

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

Not Restricted

S ECI 2021 00218

SAATH PTY LTD (ACN 166 860 126)

Plaintiff

v

SEASCAPE CONSTRUCTIONS PTY LTD (ACN 083 415 561)

First Defendant

- and -

JOHN MCMULLAN

Second Defendant

JUDGE: Stynes J

WHERE HELD: Melbourne

DATE OF HEARING: 27 May 2021

DATE OF JUDGMENT: 21 June 2021

CASE MAY BE CITED AS: Saath Pty Ltd v Seascape Constructions Pty Ltd & Anor

MEDIUM NEUTRAL CITATION: [2021] VSC 358

BUILDING CONTRACTS — Trial — Judicial review — Adjudication — Whether plaintiff is in the business of building residences — Whether Adjudicator considered the first defendant's submissions and related material — Whether Adjudicator properly valued the payment claim — Whether works were at completion and a corresponding reference date arose — *Building and Construction Industry Security of Payment Act 2002* (Vic) ss 7(2)(b), 9(2) and 23(2) — *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd* [2020] VSC 414, applied — *R v Marshall; Ex parte Baranor Nominees Pty Ltd* [1986] VR 19, applied — *Golets v Southbourne Homes Pty Ltd* [2017] VSC 705, applied — *Republic of Turkey v Mackie Pty Ltd* [2012] VSC 309, applied — *BWay Group v Pasiopolous* [2019] VCC 691, applied — *Director of Housing (Vic) v Structx Pty Ltd* [2011] VSC 410, applied — *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* (2018) 54 VR 721, applied — *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152, applied — *Laing O'Rourke Australia Construction Pty Ltd v H & M Engineering & Construction Pty Ltd* [2010] NSWSC 818, applied — *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* (2020) 4 QR 410, applied — *Southern Cross Electrical Engineering v Steve Magill Earthmoving* [2018] NSWSC 1027, applied — *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* (2018) 97 NSWLR 773, applied

— *Iskra v MMIR Pty Ltd* [2019] NSWCA 126, applied — *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172, applied — *Health Care Complaints Commission v Sultan* [2018] NSWCA 303, applied — *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, applied — *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, applied — *Cardona v Brown* (2012) 35 VR 538, applied — *Hoenig v Isaacs* [1952] 2 All ER 176, distinguished — *Murphy Corporation Ltd v Acumen Design and Development (Qld) Pty Ltd* (1995) 11 BCL 274, distinguished — *Craig v South Australia* (1995) 184 CLR 163, applied.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Romauld Andrew

Best Hooper

For the Defendant

Andrew Morrison

Ward & Co Legal
Consultants Pty Ltd

HER HONOUR:

A Introduction

1 The plaintiff seeks an order in the nature of certiorari that the adjudication determination made by Mr McMullan (**Adjudicator**) dated 18 January 2021 (**Adjudication Determination**) be quashed. The Adjudication Determination was delivered under s 23 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SOP Act**).

2 The issues that arise for determination are:

- (a) Issue 1 – Whether the plaintiff is in the business of building residences for the purpose of s 7(2)(b) of the SOP Act;
- (b) Issue 2 – Whether the Adjudicator considered the submissions made by the plaintiff, specifically a defects report, pursuant to s 23(2)(d) of the SOP Act;
- (c) Issue 3 – Whether the Adjudicator failed to value the payment claim dated 27 November 2020, specifically a provisional sum allowance claimed by the first defendant; and
- (d) Issue 4 – Whether the works were at completion and that therefore a valid reference date had arisen under the relevant contract.

3 For the reasons that follow I have determined that, in relation to Issue 1, the plaintiff is not in the business of building residences and that therefore the SOP Act does not apply to the relevant contract and the Adjudication Determination ought to be quashed.

4 In case it becomes material, I have further determined that:

- (a) in relation to Issue 2, the Adjudicator did consider the submissions, including a defects report, duly made by the plaintiff;
- (b) in relation to Issue 3, the Adjudicator did properly value the provisional

sum allowance claimed by the first defendant; and

- (c) in relation to Issue 4, a valid reference date had not arisen under the contract in relation to the relevant payment claim.

B Background

5 The directors of the plaintiff, Mr Zamir and Mr Chempakasseril, and their families are close friends.

6 From around 2011, they discussed the possibility of doing a build together so that their families could live close to one another.

7 On 9 November 2013, Mr Zamir and Mr Chempakasseril purchased a property at 9 Montgomery Place, Bulleen VIC 3105 (**the Property**) at auction. They had inspected the property together prior to auction and decided it was a suitable block where they could build four units or townhouses as discussed from around 2011. The contract of sale was in their own names and/or nominee.

8 After the auction, Mr Zamir and Mr Chempakasseril were advised by an accountant to set up a single use corporate entity and unit trust for the purpose of carrying out the building project on the Property.

9 On 20 November 2013, the plaintiff was incorporated.

10 The first defendant is a building company.

11 On 20 November 2015, the plaintiff engaged the first defendant under a building contract to construct four new townhouses (**the Project**) at the Property (**the Contract**). The Contract provided for a construction period of 371 days (which included delay days) with completion of the works due in or around November or December 2016.

12 Works commenced shortly afterwards with the first inspection for pre-slab performed on or around 21 December 2015.

13 Thereafter the works were slow. Inspection of strip footings did not occur until around 3 June 2016. The framework did not appear to have been passed until 15 January 2018.

14 The relationship between the plaintiff and first defendant deteriorated.

15 In around May 2019, the plaintiff lodged an application with Domestic Building Dispute Resolution Victoria (**DBDRV**) seeking conciliation with the first defendant given the protracted delays associated with the Project.

16 The directors of the plaintiff attended the conciliation conference at DBDRV. The Chief Resolution Officer at DBDRV issued a dispute resolution order dated 19 December 2019 requiring the first defendant to:

- (a) complete the building works in accordance with the definition of Completion under the Contract within 74 days of the date of the order;
- (b) carry out the domestic building work in accordance with the *Building Act 1993* (Vic), any regulations made under that Act and any relevant building permit; and
- (c) notify the Chief Dispute Resolution Officer and the plaintiff that the work required by the order has been carried out, within two days of completion.

17 The first defendant then appealed to the Victorian Civil and Administrative Tribunal seeking that the order made by DBDRV be reviewed and varied by way of a further extension to the date for compliance. The parties reached agreement without the need to proceed to a hearing which afforded the first defendant some additional time (to 31 July 2020) to comply with the order and complete the work.

18 On 22 July 2020, the first defendant issued a Notice of Completion pursuant to cl 17.3 of the Contract, accompanied by four occupancy permits for each of the four units, asserting that practical completion had been achieved on or about 20 July 2020.

- 19 On 31 July 2020, the directors of the plaintiff attended the townhouses for a final inspection with Mr Holt, a building inspector, of Buildspect Consulting Pty Ltd (**Buildspect**).
- 20 On 3 August 2020, the plaintiff requested the first defendant to withdraw its Notice of Completion and re-serve it upon actual completion. The first defendant refused to withdraw its notice.
- 21 On 10 August 2020, the plaintiff then issued a list of defective and incomplete works, prepared by Buildspect (**Defects List Report**).
- 22 On 21 August 2020, the plaintiff applied for an independent assessor to examine the works under s 49(s) of the *Domestic Building Contracts Act 1995* (Vic) (**DBC Act**) to determine whether the works had reached completion in accordance with the terms of the Contract. This inspection occurred on 20 November 2020 (the inspection was delayed due to COVID-19).
- 23 On 5 November 2020, the first defendant issued a Notice of Completion of all items within the Defects List Report and a final claim in the sum of \$231,250.00.
- 24 On 12 November 2020, the directors of the plaintiff attended the Property to inspect the works to determine whether they were in fact completed. On this day, a subcontractor of the first defendant attempted to return possession of the Property and offered the keys to Mr Zamir and Mr Chempakasseril. They refused to take back possession of the keys because they did not agree the works were complete and they had not yet been paid the final claim.¹ The subcontractor left the keys in townhouse 1 and left the Property, leaving townhouse 1 unlocked. The directors of the plaintiff later decided to retake possession of the Property given that townhouse 1 had been left unlocked, the Property unsecure and the first defendant had indicated it would not be returning.²

¹ Affidavit of Mr Zamir affirmed on 22 March 2021 at [46] 2080 of the Court Book.

