

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

S ECI 2022 04386

ENDEAVOUR CONSTRUCTIONS PTY LTD
(ACN 629 118 163)

Plaintiff

v

DOWN UNDER PILING PTY LTD
(ACN 634 721 681)

First Defendant

SAUL ROZENBES

Second Defendant

<u>JUDGE:</u>	Stynes J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	18 May 2023
<u>DATE OF JUDGMENT:</u>	25 July 2023
<u>CASE MAY BE CITED AS:</u>	Endeavour Constructions Pty Ltd v Down Under Piling Australia Pty Ltd
<u>MEDIUM NEUTRAL CITATION:</u>	[2023] VSC 424

ADMINISTRATIVE LAW – Judicial review – Jurisdictional error – Review of adjudication determination made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Validity of reference date arising under *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9(2)(d)(iii) turns on when construction work was last carried out under construction contract – Validity of purported notice served under *Building and Construction Industry Security of Payment Act 2002* (Vic) s 18(2) – Adjudication determination upheld – *Vinson v Neerim Properties Developments Pty Ltd* [2016] VSC 321, applied.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	A R Morrison	Nicholas O'Donohue & Co
For the First Defendant	A Ritchie	Turnbull Brown Lawyers

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HER HONOUR:

A Introduction

- 1 The plaintiff, Endeavour Constructions Pty Ltd (**'Endeavour'**), seeks an order in the nature of certiorari that the adjudication determination made by the second defendant, Mr Rozenbes (**'the Adjudicator'**), dated 29 August 2022 (**'Determination'**) be quashed.
- 2 The Determination was delivered under s 23 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**'SOP Act'**) and was made in respect of a claim for final payment served by the first defendant, Down Under Piling Australia Pty Ltd (**'DUPA'**). DUPA served this final payment claim on 6 July 2022 seeking the sum of \$125,989.68¹ from Endeavour (**'6 July Payment Claim'**). The Adjudicator determined that \$119,379.81 was payable by Endeavour to DUPA.
- 3 Endeavour challenges the Determination on the basis that the 6 July Payment Claim was not supported by a valid reference date under the *SOP Act*. It also contends that DUPA failed to serve a valid notice in accordance with s 18(2) of the *SOP Act* (**'s 18(2) Notice'**) before applying for adjudication.
- 4 The issues that arise for determination are:
 - (a) **Issue 1** – Was the 6 July Payment Claim supported by a valid reference date pursuant to s 9(2)(d)(iii) of the *SOP Act*? This turns on the factual question of when DUPA last carried out work under the construction contract; and
 - (b) **Issue 2** – Did DUPA serve a valid s 18(2) Notice prior to applying for adjudication?
- 5 Endeavour relied on the written and oral submissions of its counsel, and the following evidence:

¹ All amounts are inclusive of GST unless stated otherwise.

- (a) four affidavits and exhibits of its site manager, Garry Lawes;²
- (b) an affidavit and exhibit of James Dargan,³ who is an acquaintance of Mr Lawes; and
- (c) an affidavit and exhibit of a plumbing contractor, Kristian Duca.⁴

6 DUPA relied on the written and oral submissions of its counsel, and the following evidence:

- (a) two affidavits and exhibits of its managing director, Andrew Atkinson;⁵ and
- (b) two affidavits and exhibits of its plant operator, James Atkinson,⁶ who is Andrew Atkinson's son.

7 All of the parties' witnesses were cross-examined at trial.

B Summary of decision

8 For the reasons that follow, I have determined that the Adjudicator's Determination be upheld:

- (a) In relation to Issue 1, I find that DUPA did carry out work under the construction contract on 7 April 2022. Accordingly, the 6 July Payment Claim was supported by a valid reference date under s 9(2)(d)(iii) of the *SOP Act*. It was not necessary for me to go on to consider whether work was also done by DUPA on 28 April 2022.
- (b) In relation to Issue 2, I find that DUPA did serve a valid s 18(2) Notice.

² Mr Lawes affirmed affidavits on 28 October 2022 ('**First Lawes Affidavit**'), 16 December 2022 ('**Second Lawes Affidavit**'), 13 February 2023 ('**Third Lawes Affidavit**') and 24 March 2023 ('**Fourth Lawes Affidavit**').

³ Mr Dargan affirmed an affidavit on 10 February 2023 ('**Dargan Affidavit**').

⁴ Mr Duca affirmed an affidavit on 13 February 2023 ('**Duca Affidavit**').

⁵ Andrew Atkinson swore affidavits on 8 March 2023 ('**First A Atkinson Affidavit**') and 14 April 2023 ('**Second A Atkinson Affidavit**').

⁶ James Atkinson swore affidavits on 8 March 2023 ('**First J Atkinson Affidavit**') and 14 April 2023 ('**Second J Atkinson Affidavit**').

C Background

C.1 **The Contract and the construction works**

9 Endeavour is a building company. DUPA is a contractor that performs excavation and piling works, including the construction of basements.

10 On 29 July 2021, Endeavour as head contractor engaged DUPA under a building subcontract (**'Contract'**) to perform various works, including bulk excavation, piling and the installation of capping beams and shotcrete walls (**'Works'**) for the single-level basement carpark of the apartment building at 178 Francis Street, Yarraville (**'Site'**).⁷

11 The Site sits on a corner block – the southern boundary is Francis Street, and the eastern boundary is Powell Street. On the northern boundary sits a neighbouring property at 98 Powell Street.

12 Mr Lawes is employed by Endeavour, and manages the Site on its behalf.

13 Andrew Atkinson is the managing director of DUPA. His son, James Atkinson, is employed by DUPA as a plant operator.

14 DUPA commenced the Works on Site on or around 11 November 2021.

15 To carry out the Works, DUPA used a number of different sized excavators, including a Takeuchi 5 tonne excavator (**'Excavator'**).

16 It is not in dispute that DUPA performed Works on Site on 4 April 2022. Namely, Andrew Atkinson attended the Site that day and used the Excavator to spread stabilising sand around the basement in preparation for the laying of a concrete slab.

17 On 28 April 2022, the Excavator was removed from the Site with a crane.

C.2 **The SOP Act and the Determination**

⁷ Court Book 115-121, DUPA's Quotation signed on 29 July 2021 and Terms & Conditions of Trade.

- 18 The Adjudicator found,⁸ and it is not in dispute, that for the purposes of the *SOP Act*:
- (a) the Contract constitutes a 'construction contract';⁹ and
 - (b) the Works comprise 'construction work'.¹⁰
- 19 Section 9(1) of the *SOP Act* entitles a claimant who has undertaken to carry out construction work under a construction contract to a progress payment on and from each reference date under that contract.¹¹ Between 23 November 2021 and 21 January 2022, DUPA submitted claims for progress payments.¹²
- 20 The Contract made no express provision for the making of a claim for final payment. There was no defects liability period under the Contract, and no final certificate was issued by Endeavour as the head contractor.
- 21 In these circumstances, s 9(2)(d)(iii) of the *SOP Act* defines the reference date applicable to the claim for final payment, and s 14(5) of the *SOP Act* stipulates when that final payment claim must be served.
- 22 Section 9(2)(d) provides (emphasis added):

In this section, *reference date*, in relation to a construction contract, means –

...

- (d) in the case of a final payment, if the contract makes no express provision with respect to the matter, **the date immediately following –**
 - (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
 - (ii) the issue under the contract of a certificate specifying the final amount payable under the contract *a final certificate*; or

⁸ Court Book 325-342, Adjudicator's Determination, [3]–[9].

⁹ *Building and Construction Industry Security of Payment Act 2002* (Vic), s 4 ('*SOP Act*').

¹⁰ *Ibid*, s 5(1)(a).

¹¹ *Ibid*, s 9(1)(a).

¹² Court Book 109, Adjudication Application, Document 2, page 12.

(iii) if neither subparagraph (i) nor subparagraph (ii) applies, **the day that –**

(A) **construction work was last carried out under the contract; or**

(B) related goods and services were last supplied under the contract.

23 Section 14(5) provides (emphasis added):

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; or

(b) if no such period applies, within **3 months after the reference date** referred to in section 9(2) that relates to that progress payment.

