

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

Not Restricted

S ECI 2019 5359

PUNTON'S SHOES PTY LTD (ACN 004 133 751)

Plaintiff

v

CITI-CON (VIC) PTY LTD (ACN 143 889 678) & ANOR

Defendants

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JUDGE: Digby J  
WHERE HELD: Melbourne  
DATE OF HEARING: 17 April 2020  
DATE OF JUDGMENT: 24 August 2020  
CASE MAY BE CITED AS: Punton's Shoes v Citi-Con  
MEDIUM NEUTRAL CITATION: [2020] VSC 514

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ADMINISTRATIVE LAW - Judicial review - Certiorari sought in relation to an adjudication determination - Whether claim under construction contract for return of retention moneys is valued in accordance with the *Building and Construction Industry Security of Payment Act 2002* (Vic) - Whether progress claim for retention is based on a contractual entitlement giving rise to a reference date - Nature of retention and operation of construction contract in relation to retention moneys - Whether under the *Building and Construction Industry Security of Payment Act 2002* (Vic) ss 1, 3, 5, 6, 9, 10, 11, 14(2), 15, 18 and 23, a claim for return of retention is in the nature of a payment claim for construction work carried out and the supply of related goods and services.

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APPEARANCES:

	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr A Morrison	HFW Australia
For the First Defendant	Ms C Jones	Eidelweisz Lawyers Pty Ltd

HIS HONOUR:

**Background**

- 1 On or about 16 December 2016, Punton's Shoes Pty Ltd (plaintiff) and Citi-Con (Vic) Pty Ltd (first defendant) entered into a design and construction contract (Contract)<sup>1</sup> for the first defendant to design and construct a retail and residential building complex, including carpark spaces, at 107-109 Upper Heidelberg Road, Ivanhoe in the State of Victoria (Project).
- 2 The plaintiff is a developer and the first defendant is a commercial and residential builder and the head Contractor on the Project.
- 3 Pursuant to cl 5.5 and item 13 of Annexure Part A to the Contract, the first defendant agreed to provide security under the Contract in the amount of 5% of the contract sum, being \$405,000, in the form of cash retention, with such retention moneys to be reduced to 50% pursuant to cl 5.8 and Item 17 of Annexure part A of the Contract, upon the issue of the Certificate of Practical Completion.
- 4 On 26 September 2019, the first defendant issued a payment claim in the amount of \$222,750.00 (incl GST) (September 2019 Payment Claim)<sup>2</sup> in respect of the return of 50% of the retention money but without any claim in respect of the balance of the Works.
- 5 On 11 October 2019, the plaintiff issued a payment schedule (Payment Schedule) in response to the September 2019 Payment Claim recording the amount payable as 'nil' and scheduling an amount of -\$419,339.50.<sup>3</sup>
- 6 On 25 October 2019, the first defendant issued an adjudication application in relation to its September 2019 Payment Claim.<sup>4</sup>

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1 CB29-138.  
2 CB224-250.  
3 CB251-256.  
4 CB257-273.

7 On 4 November 2019, the plaintiff issued an adjudication response.<sup>5</sup>

8 On 18 November 2019, pursuant to s 23 of *Building and Construction Industry Security of Payment Act 2002* (Vic) (SoP Act), the second defendant (Adjudicator)<sup>6</sup> issued an Adjudication Determination determining that the first defendant was entitled to payment of \$222,750.00 (incl. GST) (November 2019 Adjudication Determination).<sup>7</sup>

9 The plaintiff contends that the November 2019 Adjudication Determination is void or liable to be quashed.

**Plaintiff's application**

10 The plaintiff, by Originating Motion for Judicial Review and Summons, both dated 26 November 2019, seeks:

- (a) an order in the nature of *certiorari* that the November 2019 Adjudication Determination be quashed;
- (b) a declaration that the November 2019 Adjudication Determination is void;
- (c) an order that the first defendant pay the plaintiff's costs of the proceeding and such other orders as the Court deems fit.

11 The plaintiff relies upon the following three grounds to establish that the Adjudicator committed jurisdictional error, or alternatively erred in law:

- (a) failing to determine the amount of the progress payment under the SoP Act;
- (b) taking into account parts of the September 2019 Payment Claim which were excluded amounts under s 10B of the SoP Act; and
- (c) determining that cl 5 of the Contract provided a separate right to payment.

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<sup>5</sup> CB285-306.

<sup>6</sup> By letter dated 29 November 2019 the Adjudicator advised the Court that he does not intend to take any active role in the proceeding and will abide the decision of the Court, save for any costs order being considered against him.

<sup>7</sup> CB322-336.

12 The plaintiff submits that each ground it relies upon can be summarised by the central proposition that the SoP Act does not underwrite parties' obligations generally under a construction contract, rather it provides an alternative statutory pathway for enforcing rights to progress payments. As part of this submission the plaintiff contends that the SoP Act operates alongside, but does not supersede the parties contractual rights.

**Ground 1 - The Adjudicator failed to determine the amount of the progress payment to be made under the SoP Act**

**Plaintiff submissions**

13 The plaintiff submits that cl 42.1 of the Contract does not govern how SoP Act claims are to be valued, and that s 11(1)(b) of the SoP Act applies to the valuation of the September 2019 Payment Claim, requiring the Adjudicator to have regard to: the Contract price; any other rates or prices set out in the Contract; 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, if any of the work is defective, the estimated cost of rectifying the defect.

14 The plaintiff submits that cl 5.8 of the Contract does not provide a standalone entitlement for a claim under the SoP Act, and therefore properly construed the September 2019 Payment Claim is not a quarantined claim for retention moneys only, but is a balancing claim requiring the Adjudicator to value all of the Works in order to determine whether the retention money ought to be paid to the claimant. Accordingly, the plaintiff submits that the September 2019 Payment Claim can be explained on no basis other than that of a balancing claim which seeks to recover, as part of a balancing exercise, the retention money the first defendant claims is payable to it under cl 5.8 of the Contract.

15 Accordingly, the plaintiff submits that the Adjudicator fell into jurisdictional error by failing to determine the value of the September 2019 Payment Claim in accordance with the SoP Act and failing to engage with the plaintiff's submissions as to the existence of defective work which ought to have been taken into account.

**First defendant submissions**

- 16 The first defendant submits that the Adjudicator was entitled to find that the payment of retention money is in the nature of payment for construction works and is claimable under the SoP Act.
- 17 The first defendant submits that cl 5.6 of the Contract provides for a mechanism by which the plaintiff can have made recourse to the security provided under the Contract if it wished to do so, for example for defective works, however it is not in dispute that it did not avail itself of that right.
- 18 The first defendant argues that the September 2019 Payment Claim in issue sought payment of a claimed amount which represented the value of 50% of the retention moneys held under the Contract. The first defendant submits that it did not (as submitted by the plaintiff) seek payment of the unpaid balance of the contract sum or in relation to variations under the Contract.
- 19 The first defendant submits that the plaintiff's position ignores the primacy to be given to the terms of the Contract, and that the first step in valuing the Works the subject of the September 2019 Payment Claim is to ascertain whether the Contract makes provision for the valuation of such work. The first defendant submits that it is only where the Contract makes no provision in relation to the valuation of a progress claim that it is to be valued in accordance with s 11(1)(b) of the SoP Act.
- 20 The first defendant submits that cl 5 of the Contract deals comprehensively with a valuation mechanism in relation to the retention amount agreed upon by the parties and that the Adjudicator discharged his statutory functions by turning his mind to the valuation process and appropriately valuing the September 2019 Payment Claim.
- 21 The first defendant submits that the Adjudicator correctly determined that the only new claim which formed part of the September 2019 Payment Claim was in relation to the return of the retention amount in respect of the value of Works not in dispute. Therefore the first defendant submits it was not necessary for the Adjudicator to value the Contract Works, including defective works, and variations because no such

amounts were claimed by the first defendant.

