

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2015 0128

ENWERD PTY LTD

First Applicant

and

SHL NOMINEES (1965) PTY LTD

Second Applicant

v

METIER 3 PTY LTD

Respondent

JUDGES: WHELAN and McLEISH JJA and CAVANOUGH AJA
WHERE HELD: MELBOURNE
DATE OF HEARING: 3 August 2016
DATE OF JUDGMENT: 6 October 2016
MEDIUM NEUTRAL CITATION: [2016] VSCA 234
JUDGMENT APPEALED FROM: [2015] VSC 587 (Vickery J)

CONTRACT - Deed of settlement - Payment obligation under deed of settlement dependent on practical completion under construction contract - Certificate issued but validity challenged - Whether payment under deed of settlement dependent on valid certificate - Construction contract providing for date of practical completion by reference to date in certificate or other date determined in arbitration or litigation - No other date determined - Whether judge relied on post-contractual conduct in construing deed of settlement - Whether trial judge required to determine validity of certificate - Whether applicants elected to accept validity of certificate - Leave to appeal refused.

APPEARANCES:

Counsel

Solicitors

For the Applicants

Mr M H Whitten QC

Arnold Bloch Leibler

For the Respondent

Mr G H Golvan QC

Carrick Gill Smyth

WHELAN JA
McLEISH JA
CAVANOUGH AJA:

1 The applicants Enwerd Pty Ltd and SHL Nominees (1965) Pty Ltd are the proprietors of a block of land situated at 535 and 555 Bourke Street, Melbourne.

2 For the purpose of redeveloping the St James Building, which sits on the land, the applicants engaged the respondent Metier 3 Pty Ltd to provide architectural services pursuant to an undated agreement entered into in or about January 2010 ('the architect agreement'). They also engaged Construction Engineering (Aust) Pty Ltd ('the builder') as the builder pursuant to a contract dated 11 July 2011 ('the construction contract').

3 The applicants' rights and obligations under the architect agreement were novated to the builder pursuant to a deed of novation, also dated 11 July 2011. However, in practice the deed of novation was not implemented; the applicants continued to pay the respondent's fees and generally maintained an active role in respect of the architect agreement.

4 A dispute developed between the applicants and the respondent regarding the fees payable under the architect agreement. The parties entered into a deed of settlement dated 19 November 2012, which contained a schedule for payment of instalments by the applicants to the respondent. The issue remaining in dispute is whether the final instalment, in the amount of \$300,000, has become due and payable. A judge in the Trial Division held that it had, on 21 March 2013.¹ He ordered the payment of interest from that date accordingly (the principal amount having been paid, without admission of liability, before trial).

5 The applicants seek leave to appeal from the judge's orders. For the reasons that follow, leave should be refused.

¹ *Metier3 Pty Ltd v Enwerd Pty Ltd* [No 3] [2015] VSC 587 ('Reasons').

Contractual provisions

6 The dispute centres around satisfaction of the contractual requirement of practical completion, in respect of which a certificate was issued by the superintendent under the construction contract, and the provision of documents required to be provided by the respondent to the applicants thereafter.

7 It is convenient first to outline the key contractual provisions, before turning to the factual circumstances of the dispute.

The deed of settlement

8 The deed of settlement recited the entry of the parties into the architect agreement and that they had reached agreement upon the total fees payable to the respondent in respect of the project. The deed provided for the payment by the applicants to the respondent of outstanding fees in the sum of \$1,314,584 (plus GST). Schedule 1 to the deed provided for the instalments in which payments were to be made.

9 Relevantly, the final instalment, for the sum of \$300,000, was payable in accordance with cl 2(e), which provided:

2 Terms of Settlement

The parties agree that:

...

- (e) payment by the [applicants] of the last instalment of the Final Payment shall be subject to Practical Completion of the Works (including the provision of all construction drawings and any other documents required under the [architect agreement] to be provided by the [respondent] in respect of the Project, upon, or immediately following, Practical Completion).

10 'Practical Completion' was defined in cl 1.1 of the deed of settlement:

"Practical Completion" means the issue of a Certificate of Practical Completion for the Works, or any relevant portion of the Works, in accordance with the contractual arrangements for the performance of the Works.

11 The deed of settlement did not define 'Certificate of Practical Completion'. As set
out below, that expression was defined in the construction contract. The 'Works'
were defined in cl 1.1 of the deed of settlement by reference to the redevelopment
project.