24 On 6 July 2022, DUPA served the 6 July Payment Claim via email to Endeavour seeking payment of \$125,989.68.¹³ It is common ground that the 6 July Payment Claim was a final payment claim under the *SOP Act*, and this is how it was treated by the Adjudicator.¹⁴

25 In the attachment to the 6 July Payment Claim labelled 'Machine Hire for Additional Works', DUPA identified that the last date the Excavator was used on Site was 7 April 2022.¹⁵

26 The due date for Endeavour to either pay the 6 July Payment Claim, or serve a payment schedule in response, was 20 July 2022.¹⁶

27 In response to DUPA's email attaching the 6 July Payment Claim, Mr Lawes of Endeavour asked DUPA to send him the 'rock receipts'.¹⁷

28 Endeavour did not serve a payment schedule, nor did it make payment of the sum identified in the 6 July Payment Claim. Consequently, DUPA became entitled to apply for adjudication of the 6 July Payment Claim under s 18(1)(b) of the *SOP Act*.

¹³ Court Book 50–64, Email correspondence dated 6 July 2022 with attachments.

¹⁴ Court Book 325–342, Adjudicator's Determination, [24].

¹⁵ Court Book 64.

¹⁶ In accordance with ss 12(b) and 15(4)(b)(ii) of the *SOP Act*.

¹⁷ Court Book 194, Email correspondence.

However, an adjudication application cannot be made until the requisite notice is given under s 18(2) of the *SOP Act*.

29 Section 18(2) provides:

An adjudication application to which subsection (1)(b) applies cannot be made unless–

- (a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and
- (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.

30 On 25 July 2022, Lisa Atkinson of DUPA sent an email to Mr Lawes attaching:¹⁸

- (a) a bundle of the requested 'rock receipts'; and
- (b) a new version of the 6 July Payment Claim. This version included a text box at the end of the document containing the following:

This Section 18(2) Notice pursuant to the Building and Construction Industry Security of Payment Act (Vic) 2002 relates to payment claim dated 06/07/22 and is served on 25/07/22. Under Section 18(2) of the *Building and Construction Industry Security of Payment Act (Vic) 2002* you have two business days to provide a payment schedule before application for adjudication.

31 Endeavour did not provide a payment schedule within two business days of receiving DUPA's email and attachments on 25 July 2022.

32 On 3 August 2022, DUPA submitted an application for adjudication of the 6 July Payment Claim ('**Adjudication Application**'). In its Adjudication Application, DUPA identified the reference date for the 6 July Payment Claim as 7 April 2022, being the date it had identified as the last date on which construction work was carried out.¹⁹

33 On 9 August 2022, the Adjudicator sent a letter to the parties accepting his appointment as Adjudicator.

¹⁸ Court Book 68–91, Email correspondence and attachments.

¹⁹ Court Book 109, Adjudication Application, Document 2, page 12.

- 34 Endeavour, as the respondent to DUPA's Adjudication Application, did not provide an adjudication response in accordance with s 21(2A) of the *SOP Act*. It made a number of what the Adjudicator described as 'unsolicited submissions' to the Adjudicator, which he disregarded for the purposes of his Determination. The Adjudicator proceeded with the Determination in accordance with s 22(6) of the *SOP Act*.
- 35 On 29 August 2022, the Adjudicator provided his Determination to the parties. In accordance with s 23(1) of the *SOP Act*, he determined that the amount to be paid by Endeavour to DUPA was \$119,379.81, and that such amount became payable on 20 July 2022.²⁰
- 36 Endeavour now disputes the reference date relied on by DUPA for the 6 July Payment Claim, as it alleges that the last date construction work was carried out by DUPA was actually 4 April 2022 (rather than 7 April as claimed by DUPA). It also says that the version of the 6 July Payment Claim attached to Ms Atkinson's email on 25 July 2022 does not constitute a valid notice in accordance with s 18(2) of the *SOP Act*. Accordingly, it claims the Determination is invalid on these two grounds and should be quashed.

D Legal principles – Jurisdictional error

- 37 The existence of a reference date under a construction contract is a statutory precondition to the making of a valid payment claim,²¹ which is in turn a precondition to an adjudication application and hence the jurisdiction of the Adjudicator.²² The existence of a reference date may be labelled a 'jurisdictional fact' in the sense that it is a criterion, the satisfaction of which enlivens the power of the decision maker.²³

²⁰ Court Book 325–342, Adjudicator's Determination, [182].

²¹ *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, 345 [2] ('*Southern Han*').

²² *Ibid*, [44].

²³ *Ibid*, [47].

38 The existence of a valid reference date, and a finding made in relation to it, is open to review by the Court.²⁴

39 In this case, the existence of a valid reference date for the 6 July Payment Claim is dependent on when construction work was last carried out by DUPA.

40 The giving of requisite notice under s 18(2) of the *SOP Act* is also a precondition to the jurisdiction of the Adjudicator.²⁵

41 As conveniently summarised by Riordan J in the decision of *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd*,²⁶ if jurisdiction depends on a matter of fact, as it does in this case:

- (a) the Court must determine the question of fact for itself on the evidence placed before it;²⁷
- (b) the burden of establishing the facts which show an absence of jurisdiction always rests on the party applying for relief;²⁸
- (c) the standard of proof is high, requiring 'clear proof leading unmistakably to [the] conclusion' that there was an excess of jurisdiction;²⁹ and
- (d) the Court will hesitate before interfering if the Adjudicator has investigated the facts upon which the jurisdiction depends, and the finding is not manifestly wrong.³⁰

²⁴ *Shape Australia Pty Ltd v Nuance Group (Australia) Pty Ltd* [2018] VSC 808, [38]–[49] (Digby J).

²⁵ *Vinson v Neerim Properties Developments Pty Ltd* [2016] VSC 321, [53]–[56] (Vickery J) ('*Vinson*').

²⁶ [2020] VSC 414 ('*Watpac*').

²⁷ *Ibid*, [39]–[40] (Riordan J), citing *R v Marshall; Ex parte Baranor Nominees Pty Ltd* [1986] VR 19, 32–3 (Brooking J) ('*Marshall*').

²⁸ *Watpac* (n 26), [39] (Riordan J), citing *Marshall* (n 27) 32–3 (Brooking J); *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138, 153 (Dixon, Fullagar and Kitto JJ).

²⁹ *Watpac* (n 26), [39] (Riordan J), citing *Marshall* (n 27), 32–3 (Brooking J).

³⁰ *Watpac* (n 26), [39] (Riordan J), citing *R v Yaldwyn* (1899) 9 QLJ 242, 244 (Griffiths CJ); *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54, 92 (Fullagar J).

E Issue 1 – Was the 6 July Payment Claim supported by a valid reference date?

E.1 How the issue arises

42 DUPA claims that its last day of construction work occurred on 28 April 2022 and therefore the reference date which supports the 6 July Payment Claim arose on 29 April 2022.

43 Alternatively, and consistently with its application for adjudication, DUPA claims that its last day of construction work occurred on 7 April 2022, and the resulting reference date that supported the 6 July Payment Claim was 8 April 2022.

44 Endeavour says that DUPA was not on Site on 7 April 2022. It claims that the last day that DUPA performed construction work was actually 4 April 2022, and therefore the reference date arising under s 9(2)(d)(iii) was 5 April 2022. If this is correct, then the 6 July Payment Claim is not supported by a valid reference date.

E.2 Adjudicator's Determination

45 DUPA submitted to the Adjudicator, and the Adjudicator determined, that the last day of construction work performed by DUPA was on 7 April 2022. As a consequence, the Adjudicator determined that the applicable reference date for the 6 July Payment Claim was 7 April 2022. I note that under s 9(2)(d)(iii) of the *SOP Act*, the reference date ought properly to have been calculated as 8 April 2022, being the date immediately following 7 April 2022.

46 DUPA submitted five statutory declarations as part of its Adjudication Application.

47 Andrew Atkinson's statutory declaration dated 1 August 2022 contains a statement, amongst others, that:

- (a) DUPA performed Works on Site from 11 November 2021 to 7 April 2022; and
- (b) its last day of performing Works on Site was 7 April 2022.

48 James Atkinson's statutory declaration dated 1 August 2022 contains a statement that he worked at the Site from 6 December 2021 to 7 April 2022.

49 The Adjudicator stated that he was 'satisfied that the statutory declaration statements contained factual matters that the signatories stated were true and correct'.