22 In these circumstances the first defendant submits that the Adjudicator discharged his statutory function by turning his mind to the valuation process and finding that there was a contractual mechanism for valuing retention under cl 5.8 of the Contract, and valuing the September 2019 Payment Claim accordingly.

23 The first defendant further submits that there was nothing in cl 5.8 of the Contract which prohibits it from making a claim for payment in respect of an entitlement to payment of 50% of retention moneys, arising upon certification of Practical Completion under the Contract.

#### **Plaintiff reply submissions**

24 In reply the plaintiff submits that:

- (a) the return of retention money is not in the nature of a progress payment under the SoP Act;
- (b) retention money under the Contract is however relevant in the valuation of a progress payment under the SoP Act;<sup>8</sup> and
- (c) the SoP Act secures only 'progress payments in relation to the carrying out of construction work and the supply of goods and services under a construction contract'.

25 The plaintiff also submits that the contractual right to withhold and draw down upon security and the obligation on the proprietor (here the plaintiff) to return security in the nature of retention money falls outside the SoP Act meaning of 'construction work' and 'related goods and services' as defined in ss 5 and 6 of the SoP Act.

26 The plaintiff submits therefore a contractual provision which relates to payment of security in the nature of retention money, will not trigger a reference date under the

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<sup>8</sup> Plaintiff Reply Submission, 14 April 2020, [2(c)]; T10.

SoP Act because that entitlement is not in respect of 'construction work' or 'related goods and services', which relate to physical exertion of labour and services or the supply of plant and materials.

27 The plaintiff submits that cl 5.8 of the Contract neither deals with an entitlement to a progress payment nor the payment of an amount in relation to a specific item of construction work or related goods and services, and that retention money does not fit into any of the claimable construction work or related goods and services categories identified in ss 5 and 6 of the SoP Act. The plaintiff does not concede that cl 5.8 of the Contract provides the first defendant with any immediately enforceable rights under the Contract, but to the extent the clause does have that effect the plaintiff submits such rights are contractual rights and do not generate any corresponding rights under the SoP Act.<sup>9</sup>

28 In relation to Ground 1, the plaintiff submits that the first defendant's relevant entitlement to a progress payment arose under cl 42.1 of the Contract. The plaintiff also submits that upon the issue of a Certificate of Practical Completion, the first defendant was entitled to a progress payment for 'the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then otherwise due to the Contractor arising out of the Contract'.

29 The plaintiff submits that the proper valuation of the September 2019 Payment Claim required the Adjudicator to have regard to the matters set out in s 10B and s 11 of the SoP Act, including whether the Works were defective and, if so, the estimated cost of rectifying the defect and whether the claim included excluded amounts.<sup>10</sup>

30 Further, the plaintiff identified parts of the September 2019 Payment Claim to which it responded by way of its Payment Schedule disputing the first defendant's entitlements on the basis that they were either excluded amounts (Head Contract

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<sup>9</sup> T7 and 8.

<sup>10</sup> T8.

Variations: Claimed \$285,160.28 – Scheduled \$67,146.85) or related to defective or incomplete<sup>11</sup> work (Contract Works: Claimed \$8,100,000 – Scheduled \$7,734,285.70).

31 The plaintiff submits that the first defendant's balancing claim in the sum of \$202,500.00, plus GST (\$222,750.00) included in the September 2019 Payment Claim as 'Half Retention Release', cannot be separately claimed under the Contract.<sup>12</sup> The plaintiff also submits that its Payment Schedule includes a deduction for the second tranche of retention moneys rather than the first tranche.<sup>13</sup> The plaintiff submits however that this is a matter of inference only.<sup>14</sup>

32 The plaintiff also contends that upon achievement of Practical Completion the plaintiff's entitlement to retention moneys evaporates, by reason of the operation of cl 5.8 of the Contract, and that no automatic entitlement arises in the Contract to claim those retention moneys under the Contract.<sup>15</sup>

33 The plaintiff says that even if cl 5.8 of the Contract did generate an entitlement to make a claim for the first tranche of retention moneys at the time of the issue of the Certificate of Practical Completion, it does not follow that a claim entitlement arises under the SoP Act.<sup>16</sup>

34 The plaintiff, in substance, concedes that although cl 5.8 of the Contract does not give the first defendant an entitlement to make a claim on the retention moneys, such a claim may arise under cl 42.1 of the Contract, with cl 5.8 operating in a way relevant to the valuation mechanisms for a claim under the Contract rather than as a provision of the Contract which gives rise to an entitlement to retention moneys per se.<sup>17</sup>

35 The plaintiff also refers to cl 42.8 of the Contract empowering the Principal to deduct

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11 See also Plaintiff's Adjudication Response, 4 November 2019; CB285-320.

12 T37.7-12.

13 T37.22-24.

14 T37.26-30.

15 T38.19-23.

16 T38.27-31.

17 T40.1-9; T40.11-18.



moneys due from the security held under the Contract and submits therefore that a proper valuation of a claim under cl 42.1 could not be restricted to the issue of retention under cl 5.8 of the Contract.<sup>18</sup>

### **First defendant reply submissions**

36 The first defendant further submits that if retention was not released upon Practical Completion, but rather held as a balancing amount under the Contract, cl 5.8 would be rendered superfluous and there would be no basis for the Contractor to recover retention at the Date of Practical Completion.<sup>19</sup>

### **Ground 2 - The Adjudicator took into account parts of the September 2019 Payment Claim which are excluded amounts under s 10B of the SoP Act**

#### **Plaintiff submissions**

37 The plaintiff submits that the September 2019 Payment Claim contains an amount for variations which were neither first nor second class variations under the SoP Act, and were therefore excluded amounts under s 10B of the SoP Act.

38 The plaintiff submits that the Adjudicator failed to determine whether the September 2019 Payment Claim included amounts which were defined by the SoP Act as excluded amounts because the Adjudicator was of the view that his enquiry was limited only to the operation of the retention clause in cl 5.8 of the Contract. The Adjudicator found that the September 2019 Payment Claim did not include any claim for variations and he was therefore not required to consider whether any variations were excluded amounts under the SoP Act.

39 The plaintiff submits that the Adjudicator erred in failing to consider the plaintiff's position in relation to variation works, and submitted that the November 2019 Adjudication Determination is accordingly void, to the extent that it takes into account excluded amounts.

40 Further, the plaintiff submits that second class variations, as defined in s 10A(3) of

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<sup>18</sup> T40.28-T41.4.

<sup>19</sup> T42.24-31.

the SoP Act, are not claimable as part of the September 2019 Payment Claim because the contract sum exceeds the threshold of \$5,000,000 and cl 47 of the Contract contains a method for resolving disputes under the Contract; therefore the only circumstances in which the claimant could seek to recover such variations, is if they were first class variations. The plaintiff submits that no relevant claimed variations were first class claimable variations under s 10A(2) of the SoP Act, and all such 'variations' are therefore 'excluded amounts' and unable to be claimed under the Act.

### **First defendant submissions**

41 The first defendant relies upon and repeats its submissions in respect of Ground 1 in answer to Ground 2.

42 The first defendant concedes that an Adjudicator must, at a minimum, make a determination as to whether the Works have been performed and their value, and that it is not enough to simply accept one party's claim and reject the other party's claim.

43 In these circumstances the first defendant submits that the Adjudicator reasoned that the September 2019 Payment Claim did not seek to claim any amount for contract Works or variations and therefore, in undertaking the valuation exercise, he was not obliged to consider whether any variations were for excluded amounts. The first defendant submits that having considered the plaintiff's claims in this regard, the Adjudicator appropriately rejected those claims and further the Adjudicator provided detailed reasons as to why those claims were rejected, which reasons did not simply adopt the first defendant's reasoning.