12 Clause 2(f) went on to provide:

- (f) notwithstanding payment of the Final Payment, the [respondent] agrees to continue to perform its Services required under the [architect agreement] during and in respect of the Defects Liability Period for the Works.

13 The deed of settlement defined the 'Services' to mean and include 'all architectural and other services performed by the [respondent]' in respect of the project. The 'Defects Liability Period' was defined as the 'period of 12 months following Practical Completion of the Works' for the identification and rectification by the builder of defects and omissions in the Works.

The construction contract

14 The construction contract made extensive provision for practical completion. General condition 2 of the construction contract defined 'Practical Completion' as follows:

"Practical Completion" is that stage in the execution of the work under the Contract when:

- (a) the Works are complete except for minor omissions and minor defects:
 - (i) which do not prevent the Works from being reasonably capable of being used for their stated purpose and, in respect of the Major Tenancy, do not prevent the occupancy and use of office premises of the Major Tenancy in accordance with the Major Tenant Requirements;
 - (ii) which the Superintendent determines the [builder] has reasonable grounds for not promptly rectifying; and
 - (iii) rectification of which will not prejudice the convenient use of the Works;
- (b) those tests which are required by the Contract to be carried out and passed before the Works reach Practical Completion, have been carried out and passed;

- (c) documents and other information required under the Contract which, in the opinion of the Superintendent, are essential for the use, operation and maintenance of the Works, have been supplied;
- (d) all Planning Permit Requirements have been completed to the satisfaction of the Superintendent;
- (e) Separate Contractors have been afforded access to each Tenancy for the performance of tenancy fitout work for not less than the applicable Tenancy Fitout Period (unless the relevant tenancy fitout work is completed earlier);
- (f) the [builder] has obtained and provided to the Superintendent the original Contractor Approvals, including all necessary Occupancy Permits, required for the Works including Approvals and other documents provided by or received by the [builder] to or from the Building Surveyor, any Government Agency, the Major Tenant and any Utility, except to the extent unable to be obtained in respect of any retail tenancies only required under the Contract to be completed to a shell and core standard, for subsequent fitout by a tenant;
- (g) the [builder] has obtained and provided to the Superintendent a certificate from a licensed surveyor which confirms that the whole of the Works have been constructed in accordance with locations marked on the approved Design Documents and which certifies the Lettable Area of the Major Tenancy;
- (h) all services and installations incorporated in the Works, including mechanical, electrical, hydraulic, water and fire protection services are:
 - (i) physically completed and commissioned;
 - (ii) initially and finally tested as any Government Agency may require; and
 - (iii) in a continuously useable condition which is appropriate in a particular case and this has been demonstrated under normal and emergency operating conditions, to the satisfaction of the Superintendent;
- (i) all necessary infrastructure work, including Utilities' services connections, have been completed to the satisfaction of the responsible authority and the relevant Utilities;
- (j) the [builder] has provided to the Superintendent a final certificate from the principal architectural and engineering Consultants, addressed to the [applicants] and the Major Tenant ... which confirms that, for their respective disciplines, and based where necessary on periodic inspections of the Works, the design and construction of the Works are in accordance with the Design Documents prepared by it and all relevant Legislative Requirements;
- (k) the [builder] has provided to the Superintendent those warranties, guarantees and operation manuals required for the immediate use of

the Works, including those required by the commencement of the lease under the Agreement for Lease;

- (l) all rubbish, surplus materials, Temporary Works and Constructional Plant have been removed from the Site, except for those items, if any, which the Superintendent directs in writing may remain on the Site; and
- (m) training in the use, operation and maintenance requirements for all building services and systems has been provided to the [applicants] and the Major Tenant, to the reasonable satisfaction of the Superintendent.

15 General condition 42.3 dealt with the Superintendent's power to issue a Certificate of Practical Completion (which was defined in general condition 2 as the certificate referred to in that condition):

42.3 Certificate of Practical Completion

The [builder] shall give the Superintendent, the [applicants] and each Tenant at least 14 days notice of the date upon which the [builder] anticipates that Practical Completion will be reached.

When the [builder] is reasonably of the opinion that Practical Completion has been reached, the [builder] shall:

- (a) provide to the Superintendent, drafts of all documents required to be provided to the Superintendent at Practical Completion;
- (b) in respect of the Major Tenancy, in writing request a joint inspection of the Works by the Superintendent, the [applicants] and the Major Tenant; and
- (c) request the Superintendent to issue a Certificate of Practical Completion.