² Ibid [47] 2080 of the Court Book.

- 25 On or about 19 November 2020, the plaintiff provided an updated list of defective and/or incomplete works to DBDRV and the first defendant.
- 26 On 20 November 2020, DBDRV engaged in a video conference with representatives of each party for the purpose of assessing the works.
- 27 On 27 November 2020, the first defendant served a tax invoice for completion of the works plus variations in the sum of \$231,250.00 (incl. of GST). It was expressed to be a payment claim in accordance with the SOP Act (**Payment Claim**).
- 28 On 10 December 2020, DBDRV provided a report by Mr Brodie. He concluded that the first defendant had not completed the building work under the Contract by the extended date of 31 July 2020 in accordance with the relevant plans and specifications. He then identified four items of work as 'some of the works not completed'.³ Having regard to that language, I infer that Mr Brodie did not intend his report to identify a complete list of outstanding works.
- 29 On 11 December 2020, the plaintiff served a payment schedule proposing to pay nil to the first defendant (**Payment Schedule**).
- 30 On 14 December 2020, the first defendant's solicitors wrote to DBDRV referring to the report of 10 December 2020 and asserting that the works DBDRV had specifically identified as incomplete works were all minor in nature and did not detract from the building works having achieved completion. The letter included a lengthy submission in support of the contention that completion had been achieved in accordance with the definition of 'Completion' under the Contract. Remarkably, the letter appears to have been sent to DBDRV alone and not copied to the plaintiff or its solicitors.⁴
- 31 On 14 December 2020, DBDRV responded informing the first defendant's solicitors that it could not take into consideration the information provided by the first

³ DBDRV Report dated 10 December 2020 at 124 of the Court Book.

⁴ I refer to the face of the correspondence itself and the Adjudication Determination at [110.19] 2017 of the Court Book (**Adjudication Determination**).

defendant after the actual assessment date. DBDRV further responded:

Can you confirm that all items are complete now and the Owners are satisfied the dwellings are completed? We may not need to issue a Breach of Dispute Resolution Order Notice (BODRON) if the Owners agree the build is complete post-report.

32 On 14 December 2020, the first defendant's solicitors responded to DBDRV asserting that its responses should be taken into consideration and asking Mr Brodie to reconsider his assessment taking into account its letter of 14 December 2020.

33 On 21 December 2020, DBDRV responded stating that from the additional material provided by the first defendant:

... it appears that only the intercom issue noted in the report were still outstanding post-assessment. Could you please confirm that this has been completed with your client?

If the items listed in the assessor's report have been completed, DBDRV would not be comfortable issuing a breach of dispute resolution audit notice (BODRON) based on the report issued to the parties. It may be that we assess the completion of the property again in the new year to confirm before making a determination.

34 It is apparent from its report of 10 December 2020 and this correspondence that DBDRV did not purport to conduct a detailed assessment of the status of the works, nor was it in a position to assess whether or not completion had been achieved in accordance with the definition of 'Completion' under the Contract.

35 On 22 December 2020, the first defendant applied for an adjudication.

36 On 31 December 2020, the plaintiff served its adjudication response on the first defendant, including a Buildspect Report dated 30 December 2020 (**Buildspect Report**). The Buildspect Report alleged 60 categories of defects in the works and estimated the cost of rectification of those defects to be \$786,918.67. The Adjudicator acknowledged receipt of the adjudication response.

37 On 3 January 2020, the Adjudicator issued a notice under s 21(2B) of the SOP Act stating that in his opinion the plaintiff's adjudication response included the following reasons for withholding payments that were not included in the Payment

Schedule:

- (a) the adjudication application was invalid because the plaintiff was not in the business of building residences;
- (b) the deduction to be made in respect of estimated cost of rectification;
- (c) the Payment Claim is invalid as no reference date arose for the purpose of the SOP Act because certain pre-conditions under the Contract were not met;
- (d) the inclusion of variations in the Payment Claim constitute excluded amounts; and
- (e) the inclusion of excessive prime cost items in the Payment Claim, which cannot be claimed under the Contract.

38 In accordance with the timeframe set out in the SOP Act, the Adjudicator gave the first defendant two business days from the date of service of the s 21(2B) notice to respond to those reasons.

39 On 6 January 2021, in the time permitted, the first defendant delivered a response to the s 21(2B) notice. The first defendant's response included an expert report prepared by Trevor Jeffery Construction & Asset Management Consultants (**Jeffery Report**).

40 On 19 January 2021, the Adjudicator delivered the Adjudication Determination. He determined the plaintiff to be liable to the first defendant in the sum of \$157,250.00 (incl. of GST).⁵

C **Issue 1 – Was the plaintiff in the business of building residences**

C.1 **The issue**

41 The SOP Act does not apply to a construction contract, which is a domestic

⁵ Adjudication Determination at [177]–[186] 2042–3 of the Court Book.

building contract within the meaning of the DBC Act, other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business.⁶

42 It is undisputed that the Contract is a domestic building contract.

43 The plaintiff contends that it is not in the business of building residences and that therefore the SOP Act does not apply to the Contract.

C.2 The Adjudicator's determination

44 The Adjudicator determined that the plaintiff was in the business of building residences. As a consequence, he determined that the SOP Act applied to the Contract notwithstanding it was a domestic building contract.⁷

45 The Adjudicator reached this decision for the following reasons:

- (a) it appeared to the Adjudicator that the directors of the plaintiff had substantial experience and expertise in land acquisition, design, town planning and construction of this type of multi-unit project albeit that they may have genuinely intended the development to become a residence for the respective family members;⁸
- (b) the unit trust structure, created to acquire and develop the Property, was to the Adjudicator in the nature of a vehicle which had as its purpose a commercial enterprise to generate profit for those engaged in it or who had an interest in it;⁹
- (c) irrespective of the desire to provide residences to family members as a primary purpose of the Project, profit-making was an equally true primary

⁶ SOP Act s 7(2)(b).

⁷ Ibid.

⁸ Adjudication Determination (n 4) at [104] 2016 of the Court Book.

⁹ Ibid [105] 2016 of the Court Book.

purpose;¹⁰ and

- (d) the Project was so substantial that it was more consistent with a professional property development project for profit than a domestic building contract of the nature that might be expected to fall outside the SOP Act.¹¹ I note that the contract sum for the Project comprising all four units was \$1,215,000.00.

C.3 The applicable legal principles

C.3.1 Jurisdictional fact

46 It is an essential pre condition to the application of the SOP Act, and therefore the existence of the Adjudicator's jurisdiction, that the plaintiff was in the business of building residences.

47 As conveniently summarised by Riordan J in the decision of *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd*,¹² if jurisdiction depends on a matter of fact, as it does in this case:

- (a) the Court must determine the question of fact for itself on the evidence placed before it;¹³
- (b) the burden of establishing the facts which show an absence of jurisdiction always rests on the party applying for relief;¹⁴
- (c) the standard of proof is high, requiring 'clear proof leading unmistakably to [the] conclusion' that there was an excess of jurisdiction;¹⁵ and
- (d) the Court will hesitate before interfering if the adjudicator has investigated

¹⁰ Ibid [106] 2016 of the Court Book.

¹¹ Ibid [107] 2016 of the Court Book.

¹² [2020] VSC 414 (*Watpac*).

¹³ Ibid [39]–[40] (Riordan J), citing *R v Marshall; Ex parte Baranor Nominees Pty Ltd* [1986] VR 19, 32–3 (Brooking J) (*Marshall*).

