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

Not Restricted

S ECI 2017 0068

CONTRACT CONTROL SERVICES PTY LTD (ACN 007 453 965) — Plaintiff

v

DEPARTMENT OF EDUCATION AND TRAINING (ABN 52 705 101 522) — First Defendant

MAX TONKIN (as adjudicator in an adjudication under the *Building and Construction Industry Security of Payment Act 2002 (Vic)* between Contract Control Services Pty Ltd and Department of Education and Training) — Second Defendant

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JUDGE:	Digby J
WHERE HELD:	Melbourne
DATE OF HEARING:	27 June 2017
DATE OF JUDGMENT:	30 August 2017
CASE MAY BE CITED AS:	Contract Control Services v DET
MEDIUM NEUTRAL CITATION:	[2017] VSC 507

CONTRACTS – Building Contract – Whether incorrect exclusion of non-claimable second class variations – Whether the Construction Contract contained a method for resolving disputes within the meaning of s 10A(3)(d)(ii) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) – *SSC Plenty Road v Construction Engineering* [2016] VSCA 119 – *SSC Plenty Road v Construction Engineering* [2015] VSC 631 – *Branlin Pty Ltd v Totaro* [2014] VSC 492.

ADMINISTRATIVE LAW – Judicial review – Decision of adjudicator appointed under the *Building and Construction Industry Security of Payment Act 2002 (Vic)* – Whether certiorari should be granted to quash the decision.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M A Robins QC	KCL Law
For the Defendant	Mr M Roberts QC	Corrs Chambers Westgarth

HIS HONOUR:

Summary of Application

1 By Originating Process dated 16 March 2017, the plaintiff, Contract Control Services Pty Ltd (CCS) seeks relief in the nature of Certiorari in relation to an adjudication determination made by the second defendant, Max Tonkin (the Adjudicator) dated 7 March 2017 pursuant to the *Building and Construction Industry Security of Payment Act 2002 (Vic)* (the Act).

2 CCS seeks declarations that:

(a) clauses 47.2 and 47.2A of the Construction Contract are not methods of resolving disputes within the meaning given by s 10A(3)(d)(ii) of the Act;

(b) insofar as the claimed amount in the Adjudication Application includes claims for second class variations, that such claims are claimable variations within the meaning of s 10A(3) of the Act; and

(c) the Adjudicator's determination to the effect that second class variations are not claimable variations and are excluded by s 10B(2)(a) and/or (b) is contrary to law.

3 CCS further seeks an order remitting the Adjudication Application back to the Adjudicator to be determined according to law.

Outline of Agreed Facts[1]

Contract

4 On or about 13 August 2013, CCS and the first defendant, Department of Education and Training (DET) entered into a Construction Contract in the form of a written contract executed by them (Construction Contract) pursuant to which CCS was to provide construction works and related goods and services to DET for the construction of the Bendigo Senior Secondary College Theatre Project located at Gaol

[1] In this proceeding the plaintiff and the first defendant by an Agreed Statement of Facts dated 23 June 2017, agreed to the facts referred to in paragraphs [4]-[13] of these Reasons for Judgment.

Road, Bendigo in the State of Victoria.[2]

5 The Construction Contract contains terms relevant to this proceeding including terms concerning dispute resolution, namely, clause 47 (as amended in Annexure Part B) and Items 43, 44 and 45 of Annexure Part A.

6 For the purposes of s 10A(3)(d)(ii) of the Act, the consideration under the Construction Contract exceeded $5,000,000.

Payment Claim and Payment Schedule

7 By a Final Payment Claim dated and served on 23 December 2016 in accordance with the Construction Contract and the Act, CCS claimed the sum of $2,682,200.75 (plus GST) (Payment Claim).[3]

8 DET replied to the Payment Claim by serving CCS with a Payment Schedule on 11 January 2017 (within 10 business days after service of the Payment Claim in accordance with the Construction Contract and the Act) with a scheduled amount of $0.00 (payment schedule).[4]

Adjudication Application

9 On 25 January 2017, CCS applied for adjudication of the Payment Claim by lodging an adjudication application (Adjudication Application) with Adjudicate Today Pty Ltd (an 'authorised nominating authority' authorised to nominate persons, including the Adjudicator, to determine 'adjudication applications' within the meaning of s 4 of the Act) pursuant to the Act.[5]

10 The revised amount claimed in the Adjudication Application (claimed amount) included the sum total of $2,462,063.26 (plus GST) in respect of 118 variation claims.

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2 The Formal Instrument of Agreement, General Conditions of Contract (as amended) and Annexure Parts A and B to the Construction Contract are contained in Exhibit "DS-2" to the affidavit of Damien Franz Joseph Simonetti, 16 March 2017 (the Simonetti Affidavit).

3 The Payment Claim is contained in Exhibit "DS-3" of the Simonetti Affidavit.

4 The Payment Schedule is contained in Exhibit "DS-4" of the Simonetti Affidavit.

5 The Adjudication Application (without attachments) is contained in Exhibit "DS-5" of the Simonetti Affidavit.

Other than minor trade works and provisional sum items forming part of the Contact Sum, the Adjudication Application primarily claimed these variations.