50 The Adjudicator was also provided with DUPA's job diary records. James Atkinson's job diary entry for 7 April 2022 records:³¹

- (a) a start time of 7:00am, and an end time of 1:00pm;
- (b) a description of the Works performed that day as follows:

Walls at elevator shaft was filled of gravel and stabilising sand on basement slab

Trench dug for plumber

Spread gravel and sand with 5T

- (c) that the five tonne Excavator was used on Site; and

- (d) that he was on Site.

51 The Adjudicator stated that:³²

In its adjudication application, the claimant stated that the last day that construction work was carried out was 07/04/2022.

The payment claim included claims for completed variation works only and did not contain any submissions on payment for contract works for the period after 07/04/2022.

52 The Adjudicator then concluded that:³³

I am satisfied that this payment claim was a final payment claim for payment under the contract and that the last day that construction work was carried out was 07/04/2022.

I determine that, in accordance with s.9(2)(d)(iii)(A) of the Act, the reference date for the payment claims was 07/04/2022.

³¹ Court Book 292, Adjudication Application, Attachment 37.

³² Court Book 325-342, Adjudicator's Determination, [16]-[17].

³³ Court Book 325-342, Adjudicator's Determination, [18]-[19].

E.3 Competing evidence

53 At trial, the parties sensibly focussed their attention on the events of 7 April 2022. Their evidence addressed a number of factual matters, but the following are of particular significance to my determination of Issue 1:

- (a) Who was on Site on 7 April 2022?
- (b) What Works were done on that day?
- (c) Who operated the Excavator and what Works, if any, were performed with the Excavator?

54 For convenience, in the following paragraphs I have set out a summary of the evidence directed to those matters.

E.3.1 Endeavour's evidence

E.3.1.1 Photographs and videos of the Site

55 Through its witnesses, Endeavour adduced the following photographs and videos taken of the Site:

- (a) a photograph taken at 3:25pm on 31 March 2022 ('**31 March Photo**');³⁴
- (b) a photograph taken at 1:19pm on 6 April 2022 ('**6 April Photo**');³⁵
- (c) a photograph taken at 7:15am on 7 April 2022 ('**7:15am Photo**');³⁶
- (d) a video taken at 7:18am on 7 April 2022 ('**7:18am Video**');³⁷
- (e) a photograph taken at 7:31am on 7 April 2022 ('**7:31am Photo**');³⁸

³⁴ Court Book 37.

³⁵ Court Book 38.

³⁶ Court Book 40.

³⁷ Exhibit GL-2 to the First Lawes Affidavit.

³⁸ Court Book 41.

- (f) a photograph taken at 8:39am on 7 April 2022 ('**8:39am Photo**');³⁹
- (g) a photograph taken at 9:13am on 7 April 2022 ('**9:13am Photo**');⁴⁰
- (h) two photographs taken on 9 April 2022 ('**9 April Photos**');⁴¹
- (i) two photographs taken on 11 April 2022 ('**11 April Photos**');⁴² and
- (j) a photograph taken at 10:33am on 26 April 2022 ('**26 April Photo**').⁴³

56 James Atkinson does not appear in any of the photographs or videos taken on 7 April 2022.

E.3.1.2 Mr Lawes' evidence

57 Mr Lawes is an employee of Endeavour. He was responsible for managing the Site. He gave the following evidence in relation to who was on Site on 7 April 2022:

- (a) At 5:48am, he sent a text message to Andrew Atkinson asking if James Atkinson (DUPA's plant operator) could attend Site that day.⁴⁴ Andrew Atkinson did not respond to his text message, so Mr Lawes then organised for Mr Dargan (a friend of his since kindergarten) to help out on Site instead. During cross-examination, he said he waited until about 6:00am (12 minutes after he had sent his text) for a response from Andrew Atkinson before calling Mr Dargan. He did not try to call Andrew Atkinson.⁴⁵
- (b) The text message reveals that the reason Mr Lawes had asked for James Atkinson to attend Site that day was in order for James to operate the Excavator to move crushed rock, known as 'quarter minus', which was to be delivered to

³⁹ Court Book 42.

⁴⁰ Court Book 361.

⁴¹ Court Book 43–44.

⁴² Court Book 45–46.

⁴³ Court Book 47.

⁴⁴ Court Book 39.

⁴⁵ Transcript of Proceedings, *Endeavour Constructions Pty Ltd v Down Under Piling Pty Ltd* (Supreme Court of Victoria, Stynes J, 18 May 2023) 29–30 ('**Trial Transcript**').

Site that morning.⁴⁶ The quarter minus was used for infilling the lift core in the basement that was under construction.

- (c) Mr Lawes was on Site all day, and says James Atkinson did not attend Site at any time that day.⁴⁷

58 Mr Lawes gave the following evidence in relation to the delivery of the quarter minus to Site, and the work done to move the quarter minus to the lift core:

- (a) Two cubic metres of quarter minus was delivered to Site at around 8:00am.⁴⁸ He arranged for it to be delivered and dropped off on the south side of the Site, being the Francis Street side. Francis Street has two lanes of traffic each way and is a very busy road, as it goes between the docks and the container parks.⁴⁹ The delivery truck reversed up to the edge of the basement, and tipped the quarter minus directly onto the floor of the basement below ground level.
- (b) The quarter minus was then wheel-barrowed to where it was needed at the lift core by him and Mr Dargan.⁵⁰ The Excavator was not used for this. He took the 8:39am Photo, which depicts Mr Dargan holding a shovel and standing in the lift core on top of the quarter minus.
- (c) During cross-examination, it was put to Mr Lawes that, using a standard 100 litre wheelbarrow, it would take 20 barrow loads to move the two cubic metres of quarter minus from where it was dropped off on the Francis Street side of the basement to the lift core. He responded that he was uncertain of this, and said he had never counted the number of barrow loads used to complete the task.⁵¹

⁴⁶ Fourth Lawes Affidavit, [6]; Court Book 39.

⁴⁷ First Lawes Affidavit, [19].

⁴⁸ Trial Transcript (n 45), 14-5.

⁴⁹ Trial Transcript (n 45), 9.

⁵⁰ Fourth Lawes Affidavit, [7]

⁵¹ Trial Transcript (n 45), 15-6.

- (d) He rejected the proposition that a full barrow of quarter minus would be heavy, stating, 'Not for us. We're used to it'.⁵²
- (e) He initially estimated that it took him and Mr Dargan about 40 minutes to move the two cubic metres of quarter minus to the lift core using a wheelbarrow. Under further cross-examination, he stated that it took about five minutes to fill one barrow load and move it to where it was required. When counsel for DUPA then pointed out that filling and moving 20 barrow loads at that rate would take around two hours in total, he responded:⁵³

I don't recall but sometimes we do have a – out the front of our nature strip we do put a lot of rock to keep it – ah, so that we can do some in the basement, some on the nature strip. I don't remember if it all went into the basement that day, because we do put a lot on the nature strip where the trucks sit.

- (f) He was then shown the 9:13am Photo. By that time, the basement was largely covered in black plastic sheeting. Mr Lawes can be seen standing near and to the east of the Excavator, and Mr Dargan is nearby in the lift core. Mr Lawes said that at this time (9:13am), he was still moving the quarter minus to the lift core.⁵⁴ However, I note that in this photograph, there is no wheelbarrow visible near him or the lift core on the floor of the basement.⁵⁵

59 Mr Lawes gave the following evidence about the work done in relation to a stormwater pipe in the area near and to the east of the Excavator:

- (a) There is a stormwater pit located in the north-east corner of the Site. The stormwater pipe that connects to it runs parallel to the north wall of the basement. The end of the pipe starts at a point near and to the east of the Excavator. The 31 March Photo shows that on that date, the end of the pipe

⁵² Trial Transcript (n 45), 16.

⁵³ Trial Transcript (n 45), 16–7.

⁵⁴ Trial Transcript (n 45), 19.

⁵⁵ I further note that a red wheelbarrow can be seen parked next to a portable toilet in the upper left of the photograph. However this wheelbarrow is located outside of the basement at a higher elevation and some distance from Mr Lawes..

had been covered in crushed rock. Mr Lawes estimated it had been covered with about 100-130mm of crushed rock.⁵⁶

- (b) The 6 April Photo shows that the area around the end of the pipe had, by that time, been covered with a pile of sand.⁵⁷
- (c) To prepare for the concrete slab to be poured on the basement, the end of the pipe had to be uncovered from the layers of crushed rock and sand, and then capped off to prevent concrete entering the pipe during the pour.⁵⁸
- (d) He could not initially remember when the pipe was uncovered and capped off, and he could not recall if he or Mr Duca did that work.⁵⁹ He was then shown the 9:13am Photo, which shows that the pipe had been capped off by that time on 7 April 2022. He said Mr Duca must have done this.⁶⁰ Under re-examination, he was asked who removed the crushed rock that was over the pipe. He said:⁶¹

I would have, by hand and shovel. And if I needed a hand I had three steel fixers which are very big boys. They'd help me do anything I asked on that site.

