

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

Not Restricted

S ECI 2024 06092

LITTLE HARDIMAN STREET PTY LTD
(ACN 625 167 955)

Plaintiff

v

HENNY PTY LTD (ACN 625 359 766)

First Defendant

PHILIP MARTIN

Second Defendant

<u>JUDGE:</u>	Stynes J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	2 April 2025
<u>DATE OF JUDGMENT:</u>	22 July 2025
<u>CASE MAY BE CITED AS:</u>	Little Hardiman Street Pty Ltd v Henny Pty Ltd
<u>MEDIUM NEUTRAL CITATION:</u>	[2025] VSC 436

ADMINISTRATIVE LAW – Judicial review – Error of law on the face of the record – Review of adjudication determination made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether adjudicator fell into error by misconstruing the construction contract – Whether superintendent’s certificate had the effect of certifying a debt due and payable – Whether adjudicator fell into error by failing to assess certain items of work as a second-class claimable variation pursuant to s 10A(3) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Finding no error of law – Adjudication determination upheld.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	B Reid	Dentons
For the Defendant	R Andrew KC with B Mason	Moray & Agnew
For the Second Defendant	No appearance	No appearance

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HER HONOUR:

A Introduction

- 1 This proceeding concerns a dispute between parties to a construction contract to which the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**'SOP Act'**) applies.
- 2 The plaintiff (**'Little Hardiman Street'**) as the principal engaged the first defendant (**'Henny'**) as the contractor, pursuant to an amended AS4902-2000 design and construct contract dated 19 May 2022 (**'Contract'**), to undertake the construction of the 'Little Hardiman Lofts' at 347-367 Macaulay Road, Kensington in the State of Victoria for the sum of \$25,000,000 plus GST (**'Project'**).
- 3 On 26 September 2024, Henny served progress claim 27 on Little Hardiman Street seeking payment of \$380,149.32 plus GST in relation to works under the Contract (**'Payment Claim'**).
- 4 On 30 September 2024, the Project superintendent, Bo Chu of Pitch Architecture & Design (**'Superintendent'**), sent an email to Henny and Little Hardiman Street, by which he recorded his assessment and purported certification of a debt due and payable under the Contract by Henny to Little Hardiman Street (**'Superintendent's Certificate'**) in the amount of \$752,624.57 plus GST for 'value management and alternative materials cost savings' (**'Value Management Adjustment'**).
- 5 On 3 October 2024, the Superintendent issued a payment schedule in response to the Payment Claim which, after taking into account the Value Management Adjustment, amongst other matters, recorded the Superintendent's assessment that Henny owed Little Hardiman Street \$479,594.86 plus GST (**'Payment Schedule'**).
- 6 Henny applied for an adjudication of the Payment Claim under the SOP Act.
- 7 The second defendant (**'Adjudicator'**) delivered his determination on 1 November 2024 (**'Determination'**). He determined that Little Hardiman Street was liable to pay

Henny \$386,231.26 inclusive of GST, interest and 100% of the Adjudicator's fees ('**Adjudicated Amount**'). The Adjudicator rejected Little Hardiman Street's submission that the Value Management Adjustment should be deducted from the amount claimed by Henny.

8 Little Hardiman Street seeks judicial review of the Determination and seeks relief in the nature of certiorari that the Determination be quashed or alternatively declared void.

9 The issues that arise for determination are:

- (a) **Issue 1** – Did the Adjudicator err by misconstruing the Contract?
- (b) **Issue 2** – Alternatively to Issue 1, did the Adjudicator err by failing to identify the Value Management Adjustment as a second-class claimable variation pursuant to s 10A(3) of the SOP Act?

B Background

B.1 The Contract

10 For convenience I have set out the parts of the Contract relied on by the parties.

11 The Contract comprises documents including:

- (a) the Formal Instrument of Agreement;
- (b) the General Conditions of Contract for Design and Construct AS4902-2000 as amended ('**General Conditions**'); and
- (c) the Annexure Parts A-H.

