KEY 2020 VICTORIAN CASES

Punton's Shoes Pty Ltd v City-Con Pty Ltd [2020] VSC 514

The Claimant, who entered into a construction contract with the Respondent, issued a payment claim for the amount of $222,750.00. The amount claimed was for the return of 50% of retention monies, on the basis that a certificate of practical completion had been issued. The payment claim did not include any amount in respect to the balance of the contract works. The Respondent issued a payment schedule for the amount of ($419,340.00) which referred to deductions for defective and incomplete works and disputed variations. The Claimant referred its payment claim to adjudication. The Adjudicator determined that the Claimant was entitled to the claimed amount. The Respondent applied for judicial review of the adjudicator's determination.

The Adjudicator's Determination

In arriving at his determination, the Adjudicator noted that:

(a) the retention was an amount withheld from previous progress claims from previously completed work and that the Claimant had already made claims for payment for the amounts in respect of which retention had already been retained; and

(b) those earlier claims for payment had been made pursuant to the relevant clause in the Contract and that it was therefore not necessary to make a new claim in relation to payment for retention. Indeed, to do so would amount to a "double-up" in relation to those claims.

The Adjudicator accordingly went on to conclude that:

(a) under the Contract, the Respondent's right to have recourse to retention was governed by the specific provision within the contract and was independent of any progress claims;

(b) the Contract contained no provision for off-set of amounts which the Respondent might consider were due to it in respect of the retention sum;

(c) he was not required to value the contract works carried to date or the value of variations because there was no claim against these items in the payment claim;

(d) he did not need to consider whether any variations were excluded amounts because the payment claim made no claims for variations;

(e) he was not required to considered whether any excluded amounts were claimed in previous payment claims;

(f) retention is payment for construction works, and is therefore claimable under the Act and, in the absence of a contractual procedure to claim unpaid retention, the Act provides an available procedure;

(g) in the event that there were unrectified defects, the Claimant remained obliged to rectify such defects and, further, there would be recourse to remaining (50%) retention; and

(h) he was not required him to take account of the estimated cost of rectifying defects because section 10 of the Act required the amount to be calculated in accordance with the terms of the Contract and section 11(1)(a) also required construction work to be valued pursuant to the terms of the Contract. It is only if the Contract does not provide as to how progress claims are to be calculated that regard is to be had pursuant to section 11(1)(b) of the Act in relation to the cost of rectifying defects.

The Respondent's grounds for Judicial Review

In applying for judicial review, the Respondent argued that the Adjudicator had:

(a) failed to determine the amount of the progress payment to be made under the Act, because:

(i) there is no provision within the Contract that governs how Security of Payment claims are to be valued and that accordingly, section 11(1)(b) of the Act ought to have been applied in the valuation of the payment claim; and

(ii) the relevant retention clause does not provide a standalone entitlement for a claim under the Act and therefore, properly construed, the payment claim is not a quarantined claim for retention monies, 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;

(b) he had taken into account parts of the payment claim which were excluded amounts under section 10B of the Act, because the adjudicator was of the view that his enquiry was limited only to the operation of the relevant retention clause of the contract. The Respondent argued that the adjudicator had erred in not enquiring as to the inclusion of excluded amounts and defective and incomplete works by not valuing the works, or the variations to the works; and

(c) erred in determining that the relevant retention clause provided a separate right to payment. According to the Respondent, the claim to retention money was one factor that was relevant to the proper valuation of a payment claim. In other words, the Respondent argued that the Claimant's sole entitlement to recover retention money was to have it included as a relevant consideration in the proper valuation of the payment claim.

Decision of Digby J

In quashing the Adjudicator's determination, Digby J noted that under the relevant payments clause, the Claimant was entitled to make a progress claim for payment in relation to the value of work carried out in the performance of the contract to the relevant date of the claim. The payments clause also provided the Claimant with the entitlement to include, together with its progress claim for the value of work carried out in performance of the Contract, a claim for all

amounts then otherwise due to the Claimant arising out of the Contract. His Honour also noted that under the retention clause retention moneys were to be deducted progressively as certified until 5% of the contract sum had been reached:

> *"108. The retention moneys so deducted pursuant to cl 5.5, under cl 42, 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 form 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.*
>
> *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 there can also be no relevant reference date under s 9 of 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." (emphasis added)

Insofar as the Adjudicator took the view that the issue of the Certificate of Practical Completion showed that the works were satisfactorily completed except for minor omissions and minor defects, then this did not displace the Adjudicator's obligations under the separate processes and requirements of the Act concerning the valuation of construction work undertaken and related goods and services supplied. This is because the statutory entitlement to progress payments is separate from, and in addition to, the Claimant's entitlement under the contract to receive payment for completed work:

"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.

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.

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'.

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.

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.

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.'(emphasis added)

Thus, as a result of the Claimant's payment claim not being in the nature of a claim for construction work and related goods and services as required under the Act, and the Adjudicator's failures to consider and determine that payment claim in accordance with the Act, Digby J held that the Respondent's first ground for appeal had been applied and, although not strictly necessary to reach a conclusion on the second ground, his Honour was also satisfied that the second ground had also been made out. Given his conclusions, his Honour stated that it was not necessary to deal with the third ground of appeal, viz: that the Adjudicator had erred in determining that the retention clause provided a separate right to make a payment claim under the Act.

Commentary

Digby J's decision underscored the fact that the purpose of the SoP Act is to provide an entitlement to progress payment for persons who carry out construction work or supply related goods and services under a construction contract, and to provide a rapid adjudication process to enable such persons to recover such entitlement. Digby J however considered that the Claimant's claim for the return of one-half of the retention moneys cannot be construed to be in the nature of a claim able to be made under the Act because it was not a payment claim for construction work/related goods and services undertaken, but rather a claim for payment from a discrete fund that had been established to ensure the contractor's due and proper performance under the contract. In any event, his Honour found that the Contract did not provide for the Claimant to be able to claim for the retention moneys. Accordingly, insofar as the Claimant had made a claim solely for an amount representing 50% of the retention moneys, then that was not a claim able to be made under the Act and that therefore the payment claim was invalid.

There is a further aspect relating to this case that needs to be highlighted. His Honour emphasised that the Adjudicator's determination was also void because of the Adjudicator's failure to discharge the specific functions prescribed under the Act. In this regard, Digby J emphasises that these functions included the following:

(a) to determine whether construction work had been carried out and whether related goods and services had been supplied under the relevant contract and the value of such construction work/related goods and services (s 11(1) and 11(2)); and

(b) to value the construction work/related goods and services in accordance with the terms of the contract, or, if the contract makes no express provision, then having regard to the various matters set out in s 11(1)(b)(i) to (iv) / s11(2)(b)(i) to (iv).

Further (and this is important), in carrying out the above tasks the Adjudicator must not take into account *"any part of the claimed amount that is an excluded amount"* (s 23(2A)). Given not only that the Claimant's claim for 50% of the retention money had been based on the adjusted Contract sum which included variations which in its payment schedule the Respondent had stated to have included excluded amounts **and** given that the Adjudicator had expressly stated in his determination that he considered that he was not required to value the contract works carried out to date (because there was no claim for such item) nor consider whether any variations were excluded amounts (again because the payment claim was only in relation to retention moneys and not for variations) Digby J held that the Adjudicator's failure to discharge his required statutory duties meant that the Adjudicator fell into jurisdictional error.

Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd [2000] VSC 414

Background

Under the Subcontract entered into between the head contractor (Watpac) and the mechanical services contractor (Collins & Graham Mechanical ("CGM")), clause 38.6 enabled the head contractor to terminate the Subcontract for convenience *"by written notice…at any time for any reason"*. Clause 38.7 of the Subcontract provided however that:

> *"If Watpac purports to terminate the Subcontract and a court or other relevant tribunal determines that such purported termination was wrongful, or if Watpac is found to have repudiated the Subcontract and the Subcontractor elects to treat the Subcontract as at an end, then such termination or election shall be deemed to be termination by Watpac under clause 38.6 and the Subcontractor shall have no entitlement arising out of or in connection with such purported termination or election other than as provided in clause 38.6."*

On 8 August 2019, Watpac served a Take Out Notice in which it purported to exercise its right to take out of CGM's hands all works that remained to be completed under the Subcontract. The Take Out Notice relied on the following acts of default:

(a) breach of conditions & warranties;

(b) failure to proceed with due expedition and without delay;

(c) failure to use materials or standards of workmanship required by the Subcontract; and

(d) failure to comply with the direction of Watpac.

On 19 August 2019, CGM responded to the Take Out Notice and the alleged acts of default. CGM asserted that the Take Out Notice was a repudiation of the Subcontract, which it accepted and terminated the Subcontract. On 5 September 2019, Watpac refuted CGM's responses and maintained that the Take Out Notice was lawful and justified.

On 19 November 2019, CGM served a payment claim on the Claimant, claiming an amount of $935,643.00. Watpac replied by way of a payment schedule that scheduled a $nil amount. CGM referred its payment claim to adjudication and, on 10 January 2020, the Adjudicator determined that CGM was entitled to an adjudicated amount of $329,818.00.

Adjudicator's Determination

In arriving at his determination, the Adjudicator concluded that he had jurisdiction because:

(a) Clause 38.6 provided, in part, that CGM must make a claim for payment for any amount due to it under clause 38.6 within 28 days after receiving the notice referred to under that clause; and

(b) Clause 38.6 had been triggered by clause 38.7 because the Take Out Notice effected a repudiation by Watpac of the Subcontract, which CGM had elected to accept on 19 August 2019.

