

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

Not Restricted

S ECI 2022 02629

J HUTCHINSON PTY LTD (ACN 009 778 330)

Plaintiff

v

TRANSCEND PLUMBING AND GASFITTING PTY LTD
(ACN 147 931 324)

First Defendant

and

MICHAEL D G HEATON KC

Second Defendant

and

RESOLUTION INSTITUTE (ACN 008 651 232)

Third Defendant

JUDGE: Stynes J

WHERE HELD: Melbourne

DATE OF HEARING: 3 October 2022

DATE OF JUDGMENT: 10 February 2023

CASE MAY BE CITED AS: J Hutchinson Pty Ltd v Transcend Plumbing and Gasfitting Pty Ltd

MEDIUM NEUTRAL CITATION: [2023] VSC 39

ADMINISTRATIVE LAW — Judicial review — Jurisdictional error — Review of adjudication determinations made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) — Whether payment claims were made with respect to valid reference dates — Adjudication determinations upheld.

BUILDING AND CONSTRUCTION — Building contract — Payment claims — Reference dates — Interpretation of contract — Meaning of ‘prior to practical completion’ — *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 applied.

BUILDING AND CONSTRUCTION – Building contract – Validity of certificate of practical completion – Whether informal email from superintendent constitutes a certificate of practical completion – *St Hilliers Construction Pty Ltd v Fitzpatrick Investments Pty Ltd* (2013) 29 BCL 476 applied – *Token Construction Co Ltd v Charlton Estates Ltd* (1973) 1 BLR 48 applied.

ESTOPPEL – Estoppel by convention – Whether common assumption exists that a certificate of practical completion is not required because practical completion has already occurred – *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 applied – *Moratic Pty Ltd v Gordon* [2007] NSWSC 5 applied – *Miller Heiman Pty Ltd v Sales Principles Pty Ltd* (2017) 94 NSWLR 500 applied.

ESTOPPEL – Promissory estoppel – Whether conduct induces assumption that a certificate of practical completion is not required because practical completion has already occurred – *Moratic Pty Ltd v Gordon* [2007] NSWSC 5 applied.

ELECTION AND WAIVER – Whether unequivocal decision communicated to treat practical completion as having occurred so as to waive the requirement for a certificate of practical completion – *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS* 39788 [2022] HCA 38 applied – *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 applied – *Fried v National Australia Bank Ltd* [2000] FCA 910 applied.

WORDS AND PHRASES – ‘payment claim’ – ‘reference date’ – ‘certificate of practical completion’ – ‘date of practical completion’ – ‘common assumption’ – ‘induce’ – ‘unequivocal communication’.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

L Connolly and
W J Stephenson

HWL Ebsworth

For the Defendant

A Morrison

Holding Redlich

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HER HONOUR:

A Introduction

1 J Hutchinson Pty Ltd, the plaintiff (**'Head Contractor'**), is a construction company that was engaged by the Victorian School Building Authority to construct a number of new schools in Victoria.

2 Transcend Plumbing and Gasfitting Pty Ltd, the first defendant (**'Subcontractor'**), specialises in plumbing and hydraulic services.

3 On 4 March 2021, the parties entered into a subcontract, an amended AS4902 design and construct contract (**'Subcontract'**). Relevantly, the Subcontractor was engaged to perform civil, stormwater, sewer, water and fire services works for two secondary school projects in Clyde North and Greenvale.

4 In April 2022, the Subcontractor submitted payment claims in relation to those works for each project (**'the April Payment Claims'**) under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**'SOP Act'**).

5 The Head Contractor says these payment claims were not supported by valid reference dates under the Subcontract.

6 Under the Subcontract, reference dates arise on a monthly basis 'prior to practical completion'. Thereafter, one reference date arises 'at practical completion', and one further reference date arises for the final payment claim after the expiration of the last defects liability period. The Subcontractor does not seek to rely on the reference dates arising at practical completion or in relation to the final payment claim.

7 It is common ground that whether or not there were valid monthly reference dates applicable to the April Payment Claims turns on whether those claims were made 'prior to practical completion'.

8 The April Payment Claims were referred to adjudication under the SOP Act.

9 The adjudicator, the second defendant, issued two determinations (one for each project) on 29 June 2022 which were then amended on 4 July 2022 (to account for the adjudicator's fees). Relevantly, he determined that:

- (a) practical completion of the works 'had occurred as evidenced by the release of Practical Completion retentions in respect of the Project';
- (b) however, certificates of practical completion had not been issued;
- (c) in the absence of those certificates, reference dates continued to accrue under a clause in the Subcontract providing for monthly payment claims 'prior to practical completion' (that clause is referred to as '**item 37(a)(a)**'); and
- (d) therefore, the April Payment Claims were supported by valid reference dates.

10 The Head Contractor seeks an order that the two adjudication determinations be quashed. The Head Contractor says that because practical completion had been achieved, the adjudicator erred in finding that a valid reference date arose under item 37(a)(a) of the Subcontract which provides for reference dates 'prior to practical completion'.

11 The Subcontractor says:

- (a) the adjudicator erred in finding that practical completion had been achieved in circumstances where a certificate of practical completion had not been issued;
- (b) nonetheless, the adjudicator was correct in his conclusion that valid reference dates arose under item 37(a)(a) because reference dates continued to accrue under that clause 'prior to practical completion'.

12 The issues that arise for determination are:

- (a) **Issue 1:** On the proper construction of the Subcontract, what is the meaning of the phrase 'prior to practical completion' in item 37(a)(a)? More

particularly, I am required to consider and determine whether 'practical completion' as it appears in that phrase means either:

- (i) when the works have, as a matter of fact, reached the stage of 'practical completion' as defined in cl 1 of the Subcontract, such that the Subcontractor's entitlement to make monthly progress claims ceases once that stage has been reached regardless of whether or not a certificate of practical completion has been issued;¹ or
- (ii) alternatively, the 'date of practical completion' as evidenced in a certificate of practical completion or as determined in any expert determination or litigation, such that (having regard to the definition of 'date of practical completion' in cl 1 of the Subcontract) the Subcontractor's entitlement to make monthly progress claims continues to accrue until (and then ceases upon) that specified date.²

(b) **Issue 2:** Has a certificate of practical completion been issued?

(c) **Issue 3:** In any event, is the Subcontractor precluded from denying that practical completion has been achieved by the doctrines of estoppel, election or waiver?

(d) **Issue 4:** Has the adjudicator committed jurisdictional error by determining that the April Payment Claims were made in respect of valid reference dates?

13 For the reasons that follow, I have determined that:

- (a) In relation to Issue 1, on the proper construction of the Subcontract, the phrase 'prior to practical completion' in item 37(a)(a) means prior to the date

¹ LJ Connolly and WJ Stephenson, 'Plaintiff's outline of submissions', Submissions in *J Hutchinson Pty Ltd v Transcend Plumbing and Gasfitting Pty Ltd*, S ECI 2022 02629, 3 October 2022 ('**Head Contractor's Written Submissions**') [25]–[26]; Transcript of Proceedings, *J Hutchinson Pty Ltd v Transcend Plumbing and Gasfitting Pty Ltd* (Supreme Court of Victoria, Stynes J, 3 October 2022) ('**Trial Transcript**') 43.1.