12 Clauses 37.1 and 37.2 of the General Conditions relevantly provide:

37.1 Progress claims

The Contractor shall claim payment progressively in accordance with Item 33.

...

37.2 Certificates

The Superintendent shall, within 7 days after receiving such a progress claim, issue to the Principal and Contractor:

- (a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and
- (b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.

...

The Principal shall, by the 25th day of the month following the month in which the progress claim is issued, pay to the Contractor the balance of the progress certificate after setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.

13 Part F of the Annexure to the General Conditions is entitled "The Contractor's Exclusions and Clarifications" (**Part F**). It comprises 127 items under the following headings:

- (a) General Exclusions — items 1 to 21;
- (b) Pre-Construction and Construction Management — items 22 to 28;
- (c) Early Works and Basement — items 29 to 39;
- (d) Concrete and Structure and Precast and Façade — items 40 to 47;
- (e) Electrical Services — items 48 to 54;
- (f) Hydraulic Services — items 55 to 57;
- (g) Mechanical Services — items 58 to 63;
- (h) Fire Services — items 64 to 67;
- (i) Lifts Services — items 68 to 69
- (j) Windows — items 70 to 76;

- (k) Screens, Balustrade and Architectural Metalworks — items 77 to 80;
- (l) Metal Cladding — item 81;
- (m) Joinery — items 82 to 88;
- (n) Sanitaryware & Plumbing and Fixtures and Fittings — items 89 to 91;
- (o) Appliances — items 92 to 93;
- (p) Painting and Render — items 94 to 102;
- (q) Plastering & Insulation — items 103 to 107;
- (r) Floor and walls finishes — items 108 to 115;
- (s) Landscape — items 116 to 119;
- (t) Waste Room — item 120;
- (u) Authority Services & Consultancy fees — items 121 to 125; and
- (v) Value Management Schedule — items 126 and 127.

14 Items 126 and 127 appear as follows:

Value Management Schedule

- 126. All proposed Value Management Items are to be agreed by the Principal and related consultants, in particular the architect. The Value Management savings may be adjusted pending the confirmation of VMs to be taken up by the Principal.
- 127. Alternative materials including FF&E subject to meet contract of sales and marketing images. For all substitution and alternatives, submit sample to be submitted to the Architect for review and approval prior.

15 Clause 2.3 of the Formal Instrument of Agreement lists the order of precedence of the documents comprising the Contract as follows:

- (a) Any purchaser changes agreed between the parties.

- (b) The Contractor's Exclusions and Clarifications set out in Annexure Part F and any value management items agreed between the parties.
- (c) The Principal's Project Requirements set out in Annexure Part H (except the marketing material set out at paragraph 2.1).
- (d) Formal Instrument of Agreement and General Conditions of Contract for Design and Construct AS4902-2000 General Conditions of Contract as amended (excluding the Annexure Parts).
- (e) The marketing material set out at paragraph 2.1 of the Principal's Project Requirements set out in Annexure Part H.
- (f) The balance of the Annexure Parts, being Annexure Parts A, B, C, D, E and G.

16 Other clauses said to be relevant to the determination of the issues in dispute are cl 2.1, 29.3, 29.4 and 36.4 of the General Conditions. The relevant parts of those clauses are set out here for convenience:

2.1 Performance and payment

...

The Principal shall pay the Contractor ... for work ... adjusted by any additions or deductions made pursuant to the Contract.

29.3 Defective work

If the Superintendent becomes aware of work done (including material provided) by the Contractor which does not comply with the Contract, the Superintendent shall as soon as practicable give the Contractor written details thereof. If the subject work has not been rectified, the Superintendent may direct the Contractor to do any one or more of the following (including times for commencement and completion):

- (a) remove the material from the site;
- (b) demolish the work;
- (c) redesign, reconstruct, replace or correct the work; and
- (d) not deliver it to the site.

If:

- (e) the Contractor fails to comply with such a direction; and
- (f) that failure has not been made good within 8 days after the Contractor receives written notice from the Superintendent that the Principal intends to have the work rectified by others,

the Principal may have that work so rectified and the Superintendent shall certify the cost incurred as moneys due from the Contractor to the Principal.