¹⁴ *Watpac* (n 12), [39] (Riordan J), citing *Marshall* (n 13) 32–3 (Brooking J); *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138, 153 (Dixon, Fullagar and Kitto JJ).

¹⁵ *Watpac* (n 12), [39] (Riordan J), citing *Marshall* (n 13), 32–3 (Brooking J).

the facts upon which the jurisdiction depends and the finding is not manifestly wrong.¹⁶

C.3.2 “in the business of building residences”

48 Consistent with the principles identified above, the evidentiary onus of proof lies with the plaintiff to establish that the building owner was not ‘in the business of building residences’.¹⁷

49 Whether the exemption in s 7(2)(b) of the SOP Act applies must be assessed at the date the contract was entered into.¹⁸

50 The phrase ‘in the business of’ is not defined in the SOP Act.

51 A number of authorities have considered the phrase ‘in the business of’, both within and outside the construction context. The following principles can be extracted:

- (a) the expression ‘in the business of building residences’ connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis;¹⁹
- (b) s 7(2)(b) of the SOP Act ‘speaks in terms of the actual business which the builder owner undertakes, not whether a party in the position of the building owner has the power to undertake the activity’;²⁰
- (c) the determination of the question of whether a ‘building owner is in the business of building residences’ does not depend on the scale of the

¹⁶ *Watpac* (n 12) [39] (Riordan J), citing *R v Yaldwyn* (1899) 9 QJL 242, 244 (Griffiths CJ); *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54, 92 (Fullagar J).

¹⁷ *Golets v Southbourne Homes Pty Ltd* [2017] VSC 705, [42] (Vickery J) (*Golets*).

¹⁸ *BWay Group v Pasiopolous* [2019] VCC 691, [26]–[29] (Marks J) (*Bway*).

¹⁹ *Director of Housing (Vic) v Structx Pty Ltd* [2011] VSC 410, [28] (Vickery J) (*Structx*), quoted in *Vinson v Neerim Properties Developments Pty Ltd* [2016] VSC 321, [32] (Vickery J).

²⁰ *Structx* (n 19) [37] (Vickery J).

business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future;²¹

- (d) 'what constitutes being "in the business of building residences" for the purposes of s 7(2)(b) of the [SOP] Act is in each case an issue of fact to be determined on a case by case basis';²²
- (e) a single joint venture may be sufficient to fall within the concept [of carrying on a business], in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis.²³ In *Ian Street Developer Pty Ltd v Arrow International Pty Ltd*, Riordan J confirmed that special purpose entities or companies incorporated for a single project may be 'in the business of building residences' even where the entity or company intends to sell the residences through another entity or company.²⁴ It was considered relevant in *Ian Street Developer* that a special purpose vehicle was incorporated with the sole purpose of constructing the project and the units in the project being resold to a related corporation for profit.²⁵

C.4 Submissions

52 The plaintiff submits that the following facts support its assertion that at the time it entered into the Contract it was not in the business of building residences:

- (a) there is no evidence of an intention on the part of the plaintiff to make a profit. To the contrary, the plaintiff is a special purpose vehicle created to build four units for occupation by the two families of the two directors;
- (b) the company structure was employed on the advice of an accountant, not

²¹ *Promax Building Developments Pty Ltd v PCarol & Co Pty Ltd* [2017] VCC 495, [27] (Anderson J), quoted in *Golets* (n 17) [40] (Vickery J).

²² *Golets* (n 17) [33] (Vickery J).

²³ *Ibid* [37] (Vickery J), quoting *United Dominions Corp Ltd v Brian Pty Ltd* (1980) 144 CLR 1, 15 (Dawson J) (*United Dominions Corp*).

²⁴ (2018) 54 VR 721, 749 [102(d)] (*Ian Street Developer*), quoting *United Dominions Corp* (n 23) 15 (Dawson J) and *Golets* (n 17) [37] (Vickery J).

²⁵ *Ian Street Developer* (n 24) [102] (Riordan J), cited in *Bway* (n 18) [24] (Marks J).

with the intention of making a profit;

- (c) the plaintiff has no prior involvement in any other development or business of building residences. By their affidavits the directors of the plaintiff addressed their personal involvement (as distinct from the plaintiff's involvement) in construction projects and expressly deny any involvement in a business of building residences. Mr Chempakasseril deposed that he had never built before or been involved in any property development prior to the Project. Mr Zamir has had experience building homes. He addresses that experience in some detail. In summary, in around 2001 he engaged a builder to build a home which he and his family lived in for about 12 years and in around 2014 he and one of his sons engaged a builder to build three units to be occupied by Mr Chempakasseril and his two sons; and
- (d) the directors are not builders or subcontractors, but are naval engineers.

53 The first defendant submits that for the following reasons I ought to find that the plaintiff was in the business of building residences:

- (a) the use of the corporate trustee. It was submitted that this is a relevant factor on the basis that when someone is engaging in a project for profit they are more likely to engage the protections of a corporate structure and to use a trustee arrangement. Counsel for the first defendant noted that cl 13.17 of the relevant trust deed permitted the plaintiff to carry on a business;
- (b) the use of a fixed unit trust, as opposed to a discretionary trust or other more common family arrangement;
- (c) the trust bears the property name raising an inference that it is a special purpose vehicle;
- (d) the trust has an ABN;
- (e) the trust is registered for GST. It was submitted that s 23.10 of *A New Tax*

System (Goods and Services Tax) Act 1999 (Cth) permits an entity to be registered only if it carried on, or intends to carry on an 'enterprise'. Section 9.20 relevantly defines the expression 'enterprise' to include an activity or series of activities done in the form of a business. It is submitted that the implication is that the plaintiff has represented to the tax office, at least for GST purposes, that it is developing the Property as a business;

- (f) the contract was entered into in accordance with the business the subject of the ABN;
- (g) the plaintiff conducted no other business; and
- (h) a four unit development for a contract sum of \$1,215,000.00 is a substantial property development more in the nature of a professional property development project than a domestic building project of the nature that might be expected to deprive the builder of the ability to leverage rights available under the SOP Act.

54 Counsel for the first defendant submitted that the first defendant does not rely on any one of the above reasons alone to make good the submission that the plaintiff was conducting a business, but rather relies on them collectively. However, particular emphasis was placed on the fact that the trust was registered for GST. In relation to that issue, counsel for the plaintiff submitted that:

- (a) if registration for GST was a mistake then it was a mistake, but that does not transform the activity of the plaintiff into a business; and
- (b) the plaintiff has not lodged any business activity statements.

C.5 Consideration

55 It is not disputed that the plaintiff has a single purpose, that is, to construct four units. It is not disputed that a single joint venture may be sufficient to fall within the concept of carrying on a business notwithstanding the apparent absence of the

element of a going concern conducted on a continuous and repetitive basis.

56 However, the essential feature of a business that is missing from the enterprise engaged in by the plaintiff, assessed at the time the Contract was entered into, was that it was engaged in for the purpose of profit.

57 The plaintiff relies on the affidavits of Mr Zamir and Mr Chempakasseril. Neither were subjected to cross examination. By those affidavits, they describe the purpose of the development being to build four units so that their families could live close to one another. There was no intention on the part of the plaintiff or its directors to profit from the Project.

58 In relation to the other features relied on by the first defendant:

- (a) Mr Zamir and Mr Chempakasseril explained that the corporate trustee was employed on the advice of an accountant for personal liability purposes and was not driven by a desire to conduct a business. They were not subjected to cross examination. I accept that evidence;
- (b) the fact that the plaintiff was created for a single purpose is entirely consistent with the plaintiff's position that its sole purpose was to build residences for occupation by the two families and that there was no intention that it engage in an enterprise for the purpose of profit on a continuous or repetitive basis;
- (c) I do not consider a four unit development for a contract sum of \$1,215,000.00 to be such a substantial development to support the proposition that it is in the nature of a professional development; and
- (d) in my opinion an inference to be drawn from the collection of factors relied on by the first defendant relating to the creation of a corporate vehicle and the registration for GST is not as persuasive as the direct and uncontested evidence of the plaintiff's directors as to the sole purpose of the plaintiff to build dwellings for the personal use by the directors and their families.