- (e) He denied that the Excavator had been used to uncover the pipe.

60 Finally, Mr Lawes gave the following evidence in relation to the operation of the Excavator on 7 April 2022:

- (a) Andrew Atkinson had pointed out in his affidavit evidence that photographs of the Site taken by Mr Lawes (specifically the 7:31am Photo, 9 April Photos, 11 April Photos, and 26 April Photo) revealed that the cabin of the Excavator had changed direction after 7:31am on 7 April 2022, thereby supporting the proposition that it had been operated by DUPA on 7 April 2022.⁶² In response,

⁵⁶ Trial Transcript (n 45), 22-4.

⁵⁷ Trial Transcript (n 45), 24.

⁵⁸ Trial Transcript (n 45), 25.

⁵⁹ Trial Transcript (n 45), 27.

⁶⁰ Trial Transcript (n 45), 27.

⁶¹ Trial Transcript (n 45), 32.

⁶² First A Atkinson Affidavit, [27].

Mr Lawes explained that *he* had operated the Excavator on 7 April 2022 by using a spare key to unlock it and move its boom out of the way. He deposed that:

- (i) On 6 April 2022 at 8:31am, he had sent a text message to Andrew Atkinson asking if he could come to Site to operate the Takeuchi Excavator. The text message stated 'Morning have you got time to come past put that sand in holes I think I need my own key'.⁶³ I note that he ended this text message with an emoji depicting a face crying with laughter.
- (ii) He did not hear back from Andrew Atkinson and only received missed calls from him at 3:00pm that day.⁶⁴
- (iii) He therefore borrowed a spare Takeuchi key from a friend of his.⁶⁵ During cross-examination, he said he borrowed the key on 6 April 2022 'just in case [he] had to move the machine so it didn't stop [his] concrete pour coming up on Monday...'.⁶⁶
- (iv) The Takeuchi key can be purchased online. It is a common key used across a range of Takeuchi machinery, including the Excavator.⁶⁷ This fact is not disputed.
- (v) At around 10:00am on 7 April 2022, he used the spare key to move the boom of the Excavator around so that it was out of the way of other Works happening on Site.⁶⁸
- (vi) He has grown up around construction sites and is very familiar with heavy machinery and knows their basic operations. On one occasion, Andrew Atkinson had previously asked him to use a different and much

⁶³ Fourth Lawes Affidavit, [11].

⁶⁴ Fourth Lawes Affidavit, [12].

⁶⁵ Fourth Lawes Affidavit, [12].

⁶⁶ Trial Transcript (n 45), 31.

⁶⁷ Fourth Lawes Affidavit, [12].

⁶⁸ Fourth Lawes Affidavit, [13].

larger 50 tonne excavator to move some dirt around on Site, which he did for no more than 20 minutes. However he could not recall when this occurred.⁶⁹

- (b) Under cross-examination, he initially said that he operated the Excavator at about 10:00am on 7 April 2022 and did nothing but move the boom, stressing that '[he] didn't move the sand; [he] moved it by hand'.⁷⁰ He was then shown the 7:18am Video, and he agreed that it showed the Excavator's bucket resting on top of a pile of sand, and the Excavator's front bulldozer blade buried in that pile of sand at 7:18am. He agreed that the 9:13am Photo, taken two hours later, shows the Excavator's bucket and blade clear of the sand.⁷¹ It was put to Mr Lawes that the Excavator had clearly been operated between 7:18am and 9.13am, but not by him because, on his evidence, he had not operated it until 10:00am and had only moved the boom. Contrary to that evidence, the boom remained pointing east (and therefore had not been turned) in both the 7:18am Video and the 9:13am Photo. Mr Lawes responded that:⁷²

MR LAWES: When you hop in a machine, not knowing exactly what you [sic] doing, you move the levers. It could have lifted the boom. It could have moved the machine back slightly. I'm not a professional excavator driver. I just moved it out.

COUNSEL: But that's at 9.13am. You said that you did the moving of the boom at 10am?

MR LAWES: Well, if my - if I've made a mistake on my timing, exactly ---

COUNSEL: But, Mr Lawes, the boom is in the opposite direction?

MR LAWES: I can see - I can see the photo. I have a key, and I - I - I can move the machine. If it's in my way and it's gonna stop my job, I will be moving it.

- (c) During re-examination, he was asked who had removed the sand from under the Excavator's bucket. He said he removed it by hand using a wheelbarrow.⁷³

⁶⁹ Fourth Lawes Affidavit, [13].

⁷⁰ Trial Transcript (n 45), 27-8.

⁷¹ Trial Transcript (n 45), 28.

⁷² Trial Transcript (n 45), 29.

⁷³ Trial Transcript (n 45), 32-3.

In response to my question, he pointed out that the sand had been put into the same hole that Mr Dargan had been filling with quarter minus, being the lift core. The sand can be seen inside the lift core, under Mr Dargan's feet, in the 9:13am Photo. Mr Lawes confirmed that the sand was put on top of the quarter minus.⁷⁴

E.3.1.3 Mr Dargan's evidence

61 Mr Lawes and Mr Dargan are old friends.⁷⁵ Mr Dargan is unemployed. He lives in the rural town of Benloch in Victoria, which is located around one hour's drive away from Site. He gave the following evidence in relation to who was on Site on 7 April 2022:

- (a) He was contacted by Mr Lawes early on the morning of 7 April 2022 to help out on Site, because Mr Lawes had not heard back from the excavation contractor and he needed help filling in the lift core.⁷⁶ Under cross-examination, he emphasised that he went to Site only to 'help' Mr Lawes and did not 'work' for him.⁷⁷
- (b) He deposed that he arrived on Site at 7:10am and stayed until about 4:30pm.⁷⁸
- (c) He initially deposed that 7 April 2022 'was the one and only day that [he had] ever been on the job site'.⁷⁹ However, the 6 April Photo shows Mr Dargan was also on Site the day prior. Under cross-examination, he said he had made an honest mistake about this in his affidavit because he has problems reading and writing.⁸⁰ He clarified that he had in fact been on Site on 6 April 2022 but insisted that it was only to 'say hello and stuff on the job site'. He denied working or helping on Site on 6 April 2022, saying he had simply 'popped in to

⁷⁴ Trial Transcript (n 45), 33.

⁷⁵ Trial Transcript (n 45), 35.

⁷⁶ Dargan Affidavit, [3].

⁷⁷ Trial Transcript (n 45), 40.

⁷⁸ Dargan Affidavit, [4].

⁷⁹ Dargan Affidavit, [9].

⁸⁰ Trial Transcript (n 45), 36.

see [his] friends.’⁸¹ He also said that Mr Lawes had actually asked him on 6 April 2022 to return the next day to help.⁸²

- (d) He then said he received the call from Mr Lawes at around 5:40am on 7 April 2022. He said he had been asleep at the time, and after receiving the call, he did not have breakfast and drove straight to Site. He said he arrived at the Site around 7:00am.⁸³ He had previously deposed to arriving at 7:10am.⁸⁴
- (e) He recalled that the only other people on Site that day were Mr Duca for a few hours in the morning, and three steel fixing contractors.⁸⁵

62 In relation to the Works done on Site on 7 April 2022, Mr Dargan deposed that he filled in the lift core by hand using a shovel, and that the Excavator was not used to help him with this.⁸⁶ During cross-examination, he said that Mr Lawes helped him with this task for ‘most of the time’.⁸⁷ He said that in places where there were starter bars (steel bars forming part of the concrete reinforcement) surrounding the lift core, which blocked the path of the wheelbarrow and prevented them from being able to tip quarter minus directly into the lift core, they had to shovel the quarter minus out of the wheelbarrow into the lift core.⁸⁸

63 Further, under cross-examination, Mr Dargan conceded that he had discussed what his evidence would be with Mr Lawes. He then said: ‘Oh, we talked, but I - I know what I did on the 7th, that day, yes’.⁸⁹

E.3.1.4 Mr Duca’s evidence

64 Mr Duca is a plumber at Plumbpro Solutions, a company which was subcontracted by Endeavour to carry out plumbing works on Site. He gave evidence that:

⁸¹ Trial Transcript (n 45), 36.