...

29.4 Acceptance of defective work

Instead of a direction pursuant to subclause 29.3, the Superintendent may direct the Contractor that the Principal elects to accept the subject work, whereupon there shall be a deemed variation.

...

36.4 Pricing

The Superintendent shall, as soon as possible, price each variation using the following order of precedence:

- (a) prior agreement;
- (b) applicable rates or prices in the Contract;
- (c) rates or prices in a schedule of rates or schedule of prices, even though not Contract documents, to the extent that it is reasonable to use them; and
- (d) reasonable rates or prices, which shall include a reasonable amount for profit and overheads,

and any deductions shall include a reasonable amount for profit but not overheads. The price shall be added to or deducted from the contract sum.

B.2 The Payment Claim, the Superintendent's Certificate, the Value Management Adjustment and the Payment Schedule

- 17 On 26 September 2024, Henny served the Payment Claim on Little Hardiman Street seeking payment of \$380,149.32 plus GST.

- 18 On 30 September 2024, the Superintendent sent the Superintendent's Certificate by email to Henny and Little Hardiman Street, by which he recorded his purported assessment and certification of a debt due and payable under the Contract by Henny to Little Hardiman Street in the amount of \$752,624.57 plus GST for the Value Management Adjustment.
- 19 The Superintendent's Certificate attached a report from Mitchell Brandtman dated 16 May 2024 ('**Brandtman Report**'). The Brandtman Report records, amongst other things, that Mitchell Brandtman had been engaged by Little Hardiman Street to provide an opinion of the "likely order of cost savings associated with value management items as per the summary of alternative materials schedule including descriptions & quantities provided by [the Superintendent] and Architectural Drawings (Construction Issue) provided for context".
- 20 It attached a table entitled "VM/ Alternative Specifications Register" which identifies 30 items of potential savings and in relation to each describes:
- (a) the original specification;
 - (b) the alternative specification;
 - (c) the relevant quantity; and
 - (d) Mitchell Brandtman's estimate of the potential cost savings.
- 21 Mitchell Brandtman estimated the total savings to be \$752,624.57 plus GST.
- 22 On 3 October 2024, the Superintendent issued the Payment Schedule recording the Superintendent's assessment that, after accounting for the Value Management Adjustment and other smaller adjustments, Henny owed Little Hardiman Street \$479,594.86 plus GST.

B.3 The Adjudication Application

- 23 On 16 October 2024, Henny submitted its adjudication application (**'Adjudication Application'**). Relevantly, it contested the deduction in the Payment Schedule of \$752,624.57 plus GST for the Value Management Adjustment. Amongst other things, Henny submitted that the savings contemplated in Part F were reflected in the contract sum at the time of execution of the Contract.
- 24 On 24 October 2024, Little Hardiman Street submitted its adjudication response (**'Adjudication Response'**).
- 25 Among other things and by way of summary, Little Hardiman Street submitted to the Adjudicator that:
- (a) the effect of the Superintendent's Certificate was that the Superintendent had assessed and certified under cl 37.2(b) of the Contract that a debt was due and payable by Henny to Little Hardiman Street in the amount of the Value Management Adjustment;
 - (b) that debt is able to be, and was, set off against the Payment Claim; and
 - (c) the Payment Schedule is therefore correct because it properly accounts for the Value Management Adjustment.

B.4 The Determination

- 26 The Adjudicator delivered the Determination on 1 November 2024. The Adjudicator determined that Little Hardiman Street was liable to pay Henny the Adjudicated Amount of \$386,231.26. The Adjudicator found that Little Hardiman Street was not entitled to make a deduction for the Value Management Adjustment. He reasoned, in summary, that:
- (a) there is no provision in the Contract as to how any savings are to be evaluated or any obligation for any savings to be deducted from the contract value;

- (b) there is no provision in the Contract authorising the Superintendent to make the decision whether Value Management items are to be deducted or not. There is no mechanism as to how the Superintendent is to value the saving to then apply cl 37.2(b) of the Contract;
- (c) any alteration of the value for the Value Management items is not a variation as defined in the Contract as it is not an increase, decrease, omission or change in the contract work;
- (d) the Value Management Adjustment is not a claimable variation under s 10A of the SOP Act; and
- (e) Little Hardiman Street did not provide sufficient documents or information to substantiate the proposed deduction for the Value Management Adjustment.