44 The first defendant did not appear to dispute the plaintiff's submissions as to the classification and existence of first or second class variations forming part of the September 2019 Payment Claim.

### **Plaintiff reply submissions**

45 The plaintiff submits that the first defendant's submissions show that its September

2019 Payment Claim sought to recover substantial payment for variation works that constituted excluded amounts under the SoP Act.

46 The plaintiff contends that the Adjudicator erred in not enquiring as to the inclusion of excluded amounts and defective and incomplete Works by dealing only with the retention amount and not valuing the Works or variations to the Works.

**Ground 3 - The Adjudicator erred in determining that clause 5 of the Contract provided a separate right to payment**

**Plaintiff submissions**

47 The plaintiff again relies upon its central proposition that the Adjudicator erred in determining that the first defendant's right to make a claim for the return of retention is independent of the right to make its September 2019 Payment Claim under the SoP Act, and that such finding is fundamentally flawed.

48 The plaintiff submits that in the circumstances the Adjudicator has fallen into error by incorrectly considering that cl 5.8 of the Contract provides for an independent entitlement for a claim to retention money under the SoP Act, rather than being one factor amongst others that are relevant to the proper valuation of a claim.

49 The plaintiff submits that there is no separate right to make a claim for retention sums, and that the first defendant's sole entitlement to recover retention money was to have it included as a relevant consideration in the proper valuation of the September 2019 Payment Claim.

**First defendant submissions**

50 The first defendant relies upon and repeats its submissions in respect of Ground 1 in answer to Ground 3.

51 The first defendant further submits that the Adjudicator was correct in determining that cl 5.8 of the Contract makes express provision for a discrete and separate payment entitlement, such entitlement arising upon the issue of the Certificate of Practical Completion.

52 The first defendant submits that the plaintiff's submission to the effect that the Adjudicator was required to go beyond valuing the amount claimed in the September 2019 Payment Claim to value all of the Works previously claimed by the first defendant under the Contract in order to determine the value of the claimed amount the subject of the September 2019 Payment Claim, is misconceived, and is inconsistent with the objects and purposes of the SoP Act which provide for prompt payment of progress claims under an expeditious process and would lead to commercially absurd results.

53 The first defendant submits that it is clear that the Adjudicator had regard to both cl 5 and cl 42.1 of the Contract, and determined that the first defendant had an independent entitlement to the payment of half the retention amount, apart from its entitlement to payment under cl 42.1.

#### **Plaintiff reply submissions**

54 The plaintiff observes that Ground 3 covers much of the same territory as Ground 1, save that the focus is on the Adjudicator's error in determining that cl 5.8 of the Contract generated a separate right to a progress payment under the SoP Act rather than his failure to properly value the progress payment.

55 In submissions in reply the plaintiff concedes that cl 5.6 of the Contract creates a right for the plaintiff to draw down on the security from time to time, for example, in respect of defective work. The plaintiff however maintains that there is a distinction between the mechanism for calculation of an entitlement, and a right to bring a claim in respect of that entitlement. The plaintiff submits that, construed properly, the effect of cl 5.8 is to bring the cash retention back into the pool of matters to be taken into account in respect of a claim made elsewhere under the Contract.

56 The plaintiff submits further that even were cl 5.8 of the Contract found to generate an independent entitlement to make a claim for retention money upon issue of a Certificate of Practical Completion, which it does not accept, it does not therefore generate an entitlement to make a claim under the SoP Act. The claim arises

elsewhere, under cl 42.1, the relevance of cl 5.8 is part of the valuation mechanism for a claim, rather than an exclusive entitlement in and of itself.

57 As to the first defendant's submission that cl 5.8 governs the valuation of a September 2019 Payment Claim arising under another part of the Contract such that the Adjudicator was not required to consider the default provisions under the SoP Act, if it be accepted that cl 5.8 does not create an independent entitlement to bring a claim, the plaintiff denies this and says that the proper valuation of a claim under cl 42.1 could not be restricted to the issue of retention under cl 5.8.

58 The plaintiff submits that the first defendant's contention that requiring the Adjudicator to value all of the Works previously claimed under the Contract is inconsistent with the objects of the SoP Act, and would lead to commercially absurd results, is irrelevant. The plaintiff submits that the nature of the claim for retention in this case is in substance a balancing claim, entitling the respondent to meet that claim by saying why the claimant ought to be entitled to a lesser sum.

### **Considerations - Ground 1 and Ground 2**

59 For reasons which will become apparent it is convenient to deal with Ground 1 and Ground 2 together.

### **November 2019 Adjudication Determination**

60 The Adjudicator determined that the first defendant is entitled to the release of 50% of the retention due to the issue of the Certificate of Practical Completion, and the Adjudicated Amount is the claimed amount of \$222,750 (incl GST).<sup>20</sup>

61 The Adjudicator found that:

- (a) the Works were certified as having reached Practical Completion on 9 August 2019;
- (b) the first defendant had, to the date of its September 2019 Payment Claim,

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<sup>20</sup> November 2019 Adjudication Determination, [51]; CB325-335.

claimed contract Works in the value of \$8,100,000.00 to which the plaintiff had scheduled responses acknowledging liability to pay \$7,734,285.70, identifying the balance as being in dispute by reason of incomplete work and defects;

- (c) the first defendant had, to the date of its September 2019 Payment Claim, claimed for variations to the Works in the sum of \$285,150.28 to which the plaintiff scheduled responses acknowledging liability for \$67,146.85 in respect of variations on the basis of certain variations being rejected or not substantiated;<sup>21</sup>
- (d) both the first defendant and the plaintiff agreed that the sum of \$202,500.00 had been withheld from progress payments to the first defendant on account of retention under the Contract.<sup>22</sup>

62 The Adjudicator acknowledged that the plaintiff submitted that the Adjudicator was required to have regard to the Payment Claim and the Payment Schedule,<sup>23</sup> and adequately summarised the plaintiff's submissions in the Adjudication.<sup>24</sup>

63 The plaintiff's submissions included submissions that the subject Payment Claim included amounts for disputed variations in the sum of \$218,003.43 and that all of those disputed variations were excluded amounts under the SoP Act and could not be taken into account in relation to the first defendant's adjudication application.<sup>25</sup>

64 The Adjudicator:

- (a) concluded that the September 2019 Payment Claim did not claim any amount for contract works or variations because the first defendant had made those claims previously;<sup>26</sup>

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<sup>21</sup> November 2019 Adjudication Determination, [7].

<sup>22</sup> Ibid [7].

<sup>23</sup> Ibid [9(e)].

<sup>24</sup> Ibid [8]-[10].

<sup>25</sup> Ibid [10(e)-(f)].

<sup>26</sup> Ibid [15].

(b) also recorded that the plaintiff had disputed some of the first defendant's earlier progress claims.<sup>27</sup>

65 The Adjudicator found that the September 2019 Payment Claim was limited to a claim for the retention amount<sup>28</sup> which the first defendant claimed was owing under the Contract, and made no claim against contract amounts or variations.<sup>29</sup>

66 The Adjudicator considered that the first defendant (as claimant) had a right to the return of retention pursuant to cl 5.8 of the Contract at the time of certification of Practical Completion. Further, the Adjudicator determined that the first defendant's right to the return of retention was independent of the progress claim procedures under cl 42.1 of the Contract.<sup>30</sup>

67 The Adjudicator observed:

(a) that retention is an amount withheld from previous progress claims under cl 42.1 of the Contract for previously completed work and that the first defendant had already made its claims for payment for the amounts in respect of which retention had already been retained;

(b) those earlier claims for payment had been made pursuant to cl 42.1 of the Contract and it was not necessary to make a new claim under cl 42.1 of the Contract in relation to payment for retention and indeed to do so would amount to a 'double-up' in relation to claims.