² AR Morrison, 'First Defendant's outline of submissions', Submissions in *J Hutchinson Pty Ltd v Transcend Plumbing and Gasfitting Pty Ltd*, S ECI 2022 02629, 3 October 2022 ('**Subcontractor's Written Submissions**') [17]; Trial Transcript (n 1) 33.13, 73.3–9.

of practical completion such that the Subcontractor’s entitlement to make monthly progress claims continues to accrue until the date of practical completion as evidenced in a certificate of practical completion or as determined in any expert determination or litigation;

- (b) In relation to Issue 2, a certificate of practical completion had not been issued at the time the April Payment Claims were made;
- (c) In relation to Issue 3, the Subcontractor is entitled to deny that practical completion has been achieved. It is not precluded from doing so by the doctrines of estoppel, election or waiver; and
- (d) In relation to Issue 4, the adjudicator did not err in determining that the April Payment Claims were supported by valid reference dates.

B Background

14 The works to be performed by the Subcontractor under the Subcontract included the provision of civil, stormwater, sewer, water and fire services for:

- (a) Clyde North Station Secondary School ('CNSSS') at Tuckers Road in Clyde North, Victoria ('the CNSSS Project'); and
- (b) Greenvale Secondary School ('GSS') at 2-16 Glencairn Drive in Greenvale, Victoria ('the GSS Project').

15 The CNSSS Project was divided into the following separable portions:³

Separable Portion 2, otherwise known as Stage 1	\$2,714,502.00
Separable Portion 4B, otherwise known as Stage 2	\$880,387.00

16 The GSS Project was divided into the following separable portions:

³ All figures are exclusive of GST, unless stated otherwise.

Separable Portion 3, otherwise known as Stage 1

\$2,689,823.00

Separable Portion 5B, otherwise known as Stage

\$974,308.00

2

17 Only Stage 1 of the CNSSS Project and Stage 1 of the GSS Project were included in the works to be performed under the Subcontract.⁴

18 It is common ground that by the end of December 2021, the physical works were complete or nearly complete.

19 The Subcontractor submitted monthly payment claims to the Head Contractor in January, February and March 2022.

20 On 30 April 2022, the Subcontractor submitted the April Payment Claims under the SOP Act for the CNSSS and GSS Projects, namely:

(a) \$745,867.18 in respect of the CNSSS Project; and

(b) \$656,023.07 in respect of the GSS Project.

21 On 10 May 2022, the Head Contractor served two payment schedules in response to the April Payment Claims in the amounts of:

(a) -\$7,419.00 in respect of the CNSSS Project; and

(b) \$0.00 in respect of the GSS Project.

22 On 19 May 2022, the Subcontractor applied for adjudication of the April Payment Claims.

23 On 27 May 2022, the Head Contractor provided its adjudication response to the Subcontractor's application.

⁴ Court Book 88-9, Formal Instrument of Agreement for Contract AS4903-2000, provision 8 ('**Subcontract**'). All references to the Court Book in this judgment are to the PDF page rather than the numerated page.

24 On 4 July 2022, the adjudicator issued his adjudication determinations. He determined that the Subcontractor was entitled to a total sum of \$980,975.37 for the April Payment Claims, namely:⁵

- (a) \$537,106.70 for the CNSSS Project; and
- (b) \$443,868.67 for the GSS Project.

C Issue 1 – What is the meaning of the phrase ‘prior to practical completion’ in item 37(a)(a)?

C.1 How the issue arises

25 The existence of a reference date under a construction contract is a statutory precondition to the making of a valid payment claim, which is in turn a precondition to the jurisdiction of the adjudicator.⁶

26 As a jurisdictional fact, it is therefore a matter for the Court to determine whether a reference date had arisen under the Subcontract at the time when the April Payment Claims were served.⁷

27 A reference date in relation to a construction contract means, amongst other things, a date determined by or in accordance with the terms of the contract as a date on which a claim for a progress payment may be made.⁸

28 Clause 37.1 of the Subcontract governs progress payment claims. Relevantly, it provides:⁹

The *Subcontractor* shall submit the *Claim Documentation* and claim payment progressively in accordance with *Item 37* while *WUS* is being carried out, at

⁵ Court Book 2659, Amended adjudication determinations dated 4 July 2022, [480]–[481].

⁶ *Saath Pty Ltd v Seascope Constructions Pty Ltd* [2021] VSC 358, [83] (Stynes J), citing *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, [2], [44], [47] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

⁷ *Ibid*; *Abergeldie Contractors Pty Ltd v Fairfield City Council* (2018) 34 BCL 39, [38] (Basten JA, with Beazley ACJ and Meagher JA agreeing) (*‘Abergeldie’*); *Saville v Hallmarc Construction Pty Ltd* (2015) 47 VR 177, [59] (Warren CJ and Tate JA, with Kaye JA agreeing).

⁸ *Building and Construction Industry Security of Payment Act 2002* (Vic) s 9(2)(a)(i) (*‘SOP Act’*).

⁹ Under the Subcontract, *‘WUS’* is defined to mean *‘work under the Subcontract’*.

practical completion and at the *final payment claim* under subclause 37.4.

For the avoidance of doubt, no right to submit a progress claim arises during the period following 7 *business days* after the *certificate of practical completion* is issued until the time for making the *final claim* under subclause 37.4.

29 The parties agreed the dates on which progress payment claims may be made.

Specifically, item 37(a) of Part A of the Annexure to the Subcontract states:

(a) Times for progress claims

- (a) prior to *practical completion*, a progress claim may be made 2 *business days* after the *Claim Documentation* has been received. The *Claim Documentation* is to be submitted once per month on the last day of the month;
- (b) at *practical completion*, a progress claim may be made 2 *business days* after the *Claim Documentation* has been received. The *Claim Documentation* is to be submitted within 5 *business days* after the *Subcontractor's* receipt of the *certificate of practical completion*; and
- (c) with respect to the *final payment claim*, the *final payment claim* may be made 2 *business days* after the *Claim Documentation* has been received. The *Claim Documentation* is to be submitted within 5 *business days* after the expiration of the last *defects liability period*.

30 Clause 1 of the Subcontract defines 'practical completion' as the stage in the carrying out and completion of works under the Subcontract when the following criteria are satisfied:

- (a) *the Subcontract Works* are complete except for minor defects:
 - (i) which do not prevent *the Subcontract Works* from being reasonably capable of being used for their stated purpose;
 - (ii) which the *Subcontract Superintendent* determines the *Subcontractor* has reasonable grounds for not promptly rectifying; and
 - (iii) the rectification of which will not prejudice the convenient use of *the Subcontract Works*;
- (b) those tests which are required by the *Subcontract* to be carried out and passed before *the Subcontract Works* reach *practical completion* have been carried out and passed; and
- (c) documents and other information required under the *Subcontract* which, in the *Subcontract Superintendent's* opinion, are essential for the use, operation and maintenance of *the Subcontract Works* have been supplied, including all *Subcontractor Statements* (if required by the

Subcontract) and collateral deed of warranty the *Subcontractor* is required to procure and/or provide under, and in accordance with, this *Subcontract*;

- (d) all permits, approvals, certificates and other authorisations required under relevant *legislative requirements* to be issued by any authority before the *Subcontract Works* can be used for its intended purpose (whether stated or inferred) have been supplied to the *Subcontract Superintendent*;
- (e) a completed and executed Deed of Release – Practical Completion as contained in Annexure Part J;
- (f) an occupancy permit for the *Subcontract Works* has been issued (if necessary);
- (g) all of the *Subcontractor's* material and equipment, including but not limited to cranes, scaffolding, signage, hoardings, builder's sheds and building debris have been removed from the *site*;
- (h) all "as-built/as-installed" drawings (marked-up to show the *Subcontract Works* as constructed by the *Subcontractor* and a clean set of those documents) and other documents required under the *Subcontract* have been provided to the *Main Contractor*;
- (i) the *Subcontractor* has provided to the *Subcontract Superintendent* advanced drafts of all *Operation and Maintenance Manuals* for the items of the plant and equipment incorporated into the *Subcontract Works*;
- [(j)] the *Subcontractor* has:
 - (i) conducted the commissioning tests required by the *Subcontract* (if any) for the purpose of verifying that the building services, systems and installations comprised in the *Subcontract Works* (if any) are performing in accordance with the *Subcontract* (or, where no requirement is stated, in accordance with the specification issued by the relevant manufacturer; and
 - (ii) supplied evidence, to the reasonable satisfaction of the *Subcontract Superintendent*, both of the conduct and results of those commissioning tests;

31 A 'certificate of practical completion' is defined by reference to clause 34.6.

32 Clause 34.6 provides:

The *Subcontractor* shall give the *Subcontract Superintendent* at least 14 days written notice of the date upon which the *Subcontractor* anticipates that *practical completion* will be reached.