C The SOP Act – The relevant provisions

- 27 An adjudicator is to determine, amongst other things, the amount of the progress payment (if any) to be paid by the respondent to the claimant.
- 28 Section 23(2) of the SOP Act exhaustively sets out the matters which an adjudicator is obligated to take into account when making their determination. It provides:
- (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only –
 - (a) the provisions of this Act and any regulations made under this Act;
 - (b) subject to this Act, the provisions of the construction contract from which the application arose;
 - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;
 - (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

29 Section 10A of the SOP Act sets out the classes of variations to a construction contract (known as 'claimable variations') that may be taken into account in calculating the amount of a progress payment. To qualify, the variation must be a "variation" defined by the SOP Act as follows:¹

variation in relation to a construction contract, means a change in the scope of the construction work to be carried out, or the related goods and services to be supplied, under the contract.

D Issue 1 – Did the Adjudicator misconstrue the Contract?

D.1 How this issue arises

30 By its Originating Motion, Little Hardiman Street framed its sole ground for review as follows:

[The Adjudicator] made an error of law on the face of the record, or alternatively, erred at law, by failing to properly consider the provisions of the construction contract from which [Henny's] adjudication application arose, as required by section 23(2)(b) of the [SOP Act].

31 Owing to the way that Little Hardiman Street had articulated this ground for review, senior counsel for Henny submitted that the role of the Court in this proceeding is to determine whether the Adjudicator fell into appealable error by failing to consider the Contract, as required by s 23(2)(b) of the SOP Act.

32 However, Little Hardiman Street's written and oral submissions made it clear that Little Hardiman Street's primary ground of review is that the Adjudicator erred by misconstruing the Contract. In summary, it is Little Hardiman Street's position that:

- (a) by operation of the terms of the Contract (namely cl 29.3, 29.4 and 36.4, and item 126 of Part F) and upon the issue of the Superintendent's Certificate under cl 37.2(b), there arose a debt due and payable by Henny to Little Hardiman Street; and

¹ *Building and Construction Industry Security of Payment Act 2002* (Vic), s 4.

- (b) therefore the Adjudicator erred in determining that there is no provision in the Contract as to how the Value Management Adjustment was to be evaluated or converted into a debt due or authorising the Superintendent to make the decision whether the Value Management Adjustment was to be deducted from the contract value.

D.2 Submissions

D.2.1 *Little Hardiman Street's submissions*

33 Little Hardiman Street submits, in summary:

- (a) Properly construed, cl 37.2(b) confers upon the Superintendent a wide discretionary power to certify that the Value Management Adjustment was a debt due and payable by Henny to Little Hardiman Street.
- (b) Clauses 2.1, 29.3, 29.4 and 36.4 of the General Conditions and item 126 of Part F govern the valuation and deduction of the Value Management Adjustment as follows:
 - (i) item 126 of Part F recognises that if Henny proposes a cheaper alternative, which is the value management item, that can only be effected if Little Hardiman Street and its consultants agree with the change. Once the change is agreed, there may be a saving;
 - (ii) it is clear from cl 2.1 that the Contract price may be adjusted;
 - (iii) the procedure for adjustment is either by cl 29.3 or 29.4;
 - (iv) the effect of cl 29.3 is that almost all of the items of work the subject of the Value Management Adjustment is defective work. However, instead of directing Henny to fix the work under cl 29.3, the Superintendent may instead direct Henny under cl 29.4 that Little Hardiman Street elects to accept the subject work, whereupon there

will be a deemed variation under cl 29.4. It is Little Hardiman Street's position that that is what happened in this case; and