59 For these reasons, I find that the plaintiff was not, at the time it entered into the
Contract, in the business of building residences.

60 As a consequence:

- (a) the SOP Act does not apply to the Contract;
- (b) in determining that the SOP Act applied to the Contract, the Adjudicator has made a jurisdictional error; and
- (c) I order that the Adjudication Determination be quashed.

61 In light of my findings in relation to Issue 1 it is not necessary to address Issues 2–4. However, in case it becomes important I will address them in short compass.

D Issue 2 – Did the Adjudicator fail to have regard to the submissions made by the plaintiff pursuant to s 23(2)(d) of the SOP Act

D.1 The issue

62 Under s 23(2)(d) of the SOP Act, the Adjudicator was required to consider the Payment Schedule together with all the plaintiff's submissions (including relevant documentation).

63 The Adjudicator's determination is void to the extent that the Adjudicator failed to do so.²⁶

64 There is no dispute that the plaintiff lodged with the Adjudicator its adjudication response within the time permitted by the SOP Act. Included in that response was the Buildspect Report.

65 The parties are in dispute about whether the Adjudicator considered the Buildspect Report as required by s 23(2)(d) of the SOP Act

D.2 The Adjudicator's determination

²⁶ SOP Act (n 6) s 23(2B).

66 At paragraph 68 of the Adjudication Determination, the Adjudicator sets out the issues for determination in the adjudication. The third issue is identified as ‘the deduction (if any) to be made in respect of estimated cost of rectification’.

67 In reaching his determination in relation to that issue the Adjudicator states: ‘I do not take the Buildspect Report dated 30 December 2020 into account in assessing the estimated cost of rectifying defect work’.²⁷ He gave the following reasons:

- (a) in his view the very late delivery of the highly detailed Buildspect Report, together with the adjudication response, made it impossible as a matter of practicality for the first defendant to be able to properly respond within the two business days allowed in s 21(2B) of the SOP Act. As a matter of natural justice, he determined to err on the side of not placing the first defendant at a disadvantage by being unable to respond to the Buildspect Report within the two business days available;²⁸
- (b) considering the Buildspect Report would be inconsistent with the interim nature of the SOP Act, and the plaintiff is not prevented from relying upon it in any further proceeding;²⁹
- (c) the plaintiff had produced a number of previous lists of defects;³⁰
- (d) the conclusions in the Buildspect Report were not easily reconciled with the Defects List Report and/or ‘the plaintiff’s report to DBDRV dated 10 December 2020’;³¹ and
- (e) the conclusions in the Buildspect Report could not reasonably have been anticipated by the first defendant on the basis of the material contained in

²⁷ Adjudication Determination (n 4) at [127] 2023 of the Court Book.

²⁸ Ibid [128] 2023 of the Court Book.

²⁹ Ibid.

³⁰ Ibid [129], [132] 2023 of the Court Book.

³¹ Ibid [130] 2023 of the Court Book. I understand the reference to the plaintiff’s report to DBDRV ‘dated 10 December 2020’ to be a reference to the plaintiff’s updated list of defective or incomplete works sent to DBDRV on 19 November 2020 referred to by the Adjudicator at paragraph 125.5 of the Adjudication Determination.

the Payment Schedule.³²

68 Notwithstanding that the Adjudicator was unwilling to take the Buildspect Report into account in assessing the estimated cost of rectifying defect work, he did take into account the Jeffrey Report, procured by the first defendant in response to the Buildspect Report. He first accepted that the defects existing as at 27 November 2020 to be reasonably accurate as per the report by DBDRV, notwithstanding that the DBDRV report did not purport to be a complete list of defects. He then stated:³³

I adopt the estimates of cost of rectifying defective work assessed in the Jeffery Report dated 6 January 2021 in preference to the estimated cost of rectifying defective work assessed in the Buildspect Report dated 3 December 2020. In my view, the cost analysis in the [sic] looks high relative to the nature of the defects identified in the DBDRV report dated 11 December 2020. On balance, in my view, the cost assessments contained in the Jeffery Report dated 6 January 2021 look reasonable.

69 As set out below in relation to Issue 4, the Buildspect Report was also relevant to the Adjudicator's determination of the existence of a reference date. He does not refer to the Buildspect Report at all in that context.

D.3 The applicable legal principles

70 The following principles are relevant to the determination of whether or not the Adjudicator has made his determination in contravention of the obligation to consider the Buildspect Report:

- (a) the whole of the content and tenor of an adjudication may be called in aid in deciding whether particular submissions were considered in the way the SOP Act requires. Inference is permissible. The question is not to be approached solely by reference to the presence or absence of explicit statements referring expressly to the submissions;³⁴
- (b) the obligation to 'consider' something requires that it be given attention, or

³² Adjudication Determination (n 4) at [131] 2023 of the Court Book.

³³ Ibid [135] 2024 of the Court Book. I note that the Adjudicator refers to a DBDRV report dated 11 December 2020. I understand that to be a reference to the DBDRV report dated 10 December 2020.

³⁴ *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152, [20] (Barrett J), quoted in *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2010] QSC 95, [12] (Martin J).

looked at on its merits.³⁵ It requires an active process of intellectual engagement. As stated by McDougall J in the decision of *Laing O'Rourke*:³⁶

In my view, the obligation to consider matters imposed by [the equivalent section in the NSW legislation to s 23(2)] should ... [require] an active process of intellectual engagement. It may be thought that this imposes a substantial burden on adjudicators. That may be so; but there are at least two reasons why, even if that is correct, it does not justify reading down the statutory obligation to "consider". The first is that adjudicators are not forced to accept nomination. They may decline nomination; or they may accept only on the condition that they are given some longer period of time than ten working days to produce their determination. The second reason is that the outcome of the adjudicators consideration may have very significant consequences.

- (c) '... the reasons given by adjudicators for their determinations are not to be analysed closely and parsed pedantically, with a predisposition to discerning error';³⁷
- (d) '... the language of a decision-maker, who need not be a lawyer, nor legally trained, is not to be viewed through the prism of legal concepts'.³⁸ In other words, a 'fine-tooth comb' approach should not be adopted;³⁹
- (e) '[t]he [SOP] Act does not contemplate the reception of evidence which would be admissible under the laws of evidence in a court of law. Documentary evidence in the nature of submissions and relevant documentation is to be considered by an adjudicator';⁴⁰
- (f) 'it is unrealistic to expect that those reasons will treat minutely and in detail with each and every aspect of the parties' submissions and each and every aspect of the evidence. Having said that, adjudicators' reasons should be

³⁵ *Laing O'Rourke Australia Construction Pty Ltd v H & M Engineering & Construction Pty Ltd* [2010] NSWSC 818, [38]–[39] (McDougall J) (*Laing O'Rourke*); *Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd* (2020) 4 QR 410, [35(e)] (Bond J).

³⁶ *Laing O'Rourke* (n 35) [38]–[39] (McDougall J).

³⁷ *Southern Cross Electrical Engineering v Steve Magill Earthmoving* [2018] NSWSC 1027, [34] (McDougall J).

³⁸ *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* (2018) 97 NSWLR 773, 777 [17] (Basten JA) (*Cockram*), cited in *Iskra v MMIR Pty Ltd* [2019] NSWCA 126, [49] (Gleeson JA) (*Iskra*).

³⁹ *Cockram* (n 38) 777 [17] (Basten JA); *Iskra* (n 38) [49] (Gleeson JA). See also *1155 Nepean Highway Pty Ltd v Promax Buildings Pty Ltd* [2020] VSCA 253, [50] (Beach, Kyrou and McLeish JJA).