Respondent's grounds for Judicial Review

Watpac applied for judicial review arguing that the Adjudicator did not have jurisdiction to make a determination as there was no reference date referrable to the payment claim because under clause 38.7, the right to make a payment claim could only arise after a finding of repudiation and there was no such finding made before the service of the payment claim. CGM argued that a proper interpretation of clause 38.7 right arose on the election to terminate for repudiation and not on a finding of repudiation. This was because, on Watpac's construction, clause 38.7 would violate section 48 of the Act because if the reference date did not arise until the determination or finding of repudiation, it would be delayed for a very long period and such inordinate delay would modify the operation of the Act.

Riordan J's Decision

Riordan J held that clause 38.7 of the Subcontract contravened section 48 of the Act because, in effect, that clause would require a subcontractor to either:

(a) file a proceeding seeking declaration of wrongful termination or repudiation; or

(b) incorporate a claim for such a declaration in a construction dispute after the completion of a project

prior to making a payment claim under the Act.

> *"In my opinion to effectively delay a right to a progress payment until a decision is made by a court or a tribunal on a substantial issue such as repudiation is directly inconsistent with the purposes of the Act and, if applied in its terms, would have the effect of excluding, modifying or restricting the operation of the Act, within the meaning of s 48 of the Act."*[1]

[1] At [57].

Watpac Construction Pty Ltd v Collins & Graham Mechanical Pty Ltd [2020] VSC 637

This decision comprises of two parts. The first relates to the Respondent's application for judicial review of the Adjudicator's determination relating to an earlier payment claim that the Claimant had referred to adjudication. The second part of this decision (and perhaps, more significantly) relates to an application for judgment made by way of a cross-application under s 16(2)(a)(i) of the Act against the Respondent on the basis that the Respondent had failed to issue a payment schedule to the Claimant's payment claims.

A. Re: Judicial Review of the Adjudicator's Determination

On 25 July 2019, the Claimant issued a payment claim under the Act seeking payment of $1,747,476.00 (July Payment Claim). On 8 August 2019, the Respondent issued its payment schedule in response, scheduling a negative amount of $1,903,718.00. The payment schedule included a deduction of $530,000.00, which was stated to be *"the maximum amount that can be held on this payment claim for the purposes of retention"*. Also, on 8 August 2019, the Respondent issued a Take Out Notice under clause 38.5 of the Subcontract. On 19 August 2019, the Claimant issued a Termination Notice disputing the validity of the Take Out Notice and terminating the Subcontract based on what it said was the Respondent's repudiatory conduct. The Claimant then referred its July Payment Claim to adjudication.

In his determination, the Adjudicator found that:

(a) the due date for payment of the adjudicated amount was 8 August 2019;

(b) the due date for payment of 8 August 2019, arose prior to the effect of the Take Out Notice (also on 8 August 2019) that the Respondent had issued under the Subcontract; and

(c) clause 5.6 of the Subcontract, read together with the relevant Items in Schedule 1 of the Subcontract was in the nature of a "pay when paid" provision and that therefore the amount of retention monies of $530,000.00 claimed by the Respondent as a deduction under the Subcontract was not contractually deductable.

The Respondent applied for judicial review, primarily on the following grounds:

(a) The Adjudicator committed jurisdictional error in determining that the Subcontract made no express provision for the date on which the progress payment in issue became due and payable. In so determining the Adjudicator had incorrectly applied s 12(1)(b) of the Act and wrongly determined that the date for payment of the progress payment under the Subcontract was 8 August 2019;

(b) The Adjudicator committed jurisdictional error by finding that the date for payment was 8 August 2019 and had also erred in finding that clause 38.5 of the Subcontract did not affect the Claimant's entitlement to payment of the July Payment Claim because the Respondent's contractual Take Out Notice was issued later on 8 August 2019 and after the accrual of the Claimant's entitlement to the July Payment Claim; and

(c) The Adjudicator committed jurisdictional error because he had failed, pursuant to s 23 of the Act, to compliantly determine the amount of progress payment to be paid to the Claimant, and wrongly decided that clause 5.6 of the Subcontract was a "pay when paid" provision and also wrongly decided that past "back-charges" earlier set off against the Claimant should be reversed.

In relation to the first ground, clause 36.4 of the Subcontract provided:

> *"**36.4 Payment***
> *If Watpac in its payment schedule (including the final payment schedule under clause 36.9), determines an amount as payable by:*
>
> *(a) Watpac to the Subcontractor, Watpac must (subject to clauses 36.13 and 36.14) pay the Subcontractor the amount assessed within the period stated in schedule 1 (or whether the Subcontractor does not make a payment claim and Watpac nevertheless issues a payment schedule, within 30 Business Days of the payment schedule); or*
>
> *(b) The Subcontractor to Watpac, the Subcontractor must pay Watpac the amount assessed within 5 days of the issue of the payment schedule.*
>
> *To the maximum extent permitted by Law, notwithstanding any other provision of the Subcontract, the Subcontractor is not entitled to submit a payment claim and shall have no Entitlement to any payment under the Subcontract in respect of Defects or any part of the Work Under the Subcontract or the Subcontract Works that contains a Defect.*
>
> *Schedule 1 of the Subcontract states as follows:*
>
> *Time for payment: (clause 36.4(a)) The later of: 1. [insert]; and*
>
> *[If nothing stated in paragraph 1 above, the first working day on or after the 38th day from the end of the month in which the payment claim was submitted.]*
>
> *2. the date that the Subcontractor has complied with the clauses referred to in Schedule 7."*

The Adjudicator gave the following reasons for determining that the relevant date for payment under the Subcontract was 8 August 2019:

> *"(a) Clause 36.4(a) of the contract applies when Watpac issues a payment schedule where it is to make payment of an amount to CGM, the payment schedule amount. In that case the payment would be due, 'the first working day on or after the 38th day from the end of the month in which the payment claim was submitted'. If clause 36.4(a) was to apply, the due date for payment would be 9 September 2019; however,*
>
> *(b) Watpac, in its payment schedule, has determined that an amount is payable by CGM to Watpac, accordingly 36.4(b) of the Contract would apply and that would provide the due date for payment as being by 13 August 2019; however,*

(c) In this instance, there is (or will be) an adjudicated amount that is either nil or is a positive figure (the adjudicated amount has not yet been determined) that the respondent is to pay to the claimant. As it is not a payment schedule amount (as required by clause 36.4 of the contract), it is an adjudicated amount, and the contract does not make an express provision for the due date for payment (as required by s 12(1)(a) of the Act.

(d) Accordingly, s 12(1)(b) of the Act would apply, this provides for the due date for payment being 10 business days after the payment claim was made (25 July 2019 + 10 business dates) 8 August 2019 (in accordance with the previous adjudicator(s) timing)."

Digby J agreed that the Adjudicator was correct in his conclusions that:

(a) Clause 36.4(a) of the Subcontract applies only if and when the Respondent issues a payment schedule pursuant to which the Respondent has determined that an amount is payable to the Claimant;

(b) Clause 36.4(b) of the Subcontract applies only in circumstances where the Subcontractor is required to make a payment to the Respondent;

(c) The Subcontract makes no provision for the date on which the Subcontractor's claim becomes due and payable where the Respondent issues a payment schedule which does not determine an amount payable by the Respondent to the Subcontractor;

(d) In the above circumstances, s 12(1)(a) of the Act does not apply, but s 12(1)(b) of the Act applies to fix the date when the Claimant's progress payment entitlement becomes due and payable; and

(e) By reason of s 12(1)(b) of the Act the date when the progress payment under the Act becomes due and payable was 8 August 2019.

Thus, even though Digby J did not accept the Adjudicator's reasoning in respect to how he arrived at his conclusion in respect to (c) above, his Honour held that what mattered was that the Adjudicator arrived at the proper conclusion:

"Accordingly, in my view, the (Respondent's) submission … does not establish any error by the Adjudicator in including in relation to the Adjudicator's ultimate conclusion and determination as to the application of s 12(1)(b) of the (Act) fixing 8 August 2019 as the date on which the (Claimant's) July Payment Claim was payable.

…

I consider that the Adjudicator was correct to conclude and determine that because in the applicable circumstances the Subcontract did not provide the date on which the (Claimant's) progress payment for construction work and related goods and services became due and payable, the resultant position was that the date on which the relevant progress payment became due and payable was fixed, pursuant to s 12(1)(b) of the (Act), at 8 August 2019."[2]

[2] [63], [65].

Given his conclusion that the Adjudicator had correctly applied s 12(1)(b) of the Act in determining that the date for payment of the progress payment was 8 August 2019, Digby J stated that it was unnecessary to deal with the Respondent's argument that its Take Out Notice of 8 August 2019, together with the effect of clause 38.5 of the Subcontract brought an end to any entitlement the Claimant may otherwise have had to payment of its July Payment Claim. Nonetheless, his Honour observed that the following termination clause (viz: clause 38.5) of the Subcontract would have been rendered void and of no effect by reason of s 48 of the Act.

> ***38.5 Watpac May Terminate Subcontract or take Work under the Subcontract out of Subcontractor's Hands***
> *If an act of default under clause 38.4 occurs, Watpac may, by written notice to the Subcontractor, do either of the following:*
>
> *(a) terminate the Subcontract; or*
>
> *(b) take all or any part of the Work Under the Subcontract out of the hands of the Subcontract.*
>
> *If Watpac has exercised its rights under this clause 38.5 to terminate the Subcontract or take all or any part of the Work Under the Subcontract out of the hands of the Subcontractor:*
>
> *…*
>
> *(g) Watpac shall not be obliged to make any further payment to the Subcontractor (whether pursuant to a payment schedule or otherwise) until all of the following conditions are satisfied: …"*

As his Honour said:

> *"I consider that cl 38.5, and in particular cl 38.5(g), of the Subcontract is rendered ineffective by s 48 of the SoP Act, to exclude, modify or restrict the first defendant's right and entitlements under the Act, including pursuant to ss 9, 12 and 23(1)(b) of the Act.*
>
> *I also consider that any attempt by the plaintiff to deploy cl 38.5 of the Subcontract to deny the first defendant's entitlements under the SoP Act to payment in relation to the first defendant's July 2019 Payment Claim would be void and ineffective as a result of the operation of s 48 of the SoP Act.*
>
> *I also observe that the practical effect of the above is as the first defendant has submitted, that is even if the plaintiff was correct in its assertion as to the date for payment of the first defendant's July 2019 Payment Claim under the Subcontract (13 August2019) which I have rejected."*[3]

Digby J also rejected the Respondent's argument that the Adjudicator's determination was not a valid determination because the Adjudicator had failed to compliantly determine the amount of the progress payment to be paid to the Claimant by wrongly deciding that the provisions of clause 5.6 of the Subcontract were "pay when paid" provisions and because he had failed to

[3] [73] – [75].

sever the "pay when paid" provisions of the Subcontract and further wrongly deciding that past "back-charges" earlier set off against the Claimant should be reversed.