Adjudication Response

11 On 3 February 2017, DET lodged an adjudication response to the Adjudication Application with the Adjudicator.[6]

Further Submissions

12 During the period 8 February 2017 to 22 February 2017, the Adjudicator requested or allowed further submissions and further submissions were made by CCS and DET to the Adjudicator.[7]

Determination

13 On 8 March 2017, the Adjudicator delivered an Adjudication Determination dated 7 March 2017[8] (Adjudication Determination) and determined, inter alia, that:

(a) the Construction Contract provided a 'method of resolving disputes' under the Construction Contract for the purposes of s 10A(3)(d)(ii) of the Act;

(b) all of the second class variations claimed by CCS in the Adjudication Application were therefore not claimable variations under s 10A of the Act and were excluded amounts under s 10B of the Act; and

(c) CCS was entitled to be paid by way of interim payment under the Act, the sum of $61,750.47 (including GST) (Adjudicated Amount) and $20,350 (including GST) for half the Adjudicator's fees.

14 DET has paid the Adjudicated Amount and the sum of $20,350 being half the Adjudicator's fees to CCS.

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6 The Adjudication Response (without attachments) is contained in Exhibit "DS-6" of the Simonetti Affidavit.

7 These further submissions (without all attachments) are contained in Exhibits "DS-8" and "DS-10" to "DS-13" of the Simonetti Affidavit.

8 The Adjudication Determination is contained in Exhibit "DS-1" of the Simonetti Affidavit.

15 Further, it is to be noted that after 11 January 2017, and after DET served the Payment Schedule, neither CCS nor DET issued to the other a notice of dispute under clause 47.1 of the Construction Contract or undertook any of the other procedures stated in clause 47 of the Construction Contract, including making any election to litigate or arbitrate.

Ground for Judicial Review

16 CCS's Originating Process sets out the following Grounds for Judicial Review:

> (11) The Adjudicator's Determination at [82], [84], [85], [86], [96], [101], [118] and [130]:
>
> (a) is contrary to law; and/or
>
> (b) contains an error on the face of the record;
>
> on the following ground:
>
> (12) The Adjudicator, contrary to law, found that Clauses 47.2 and 47.2A of the Construction Contract are methods of resolving disputes in accordance with s 10A(3)(d)(ii) of the Act.
>
> (13) A method of resolving disputes must comply with the test set out in *Branlin v Totaro* [2014] VSC 492 (the test):
>
> [65] In order for a Construction Contract to provide a method of resolving disputes for the purposes of s 10A(3)(d)(ii) of the Act, at least what is required are three things:
>
> (a) a process which could be described as a 'method' of dispute resolution;
>
> (b) a process which is capable of resulting in a binding resolution of the dispute; and
>
> (c) a process which the contract makes it a binding obligation for the parties to enter upon and participate in.
>
> (15) The Adjudicator erred in law because:
>
> (a) Contrary to his findings, Clauses 47.2 and 47.2A do not comply with the test;
>
> (b) Contrary to his findings:
>
> (i) Clause 47.2 of the Construction Contract, which provides that '*either party may, … refer such dispute to arbitration or litigation*'; and

(ii) Clause 47.2A of the Construction Contract, which provides that '*either party may, … refer such second class of variation payment claim dispute to arbitration or litigation*',

do not bind the parties to enter upon and participate in arbitration;

(c) Contrary to his findings, the process in the Construction Contract does not make it a binding obligation to enter upon and participate in arbitration unless either of the parties gives notice to the other to arbitrate; and

(d) He wrongly determined that the claimed amount included second class variations that were not claimable under s 10A(3) of the Act, and were therefore excluded amounts under s 10B(2) of the Act.

Relevant Statutory Provisions

17 The following relevant sections of the Act provide as follows:

1. Purpose

The main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under Construction Contracts.

3. Object of the Act

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a Construction Contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—

(a) the making of a payment claim by the person claiming payment; and

(b) the provision of a payment schedule by the person by whom the payment is payable; and

(c) the referral of any disputed claim to an adjudicator for determination; and

(d) the payment of the amount of the progress payment determined by the adjudicator; and

(e) the recovery of the progress payment in the event of a failure to pay.

(4) It is intended that this Act does not limit—

(a) any other entitlement that a claimant may have under a Construction Contract; or

(b) any other remedy that a claimant may have for recovering that other entitlement.

9. Rights to progress payments

(1) On and from each reference date under a Construction Contract, a person—

(a) who has undertaken to carry out construction work under the contract; or

(b) who has undertaken to supply related goods and services under the contract—

is entitled to a progress payment under this Act, calculated by reference to that date.

10. Amount of progress payment

(1) The amount of a progress payment to which a person is entitled in respect of a Construction Contract is to be—

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of—

(i) construction work carried out or undertaken to be carried out by the person under the contract; or

(ii) related goods and services supplied or undertaken to be supplied by the person under the contract—

as the case requires.

(2) Despite subsection (1) and anything to the contrary in the Construction Contract, a claimable variation may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that Construction Contract.

(3) Despite subsection (1) and anything to the contrary in the Construction Contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that Construction Contract.

10A Claimable variations

(1) This section sets out the classes of variation to a Construction Contract (the **claimable variations)** that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that Construction Contract.