68 Further the Adjudicator concluded that:

(a) under the Contract the plaintiff's right to have recourse to retention is governed by cl 5.6 of the Contract and is independent of any progress claims;

(b) the Contract contained no provision for off-set of amounts which the plaintiff

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<sup>27</sup> Ibid [15].

<sup>28</sup> Ibid [19].

<sup>29</sup> Ibid [17].

<sup>30</sup> Ibid [20].

- might consider were due to it in respect of the retention sum,<sup>31</sup> and
- (c) he did not accept that he was required to value the contract Works to date or variations because there was no claim against those items in the September 2019 Payment Claim;<sup>32</sup>
  - (d) he did not accept that he needed to consider whether any variations are excluded amounts because the September Payment Claim made no claims for variations;<sup>33</sup>
  - (e) he did not accept he was required to consider whether any excluded amounts were claimed in previous payment claims;<sup>34</sup>
  - (f) noted further that the first defendant had not, in its September 2019 Payment Claim, made any claim for variations;<sup>35</sup>
  - (g) no amounts were claimed by the first defendant for contract Works or variations in its September 2019 Payment Claim.

69 In relation to the Adjudicator's evaluation of the September 2019 Payment Claim, the Adjudicator:

- (a) recorded that the first defendant sought payment of 50% of the retention held under the Contract;
- (b) found that under cl 5.8 of the Contract the plaintiff's right to hold retention is reduced by 50% upon the issue of a Certificate of Practical Completion and that such Certificate was issued on 9 August 2019;<sup>36</sup>
- (c) noted that the parties did not dispute that retention had been withheld from

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<sup>31</sup> Ibid [20].

<sup>32</sup> Ibid [21], [22] and [23].

<sup>33</sup> Ibid [22].

<sup>34</sup> Ibid [23(e)].

<sup>35</sup> Ibid [22] and [23].

<sup>36</sup> Ibid [25]-[26].



previous payment claims up to the limit of 5% of the Contract sum, in the total of \$405,000 and concluded that therefore upon the issue of a Certificate of Practical Completion, 50% of that amount became due and payable to the first defendant;<sup>37</sup>

(d) concluded that 'there was no contractual procedure for the Claimant to request or claim the return of retention, and the Respondent's obligation under the Contract was simply to make the payment, without a claim';<sup>38</sup>

(e) also found that retention is payment for construction works, and is therefore claimable under the SoP Act and in the absence of a contractual procedure to claim unpaid retention, the SoP Act provides an available procedure;<sup>39</sup>

70 The Adjudicator rejected the part of the plaintiff's case which sought to off-set amounts the plaintiff believed had been 'over claimed' in previous payment claims in relation to contract Works and variations and found that the plaintiff had no right to set-off against a payment claim for return of retention.<sup>40</sup>

71 The Adjudicator observed that if the Works were incomplete or contained defects, as asserted by the plaintiff, it would be unclear as to why the Superintendent would issue the Certificate of Practical Completion.<sup>41</sup>

72 The Adjudicator also observed that in the event there were unrectified defects the first defendant remains obliged to rectify and further there could be recourse to the remaining retention.

73 The Adjudicator rejected that pursuant to s 11 of the SoP Act he was required to take account of estimated costs of rectifying any defect. The Adjudicator reasoned that s 10 of the SoP Act required the amount of a progress payment to be calculated in

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<sup>37</sup> Ibid [27]-[28].

<sup>38</sup> Ibid [29] and [34]-[36].

<sup>39</sup> Ibid [30].

<sup>40</sup> Ibid [32]-[33].

<sup>41</sup> Ibid [37].

accordance with the terms of the Contract and s 11(1)(a) of the SoP Act also requires construction work to be valued pursuant to the terms of the Contract. The Adjudicator concluded that it is only if the Contract does not provide as to how a progress claim is to be calculated that regard is to be had pursuant to s 11(1)(b) of the SoP Act in relation to the cost of rectifying defects.<sup>42</sup>

74 However, the Adjudicator found that the Contract provides by cl 5.8 that 50% of the retention is to be released at the time of issue of the Certificate of Practical Completion, and concluded that because the only claim made in the first defendant's September Payment Claim is for the release of retention, cl 5.8 of the Contract establishes the way in which the progress payment is to be determined and how the work is valued.<sup>43</sup>

### **Relevant provisions of the SoP Act**

75 As to its purpose the SoP Act provides:

#### **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.

76 As to its object, the Act provide:

#### **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.

77 Section 5 of the SoP Act provides as follows:

#### **Definition of construction work**

- (1) In this Act, "construction work" means any of the following work –
  - (a) the construction, alteration, repair, restoration, maintenance,

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<sup>42</sup> Ibid [47].

<sup>43</sup> Ibid [47]-[48].

- (b) extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not);
  - (c) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for the purposes of land drainage or coast protection;
  - (d) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;
  - (e) the external or internal cleaning of buildings, structures or works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension;
  - (f) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including –
    - (i) site clearance, earth-moving, excavation, tunnelling and boring; and
    - (ii) the laying of foundations; and
    - (iii) the erection, maintenance or dismantling of scaffolding; and
    - (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site; and
    - (v) site restoration, landscaping and the provision of roadways and other access works;
  - (g) the painting or decorating of the internal or external surfaces of any building, structure or works;
  - (h) any other work of a kind prescribed for the purposes of this subsection.
- (2) Despite subsection (1), construction work does not include any of the following work –
- (a) the drilling for, or extraction of, oil or natural gas;
  - (b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose;
  - (c) any other work of a kind prescribed for the purposes of this subsection.

78 Section 6 provides as follows:

**Definition of related goods and services**

- (1) In this Act, “related goods and services”, in relation to construction work, means any of the following goods and services –
- (a) goods of the following kind –
    - (i) materials and components to form part of any building, structure or work arising from construction work;
    - (ii) plant or materials (whether supplied by sale, hire or

- otherwise) for use in connection with the carrying out of construction work;
- (b) services of the following kind—
    - (i) the provision of labour to carry out construction work;
    - (ii) architectural, design, surveying or quantity surveying services in relation to construction work;
    - (iii) building, engineering, interior or exterior decoration or landscape advisory or technical services in relation to construction work;
  - (c) goods and services of a kind prescribed for the purposes of this subsection.
- (2) Despite subsection (1), related goods and services does not include any goods or services of a kind prescribed for the purposes of this subsection.
- (3) In this Act, a reference to related goods and services includes a reference to related goods or services.

79 Section 9 provides as follows:

**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.
- (2) In this section, “reference date”, in relation to a construction contract, means-
- (a) a date determined by or in accordance with the terms of the contract as-
    - (i) a date on which a claim for a progress payment may be made; or
    - (ii) a date by reference to which the amount of a progress payment is to be calculated-

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or
  - (b) subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after-
    - (i) construction work was first carried out under the contract; or
    - (ii) related goods and services were first supplied under the contract; or
  - (c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that-
    - (i) construction work was last carried out under the contract; or

- (ii) related goods and services were last supplied under the contract; or
- (d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following-
  - (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
  - (ii) the issue under the contract of a certificate specifying the final amount payable under the contract a final certificate ; or
  - (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that-
    - (A) construction work was last carried out under the contract; or
    - (B) related goods and services were last supplied under the contract.

80 Section 10 provides as follows:

**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.

81 Section 10B provides as follows:

**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.

82 Section 11 provides as follows:

**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.
- (2) Related goods and services supplied or undertaken to be supplied under a construction contract are 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 goods and services; 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 goods are defective, the estimated cost of rectifying the defect.

