date, either 'expressly or impliedly' in relation to a payment claim by the first defendant for reduction or release and return of security under the Contracts.

191 I consider that for the above reasons the first defendant has not served valid payment claims on the plaintiff in relation to the Torquay Contract or the Bannockburn Contract including pursuant to s 9, as required by ss 14 and 15(4)(a) of the SoP Act. Therefore s 16 of the SoP Act, which is predicated on the respondent's liability under the Act, is not engaged and does not avail the first defendant, which has no entitlement in the circumstances to recover any portion of the amounts claimed under the SoP Act.

¹¹² *Punton's Shoes Pty Ltd v Citi-Con (Vic) Pty Ltd & Anor* [2020] VSC 514, [97]-[114].

192 For the above reasons it is clear that the first defendant has also failed to establish that the plaintiff's defences to the first defendant's cross-claim based on s 16 of the SoP Act have no real prospect of success.

193 In the result the first defendant is not entitled to summary judgment under s 61 and s 63 of the CPA, or r 22 of the Rules, as submitted, based on any entitlement pursuant to s 16 of the SoP Act.

Service of Payment Claims

194 Given my above conclusions and decisions in relation to the Payment Claims it is unnecessary to deal with the plaintiff's additional arguments as to why the Payment Claims were not effectively served under the Contracts or for the purposes of the SoP Act.

Plaintiff's mistaken payment claim (payment on 27 March 2020 by the plaintiff to the first defendant of \$83,361.22 (incl GST))

Plaintiff submissions dated 8 April 2020

195 On 27 March 2020 the plaintiff processed a payment to the first defendant in an amount equivalent to the value of the Bannockburn Payment Claim in the sum of \$83,361.22 (incl. GST) (Mistaken Payment). The plaintiff argues that this payment was made erroneously and mistakenly, and the plaintiff immediately demanded reimbursement of that payment.

196 The plaintiff submits that the payment was made under a mistake of fact, namely that administratively the Mistaken Payment was processed as being due, when in fact it is the plaintiff's position under the Contract (by then formally and earlier conveyed to the first defendant) was, and always had been, that under the Bannockburn Contract no such payment was due.

197 The plaintiff submits that the first defendant is liable to account for the Mistaken Payment in restitution, alternatively in an action for money had and received.

198 In these circumstances the plaintiff submits that the Mistaken Payment does not:

- (a) constitute a progress payment to which the first defendant is entitled to under s 9 of the SoP Act;
- (b) constitute an admission that the plaintiff is liable to pay a progress payment to the first defendant under s 9 of the SoP Act;
- (c) otherwise affect the judgment of the Court in relation to this issue; or
- (d) operate to validate an otherwise invalid payment claim under the SoP Act.

199 The plaintiff submits that the following principles apply to receipt of payment which has been made under a fundamental mistake:

- (a) such circumstances give rise to causes of action for restitutionary remedies including money paid under a mistake or pursuant to contract where the consideration has totally failed;¹¹³
- (b) where a party pays money under a mistake for no consideration there is a prima facie liability on the recipient to make restitution;¹¹⁴
- (c) the recipient is entitled to raise by way of defence any matter or circumstances that will demonstrate that the retention of the payment is not unjust;¹¹⁵
- (d) where a payee receives money paid under a mistake for no consideration, the recipient's conscience is bound, upon being aware of the mistake, and a proprietary remedy is available, upon the recipient acquiring such knowledge, in the nature of a constructive trust over the moneys;¹¹⁶
- (e) without consideration, as distinct from the question whether a recipient of property already impressed with a trust is bound by the trust, the proper question is whether the payee has such knowledge of the mistake as to affect

¹¹³ *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257. See also *Australia & New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662 at 673.

¹¹⁴ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.

¹¹⁵ *Australia & New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662 at 673.