…

(3) The second class of variation is a variation where—

(a) the work has been carried out or the goods and services have been supplied under the Construction Contract; and

(b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the Construction Contract requested or directed the carrying out of the work or the supply of the goods and services; and

(c) the parties to the Construction Contract do not agree as to one or more of the following—

(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;

(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the Construction Contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

(iii) the value of the amount payable in respect of the work or the goods and services;

(iv) the method of valuing the amount payable in respect of the work or the goods and services;

(v) the time for payment of the amount payable in respect of the work or the goods and services; and

(d) subject to subsection (4), the consideration under the Construction Contract at the time the contract is entered into—

(i) is $5 000 000 or less; or

(ii) exceeds $5 000 000 <u>but the contract does not provide a method of resolving disputes under the contract</u> (including disputes referred to in paragraph (c)).

(4) If at any time the total amount of claims under a Construction Contract for the second class of variations exceeds 10% of the consideration under the Construction Contract at the time the contract is entered into, subsection (3)(d) applies in relation to that Construction Contract as if any reference to '$5 000 000' were a reference to '$150 000'.

10B Excluded amounts

(1) This section sets out the classes of amounts (**excluded amounts**) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a Construction Contract.

(2) The excluded amounts are —

(a) any amount that relates to a variation of the Construction Contract that is not a claimable variation;

(b) any amount (other than a claimable variation) claimed under the Construction Contract for compensation due to the happening of an event including any amount relating to—

(i) latent conditions; and

(ii) time-related costs; and

(iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the Construction Contract or for any other claim for damages arising under or in connection with the contract;

(d) any amount in relation to a claim arising at law other than under the Construction Contract;

(e) any amount of a class prescribed by the regulations as an excluded amount.

11 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a Construction Contract is to be valued —

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to —

(i) the contract price for the work; and

(ii) any other rates or prices set out in the contract; and

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

18 Section 48 of the Act precludes contracting out of the Act by declaring to be void any contractual provision which excludes, modifies or restricts the operation of the Act, or has that effect. Section 48 is in the following terms:

> **No contracting out**
>
> (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
>
> (2) A provision of any agreement, whether in writing or not—
>
> (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or
>
> (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act—
>
> is void.

Relevant provisions of the Construction Contract

19 The parties agree that in relation to the issues in this proceeding the relevant clauses of the Construction Contract are clauses 47.2 and 47.2A and 49.

20 Clause 47.2 of the Construction Contract provides:

> **47.2 Further Steps Required Before Proceedings**
>
> Alternative 1
> Within 14 days after service of a notice of dispute, the parties shall confer at least once, and as the option of either party and provided the Superintendent so agrees, in the presence of the Superintendent, to attempt to resolve the dispute and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.
>
> In the event that the dispute cannot be so resolved or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may be notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration or litigation.
>
> Alternative 2
> A party served with a notice of dispute may give a written response to the notice to the other party and the Superintendent within 28 days of the receipt of the notice.
>
> Within 42 days of the service on the Superintendent of a notice of dispute or within 14 days of the receipt by the Superintendent of the written response, whichever is the earlier, the Superintendent shall give to each party the Superintendent's written decision on the dispute, together with reasons for

the decision.

If either party is dissatisfied with the decision of the Superintendent, or if the Superintendent fails to give a written decision on the dispute within the time required under Clause 47.2 the parties shall, within 14 days of the date of receipt of the decision, or within 14 days of the date upon which the decision should have been given by the Superintendent confer at least once to attempt to resolve the dispute and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means. At any such conference, each party shall be represented by a person having authority to agree to a resolution of the dispute.

In the event that the dispute cannot be so resolved or if at any time after the Superintendent has given a decision either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may, by notice in writing delivered by hand or sent by certified mail to the other party, refer such dispute to arbitration or litigation.

21 Clause 47.2A of the Construction Contract provides:

Clause 47.2A is amended by adding after the words 'Alternative 1' and 'Alternative 2' the words 'Subject to clause 47.2A'

47.2A Further Steps Required Before Proceedings – Payment Claims for Second Class of Variation

This Clause 47.2A shall only apply to disputes, or that part of any dispute, regarding a payment schedule or final payment schedule that relates to a payment claim for a second class of variation as defined by the Security of Payment Act ['second class of variation payment claim dispute'].

Clause 47.1A shall not apply to second class of variation payment claim disputes

Where the Contractor has delivered a notice of dispute to the Principal and Superintendent In relation to a second class of variation payment claim dispute within 10 business days of the receipt of the relevant payment schedule or final payment schedule, the Principal may give a written response to the notice to the Contractor and Superintendent within 5 Business days of receiving the notice of dispute.

Within 10 business days of the date for the Principal to provide a written response to the notice of dispute, the Superintendent shall give to each party the Superintendent's written decision on the second class of variation payment claim dispute, together with reasons for the decision.

If either party is dissatisfied with the decision of the Superintendent, or if the Superintendent fails to give a written decision on the second class of variation payment claim dispute within the time required under Clause 47.2A the parties shall, within 14 days of the date of receipt of the decision, or within 14 days of the date upon which the decision should have been given by the Superintendent confer at least once to attempt to resolve the dispute and failing resolution of the dispute to explore and if possible agree on methods of resolving the dispute by other means. At any such conference, each party

shall be represented by a person having authority to agree to a resolution of the dispute.

In the event that the second class of variation payment claim dispute cannot be so resolved or if at any time after the Superintendent has given a decision either party considers that the other party is not making reasonable efforts to resolve the second class of variation payment claim dispute, either party may, by notice in writing delivered by hand or sent by certified mail to the other party, refer such second class of variation payment claim dispute to arbitration or litigation.