Clause 5.6 of the Subcontract provided:

> *"The security (other than the security provided under clause 36.7) shall be reduced at the time and to the amount stated in Schedule 1. The balance of the security (other than the security provided under clause 36.7) then held by Watpac (and not applied) shall be released and returned to the subcontractor at the time stated in Schedule.*
>
> *Schedule 1 of the Subcontract provides:*
>
> ***Time for Reduction of Security***
>
> *Security shall be reduced following the later to occur of:*
>
> *1. The date that is 14 days after the Date of Substantial Completion;*
> *2. The achievement of Practical Completion under the Head Contract;*
> *3. The satisfactory rectification by the Subcontractor of all defects notified to the Subcontractor by Watpac on or before the Date of Substantial Completion, or where there are stages, on or before the last date of Substantial Completion;*
> *4. Receipt of a written notice from the Subcontractor requesting a reduction of Security.*
>
> ***Date of Final Release of Security***
>
> *1. The expiry of the Defects Liability Period, or where there is more than one Defects Liability Period, after the last of the Defects Liability Period to expire;*
> *2. Satisfactory rectification of all Defects;*
> *3. The subcontractor has complied with all of its other obligations under the Subcontract;*
> *4. Receipt of a written notice from the Subcontractor requesting a reduction of Security;*
> *5. The return of the security under the Head Contract.*
>
> *It is to be noted that the above requirements [1] to [4] and [1] to [5] total nine requirements."*

His Honour noted that in his determination, the Adjudicator had addressed each of the above requirements of Schedule 1, referred to clause 5.6 of the Subcontract and concluded in respect of each of the matters under the heading "*Time for Reduction of Security*" and "*Date of Release of Security"* (as set out above) that those requirements had either been satisfied, as a matter of factual finding by the Adjudicator, or were in the nature of "pay when paid" provisions and therefore of no effect in relation to the Claimant's entitlement to payment. The Adjudicator had also provided reasons for so concluding in relation to each of the nine Schedule 1 matters. His Honour concluded that not only had the Respondent not established that the Adjudicator's conclusions and determinations in respect of the nine Schedule 1 matters referred to above was incorrect, but that even if the Adjudicator's conclusions and factual findings were incorrect, they would not have given rise to any jurisdictional error. His Honour also held that the Respondent had not identified precisely which of the nine above requirements within Schedule 1 should have been severed, but that in any event the Adjudicator was at law not bound to sever particular provisions of the Subcontract and that also because of the contractually interrelated

nature of the completion related requirement of clause 5.6 and Schedule 1, any severance as contended by the Respondent, would have done *"substantial violence"* to the Subcontract.

B. Re: The Claimant's Cross Application under s 16(2)(a)(i) of the Act

The Claimant sought summary judgement against the Respondent on the basis that it had served two separate payment claims (both dated 18 March 2019) which related to two (separate) construction contract for the amounts of $32,648.00 and $83,361.00 respectively and where the Respondent had not issued a payment schedule in respect of these two payment claims. The Claimant contended that the amounts it had claimed in respect of the two payment claims were debts, due and recoverable under s 16 of the Act. The Claimant also relied on s 61 of the *Civil Procedure Act 2010 (Viv)* ("CPA") and r 22 of the *Supreme Court (General Civil Procedure) Rules 2015* ("Rules"). The Claimant also argued that, by reason of clause 5.6 and Schedule 1 of the Contract (the clause is set out above), and because it had issued a written notice when it issued its two payment claims on 18 March 2019, the payment claims were supported by a relevant reference date.

Digby J however held, that even assuming that the Claimant's claims for release and return of security comes with the Act (which for the reasons set out below his Honour, separately concluded it does not), the Claimant's claimed entitlement to payment of security based on clause 5.6 and Schedule 1 of the Contracts (Schedule 1 "Date for final release and return of security") made no provision for the time at, or within which, any claim based on an express or implied clause 5.6 entitlement is to be made and that this contrasted with the Contract "*Timing of Payment Claims"* stipulations in clause 36.1.

> *"The sole express provision in the Contracts in relation to claims for progress payment and the determination of reference dates for claims for progress payment for Work completed under the Contracts is to be found in clause 36. Clause 36 is concerned, as is the SoP Act, with payment claims for the value of work under the Subcontract performed by the subcontractor. These express provisions of clause 36 of the Contracts in my view preclude the implication sought to be established by the (Claimant) because such an implication would be inconsistent with the scheme of the Contracts, and in particular clause 36; neither is it necessary or reasonable given the scheme and express terms of the Contracts."*[4] (emphasis added)

Further, his Honour noted that there was a dispute between the parties as to when the Date of Substantial Completion was achieved under the Contracts and that this was fatal to any progress payment claim in relation to a Progressive Payment Claim Reference Date, or Final Payment Reference Date, because:

> *"…(a) the latest of the disputed dates for Practical Completion (on the first defendant's case) is 'middle January 2018' for the Bannockburn Contract;*
> *(b) cl .1. of the Contracts includes in its definition of Progressive Payment Claim Reference Date a stipulation that date is as specified in Schedule 1 of the Contracts, 'up until to the Date of Substantial Completion';*
>
> *(c) the 'Final Payment Reference Date' arises on the later of the events in (a), (b) and (c) of the cl 1.1 definition of that reference date, all of which events have*

[4] [173].

occurred, or at least are not contested as having occurred, by about the end of January 2018;

(d) the first defendant's payment claims of 18 March 2019, were made over a year after the latest asserted Date of Substantial Completion in 'middle January 2018'.

This is because on either the first defendant's or the plaintiff's assertions as to the time of achievement of the Date of Substantial Completion under the Contracts, the first defendant's purported Payment Claims were issued in excess of one year after the Date of Substantial Completion which is stipulated as the end date for any progress payment claim under the Contracts, as provided in the definitions of these dates in cl 1.1 of the Contract.

Further, the argument that the first defendant's claims for release and return of security can be supported by a reference date arising under s 9(2) of the SoP Act, is also met by the plaintiff's argument that such claims would, in any event be out of time pursuant to s 14(4) or s 14(5)(b) of the Act which requires such payment claim to be made within three months of a relevant reference date.

In this matter and on the evidence as to the Dates of Substantial Completion outlined above, I also consider that the plaintiff has a real prospect of success in establishing that the first defendant's Payment Claims have been made well after three (3) months of the Dates of Substantial Completion under both Contracts, and therefore are out of time. This is because the relevant Contract cl 1.1 Definitions referred to above limit the time for such claims, by reference to the Date of Substantial Completion in relation to either the Contract's Progressive Payment Claim Reference Date provision or Final Payment Reference Date."[5]

More significantly, however, his Honour held that the two 18 March Payment Claims were not valid claims for progress payment under the Act because they were not claims in relation to construction work or related goods and services undertaken under the Contracts, but rather claims for reduction of security pursuant to clause 5.6 of the Contracts and that, for this further reason, no reference date was available under the Act to support the Claimant's payment claims.

"On the proper construction f the first defendant's Payment Claims and the SoP Act, in particular ss 9(1) and 14(2)(c), I consider, for the reasons earlier outlined, that the first defendant's Payment Claims are non-compliant with, and do not fall within the SoP Act, as generally argued by the plaintiff, because the Payment Claims do not claim progress payment entitlements in relation to construction work or the supply of related goods and services as required by the SoP Act, including ss 9(1), 10(1) and 14(2)(c) of the Act.

The first defendant's claim for $32,648.41 (incl GST) in relation to the Torquay Contract and its claim for $83,361.22 (incl GST) in relation to the Bannockburn Contract are claims in respect of security under the Contracts which the first defendant asserts it is entitled to have released and returned and are not in the nature of claims for construction work or related goods and services.

[5] [175] – [178].

This much is acknowledged by the first defendant in its submissions. The first defendant instead seeks to rely upon cl 5.6 of the Contracts (which relates to reduction of security) as giving rise to 'express or implied' reference dates for the purposes of the SoP Act. The first defendant does not seek to rely upon any express provision of the Contracts as establishing or giving rise to relevant reference dates, including cl 36.1 of the Contracts.

Further, the first defendant's claims for reduction of security refer to a security sum which is a composite sum aggregated over many months and claimed in March 2019 in any way which could not be readily addressed, or valued and determined, by the Adjudicator as contemplated under ss 11 and 23 of the SoP Act which require the Adjudicator to value construction work and related goods and services undertaken and supplied by the claimant.

I have also rejected the first defendant's assertion that cl 5.6 of the Contracts gives rise to a separate and distinct reference date, either 'expressly or impliedly' in relation to a payment claim by the first defendant for reduction or release and return of security under the Contracts."[6] (emphasis added)

Accordingly, his Honour concluded that the Claimant had not served valid payment claims on the Respondent in relation to the two Contracts and that therefore s 16 of the Act, "*which is predicated on the Respondent's liability under the Act was not engaged and did not avail the Claimant which had no entitlement in the circumstances to recover any portion of the amounts claimed under the Act"*.