- (v) once there is a deemed variation under cl 29.4, cl 36.4 requires the Superintendent 'as soon as possible' to price each of the variations.
- (c) Finally, in accordance with cl 37.2, the Superintendent is required to issue to Little Hardiman Street and Henny:
 - (i) a progress certificate evidencing the Superintendent's opinion of the moneys due from Henny to Little Hardiman Street pursuant to the progress payment claim and the reason for any difference (cl 37.2(a)); and
 - (ii) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from Henny to Little Hardiman Street pursuant to the Contract (cl 37.2(b)).
- (d) While it is common ground between the parties that the Adjudicator is not bound by a progress certificate issued by the Superintendent under cl 37.2(a), the Adjudicator cannot look behind a certification of moneys due by the Superintendent under cl 37.2(b).

D.2.2 Henny's submissions

34 Henny submits, in summary:

- (a) Clause 37.2 does not empower the Superintendent to certify an indebtedness to Little Hardiman Street. Nor does it create an indebtedness. Any indebtedness must be sourced elsewhere in the Contract.
- (b) If Little Hardiman Street's construction of the Contract is correct, then it constitutes an impermissible contracting out of the SOP Act's arrangements such that it is void to that extent pursuant to s 48. It would, in effect, have the Adjudicator rubber stamp a superintendent's certificate issued under

cl 37.2(b). Further, it would preclude the Adjudicator from even considering whether the amount purportedly certified contains excluded amounts, which must not comprise part of an adjudicated amount pursuant to s 23(2A)(a). This would circumvent the SOP Act's arrangements for excluded amounts. An adjudicator is not bound by the calculation performed by a superintendent in reaching and certifying an amount due and payable between the parties.²

- (c) Further, the text of cl 37.2(b) on which Little Hardiman Street's case relies relates to the mechanics of a contractual progress payment. Clause 37.2(b) therefore has no relevance to the SOP Act's arrangements for determining the amount of any statutory progress payment to which the plaintiff may be entitled. The authorities accept that a contractor's statutory progress payment entitlement and contractual progress payment entitlement may be different.
- (d) The Determination did not contain an error of law. The Adjudicator was correct to exclude any part of the Value Management Adjustment from the adjudicated amount.

D.3 Consideration

35 My task is to determine whether there is an error on the face of the record, specifically whether, as contended by Little Hardiman Street, the Adjudicator erred in construing the Contract and concluding there is no mechanism for the valuation or deduction of the Value Management Adjustment.

² *JG King Project Management Pty Ltd v Hunters Green Retirement Living Pty Ltd* [2024] VSCA 310, [243] (Kennedy JA).

36 The relevant principles of contract construction are well known and not in dispute. In short:

- (a) The Contract 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.³
- (b) 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.⁴
- (c) 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 contract.⁵

37 For the reasons that follow, I have determined:

- (a) The work the subject of the Value Management Adjustment ('VMA Work') forms part of the agreed scope of work under the Contract.
- (b) Unsurprisingly, therefore, on the proper construction of the Contract, there are no provisions that govern the valuation of, or the adjustment to the contract sum to account for, such works.
- (c) The provisions relied on by Little Hardiman Street are inapplicable to the VMA Work.
- (d) Therefore, the Adjudicator did not err.

³ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 ('*Mount Bruce Mining*'), [46] (French CJ, Nettle and Gordon JJ).

⁴ *Mount Bruce Mining*, [47] (French CJ, Nettle and Gordon JJ).

⁵ *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522, [16] (Gleeson CJ, McHugh, Gummow and Kirby JJ).

D.3.1 The VMA Work forms part of the agreed scope of work under the Contract

38 “Value Management Adjustment” is a phrase coined for the purpose of this proceeding and refers to the cost saving estimated by Mitchell Brandtman in relation to 30 items of work identified in the Brandtman Report (i.e. the VMA Work).