22 Clause 49 of the Construction Contract provides:

49 Severability

The parties agree that a construction of this Contract that results in all provisions being enforceable is to be preferred to a construction that does not so result.

If, despite the application of this Clause, a provision of this Contract is illegal or unenforceable if the provision would not be illegal or unenforceable if a word or words were omitted, that word or, the whole provision is severed, and the remainder of this Contract continues in force.

23 The Adjudicator in his Adjudication Determination concluded:

[82] However, I think the Claimant has taken too narrow a view of *Branlin* and *SSC Plenty Road*. I do not accept that these cases provide authority for the Claimant's position. These cases considered clause 27.2 of AS 4905-2002, which provides if the dispute has not been resolved within 28 days of service of the notice of dispute/that dispute shall be and is hereby referred to arbitration. I accept that inclusion of this provision in a contract means "the Contract makes it a binding obligation for the parties to enter upon and participate in" arbitration. However, I don't accept that the converse applies. I think Vickery J expressed the test a little more broadly in paragraph [66] In *Branlin*: "a method provided in the contract which is capable of resulting in a binding resolution of the dispute and which the Contract makes it a binding obligation for the parties to enter upon and participate in". I do not accept that a contract with an election such as that in clause 47.2/47.2A fails this test. I think the Contract does have such a method, albeit one that requires an election.

…

[84] Here as well as in paragraph [66] in *Branlin* the language is broader than "the contract makes it a binding obligation" in the third step of the test in *Branlin*.

[85] The Claimant's position is that as neither party has made an election to refer disputes to arbitration, and may not make an election, the contract does not have a method for resolving disputes. I do not think this can be correct. I accept that arbitration is not mandated by the

Contract unless an election is made by one of the parties. However, I am satisfied that if an election is made, the line of cases cited by the Respondent, and the CAA, establish that the other party is bound to the process. I think this means that the Contract does "provide a method for resolving disputes under the contract". Although the Contract does not mandate that the parties follow the method available, I am satisfied that as the method is available, "the parties are in effect directed by the Legislature to avail themselves of that process". On that basis, I am satisfied that the Contract does not fall within s.10A(3)(d) of the Act and therefore all of the variations claimed by the Claimant as second class variations are not within the second class of claimable variations under s.10A(3) of the Act.

[86] The Claimant acknowledged that none of the variations claimed in the payment claim are within the first class of claimable variation under s.10A(2) of the Act. It follows that all variations claimed are not claimable variations and therefore are excluded amounts within s.10B(2)(a) of the Act. Accordingly, I do not propose to include any variations claimed in the progress payment amount.

…

[96] Thus, if the claims are variations, they can only be claimable variations if they are in the second class. However, as I have formed the view that the Contract does not fall within s.10A(3)(d), I do not accept that such claims are claimable variations in the second class. Thus, if V230, V259 and V283 are variations, they are not claimable variations and are therefore excluded amounts under s.10B(2)(a).

…

[101] Thus, if the claim is a variation, it can only be a claimable variation if it is in the second class. However, as I have formed the view that the Contract does not fall within s.10A(3)(d), the claim is not a claimable variation in the second class. Accordingly, It is an excluded amount under s.10B(2)(a).

…

[130] However, irrespective of what the correct amount claimed for the disputed variations is, as I have formed the view that the disputed variation claims are excluded amounts, I propose to allow $nil as the net claimable value of variations by adopting the Respondent's cumulative valuation of variations as indicated in the payment claim and payment schedule.

Summary of Submissions

CCS's Submissions

24 CCS in essence contends that the errors of law referred to in its Origination Motion can be reduced to the following principal submissions, which are as follows:

(a) The test for what satisfies the requirements of s 10A(3)(d)(ii) of the Act is that set out in *Branlin v Totaro*[9] (*Branlin*) and *SSC Plenty Road v Construction Engineering (Aust) & Anor*[10] (*SSC Plenty Road*), as affirmed in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*[11] (*SSC Plenty Road VSCA*).

(b) In *Branlin* this Court considered the requirements for a construction contract to provide for a 'method for resolving disputes' for the purposes of s 10A(3)(d)(ii) of the Act (the test in *Branlin*). The basic requirements for a construction contract to provide a 'method for resolving disputes' were stated as:

(i) a process which could be described as a 'method' of dispute resolution;

(ii) a process which is capable of resulting in a binding resolution of the dispute; and

(iii) a process which the contract makes it a binding obligation for the parties to enter upon and participate in.

(c) As a matter of law, on their proper construction, clauses 47.2 and 47.2A of the Construction Contract do not satisfy the said test, because they lack the required elements of certainty and a mandatory obligation to resolve disputes by arbitration.

(d) Accordingly, CCS submits that the Adjudicator's Determination at paragraphs [82], [84], [85], [86], [96], [101], [118] and [130] is and was wrong at law, and ought to be quashed, entitling CCS to the relief sought in the Originating Process.

25 CCS submits that the critical issue to be determined in this proceeding is whether the Construction Contract makes arbitration a binding obligation for the parties to enter

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9 [2014] VSC 492, [65].
10 [2015] VSC 631, [33].
11 [2016] VSCA 119.

upon and participate in, and therefore a method for resolving disputes for the purposes of section 10A(3)(d)(ii) of the Act. CCS submits that the Construction Contract does not in terms make arbitration obligatory or binding, and thus does not meet the third limb of the test in *Branlin* and *SSC Plenty Road*.