When the *Subcontractor* is of the opinion that *practical completion* has been reached, the *Subcontractor* shall in writing request the *Subcontract Superintendent* to issue a *certificate of practical completion*. Within 14 days after receiving the request, the *Subcontract Superintendent* shall give the

Subcontractor and the Main Contractor either a certificate of practical completion evidencing the date of practical completion or written reasons for not doing so.

If the Subcontract Superintendent is of the opinion that practical completion has been reached, the Subcontract Superintendent may issue a certificate of practical completion even though no request has been made.

33 The 'date of practical completion' is defined under cl 1 to mean:

- (a) the date evidenced in a *certificate of practical completion* as the date on which *practical completion* was reached; or
- (b) where another date is determined in any expert determination or litigation as the date upon which *practical completion* was reached, that other date.

34 In substance, the Subcontractor contends that reference dates for the April Payment Claims arose under paragraph (a) of item 37(a) because:

- (a) the phrase 'prior to practical completion' as used in item 37(a)(a) means prior to the date of practical completion as evidenced in a certificate of practical completion;¹⁰ and
- (b) as no certificate of practical completion had been issued, reference dates continued to accrue to the Subcontractor under item 37(a)(a).

35 The Head Contractor says the *stage* of practical completion and a *certificate* of practical completion are employed as two distinct concepts which do not have to occur at the same time. It argues that the stage of practical completion is intended to be a condition precedent to the issuing of a certificate under cl 34.6.¹¹ The stage can be achieved notwithstanding that a certificate has not been issued.¹² The use of the italicised term '*practical completion*' in items 37(a)(a) and (b) refers directly to the definition of that term in cl 1, which refers to a stage of the works and does not refer

¹⁰ Trial Transcript (n 1) 33.13–16, 75.20–28. As submitted by the Subcontractor and not contested by the Head Contractor, the date of practical completion may be determined by a court or properly appointed expert, but until they do so (and I am not being asked to do so), the date of practical completion is to be determined by reference to a certificate of practical completion, if any.

¹¹ Ibid 40.2–28, 50.

¹² Ibid 50, referring to *Agro Invest Overseas Ltd v Stewart Milne Group Ltd* [2018] CSOH 120, [103] (Lord Clark); *Clyde Contractors Pty Ltd v Northern Beaches Developments Pty Ltd* (2002) BCL 144, [10]–[12], [16] (Williams JA, with McMurdo P and Philippides J agreeing).

to a certificate. This means that once the stage of practical completion is achieved on the underlying facts, the monthly reference dates cease to accrue under paragraph (a) of item 37(a).¹³

C.2 Applicable legal principles

36 The Subcontract is to be construed objectively, by reference to its text, context (being the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.¹⁴ In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable business person would have understood those terms to mean. That inquiry requires consideration of the language used by the parties within the contract, the circumstances addressed by the contract, and the commercial purpose or objects to be secured by the contract.¹⁵

37 Recourse may be had to events, circumstances and things external to the contract in identifying the commercial purpose or object of the contract. What may be referred to are events, circumstances and things external to the contract which are known to the parties, or which assist in identifying the purpose or object of the transaction. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.¹⁶

38 In searching for the intention of the parties, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements.¹⁷

39 The whole of the contract has to be considered. Preference is given to a construction which supplies a congruent operation to the various components of the whole of the

¹³ Trial Transcript (n 1) 41-2.

¹⁴ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [46] (French CJ, Nettle and Gordon JJ).

¹⁵ *Ibid* [47] (French CJ, Nettle and Gordon JJ).

¹⁶ *Ibid* [49] (French CJ, Nettle and Gordon JJ).

¹⁷ *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429, 437 (Barwick CJ).

contract.¹⁸

C.3 Consideration

40 I disagree with the Head Contractor's contention that I should construe paragraph (a) of item 37(a) as referring to the period of time up until the relevant stage of work has been achieved regardless of whether or not a certificate has been issued.

41 In my view, for the reasons that follow, it is the date of practical completion as evidenced in a certificate of practical completion, not the underlying fact of practical completion, which governs the period of operation of item 37(a)(a).

42 Item 37(a), together with cl 37, serves the important purpose of defining the Subcontractor's entitlement to make claims for progress payments under the Subcontract, and providing reference dates for progress payments under the SOP Act.

43 Clause 37 identifies, in broad terms, three periods of time when progress claims can be made, those being:

- (a) while work under the Subcontract is being carried out;
- (b) at practical completion; and
- (c) at the final payment claim.

44 This timing is repeated by item 37(a), although instead of using the expression 'while [work under the Subcontract] is being carried out' as employed in cl 37.1, paragraph (a) of item 37(a) refers to the period 'prior to practical completion'.

45 'Practical completion' is defined in cl 1 as a stage in the carrying out and completion of the works. That is common ground. On a plain reading of paragraph (a) of item 37(a), the operation of that paragraph is limited to the period of time before that stage has been reached.

¹⁸ *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522, [16] (Gleeson CJ, McHugh, Gummow and Kirby JJ).

46 Neither cl 37.1 nor item 37(a) identify when practical completion has been reached. It is necessary to refer to other provisions of the Subcontract to ascertain this.

47 It is clear from the definition of 'practical completion' in cl 1 that it is more complex than the works reaching a particular physical state where they are 'complete except for minor defects'.¹⁹ There is also a significant documentary component which must be met (sometimes to the subjective satisfaction of the superintendent) in order to satisfy the definition. For example:

- (a) paragraph (c) requires the provision of documents which, in the superintendent's opinion, are essential for the use, operation and maintenance of the works;
- (b) paragraph (d) requires the supply to the superintendent of all permits, approvals, certificates and other authorisations required under relevant legislative requirements to be issued by any authority before the works can be used for its intended purpose;
- (c) paragraph (i) requires the provision to the superintendent of advanced drafts of all operation and maintenance manuals for the items of plant and equipment incorporated into the works; and
- (d) paragraph (j) requires the supply of evidence, to the reasonable satisfaction of the superintendent, of the conduct and results of commissioning tests required by the Subcontract.

48 The date on which practical completion is reached is referred to in this Subcontract (and in the construction industry generally) as the 'date of practical completion'. That is defined in the Subcontract by reference to the date 'evidenced in a certificate of practical completion' or 'another date ... determined in any expert determination or litigation'. Unless or until a court or expert considers the matter (which I am not being asked to do in this proceeding), the identification of the date on which

¹⁹ Court Book 103, Subcontract cl 1 (definition of 'practical completion' paragraph (a)).

practical completion is reached is dependent on the issuance of a certificate of practical completion. To put it another way, the Subcontractor cannot know when practical completion is reached until a certificate is issued.