83 Section 14 provides as follows:

**14. Payment claims**

- (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
- (2) A payment claim-
  - (a) must be in the relevant prescribed form (if any); and
  - (b) must contain the prescribed information (if any); and
  - (c) must identify the construction work or related goods and services to which the progress payment relates; and

- (d) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount); and
- (e) must state that it is made under this Act.

84 Section 15 provides as follows:

**15. Payment schedules**

- (1) A person on whom a payment claim is served (the respondent) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule-
  - (a) must identify the payment claim to which it relates; and
  - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount); and
  - (c) must identify any amount of the claim that the respondent alleges is an excluded amount; and
  - (d) must be in the relevant prescribed form (if any); and
  - (e) must contain the prescribed information (if any).

85 Section 23 provides as follows:

**23. Adjudicator's determination**

- (1) An adjudicator is to determine-
  - (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount); and
  - (b) the date on which that amount became or becomes payable; and
  - (c) the rate of interest payable on that amount in accordance with section 12(2).
- (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only-
  - (a) the provisions of this Act and any regulations made under this Act;
  - (b) subject to this Act, the provisions of the construction contract from which the application arose;
  - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;
  - (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
  - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
- (2A) In determining an adjudication application, the adjudicator must not take into account-
  - (a) any part of the claimed amount that is an excluded amount; or
  - (b) any other matter that is prohibited by this Act from being taken into account.
- (2B) An adjudicator's determination is void-
  - (a) to the extent that it has been made in contravention of subsection (2);
  - (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

## Relevant clauses of the Contract

86 The Contract provides:

### **2 Interpretation**

'Practical Completion' is that stage in the execution of the work under the Contract when –

- (a) the Works are complete except for minor omissions and minor defects –
  - (i) which do not prevent the Works from being reasonably capable of being used for their stated purpose;
  - (ii) which the Superintendent determines the Contractor has reasonable grounds for not promptly rectifying; and
  - (iii) rectification of which will not prejudice the convenient use of the Works;
- (b) those tests testing which are required by the Contract to be carried out and passed before the Works reach Practical Completion, have been carried out and passed; and
- (c) documents and other information required under the Contract which, in the opinion of the Superintendent, are essential for the use, operation and maintenance of the Works, have been supplied;

### **5.1 Purpose**

Security, retention moneys and performance undertakings are for the purpose of ensuring the due and proper performance of the Contract.

### **5.2 Provision of Security**

If it is provided in Annexure Part A that a party shall provide security then the party shall provide security in the amount stated in Annexure Part A and in accordance with this Clause 5.

### **5.5 Retention Moneys**

Any retention shall be in accordance with Clause 42.1 and Item 15 of Annexure Part A.

### **5.6 Conversion of Security and Recourse to Retention Moneys**

A party may have recourse to security, retention moneys or both and may convert into money security that does not consist of money where –

- (a) the party has become entitled to exercise a right under the Contract in respect of the security, retention moneys or both;
- (b) the party has given the other party notice in writing for the period stated in Annexure Part A or, if no period is stated, 5 days, of the party's intention to have recourse to the security, retention moneys or both; and
- (c) the period stated in Annexure Part A or, if no period is stated, 5 days, has or have elapsed since the notice was given.

### **5.7 Substitution of Security for Retention Moneys**

The Contractor shall be at liberty at any time to provide in lieu of retention moneys, security in any of the forms permitted in Clause 5.3. To the extent that such security is provided, the Principal shall not deduct retention moneys and shall forthwith release retention moneys.

### **5.8 Reduction of Security and Retention Moneys**



Upon the issue of the Certificate of Practical Completion, the Principal's entitlement to security and retention moneys shall be reduced to the percentage thereof stated in Annexure Part A or, if no percentage is stated, to 50 per cent thereof.

Upon the issue of the Certificate of Practical Completion, the Contractor's entitlement to security shall be reduced to the percentage thereof stated in Annexure Part A or, if no percentage is stated, to 50 per cent thereof.

If at any time after Practical Completion the Superintendent is of the opinion that it is reasonable to further reduce the Principal's entitlement to security and retention moneys, that entitlement shall be reduced to the amount which the Superintendent determines to be reasonable.

The Principal shall release security and retention moneys in excess of the entitlement within 14 days of the entitlement being so reduced.

The Contractor shall release security in excess of the entitlement within 14 days of the entitlement being so reduced.

### **5.9 Release of Security and Retention Moneys**

If the Contractor has provided security, retention moneys or both, then the Principal shall release them when required by Clause 42.6. If the Contractor has provided additional security for any item of unfixed plant and materials pursuant to Clause 42.2, the Principal shall release that additional security within 14 days of the incorporation into the Works of the unfixed plant or materials.

If the Principal has provided security, then, when the Contractor has been paid all moneys finally due to the Contractor on any account whatsoever (whether in connection with the Contract or otherwise) the Contractor shall release the security provided by the Principal.

### **42.1 Payment Claims, Certificates, Calculations and Time for Payment**

At the times for payment claims or upon completion of the stages of the work under the Contract stated in Annexure Part A and upon the issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.5, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then otherwise due to the Contractor arising out of the Contract.

If the time for any payment claim under the preceding paragraph falls due on a day which is Saturday, Sunday, Statutory or Public Holiday the Contractor shall submit the claim either on the day before or next following that date which itself is not a Saturday, Sunday, Statutory or Public Holiday.

If the Contractor submits a payment claim before the time for lodgement of that payment claim, such early lodgement shall not require the Superintendent to issue the payment certificate in respect of that payment claim earlier than would have been the case had the Contractor submitted the payment claim in accordance with the Contract.

Within 14 days of receipt of a claim for payment, the Superintendent shall assess the claim and shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the Superintendent's opinion, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall also set out, as applicable, in any payment certificate issued pursuant to Clause 42, the allowances made for -

- (a) the value of work carried out by the Contractor in the performance of the Contract to the date of the claim;
- (b) amounts otherwise due from -
  - (i) the Principal to the Contractor; and
  - (ii) the Contractor to the Principal;
- (c) amounts assessed under Clause 46.4 and not duly disputed;
- (d) amounts paid previously under the Contract;
- (e) amounts previously deducted for retention moneys pursuant to Annexure Part A; and
- (f) retention moneys to be deducted pursuant to Annexure Part A, arising out of the Contract resulting in the balance due to the Contractor or the Principal, as the case may be.

If the Contractor fails to make a claim for payment under this Clause 42.1, the Superintendent may nevertheless issue a payment certificate and the Principal or the Contractor, as the case may be, shall pay the amount so certified within 14 days of that Certificate.

Subject to the provisions of the Contract, within 28 days of receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, and within 14 days of the issue of a Final Certificate, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in such certificate as due to the Contractor or to the Principal, as the case may be, of if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause 42.1 shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or the Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided under Clause 42.6.

#### **42.4 Effect of Certificate**

The issue of a payment certificate or a Certificate of Practical Completion shall not constitute approval of any work or other matter nor shall it prejudice any claim by the Principal or the Contractor.

87 Clause 42.4 of the Contract, being the issue of a Certificate of Practical Completion, does not constitute approval of any work and shall not prejudice any claim by the Principal and cl 42.8 empowers the Principal to deduct moneys due to the Contractor, and if such moneys are insufficient, subject to cl 5.6, have recourse to retention moneys, and if they are insufficient, then to security under the Contract.

88 Annexure Part A of the Contract provides:

**Item 13**

# Contractor shall provide security in the amount of: 5% of the Contract sum in the form of cash retention \$405,000 (Clause 5.2)

**Item 15**

Retention moneys shall be deducted progressively as follows: 10 percent of the value of the work incorporated into the Works until 5 per cent of the Contract Sum is reached (Clauses 5.5 and 42.1)

**Item 17**

The percentage to which the Principal's entitlement to security and retention moneys is reduced: 50% (if nothing stated 50 per cent) (Clause 5.8).