26 In particular, CCS submits, adopting the language of the second and third limbs of the test in *Branlin*, that in order to satisfy the test, the Construction Contract must not only provide a dispute resolution process that is capable of resulting in a binding resolution of the dispute, but the Construction Contract must also provide, at the very least, a process which the Construction Contract makes it a binding obligation for the parties to enter upon and participate in.

27 CCS emphasises that clauses 47.2 and 47.2A of the Construction Contract provides that if all of the preceding steps in relation to the dispute resolution clause have been complied with, "*either party may … refer such … dispute to arbitration or litigation*." CCS contends that examined objectively and analysed against the test in *Branlin* and *SSC Plenty Road*, as affirmed in *SSC Plenty Road VSCA*, clause 47 of the Construction Contract does not provide a binding process that inevitably leads to arbitration because the very existence of the right to make a choice to arbitrate, rather than being mandated by the Construction Contract to do so, excludes it from falling within the bounds specified by the test.

28 CCS makes reference in its submissions to the statements of Vickery J in *Branlin* at [66], [67] and [68] where, in the context of discussing the Act's statutory purpose his Honour observes, that s 10A(3)(d)(ii) insofar as it refers to a method of resolving disputes, 'requires a method provided in the contract which is capable of resulting in a binding resolution of the dispute and which the contract makes it a binding obligation for the parties to enter upon and participate in', and further that the 'failsafe mechanism' statutory purpose:

> could not be advanced in a practical way, unless the contractual method for resolving disputes provided in the relevant Construction Contract is at the very least a process which the contract makes it a binding obligation for the

parties to enter upon and participate in.[12]

29 CCS submits that the decision of Vickery J in *SSC Plenty Road* in which his Honour applied the test in *Branlin*,[13] is nonetheless relevant given that it was affirmed in *SSC Plenty Road*, even though the contract in issue dealt with a dispute resolution clause which differed from clauses 47.2 and 47.2A in that it provided for mediation as the final step as opposed to arbitration (optional or otherwise).

30 Further, CCS submits that the Court of Appeal's analysis in *SSC Plenty Road VSCA* explains and informs the test in *Branlin* and Vickery J's judgment in *SSC Plenty Road.* In particular, CCS submits that the Court of Appeal in *SSC Plenty Road VSCA* stressed the need for 'certainty' in respect of any dispute resolution method in order to satisfy s 10A(3)(d)(ii) of the Act. Here CCS submits the Construction Contract provides what is at best an optional course, which the parties may or may not follow at their whim, and accordingly the subject dispute resolution process falls well short of being sufficiently certain.

31 CCS submits that at their highest, for present purposes, the express terms of Clauses 47.2 and 47.2A of the Construction Contract give a party the option to elect either between arbitration or litigation to resolve their dispute.

32 CCS contrasts clauses 47.2 and 47.2A with the wording of clause 47.1A which provides that a 'dispute must be referred for mediation' and submits that this reflects a distinct approach under the Construction Contract in relation to mandatory mediation, and the other purely optional dispute resolution processes provided under the Construction Contract which may include arbitration, litigation, or some other agreed method.

33 CCS contends that after satisfying the preliminary steps pursuant to clauses 47.2 and 47.2A, it is here permissible for either party to elect to take various possible further steps with respect to a dispute under the Construction Contract. CCS identifies the

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12 *Branlin* at [68].
13 At [34].

following possibilities, and stresses that none of these options are mandatory:

(a) a party may refer the dispute to litigation, whereupon the other party may agree to litigation thereby removing the possibility of arbitration; or

(b) a party may refer the dispute to litigation, whereupon the other party may seek to stay that proceeding in lieu of arbitration by virtue of the *Commercial Arbitration Act 2011 (Vic)*; or

(c) a party may refer the dispute to arbitration, whereupon the parties must arbitrate the dispute; or

(d) a party may do nothing further at all, whereupon the other party may refer the dispute to litigation or arbitration, whereupon the first party may take one of the three steps noted in paragraphs (a) to (c) above, or also do nothing further at all whereupon the parties are not required to enter upon and participate in arbitration (or litigation); or

(e) the parties may agree to resolve the dispute by some other method. The word 'may' in clause 47.2 and 47.2 leaves open this possibility and the parties may otherwise before that step 'if possible agree on methods of resolving the dispute by other means'.

34 CCS further submits that the Construction Contract itself does not mandate that the parties arbitrate after a notice of dispute has been served. Instead some further action by a party is required to commence the arbitration process. CCS contends that this is crucial because the test must be applied to the Construction Contract as executed, not to actions that may or may not be taken by the parties to the Construction Contract. Thus, as executed CCS submits that the Construction Contract cannot be said to meet the requirements of the test in *Branlin*.

35 Further to this, CCS refers to *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (No 3)*[14] (*Lysaght*) which involved a dispute resolution clause containing two alternate

[14] [2013] VSC 435.

options where if either failed to resolve the dispute, both alternatives provided that the dispute 'shall be and is hereby referred to arbitration', and submits that it is clear from the Court's reasoning at [141] that the dispute must inevitably result in arbitration by virtue of the parties' agreement under the contract, not a possible agreement that might be made by the parties to arbitrate after the contract had been executed.