⁴⁰ *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172, 206 [126] (Vickery J) (*Grocon*).

sufficiently detailed to enable parties to understand that their contentions, as advanced in the payment claim and payment schedule, and relevant material in support, have been considered, and to understand the process of reasoning that led to the particular conclusion’;⁴¹ and

- (g) ‘any failure by the Tribunal to consider, and record in its reasons its consideration of, the consistency and probative value of evidence [does not necessarily amount] to an error of law or jurisdictional error’.⁴² Further, ‘issues of weight’ are intended for the Tribunal to determine.⁴³ Relevantly, ‘if the conclusion cannot be challenged as legally erroneous, the reasoning cannot be challenged as legally inadequate to justify the conclusion’.⁴⁴

D.4 Submissions

71 It is the plaintiff’s position that the Adjudicator failed to consider that Buildspect Report and thereby failed to comply with its obligations under s 23(2)(d) of the SOP Act.

72 It is the first defendant’s position that:

- (a) there is a preliminary issue as to whether the Adjudicator was required to have regard to defective works in valuing the Payment Claim. If he wasn’t so required, then the Adjudicator could not have fallen into jurisdictional error as alleged by the plaintiff; and
- (b) if the Adjudicator was required to have regard to defective works in valuing the claim, a review of the Adjudication Determination reveals that the Adjudicator did have regard to the Buildspect Report but decided not to allow it to supplant the previous lists of defects.

⁴¹ *Laing O’Rourke* (n 35) [73] (McDougall J)].

⁴² *Health Care Complaints Commission v Sultan* [2018] NSWCA 303, [166] (Meagher JA) (*Health Care Complaints Commission*).

⁴³ *Ibid*, citing *Abebe v The Commonwealth* (1999) 197 CLR 510.

⁴⁴ *Cockram* (n 38) 777 [17] (Basten JA).

D.5 Consideration

73 The first defendant's submission that the Adjudicator was not required to have regard to defective works in valuing the Payment Claim is no answer, in this case, to the Adjudicator's failure to consider the Buildspect Report. It was relevant to two issues raised for determination by the Adjudicator, including the determination of whether a reference date arose for the purposes of the SOP Act. By virtue of s 23(2) of the SOP Act, the Adjudicator was obliged to consider it. By virtue of s 23(2B) of the SOP Act, his Adjudication Determination is void if he failed to do so.

74 If I were to look only at the Adjudicator's statement that he did 'not take the Buildspect Report ... into account in assessing the estimated cost of rectifying defect work' and the complete absence of his consideration of the Buildspect Report in relation to his determination of the existence of a reference date, it is tempting to conclude that his consideration of the Buildspect Report was inadequate to satisfy the requirement of s 23(2) of the SOP Act. However, his comments that:

- (a) the conclusions in the Buildspect Report were not easily reconciled with the Defects List Report and/or the plaintiff's report to DBDRV; and
- (b) in his view the cost analysis in the Buildspect Report looked high relative to the nature of the defects identified in the DBDRV report,

make it clear that he did consider the Buildspect Report as required by s 23(2) of the SOP Act in the sense that he engaged with the merits of it and compared its contents with other evidence going to the identification of defects and the costs of rectification.

75 Accordingly, I find that the Adjudicator did not err and considered the Buildspect Report as required by s 23(2) of the SOP Act.

E Issue 3 – Did the Adjudicator fail to value the payment claim, specifically a

provisional sum allowance claimed by the first defendant

E.1 The issue

76 The Contract provided for various provisional sum allowances including a \$15,000.00 allowance for kitchen & joinery per unit, being a total of \$60,000.00 for all four units.

77 The first defendant contends it expended \$144,700.00 in respect of the joinery works and therefore claimed \$84,700.00 for those works.

78 The plaintiff contends that in relation to the provisional sum allowance under the Contract, the Adjudicator merely adopted the amount claimed without conducting any valuation of that amount.

E.2 The Adjudicator's determination

79 The Adjudicator concluded that:

- (a) the kitchen & joinery was a provisional sum item. This conclusion is not disputed in this proceeding;
- (b) the first defendant had spent \$144,700.00 in respect of that item; and
- (c) the first defendant is entitled to an adjustment to the contract sum of \$144,700.00.

80 By its adjudication response, the plaintiff contested the basis on which the sum was claimed, contending that it was a prime cost item rather than a provisional sum item. The plaintiff further contended that the first defendant had failed to comply with the preconditions to its entitlement to claim it as a prime costs item. However, the plaintiff did not advance any evidence challenging the fact that the first defendant had spent \$144,700.00 in respect of the kitchen and joinery.

E.3 The applicable legal principles

81 I have addressed the principles applicable to the task of an adjudicator under the SOP Act in *Citi-Con (Vic) Pty Ltd v Trojan Built Pty Ltd*⁴⁵ (initially addressed by Vickery J in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*).⁴⁶ I have extracted the following principles relevant to my review of the task undertaken by the Adjudicator:

- (a) the absence of relevant material from the respondent, or the presentation of material in an incoherent fashion, does not entitle an adjudicator to simply award the amount of the claim. As a minimum, the adjudicator is obliged to determine whether the construction work identified in the payment claim has been carried out, and what is its value.⁴⁷ The adjudicator is obliged to make these findings on the evidence before him or her;⁴⁸
- (b) nevertheless, if the claimant has put on material as to the value of a claim, but the respondent has not, the adjudicator in assessing the value is entitled to draw any necessary inference from the absence of controverting material from the respondent, including an inference that no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may not be conclusive, but it may be taken into account in assessing the evidence of value overall;⁴⁹
- (c) an adjudicator is not required to act as an expert building valuer;⁵⁰
- (d) what is required is for an adjudicator in each case to consider and assess the valuation evidence presented in the course of the adjudication, and arrive at a rational assessment of value on the basis of that evidence;⁵¹
- (e) given the severe statutory time constraints placed on adjudicators to

⁴⁵ [2020] VSC 557, [66] (Stynes J) (*Citi-Con*).

⁴⁶ [2015] VSC 631, [76]–[108] (Vickery J) (*SSC Plenty Road*).

⁴⁷ Ibid, cited in *Citi-Con* (n 45) [66(a)] (Stynes J).

⁴⁸ *Citi-Con* (n 45) [66(a)] (Stynes J).

⁴⁹ Ibid [66(b)] (Stynes J), citing *SSC Plenty Road* (n 46) (Vickery J) [82].

⁵⁰ *Citi-Con* (n 45) [66(c)] (Stynes J), citing *SSC Plenty Road* (n 46) (Vickery J) [96].

⁵¹ *Citi-Con* (n 45) [66(d)] (Stynes J), citing *SSC Plenty Road* (n 46) (Vickery J) [96].

perform their tasks,⁵² an analysis undertaken on judicial review of the valuation exercise documented in the adjudicator's adjudication determination ought not to be approached from an unduly critical viewpoint.⁵³ Rather, the SOP Act calls for a practical and robust approach to the assessment process on the part of adjudicators and their expressed reasons;⁵⁴

- (f) the adjudicator must proceed with their task by:
 - (i) fairly assessing and weighing the whole of the evidence which is relevant to each issue arising for determination at the adjudication;
 - (ii) drawing any necessary inferences from the evidence, or from the absence of any controverting material provided by the respondent, including an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may be considered in the context of the evidence as a whole;
 - (iii) arriving at a rational conclusion founded upon the evidence;
 - (iv) in so doing, is not called upon to act as an expert; and
 - (v) is not entitled to impose an onus on either party to establish a sufficient basis for payment or sufficient basis for withholding payment;⁵⁵ and
- (g) the legislative scheme is such that the standard of reasons delivered by an adjudicator within the time constraints required by the SOP Act, and given

⁵² *Citi-Con* (n 45) [66(e)] (Stynes J)]. The time within which an adjudicator is to deliver a determination (including in relation to claimable variations) is strictly limited, namely within 10 business days of the adjudicator accepting nomination or within a shortly extended period of 15 days if agreed to by the claimant (SOP Act s 22(4)).

⁵³ *Ibid*, citing *SSC Plenty Road* (n 46) [99] (Vickery J).