¹¹⁶ *Wambo Coal Pty Ltd v Stuart Karim Ariff* [2007] NSWSC 589, [42]-[44].

his conscience because the payee is aware that it is not entitled to deal with the money as the beneficial owner; and¹¹⁷

(f) in the absence of knowledge, a party receiving money as a result of mistake is liable in an action for restitution or in an action for money had and received.¹¹⁸

200 The plaintiff submits that it is not disputed that the payment was made in error, and the Court can be satisfied of this given that the plaintiff wholly defended the first defendant's cross-applications for summary judgment on the basis that the first defendant has no legal entitlement to be paid a progress payment in the sum of \$83,361.22 in respect of security under the SoP Act in relation to the Bannockburn Contract, and incurred legal costs in doing so.

201 The plaintiff also submits that at no time did it have any reason to reconsider its defence to the first defendant's cross-application, in absence of a judgment from the Court finding otherwise, and that, upon realising the Mistaken Payment had been made, the plaintiff (by its solicitors) immediately demanded reimbursement from the first defendant.

202 The plaintiff submits, principally based on the plaintiff's long-standing position refuting the first defendant's entitlement to the sum in issue, that there is little doubt the first defendant knew the plaintiff did not intend to make the Mistaken Payment.

203 The plaintiff submits that allowing the first defendant to retain the Mistaken Payment would mean that the first defendant is unjustly enriched. The plaintiff further submits that its claim for return of the Mistaken Payment can be justly and conveniently raised and determined in this proceeding.

First defendant's submissions dated 8 April 2020

204 The first defendant submitted (it is to be noted that the first defendant's submissions

¹¹⁷ *Re Montagu's Settlement Trusts; Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264 at 278-279 and 285 (a case of liability of a recipient of trust property).

¹¹⁸ *Focus Metals Pty Ltd v Babicci & Anor* [2014] VSC 380, [120].

were provided at a time when it had not yet been decided that the first defendant's cross-applications for summary judgment in relation to the Torquay Payment Claim and the Bannockburn Payment Claim in this proceeding were unsuccessful) that a court should only determine matters which are aimed at determining legal controversies and not to answering hypothetical questions, should not grant relief if that relief is claimed in relation to circumstances that have not occurred or might never happen, or if the exercise of a court's power will produce no foreseeable consequence for the parties.¹¹⁹

205 The first defendant also submitted that, in the context of SoP Act proceeding, the payment by the plaintiff of the amount claimed in the first defendant's cross-application has put the controversy concerning the first defendant's Bannockburn Payment Claim cross-application to an end, and that:

- (a) the Court is no longer required to consider whether the first defendant has an interim entitlement to the Bannockburn Payment Claim amount;
- (b) the issues of controversy arising under the SoP Act are now academic by virtue of the payment made in the sum of \$83,361.22;
- (c) the Court should not consider whether there was hypothetical compliance with the SoP Act where it will not produce any foreseeable consequences; and
- (d) any judgment on this issue would be, in substance an empty threat and would give rise to an exercise in futility because the issues raised by the plaintiff are now academic.

206 The first defendant submits that the Court should order the plaintiff to pay the outstanding interest in relation to the Bannockburn Payment Claim, together with the costs of the part of the cross-application dealing with the Bannockburn Payment Claim, on the basis that the costs should follow the event.

¹¹⁹ *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582.

Plaintiff submissions in response dated 9 April 2020

207 The plaintiff submits that the first defendant's above submissions proceed on the erroneous basis that:

- (a) the requirements for the release of retention (\$83,361.22) under the Bannockburn Contract have been satisfied; and
- (b) the controversy between the parties has been resolved by the fact of the Mistaken Payment.

208 The plaintiff maintains that the requirements for the release of the retention under the Bannockburn Contract have not been satisfied, and the fact of the Mistaken Payment does not establish a legal entitlement under the SoP Act to be paid the retained amount of security.

First defendant's submissions in response dated 9 April 2020

209 The first defendant submits that the plaintiff has not established that the payment in issue was made by mistake and that, absent evidence of 'mistake', the first defendant is entitled to retain the payment and its conscience cannot be said to be affected. The first defendant also submits that in the circumstances the person who made the mistake must be identified,¹²⁰ and so must the underlying facts of the mistake, and adds that the Affidavit of Anna Scannell on the cross-application dated 8 April 2020 is based on hearsay and is inadmissible because the deponent does not identify the person who is the source of her instructions (at [8]) and does not identify the 'administration staff' (at [9]) who made the payment.