49 Clause 34.6 provides for the issuance of a certificate of practical completion. It envisages that both the Subcontractor and the superintendent may form opinions as to whether practical completion has been reached. The superintendent does not have the power to issue a certificate of practical completion unless they hold the opinion that it has been reached. Clause 34.6 provides that it is the certificate issued by the superintendent which evidences the date of practical completion. The language and structure of this clause is consistent with the proposition that the conclusive event is the issuing of a certificate of practical completion, which must depend upon a contemporaneous opinion of the superintendent.²⁰

50 Having regard to the text of the Subcontract (in particular the text of item 37(a)(a) which is concerned with the period of time until practical completion has been reached, the text of cl 34.6 and the definition of 'date of practical completion') leads me to understand 'prior to practical completion' in item 37(a)(a) to mean prior to the date on which practical completion was reached, that is, prior to the 'date of practical completion'.

51 Consistent with my understanding, paragraph (b) of item 37(a) links 'at practical completion' to the issuance of the certificate of practical completion. It makes commercial sense that as the period described by paragraph (a) comes to an end, the period described by paragraph (b) commences. That connection is reinforced in the second paragraph of cl 37.1 which states:

For the avoidance of doubt, no right to submit a progress claim arises during the period following 7 business days after the certificate of practical completion is issued until the time for making the final claim under subclause 37.4.

52 As stated above, the purpose of item 37(a)(a) is to define the Subcontractor's

²⁰ *Abergeldie* (n 7) [40] (Basten JA, with Beazley ACJ and Meagher JA agreeing).

entitlement to make monthly claims for progress payments under the Subcontract and to provide reference dates for progress payments under the SOP Act. Determining when practical completion has been reached is important to determining the applicability of item 37(a)(a). In my view, understanding the period 'prior to practical completion' in item 37(a)(a) to be the period prior to the 'date of practical completion' (as defined and relevantly being the date evidenced in a certificate of practical completion) brings more certainty to the date on which the relevant period comes to an end.²¹ To condition the contractual entitlement to make a progress claim under item 37(a)(a) upon the existence of a state of facts underpinning practical completion, as opposed to the superintendent's opinion that those facts exist, would greatly exacerbate the opportunity for dispute.²²

53 Having regard to my considerations set out above, in my view, a reasonable business person would understand 'practical completion' in item 37(a)(a) to mean 'the date of practical completion' as that phrase is defined, not the underlying fact of practical completion.

54 As set out in my footnotes, I have cited the decision of the NSW Court of Appeal in *Abergeldie Contractors Pty Ltd v Fairfield City Council* ('**Abergeldie**').²³ The Head Contractor contends that I should distinguish *Abergeldie*.

55 In that case, the contract provided for monthly payment claims (and therefore reference dates) prior to practical completion with only two reference dates arising after practical completion. The parties were in dispute about when practical completion had been achieved. On 25 November 2016, the superintendent issued a certificate of practical completion which indicated that practical completion for the relevant work had been achieved over two months earlier on 16 September 2016. The question on appeal was whether practical completion of the work occurred on 16 September or on 25 November. The determination of that question turned on the

²¹ Ibid [42] (Basten JA, with Beazley ACJ and Meagher JA agreeing).

²² Ibid [46] (Basten JA, with Beazley ACJ and Meagher JA agreeing).

²³ *Abergeldie* (n 7).

proper construction of the contract. To understand the meaning of the term 'practical completion', the Court of Appeal looked primarily to clause 34.6 and the definitions of 'practical completion' and 'date of practical completion'. Those clauses were very similar to their equivalent provisions in the Subcontract in that:

- (a) clause 34.6 is the same in each contract;
- (b) the definitions of 'date of practical completion' and 'certificate of practical completion' are nearly identical; and
- (c) the definitions of 'practical completion' each contain a list of indicia that must be achieved.

56 In *Abergeldie*, the clause governing progress claims was clause 37.1. It stated in its relevant part:

37.1 Progress claims

The Contractor shall claim payment progressively in accordance with Item 28.

An early progress claim shall be deemed to have been made on the date for making that claim. ...

57 The Court of Appeal did not provide a direct quote of the wording used in item 28, but stated that 'item 28 ... prescribed the times for progress claims as the 28th day of each month, for work done up to that day of the month'.²⁴ The Court then stated that the operation of cl 37.1 was qualified by cl 44.3 which read:²⁵

44.3 Final Reference Date

- (a) For the purposes of section 8(2) of SOP Act, there are only two reference dates after practical completion being:
 - (i) the first date for a progress claim arising immediately after practical completion (as determined by subclause 37.1); and
 - (ii) the date provided in subclause 37.4 for the Contractor to give its final payment claim.

²⁴ Ibid [21] (Basten JA, with Beazley ACJ and Meagher JA agreeing).

²⁵ Ibid (Basten JA, with Beazley ACJ and Meagher JA agreeing).

58 In *Abergeldie*, the Court of Appeal concluded that it is the issuing of the certificate of practical completion which records practical completion. From his reasons, Basten JA identified the following propositions:²⁶

- (a) The achievement of practical completion depends upon the satisfaction of the superintendent as to the elements of that defined term;
- (b) That state of satisfaction is effective when it is communicated by the issuance of a certificate of practical completion, which includes provision of the certificate to the contractor; and
- (c) The date of practical completion evidenced by the certificate is the date of the certificate.

59 The Head Contractor notes that in the Subcontract, paragraph (b) of item 37(a) expressly refers to a certificate while paragraph (a) does not. It submits that this is a significant difference to the corresponding clauses in *Abergeldie*, none of which refer to a certificate. The Head Contractor also contends that cl 37.1 of the Subcontract differs from that in *Abergeldie* because cl 37.1 allows for a progress claim only ‘while [the work] is being carried out’, with emphasis on the word *being*.²⁷ It submits that once performance of the work ceases (regardless of whether or not a certificate has been issued), the accrual of monthly reference dates ceases under paragraph (a) of item 37(a).²⁸ Accordingly, the Head Contractor submits that:

- (a) in contrast to *Abergeldie*, the parties deliberately chose two distinct concepts (namely, the *stage* of practical completion and the *certificate* of practical completion), and employed these differently in paragraphs (a) and (b) of item 37(a);²⁹ and
- (b) to read the word ‘certificate’ into paragraph (a) would amount to a redrafting

²⁶ *Abergeldie* (n 7) [48] (Basten JA, with Beazley ACJ and Meagher JA agreeing).

²⁷ Trial Transcript (n 1) 44.8–46.18.

²⁸ *Ibid* 30.18–31.8.

²⁹ *Ibid* 53.8–19.

of this clause that would undermine the parties' freedom of contract.³⁰

60 Although they do not use identical wording, the substantive effect of the relevant payment clauses is the same in the Subcontract and the contract in *Abergeldie*. That is, in both cases, monthly payment claims can be made prior to practical completion with only two further reference dates arising thereafter.

61 The question on appeal in *Abergeldie* was different from the question before me. The facts of that case are also different. However, I found the Court's consideration of the meaning of practical completion by reference to cl 34.6 and the definitions of 'practical completion' and 'date of practical completion' to be relevant and of assistance. However, I do not depend on that case for my decision which, as should be apparent from my reasoning, is based on the text and purpose of the Subcontract.