36 CCS also submits that a dispute resolution provision similar to clauses 47.2 and 47.2A was considered in *AC Hall Airconditioning Pty Ltd v Schiavello (Vic) Pty Ltd*[15] (*AC Hall*). In that case the relevant dispute resolution clause provided relevantly that 'the parties may agree … to refer part or all of such a dispute or difference to arbitration …'. Although decided before *Branlin*, CCS submits that the finding by Judge Shelton that the relevant clause did not satisfy the requirements of s 10A(3)(d)(ii) because the word 'may' simply suggested the possibility of arbitration, is correct and wholly consistent with the test as ultimately set out by Vickery J in *Branlin* and *SSC Plenty Road*, and as upheld in *SSC Plenty Road VCSA*.

CCS's secondary applications

37 CCS also argues that if its primary relief is successful, there should be a remitter.

38 In response to the submissions by DET that in the event CCS is successful in its primary argument an order remitting the matter to the Adjudicator for further consideration would be of no utility because the Adjudicator is either *functus officio* or devoid of any continuing power to permit him to make any further decision, CCS argues that certiorari is available to address an error of law on the face of the record committed by an adjudicator under the Act. Accordingly, CCS submits that appropriate matters can and ought to be remitted.

DET's Submissions

39 In its submissions DET acknowledges that the central issue raised by CCS's

[15] [2008] VCC 1490.

Originating Process is whether the dispute resolution mechanism contained in clauses 47.2 and 47.2A of the Construction Contract constitute a method of resolving disputes for the purposes of s 10A(3)(d)(ii) of the Act as set out in the decisions of *Branlin* and *SSC Plenty Road*.

40 DET submits that no error of law of the kind contended for by CCS was committed by the Adjudicator. DET submits that the Adjudicator correctly applied the relevant test to determine that the dispute resolution mechanism contained within clauses 47.2 and 47.2A constituted a method of resolving disputes for the purposes of s 10A(3)(d)(ii) of the Act.

41 DET submits that by amendments made to the standard form AS2124-1992 Contract the parties agreed a specific procedure in clause 47.2 of the Construction Contract to deal with claims which involve a claim for a *second class of variation* as defined by the Act, namely the procedure in clause 47.2. DET submits that this clause provides both parties with a definite, certain and binding means by which any dispute relating to variation claims of the nominated type may be resolved should either party wish that to occur.

42 DET submits, referring to its Adjudication response submissions before the Adjudicator, that the operation of clause 47.2A is as follows:

> **No mediation for Second Class Claimable Variations**
>
> Where the Notice of Dispute relates to a payment claim for a second class of variation, the requirement for mediation in Clause 47.1A does not apply.
>
> Instead, Clause 47.1B (sic)[16] applies. This is a fast-tracked version of the Clause 47.1 process:
>
> - The Principal has 5 business days to respond
> - The Superintendent has a further 5 business days (being 10 business days from the Notice of Dispute) to make a decision.
> - The parties are obliged to meet at least once with a view to resolve the dispute within 14 days of that decision. If there is no resolution within that 14 days, either party may refer it to arbitration.

[16] Note: "sic" added in relation to an apparent error.

> Again, the mandated and binding final forum for resolving the dispute is arbitration.
>
> Each step of the Contract's procedure is clear, certain and enforceable. The consequence of a preceding step not resolving the dispute inevitably means that the relevant dispute will be resolved by arbitration. Arbitration is the mandated end point.

43 DET submits that it is misconceived for CCS to contend that the insertion of the word 'may' in clause 47.2A deprives the clause of the necessary binding nature of a dispute resolution clause that satisfies s 10A(3)(d)(ii). DET submits that whilst at the last point in the process each of the parties are given the right to elect to go to arbitration, there is in no sense 'any agreement to agree' or uncertainty in the process.

44 DET submits that once the election is made (as the contract contemplates on a unilateral basis) the other party is bound to that process and the party which so elects is given an effective means to achieve the legislated objective; namely the resolution of the disputed variation claims by an alternative dispute resolution means.

45 DET contends that the product of that election will result in a binding decision of a third party appointed under the Construction Contract for the purposes of the dispute.

46 DET accepts that *Branlin*, *SSC Plenty Road*, and *SSC Plenty Road VSCA* establish the relevant test to be applied to determine whether clauses 47.2 and 47.2A are a valid and binding dispute resolution clause, including for the purposes of s 10A(3)(d)(ii) of the Act and submits that clause 47.2A satisfies the test.

47 DET submits that the reason why the dispute resolution mechanisms in each of *Branlin*, *SSC Plenty Road* and *AC Hall* failed was that in each instance the contract in question did not provide for a party in the position of CCS an effective alternative dispute resolution mechanism by which that party could oblige the other contracting party to participate in an alternative dispute resolution method or process so as to obtain a speedy resolution of disputed second-class variation claims.

48 DET submits that in *AC Hall* the relevant mechanism simply provided that any unresolved dispute would be referred to litigation. DET also submits that in *AC Hall* it was held that in such a circumstance the clause failed to satisfy the test because the contractual provision there in issue did not contemplate any form of alternative dispute resolution.

49 DET contends that in both *Branlin* and *SSC Plenty Road* the contractual clause in issue failed to satisfy the relevant test because that contractual provision did not contain any enforceable alternate dispute resolution method or process.

50 DET submits that conversely, clause 47.2A provides CCS, indeed either party, with a valid and effective means by which it can refer any dispute regarding the second class variation claims to the fast track dispute resolution procedure in clause 47.1 which is ultimately binding.