⁵⁴ *Citi-Con* (n 45) [66(e)] (Stynes J), citing *SSC Plenty Road* (n 46) [100] (Vickery J).

⁵⁵ *Citi-Con* (n 45) [66(f)] (Stynes J), citing *SSC Plenty Road* (n 46) [101(j)] (Vickery J).

the nature of the decision to be delivered in this demanding context, and by persons who are often not legally qualified, of necessity means that it falls towards the lower end of the scale.⁵⁶

E.4 Consideration

82 In circumstances where:

- (a) it was not in dispute that the works the subject of this ground were performed;
- (b) the first defendant identified the value of the work claimed, supported by:
 - (i) the Sagor Declaration dated 21 December 2020;⁵⁷
 - (ii) the Sagor Declaration dated 6 January 2021;⁵⁸ and
 - (iii) a number of remittances and invoices annexed to the Sagor Declaration dated 6 January 2021 and marked DS-12;⁵⁹ and
- (c) the plaintiff did not put on material to contradict the quantum of the sum claimed,

I am satisfied that the Adjudicator's assessment of the value of the claim was sufficient and not in error.

F Issue 4 – Did the Adjudicator err by finding that the works were at completion and that therefore a valid reference date had arisen under the Contract

F.1 The issue

83 The existence of a reference date under a construction contract is a statutory precondition to the making of a valid payment claim,⁶⁰ which is in turn a

⁵⁶ *Citi-Con* (n 45) [66(g)] (Stynes J), citing *SSC Plenty Road* (n 46) [107] (Vickery J).

⁵⁷ Statutory Declaration of Mr Sagor dated 21 December 2020 at [24]–[25] 3175 of the Court Book.

⁵⁸ Ibid 3352–4 of the Court Book.

⁵⁹ Ibid 3370–7 of the Court Book.

⁶⁰ *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, 345 [2]

precondition to an adjudication application and hence the jurisdiction of the Adjudicator.⁶¹ The existence of a reference date may be labelled a 'jurisdictional fact' in the sense that it is a criterion, satisfaction of which enlivens the power of the decision maker.⁶²

84 In this case, the existence of a reference date is dependent on the 'Works' achieving 'Completion' as that term is defined in the Contract.

85 The plaintiff contends that the Adjudicator erred in determining that the Works achieved Completion on 5 November 2020. It contends the Works did not achieve Completion and that no reference date arose in relation to the Payment Claim.

F.2 The Adjudicator's determination

86 The Adjudicator determined that the first defendant achieved Completion on 5 November 2020.⁶³

87 The Adjudicator reasoned that:

- (a) 'Completion' within the meaning of the Contract did not require there to be zero defects and/or incomplete work items. Rather, under the Contract, 'Completion' required that the Works are complete to the point where the builder notifies that the Works have been completed in accordance with the Plans and Specifications, and delivers a Certificate of Occupancy. Separately, in relation to defects and/or incomplete work, the builder is obliged to comply with the terms of cls 17.1 and 17.5-17.7;⁶⁴ and
- (b) accordingly, the service of Certificates of Occupancy on 9 July 2020, a Notice of Completion on 22 July 2020 and a Notice of Completion of Items on 5 November 2020 by the first defendant was collectively sufficient to

(*Southern Han*).

⁶¹ Ibid 356 [44].

⁶² Ibid 357 [47].

⁶³ Adjudication Determination (n 4) at [78], [81] 2001 of the Court Book.

⁶⁴ Ibid [79] 2001 of the Court Book.

constitute 'Completion'.⁶⁵

88 For those reasons, the Adjudicator determined that a reference date in relation to
the Payment Claim arose on 5 November 2020.⁶⁶

F.3 The applicable legal principles

89 I refer to the principles set out in paragraph 47 above which are equally applicable
in relation to this issue.

F.4 Submissions

90 The plaintiff submits that Completion has not been achieved because the Works
were not completed in accordance with the Plans and Specifications annexed to the
Contract. It relies on the Buildspect Report in support of this submission.

91 The first defendant submits that the following facts are sufficient to support a
finding that Completion was achieved:

- (a) Certificates of Occupancy were issued on 9 July 2020;
- (b) the first defendant issued a Notice of Completion of Items under cl 17.1 on
22 July 2020, advising that the Works achieved Completion on 20 July 2020;
- (c) a contractual final inspection took place on 31 July 2020;
- (d) the plaintiff provided the Defects List Report to the first defendant under
cl 17.5 on 10 August 2020;
- (e) the first defendant subsequently returned to site and addressed each defect.
This was and continues to be disputed by the plaintiff;
- (f) the first defendant notified the plaintiff that it had completed the defects on
5 November 2020;

⁶⁵ Ibid [80] 2001 of the Court Book.

⁶⁶ Ibid [195] 2044 of the Court Book.

- (g) the plaintiff took possession of the site on 12 November 2020; and
- (h) on 27 November 2020, the first defendant issued the Payment Claim the subject of this proceeding.

92 The first defendant further submits that:

- (a) trivial failures of failures born of impracticalities do not preclude effective and satisfactory completion;⁶⁷ and
- (b) in any event, the fact that the plaintiff has taken possession of the Property means that it has waived any condition precedent requiring entire performance. It relies only on the decisions of *Hoenig v Isaacs*⁶⁸ and *Murphy Corporation Ltd v Acumen Design and Development (Qld) Pty Ltd*⁶⁹ in support of this submission.

F.5 Relevant provisions of the SOP Act

93 Section 9(1) of the SOP Act relevantly provides that a person who has undertaken to carry out construction work under a construction contract is entitled to a progress payment under the SOP Act on and from each reference date under the contract.

94 Section 9(2)(a) of the SOP Act relevantly provides that a reference date in relation to a construction contract means 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.

95 Section 9(2)(d) applies to identify a reference date in relation to a final payment if the relevant contract makes no express provision with respect to the matter. It is not relevant to this proceeding as the Contract does address when a final payment may be claimed.

⁶⁷ *Cardona v Brown* (2012) 35 VR 538, 556 [74] (Tate JA) (*Cardona*).

⁶⁸ [1952] 2 All ER 176 (Somervell, Denning and Romer LJ) (*Hoenig*).

⁶⁹ (1995) 11 BCL 274 (Williams J) (*Murphy*).

F.6 Relevant provisions of the Contract

96 The Payment Claim relates to the final stage of the Works.

97 The first defendant is entitled to submit a 'Final Claim' on Completion of the Works.⁷⁰

98 Clause 1 of the Contract defines 'Completion' as:

Completion — when the Works to be carried out under the Contract:

- have been completed in accordance with the Plans and Specifications; and
- if a building permit was issued for the Works, the Owner is given an Occupancy permit, if required, or in any other case, a copy of the certificate of final inspection.

99 It was common ground between the parties that the resolution of this issue turns on whether the Works achieved Completion. Specifically, whether the Works had been completed in accordance with the 'Plans and Specifications'.⁷¹

100 'Plans' are defined in the Contract to mean all plans, drawings and designs relating to the Works as described in items seven and eight of the appendix to the Contract.

101 Item 7 of the appendix describes the Plans as drawing number 14002 of 19 pages dated April 2015 prepared by LR Design.

102 Item 8 of the appendix describes other documents forming part of the Plans as drawing 1522 of 27 pages dated 31 July 2015 prepared by Lexicon Engineering.

103 'Specifications' are defined to mean specifications described in item 6 of the appendix and to include and incorporate the Standards and Tolerances Guide produced by the Building Commission as applicable as at the date of the Contract.

104 Item 6 of the appendix describes the Specifications as being 'attached at rear'.

105 At the rear of the Contract is a document produced by the first defendant dated

⁷⁰ Clause 17.1 and the definition of 'Final Claim' in cl 1 of Contract.

⁷¹ Transcript at T92.30–93.20 and T94.25–27.

20 October 2015 in the form of a specification. Included in the specification is an undertaking by the first defendant that it 'will carry out all works to comply with the Building Regulations'.