Within 14 days of the receipt of the request, subject to satisfaction by the [builder] of all requirements under the Agreement for Lease for the completion of all relevant elements of the Works to enable the commencement of the lease of the Major Tenancy, the Superintendent shall give to the [builder] and to the [applicants] a Certificate of Practical Completion certifying the Date of Practical Completion or give the [builder] in writing the reasons for not issuing the Certificate.

When the Superintendent is of the opinion that Practical Completion has been reached, the Superintendent may issue a Certificate of Practical Completion, whether or not the [builder] has made a request for its issue.

Within 30 days after the Date of Practical Completion, the [builder] must provide to the Superintendent, all warranties, guarantees,

operation manuals and other documents and information required under the Contract for the use, operation and maintenance of the Works, to the extent not provided prior to Practical Completion.

16 General condition 2 defined 'Date of Practical Completion' as:

- (a) the date certified by the Superintendent in a Certificate of Practical Completion to be the date upon which Practical Completion was reached; or
- (b) where another date is determined in any arbitration or litigation as the date upon which Practical Completion was reached, that other date.

17 General condition 37 concerned the defects liability period:

37 Defects liability

The Defects Liability Period ... shall commence at 4:00 pm on the Date of Practical Completion.

Within the times directed by the Superintendent, and in respect of the Major Tenancy within 10 days, and otherwise as soon as possible, after the Date of Practical Completion, the [builder] shall rectify any defects or omissions in the work under the Contract existing at the Date of Practical Completion.

At any time during the Defects Liability Period, the Superintendent may direct the [builder] to promptly rectify any omission or defect in the work under the Contract for which the [builder] is responsible. ...

The architect agreement

18 Clause 17.3 of the architect agreement provided:

17.3 Design obligations

...

- (i) The [respondent] must within 14 days (or other time period agreed between the parties) of the Date of Practical Completion of the Works under the construction contract provide to the [applicants]:
 - (i) all final design documents issued for construction;
 - (ii) confirmation in writing that, on the basis of inspections from time to time, the construction work (or the relevant parts thereof having regard to the Services) as executed have [sic] been performed generally in accordance with the final design documents; and

- (iii) a written report as to whether and in what particulars the construction work appears to depart or vary from the final design documents issued by the [respondent].

The factual basis of the dispute

19 Case Meallin & Associates Pty Ltd ('Case Meallin') were named as the superintendent under the construction contract. On 1 March 2013, Peter Steinschulte of Case Meallin issued a document described as a certificate of practical completion ('the CPC') for the works undertaken under the construction contract. It stated:

Pursuant to Clause 42.3 of the Amended form of *AS4300-1995 Design and Construct Contract* between the [applicants] and the [builder], the Superintendent notifies the [builder] and the [applicants] that the Superintendent certifies that Practical Completion has been achieved for the remaining Works not included in Separable Portions 1 through 5 previously issued.

20 The CPC acknowledged that certain work was incomplete and was due to be completed by 28 March 2013. The items included '[w]orks to interior of 535 lobby', and an '[a]dditional disabled toilet to level 4'. It further stated that certain works were considered 'building enhancements' outside the contract scope of works, in respect of which the builder was requested to provide the applicants with a completion program for review and agreement within 7 days. The CPC concluded as follows:

The Date of Practical Completion is the date established by the issuance of this Certificate, which is also the date of commencement of the *defects liability period* and applicable warranties required by the Contract Documents.

In accordance with the Contract the following documentation must be submitted within 30 days of Practical Completion:

- Provision of remaining commissioning data for review and verification by Services Consultants.
- Final copies of all Operation and Maintenance Manuals for Stage 1 and 2 of the Works.
- Updated and finalised copies of the as-built drawings.
- Collated list of all warranties, guarantees and service agreements.
- Training of the [applicants'] representatives in the use of associated services must be completed.

The release of security will be certified upon fulfilling the conditions of Clause 5.8 of the Contract.²

21 On or about 8 March 2013, the respondent issued an invoice to the applicants for the payment of the final instalment of \$300,000 (plus GST). The amount was said to be payable in accordance with the deed of settlement on the basis that Practical Completion had occurred.

22 Shortly thereafter, there was a series of emails between the applicants, the respondent and Case Meallin regarding the provision of the 'construction drawings and any other documents' described in cl 2(e) of the deed of settlement. For present purposes, it suffices to say that the trial judge found that those documents were provided to the applicants by 20 March 2013.