62 Finally, I disagree that my construction of the Subcontract amounts to redrafting item 37(a) so as to insert the word 'certificate' into paragraph (a). For the reasons set out above, it is the appropriate construction of item 37(a)(a) having regard to its text and purpose. Further, I note that it is the issuing of the certificate, a matter expressly referred to in paragraph (b), which signals to the parties that they have crossed the threshold from paragraph (a) into the period in paragraph (b). It is therefore unnecessary for the word 'certificate' to appear in both paragraphs; the intended function of the clause is clear in its present form.

63 Having found that item 37(a)(a) will continue to operate in the period prior to the date of practical completion, it is necessary for me to consider whether or not a certificate of practical completion evidencing that date has in fact been issued.

D Issue 2 – Has a certificate of practical completion been issued?

D.1 How the issue arises

64 The Head Contractor contends that certain emails sent by the relevant

³⁰ Ibid 43.11-28.

superintendents for each project on 3 and 11 March 2022 constitute certificates of practical completion for the purpose of clause 34.6.

D.2 The emails

65 The emails relied on by the Head Contractor are not expressly identified as certificates. They adopt informal language, and each forms part of longer, separate email chains.

66 The email chain concerning the Clyde North Station Secondary School commenced on 3 March 2022 with an email from the CNSSS superintendent to the Subcontractor attaching a maintenance schedule and asking the Subcontractor to ensure that essential maintenance was being carried out and that service records were being provided to the superintendent. It notes that these documents would form part of the handover at the end of the defects liability period and were required for the return of the remaining security.³¹

67 Around 12 minutes later, the Subcontractor responded: 'Please provide practical completion date of project'. A few minutes later, the superintendent responded: 'PC was granted for the buildings on 22nd December and external works on 15th February'.³²

68 These emails do not identify which separable portions had achieved practical completion.

69 A little over four hours later, the Subcontractor responded by setting out the due dates for various maintenance reports based on the date of practical completion for the external works being 15 February 2022. The next day the superintendent responded stating: 'This just pushes you [sic] dates out further'.³³

70 Separately, the email chain concerning the Greenvale Secondary School commences

³¹ Court Book 515, Email correspondence.

³² Court Book 514–5, Email correspondence.

³³ Court Book 514, Email correspondence.

with an email on 9 March 2022 from the Subcontractor asking the GSS superintendent to advise when the project had reached practical completion for buildings and external works.³⁴ Two days later, the superintendent responded stating:³⁵

Sorry, see dates for Practical Completion.

Stage 1 SP3 – 21/12/21

Stage 1a 5c – 14/1/22

71 About 10 minutes later, the Subcontractor queried: 'Did stage 1 pc include external works?'. A few minutes later, the superintendent responded: 'Yep'.³⁶

D.3 Consideration

72 Clause 34.6 requires a certificate to be issued by the relevant superintendent 'evidencing the date of practical completion'. The Head Contractor submits that as there is no obligation at common law to issue a certificate in any particular form, whether a certificate is formally effective depends upon its proper construction in light of any contractual obligations regarding its issue and its form.³⁷ Relying on the terms of the Subcontract, the Head Contractor therefore submits that the only requirements for a valid certificate of practical completion are simply:

- (a) that it needs to be issued by the superintendent; and
- (b) that it needs to evidence the date of practical completion.

73 To determine whether the emails provided by the superintendents constitute certificates of practical completion, it is necessary to consider whether, in the circumstances in which they were provided, each email was understood, viewing the matter objectively, to be certifying practical completion.³⁸ Given the date of

³⁴ Court Book 517–8, Email correspondence.

³⁵ Court Book 517, Email correspondence.

³⁶ Court Book 516, Email correspondence.

³⁷ *V601 Developments Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2021] VSC 849, [252] (Digby J).

³⁸ This test was adopted by the NSW Court of Appeal in *St Hilliers Construction Pty Ltd v Fitzpatrick Investments Pty Ltd* (2013) 29 BCL 476, [35] (Emmett JA, with Meagher JA and Sackville AJA agreeing),

practical completion is an important event which triggers major consequences under any construction contract, its certification should be clear and unambiguous so that the parties are not left in doubt.³⁹

74 For the following reasons, the emails are not clear or unambiguous:

- (a) First, both sets of emails lacked certainty about whether the dates identified related to practical completion under the head contract or the Subcontract. In particular, the email referred to above at paragraph [67] in relation to the CNSSS Project says 'PC was granted ... on'. The use of such language (ie, the use of the past tense together with the word 'granted') is just as consistent with the superintendent notifying the Subcontractor of when works under the head contract had achieved practical completion as with the superintendent presently certifying practical completion of the Subcontract works.
- (b) Second, the email in relation to the CNSSS Project also lacked certainty about which separable portions had achieved practical completion.

75 The Head Contractor submitted that it is relevant to my assessment of the emails that they were sent after the following events:

- (a) On 1 January 2022, the Subcontractor made claims for the release of 50% of the cash retentions held as security by the Head Contractor for both projects which, under the Subcontract, is only required to be released upon the issuing of a certificate of practical completion. I note that both retention claims were rejected by the Head Contractor;
- (b) On 20 January 2022, the Subcontractor confirmed it was seeking the release of 50% of the security on the basis that the works were 'finished', and the Head Contractor responded by informing the Subcontractor of its intention to

in relation to the Court's assessment of documents signed by consultants under a contract and its determination of whether it could be said that, by reason of those documents, the consultants had certified in writing that the relevant work under the contract had been completed in accordance with the contract.

³⁹ *Token Construction Co Ltd v Charlton Estates Ltd* (1973) 1 BLR 48, 57 (Stephenson LJ), 58-9 (Roskill LJ).

release those retention monies; and

- (c) On 15 February 2022, the Head Contractor ultimately released 50% of the retentions it held to the Subcontractor.

76 While these facts may be relevant to understanding the Head Contractor's opinion about the status of the works at various times, and I make no finding about that opinion, they do not alter my view that, objectively assessed, the superintendents' emails were not clear and unambiguous.

77 Further, I note that the word 'certificate' is not defined in the Subcontract. The *Macquarie Dictionary* relevantly defines the words 'certificate' and 'certify' as follows:⁴⁰

'Certificate' means:

1. a writing on paper certifying to the truth of something or to status, qualifications, privileges, etc.

...

'Certify' means:

1. to guarantee as certain, give reliable information of.
2. to testify to or vouch for in writing.

...

4. to assure or inform with certainty.
5. to guarantee, endorse reliably.

78 The *Oxford English Dictionary* relevantly defines these terms as follows:⁴¹

'Certificate' means:

3. a document wherein a fact is formally certified or attested.

...

'Certify' means:

1. to make (a thing) certain, to guarantee as certain, attest in an authoritative

⁴⁰ *Macquarie Dictionary* (8th ed, 2020) 'certificate' (definition 1); 'certify' (definitions 1, 2, 4, 5).

⁴¹ *Oxford English Dictionary* (3rd ed, 2000) 'certificate' (definition 3), 'certify' (definitions 1, 2).

manner, to give certain information of.

2. a. to declare or attest by a formal or legal certificate.

79 The definitions describe a document of some formality intended to do more than simply communicate information. It is intended to assure, make certain or attest a fact with authority.

80 Having regard to the significance of a certificate of practical completion, I do not accept that a superintendent's email forming part of a written conversation and informally responding to a question raised by the Subcontractor is to be regarded as a certificate. Such an email is not a document of formality intended to attest in an authoritative manner or otherwise assure the Subcontractor with certainty of the date of practical completion. Neither the substance nor the form of the emails relied on by the Head Contractor are adequate for that purpose.