Considerations

The issue

51 In his Adjudication Determination, the Adjudicator determined that the Construction Contract provided a 'method of resolving disputes' under the Construction Contract for the purposes of s 10A(3)(d)(ii) of the Act.

52 Accordingly, the Adjudicator found that all of the second class variations claimed by CCS in the Adjudication Application were therefore not claimable variations under s 10A of the Act and were excluded amounts under s 10B of the Act.

53 As correctly acknowledged by the parties in this proceeding, the critical issue for determination is whether the Construction Contract provides 'a method of resolving disputes' for the purposes of s 10A(3)(d)(ii) of the Act, as construed in the decisions of *Branlin,* and *SSC Plenty Road*, and as affirmed by the Court of Appeal of this Court in *SSC Plenty Road VSCA*.

54 The key clauses of the Construction Contract are clauses 47.2 and 47.2A. The latter

expressly applies to *second class of variation* payment claim disputes.

55 The Act provides an expedited interim statutory entitlement to progress payments under eligible Construction Contracts in respect of specified construction work and related goods and services.

56 Under the scheme of the Act such interim statutory entitlements are conditioned by requirements in relation to the timing of claims for payment, including progress payment claims, and by the provisions of the Act which specify the amounts of progress payment claims to which the claimant is entitled. Included in such claimable potential entitlements are certain types of variation claims in respect of changes in the scope of work which the contract required to be performed.

57 More specifically the Act contemplates that a certain type of variation is able to be claimed and paid as part of a progress claim falling with the scheme of the Act if such a variation claim, amongst other things, is made in respect of a construction contract which has a contract sum less than the amount specified in sections 10A(3)(d)(i), or the contract sum exceeds the sum specified in section 10A(3)(d)(ii) but that contract does not provide a method of resolving disputes. Under the Act such variations are referred to as the second class of variations.

58 Accordingly, by this mechanism the Act provides that the work or related goods and services supplied as a result of changes in scope under certain construction contracts may be claimed as part of a progress claim under the Act and be referrable to an adjudication under the Act, if amongst other things, the construction contract does not provide for a method of resolving disputes under the contract.

59 Here the parties have in their contract both made specific provision in relation to 'second class of variations', and further by agreement pursuant to clause 47.2A, provided a method of resolving disputes under the contract.

60 Apart from the contract sum related requirement, the application of s 10A(3)(d)(ii) by its express language, stipulates only that the Construction Contract does not

provide a method of resolving disputes under the contract. However, authority binding on me has construed that subsection as displaced only when the method of resolving disputes under the subject contract provides for a dispute resolution method which is capable of resulting in a binding resolution of the dispute and such process is one which the parties are bound to enter upon and participate in.

61 The Court of Appeal of this Court has stated in relation to s 10A(3)(d)(ii) that the potential second class variation entitlements contemplated by the legislation are not claimable if the method of resolving disputes is confined to methods such as mediation, that may not result in their resolution.

62 The Court of Appeal in *SSC Plenty Road VSCA* stated that:

> 56 None of the provisions adjacent to s 10A(3)(d)(ii) are of assistance. However, s 1 of the Act describes its main purpose as being 'to provide for entitlements to progress payments for persons who carry out construction work ... under Construction Contracts'. As indicated at [36] above, s 3 identifies the objects of the Act. Those objects are repeatedly expressed in terms of entitlement. Thus, s 3(1) refers to ensuring 'that any person ... is entitled to receive'; and s 3(2) speaks of ensuring 'that a person is entitled to receive a progress payment'. Section 3(4) of the Act (which was introduced by the Amending Act), also speaks in terms of entitlement. It uses in (a) the expression 'any other entitlement', and in (b) 'for recovering that other entitlement'. Depriving parties to a Construction Contract of the advantages conferred by the Act if they have nothing more than a forum in which they might or might not agree to bring their dispute to a resolution falls short of giving rise to the entitlements that the Act intends to create. In our opinion, the entitlements contemplated by the legislation are not achieved if the method of resolving disputes is confined to methods, such a mediation, that may not result in their resolution.
>
> 57 This construction of the legislation appears to be borne out by its context. The Act exists to solve a problem. That problem is evident when one considers the 'purpose' in s 1 and 'objects' in s 3. Access to 'progress payments' was notoriously insecure. The provision of a means to ensure entitlements to progress payments for persons who carry out construction work arises from the fact that, when the matter was simply left to the parties, those who carried out construction work did not have a means of securing progress payments. The scope for dispute about variations, and, in particular, whether a particular 'variation' is in, in truth, 'a change in the scope of the construction work to be carried out ... under the contact', and, thus, the scope for dispute about withholding of payments in respect of variations is self-evident. Accordingly, a construction of the provisions of the Act that