F.7 Consideration

106 Before I consider this issue as put by the parties, I note that it appears to me that the Adjudicator has misconstrued the definition of 'Completion' in the Contract and that this error directly affected his determination of the existence of a reference date. As my determination of this proceeding is not dependent on this error and as neither party raised it or made submissions in relation to it, I will keep my consideration of it brief.

107 First, the Adjudicator reasoned that 'Completion' within the meaning of cl 1.1 of the Contract does not require that there be zero defects and/or incomplete work items.

108 Second, he reasoned that the definition of Completion requires the Works to have been completed 'to the point where the Builder notifies that the Works have been completed in accordance with the Plans and Specifications'.⁷²

109 The parties agreed that trivial failures or failures born of impracticalities do not preclude effective or satisfactory completion of the Works.⁷³ However, neither sought to rely on the construction of 'Completion' adopted by the Adjudicator.

110 The Adjudicator's construction in effect empowers the first defendant to determine when Completion has been achieved and to identify that achievement by giving a notice, notwithstanding the existence of defects or incomplete works. That is not a reasonable construction of the text of the definition of 'Completion' in the Contract.

111 On a plain reading of the text it is clear that Completion is achieved when the Works have in fact been completed in accordance with the Plans and Specifications.

⁷² Transcript at T82.2-6.

⁷³ *Cardona* (n 67) 556 [74] (Tate JA). Transcript at T91.29-92.1 and T94.23-27.

112 Consistent with his construction, and therefore in error, the Adjudicator:

- (a) was satisfied Completion had been achieved by reference to the following documents provided by the first defendant to the plaintiff: Certificates of Occupancy on 9 July 2020; a Notice of Completion on 22 July 2020; and a Notice of Completion of Items on 5 November 2020;⁷⁴ and
- (b) failed to have regard to whether the Works had in fact been completed in accordance with the Plans and Specifications.

113 The Adjudicator's determination of the existence of a reference date is directly affected by that error and ought to be quashed.⁷⁵

114 I will now consider this issue as put by the parties, specifically whether the Works achieved Completion as defined in the Contract. The parties submissions in relation to this issue were very brief.

115 Before setting out my reasons I note that whether Completion has been achieved in this case is a mixed question of fact and law. It is perhaps unusual for a jurisdictional fact to stray into the merits of a dispute between the parties as far as the issue of completion does. Ordinarily, whether completion has been achieved would require the exchange of pleadings, full evidence in admissible form and cross examination. Of course, my determination of this issue is required to be undertaken within the confines of this judicial review and the very limited evidence that is before me. However, I am mindful of the concern expressed by Riordan J in *Watpac* and it is worth reiterating it here. In that case the relevant jurisdictional fact was whether a contract had been repudiated. Neither party contended that there was sufficient evidence before the Court in that case to enable a determination of whether or not there had been a repudiation. In that context Riordan J stated:⁷⁶

⁷⁴ Adjudication Determination (n 4) at [80] 2001 of the Court Book.

⁷⁵ *Grocon* (n 40) [104] (Vickery J), quoting *Craig v South Australia* (1995) 184 CLR 163, 179–80.

⁷⁶ *Watpac* (n 12) [43]–[44].

I do further observe that for the Court to determine that there was 'clear proof leading unmistakably to [the] conclusion'⁷⁷ that there had been no act of repudiation, it would have been necessary to adopt the ordinary procedure for determining such questions, being the exchange of pleadings, full evidence in admissible form and cross-examination.⁷⁸

The adoption of such a process 'would drive a horse and cart (or perhaps a B-double) through the legislative scheme',⁷⁹ and neither party sought to do so. If a party does apply to conduct a fully blown trial in a future application under this Act, it may be necessary for the Court to consider whether, in exercising its residuary discretion in a judicial review proceeding, it should refuse such an application.⁸⁰

116 In this case, neither party sought to conduct a fully blown trial and, as I have stated, the evidence and submissions relevant to this issue were limited.

117 The following materials are relevant to the status of the Works prior to the issue of the Payment Claim:

- (a) The report of DBDRV dated 10 December 2020;
- (b) the Defects List Report;
- (c) the Buildspect Report, relied on by the plaintiff; and
- (d) the Jeffery Report, relied on by the first defendant.

118 The DBDRV report was based on an assessment conducted by video conference on 20 November 2020 and concluded that the first defendant had not completed the building work under the Contract by 31 July 2020 in accordance with the relevant plans and specifications.

119 The Defects List Report and the Buildspect Report were prepared by the building

⁷⁷ *Marshall* (n 13) 32–3 (Brooking J).

⁷⁸ *Castle Constructions Pty Ltd v N & R Younis Plumbing Pty Ltd* [2019] NSWSC 225, [89] (Parker J).

⁷⁹ *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113, [47] (Basten JA, with whom Beazley ACJ and Meagher JA agreed) with reference to the prospect of the Court being required to consider when practical completion had been achieved, rather than when an appropriate certificate had been issued.

⁸⁰ An invalid administrative decision may be treated as valid if a court refuses to set it aside for a discretionary reason: *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400, 413. The prospect of a court refusing relief on discretionary grounds in a valid claim against a decision of an adjudicator was noted but not further considered by Basten JA in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, 417 [104].

consultant Mr Holt. The Defects List Report was prepared in August 2020 based on an inspection conducted on 31 July 2020.

120 The Buildspect Report was prepared following inspections of the property by Mr Holt as follows:

- (a) on 16 March 2020, to provide a list of defects;
- (b) on 31 July 2020, to determine if the Works had achieved Completion and whether the building Works were compliant;
- (c) on 20 November 2020, to assess defective and incomplete works and assess the completion of identified defects noted on 31 July 2021;
- (d) on 16 December 2020, to review the unit three garage store room; and
- (e) on 28 December 2020, to update the report with recent photographs.

121 The Buildspect Report identifies 60 categories of defect. In relation to each of those defects Mr Holt describes his observations, makes a recommendation in relation to the defects identified and provides a detailed costing.

122 It would have been of assistance to me for the parties to descend into the detail of the Buildspect Report for the purpose of identifying particular defects relied on in support of the contention that Completion had or had not been achieved. Unfortunately no such submission was made.

123 I have not attempted to reconcile the defects identified in the Defects List Report with those identified in the Buildspect Report. However, a quick review of them reveals that a number of defects appear in both reports. This suggests that they were not, on Mr Holt's assessment, rectified by the first defendant as asserted in the Notice of Completion of Items issued by the first defendant on 5 November 2020. For example:

- (a) the backfill to the retaining wall: item 1.1 in the Defect List Report and item 1

- in the Buildspect Report;
- (b) the entrance floor heights: item 1.7 in the Defect List Report and item 4 in the Buildspect Report;
- (c) the foundation to the letter box: item 1.8 in the Defect List Report and item 5 in the Buildspect Report;
- (d) the construction of steps in the concrete pathway: item 1.11 in the Defect List Report and item 2 in the Buildspect Report;
- (e) blocked weepholes in masonry: item 1.17 in the Defect List Report and item 9 in the Buildspect Report;
- (f) installation of external weatherboards cladding without a gap to the transition flashing: item 1.36 in the Defect List Report and item 14 in the Buildspect Report;
- (g) the installation of the feature aluminium pickets: item 1.42 in the Defect List Report and item 16 in the Buildspect Report;
- (h) the transition flashing between blockwork and weatherboard cladding is proud of the wall face: item 1.51 in the Defect List Report and item 19 in the Buildspect Report;
- (i) pressure flashing installation: item 1.57 in the Defect List Report and item 21 in the Buildspect Report;
- (j) overflows to balconies: item 1.119 in the Defect List Report and item 27 in the Buildspect Report.

