

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

Not Restricted

S ECI 2025 00821

In the matter of an application by XS Construction Pty Ltd for judgment to be entered pursuant to s 28R of the *Building and Construction Industry Security of Payment Act 2002* (Vic)

XS CONSTRUCTION PTY LTD (ACN 623 307 648)

Plaintiff

v

AUSTRALIAN EPIC GROUP PTY LTD (ACN 639 087 844)

Defendant

JUDGE:

Stynes J

WHERE HELD:

Melbourne

DATE OF HEARING:

Decision made 'on the papers' having considered the application filed by the plaintiff

DATE OF JUDGMENT:

13 June 2025

CASE MAY BE CITED AS:

XS Construction Pty Ltd v Australian Epic Group Pty Ltd

MEDIUM NEUTRAL CITATION:

[2025] VSC 336

BUILDING CONTRACTS — Construction dispute — Adjudication — Adjudication Certificate — Satisfaction of the requirements of ss 28Q and 28R of the *Building and Construction Industry Security of Payment Act 2002* (Vic) — Entry of judgment pursuant to s 28R of the *Building and Construction Industry Security of Payment Act 2002* (Vic) — Where application for debt certificate pursuant to s 33 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) is to be made on notice — Where defendant duly served with relevant material — Where defendant has failed to file a notice of appearance — Where judgment entered and debt certificate issued in default of appearance.

The material filed by the plaintiff:

1. Originating Motion in Form 5C filed 18 February 2025.
2. Summons in Form 45A filed 18 February 2025.
3. Affidavit of Xavier Rodger Strom made 18 February 2025.
4. Affidavit of service of Emily Jane King made and filed 29 May 2025.
5. Affidavit of service of Sophia Olivia McMahon made and filed 29 May 2025.
6. Adjudication Certificate provided by Adjudicate Today Pty Ltd under section 28Q of the *Building and Construction Industry Security of Payment Act 2002* (Vic).

HER HONOUR:

A Introduction

- 1 By Originating Motion in Form 5C and Summons in Form 45A, the plaintiff, XS Construction Pty Ltd (**'XS Construction'**), seeks judgment under s 28R of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**'SOP Act'**) against Australian Epic Group Pty Ltd (**'AEG'**) in the sum of \$451,424.85, together with interest to the date of this proceeding in the sum of \$29,124.83, and a debt certificate pursuant to s 33 of the SOP Act.
- 2 In support of its application, XS Construction relies on:
 - (a) the affidavit of its director, Xavier Rodger Strom (**'Mr Strom'**), made and filed on 18 February 2025 (**'Strom Affidavit'**);
 - (b) the adjudication certificate provided by Adjudicate Today Pty Ltd (**'Adjudicate Today'**) pursuant to s 28Q of the SOP Act on 27 June 2024 (**'Adjudication Certificate'**); and
 - (c) two affidavits of service made and filed by its legal representatives on 29 May 2025.

B Legislation

- 3 Section 28R of the SOP Act provides in part as follows:

Proceedings to recover amounts payable under section 28M or 28N

- (1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.
- (2) A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court —
 - (a) the adjudication certificate; and
 - (b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.

- (3) If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.
- (4) Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.

4 Section 33 of the SOP Act provides:

Certification of debt by court

- (1) When judgment is given or entered in proceedings for the recovery of an adjudicated amount as a debt, the court may, by order made on the application of the claimant, issue a certificate (a *debt certificate*) in respect of the debt under this section.
- (2) A debt certificate is to be in a prescribed form.
- (3) In this section, "judgment" includes a default judgment.

C The material filed in support of the application

5 The Strom Affidavit and the Adjudication Certificate establishes the following:

- (a) XS Construction and AEG are parties to a building contract dated 19 September 2023.
- (b) On 23 May 2024, XS Construction applied to Adjudicate Today (an 'authorised nominating authority' for the purpose of s 4 of the SOP Act) to adjudicate a payment dispute between it and AEG pursuant to the SOP Act (**'Adjudication Application'**).
- (c) The Adjudication Application was assigned the reference number 2024ADJTVICA445 and Mr David Rodighiero (**'Adjudicator'**) was appointed as its adjudicator.
- (d) On 12 June 2024, the Adjudicator made a determination in respect of the Adjudication Application (**'Determination'**).

- (e) On 27 June 2024, Adjudicate Today issued an Adjudication Certificate in respect of the Determination pursuant to s 28Q of the SOP Act, which:
- (i) names XS Construction as the claimant;
 - (ii) certifies that AEG (as respondent) is liable to pay to XS Construction the sum of \$451,424.85 ('**Adjudicated Amount**'), comprising:
 - (1) the adjudicated amount determined by the adjudicator of \$444,493.70 (including GST);
 - (2) the amount of interest then due and payable on the adjudicated amount in the sum of \$3,400.50; and
 - (3) the total fees paid by XS Construction on behalf of AEG in the amount of \$3,530.65.
 - (f) As at the date of the Strom Affidavit, AEG has not paid to XS Construction, either in part or in full, the Adjudicated Amount.