39 It is common ground that each item of the VMA Work relates to an item numbered between 1–125 in Part F. The precise relationship between the VMA Work and the clarifications and exclusions itemised in Part F was identified by Henny in a table included in its Adjudication Application.⁶ For example:

- (a) item 1 of the Brandtman Report concerns a change to the brick tile finish from “Brick snaps, case-in on Precast panel” to “Brick + rail system”. That item relates to item 46 of Part F which provides: “Alternative brick and brick snaps have been allowed for. Samples to be supplied to Architect for review and approval before ordering.”; and
- (b) item 2 of the Brandtman Report concerns a change to the metal cladding from “standing Seam metal Cladding – 28mm rib height, pan width 180mm, 15mm construction grade substructure” to “Archlad Cliptray – 48mm rib, pan width 275mm”. That item relates to item 81 of Part F which provides: “Alternative Nailstrip metal cladding profile in lieu of Standing Seam metal cladding profile”.

40 On a plain reading of the Contract, each item of the VMA Work forms part of the agreed scope of work under the Contract. Specifically:

- (a) clause 1.2 of the Formal Instrument of Agreement requires Henny to carry out and complete the work under the Contract in accordance with the Contract;

⁶ That table was referred to and relied upon by Little Hardiman Street’s counsel during the hearing in support of the proposition that Little Hardiman Street had directed the works to be done, without contradicting its content.

- (b) as described above, each item of the VMA Work is a specific clarification or exclusion to the scope of work as set out in Part F. Part F forms part of the Contract. Indeed, clause 2.1 of the Formal Instrument of Agreement lists Part F as second in the order of precedence of contract documents; and
- (c) no item of the VMA Work, as articulated in Part F, is expressed to be subject to any further agreement between Little Hardiman Street and Henny.

D.3.2 There are no provisions in the Contract that govern how the Superintendent is to value or account for the Value Management Adjustment – The provisions relied on by Little Hardiman Street are inapplicable to the VMA Work

41 Little Hardiman Street contends that the Contract makes provision for how the Value Management Adjustment is to be evaluated and deducted from the contract sum and therefore the Adjudicator erred in determining otherwise.

42 Little Hardiman Street relies primarily on cl 37.2(b) as set out in the summary of its submissions above.

43 Clause 37.2 forms part of the payment provisions of the Contract. It governs how and when the Superintendent is to respond to a payment claim and also the payments to be made between the parties as follows:

- (a) the Superintendent is to issue a progress certificate evidencing his opinion of the moneys due from Little Hardiman Street to Henny pursuant to the progress claim (**‘Progress Certificate’**);
- (b) the Superintendent is to issue a certificate evidencing his assessment of retention moneys and “moneys due from [Henny] to [Little Hardiman Street] pursuant to the Contract”; and
- (c) Little Hardiman Street must then pay to Henny the balance of the Progress Certificate after setting off such of the Superintendent’s Certificate as Little

Hardiman Street elects to set off. If that setting off produces a negative balance, then Henny must pay that balance to Little Hardiman Street.

44 On a plain reading of cl 37.2(b), giving the phrase “pursuant to the Contract” work to do, it does not empower the Superintendent to create an indebtedness simply by issuing a certificate. Rather, it requires him to certify his assessment of indebtedness arising elsewhere under the Contract. Consistent with this construction, there are a number of provisions which do expressly empower the Superintendent to certify a sum as due and payable. For example:

- (a) in the case of liquidated damages, cl 34.7 authorises the Superintendent to certify an amount in liquidated damages “as due and payable to [Little Hardiman Street]”;
- (b) in the case of early practical completion, cl 34.8 empowers the Superintendent to certify a bonus amount as due and payable to Henny; and
- (c) in the case of defects rectified by others, cl 29.3 empowers the Superintendent to certify the cost incurred as “moneys due from [Henny] to [Little Hardiman Street]”.

45 In the context of those clauses, in my view, a reasonable business person would have understood cl 37.2 as I have construed it. In any event, this construction was not resisted by Little Hardiman Street.

46 To the contrary, Little Hardiman Street relied on cll 2.1, 29.3, 29.4 and 36.4 of the General Conditions and item 126 of Part F as the provisions governing the valuation and deduction of the Value Management Adjustment. I note that Little Hardiman Street’s reliance on these clauses was articulated for the first time at the hearing of this matter. They were not addressed in the Payment Schedule, the Adjudication Response, the Originating Motion or written submissions. Its submissions about this issue are summarised above.