81 For these reasons I find that a certificate of practical completion had not been issued at the time the April Payment Claims were made.

E **Issue 3 – Is the Subcontractor precluded from denying that practical completion has been achieved by the doctrines of estoppel, election or waiver?**

E.1 **How the issue arises**

82 The Head Contractor submits that having regard to only the following facts,⁴² the Subcontractor was operating, and inducing the Head Contractor to operate, on the assumption that the works had reached practical completion prior to the making of the April Payment Claims, so that the Subcontractor had abandoned any right to insist that a certificate of practical completion was a necessary condition to achieving practical completion.⁴³

(a) On 1 January 2022, the Subcontractor applied for the release of 50% of the

⁴² By its written submissions, the Head Contractor repeated that it relies only on these matters and stated: 'The court must make a narrow factual enquiry as to whether those matters give rise to an estoppel, election or waiver. Consideration of broader questions of fact are not required'.

⁴³ Head Contractor's Written Submissions (n 1), [24(c)], [41].

- cash retentions held as security by the Head Contractor;
- (b) On 20 January 2022, the Subcontractor confirmed it was seeking the release of 50% of the security on the basis that the works were 'finished', and the Head Contractor responded by informing the Subcontractor of its intention to release those retention monies;
 - (c) The Head Contractor ultimately released 50% of the cash retentions to the Subcontractor on 15 February 2022;
 - (d) The Subcontractor subsequently requested confirmation of the dates of practical completion, and was notified of those dates by the relevant superintendents via the emails in March 2022 (referred to in paragraphs [66] to [71] above); and
 - (e) The Subcontractor continued to act in a manner consistent with a certificate of practical completion having been issued, specifically, by informing the Head Contractor and CNSSS superintendent on 3 March 2022 of its maintenance obligations during the defects liability period (a period which only starts after practical completion) in relation to the CNSSS Project.

E.2 Relevant chronology of events

- 83 Under the Subcontract, security was to be provided by the Subcontractor in the form of cash retentions to the value of 5% of the Subcontract sum. Half of that retained sum was required to be released upon the issuing of a certificate of practical completion, with the other half to be released at the end of the defects liability period.⁴⁴
- 84 In early December 2021, the Subcontractor approached the Head Contractor about the possibility of substituting the retention monies held by the Head Contractor with

⁴⁴ Court Book 69–70, First Affidavit of Bernard Kevin Nolan sworn 26 July 2022, [17]–[18].

an insurance bond for the same amount.⁴⁵

85 On 1 January 2022, the Subcontractor delivered the following claims to the Head Contractor:⁴⁶

- (a) a monthly progress claim and invoice in relation to the CNSSS Project for the month of December. Relevantly it records:
 - (i) a current contract value of \$3,705,163.00;
 - (ii) that \$135,725.10 had been retained as security;
 - (iii) the current payment due in the sum of \$260,949.63; and
 - (iv) the balance to contract completion of \$890,814.00.

Mr Nolan for the Head Contractor deposed that by this payment claim, the Subcontractor had claimed more than the entirety of the relevant Subcontract sum for Stage 1 of the CNSSS Project (which was a sum of only \$2,714,502.00);⁴⁷

- (b) a claim for the release of 50% of the cash retentions held in relation to the CNSSS Project in the sum of \$67,862.55;
- (c) a progress claim and invoice in relation to the GSS Project for the month of December. Relevantly it records:
 - (i) a current contract value of \$3,379,927.65;
 - (ii) that \$132,854.78 had been retained as security;
 - (iii) the current payment due in the sum of \$212,086.99; and
 - (iv) the balance to contract completion of \$635,421.43.

⁴⁵ Court Book 81–2, Second Affidavit of Bernard Kevin Nolan sworn 16 August 2022, [8]–[10].

⁴⁶ Court Book 453–74, Subcontractor’s claim documentation.

⁴⁷ Court Book 81, Second Affidavit of Bernard Kevin Nolan sworn 16 August 2022, [5].

Mr Nolan for the Head Contractor deposed that by this payment claim, the Subcontractor claimed more than the entirety of the relevant Subcontract sum for Stage 1 of the GSS Project (which was a sum of only \$2,689,823.00);⁴⁸ and

- (d) a claim for the release of 50% of the cash retentions held in relation to the GSS Project in the sum of \$66,427.39.

86 Mr Hoy, the Subcontractor's construction manager, deposes that in January 2022, the Subcontractor was negotiating for the early release of half of the cash retentions held by the Head Contractor ahead of practical completion.⁴⁹ Mr Nolan for the Head Contractor disputes this evidence and deposes that these discussions between the parties related to the exchange of insurance bonds for the cash retentions held by the Head Contractor to assist the Subcontractor's cash flow.⁵⁰ Neither witness was called for cross-examination.

87 Consistent with Mr Hoy's recollection of events, on 14 January 2022, the Subcontractor sent an email to the Head Contractor stating, amongst other things:⁵¹

RETENTION:

1st Release of retention on all schools; **Attached. All works are more or less completed. Defecting being closed out currently – Was discussed as soon as complete Hutchies would help TP out with earlier than usual release, of which we appreciate:

- Greenvale \$66,427.39 ex gst
- Clyde Secondary \$67,862.55
- Clyde Primary \$51,410.53

Bonds for 2nd half of retention all same value as above.

88 Based on the evidence of Mr Hoy and the email of 14 January 2022, I am satisfied on the balance of probabilities that the Subcontractor was negotiating or attempting to negotiate with the Head Contractor for the early release of half of the cash retentions,

⁴⁸ Court Book 81, Second Affidavit of Bernard Kevin Nolan sworn 16 August 2022, [5].

⁴⁹ Court Book 78, Affidavit of Daniel Albert Hoy affirmed 29 July 2022, [9(d)].

⁵⁰ Court Book 81–3, Second Affidavit of Bernard Kevin Nolan sworn 16 August 2022, [7]–[10].

⁵¹ Court Book 477, Email correspondence.

although I make no finding as to whether or not any agreement was reached about that matter.

89 Later that day, the Head Contractor sent an email to the Subcontractor responding to the payment claim and retention claim in relation to the CNSSS Project and attaching the Head Contractor's payment schedule. The Head Contractor stated:⁵²

1st retention release will be done once works have reached practical completion (CCTV footage, commissioning data 100% complete and handed over, Defects completed etc)

90 It is plain from this email that as at 14 January 2022, the Head Contractor did not believe practical completion had been achieved in relation to the CNSSS Project.

91 The attached payment schedule for the CNSSS Project is incorrectly dated 31 October 2021. It certified payment to the Subcontractor on the basis that all of the work associated with Stage 1 of the CNSSS Project was complete except for minor defects. Deductions totalling \$26,719.00 were made in relation to the CNSSS Project on account of minor defects.⁵³ Consistent with the Head Contractor's position that it would not be releasing any part of the cash retentions, the payment schedule recorded a deduction of the full amount of the retention for that project, being the sum of \$135,725.10.⁵⁴

92 The other payment schedule in relation to the GSS Project is undated, although counsel for the Head Contractor submitted it was issued in mid-January 2022⁵⁵ after receiving the Subcontractor's payment claim on 1 January 2022.⁵⁶ Again it records a deduction of the full amount of the retention for that project being \$132,854.78.⁵⁷

93 Mr Hoy deposes that on 19 January 2022, two conditional certificates of practical completion were issued by the principal to the Head Contractor under the head

⁵² Court Book 480, Email correspondence.