**Clause 30 of the Contract - defective workmanship - incomplete work**

89 Clause 30 of the Contract deals with quality and completion of work.

90 Clause 30.3 empowers the Superintendent, as soon as practicable after discovery thereof, to notify the Contractor in relation to defective or incomplete work and direct rectification and/or completion.

91 Clause 30.4 empowers the Superintendent to decrease the value of the Works having regard to the cost of the Contractor rectifying defective or incomplete work as an alternative to directing rectification by the Contractor.

92 Clause 30.5 provides that the Principal may elect to accept non-compliant material or work and adjust or require payment or allowance by the Contractor for the price thereof.

93 Clause 30.6 further provides a power in the Superintendent to give a direction in relation to defective materials or work. The Superintendent must however do so as soon as practicable after becoming aware of that material or work not being in

accordance with the Contract. The Superintendent may give a direction in that regard at any time before the issue of the Final Certificate under cl 42.6 of the Contract.

### **Purpose of the SoP Act**

94 In essence the purpose and object of the SoP Act is to provide for entitlements to progress payments for persons who carry out construction work or supply related goods and services under a construction contract and to ensure those persons are entitled to receive, and able to recover, progress payments pursuant to the statutory scheme and procedures established by the SoP Act, in a prompt and relatively informal and cost efficient way.

95 Further, in the case of disputes in relation to a payment claim, the Act provides for such disputation to be resolved by an Adjudicator conversant with the Act and the operation and administration of building contracts, on an interim basis, efficiently, promptly, and relatively informally.

96 To achieve the above purpose and object, the SoP Act (and largely congruous companion legislation throughout Australia) establishes, amongst other processes, a self-contained and unique form of adjudication of disputes in relation to payment for construction work and related supply of goods and services.<sup>44</sup>

### **The SoP Act is concerned with payment claim entitlements for construction work or supply of related goods and services under a construction contract**

97 The requirements of the SoP Act include in relation to a payment claim that it:

- (a) must be based on an entitlement to payment in relation to construction work undertaken, or related goods and services supplied, on or from a reference date, in accordance with s 9 of the Act;<sup>45</sup>

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<sup>44</sup> *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* (2005) 62 NSWLR 385, [22].

<sup>45</sup> The reference date referred to in s 9(1) of the SoP Act is that date defined in s 9(2) of the Act, including a date determined in accordance with the terms of the contract as the date on which a claim for a progress payment may be made or by reference to which the amount of a progress payment is to be calculated.

(b) the claimant must serve a payment claim upon the person who, under the construction contract concerned, is or may be liable to pay that claim. Section 14 of the SoP Act provides that a person referred to in s 9(1) of the Act who is, or claims to be, entitled to a progress payment may serve a payment claim under the Act;<sup>46</sup>

(c) the payment claim, amongst other things, must identify the 'construction work' or 'related goods and services' to which the progress payment relates and indicate the amount of the progress payment which the claimant claims.<sup>47</sup>

98 By s 5 of the SoP Act 'construction work' is defined to include a broad range of construction work and by s 6 of the Act 'related goods and services' is defined to include a broad range of goods and services, in relation to construction work.

99 Consistent with the purpose and object of the SoP Act it is clear on the natural meaning of the language employed in the above sections of the Act that a potential claimant's entitlement to a progress payment, and to serve a payment claim under s 14 of the SoP Act, is in respect of construction work and related goods and services undertaken under the relevant construction contract.<sup>48</sup>

100 Further, the requirement in s 14(2) of the SoP Act that a payment claim must identify the construction work and related goods and services to which the progress payment relates and the requirements in s 15(1)(c) and s 15(3) that any payment schedule responding to a payment claim must identify the amount of the claim which the respondent alleges is an excluded amount, and explain why (if applicable) a scheduled amount is less than the claimed amount, also reflect the intent of the Act that:

(a) a progress claim under the Act is to be a claim in respect of construction work

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<sup>46</sup> SoP Act, s 14(1).

<sup>47</sup> SoP Act, s 14(2)(c) and (d).

<sup>48</sup> See also SoP Act, s 9(1); *Grocon (Belgrave St) Developer Pty Ltd v Construction Profile Pty Ltd* [2020] NSWSC 409, [20] and [23]; *Patrick Stevedores Operations No 2 Pty Ltd v McConnell Dowell Contractors (Aust) Pty Ltd* [2014] NSWSC 1413, [32].

or related goods and services undertaken or supplied under the construction contract; and

(b) the content of a progress claim is to be sufficiently detailed in relation to claimed construction work and related goods and services so as to enable the respondent by its payment schedule to comply with the above requirements of s 15(1)(c) and s 15(3) of the SoP Act.

101 Pursuant to cl 42.1 of the Contract the Contractor is entitled to make a progress claim for payment under the Contract in relation to the value of work carried out by the Contractor in the performance of the Contract to the relevant date of claim. Clause 42.1 of the Contract also provides that the Contractor is entitled to include together with its progress claim for the value of work carried out by the Contractor in the performance of the Contract, a claim for all amounts then otherwise due to the Contractor arising out of the Contract.

102 Accordingly, cl 42.1 establishes an entitlement in the Contractor to make a claim for payment in relation to the value of the works carried out by it in performance of the Contract, to the date of that claim, and cl 42.1 also entitles the Contractor to make a claim under that clause for amounts due under the Contract other than a claim for payment for the value of the work carried out in performance of the Contract.

103 Clause 42.1 also provides for the Contractor's claims to be assessed and certified and for that assessment process to make allowance, amongst other things, for retention moneys to be deducted pursuant to cls 5.5 and 42.1 and Item 15 of Annexure Part A of the Contract. It is to be noted that cl 42.1 does not provide for retention moneys to be claimed by the Contractor, or to be paid, or be the subject of an allowance to the Contractor.

**Security by way of retention**

104 Pursuant to cl 5.2, Annexure Part A Item 13, of the Contract the first defendant was obliged to provide security in the amount of 5% of the Contract Sum in the form of cash retention.

- 105 The Contract provides that any retention shall be in accordance with cl 42.1 and Item 15 of Annexure Part A.
- 106 Under cl 5.5 and Item 15 of Annexure Part A that retention money shall be deducted progressively and as certified under cl 42.1 of the Contract. The Contract provides for this deduction to 10% of the value of the Works incorporated into the Works, until 5% of the Contract Sum is reached.
- 107 Accordingly, the retention moneys the subject of the November 2019 Adjudication Determination were progressively provided by way of security under the Contract, from time to time by means of allowances in the nature of deductions made under cl 42.1 of the Contract, in the percentage stated in Annexure Part A, Item 15, and pursuant to cl 5.5 of the Contract.
- 108 The retention moneys so deducted pursuant to cl 5.5, under cl 42.1 and Item 15 of Annexure A of the Contract, were in respect of the certified value of work incorporated into the Works assessed in relation to the Contractor's periodic payment claims under cl 42.1 of the Contract.
- 109 By this agreed contractual mechanism a discrete fund in the nature of retention moneys was established and accumulated to ensure due and proper performance of the Contract by the Contractor.
- 110 Under the scheme of the Contract the retention moneys progressively deducted formed a separate and distinct security fund to ensure performance by the Contractor. The separate and distinct character of the contractual security fund created by the deduction of retention moneys is apparent from the terms and operation of cls 5.1, 5.2, 5.5, 5.6 and 42.8 of the Contract which establish the purpose of that security fund, the contractual mechanism for its accumulation and reduction and the bases upon which recourse may be had to that security fund by the Principal. The Contract makes no provision for a claim in respect of, or for payment to the Contractor in relation to the security fund. Accordingly, any implied right or entitlement there may be in the Contractor to return of a portion of retention moneys

is different in character and distinct from either a claim under the Contract for the value of work carried out or an entitlement under the SoP Act for the value of construction work carried out and related goods and services.<sup>49</sup>

111 In distinction to a payment claim entitlement, the Contract does provide a mechanism to adjust the parties' entitlements in relation to moneys deducted by way of retention. Any sum held by way of retention is to taken into account in the Final certification process under cl 42.6 of the Contract and thereby accounted for in the amount ultimately payable as between the Contractor and the Principal on the final reconciliation of each parties entitlements under the Contract. The retention deduction, reduction, recourse and security related provisions of the Contract do not contemplate or accommodate payment claims by the Contractor for contract work undertaken or related goods and services supplied.