[6] [186] – [190].

1155 Nepean Hwy v Promax Buildings [2020] VSC 398 and [2020] VSCA 253

Background

The Claimant, a head contractor, entered into a Contract with the Respondent's, development company, for the construction of residential building works at Highett. Prior to entering into this Contract, the Claimant entered into two separate contracts with the Respondent's related company, LDS Lifestyle Pty Ltd, in relation to construction projects at Bulleen and Glenhuntly.

On 15 July 2019, the Claimant served a payment claim on the Respondent for an amount of (circa) $2 Million. The Respondent failed to serve a payment schedule and, as a result (pursuant to s 15(4) of the Act), the Respondent became liable to pay the claimed amount. The Respondent failed to pay the whole or any part of the claimed amount and therefore, pursuant to s 16(2)(a)(ii), the Claimant elected to make an adjudication application under s 18(2) of the Act. The Claimant gave the Respondent the relevant notice pursuant to s 18(2) of the Act, but the Respondent did not avail itself of the (second) opportunity to provide a payment schedule.

On 15 August 2019, the Claimant's solicitors made three adjudication applications with Adjudicate Today in respect of the Bulleen, Glenhuntly and the Highett projects. Each of the 3 applications was made by electronically uploading the application documents to Adjudicate Today's lockbox. On the following day (16 August 2019), the Claimant's lawyers sought to serve the Adjudication Application (AA) relating to the Highett project together with the AA (and the supporting documents) for the Bulleen and Glenhuntly projects. An employee of LDS Lifestyle (i.e. the Respondent's related companies) accepted service of the materials for all three AAs.

Seven folders of materials were provided by the Claimant on 16 August 2019. Two folders related to the Highett project, but some of the Highett project documents were incorrectly included in the Glenhuntly AA folders (a one page covering letter from the Claimant's lawyers and a one page Adjudicate Today application form). Also, a statutory declaration relating to the Highett project was also included in the Bulleen project folders.

On 17 August 2019, the Respondent provided its solicitors with all the hard copy documents. On 20 August 2019, Adjudicate Today advised the parties of the name of the person who had accepted the Highett AA as adjudicator. On the same day, the Respondent's lawyers wrote to the adjudicator advising that the AA that the Claimant had served on the Respondent did not *"identify the payment claim … to which it relates"* and accordingly was not an adjudication application made under the Act.

On 21 August 2019, the Respondent's lawyers wrote to the Claimant's lawyers advising that it acted not only for the Respondent, but also LDS Lifestyle Pty Ltd in relation to the Glenhuntly and Bulleen projects and that it had received all of the Claimant's lawyers cover letters relating to the three applications, together with Adjudicate Today's application forms and submissions for each of the three application.

On 23 August 2019, the Claimant's lawyers served a further copy of the AA relating to the Highett project.

The adjudicator that Adjudicate Today had appointed timed himself out and the Claimant withdrew its application and, on 10 September 2019, the Claimant made a fresh AA with

another ANA. Subsequent to the second ANA's appointed adjudicator advising the parties of his acceptance, the Respondent wrote to that adjudicator advising that.

> *"… the 15 August Adjudication Application, was not served on 1155NH as required by the Act. The 6 business day delay between filing and service was not service as soon as practicable, as required by the Act, if the 15 August Adjudication Application was not an adjudication application under the Act, then it follows that any further (purported) adjudication application under s 28(2) must fail, because that section proceeds on the footing that there was a valid adjudication application in the first instance."*

The Adjudicator's Determination

The adjudicator proceeded with the making of his determination and decided that the Claimant was entitled to the amount claimed. In relation to the jurisdictional issue relating ot the service of the AA, the adjudicator expressed the following view:

> *"[74] For the reasons set out below, in my view, the Application for Adjudication is not invalid.*
>
> *[75] Firstly, in my view, the Application for Adjudication was, in fact, made to Adjudicate Today on 15 August 2019. In my view, the service of a copy of the Application for Adjudication on the respondent is not, itself, a requirement for validity, but rather is a matter that goes to the timing of the Adjudication Response (if any). Section 18(5) expressly provides that a copy of the adjudication application must be served on the respondent but does not provide that a failure to comply with the provision invalidates an Application for Adjudication, nor does Section 18(5) expressly provide the time within which a copy of the Application for Adjudication must be served on the respondent. In the absence of such express language, in my view, the failure to provide a copy of the Application for Adjudication to the respondent does not, on its own, have the effect that an Application for Adjudication is invalid.*
>
> *[76] Secondly, in my view, the respondent did, in fact, receive a copy of the Application for Adjudication on 16 August 2019 (albeit that the cover letters in relation to the three Applications for Adjudication delivered to Adjudicate Today and to the respondent were not in the correct folders, and that two of the statutory declarations had been switched).*
>
> *[77] Thirdly, in my view, the respondent, no later than after receiving the MinterEllison email dated 21 August 2019, was, in fact, aware of the filed copy of, and the correct attachments to, the Application for Adjudication. In my view, the delay between 15 August 2019, when the Application for Adjudication was lodged electronically with Adjudicate Today, and 21 August 2019, when the Index of the documents, the previously served documents on the respondent on 16 August 2019, comprising the Application for Adjudication, was confirmed in the email dated 21 August 2019 from MinterEllison to Arnold Block Leibler, meant that the delay (if any) in service of a copy of the Application for Adjudication on the respondent had no practical effect.*
>
> *[78] Fourthly, if I am wrong in my view that the respondent is to be taken as having received a copy of the Adjudication Response on 16 August 2019, then the respondent received a copy of the Adjudication Response no later than 23 August 2019, when the fresh copy of the Application for Adjudication was delivered to the respondent. In my*

view, the delay between 15 August 2019, when the Application was lodged electronically with Adjudicate Today, and 23 August 2019, when the further, correctly collated, hard copy of the Application for Adjudication was served on the respondent, had no practical effect.

[79] Fifthly, in this instance, the respondent failed to deliver a payment schedule in response to, either, the Payment Claim dated 15 July 2019 or the Section 18(2) Notice dated 7 August 2019. Accordingly, the respondent was, pursuant to Section 21(2A) of the Act, the Act, not entitled to deliver an Adjudication Response. In that circumstance, in my view, the delay between 15 August 2019, when the Application for Adjudication was lodged with Adjudicate Today, and 23 August 2019, when the further, correctly collated, hard copy of the Application for Adjudication was served on the respondent, had no practical effect.

[80] For these reasons, in my view, the Application for Adjudication is not invalid.

Digby J's Decision relating to the Claimant providing the Respondent with a copy of the Adjudication Application

Digby J held that the statutory context and operation of the interrelated provisions within the Act supports a construction of s 18(5) to which the applicant is to serve its adjudication application within a reasonable time of the applicant making its adjudication application under s 18(3)(b) of the Act. His Honour arrived at this conclusion because:

"(a) It can be inferred from the absence of an express stipulation of a time for service in s 18(5) of the SoP Act and the provisions of several other sections in the SoP Act which do circumscribe the period within which a notice or document is to be served under the Act, that it was not the intention of Parliament to fix or otherwise stipulate the date by which the claimant is to serve a copy of its adjudication application on the respondent. The sections of the SoP Act which are, by contrast to s 18(5) of the Act, prescriptive in fixing tight times within which an act is to take place, include;

> *"(i) the claimant's notification of intention to apply for an adjudication application (s 18(2)(a) – 10 business day limit);*
>
> *(ii) the time within which the respondent may provide a payment schedule to the claimant after receiving the claimant's notice of intention to supply (s18(2)(b) – two business days);*
>
> *(iii) the 10 business day limit under s 18(3)(a), (b) and (d) within which the claimant must make its adjudication application after a respondent provides a schedule (where the payment schedule is for less than was claimed) or the respondent fails to pay the whole or part of the scheduled amount in s 18(3) (s 18(3)(a), (b) and (d) – 10 business day limit);*
>
> *(iv) the five day limit under s 18(3)(e) in respect of an adjudication application initiated on the basis that the respondent has failed to provide a payment schedule and fails to pay the whole of the amount claimed in s 18(3)(e) (s18 (3)(e) – 5 business day limit);*

(v) the 10 business day limit for an adjudicator to give a copy of his or her notice of acceptance to the authority, pursuant to s 20(4), and s 28(3) and 28D(2) (s 20(4) and 28(3) – 10 business day limit);

(b) Similarly, it can be inferred that because no date for service is fixed or otherwise stipulated in s 18(5) of the SoP Act, the timing of service of the adjudication application on the respondent was not considered by the Parliament to be critical to the timing of the operation of the SoP Act, including the provisions which are interrelated with s 18 of the Act.