⁸² Trial Transcript (n 45), 36–7.

⁸³ Trial Transcript (n 45), 37–8.

⁸⁴ Dargan Affidavit, [4].

⁸⁵ Dargan Affidavit, [6].

⁸⁶ Dargan Affidavit, [4].

⁸⁷ Trial Transcript (n 45), 40.

⁸⁸ Trial Transcript (n 45), 47.

⁸⁹ Trial Transcript (n 45), 37.

- (a) He attended Site from about 7:00am to 10:30am on 7 April 2022. During that time, he was check-measuring and lagging the pipes, as well as installing some Agi-Pipe around the steel shafts, prior to the concrete pour.⁹⁰
- (b) On Site that day were Mr Lawes, three steel fixing contractors, and Mr Dargan. Mr Dargan was helping to fill in the lift core. He did not recall either Andrew or James Atkinson being on Site on 7 April 2022.⁹¹
- (c) The Excavator was not used on 7 April 2022.⁹²
- (d) The quarter minus was dropped off to Site 'at the top of the ramp' and was 'wheelbarrowed down into the site, rather than using the excavator'.⁹³ In fact, the ramp down into the basement had not been constructed on 7 April 2022. Under cross-examination, Mr Duca clarified that what he meant was that the quarter minus was dropped onto the basement floor in the location where the proposed ramp was to be built, and was then wheelbarrowed 'in' the basement as opposed to being 'wheelbarrowed down into' the basement.⁹⁴
- (e) The end of the stormwater pipe in the area near the Excavator was, as at 6 April 2022, buried beneath about 130mm of crushed rock and a pile of stabilising sand.⁹⁵ The work required to bring that pipe to the surface to cap it off included exposing it by removing the layers of sand and gravel above it.⁹⁶

E.3.2 DUPA's evidence

E.3.2.1 Andrew Atkinson's evidence

65 Andrew Atkinson is the managing director of DUPA. He gave the following evidence:

⁹⁰ Duca Affidavit, [4].
⁹¹ Duca Affidavit, [5], [9].
⁹² Duca Affidavit, [9].
⁹³ Duca Affidavit, [9].
⁹⁴ Trial Transcript (n 45), 51-2.
⁹⁵ Trial Transcript (n 45), 58.
⁹⁶ Trial Transcript (n 45), 60-1.

- (a) DUPA used the Excavator for the necessary excavation works on Site. It has a miniature bulldozer blade at the front end of its tracked undercarriage. Its boom, engine and cabin sit on top of the undercarriage, and can rotate 360 degrees. When not in use by DUPA, the Excavator was locked and sat on the floor of the basement at the Site. DUPA has the only key to access the Excavator. At no time was it used by Endeavour or its other subcontractors.⁹⁷
- (b) The last day Andrew worked on Site was on 4 April 2022. He used the Excavator on that day, and says it was the only vehicle remaining on Site by that time. He used it to spread stabilising sand around the Site. He then parked the Excavator in the north-west corner of the basement as that was the only place he could leave it given the rest of the basement was ready to be concreted over.⁹⁸
- (c) He received Mr Lawes' text message at 5:48am on 7 April 2022. His son, James Atkinson, works for DUPA as an excavator operator. James lives with him. After receiving the text, Andrew arranged for James to go to Site at 8:00am.⁹⁹
- (d) He referred to the photographs of Site taken by Mr Lawes and observed that:¹⁰⁰
- (i) in the 7:31am Photo, the cabin of the Excavator was facing east; and
 - (ii) in the photograph taken two days later, on 9 April 2022 at 7.53am, the cabin of the Excavator was facing west.

I note that no one suggests the Excavator was operated other than on 7 April 2022.

- (e) It was not possible for Mr Lawes to have accessed the Excavator with a spare key and moved the boom on 7 April 2022, as Mr Lawes claims, because the Excavator has a switch that isolates the Excavator's battery from its electrical

⁹⁷ First A Atkinson Affidavit, [8]–[9].

⁹⁸ Trial Transcript (n 45), 63–4.

⁹⁹ First A Atkinson Affidavit, [17].

¹⁰⁰ First A Atkinson Affidavit, [27].

system. That isolator switch is lockable with a padlock.¹⁰¹ In answer to my question about the isolator switch, Andrew explained that its purpose is to isolate the machine so that no one can use the main ignition key to start the Excavator and use it on weekends or cause damage.¹⁰² It is DUPA's practice to keep the isolator switch locked with a padlock in the off position as an additional security measure when the Excavator is left onsite overnight. The isolator switch is located behind the engine cover panel at the rear of the Excavator's body. The ignition key opens both the rear cover panel and the cabin of the Excavator, but a separate key is used for the padlock securing the isolator switch.¹⁰³ Photographs were exhibited showing the isolator switch padlocked in the off position, and the two keys used for the padlock and the Excavator's cabin and rear cover panel.¹⁰⁴ Importantly, Andrew deposed that he never gave Mr Lawes a copy of the key to the isolator switch padlock.¹⁰⁵

- (f) Andrew says that when he finished work on 4 April 2022, he locked the isolator switch with the padlock, and then locked the rear panel of the Excavator and its cabin. He then took the keys to the Excavator with him, including the separate key for the isolator switch padlock.¹⁰⁶ During cross-examination, he confirmed that the ignition key for the Excavator can be purchased online.¹⁰⁷ It was put to him that his evidence regarding the padlocked isolator switch was a recent invention to rebut Mr Lawes' evidence that the ignition key is a common key which can be used interchangeably with other Takeuchi excavators. He persuasively rejected that proposition, stating:¹⁰⁸

... all our machines have lockable isolators on them. If you don't have them, you can't work on any tier 1 jobs. That's a requirement.

¹⁰¹ Second A Atkinson Affidavit, [7].

¹⁰² Trial Transcript (n 45), 72.

¹⁰³ Second A Atkinson Affidavit, [8]–[10].

¹⁰⁴ Court Book 418-9, Photographs of the padlocked isolator switch, and the two separate keys used for the rear engine cover panel and the isolator switch padlock.

¹⁰⁵ Second A Atkinson Affidavit, [11].

¹⁰⁶ Second A Atkinson Affidavit, [11].

¹⁰⁷ Trial Transcript (n 45), 70.

¹⁰⁸ Trial Transcript (n 45), 71.

... Now, that machine was, ah, down at the West Gate Tunnel Project alongside one of the other drill rigs'

- (g) Andrew denied that he previously asked Mr Lawes to move some dirt around on Site using a different 50 tonne excavator. He deposed that he had asked if Mr Lawes wanted to 'have a go' at using the 50 tonne excavator purely for his enjoyment. But he said that Mr Lawes only sat in the seat for a couple of minutes and, under instruction, moved the levers.¹⁰⁹
- (h) During cross-examination, Andrew was referred to an email sent by Ms Atkinson to Mr Lawes on 6 July 2022 attaching the 6 July Payment Claim.¹¹⁰ Amongst other amounts, the second line item in the 6 July Payment Claim records a sum of \$66,155 for 'Machine hire for additional works'. The details of that sum are set out in a separate table attached to the email.¹¹¹ The last item in that table is the entry for 7 April 2022. It records the following:¹¹²
- (i) in the 'Personnel' column: '1';
 - (ii) in the 'Description' column: 'Additional Works - Spreading gravel and sand';
 - (iii) in the 'Machine' column: '5T Excavator \$125.00 x 6 hours only (No minimum charge. Discount \$250.00)'; and
 - (iv) in the 'Charge' column: '\$750.00'.
- (i) Andrew said that these details of work, machinery and time recorded in the table must have come from DUPA's job diary entry for 7 April 2022, which was completed by James Atkinson.¹¹³
- (j) While Andrew did not attend Site on 7 April 2022, he said that either he rang James or James rang him during the day, to let him know what was going on.

¹⁰⁹ Second A Atkinson Affidavit, [13].

¹¹⁰ Court Book 50-64, Email correspondence dated 6 July 2022 with attachments.

¹¹¹ Court Book 57, attachment to 6 July Payment Claim labelled 'Machine Hire for Additional Works'.

¹¹² Court Book 64.