47 For the reasons that follow, I reject those submissions.

- 48 As set out above, the VMA Work is work recorded in Part F that was agreed by the parties. Henny was required by the Contract to proceed with that work and it is common ground that Henny fulfilled that obligation and performed it.
- 49 Clause 29.3, relied on by Little Hardiman Street, is by its terms directed to defective work, that is “work done (including material provided) by [Henny] which does not comply with the Contract”. That clause can have no application to the performance of the VMA Work, such work being within the agreed scope of work under the Contract.
- 50 Clause 29.4 operates where the Superintendent directs Henny (as contractor) that Little Hardiman Street (as principal) elects to accept defective work whereupon it will be a deemed variation. Again, cl 29.4 is directed to defective work and has no application to the performance of the VMA Work.
- 51 Little Hardiman Street relies on cl 36.4 to the extent that the works done are deemed to be variations under cl 29.4. Under cl 36.4, the Superintendent is required to price each variation and then add or deduct the price from the contract sum. Having found that cl 29.4 has no application, it follows that cl 36.4 is not engaged in relation to the performance of the VMA Work.
- 52 Item 126 of Part F does not assist Little Hardiman. By its terms, it applies to “Value Management Items” proposed by Henny that “are to be agreed by the Principal”. That is, it applies to Value Management Items that were not agreed at the time the Contract was entered into. Those items are separate and distinct from the VMA Work which comprises clarifications and exclusions that had been agreed between the parties. That construction is reinforced by cl 2 of the Formal Instrument of Agreement which, while defining the order of precedence, refers to “The Contractor’s Exclusions and Clarifications set out in Annexure Part F and any value management items agreed between the parties” and thereby draws a distinction between the “Contractor’s Exclusions and Clarifications” on the one hand, and “any

value management items” on the other. Further, and in any event, item 126 does not address how any savings are to be evaluated or accounted for.

53 No other provisions were identified by the parties as governing the evaluation of, and accounting for, the Value Management Adjustment or VMA Work. This is unsurprising in relation to work that is part of the agreed scope.

D.3.3 Conclusion

54 I find no error in the Adjudicator’s construction of the Contract or his determination of the Adjudicated Amount without deduction of the Value Management Adjustment.

E Issue 2 – Did the Adjudicator fall into error by failing to assess the Value Management Adjustment as a second-class claimable variation pursuant to s 10A(3) of the SOP Act?

E.1 How this issue arises

55 While not included in its Originating Motion, Little Hardiman Street alternatively argued that the Adjudicator fell into error by failing to assess the Value Management Adjustment as a claimable second-class variation under s 10A(3) of the SOP Act. This argument was raised before the Adjudicator, in Little Hardiman Street’s written reply submissions, and was addressed by both parties at trial.

E.2 Submissions

56 Little Hardiman Street submits, in summary:

- (a) If it is incorrect in relation to Issue 1, then the Value Management Adjustment ought to have been valued as a claimable second-class variation under s 10A(3) of the SOP Act.
- (b) Clause 36.1 of the General Conditions defines a variation as including any direction to “*change the character or quality*” of the work under the Contract,

which is perfectly apt to describe the work the subject of the Value Management Adjustment.

- (c) Each item of work satisfies the requirements of a second-class variation under s 10A(3).

E.3 Consideration

57 Section 10A of the SOP Act sets out the classes of variation to a construction contract that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of the relevant construction contract.

58 It describes classes of claimable variations. The common requirement for both is that they are a variation. "Variation" is defined in s 4 for the purpose of the SOP Act to mean "a change in the scope of the construction work to be carried out, or the related goods and services to be supplied, under the contract".

59 As set out above, the VMA Work is work within the agreed scope. Therefore, the performance of it did not constitute a change in the scope of the construction work to be carried out.

60 For that reason, the Adjudicator did not fall into error by failing to assess the Value Management Adjustment as a second-class claimable variation.

F Orders

61 I propose to order that Little Hardiman Street's application be dismissed. I will hear from the parties as to the form of order and costs.