(c) It can also be inferred from the matters referred to in sub-paragraphs (a)-(b) above that Parliament intended that the time within which service under s 18(5) of the SoP Act was achieved should be flexible;

(d) It is also unlikely that the legislature would have intended to impose a strict or inflexible time limit in relation to the service of a copy of the adjudication application under s 18(5) of the SoP Act, given that s 18 itself provides elsewhere for specific times within which the claimant is to do certain things, including to notify its intention to apply for adjudication (s 18(2)(a) of the SoP Act). Similarly, s 18(3) of the Act prescribes several specific time limits for the time within which the claimant must make adjudication application;

(e) In a number of provisions the SoP Act expressly seeks to limit time by specifying that matters be undertaken 'as soon as reasonably practicable' (ss 18(7), 23A(a), 28D(5), 28H(2) and 28J of the SoP Act);

(f) It is likely that if the legislature intended service under s 18(5) of the SoP Act to be effected 'as soon as practicable', after an adjudication application was made, those words, which are used in many instances elsewhere in the Act, would have been employed in s 18(5) of the Act;

(g) There are many other sections of the SoP Act in addition to s 18(5) in relation to which no time limits are expressly provided within which an act is to take place. The implication of a requirement of the SoP Act that they be done 'as soon as practicable' would be potentially problematic;

(h) In an adjudication proceeding in which the respondent is entitled to make a response to the applicant's adjudication application that response is provided for by s 21 of the SoP Act. Significantly, it is to be noted that the time under s 21(1) of the Act for the respondent to lodge its response to the adjudication application is flexible;

(i) The timing of service under s 18(5) of the SoP Act is inconsequential as a result of s 21(2A) of the Act precluding the respondent from lodging an adjudication response when it has not served a payment schedule pursuant to ss 15(4) or 18(2)(b) of the Act. In circumstances where a respondent is not entitled to lodge an adjudication response (as is the case in the instant matter), the adjudicator will, in any event, only receive and consider the applicant's adjudication application;

(j) Service of an adjudication application under s 18(5) of the SoP Act within a reasonable time accommodates both the desirability of the discipline of the requirement of a reasonable time for service when the respondent is entitled to lodge an adjudication response pursuant to s 21(1) of the SoP Act, and also when the respondent is not permitted to lodge an adjudication response because of the operation of s 21(2A) of the SoP Act.

It is to be observed that what might be a reasonable time in the scenario where the respondent cannot lodge an adjudication response would, amongst other factors be informed by:

(i) the adjudication application provided via the authorised nominating authority to the adjudicator providing all relevant materials to the adjudicator;

(ii) the adjudicator being allowed 10 business days to determine the adjudication application from the date he or she served the parties with a notice of acceptance under s 20 of the SoP Act;

(iii) the ability of the claimant to agree to extend the time of up to five additional business days to the adjudicator to determine the adjudication application (s 22(4)(b)); and

(iv) there being no likely denial of natural justice to the respondent caused by delayed service of the adjudication application where the respondent is not entitled to provide an adjudication response."

His Honour noted that in the present case, subsequent to the Respondent failing to provide a payment schedule in reply to the Claimant's payment claim:

(a) the Claimant notified the Respondent (pursuant to s 18(2)(a) of the Act) that it intended to apply for adjudication of its payment claim;

(b) the Respondent did not provide a payment schedule pursuant to either ss 15(4) or 18(2)(b) of the Act; and

(c) as a result of (b) above, pursuant to s 21(2A) of the Act, the Respondent was not entitled to lodge an adjudication response.

His Honour observed however that in circumstances where the respondent was permitted to lodge an adjudication response, the regime associated with the timing of adjudication applications and the required steps to subsequent to the Claimant making an adjudication application, *"highlight that the time at which the claimant serves the respondent with a copy of the adjudication application pursuant to s 18(5) of the SoP Act will not create any prejudice to the respondent or practical difficulties in relation to the statutory prescribed procedures under the Act"*. This is primarily because in those circumstances:

(a) pursuant to s 21(2) of the Act, a respondent may lodge its adjudication response:

(i) within 5 business days of receiving a copy of the adjudication application; or

(ii) within 2 business days after receiving notice of the adjudicator's acceptance,

whichever is the later;

(b) under s 22(2) of the Act, an adjudicator is not permitted to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response; and

(c) the adjudicator is obliged to determine the application as expeditiously as possible, and in any case, within 10 business days after the date on which acceptance by the adjudicator of the application takes effect in accordance with s 20(2), or within a further period not exceeding 15 business days after that date, providing the claimant agrees.

> *"Accordingly, the scheme of the SoP Act in relation to service by the claimant on the respondent of the adjudication application is such that the timing of service of the adjudication application on the respondent under s 18(5) of the Act is of lesser significance and little materiality in the sense that the date on which service under s 18(5) of the Act occurs will not result in the respondent to the adjudication application being unaware of that application being made or prejudiced by delayed service of the adjudication application. This is because the respondent will have received pre-application notice from the applicant that it is intending to make an adjudication application (s.18(2)(a) of the SoP Act) and because after that application has been made the respondent will have received notice of the adjudicator's acceptance of the appointment as adjudicator.*
>
> *Therefore, the timing of service of the copy of the claimant's adjudication application on the respondent is most unlikely to have any material effect on any subsequent statutory required step or deadline under the SoP Act. Further, this is clearly so in the instant case because the plaintiff is not entitled to provide an adjudication response."*[7]

Accordingly, his Honour concluded that the service of a copy of the adjudication application is not critical to the sequence of procedural steps leading up to the adjudication determination and that as such the Act requires service of the application to be made within a reasonable time of the application having been made.

Insofar as the Respondent sought to rely on the approach that the Supreme Court of Queensland had adopted in *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd* [2019] QSC 91 then the Court's decision in that case turned on s 28(4) of the *Acts Interpretation Act 1954* (Qld), which provides, when not otherwise specified, for an act referred to in legislation (such as, here, providing a copy of the adjudication application) to be done *"as soon as possible"*, but, there is no such provision in Victoria. Further, Digby J noted that, unlike the Queensland

[7] [109] – [110].

legislation, the Victorian Act provides (under s 24(4)) that the deadline for the adjudication determination is calculated from the date of acceptance of the adjudication application.

Similarly, Digby J distinguished the present case from the decision of Hammerschlag J in *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd* [2017] NSWSC 194 because in *Parkview* the issue turned on whether the respondent had received the same materials from the claimant as the adjudicator had received.

> *"(Hammerschlag J) did not focus on the time for service under the NSW equivalent of s 18(5) of the SoP Act, other than observing that under the NSW equivalent of s 18(5) of the SoP Act, other than observing that under the NSW legislation, service of the adjudication application triggers the respondent's entitlement to respond to the application".*[8]

Turning then to consider the circumstances of the present case where, on 16 August 2019, the Claimant served 7 folders of material relating to three separate projects but where the employee of the Respondent's related company (LDS Lifestyle Pty Ltd) accepted service of the documents and where both the Respondent and the related company had the same legal representation, his Honour opined that the Respondent was readily able to have appreciated *"on 16 August 2019, or very soon thereafter, that some limited documents relating to the August Adjudication Application had been intermingled with the adjudication application documents for other Projects by mistake"*. It would have however been an easy and speedy exercise for the Respondent's personnel, who were familiar with the sort of documentation involved, which documentation was readily identifiable as to which construction project each misplaced document related, to assimilate and separate out non-Highett project related documents to consolidate the August Adjudication Application. This could have been done by:

(a) substituting the cover page located in the August Adjudication Application folder with the cover page in the Glenhuntly Adjudication Application folder;

(b) substituting the one page covering letter of the Claimant's lawyers located in the August Adjudication Application with the one page covering letter located in the Glenhuntly Adjudication Application folder;

(c) substituting the one page Adjudicate Today application form located in the August Adjudication Application folder with the one page Adjudication Today application form in the Glenhuntly Adjudication Application folder; and

(d) substituting the statutory declaration of the Claimant's director located in the August Adjudication Application folder with the statutory declaration of that person that had been included in the Bulleen folder, especially given that each statutory declaration had clearly identified the project to which it related.

His Honour thought that the above exercise became even more straight forward given that the Respondent had the assistance of the index of documents that had been included in the August 2019 Adjudication Application served on 16 August 2019 and the further index of documents

[8] [115].

that the Claimant's solicitors provided on 21 August 2019 so as to enable the Respondent to identify and relocate those documents.

Accordingly, his Honour concluded that the Claimant had effected compliant service of its August Adjudication Application on 16 August 2019. His Honour also found that on 23 August 2019, the Claimant again effected service of its August Adjudication Application on the Respondent within a reasonable time of making the application and s 18(3)(b), and in compliance with s 18(5) of the Act.

Given the above conclusions, his Honour stated that it was unnecessary to decide whether the service requirement in s 18(5) of the Act is of a jurisdictional nature.

Digby J's decision on whether the Adjudicator had valued the payment claim in accordance with ss 11 & 23 of the Act?

Notwithstanding that the Respondent did not provide a payment schedule, the Respondent argued by reference to *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631; *Krongold Constructions (Aug) v SR & RS Wales* [2016] VSC 94, that the Adjudicator's determination demonstrates that he had failed to value the payment claim in accordance with ss 11 and 23 of the Act. This is because:

(a) the Adjudicator had merely adopted the amounts claimed by the Claimant in the "trade breakdown" and "budget" referred in the payment claim;

(b) the Adjudicator had erroneously assumed that the "trade breakdown" or "budget" formed part of the Contract;

(c) the Adjudicator had failed to undertake any independent assessment or valuation of the work, rates and percentages asserted by the Claimant in the "trade breakdown" or "budget", as required by ss 11 and 23(4) of the Act;

(d) rather than determining the Application pursuant to s 23(2)(b) of the Act, subject to the Act and the provisions of the Contract, the Adjudicator, in substance, treated the Claimant's "trade breakdown", as an agreed Contract document;

(e) the Adjudicator gave undue weight to the fact that the Respondent had failed to issue a payment schedule. The failure by a respondent to serve a payment schedule did not relieve the Adjudicator of undertaking a proper determination of value of the works claimed, in accordance with ss 11 and 23(4) of the Act.

Digby J rejected the Respondent's argument. His Honour held that he was not satisfied that the Adjudicator had failed to undertake a cogent, logical and evidence-based valuation of the work carried out by the Claimant in accordance with ss 11 and 23 of the Act so as to arrive at the amount of progress payment which the Claimant was entitled to be paid in accordance with the Act. *"Positively expressed, I find that the Adjudicator so proceeding in compliance with s 11(1)(b)(i) and s 23 of the Act and in that way determined that (the Claimant) was entitled to be paid (the adjudicated amount)…"*.[9]

[9] [235].