23 On 21 March 2013, Mr Shlomo Werdiger on behalf of the applicants emailed Mr Meallin of Case Meallin. His email stated that he considered the issuing of the CPC to be 'premature and inappropriate'.

24 Approximately a fortnight later, on or around 4 April 2013, Mr Werdiger met with Mr Stephen Case (of Case Meallin) and Mr Meallin to convey his view that Practical Completion had not occurred.

25 By an email dated 9 April 2013, Mr Werdiger emailed Mr Meallin attaching a draft letter setting out the reasons why, according to the applicants, Practical Completion had not occurred and a draft notice of dispute to be issued pursuant to general condition 47 of the construction contract.

26 On 12 April 2013, Mr Meallin responded to Mr Werdiger. His email stated:

the assessment to issue [the CPC] on 1 March 2013 was determined after detailed review of the Works and the requirements under the [construction contract] and the Superintendent's determination was made on the basis that the Works were complete except for minor omissions and minor defects and

² General condition 5.8 of the construction contract provided for the release of security and retention moneys upon the issue of the Certificate of Practical Completion and the provision to the Superintendent of 'all warranties, guarantees, operation manuals and other documents and information required under clause 42.3'.

32 On 22 November 2013, the respondent commenced a proceeding against the applicants in the Trial Division.

33 On 28 November 2014, before the trial but after the judge had answered a preliminary question and refused a summary judgment application, the applicants paid \$300,000 (plus GST) to the respondent '[w]ithout any admission of liability, and with a full reservation of their rights'. It did not pay any amount by way of interest or costs.

The proceeding before the trial judge

34 By its originating motion, the respondent sought the following relief:

- (a) declarations that:
 - (i) the final instalment of \$300,000 (plus GST) was due and payable upon issuance of the CPC in accordance with the contractual arrangements for the performance of the Works including the provision of all construction drawings and any other documents ('the construction documents') required pursuant to the architect agreement;
 - (ii) a [Certificate of Practical Completion] was duly issued on 1 March 2013 pursuant to general condition 42.3 of the construction contract;
 - (iii) the construction documents were duly provided on 20 March 2013;
 - (iv) the sum of \$300,000 (plus GST) was due and payable by the [applicants] to the [respondent] on 21 March 2013 or some other date and, if the latter, what date;
- (b) an order that the [respondent] have judgment for the final instalment in the sum of \$300,000 (plus GST) pursuant to sch 1 of the deed of settlement;
- (c) interest; and
- (d) costs.

35 On 21 February 2014, the trial judge directed, pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2005*, that a preliminary trial occur in relation to the following question:

Subject to cl 2(e) of the deed of settlement, whether the relevant provisions of that deed give rise to an entitlement for the respondent to be paid the final instalment of \$300,000 (plus GST) upon the issuance of a [Certificate of Practical Completion] by the Superintendent?

36 The trial of the preliminary question took place on 26 February 2014. On 12 March 2014, the trial judge answered the preliminary question 'Yes'.³ In the course of his reasons, the judge said the following:⁴

Decision

In my opinion, the construction of Clause 2(e) (entitlement of payment of the last instalment), when read alongside the definition of 'Practical Completion' in Clause 1.1 of the Deed of Settlement, means that the entitlement of the Plaintiff to payment of the last instalment under the Deed of Settlement arises when a Certificate of Practical Completion, duly issued in accordance with the terms of the Deed of Settlement, has been issued by the Superintendent.

Conversely, a Certificate of Practical Completion will be invalid for the purposes of triggering the entitlement of the Plaintiff to payment of the last instalment, if it has not been duly issued in accordance with the terms of the Deed of Settlement by the Superintendent.

This may arise if the Defendants, who bear the evidentiary onus on the issue, are able to establish the invalidity of the Certificate of Practical Completion because it has not been issued in accordance with the terms of the Deed of Settlement by the Superintendent in reliance on one or a number of general grounds, namely:

- (a) If the technical requirements of Clause 2(e) and the Clause 1.1 definition have not been satisfied, for example, if the document relied upon as the Certificate of Practical Completion, is in fact not a document of that character; or if the person who purported to issue the Certificate of Practical Completion was not in fact the Superintendent at the relevant time;
- (b) If the Superintendent did not bona fide exercise his contractual power – for example, if it is established that the Superintendent was not genuinely of the opinion that Practical Completion had been reached when he purported to issue the Certificate of Practical Completion;
- (c) If the decision of the Superintendent to issue the Certificate of Practical Completion was so unreasonable that no reasonable Superintendent in his or her position would ever consider issuing it, or if the decision lacks an evident and intelligible justification or is shown to be arbitrary or capricious or to abandon common sense;

³ *Metier3 Pty Ltd v Enwerd Pty Ltd* [2014] VSC 80.