¹¹³ Trial Transcript (n 45), 68.

Andrew conceded that he had no independent information to verify whether or not James was actually on Site that day.¹¹⁴

E.3.2.2 James Atkinson's evidence

66 James Atkinson is Andrew Atkinson's son, and lives with his father. James gave the following evidence in relation to his attendance on Site on 7 April 2022 and the Works he undertook that day:

- (a) He says he attended Site on 7 April 2022, arriving at about 8:00am.¹¹⁵ When he got to Site, he unlocked the Excavator. He first unlocked the cover panel at the rear of the Excavator with the ignition key. He then unlocked the padlock of the isolator switch using a separate key, and turned on the electrical system for the Excavator. He then closed and locked the panel at the rear of the Excavator. Lastly, he unlocked the cabin of the Excavator. At the end of the day, he locked up the Excavator by repeating this process in reverse, including padlocking the isolator switch in the off position.¹¹⁶
- (b) On the morning of 7 April 2022, after unlocking the Excavator and turning it on, James says he used the Excavator, at Mr Lawes' request, to shift quarter minus down into the basement so it could be used to fill around the lift core.¹¹⁷
- (c) He denies that the quarter minus was delivered to Site at the location described by Mr Lawes (directly into the basement on the southern Francis Street side of the Site). He noted that for the delivery truck (which was a tipper truck) to back up to the edge of the basement in the way described by Mr Lawes, the truck would have had to do a two point turn across the busy flow of traffic on Francis Street. While the tipper was elevating, the cabin of the truck would have to face outwards and partially obstruct a lane of Francis Street. The street

¹¹⁴ Trial Transcript (n 45), 69.

¹¹⁵ First J Atkinson Affidavit, [4].

¹¹⁶ Second J Atkinson Affidavit, [8]–[10].

¹¹⁷ First J Atkinson Affidavit, [5].

was a busy truck route, and was also a truck clearway (a section of road where trucks cannot stop or park) between 8:00am and 9:30am that day.¹¹⁸

- (d) James explained where the quarter minus was delivered by reference to the 9:13am Photo showing the Excavator in the north-west corner of the Site. Above the Excavator, along the north wall of the basement, is construction hoarding (ie, temporary fencing along the top edge of the basement wall). On the other side of the hoarding is the driveway of the neighbouring property to the north at 98 Powell Street. The photograph shows a gap in the hoarding. James says the quarter minus had not been delivered when he arrived at Site around 8:00am.¹¹⁹ He says it was delivered at around 8:30am to a location behind the gap in the hoarding on the driveway of 98 Powell Street, although it is not visible in the 9:13am Photo due to the angle at which it was taken.¹²⁰
- (e) He moved the quarter minus down from behind the gap in the hoarding and into the basement without tracking (ie, horizontally moving) the Excavator. He explained how he operated the Excavator to do these Works:¹²¹
- (i) First, he turned the special rotating bucket attachment, also known as the 'mud bucket', so that it was facing the other direction. The mud bucket was already fitted to the Excavator when he arrived at Site.¹²²
 - (ii) He then lifted the boom of the Excavator and placed the mud bucket through the gap in the hoarding, under the lower hoarding rail, close to the pile of quarter minus.
 - (iii) Two of the three steel fixing contractors who were on Site then helped by filling the bucket of the Excavator with quarter minus by hand using shovels.

¹¹⁸ Second J Atkinson Affidavit, [4], [6].

¹¹⁹ Second J Atkinson Affidavit, [5].

¹²⁰ First J Atkinson Affidavit, [6]–[8].

¹²¹ First J Atkinson Affidavit, [9].

¹²² Trial Transcript (n 45), 85–6.

- (iv) James then moved the full bucket through the gap in the hoarding, and deposited its contents as close as possible to the lift core.
- (v) He produced a video of himself demonstrating the rotating bucket attachment and the technique that was used by him on 7 April 2022 to move the quarter minus.¹²³
- (vi) During cross-examination, he explained that he was:¹²⁴

... essentially just going straight from the top and just dumping it straight into where it needed to be and then after that [Mr Dargan] would just smooth it out with a shovel.
- (f) He estimated that moving all of the quarter minus down into the basement in or around the lift core took him less than 30 minutes in total.¹²⁵
- (g) Additionally, while he was on Site, Mr Duca asked him to help dig a shallow trench with the Excavator for a drainage pipe on the east side of the Excavator. James also did this work without tracking the Excavator.¹²⁶ During cross-examination, he explained that he dug this trench using a different bucket attachment to the Excavator, known as the 'trenching bucket'. He said that:¹²⁷
 - (i) after he finished shifting the quarter minus, he removed the mud bucket and fitted the Excavator with the trenching bucket. It can take less than 20 seconds to change over buckets;
 - (ii) before he dug the trench, he cleared the sand in the area by pushing it underneath the Excavator;
 - (iii) the trench he dug with the trenching bucket was about one metre in length and no more than 15cm deep. He said it was very shallow; and

¹²³ Exhibit JA-1 to the First J Atkinson Affidavit.

¹²⁴ Trial Transcript (n 45), 87.

¹²⁵ Trial Transcript (n 45), 87.

¹²⁶ First J Atkinson Affidavit, [10].

¹²⁷ Trial Transcript (n 45), 87-9.

(iv) he was not quite sure how long it took for him to dig the trench, but estimated that it was probably 10 to 15 minutes.

(h) Later that day, he filled out a record of his work in DUPA's job diary.

(i) His entry in the job diary records that he started at 7:00am and finished at 1:00pm. As set out above, it records the Works performed as follows:

Walls at elevator shaft was filled of gravel and stabilising sand on basement slab

Trench dug for plumber

Spread gravel and sand with 5T

(j) He did not start work at 7:00am but at 8:00am. The start time of 7:00am recorded in the site diary was wrong. He sought to explain this error by noting that under the terms of the Contract, the minimum day hire for the Excavator (including an operator) was eight hours. He therefore entered 7:00am as the start time in the job diary so that it would show he had spent a total of six hours on Site, and Endeavour would be charged only for that amount. He said this seemed to be a reasonable compromise between the five or so hours he actually worked that day and DUPA's entitlement to charge for eight hours of hire.¹²⁸

67 During cross-examination, James Atkinson responded to questions about the timing of the activities he claims to have undertaken on Site on 7 April 2022:

(a) He was questioned about his absence from the 9:13am Photo, which captures almost the entire Site and depicts the basement covered in black plastic sheeting. He responded that he was probably having a break at this time, as he would normally take a 15-minute break between 9:00am and 10:00am.¹²⁹

¹²⁸ First J Atkinson Affidavit, [11].

¹²⁹ Trial Transcript (n 45), 79–80.

- (b) He was questioned about the timing of the Works performed. He maintained that it had probably taken him about 30 minutes to move the quarter minus, and less than 15 minutes to dig the trench for the drainage pipe.
- (c) He was asked when the black plastic sheeting was spread across Site. He said: 'Not while I was there. The steel fixers were still rolling it out' and 'were getting to it'. In fact, the 9:13am Photo shows that the plastic sheeting had been spread across Site by 9.13am on 7 April 2022.
- (d) It was put to him that there was insufficient time between 8:30am (when he said the quarter minus was delivered) and 9:13am (when he allegedly took a break) for him to have moved all the quarter minus and dug the trench for the pipe, for the plumber to have capped off the pipe, and for the plastic sheeting to have been lain over the area with the pipe. James maintained that this was possible and had occurred.¹³⁰
- (e) He was unable to explain what other Works he performed during the time he remained on Site, which he recorded in the job diary as being until 1:00pm.¹³¹

68 James Atkinson conceded that during the lunch break on the day of trial, before he had been called to give his evidence, he had a five minute conversation with his father, Andrew, over lunch about the evidence Andrew had given earlier in the day. James said they discussed '[my] affidavit and what I've already said', and said Andrew had told him to 'explain how the machine [was] sitting'. When asked what directions or advice Andrew had given him, James responded: 'Well, just truthfully say what I did – what I did in the day'. He also said his father had told him to explain the direction that the Excavator cabin was facing.¹³²

E.3.3 Counsel's submissions about the competing evidence

¹³⁰ Trial Transcript (n 45), 93–4.

¹³¹ Trial Transcript (n 45), 94–5.

¹³² Trial Transcript (n 45), 80–2.