> conduces to the identification and resolution of disputes regarding progress payments for variations is to be preferred. Such a construction is not met by treating a provision in a contract for variations that may not result in a resolution of a dispute as a 'means for resolving disputes'.
>
> 58 Finally, the jurisdiction of the adjudicator further reveals the purpose of the Act. Section 9 of the Act establishes a statutory right to progress payments. Section 10 identifies the amount of the progress payments to which s 9 has created the statutory entitlement. Section 14 of the Act provides for payment claims to be served on persons liable to make progress payments. Section 15 provides for payment schedules pursuant to which the person upon whom a payment claim has been served effectively provides their response to the payment claim. In the payment schedule, the recipient identifies the 'scheduled amount' which is the amount they propose to pay to the claimant. Division 2 of pt 3 provides for the adjudication of disputes. Section 23 is at the heart of div 2; it provides for the adjudicator to determine the 'adjudicated amount'. As is plain, the provisions of the Act provide for the making of claims, for responses to them, and, in the case of dispute, their adjudication by an independent third party. It is not open to parties to Construction Contracts to contract out of the provisions of the Act. The adjudicated amount becomes a statutory entitlement. There are cases where the variation provisions of the Act do not apply: where the contract consideration exceeds $5,000,000 and the parties to such a contract have provided their own method for resolving disputes. The exception should be construed on the basis that it provides the same degree of certainty that is achieved by the other provisions of the Act. In other words, the exception should be construed in such a way that it contemplates an alternative means of securing the certainty and finality of a binding amount. A contractual clause that does no more than require the parties to mediate will not have that effect.

63 The Construction Contract in issue in summary provides in amended General Conditions, clause 47.2A:

(a) The provisions of that clause apply to disputes regarding a payment schedule or final payment schedule that relates to a payment claim for a second class of variation as defined by the Act;

(b) Where, within the times provided the contractor has issued a notice of dispute in relation to a second class variation payment claim and the principal (at its election) has responded to the contractor's notices of dispute and the Superintendent has provided its written decision in respect of the contractor's notice of dispute;

(c) If either party is dissatisfied with the Superintendent's decision, or no written decision is provided within the time provided, the parties are required within 14 days of either such date to confer at least once to attempt to resolve the dispute, and if unsuccessful to explore and try to agree other dispute resolution methods.

(d) In the event that the second class variation dispute cannot be resolved, or at any time after the Superintendent's decision either party considers that the other party is not making a reasonable effort to resolve the dispute, either party may by notice in writing refer the dispute to arbitration or litigation.

64 In the manner outlined above the Construction Contract provides for methods of resolving second class variation disputes under the contract, both of which (arbitration and litigation) will result in a final and binding outcome in the ordinary course.[17]

65 Furthermore, each of the two methods of resolution are enforceable by either the contractor or the principal, or both.[18]

66 Insofar as s 10A(3)(d)(ii) intends that a relevant contract must provide a method of resolving disputes under the contract as an alternative to litigation, so as to trigger the application of that part of the sub-section, here either party is contractually empowered to enforce a specifically provided alternative method of resolving disputes under the contract in relation to the second class of variation contemplated by the Act, and do so via arbitration.

67 Such an arbitration process cannot be said to be a method of resolution which may not result in the resolution of the relevant dispute. Such a method conduces to the identification and resolution of progress payment disputes in respect of second class variations under the contract. Accordingly, this method of resolving disputes will

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17 Clause 47.2A (paragraph 6), refer Reasons for Judgment [63(d)].

18 The *Commercial Arbitration Act 2011* (Vic), s 8, is most likely to result in any attempted litigation by a party against the other parties wishes, being stayed and referred to arbitration under clause 47.2 and 47.2A of the contract.

determine whether a claimant is entitled to progress payments for carrying out relevant construction work.

68 Therefore clause 47.2A does, in my view, satisfy the third limb of *Branlin*.[19]

69 It is also the case that the parties (relevantly the aggrieved party with a dispute to prosecute, if it wishes) can in any event elect not to issue the necessary notice of dispute which is almost always the stipulated step required to activate recourse to a dispute resolution clause, including in contracts which provide that all disputes shall be dealt with by way of an arbitral determination.

70 Accordingly, practically all forms of submission involve an election and steps implementing such election, so as to trigger the reference to arbitration, or specified preceding steps to that end.

71 Further, it is also always possible for the parties to agree on other methods of resolving disputes, including prior to triggering the reference in their contractual stipulation for arbitration, as observed by CCS in its submissions in relation to clause 47.2A. This possible scenario does not in my view alter the enforceability of the arbitral process available to the aggrieved party which desires to refer its dispute to arbitral determination under clause 47.2A of the subject Construction Contract.[20]

72 What is determinative in this instance, for the purposes of s 10A(3)(d)(ii) of the Act is that a party with a dispute in relation to a second class variation can enforce the resolution of that dispute by arbitral determination pursuant to clause 47.2A.[21] The position is substantially the same under clause 47.2 in respect of disputes other than in relation to a second class of variation claim.

Conclusion

73 For the above reasons I consider that clauses 47.2 and 47.2A of the Construction

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19 *Branlin* at [65].

20 It is the agreed provisions of the construction contract not what related action the parties have in fact taken or not taken, which will place a contract within or outside the terms of s 10A(3)(d)(ii) of the Act.

21 Refer: footnote [21].

Contract constitute a method of resolving disputes under that contract pursuant to s 10A(3)(d)(ii) of the Act.

74 Further, for the above reasons, I consider that insofar as the claimed amount in the Adjudication Application purports to include claims for second class variations, the Adjudicator correctly determined that such claims are not claimable variations within the meaning of s 10A(3) of the Act.

75 In light of my above conclusions there is no need to determine CCS's claim for a remitter.

Orders

76 For the reasons referred to above I shall dismiss CCS's applications for the declarations sought and relief in the nature of certiorari.

77 I shall await any submissions from the parties as to the final form of orders, including as to costs.