124 It is apparent from a review of the Buildspect Report that Mr Holt assessed the completion of the Works against the Plans and Specification, amongst other things, and identified defects in the work. By way of example:

- (a) item 2 — the construction of steps to the path at the eastern elevation was

assessed as failing to comply with the Lexicon Engineering civil drawing 1522D which indicated a sloped path;

- (b) item 3 – the omission of Aerofoam at pipe penetrations in concrete paving was assessed as failing to comply with Lexicon Engineering drawing 1522, sheet 13 dated 31 July 2015;
- (c) item 16 – the installation of the feature aluminium pickets to the western elevation failed to comply with the LRW Design building permit drawing number A10 because the pickets had not been installed straight and level at their lower edge; and
- (d) item 53 – a bulkhead and storage room has been constructed to the rear of the garages to all units contrary to the LRW Design drawing A04 revision B which details no bulkhead or storeroom.

125 Further, there are a number of defects assessed against the Building Code of Australia, by way of example:

- (a) item 15 – air conditioning pipe work penetrations in wall cladding had been sealed with silicone only. Further Mr Holt observed that the pipework had been wrapped in electrical tape through the penetration, and that the silicone had adhered to the electrical tape which was deteriorating and separating from the pipe work. Mr Holt assessed this finish as failing to comply with the weatherproofing required under the BCA; and
- (b) item 19 – Mr Holt records his observations that:
 - (i) transition flashings between the blockwork wall, the rendered EPS wall and the weather board cladding are up to 20mm proud of the wall surface and have gaps into wall cavities to the southern elevation; and
 - (ii) windows to the southern elevation of unit 1 and the eastern elevation

of all units have been installed at a height that does not allow for an upstand in the transition flashing. He opined that the omission of an upstand to the transition flashing is likely to allow the ingress of water.

126 In response to the Buildspect Report, the first defendant procured, for the purpose of the adjudication, the Jeffrey Report. I note that the Jeffrey Report records that Mr Jeffrey was provided with the Buildspect Report on 2 January 2021 and was given less than two business days to respond. This was a consequence of the strict time limits imposed on the parties under the SOP Act.

127 As a consequence of the limited time available to him, Mr Jeffrey was only able to respond to a small number of defects. In relation to six items he challenges whether or not the defects identified by Mr Holt were defective. In relation to a further seven defects he challenges the costs claimed. There are many other defects, as assessed by Mr Holt, that Mr Jeffrey does not address, including those I have identified in paragraphs 123–4 above.

128 On the evidence available to me, I am satisfied that the Works had not achieved Completion by 5 November 2020 as determined by the Adjudicator or by 27 November 2020 when the Payment Claim was served. Specifically, having regard to the DBDRV Report, the Defects List Report and the Buildspect Report, I am satisfied that there were defects in the Works that were more than trivial and that prevented the Works being assessed as ‘completed in accordance with the Plans and Specifications’. As a consequence a valid reference date had not arisen under the Contract in relation to the Payment Claim.

129 The first defendant submits in the alternative, relying only on the authorities of *Hoening* and *Murphy*, that as the plaintiff took possession of the Property it waived any condition precedent to requiring entire performance.

130 I reject that submission.

131 In *Hoenig*, the plaintiff, an interior decorator and furniture designer was employed by the defendant to decorate and furnish the defendant's flat for the sum of 750 pounds. The defendant paid 400 pounds by instalments, occupied the flat and used the furniture but refused to pay the balance due on the ground that certain work done was defective. The Court held that even if entire performance was a condition precedent to payment under the contract, in taking the benefit of the work by using the defective furniture, the defendant had waived the condition and must pay the contract price subject to appropriate deductions. Denning LJ stated:⁸¹

Even if entire performance was a condition precedent, nevertheless the result would be the same, because I think the condition was waived. It is always open to a party to waive a condition which is inserted for his benefit. What amounts to a waiver depends on the circumstances. If this was an entire contract, then, when the plaintiff tendered the work to the defendant as being a fulfilment of the contract, the defendant could have refused to accept it until the defects were made good, in which case he would not have been liable for the balance of the price until they were made good. But he did not refuse to accept the work. On the contrary, he entered into possession of the flat and used the furniture as his own, including the defective items. That was a clear waiver of the condition precedent.

132 In the decision of *Murphy*, the first defendant designed and constructed a themed exhibit on the plaintiff's land. The date for practical completion was 15 December 1989. The first defendant maintained that practical completion was reached on about 17 December 1989 when the plaintiff took possession of the project and it was opened to the public with a view to receiving revenue. The plaintiff disputed that practical completion had been achieved on that date.

133 In relation to the issue of practical completion William J stated:⁸²

Ordinarily the best evidence that such a stage has or has not been reached will be a certification from the contract Superintendent. But that does not mean, in my view, that in the absence of a certification for practical completion the contractor can never prove in legal proceedings that such a stage had in fact been reached. One situation where the contractor could prove that such a stage had been attained in the absence of a certification would be where the employer had taken possession of the works as completed on the express or implied understanding that a stage of practical completion had been reached and then used them for the intended purpose; that would particularly be so where the intended use involved opening the works to the public for the profit of the employer. I find that that is what happened here. The first

⁸¹ *Hoenig* (n 68) 181 (Denning LJ).

⁸² *Murphy* (n 69) 294 (Williams J).

defendant impliedly represented to the plaintiff that the exhibit had been substantially completed as at 17th December, 1989 and was ready for opening to the public. The plaintiff, through its numerous representatives (including Ellick), who inspected on 17th December, accepted the exhibit as presented, took possession of it, and thereafter immediately put it to its intended public use. There was at that time no reservation by the plaintiff of any rights, nor did it then raise any issue that the exhibit had not been completed in accordance with the contract. It was obvious to all that some minor work (for example, the fibre optics) still had to be done, but that did not alter the fact that there had then been substantial compliance with the contractual requirements. Certainly there had been substantial compliance in accordance with the test applied in *Hoenig v Isaacs* (1952) 1 TLR 1360; the reasoning in that case appears to be particularly relevant here because of the rather indefinite nature of the contractual obligations imposed on the first defendant.

The findings of fact I have made and outlined above establish, in my view, that Ellick only directed his mind to the question of practical completion after the plaintiff, and Murphy in particular, had expressed serious disappointment with the public response to the exhibit. Notwithstanding the fact that people such as Gair and the second defendant raised questions as to the sufficiency and accuracy of the advertising material, and questions as to the adequacy of the access to the first floor level, those matters were not specifically addressed by the plaintiff early in 1990; rather the plaintiff sought to put the responsibility for the apparent poor public response back on the first defendant by asserting that the project had not been properly completed.

Against that background I accept the argument of the defendants that by accepting the project on 17th December, 1989, opening the exhibit to the public on that date, thereafter operating it and receiving revenue therefrom, the plaintiff waived any right it had to take the point that the Superintendent had not in fact issued a certificate of practical completion as at 17th December. Even if the plaintiff did not so waive that right by its conduct on 17 December 1989, there was, in my view, a waiver once it failed to raise the issue of practical completion within a reasonable time after that date. The question of practical completion was not raised at the first control meeting, and was not referred to at all until Ellick mentioned it in passing in his letter of 31st January.

134 In both of the authorities relied on by the first defendant the party alleging that completion had not been achieved voluntarily entered into possession of the property and used it for their own benefit. They had the opportunity to reject the works as tendered but they did not.

135 The circumstances of this case are quite different. The plaintiff did ultimately retake possession of the site but only after it:

- (a) initially refused to do so on the basis that the Works were defective and had not been completed; and
- (b) was compelled to do so because the Property had been left by the first

defendant unlocked, unsecure and the defendant had indicated it would not be returning.

136 Further and significantly, the plaintiff maintained that the Works had not been completed and were defective and has continued to refuse to pay the final claim on that basis.

137 I am not satisfied, in those circumstances, that the plaintiff waived the requirement that the Works be completed in accordance with the Plans and Specifications.

G Orders

138 I propose to order that:

- (a) the Adjudication Determination be quashed; and
- (b) the first defendant pay the plaintiff's costs of and incidental to this proceeding, to be taxed on a standard basis if not agreed.