6 XS Construction also filed two affidavits of service made by its legal representatives. Exhibited to one of those affidavits is an organisational search of AEG, extracted on 10 February 2025 from the information database maintained by the Australian Securities and Investments Commission ('**ASIC**'), which discloses that:

- (a) The address of AEG's current registered office is 4 Assembly Drive, Tullamarine VIC 3043.
- (b) Kayne Alex John Clark is named as the sole director and secretary of AEG.

7 The affidavits of service otherwise establish that:

- (a) On 21 February 2025, a law clerk on behalf of XS Construction sent the following documents by registered post to the registered office of AEG:
 - (i) a cover letter of service from Oldham Construction Lawyers to AEG dated 21 February 2025;
 - (ii) the urgent hearing application form dated 18 February 2025 and accompanying ASIC search of AEG;
 - (iii) the Originating Motion in Form 5C filed 18 February 2025;
 - (iv) the Summons in Form 45A filed 19 February 2025;
 - (v) the Strom Affidavit;
 - (vi) the Overarching Obligations Certification of Mr Strom dated 18 February 2025; and
 - (vii) the Proper Basis Certification of Sophia Olivia McMahon dated 18 February 2025.
- (b) On 13 March 2025, the same law clerk sent the following documents by regular post to the registered office of AEG:
 - (i) a cover letter of service from Oldham Construction Lawyers to AEG dated 13 March 2025; and
 - (ii) written submissions relied on and proposed orders sought by XS Construction in this proceeding.
- (c) On 14 May 2025, a solicitor on behalf of XS Construction sent by regular post to the registered office of AEG:
 - (i) a cover letter of service from Oldham Construction Lawyers to AEG dated 13 May 2025; and

- (ii) email correspondence between my chambers and the solicitors for XS Construction.

D Conclusion and Orders

8 I will say something here about the form of originating process used by XS Construction in this proceeding.

9 Ordinarily, a plaintiff seeking judgment under s 28R of the SOP Act would commence ex parte proceedings by the issue of an Originating Motion in Form 5D pursuant to r 5.02 of the *Supreme Court (General Civil Procedure) Rules 2015*.

10 However, in this proceeding, XS Construction also seeks a debt certificate under s 33 of the SOP Act. As set out in paragraphs 7.3 and 7.4 of Practice Note SC CC2, it is appropriate to use the form of originating process that XS Construction adopted (namely, an Originating Motion in Form 5C and Summons in Form 45A) and place the respondent (here, AEG) on notice where an application is made pursuant to s 33 of the SOP Act.

11 This highlights a practical impact of seeking both judgment under s 28R and a debt certificate under s 33 in the same proceeding: the SOP Act does not provide for an ex parte procedure when seeking a debt certificate under s 33. That is, final orders can usually only be obtained on the filing and service of an originating process and a hearing upon appropriate notice to the defendant or, alternatively, by entry of a default judgment if the defendant, having been duly served, fails to take an essential step in the proceeding, such as entering an appearance.¹

12 Here, despite being duly served with the Originating Motion, Summons and supporting material, AEG has failed to file a notice of appearance in the proceeding. Subject to its compliance with the procedural requirements of s 28R(2), which I address below, I am satisfied that XS Construction ought to be awarded judgment in default of appearance.

¹ See *Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd & Ors* [2009] VSC 425, [51] (Vickery J).

13 I consider that XS Construction has complied with the requirements under s 28R(2) of the SOP Act, in that it has filed with the Court:

- (a) the Adjudication Certificate; and
- (b) the Strom Affidavit stating that the whole or any part of the amount payable under the SOP Act has not been paid.

14 Further, I am satisfied that the Adjudication Certificate issued on 27 June 2024, together with the Strom Affidavit, establishes that AEG:

- (a) is liable to pay the Adjudicated Amount plus interest to XS Construction; and
- (b) has failed to pay the whole or any part of that amount to XS Construction.

15 For the reasons above, I order that:

- (a) There be judgment for XS Construction against AEG under s 28R of the SOP Act, in the amount of \$451,424.85.
- (b) AEG pay to XS Construction interest on the Adjudicated Amount from 28 June 2024 to the date of this proceeding in the sum of \$29,124.83.
- (c) AEG pay the XS Construction's costs of the proceeding on a standard basis, to be taxed in default of agreement.
- (d) A debt certificate be issued to XS Construction pursuant to s 33 of the SOP Act.