⁵³ Court Book 71, First Affidavit of Bernard Kevin Nolan sworn 26 July 2022, [23(a)].

⁵⁴ Court Book 475, Head Contractor's payment schedule.

⁵⁵ Trial Transcript (n 1) 22.

⁵⁶ Court Book 71, First Affidavit of Bernard Kevin Nolan sworn 26 July 2022, [23(b)].

⁵⁷ Court Book 476, Head Contractor's payment schedule.

contract in relation to GSS Project, recording that:⁵⁸

- (a) Separable Portion 3 achieved practical completion on 21 December 2021; and
- (b) Separable Portion 5C achieved practical completion on 14 January 2022.⁵⁹

94 These are the same dates that Mr Nolan deposes are the dates of practical completion for those separable portions under the Subcontract.⁶⁰ I am not aware of the terms of the head contract or the requirements for practical completion under it.

95 On 20 January 2022, in an email from Mr Thompson for the Subcontractor to Mr Nolan for the Head Contractor concerning the replacement of the cash retentions with an insurance bond, Mr Thompson said:⁶¹

Thanks Bernie, confirming the bond will only be for the final 2.5% release?

As the works are finished the first 2.5% release does not require the bond.

96 The following day, Ms Wilkinson, the Head Contractor's contract administrator, responded to Mr Thompson. In relation to the cash retentions, she stated: 'HB will arrange for Practical Completion retentions ... to be released'.⁶²

97 On 31 January 2022, both of the schools were occupied by students commencing Term 1 of the academic school year.

98 On 15 February 2022, the Head Contractor released half of the cash retentions it held in relation to the CNSSS and GSS Projects.

99 On 28 February 2022, the Subcontractor submitted two payment claims under the SOP Act in respect of the CNSSS and GSS Projects, seeking amounts previously rejected by the Head Contractor.

100 In March 2022, the relevant superintendents and the Subcontractor exchanged the

58 Court Book 78, Affidavit of Daniel Albert Hoy affirmed 29 July 2022, [9(e)].

59 Court Book 482-3, Conditional certificates of practical completion for the head contract.

60 Court Book 78-9, Affidavit of Daniel Albert Hoy affirmed 29 July 2022, [9(e)].

61 Court Book 510, Email correspondence.

62 Court Book 507, Email correspondence.

emails discussing practical completion, as described in detail at paragraphs [66] to [71] above.

101 On 31 March 2022, the Subcontractor submitted a further two payment claims under the SOP Act in respect of the CNSSS and GSS Projects, again seeking amounts previously rejected by the Head Contractor.

102 On 30 April 2022, the Subcontractor served the April Payment Claims.

E.3 Consideration – Estoppel

103 In relation to estoppel, it was not clear to me whether the Head Contractor sought to rely on estoppel by convention or promissory estoppel. Accordingly, I have addressed both.

104 The relevant principles may be summarised as follows:

- (a) Estoppel by convention is a form of estoppel founded upon an assumed state of affairs by the parties as to a matter of fact or law, which both parties will be estopped from denying;⁶³
- (b) The elements necessary to establish an estoppel by convention are:⁶⁴
 - (i) The plaintiff has adopted an assumption as to the terms of its legal relationship with the defendant;
 - (ii) The defendant has adopted the same assumption;
 - (iii) Both parties have conducted their relationship on the basis of that mutual assumption. The plaintiff must demonstrate the acceptance of a particular state of affairs as the foundation of the dealings between

⁶³ *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 244–5 (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ); *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, [194]–[201] (Tobias JA, with Mason P and Campbell JA agreeing); *FJ & PN Curran Pty Ltd v Almond Investors Land Pty Ltd* [2019] VSCA 236, [214] (Whelan, Niall and Ashley JJA).

⁶⁴ *Moratic Pty Ltd v Gordon* [2007] NSWSC 5, [31]–[33] (Brereton J) (*'Moratic'*); *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, [199]–[201] (Tobias JA, with Mason P and Campbell JA agreeing).

the parties.⁶⁵ A course of dealing explicable by reference to some other equally plausible assumption will not suffice to establish a basis for estoppel by convention;⁶⁶

- (iv) Each party knew or intended that the other would act on that basis; and
 - (v) Departure from the common assumption must occasion detriment to the plaintiff. In considering detriment, the action or inaction of the plaintiff must be such that, if the assumption upon which they proceeded was wrong and an inconsistent state of affairs was accepted as the foundation of the rights and duties of both parties, the consequence made their original act or omission a source of detriment or prejudice.⁶⁷ As a matter of causation, there can be no real detriment if the plaintiff would have been in the same position in any event;⁶⁸
- (c) To establish promissory estoppel, it is necessary for the plaintiff to prove the following elements:⁶⁹
- (i) The plaintiff has adopted an assumption as to the terms of a legal relationship with the defendant;
 - (ii) The defendant has induced the plaintiff to adopt that assumption or expectation. The inducement may arise from representations or

⁶⁵ *Miller Heiman Pty Ltd v Sales Principles Pty Ltd* (2017) 94 NSWLR 500, [38] (Macfarlan JA, with McColl JA and Sackville AJA agreeing) ('*Miller Heiman*'), citing *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641, 674–5 (Dixon J).

⁶⁶ *Ibid* [41] (Macfarlan JA, with McColl JA and Sackville AJA agreeing), citing *Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40, 46 (McPherson J, with Andrews CJ and Demack J agreeing).

⁶⁷ *Ibid* [38], [48] (Macfarlan JA, with McColl JA and Sackville AJA agreeing), citing *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641, 674–5 (Dixon J); *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, 131 (Brandon LJ).

⁶⁸ *Ibid* [46]–[49], citing *Sidhu v Van Dyke* (2014) 251 CLR 505, [91]–[94] (Gagelar J).

⁶⁹ *Moratic* (n 65), [28], [32]–[34] (Brereton J), citing *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428–9 (Brennan J).

conduct or a combination of words and conduct;⁷⁰

- (iii) The plaintiff acts in reliance of the assumption or expectation;
- (iv) The defendant knew or intended the plaintiff to so act;
- (v) The plaintiff will suffer detriment if the assumption or expectation is not fulfilled; and
- (vi) The defendant has failed to act to avoid that detriment, whether by failing to fulfil the assumption or expectation or otherwise.

105 In relation to estoppel by convention, my first task is to determine whether there was a common assumption adopted by both parties as to the state of affairs between them.

106 I consider that the relevant question for my determination is whether or not the parties acted on a mutual assumption that practical completion had been achieved and the consequent contractual effect of practical completion would operate as if a certificate had been issued (so that the need for a certificate was redundant).

107 The Head Contractor relies primarily on the fact that the Subcontractor applied for the release of 50% of the security held by the Head Contractor for each project. Under the Subcontract, the Head Contractor's entitlement to security is reduced by 50% upon the issuing of a certificate of practical completion, and it is obliged to return that amount to the Subcontractor within 14 days thereafter.⁷¹ It is the position of the Head Contractor that by asking for the return of this security, the Subcontractor was operating, and inducing the Head Contractor to operate, on the assumption that the works had reached practical completion and that it was unnecessary for a certificate to be issued to certify that this milestone had occurred.

108 The Subcontractor relied on Mr Hoy's evidence and the correspondence of 14

⁷⁰ Ibid [34] (Brereton J); *Legione v Hateley* (1983) 152 CLR 406, 438–9 (Mason and Deane JJ).

⁷¹ Court Book 117–8, Subcontract, cl 5.4.