210 The first defendant submits that the plaintiff's position assumes the Bannockburn (\$83,361.22) Payment Claim is invalid. The first defendant submits that in this matter there appears to be no dispute as to:

- (a) the work was carried out by the first defendant;
- (b) the value of the amounts claimed; and

¹²⁰ *Comprite Pty Ltd v RSL (Qld Branch)* [2008] QSC 234.

(c) that the plaintiff has derived benefit from the works carried out.

211 The first defendant submits that the authorities relied on by the plaintiff regarding the formation of an equitable trust are distinguishable because in the cases relied on by the plaintiff the payments were made in the absence of consideration, and in circumstances where the recipient of the funds admitted liability to repay the moneys in question.¹²¹ The first defendant denies that an equitable trust in respect of the Mistaken Payment arises in this matter because the first defendant submits here there is no doubt that (but for technical defences based on the SoP Act) the payment was made for consideration.

212 In these circumstances the first defendant submits that plaintiff cannot assert that the first defendant has been unjustly enriched by the payment because the first defendant has a contractual entitlement to the funds in question.

Considerations - Plaintiff's mistaken payment claim (payment on 27 March 2020 by the plaintiff to the first defendant of \$83,361.22 (incl GST))

213 I have earlier rejected the first defendant's claims by way of cross-application for summary judgment on both the Torquay Payment Claim (\$32,648.41) and the Bannockburn Payment Claim (\$83,361.22).

214 The first defendant's Bannockburn cross-claim for summary judgment on its March 2019 Payment Claim is in respect of the same sum of \$83,361.22 which was the subject of the Mistaken Payment. Both the counterclaim by the first defendant and the claim for the Mistaken Payment by the plaintiff relate to reduction of security (a retention sum) under the Bannockburn Contract.

215 As a result of the first defendant's failure in relation to the Torquay and Bannockburn Payment Claims, the first defendant's submissions to the effect that the Court should not address and deal with hypothetical questions in relation to the first defendant's entitlement to the \$83,361.22 in issue, have been overtaken by events and rendered redundant.

¹²¹ See eg *Wambo Coal Pty Ltd v Stuart Karim Ariff* [2007] NSWSC 589, [3].

216 The context in which the Mistaken Payment was made on 26 March 2020, included the existing and well defined dispute between the plaintiff and the first defendant as to whether the sum of \$83,361.22 was either payable as a progress payment under the Bannockburn Contract or recoverable by the first defendant on its cross-application for summary judgment founded on s 16(2)(a)(i) of the SoP Act and ss 61 and 63 of the CPA, including in relation to the first defendant's asserted entitlement to reduction of security moneys in the said sum under the Bannockburn Contract.

217 The plaintiff denied the first defendant's abovementioned claim and its entitlement to recover the sum of \$83,361.22 (incl GST), including on the basis that the first defendant's claim was not a valid claim under the SoP Act or pursuant to the terms of the Bannockburn Contract.

218 Accordingly, on and before 26 March 2020 the parties were engaged in a dispute about whether the first defendant was entitled to the said sum, on any basis.

219 The evidence in this application, in my view, establishes that immediately upon appreciating that the payment in issue had been made to the first defendant on 26 March 2020, the plaintiff demanded the reimbursement of the said sum.¹²²

220 Further, I am also persuaded that in the circumstances referred to above and on the evidence relied upon by the plaintiff in this matter, and in particular Ms Scannell's Affidavit of 8 April 2020¹²³ that:

- (a) the Mistaken Payment in dispute was not intended to be made, or made as a progress payment to which the first defendant was entitled under the SoP Act; and
- (b) the Mistaken Payment in dispute did not constitute an admission by the plaintiff that it was liable to pay a progress payment in the sum of \$83,361.22 to the first defendant under the SoP Act.

¹²² Affidavit of Anna Scannell, 8 April 2020, [6].

¹²³ Ibid [6], [7] and [8].