112 For the above reasons, and in particular because the Contract, including the progress payment provisions in cl 42.1 of the Contract make no provision for the return or payment of retention moneys, any implied entitlement to return of retention moneys upon the issue of the Certificate of Practical Completion under the Contract, or adjustment under cl 42.6, is not in the nature of a progress payment entitlement in relation to work carried out by the Contractor in the performance of the Contract.

113 Neither, for the same above reasons, is the first defendant's September 2019 Payment Claim under the Contract for return or payment of half retention moneys in the nature of a payment claim under the SoP Act for construction work or related goods and services undertaken and provided under the Contract. This is so irrespective of whether the first defendant was able to establish a valid reference date, and any implied or other foundation for its claim to be paid half the deducted retention moneys.

114 Further, it follows from the conclusions in the last three preceding paragraphs that

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<sup>49</sup> *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, [59]-[60].



there can also be no relevant reference date under s 9 the SoP Act because a relevant reference date under the Act is determined on the basis of a progress payment entitlement in respect of construction work undertaken or the supply of related goods and services under the construction contract. The September 2019 Payment Claim does not make a claim for an entitlement of this type.

**The September 2019 Payment Claim**

115 The first defendant's September 2019 Payment Claim simply identified its retention claim in the sum of \$202,500.00 calculated as 2.5% of \$8,100,000 (Contract Sum).<sup>50</sup>

116 The September 2019 Payment Claim<sup>51</sup> also claimed 100% completion of Items 1 to 26 inclusive in the sum of \$8,385,150.28. This claim included in Item 26, a claim for variations \$285,150.28.

117 It is in my view important to note that 2.5% retention sum (\$202,500) is calculated on the total claimed Contract Sum (\$8,100,000). There are at least two matters which are of particular significance in relation to this calculation and claim. The first is that the sum of the retention claimed is notionally made up of the retained percentage of many presently unidentifiable progress claim items, and certifications over the life of the Contract. The other is that in its Payment Schedule the plaintiff disputes more than \$365,000 of the Contract Sum on which the return of retention claim is based.

118 The September 2019 Payment Claim did not base or calculate the claim for retention of 2.5% of \$8,100,000, on any part of Item 26 of the Payment Claim, which was the first defendant's claim in relation to 'The Variations' (\$285,150.28).<sup>52</sup>

119 The plaintiff asserts that the sum of \$202,500<sup>53</sup> is a 'deduction rather than an addition, and therefore it should be read as referring to a second tranche of retention moneys that is payable on final certificate'.<sup>54</sup> This submission was however both

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50 CB224.

51 CB224-250.

52 CB224, '2.5% of \$8,100,000.00, which excluded Item 26 Variations (\$285,150.28)'.

53 CB224.

54 T36.22-28.

lightly and equivocally pressed. In any event I am not persuaded that the reference by the first defendant in its September 2019 Payment Claim to the sum of \$202,500 is a reference to the remaining half of the retention moneys, nor do I think this would matter, given my above conclusions in relation to the First Ground of appeal advanced by the plaintiff.

### **The Payment Schedule**

- 120 The plaintiff observes that its responsive Payment Schedule<sup>55</sup> includes a line item in response to the first defendant's variations claim in the sum of \$285,150.28, in which the plaintiff scheduled an amount of \$67,146.85.
- 121 The plaintiff's Payment Schedule<sup>56</sup> refers to defective and incomplete works as a reason for reductions from the September 2019 Payment Claim. Those scheduled reductions are asserted by the plaintiff as justifying the difference between the first defendant's claimed amount in the sum of \$8,100,000.00 and the plaintiff's scheduled amount in the sum of \$7,734,285.70.
- 122 The plaintiff's Payment Schedule raised disputes in relation to items which made up the first defendant's claim of \$8,100,000 in respect of contract works. The scheduled items in dispute detail many deductions which the plaintiff asserted should be made on account of defective and incomplete work.<sup>57</sup> The plaintiff's Payment Schedule also disputed the first defendant's variations claim in the sum of \$285,150.28 and detailed deductions which the plaintiff asserted should be made, including on account of the inclusion of excluded amounts in the first defendant's claim.<sup>58</sup> Because the first defendant had calculated the percentage it claimed as its entitlement to half return of retention on the entire sum of its claim for contract works, the disputes scheduled by the plaintiff as to what sum was rightly payable for those works impugned, and put in issue in the Adjudication, the first defendant's

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55 CB251-256.

56 CB253-256.

57 CB253-254.

58 CB255-256.

claim for payment of half the retention moneys.

123 However the Adjudicator took the view that the issue of a Certificate of Practical Completion accepted that the Works were satisfactorily completed except for minor omissions and minor defects (Contract cl 2 'Practical Completion') and further noted that pursuant to provisions including cl 42.8 of the Contract, the Principal is entitled to have recourse to the remaining retention moneys provided by way of security after the date of Practical Completion, including in the event of the Contractor failing to complete minor omissions and minor defects.

124 The Adjudicator's above observations and conclusion concerning the operation of contractual provisions, including those potentially relevant to the final resolution of the parties' rights and entitlements in respect of defective and incomplete work, do not displace the Adjudicator's obligations under the separate processes and requirements of the SoP Act concerning the valuation of construction work undertaken and related goods and services supplied.<sup>59</sup>

125 The statutory entitlement to progress payments is separate from, and in addition to, the plaintiff's entitlement under the Contract to receive payment for completed work.<sup>60</sup>

126 In this regard the entitlement to progress payment under the SoP Act, and the statutory means available to enforce such entitlement, stand apart from the rights and entitlements under the Contract.<sup>61</sup> The Act however integrates with the applicable construction contract in the respects provided for in the Act, including in relation to the identification of a reference date and the valuation of construction work and related goods and services.

127 Under the SoP Act the Adjudicator is required to determine the adjudication

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<sup>59</sup> *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, [59]-[60]; *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In Liq)* (2019) 99 NSWLR 317, [225].

<sup>60</sup> *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd & Anor* (2018) 264 CLR 1, 38.

<sup>61</sup> *Ibid*; *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* (2005) 62 NSWLR 385, [22].

application, and in doing so:

- (a) to determine whether construction work has been carried out and whether related goods and services have been supplied under the relevant construction contract and value such construction work and related services (s 11(1) and (2), SoP Act);
- (b) to consider certain matters, including pursuant to s 23(2) and (2A) of the SoP Act:
  - (i) the provisions of the construction contract;
  - (ii) the applicant's claim, and submissions and relevant documentation in support of the claim;
  - (iii) the respondent's payment schedule, and submissions and documentation in support of the payment schedule;
  - (iv) and not to take into account any part of the claimed amount that is an excluded amount or other matter prohibited from being taken into account;
- (c) to value construction work and related goods and services in accordance with the terms of the construction contract, or if the contract makes no express provision in relation to valuation, having regard to the contract price for the work, any other rates or prices set by the contract, making appropriate adjustments for any variations and the estimated cost of rectifying any defective work (s 11, SoP Act);
- (d) to determine the amount of the progress payment to be paid by the respondent to the claimant, the date that amount became due, and the rate of interest payable on that amount (s 23(1), SoP Act).