January 2022 (summarised at paragraphs [86] to [87] above) to submit that it had been negotiating for the early release of the cash retentions ahead of practical completion, and its request was made in that context.

109 For the following reasons, the Subcontractor's request for the return of the retentions, in the context in which it was made, does not support the existence of a common assumption about the status of the works. First, in relation to the request made on 1 January 2022, the Head Contractor rejected that request, and indicated by its correspondence and payment schedules in January 2022 that it did not consider practical completion had been achieved at that time. Second, and in any event, neither the request made on 1 nor 20 January indicates the adoption by the Subcontractor of an assumption that:

- (a) practical completion had been achieved. Those requests are equally explicable by reference to the Subcontractor's attempts to negotiate for the early release of the retentions; and
- (b) the contractual effect of practical completion would run without the need for a certificate. As an important milestone, it is highly unlikely that the Subcontractor would make an assumption that practical completion had been achieved absent some certainty about the date of practical completion. In any event, there is no evidence that the Subcontractor turned its mind to anything other than the return of the security. For example, a very significant contractual effect of practical completion is that it brings to an end the Subcontractor's entitlement to make monthly payment claims. I am not satisfied on the evidence before me that by making its request for the release of the retentions, the Subcontractor was acting on the assumption that it would be precluded from making any further monthly payment claims.

110 The Head Contractor also relies on the email correspondence between the Subcontractor and the relevant superintendents in March 2022, and specifically, the fact that the Subcontractor requested confirmation of the practical completion dates,

was notified of those dates, and then provided information about its maintenance obligations. In my view, the Subcontractor's emails do not suggest it was operating on an assumption that a certificate of practical completion was not required or would not be forthcoming for the following reasons:

- (a) There was no mention of a certificate in the emails;
- (b) It is important to view the parties' actions in the context of the contractual framework in which they were operating. Under that contractual framework, the Subcontractor does not have the unilateral power to determine that practical completion has been achieved. Clause 34.6 contemplates that the Subcontractor may voice their opinion that practical completion has been reached, but it is the issuing of a certificate, based on the superintendent's opinion, that is the conclusive event under cl 34.6. It was entirely consistent with the terms of the Subcontract for the Subcontractor to query whether the superintendent had formed an opinion about the works reaching practical completion while also still awaiting a certificate from the superintendent to evidence practical completion. There is nothing in the Subcontractor's query to suggest that they assumed the need for a certificate had been dispensed with;
- (c) As noted above at paragraph [74], it is unclear from the March 2022 emails whether the parties were discussing the completion of works under the head contract or the Subcontract. Further to that observation, item 36 of the Subcontract provides that the defects liability period will be 'the period ending on the date of expiry of the last defects liability period under the main contract'.⁷² Having regard to that clause and the CNSSS superintendent's email which refers to obligations arising at 'the end of the defects liability period', it is plausible that the Subcontractor was enquiring about practical completion under the head contract so that it could determine when its

⁷² Court Book 185, Subcontract, item 36.

defects liability period would expire under the Subcontract.

111 In relation to promissory estoppel, for the same reasons above, I am not satisfied that the Subcontractor's request for the return of the retentions, its receipt of the retentions, or its request for confirmation of the practical completion dates was conduct capable of inducing the Head Contractor to adopt the assumption that practical completion had been achieved and the need for a certificate had been dispensed with. In short, this conduct was consistent with the Subcontractor's attempts to negotiate for the early release of the retentions, and was consistent with the contractual regime governing the parties' relationship.

E.4 Consideration – Election and waiver

112 The Head Contractor submits that the Subcontractor, by their conduct identified in paragraph [82] above, made an election to treat practical completion as having occurred, or otherwise abandoned any right to insist on a certificate of practical completion being issued. For the following reasons, I reject that submission.

113 In the law of contract, an actionable election may arise where a party makes a choice between alternative and inconsistent sets of rights.⁷³ For the doctrine to operate, the party must have knowledge of the circumstances which give rise to the alternative and inconsistent sets of rights, and must act so as to unequivocally communicate its choice to exercise one set of rights.⁷⁴ Once the election is made, it is irrevocable and the party cannot resile from it.⁷⁵ Although it may be possible to describe this in terms of a waiver of rights, the better description of this doctrine is 'election by affirmation'.⁷⁶

⁷³ *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* [2022] HCA 38, [38] (Kiefel CJ, Edelman, Steward and Gleeson JJ) ('*Allianz*').

⁷⁴ *Ibid* [49]–[52] (Kiefel CJ, Edelman, Steward and Gleeson JJ); *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 642 (Stephen J) ('*Sargent*'); *Fried v National Australia Bank Ltd* [2000] FCA 910 [28]–[33] (Weinberg J) ('*Fried*'); *O'Connor v S P Bray Ltd* (1936) 36 SR (NSW) 248, 259 (Jordan CJ, with Street and Maxwell JJ agreeing).

⁷⁵ *Allianz* (n 74) [49]–[52] (Kiefel CJ, Edelman, Steward and Gleeson JJ); *Sargent* (n 75) 642 (Stephen J); *Fried* (n 75) [28]–[33] (Weinberg J).

⁷⁶ *Allianz* (n 74) [39] (Kiefel CJ, Edelman, Steward and Gleeson JJ).

114 An irrevocable waiver requires, as its first element, an unequivocal decision by a party, communicated to the other party, not to insist upon a right or not to exercise a power.⁷⁷

115 In my view, the conduct relied on by the Head Contractor does not amount to an election by the Subcontractor to unequivocally communicate that it would treat practical completion as having been reached or that the need for a certificate had been dispensed with. In relation to the Subcontractor's claim for the release of the retention monies, that conduct was explicable by reference to its attempt to negotiate for the early release of the retentions, as explained at paragraph [109] above. In relation to the Subcontractor's request for confirmation of the date of practical completion and its provision of information as to its maintenance obligations, that conduct was consistent with the contractual regime governing the parties' relationship, as noted at paragraph [110] above. Accordingly, the Subcontractor's conduct did not unequivocally communicate what the Head Contractor contends.

116 For the same reasons, the conduct relied on by the Head Contractor does not amount to an unequivocal decision by the Subcontractor, communicated to the Head Contractor, to waive the requirement that a certificate of practical completion be issued.

F Issue 4 – Has the adjudicator committed jurisdictional error by determining that the April Payment Claims were made in respect of valid reference dates?

117 The adjudicator concluded that:⁷⁸

- (a) Practical completion had occurred 'as evidenced by the release of Practical Completion retentions';
- (b) There was no certificate of practical completion; and
- (c) In the absence of a certificate of practical completion, reference dates

⁷⁷ Ibid [28] (Kiefel CJ, Edelman, Steward and Gleeson JJ), [157] (Gageler J).

⁷⁸ Court Book 2571, Amended adjudication determinations dated 4 July 2022, [59]–[63].

continued to accrue under item 37(a)(a) such that one was available at the time of the April Payment Claims.

118 I have found that the Subcontractor's entitlement to make monthly progress claims under item 37(a)(a) continued to accrue until the date of practical completion as evidenced in a certificate of practical completion and that a certificate of practical completion had not been issued at the time the April Payment Claims were made. It follows that, in my view, the adjudicator did not err in his conclusion that the April Payment Claims were made in respect of valid reference dates arising under paragraph (a) of item 37(a) and that he had jurisdiction to make a valid determination.

G Orders

119 For the reasons above, I propose to order that the Head Contractor's application be dismissed.

120 I will hear from the parties as to the form of order and costs.