- 221 Further, I am satisfied on the material in this application, in particular the Affidavit of Ms Scannell of 8 April 2020, including at [6], [7] and [8] of that Affidavit, both that the plaintiff erroneously and mistakenly made the Mistaken Payment and that no reasonable explanation, other than mistake and error on the part of the plaintiff appears to exist for the making of the Mistaken Payment.
- 222 I dismiss the first defendant's objection to the admissibility of, and in relation to the probative weight the first defendant submits should (if admitted) be given to Ms Scannell's Affidavit of 8 April 2020. In my view, in the analogously interlocutory context and circumstances in which the parties raised and sought the determination of the appended issue of the plaintiff's entitlement to enforce the return of the Mistaken Payment, the receipt of Ms Scannell's Affidavit is justified, subject to the first defendant's objections, which I have weighed in the balance in relation to the weight I have ascribed to Ms Scannell's evidence.¹²⁴
- 223 The affidavit evidence of Ms Scannell, who was the plaintiff's lawyer with day to day care and conduct of these proceedings and who affirms the instructions, and source of instructions, of her corporate client as to the erroneous and mistaken processing of the Mistaken Payment to the first defendant, at [6] and [7] of her affidavit, is admissible in the circumstances and context I have outlined above.
- 224 I consider Ms Scannell's evidence as to the above matters, which was not challenged or contradicted by any evidence put on by the first defendant or by cross-examination, is admissible, of probative weight and persuasive, including as to the whole of the Mistaken Payment by the plaintiff to the first defendant having been caused by erroneous and mistaken processing by the plaintiff's administrative staff.
- 225 In general, a payment which has been made and received as a result of a mistake gives rise to a claim for money had and received against the recipient and a

¹²⁴ After 26 March 2020 and after the hearing of the plaintiff's Motion for judicial review, the plaintiff raised the further issue of the Mistaken Payment, by Submissions dated 8 April 2020. The first defendant filed submissions on the issue and the parties acceded to the issues in relation to the Mistaken Payment being dealt with 'on the papers'; *Evidence Act 2008* (Vic), s 75.

differently described, but similarly based, cause of action founded in restitution based on unjust enrichment, obligating the recipient to act in good conscience and make restitution in relation to the Mistaken Payment to the extent to which the recipient is unjustly enriched.¹²⁵

226 In *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation*,¹²⁶ Mason CJ, Wilson, Deane, Toohey and Gaudron JJ of the High Court of Australia stated that:

The basis of the common law action of money had and received for recovery of an amount paid under fundamental mistake of fact should now be recognised as lying not in implied contract but in restitution or unjust enrichment ... In other words, receipt of payment which has been made under a fundamental mistake is one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment.¹²⁷ (footnotes omitted)

227 In *David Securities Pty Ltd v Commonwealth Bank of Australia*,¹²⁸ the High Court of Australia clarified that, where a qualifying or vitiating factor such as mistake of fact or law is established by the payer, there is a prima facie liability on the recipient to make restitution, and the recipient is entitled to raise by way of defence any matter or circumstance that will demonstrate that the receipt or retention of the payment is not unjust. In *David Securities Pty Ltd v Commonwealth Bank of Australia*, Mason CJ, Deane, Toohey, Gaudron and McHugh JJ observed:

As La Forest J. stated in *Air Canada v. British Columbia*, the two species of mistake (i.e., fact and law) should be “considered as factors which can make an enrichment at the plaintiff’s expense ‘unjust’ or ‘unjustified’”.

The respondent’s submission that the appellants must independently prove “unjustness” over and above the mistake cannot therefore be sustained. The fact that the payment has been caused by a mistake is sufficient to give rise to a prima facie obligation on the part of the respondent to make restitution. Before that prima facie liability is displaced, the respondent must point to circumstances which the law recognizes would make an order for restitution

¹²⁵ *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662 at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379; *Focus Metals Pty Ltd v ABICCI & Anor* [2014] VSC 380, [107]-[110].

¹²⁶ (1988) 164 CLR 662.

¹²⁷ *Ibid* at 673.