128 To enable the Adjudicator to undertake the statutory tasks required above, the SoP Act also provides that:

SC:

- (a) the claimant's payment claim, must, amongst other things identify the construction work or related goods and services to which the progress payment relates (s 14(2) SoP Act );
- (b) the respondent's payment schedule must, amongst other things, identify any amount which the respondent alleges is an excluded amount (s 15(2), SoP Act);
- (c) the respondent's payment schedule must indicate why the scheduled amount is less than the claimed amount, and the respondent's reasons for withholding payment (s 15(3), SoP Act).

129 In the subject Adjudication the plaintiff's Payment Schedule identified the amounts:

- (a) it had deducted from the September 2019 Progress Claim, including in relation to defective or incomplete work claimed by the plaintiff;<sup>62</sup>
- (b) the first defendant alleged were excluded amounts.<sup>63</sup>

130 In this case the Adjudicator unequivocally failed to consider, value, or determine either the claimant's payment scheduled items of defective and incomplete work or the excluded amounts which the plaintiff's Payment Schedule identified in response to the September 2019 Payment Claim.<sup>64</sup>

131 Accordingly, the Adjudicator did not in the process of his Adjudication Determination consider, value or determine the value of the construction work and related goods and services as he was required to do by the SoP Act, and thereby fell into jurisdictional error. Further, in failing to proceed as required by the Act the Adjudicator also disregarded the plaintiff's Payment Schedule and the plaintiff's submissions.

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<sup>62</sup> CB252-254.

<sup>63</sup> CB 255-256 , see examples 'VOs' # 34, # 35 and # 36.

<sup>64</sup> November 2019 Adjudication Determination, [23(d) and (e)].

- 132 I reject the first defendant's fundamental argument that the detailed reasoning of the Adjudicator established that the Adjudicator discharged his functions by turning his mind to the valuation process and valuing the amount claimed by the first defendant in relation to its 'Retention Payment Claim'.<sup>65</sup>
- 133 For the reasons earlier referred to I consider that the Adjudicator erred in not turning his mind to the valuation process, and not valuing the first defendant's claim in relation to the construction work carried out under the Contract as he was required to do pursuant to s 11(1)(b) of the SoP Act. The Adjudicator failed to consider matters which the Act required him to consider, including the value of any work which was defective, as required under ss 10B and 23(2A) of the Act by considering and determining the plaintiff's Payment Schedule identifying excluded amounts and ensuring that he did not take into account the value of any excluded amount.
- 134 The first defendant's fundamental argument referred to above is also unpersuasive because it fails to recognise that the entitlement created by the SoP Act is in respect of the value of construction work carried out under the construction contract, payable on and from each reference date under the construction contract, and not as the first defendant itself adopts from the Adjudication Determination and submits, the right, separate to and independent of the progress claim procedures under cl 42.1 of the Contract, to the return of half of the retention money upon the issue of the Certificate of Practical Completion.<sup>66</sup>
- 135 As earlier noted, the Adjudicator expressly confirmed in the November 2019 Adjudication Determination that he had not valued the Contract work or the variations, because no amounts were claimed against them. The Adjudicator also expressly confirmed that he did not consider whether excluded amounts were claimed in previous progress claims.<sup>67</sup>

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<sup>65</sup> First Defendant Submissions, 31 March 2020, [13]; T18-23.

<sup>66</sup> First Defendant Submissions, 31 March 2020, [14(c)].

<sup>67</sup> November 2019 Adjudication Determination, [23(d) and (e)].

136 The first defendant's case also fails to recognise that the Adjudicator was obliged by s 23(2)(d) of the SoP Act to consider matters, including the plaintiff's Payment Schedule, relevant documentation and the plaintiff's submissions in the Adjudication. It is clear from the above confirmations by the Adjudicator, coupled with the fact that the plaintiff's Payment Schedule detailed many items of alleged defective and incomplete work and also items which were in the nature of excluded amounts, that the consideration and valuation process required of the Adjudicator by s 23(2)(d) of the SoP Act did not occur.

137 In my view it is no answer to the above for the first defendant to submit that the Adjudicator was correct in taking that approach because the first defendant's claim was solely in relation to return of retention money no valuation of the contract work or variations was necessary. In my view this misconception underscores the likely reason why the considerations and valuations required by the SoP Act were not undertaken by the Adjudicator. That is, the valuation process required by the Act was not apposite to a Payment Claim for half the security fund; a claim which was not of the character of a progress payment claim for construction work and related goods and services but a different type of claim to part of the accumulated security fund provided by periodic deduction of retention moneys.

138 It is because a claim for payment of half retention under this Contract is not in the nature of a progress payment claim under the SoP Act that the inconsistencies and commercially absurd results suggested and relied on by the first defendant would not arise and are irrelevant.<sup>68</sup>

139 I consider that as a result of both the first defendant's September 2019 Payment Claim not being in the nature of a claim for construction work and related goods and services as required by the SoP Act, and the Adjudicator's failures to consider and determine that Payment Claim in compliance with the SoP Act, Ground 1 is made out, and although therefore it is not strictly necessary to reach a conclusion as

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<sup>68</sup> First Defendant Submissions, 31 March 2020, [17]-[21].

to Ground 2, I am also satisfied that Ground 2 is made out.

### Conclusions

**Ground 1 and Ground 2 - The Adjudicator failed to determine the amount of the progress payment to be made under the SoP Act and the Adjudicator took into account parts of the September 2019 Payment Claim which are excluded amounts under s 10B of the SoP Act**

140 For the above reasons I find that:

- (a) the first defendant's September 2019 Payment Claim was not a valid payment claim in relation to construction work or the provision of related goods and services under the Contract or the SoP Act;
- (b) the Adjudicator failed to value and determine the amount of the September 2019 Payment Claim as required by the SoP Act and thereby fell into jurisdictional error.

141 Accordingly, the November 2019 Adjudication Determination is void and must be quashed.

142 The above decisions in relation to Ground 1 of this appeal renders it strictly unnecessary to deal with Ground 2, however for completeness and for the reasons earlier outlined, I also uphold Ground 2 of the plaintiff's Originating Motion.

### Conclusions

**Ground 3 - The Adjudicator erred in determining that clause 5 of the Contract provided a separate right to payment**

143 The foregoing conclusions and decisions in relation to Ground 1 and Ground 2 renders it unnecessary to deal with or decide Ground 3.

### Decision

144 For the above reasons I find that Grounds 1 and 2 of the plaintiff's Originating Motion for Judicial Review dated 26 November 2019 are made out, and the plaintiff is entitled to the relief which it seeks based on those Grounds.



145 Accordingly, the November 2019 Adjudication Determination is void and must be quashed.

**Orders**

146 Accordingly, I order that:

- (a) The Adjudication Determination of the second defendant dated 15 November 2019 is declared void and is hereby quashed.
- (b) Pursuant to Rule 79.02 of the *Supreme Court (General Civil Procedure) Rules 2015*, the Senior Master of the Supreme Court of Victoria pay out to the plaintiff the sum of \$225,654.00 (subject to tax liability), which amount was paid into Court by the plaintiff by Orders made on 13 December 2019, and any interest allocated or received in respect of that amount.
- (c) The first defendant pay the plaintiff's costs of the proceeding:
  - (v) on a standard basis, to be taxed in default of agreement, up until 11.00am on 22 January 2020; and
  - (vi) the remainder of the costs of the proceeding on an indemnity basis to be taxed in default of agreement.
- (d) The first defendant be granted an Indemnity Certificate pursuant to s 4 of the *Appeal Costs Act 1998* (Vic).