His Honour noted that in relation to each item to which the Adjudicator undertook his valuation and determination, the Adjudicator made reference to the Claimant's presentation in its payment claim and its method of calculation and to Adjudicator had explained how he arrived at his determination of the amount payable in respect of each of the Claimant's progress claim components. The Adjudicator had regard to site photographs of the nature, scope and extent of completion of that claimed item of work and he also appropriately referred to the fact that there was no contradictory material or submission from the Respondent in relation to each claim:

> *"In this regard I consider that the Adjudicator was entitled to draw an inference form the absence of any contradictory relevant documentation or material from the Respondent, that no credible challenge was able to be made to the value of the claims made by (the Claimant). I also consider that the fact that the (Respondent) has not provided a payment schedule under either ss 15(4) or 18(2)(b) of the SoP Act and is therefore, by force of s 21(2A) of the Act, not entitled to provide an adjudication response, is no impediment to the Adjudicator proceeding in this way as the determiner of fact.*
>
> *...*
>
> *In my view the Adjudicator's above approach to his valuation task ... does not support the (Respondent's) submission that he merely adopt (the Claimant's) trade breakdown and the amount claimed by (the Claimant). The Adjudicator explains how he arrives at his ... Determination and expresses his view that the amount calculated by (the Claimant) looks reasonable. Further, the Adjudicator relies upon the site photographs with which he was provided to evaluate the nature, scope and extend of work completed and other documentation including quotations in relation to the works.*
>
> *...*
>
> *In my view, it was open to the Adjudicator to accept, or reject, as the resolver of facts and disputes and as the determiner of the value of (the Claimant's) claims, the value of the various items... and in doing so to rely upon material provided by (the Claimant), including its "trade breakdown". Further, in my view, it was also open to the Adjudicator to more readily accept the (Claimant's) claims when there was no contradictory information from the (Respondent) in relation to those claims.*
>
> *I also note that in that regard it is not the adjudicator's task to find flaws which are not obvious or manifest in relation to the Claimant's progress claim entitlements."*[10] (emphasis added)

Court of Appeal's Decision

Digby J's statement that the Adjudicator was entitled to draw an inference from the absence of any contradictory relevant documentation or material from the Respondent that no credible challenge was able to be made to the value of the Claimant's claims was challenged in the Court of Appeal. The Court of Appeal however emphasised that the Adjudicator was entitled to draw such an inference, not because of the absence of an adjudication response, but rather because of the Respondent's failure to provide a payment schedule. This distinction, between an inference to be drawn because of no adjudication response, having been provided compared

[10] [203], [206], [224] – [225].

to the circumstances (as was the case here) where no payment schedule had been provided was expressed by the Court of Appeal as follows:

> *"Here, because the applicant had not provided a payment schedule, and also because the adjudicator had not sought further submissions or material from the applicant pursuant to s 22(5), the applicant's silence in the adjudication could not be taken as indicating anything at all about the strength of its case. If the adjudicator had drawn an inference based on the absence of an adjudication response, this reasoning would at least have been illogical and would have raised the question whether it disclosed jurisdictional error on the part of the adjudicator.*
> *However, an inference drawn, not from the absence of an adjudication response, but from the applicant's failure to provide a payment schedule, is in a different position. In our view, it would have been open to the adjudicator to draw an inference from the applicant's failure to provide a payment schedule, to the effect that it was not able to dispute the payment claim. Section 23(2) makes it plain that an adjudicator is to consider certain specific matters, including the content of 'the payment schedule (if any)'. Inevitably, that means that the adjudicator must also consider the fact that no payment schedule was provided. A recipient of a payment claim may be taken to know of the critical significance of a payment schedule to the operation of the Act in general and to the making of an adjudication determination in particular. It is significant in that regard that an adjudication cannot proceed until the recipient of the payment claim has had a further opportunity to provide a payment schedule. As a matter of common sense, a recipient of a payment claim who does not respond to it might rationally be thought to have no basis upon which to contest it.*
>
> *That is so, notwithstanding that the operation of the Act means that the recipient of the payment claim is precluded from proffering an explanation to the adjudicator as to why no payment schedule was provided. It is plain that the Act calls upon the adjudicator to evaluate a payment claim by reference to identified material and envisages that he or she might do so without giving the recipient of the claim a third opportunity to argue their case. It is therefore permissible for an adjudicator to infer, based on the failure of a recipient of a payment claim to provide a payment schedule, that the recipient was not in a position to contest the claim."*[11] (emphasis added)

The Court of Appeal noted that it could not find any statement that the Adjudicator had drawn any such inference. Insofar as the Respondent submits that such an inference can be said to have been drawn from the Adjudicator's reference to the passage of Vickery J in *SSC Plenty* and to the Adjudicator's repetitious statements that there was *"no material from the (Respondent) to dispute"* the claim when such observations were made following a summary of the Claimant's claim in which the Respondent had not disputed the claim, then that was a reference to the Respondent's failure to provide a payment schedule.

The Respondent also argued that the Adjudicator had failed to properly value the work because in uncritically adopting the Claimant's claim in respect of every aspect of the claim. The Respondent contended that the Adjudicator had failed to have regard to the Contract in the making of his determination as he was required to do under s 23(2)(b) of the Act which refers to the Adjudicator having regard to *"the provisions of the construction contract from which the application arose"*. The Court however concluded that even though the contract documents

[11] [2020] VSCA 253 at [32] – [34].

as defined in the Contract incorporated by reference the drawings, these were **not** *"provisions of the construction contract"* required to be considered under s 23(2)(b):

> *"The question then is whether the contract documents, and in particular any or all of the drawings in item 5 of schedule 3 to the present contract, were 'provisions of the construction contract from which the application [for adjudication] arose'.*
>
> *The expression 'from which the application arose' could be taken to describe the construction contract as a whole, or its provisions. In our view, the former interpretation is the preferable one. The words identify the relevant contract by reference to the disputed claim and the paragraph then looks to the provisions of that contract. The alternative construction would involve difficult questions of relevance and even causation. It would have the consequence, because s 23(2)(b) confines the adjudicator's consideration 'only' to the matters identified, that the adjudicator would be prevented from having regard to the provisions from which the application did not arise.*
>
> *It would be anomalous to require an adjudicator, who need not be a lawyer, to undertake a classification of provisions on the basis of relevance and causation in order to ensure the validity of the determination. To identify the specific provisions of a contract, from which provisions a disputed claim 'arose', could be a very time-consuming exercise, especially given the typical complexity of building contracts, and it would serve no apparent purpose. Instead, just as s 23(2)(a) requires consideration of the provisions of the Act, para (b) requires consideration of the provisions of the construction contract. For these reasons, the words 'from which the application arose' describe the relevant construction contract.*
>
> *The issue becomes, what constitutes 'the provisions' of that contract? Again, two interpretations are open. On the broader view, all the contents of documents having force as part of the contract or arrangement constituting the construction contract make up the provisions of that contract. On a narrower reading, the provisions of a construction contract are to be found only in the contract executed by the parties, and not in other documents incorporated by reference in that document. On that approach, even though documents incorporated into the contract by reference form part of the construction contract, their contents are not among its provisions.*
>
> The text of s 23(2)(b) supports the narrower approach. The use of the expression 'the provisions of the construction contract'*, rather than 'the construction contract' suggests that s 23(2)(b) contemplates something other than the whole of the construction contract as broadly defined. Further, when a contract incorporates a document by referring to it, it is not usual to describe that document as containing provisions of the contract. By way of analogous example, if a will provides that personal chattels are to be bequeathed according to a list provided to the testator's solicitor, it would strain language to describe that list, as distinct from the relevant clause of the will, as a provision of the will. The provision of the will in that context is the part of it that gives effect to the incorporation, and the matter incorporated only has force by virtue of the incorporation and not as a free-standing provision. The list is not a provision of the will. The use of the word 'provisions' in s 23(2)(b) is consistent with a similar understanding here.*
>
> *The context is also supportive of this interpretation. The parties are able, subject to the Act, to provide 'relevant documentation' to the adjudicator. This suggests that the*

'provisions of the construction contract' need not refer to all aspects of the construction contract that may be relevant. To the extent that documents incorporated into the construction contract may be relevant, there is ample scope for their consideration if the parties or the adjudicator consider that necessary.

Finally, the provision's purpose also points to the narrower approach. Bearing in mind that a contravention of sub-s (2) renders an adjudication determination void, and that adjudications are required to be conducted expeditiously, it is less likely that Parliament would mandate consideration in every case of the myriad of documents that might make up a construction contract as defined. The adjudicator has a power to demand further submissions, which would extend to the provision of documents, in those cases where the adjudicator considers that the parties have not provided all 'relevant documentation'. This is consistent with a reading of para (b) whereby it sets a basal level of contractual material that an adjudicator must always consider, allowing for flexibility in the conduct of adjudications rather than mandating a heightened threshold for the validity of every adjudication."[12] (emphasis added)

[12] [57] – [63].

Citi-Con (Vic) Pty Ltd v Trojan Built Pty Ltd [2020] VSC 557

On 3 February 2020, the Claimant served a payment claim on the Respondent for the sum of $239,606.00, stating that it was a claim in respect of works completed in August 2019. On the same day the Respondent issued a payment schedule assessing the amount payable at $nil. On 3 February 2020, the Adjudicator released his determination where he had determined that the Claimant was entitled to the amount claimed.

The Respondent applied to have the Adjudicator's determination quashed on the grounds that:

(a) There was no valid reference date for the payment claim;

(b) Alternatively, the payment claim was a final payment claim and there was no valid reference date applicable to it; and

(c) Alternatively, the Adjudicator had failed to determine the amount of the progress claim and failed to provide reasons.

Issue No. 1
(a) Was there a valid reference date?