69 Counsel for Endeavour made the following submissions about the evidence and the weight it should be given, in summary:

- (a) It is generally easier to prove the positive than to prove the negative. Endeavour is unable to disprove James Atkinson's presence on Site on 7 April 2022 by mere photographs. But Endeavour was not expecting it would have to prove whether he was absent from Site when it took the photographs – the photographs it has are just incidental.¹³³
- (b) All of the witnesses, other than Mr Duca, can be criticised as being interested parties.¹³⁴
- (c) James Atkinson's evidence lacks credibility. He gave evidence that was inconsistent with the times recorded in his job diary. He could not explain what work he did between 9:13am and 1:00pm on 7 April 2022. And the timelines he gave for all of the tasks he said were completed on Site before 9:13am were 'awfully tight'.¹³⁵
- (d) For the same reason, the veracity of the job diary entry for 7 April 2022 should be called into question.¹³⁶

70 Counsel for DUPA made the following submissions about the evidence and the weight it should be given, in summary:

- (a) James Atkinson's job diary entry for 7 April 2022 records the presence of a plumber on Site, which James can only have known because he was also on Site.¹³⁷

¹³³ Trial Transcript (n 45), 110–11.

¹³⁴ Trial Transcript (n 45), 111.

¹³⁵ Trial Transcript (n 45), 116–22

¹³⁶ Trial Transcript (n 45), 123.

¹³⁷ A Ritchie, 'First Defendant's Outline of Submissions', Submissions in *Endeavour Constructions Pty Ltd v Down Under Piling Australia Pty Ltd*, S ECI 2022 04386, 18 May 2023, [18(b)].

- (b) Mr Lawes' version of events is improbable. There would have to have been some fairly 'frenetic' wheelbarrowing of the quarter minus to have it all moved to the lift core by 9:13am.¹³⁸
- (c) Mr Dargan's evidence should be questioned. His evidence about shovelling the quarter minus out of the wheelbarrow in places where starter bars were surrounding the lift core was inconsistent with Mr Lawes' evidence. More importantly, his evidence was 'fatally undermined' by his acknowledgement that his affidavit evidence was wrong and he had in fact been to Site before 7 April 2022. Further, Mr Lawes and Mr Dargan are clearly 'very close friends of very long-standing'.¹³⁹

E.4 Consideration

71 Having regard to the evidence given by each of the witnesses, it is apparent that there is some common ground between the parties.

72 First, there is little dispute about the Works done on Site on 7 April 2022. Relevantly, it is agreed that:

- (a) quarter minus was delivered to Site and was used to infill the lift core;
- (b) the lift core was filled with quarter minus and some sand was then placed on top of that; and
- (c) it was necessary to dig around the end of the stormwater pipe near the Excavator to allow for that pipe to be brought up out of the ground and capped off ahead of the concrete slab being poured.

73 Second, as to timing, it is clear that the above Works were done between around 8:00am to 9:13am. While Mr Lawes says he was still shovelling the quarter minus at

¹³⁸ Trial Transcript (n 45), 144.

¹³⁹ Trial Transcript (n 45), 145–6.

9:13am, he also gave evidence that sand was placed on top of the quarter minus. I note that the sand is visible in the lift core in the 9:13am Photo.

74 Third, as to who attended Site, it is not in dispute that:

- (a) at least Mr Dargan, Mr Lawes, Mr Duca and three steel fixing contractors attended; and
- (b) Mr Lawes contacted Andrew Atkinson at 5:48am on 7 April 2022, and asked that he organise for James Atkinson to attend Site to move the quarter minus.

75 Fourth, on both parties' evidence, the Excavator was operated in some way on 7 April 2022.

76 Finally, it is agreed that the ignition key for the Excavator is common across Takeuchi machinery and can be purchased online.

77 The issues that remain to be resolved are the following:

- (a) First, did James Atkinson attend Site on 7 April 2022?
- (b) Second, who operated the Excavator on 7 April 2022?
- (c) Third, if the Excavator was operated by James Atkinson, was it used to perform the Works the parties agree were done on 7 April 2022?

78 The parties presented two competing versions of events.

79 Endeavour says, in summary:

- (a) James Atkinson never attended Site on 7 April 2022;
- (b) the Excavator was operated by Mr Lawes, who turned it on to move the boom out of the way, and thereby rotated the cabin;
- (c) the quarter minus was deposited directly onto the basement floor from Francis Street on the south side of the Site; and

- (d) the quarter minus was then moved to the lift core by Mr Lawes and Mr Dargan by wheelbarrow, requiring them to shovel the quarter minus into and out of the wheelbarrow (due to the location of the starter bars around the lift core).

80 DUPA says, in summary:

- (a) James Atkinson attended Site that day in response to Mr Lawes' request, arriving at 8:00am;
- (b) the quarter minus was delivered at 8:30am to the driveway of 98 Powell Street on the north side of the Site;
- (c) James Atkinson then operated the Excavator by:
 - (i) using the mud bucket attachment to move the quarter minus to the lift core; and
 - (ii) subsequently, using the trenching bucket attachment to uncover the stormwater pipe; and
- (d) the above Works took James around 40 to 45 minutes to complete.

81 I note that as both parties' versions of events rely on the activities of the steel fixing contractors, both parties may have benefited from calling them as witnesses. Neither party did. I draw no inference from their failure to do so.

82 Having regard to the evidence and for the reasons that follow, I find that DUPA's version of the events of 7 April 2022 is more plausible than Endeavour's, and I accept it.

83 In relation to the first remaining issue to be resolved, which is whether James Atkinson attended Site on 7 April 2022, I find that on the balance of probabilities, he did attend Site that day.

84 His attendance was consistent with:

- (a) Mr Lawes' request that he attend; and
- (b) the contemporaneous job diary entry.

85 I was not persuaded by the evidence of Mr Duca, whose recollection of events was shown to be defective. First, he was not aware that the Excavator had been operated on the day, but it is common ground between the parties that it was. Further, he recalled the quarter minus being wheelbarrowed down a ramp which had not been constructed at the relevant time. He tried to explain away this error during cross-examination, as set out in paragraph [64(d)] above. Having regard to the clear words used in his affidavit evidence, his subsequent explanation was not persuasive.

86 I was also not persuaded by the evidence of Mr Dargan. For the following reasons, I have formed the general view that he was an unreliable witness:

- (a) His evidence was inconsistent regarding how he came to be on Site on 7 April 2022, and whether he had been on Site on an earlier occasion.
- (b) He was evasive during cross-examination.
- (c) He conceded that he had discussed what his evidence would be with Mr Lawes, who has been his friend since kindergarten.
- (d) The manner in which he gave evidence persuaded me that he was keen to give evidence in support of Mr Lawes, regardless of its truth.

87 In relation to the second remaining issue to be resolved, which is who operated the Excavator on 7 April 2022, I find on the balance of probabilities that James Atkinson operated the Excavator:

- (a) I accept the evidence of Andrew Atkinson that the Excavator had a lockable isolator switch which required a separate key. His evidence about this was supported by photographs.

- (b) I also accept the evidence of Andrew Atkinson that he applied the padlock to the isolator switch at the end of the day on 4 April 2022, the last time the Excavator was operated before 7 April 2022. It is entirely plausible that the managing director of DUPA would take steps to protect his company's assets from misuse in circumstances where it is relatively easy to acquire a standard ignition key.
- (c) Having regard to the evidence of Andrew Atkinson about the lockable isolator switch, Mr Lawes could not have operated the Excavator and I reject his evidence about this. In any event, I was not persuaded by his evidence about the operation of the Excavator. The evidence he gave under cross-examination about the timing of the operation, what he did, and his knowledge about how to operate the Excavator was inconsistent with his earlier affidavit evidence. His version of events changed when photographic evidence was used to undermine his earlier evidence.
- (d) Having accepted that James Atkinson did attend Site on 7 April 2022, the logical conclusion is that, as DUPA's plant operator with the required keys, he operated the Excavator.

88 In relation to the third remaining issue to be resolved, regarding whether the Excavator was used to perform the Works which both parties agree were done on 7 April 2022, I find on the balance of probabilities that the Works were done by James Atkinson using the Excavator. I consider that this is the more plausible version of events for the following reasons:

- (a) It is consistent with the content of the contemporaneous job diary entry.
- (b) It is consistent with Mr Lawes' intention, as expressed in his text message to Andrew Atkinson that morning, that the Excavator be used for the purpose of moving the quarter minus.¹⁴⁰

¹⁴⁰ Fourth Lawes Affidavit, [6], Court Book 39.