¹²⁸ (1992) 175 CLR 353.

unjust.¹²⁹ (footnotes omitted)

228 As noted, I have earlier held that the first defendant should not succeed in its cross-application to recover the sum of \$83,361.22 (incl GST) pursuant to the SoP Act and to ss 61 and 63 of the CPA on the first defendant's application for judgment in that sum.

229 Accordingly, for the reasons referred to above, the first defendant is liable to repay the amount of the Mistaken Payment to the plaintiff.

230 In the circumstances, the first defendant would be unjustly enriched if it retained the sum of \$83,361.22 in dispute.

231 I reject the first defendant's argument that in this case the plaintiff's conscience cannot be said to be effected and no unjust enrichment arises because, on the first defendant's submissions, it has completed the work under the Bannockburn Contract and is entitled to be paid the sum in issue.

232 I consider that the plaintiff's claim in respect of the Mistaken Payment must be considered in the relevant present setting. That setting is one in which on its application for summary judgment (in turn based on a potential interim entitlement under the SoP Act, informed by s 61 and 63 of the CPA) the first defendant has been held not to be entitled to a payment claim for reduction of security in the sum of \$83,361.00. That asserted entitlement may ultimately be determined in the first defendant's favour, if and when there is a final determination of the parties' rights and entitlements under the subject Contracts.

233 The first defendant has succeeded in its defence of its entitlements to be paid for construction work and supply of goods and services in the Adjudicated Amount which was the subject of the September 2019 Adjudication Determination but under a different contract; namely the Subcontract.

234 However, the first defendant has no present established entitlement to the reduction

¹²⁹ Ibid at 379.

or return of security in the sum of \$83,361.00 under the Bannockburn Contract nor is there any proper basis for the Court to conclude (as asserted by the first defendant) that the first defendant is entitled under the Bannockburn Contract to be paid the \$83,361.22 in issue.

235 It is also clear enough that in the above circumstances the first defendant well knew that the payment by the plaintiff to it of the sum in dispute was the result of some sort of error or mistake by some officer or employee of the plaintiff.

236 In the circumstances and for the above reasons, I find that the plaintiff is entitled to restitution by way of payment of the sum of \$83,361.22 in respect of the Mistaken Payment.

Summary of Conclusions and Decisions

Plaintiff's Originating Motion for Judicial Review

Ground 1

237 For the above reasons, I refuse the relief sought by the plaintiff in relation to Ground 1 of its Originating Motion.

Ground 2

238 As a result of the above decision in relation to Ground 1, and the matters referred to in paragraphs [77] and [78] of these reasons, it is not necessary to determine Ground 2 of the plaintiff's Originating Motion.

Ground 3

239 Ground 3 of the plaintiff's Originating Motion is abandoned by the plaintiff.

First Defendant's Cross-claim

240 For the above reasons I reject the first defendant's claims for summary judgment in relation to the Torquay Contract and the Bannockburn Contract.

Plaintiff's mistaken payment claim (payment on 27 March 2020 by the plaintiff to the first defendant of \$83,361.22 (incl GST))

241 For the above reasons I uphold the plaintiff's claim for payment by way of

restitution by the first defendant of the sum of \$83,361.22 mistakenly paid by the plaintiff to the first defendant on 26 March 2020 in respect of the Bannockburn Contract.

Orders

242 Accordingly, I order that:

- (a) The plaintiff's Application by Originating Motion dated 11 October 2019 is dismissed.
- (b) The first defendant's Cross-Application for summary judgment by Summons dated 19 November 2019 is dismissed.
- (c) Pursuant to r 79.02 of the *Supreme Court (General Civil Procedure) Rules 2015*, the Senior Master of the Supreme Court of Victoria:
 - (v) pay out to the first defendant the sum of \$849,133.83 (subject to taxation liability); and
 - (vi) pay out to the plaintiff any balance remaining, including any interest allocated or received, in respect of the sum paid into Court by the plaintiff on 22 October 2019.
- (d) The plaintiff pay the first defendant's costs of the Application on a standard basis, to be taxed in default of agreement.
- (e) The first defendant pay the plaintiff's costs of and incidental to the Cross-Application, on a standard basis to be taxed in default of agreement.