The relevant clauses of the Subcontract relating to this issue were:

Clause 12.2

"Progress claims shall be submitted at the time stated in Schedule 1 and must show the value, percentage and details of the work the Subcontractor considers to be completed, including any variations and any other adjustments to the Contract Sum. The Trade Contractor may not claim for any unfixed plants, equipment, material or goods." (emphasis added)

Clause 13(a)

"The Subcontractor agrees with Citi-Con that to the extent permitted by and for the purposes of the Security of Payment Legislation, the "reference dates" are the dates set out in Schedule 1, except that:

(i) if that date is on 24 December to 14 January (inclusive), the "reference date" shall be deemed to be 15 January; and

(ii) upon the certificate of Practical Completion being issued, the next "reference date" will be:

(A) on the date set out in Schedule 1 immediately following the certificate of Practical Completion; and

(B) thereafter, in accordance with the regime for claiming the final payment claim set out in clause 12.4."

Part A of Schedule 1 relevantly stated:

> *"Time for payment claims – 25th of each month* ***projected to end of month****."*

The Respondent contended that the Adjudicator had erred in determining that the valid reference date arose on 25 January 2020 because under clause 12.2 and Part A of Schedule 1 of the Subcontract, the reference date relevant to the payment claim was 25 August 2019. According to the Respondent:

(a) The wording of the Subcontract, in particular the words *"completed"* in clause 12.2 and *"projected to the end of the month"* in Schedule 1 give rise to a threshold requirement that the Claimant complete works in a relevant month to trigger a reference date. Reference dates will continue to arise only while there are works being completed;

(b) The task of the Adjudicator was to identify the work the subject of the payment claim, identify the latest date relating to that work and identify the reference date that next followed the latest date on which work was completed;

(c) As works were last completed in August 2019, the last reference date triggered under the Subcontract was 25 August 2019; and

(d) The Adjudicator erred in finding that the Claimant was entitled to ongoing reference dates on the 25th day of each month in the absence of any work being completed.

In rejecting the Respondent's argument, Stynes J noted that s 9 of the Act does not limit available reference dates to those months in which work is done and/or limit the works which may be claimed in respect of a reference date to works completed in the month of the reference date, as clearly articulated by Vickery J in *Commercial & Industrial Construction Group Pty ltd v King Construction Group* [2015] VSC 426 at [101] – [102]:

> *"The text "calculated by reference to [the relevant reference date]" in s 9(1) of the Act simply means that a payment claim for a progress payment made under the Act is to be calculated in respect of work done up to and including the relevant reference date and not beyond it. Payment for all such work is claimable, regardless of whether or not the work had been performed since the preceding reference date or prior to the preceding reference date.*
>
> *As long as the claimed work had been done or the materials supplied on or before the relevant reference date, the progress claim made under the Act can be calculated by reference to the reference date for the purposes of s 9(1) of the Act. The statutory scheme for the making of valid payment claims provides for no other requirement in relation to the time when the work the subject of the payment claim was performed or when the materials were supplied."* (emphasis added)

As to whether the Subcontract had imposed the limitation advanced by the Respondent, her Honour held that this was not the case:

> *"In my opinion, there are no words used in cl 12, cl 13 or the relevant part of Schedule 1 that could reasonably be construed as imposing such a limitation.*

Contrary to the (Respondent's) submissions,

(a) the phrase used in Schedule 1 "projected to end of month"; and

(b) the phrase used in cl 12.2 "considers to be completed",

serve only to describe the works that may be included in the payment claim. They do not, on a plain reading of Schedule 1 and cl 12.2, operate to impose either of the limits described (by the Respondent)."

Her Honour went further to express the view that if a provision of a contract purported to limit the occurrence of reference dates as contended by the Respondent it would have the effect of modifying the Claimant's entitlement to progress payments under s 9 of the Act and could therefore "*well be void under s 48*" of the Act.[13]

Issue No. 2

(b) Was the payment claim a final payment claim?

The Respondent argued tha, looked at objectively, the payment claim was a final payment claim and that as work was last carried out in late August 2019, the reference date applicable to such a claim was late November 2019. Thus, as the payment claim was served on 3 February relying on a reference date on 25 January 2020, the payment claim was invalid.

Her Honour noted that whilst the Act does not provide a definition of a final payment claim, the question of whether a payment claim is a final payment claim is to be determined objectively such that *"would convey to a reasonable person having the background knowledge that should reasonably be ascribed to the parties at the time the document was served"*.[14] Thus, when assessing the character of the payment claim objectively, her Honour rejected the Respondent's argument that the payment claim was a final payment claim:

"For the following reasons, I am satisfied that the Payment claim would convey to a reasonable person having the background knowledge of the parties that it was a periodic progress claim and not a final payment claim:

(a) the Payment Claim was served under cover of an email identifying it as a 'Payment Claim'. There was no suggestion in that email that it was a final payment claim;

(b) the Payment Claim was titled and referred throughout as 'Payment Claim', not as a final payment claim;

(c) the service of a periodic payment claim was consistent with the first defendant's continuing entitlement to such progress payments on and from each reference date identified in Schedule 1 of the Subcontract;

(d) the Subcontract was still on foot;

[13] At [40].
[14] At [52].

(e) practical completion had not been certified; and

(f) the first defendant had continuing obligations under the Subcontract, specifically in relation to defect liability under cl 11.7, relevant to the final accounting between the parties.

While the Payment Claim does claim 100% of the contract price, in the circumstances described in paragraph 58 above, a claim for the completion of the contract works without more does not render the payment claim, construed objectively and not in an overly technical or unduly critical way, a final payment claim under the Subcontract.

The Payment Claim does seek the return of 50% of the retention monies held by the plaintiff. However, the inclusion of a claim for the return of retention moneys is not itself determinative of the status of the Payment Claim. Of greater significance is that the obligations of the parties under the Subcontract are continuing, making it unlikely that a reasonable person would understand the Payment Claim to represent the final accounting between the parties."[15]

Issue No. 3

(c) Did the Adjudicator fail to perform his statutory function under s 23 of the Act?

The Respondent contended that the Adjudicator failed to perform the statutory function set out in s 23 of the Act in that:

(a) he did not determine the amount of progress payment but had merely adopted the Claimant's assessment of the claimed amounts; and

(b) he did not adequately explain the basis of the determination he had made in respect of the various items that comprised the payment claim.

Stynes J rejected the Respondent's argument:

"Contrary to the plaintiff's assertion, the Adjudicator did not merely adopt the first defendant's assessment of value. Rather, he had regard to the totality of the evidence and submissions before him and on that basis satisfied himself that the first defendant had carried out the work that had been claimed and was entitled to be paid for it. It is apparent by his express reference to it, that the Adjudicator had regard to the evidence available to him in relation to this issue. Having regard to that evidence, and in the absence of any material from the plaintiff contradicting it, it is my opinion that the Adjudicator's conclusion that the work had been carried out and his valuation of it was rational and founded on the evidence presented. The reasons for his conclusion are brief but adequately explain the basis of his determination."[16] (emphasis added)

[15] [58] – [60].
[16] [70].

Yuanda Vic Pty Ltd v Façade Designs International Pty Ltd [2021] VSCA 44

Overview

Pursuant to a construction contract, the Claimant agreed to install façade elements supplied by the Respondent on a large commercial project in Melbourne CBD. On 30 September 2019, the Claimant served a payment claim on the Respondent for the sum of $4,584,820.00. The payment claim comprised of several items, including a claim for interest which, under the Victorian Act, is an excluded amount. On 2 October 2019, the Respondent paid the Claimant an amount of $1,115,455.00, but did not provide a payment schedule within the 10 business day period after receiving the payment claim. The Claimant elected to commence proceedings against the Respondent to recover the unpaid portion of the claimed amount under s 16(2)(a)(i) of the Act, rather than make an adjudication application. When the matter came to the Court, the Respondent disputed the Claimant's entitlement to judgement on the ground that the payment claim, contrary to ss 14(3)(b) and 16(4)(a)(ii) of the Act, included an excluded amount.

Section 14(3)(b) provides that the claimed amount in a payment claim must not include any excluded amount. Significantly, s 16(4) provides that where a claimant has elected to commence proceedings under s 16(2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt:

> *"(a) judgement in favour of the claimant is not to be given unless the court is satisfied –*
>
> *(i) …*
>
> *(ii) that the claimed amount does not include any excluded amount.*
>
> *…"*

Judgement at first instance

The judge at first instance (Riordan J) held that whereas s 16(4)(a)(ii) prevented a claimant from recovering an excluded amount at the time when entry of judgement was sought, this did not preclude the inclusion of an excluded amount at the time of service of the payment claim. Accordingly, as the Claimant did not press for payment of the adjudicated amount, Riordan J held that judgement could be given for the lesser amount[17].

On appeal, the Respondent's prime argument was that judgement could only be given for *the claimed amount* and if an excluded amount is included in the claimed amount, judgement cannot be given and the proceeding must be dismissed.

Court of Appeals decision

In accepting the Respondent's argument, the Victoria Supreme Court of Appeal (by majority) considered that from a textual, contextual and policy examination, the phrase *"claimed amount"* in s 16(4)(a)(ii) should be interpreted as *"the claimed amount in the payment claim"* and that therefore the inclusion of any excluded amount results in a claimant not being able to enforce an unpaid amount as a debt due under s 16(2)(a)(i) of the Act.

[17] [2020] VSC 570.

Analysis of the Courts decision

The textual examination

A claimant's entitlement to enforce a debt relies on s 15(4) of the Act, which provides that, if a payment claim is served and the respondent does not provide a payment schedule within the prescribed time, the respondent *"becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates"*. Thus, the Court action under s 16(2)(a)(i) involves identifying and enforcing a statutory liability and the statutory liability, is a liability to pay *"the claimed amount"*.