- (c) The quarter minus could be, and was said by James Atkinson to be, delivered within ready reach of the Excavator. I note that by 7 April 2022, it was no longer possible for the Excavator to track across Site due to the Works being done to prepare for the concrete slab to be poured. I therefore infer, from Mr Lawes' intention that the Excavator be used to move the quarter minus,¹⁴¹ that he had intended to have the quarter minus delivered within reach of the Excavator.
- (d) James Atkinson was capable of using the Excavator in the manner he says he did, in order to move the quarter minus without needing to track the Excavator. This evidence was untrammelled by cross-examination.
- (e) No evidence was given about how much of the two cubic metres of quarter minus was required to fill in the lift core. When challenged about how long it would take to move two cubic metres by hand and wheelbarrow, Mr Lawes gave vague evidence about the possibility that some of the quarter minus was deposited onto the nature strip, although he could not recall if this did occur. It strikes me as inherently unlikely that the quarter minus would be delivered directly onto the basement floor which was intended to be, and was in fact, covered in black plastic sheeting by 9:13am in preparation for the pouring of the concrete slab. I am more persuaded by the evidence of James Atkinson that it was delivered to an area near the Excavator to the driveway behind the hoarding in the north west corner of the Site, making it possible to use as much of the quarter minus as required without otherwise disturbing the Works being done inside the basement. My view is reinforced having regard to the ease with which the quarter minus could be delivered to the end of the driveway at 98 Powell Street, compared to having it dropped onto the basement floor from Francis Street which would require a truck to perform a two-point turn across the flow of traffic on Francis Street, and to partially obstruct one lane of a busy route which was a truck clearway at the relevant time.

¹⁴¹ Fourth Lawes Affidavit, [6], Court Book 39.

- (f) While Mr Lawes and Mr Dargan may well be capable of moving heavy loads of quarter minus in a wheelbarrow at pace, and digging into sand and compressed gravel to uncover a stormwater pipe, it is more plausible that an experienced excavator operator attended to those tasks and completed them between 8:30am and 9:13am rather than those tasks being undertaken by hand between 8:00am and 9:13am. In particular, I note that the starter bars surrounding the lift core in certain places would have prevented the contents of the wheelbarrow from being tipped directly into the lift core, and so it would have been necessary for the quarter minus to be shovelled in and then out of the wheelbarrow on every trip. Further, while there are two photographs (taken about 35 minutes apart) showing Mr Dargan in the lift core spreading gravel and then sand, there is no sign of the wheelbarrow allegedly used to deliver the materials to the lift core. Those photographs are more consistent with the evidence of James Atkinson that, using the Excavator, he delivered the quarter minus to where it was needed for Mr Dargan to spread within the lift core.

89 Finally, while James Atkinson did concede that he had a five minute conversation with his father in the lunch break ahead of him giving evidence, and while he was unable to account for what Works were done after 9:13am, I found his evidence about his operation of the Excavator between 8.30 and 9.13am to be persuasive. It was clear he was trying to answer questions posed about the Works done – he was not evasive. His answers were consistent with the contemporaneous record of the Works done and his descriptions of how he attended to the Works done was believable.

90 Accordingly, I accept that DUPA carried out construction work under the Contract on 7 April 2022. Therefore, pursuant to s 9(2)(d)(iii) of the *SOP Act*, a reference date arose on 8 April 2022 which supports the 6 July Payment Claim.

91 As a result of this finding, it is unnecessary for me to consider whether or not construction work was also done by DUPA on 28 April 2022.

F Issue 2 – Was a valid notice served under s 18(2) of the SOP Act?

F.1 Adjudicator's Determination

92 The Adjudicator accepted that DUPA provided sufficient notice to Endeavour in accordance with s 18(2) of the *SOP Act*.

F.2 Submissions

93 Endeavour submits, in summary:

- (a) the covering email it received from Ms Atkinson on 25 July 2022 attaching a bundle of the requested 'rock receipts' and a new version of the 6 July Payment Claim (bearing the same title and date, but this time including at the end of the document in small font a text box purporting to be a s 18(2) Notice) only stated '[p]lease find attached rock dockets...', and made no reference to the other attachment. It was ostensibly replying to a query from Mr Lawes for the 'rock receipts';
- (b) Mr Lawes deposed that he did not notice the words in the text box of the new version of the 6 July Payment Claim when it was provided to him;¹⁴²
- (c) the purported s 18(2) Notice did not reasonably identify itself as such, and therefore does not satisfy the requirements of s 18(2)(a);
- (d) the test of whether notice has been provided is an objective one. However, analysis ought to go further than merely noting that the relevant words have been conveyed by the claimant to the respondent. Where, as here, the relevant words have been 'tucked away' in a large bundle of attachments without drawing sufficient notice to them, on an objective analysis, there is a risk that sufficient notice has not been provided; and

¹⁴² First Lawes Affidavit, [22].

(e) a contravention of s 18(2) invalidates a subsequent adjudication application.¹⁴³

94 DUPA submits, in summary:

- (a) none of the cases relied upon by Endeavour suggest that the requirement for notice should be construed with the subjective element contended for by Endeavour; and
- (b) in any event, the words comprising the s 18(2) Notice were not 'tucked away' in the relevant document. Rather:
 - (i) they were included in a further copy of the 6 July Payment Claim, which was obviously distinct from the 'rock receipts' that formed the other attachments to Ms Atkinson's email of 25 July 2022; and
 - (ii) Mr Lawes deposed to noticing the text box at the bottom of the version of the 6 July Payment Claim served on 25 July 2022.¹⁴⁴

F.3 Consideration

95 The issue in dispute is whether the document served on 25 July 2022 satisfies the requirements of s 18(2) of the *SOP Act*.

96 It is well established that contravention of s 18(2)(a) will invalidate a subsequent adjudication application.¹⁴⁵

97 The object and purpose of a s 18(2)(a) Notice is to enable the respondent to a payment claim to be given an opportunity under s 18(2)(b) to provide a payment schedule to the claimant within two business days after receiving the claimant's s 18(2) Notice.¹⁴⁶

¹⁴³ *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) 26 VR 112, [60], [146] (Vickery J) ('*Hickory*'); *Vinson* (n 25), [43]–[58] (Vickery J). See also obiter dicta in *Jotham Property Holdings Pty Ltd v Cooperative Builders Pty Ltd* [2013] VSC 552, [68] (Vickery J); *Branlin Pty Ltd v Totaro* [2014] VSC 492, [102] (Vickery J); *1155 Nepean Hwy v Promax Buildings* [2020] VSC 398, [106(d)] (Digby J).

¹⁴⁴ First Lawes Affidavit, [22].

¹⁴⁵ *Hickory* (n 143) [60], [146] (Vickery J).

¹⁴⁶ *Vinson* (n 25) [53] (Vickery J).

98 The *SOP Act* does not prescribe how the respondent is to be notified. It is critical, however, that a notice is received by the respondent and that it convey the claimant's intention to apply for adjudication of a payment claim.¹⁴⁷

99 Here, a written notice was included in a text box on the final page of a copy of the relevant payment claim.

100 It is unfortunate that the covering email did not identify it as an attachment. However in my view, that failing is not enough to render the notice invalid in this case given:

- (a) there is no dispute that the document on which the notice was printed was received by Mr Lawes;
- (b) it was a document that was clearly distinct from the other attachments to the email (ie, the 'rock receipts');
- (c) it was a document that was noticeably different from the original payment claim; and
- (d) significantly, it is apparent that Mr Lawes had regard to the document, albeit that he did not notice the different words in the text box.¹⁴⁸

101 Accordingly, I find that, DUPA did serve a valid s 18(2) Notice. It follows that the Adjudicator's jurisdiction was properly enlivened to make his Determination, and it should not be set aside.

G Orders

102 For the above reasons, I propose to order that Endeavour's application be dismissed.

103 I will hear from the parties as to the form of orders and costs.

¹⁴⁷ Ibid, [52] (Vickery J).

¹⁴⁸ First Lawes Affidavit, [22].

CERTIFICATE

I certify that this and the 39 preceding pages are a true copy of the reasons for judgment of Stynes J of the Supreme Court of Victoria delivered on 25 July 2023.

DATED this 25th day of July 2023.



Associate