Section 4 defines *"claimed amount"* to mean:

> *"an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred in section 14."*

Section 14, relevantly provides:

> *"(2) A payment claim –*
>
> *...*
>
> *(c) must identify the construction work or related goods and services to which the progress payment relates;*
>
> *(d) must indicate the amount of the progress payment that claimant claims to be due (the **claimed amount**); and*
>
> *(3) The claimed amount –*
>
> *...*
>
> *(b) must not include any excluded amount."*

The Court noted that the definition of *"claimed amount"* in s 4 is stated to be, not just the amount claimed, but the amount claimed *"as referred to in s 14"*.

> *"If s 14(2)(d) were to read as defining the claimed amount as "the amount of the progress payment that the claimant claims to be due", the reference in s 4 to s 14 would add nothing."*[18]

(b) Contextual examination

When considering the context of s 16(4)(a)(ii), the Court made the following four observations:

(a) The Court's task under this provision is to decide whether a statutory liability exists and, if so, whether it is to be enforced and there is nothing in s 16(4)(a) that suggest

[18] [11].

that the Court may identify or enforce any liability other than that created under s 15(4);

(b) In contract to the role of the Court, if a claimant elects to pursue the unpaid portion of the claimed amount by adjudication, the adjudicator is required to determine the "adjudicated amount" which is the amount of the progress payment, if any, to be paid by the respondent to the claimant[19] and the adjudicator in doing so must not take into account any part of the claimed amount that is an excluded amount[20]. The amount determined by the adjudicator then becomes a statutory liability of the respondent[21];

(c) It is noteworthy that s 23(2A)(a) is expressed in different terms to s 16(4)(a)(ii), in that it refers to the adjudicator *"not [taking] into account … an excluded amount"*, rather than the claimed amount *"not [including] any excluded amount". "Only s 23(2A) uses language directly requiring the decision-maker to put excluded amounts out of account"*[22];

(d) If an adjudicated amount is not paid, an adjudication certificate may be provided which then gives the claimant the right to recover the unpaid portion of the amount payable as a debt due to that person[23] with the Court only then being required to be satisfied that the amount payable has not been paid.

Thus, the Court said:

> *"Taken together, these provisions suggest that the Court has a limited role, confined to identifying and enforcing statutory liabilities as debts. The task of adjudication is larger. Where it takes place, excluded liabilities are expressly required to be deducted and a new statutory liability for the adjudicated amount is substituted. Again, the Court's role is confined to ordering payment of that amount to the extent it is unpaid."*[24]

(c) <u>The policy perspective</u>

The Court stated that the Act conveyed the following two relevant policy considerations:

(a) Where there are substantive issues in dispute regarding the content of a payment claim, the proper course is to pursue adjudication and this is clearly evidenced when considering s 3 which sets out the object of the Act, viz: to ensure that any person who undertakes to carry out construction work is entitled to receive and is able to recover progress payments and to establish a procedure whereby any disputed claim can be referred to an adjudicator for determination, with the Court's function being to order recovery of unpaid amounts; and

(b) The Act is at pains to prevent the recovery of excluded amounts:

[19] Ss 4, 23(1)(a) of the Act.
[20] S 23(2A)(a).
[21] S 28M.
[22] [15].
[23] S 28R.
[24] [17].

> *"Despite anything 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': s 10(3), 10B(1). In the course of providing for the service of payment claims and defining their content, s 14 states that the claimed amount 'must not include any excluded amount': s 14(3)(b). Section 15(3)(c) requires a payment schedule to identify any amount the respondent alleges is an excluded amount. As already mentioned, an adjudicator must not take into account any part of the claimed amount that is an excluded amount: s 23(2A)(a). An adjudication determination is void to the extent it takes account of an excluded amount: s 23(2B)(b). Review of an adjudication determination is available on the sole ground that the adjudicator included an excluded amount, or wrongly determined that an amount was an excluded amount: ss 28B(3), 28C(2)."*[25]

Accordingly, the Court went on to conclude:

> *"A tolerably clear statutory scheme emerges, by which, if there is a dispute about the extent to which excluded amounts are being claimed, that is a matter for adjudication. If there is no dispute, a claimant may proceed straight to court seeking recovery. At that point, the Court 'is not to' give judgment in favour of the claimant unless it is satisfied that the claimed amount does not include 'any' excluded amount. Consistently with the policy of the Act to prevent recovery of excluded amounts and the role of the Court in enforcing a liability determined by the statute, the natural meaning of those words is that, if the claimed amount includes any excluded amount, it is not to give judgment.*
>
> *Notably, in providing for the statutory liability on failure to provide a payment schedule, s 15(4) does not carve out any excluded amount. The liability is for the claimed amount, and nothing less. This is consistent with a construction of s 16(4)(a)(ii) which precludes enforcement of such a liability where it includes any excluded amount. In such a case, the liability has arisen in contravention of the various prohibitions against the use of excluded amounts in calculating progress payments and in payment claims: ss 10(3), 10B(1), 14(3)(b). It stands to reason that the Act would not permit enforcement of the liability in these circumstances but would treat the matter as one that ought to have been adjudicated.*
>
> *If one were to give 'claimed amount' an ambulatory operation, so that the Court acting under s 16(4) could give judgment for a lesser amount on the basis that the claimant (by the time of the enforcement proceedings) no longer seeks recovery of excluded amounts included in the payment claim, that would open the way for the Court to range more widely than identifying whether there is a statutory liability to enforce. It would be determining the claimed amount, albeit by reference to abandoned excluded amounts. That would permit the Court to be used, rather than the quicker and more informal processes contemplated by the Act, for the adjudication of potentially complex factual disputes. It would take the Court beyond the role of enforcing recovery of a statutory liability.*
>
> *Such a result would sit uncomfortably with the Act's clear policy of encouraging resort to adjudication for dispute resolution. In light of that policy, resort to the Court under s*

[25] [20].

16(2)(a)(i) should be seen as an option intended to be used only in a clear case. A claimant who chooses not to proceed to adjudication takes the risk that the criteria in s 16(4)(a) might not be met. Interpreting sub-paragraph (ii), in accordance with its natural meaning, as prohibiting judgment if any excluded amount has been claimed, is consistent with that understanding of the legislative scheme.

This construction also encourages a claimant to comply with the various prohibitions against including excluded amounts in a progress payment or payment claim, by denying direct judicial enforcement absent prior adjudication in all such cases.[2] The contrary construction, favoured by the primary judge, opens the way for a claimant to include excluded amounts in a payment claim and then to abandon any amounts identified as excluded amounts after a trial of the issue in court. That approach does nothing to encourage compliance with the Act's policy that excluded amounts not be claimed as part of the scheme.

The result of this construction is not that a payment claim containing an excluded amount is invalid. Such a claim is valid and may give rise to a liability under s 15(4) if a payment schedule is not provided in time. The adjudication path then offers a means of recovering the claimed amount, less any excluded amounts identified by the adjudicator. If the direct judicial enforcement path is taken in such a case, it will fail, but nothing prevents the claimant from including the same work (less any excluded amounts) in a fresh payment claim.

For the above reasons, the 'claimed amount' in s 16(4)(a)(ii) is the amount claimed in the payment claim, and if that amount includes any excluded amount the Court is precluded from giving judgment in favour of the claimant. Accordingly, we would uphold ground 2."[26]

Insofar as the Claimant contended that s 16(4)(a)(ii) could be satisfied by applying the *"doctrine of severance"* such as to sever the excluded amount from the claimed amount, the Court rejected such a proposition:

"The first basis for this contention was an argument that the word 'excluded' meant 'shut out from consideration' and that, consistently with this meaning, the definition of 'excluded amounts' invited a process whereby such amounts were shut out from consideration. This result was said to be supported by the objects of the Act and a claimant's right or entitlement to a progress payment, together with the provisions requiring an adjudicator not to take account of excluded amounts.

In our opinion, this argument fails at the threshold. In truth, it does not accept the construction of s 16(4)(a)(ii) identified above but suggests reasons for favouring the alternative construction. Those reasons should not be accepted. The critical issue is not what is meant by 'excluded' but what s 16(4)(a)(ii) means by 'does not include'. As already mentioned, it is noteworthy that the provisions governing adjudication use different language, requiring the adjudicator not to 'take into account' any excluded amount: s 23(2A)(a). This difference serves to demonstrate that the contention is misconceived.

[26] [21] – [27].

Resort to the doctrine of severance does not salvage the argument. It applies where part of an instrument is invalid and, in limited circumstances, the remainder may be preserved by severing that part. The respondent does not identify an instrument to which the doctrine might apply. It cannot be the Act itself, because no question of its validity arises. Nor can it be the payment claim. That is not simply because treating the claimed amount as something less than that which is indicated in the payment claim would fly in the face of the construction of 'claimed amount' which has been identified above. It is also because a payment claim which contains an excluded amount within the claimed amount is still a valid payment claim. That is evident from the requirement that the respondent's payment schedule identify alleged excluded amounts, and the obligations on the Court and an adjudicator in respect of excluded amounts. If the payment claim were simply invalid, these provisions would have no foundation upon which to operate. Since no question of validity of the payment claim arises, severance is not an issue."[27]

Commentary

This is a significant decision as the Victoria Court of Appeal has emphatically stated that if a payment claim includes claims for excluded amounts (whether, as here, a claim for interest, or, in other cases, claims for non-claimable variations or time based claims, etc.), then the Court cannot give judgement nor sever the excluded amount so as to give judgement for a lesser amount. This, in effect, requires a claimant who seeks to recover an unpaid amount as a debt due under s 16(2)(a)(i) to ensure that its payment claim does not include any excluded amount. Given that most payment claims (and particularly payment claims for large amounts) usually include claims for excluded amounts, the appropriate course for a claimant is to refer such a payment claim to adjudication because, notwithstanding that no payment schedule had been issued, an adjudicator is commanded by the Victorian legislation to ensure that the adjudicated amount does not include an excluded amount.

One can therefore expect the number of adjudication applications under the Victorian Act to significantly increase.

[27] [29] – [31].