⁴ *Ibid* [49]-[57] (citations omitted).

(d) Or, if the issue of the Certificate of Practical Completion is otherwise shown to be beyond the contractual power conferred on the Superintendent, or if the exercise of the power is otherwise liable [to be] set aside, for example through the application of the principles of unconscionable conduct pursuant to sections 20–22 of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)).

There has been much said in case law about the general duty [obligation] of the Superintendent to act honestly, fairly and reasonably. These general notions are given standard-form contractual expression by AS 2124. Obligations of this nature were described in *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd*⁵ as being met by a Superintendent making ‘decisions which are professional, careful and even-handed, not in the interests of any one party’. While this may be more frequently discussed in the context of a superintendent’s liability in negligence, these obligations may emanate from the contractual context of a construction or engineering project and the Superintendent’s role therein.

A construction contract implies fundamental obligations of cooperation between the principal and contractor in the achievement of the contractual aim.

An important facility designed to ensure the workability of a construction or engineering contract is the mechanism provided for the Superintendent to act as contract administrator. In issuing a Certificate of Practical Completion, and in otherwise carrying out his or her role as Superintendent, the duty of a Superintendent is, in a practical sense, the administration of the agreement in the direction of achieving its contractual objectives as agreed to between the Principal and the contractor (here the Architect).

The Superintendent, as contract administrator, thus has a duty to promote the contractual aim, set against the background of reciprocal rights and obligations provided by the terms of the contract. While this is not a positive duty of facilitation, a Superintendent must not do anything to interfere with the proper functioning of the agreement – that is, he or she must perform their role as a quasi-independent third party in such a way as to give full effect to the terms negotiated and agreed between the parties to the Contract.

The four general grounds, discussed above, on which the validity of the issue of a Certificate of Practical Completion may rest, are illustrative of ways in which the purpose of the contract may be undermined. An invalid Certificate issued under such circumstances is inimical to the carrying out and achievement of the contractual aim.

In my opinion, but subject to the Certificate of Practical Completion issued on 1 March 2013 being not demonstrated to be invalid on any one or more of the grounds described and subject to the other requirements of Clause 2(e) of the Deed of Settlement being satisfied, the issue of the Certificate of Practical Completion gave rise to an entitlement in the Plaintiff to be paid the agreed unpaid balance of fees totalling \$1,314,584 (plus GST) pursuant to the Deed of Settlement.

⁵ (1997) 13 BCL 235, 247 (Byrne J).

37 On 19 March 2014, the respondent applied for summary judgment. That application was dismissed on 26 March 2014.⁶ Among other things, the judge held that there was a triable issue as to whether the applicants were precluded from asserting the invalidity of the CPC and that there was also a significant dispute as to whether the requirement in cl 2(e) for the provision of documents had been satisfied.⁷ The judge made orders for the exchange of pleadings covering all issues.

38 Consistently with the judge's observations set out above, the respondent pleaded in its statement of claim, and the applicants admitted that, on a proper construction of the deed of settlement, the 'issue of a Certificate of Practical Completion' meant the issue of 'a valid Certificate of Practical Completion by the Superintendent in accordance with the [construction contract]'.

39 In their defence and counterclaim, the applicants denied that the CPC was valid or duly issued under cl 42.3 of the construction contract, and sought a declaration to that effect. The grounds reflected those adumbrated by the trial judge in his reasons set out at [36] above. They included allegations that the CPC did not conform to general condition 42.3, the superintendent could not genuinely have been of the opinion that the Works had in fact reached Practical Completion, and the decision to issue the CPC was so unreasonable that no reasonable superintendent would ever have considered issuing it. The applicants also sought declarations that Practical Completion had not been reached at 1 March 2013, that the respondent had not provided all drawings and documents required under the architect agreement and that the respondent was not entitled to payment of the final instalment under cl 2(e) of the deed of settlement.

40 As mentioned, while the proceeding was on foot, and after the statement of claim, defence and counterclaim, and amended reply and defence to counterclaim had been filed by the parties, the applicants paid the respondent the final instalment without interest or costs and without admitting any liability. Therefore, by the time

⁶ *Metier3 Pty Ltd v Enwerd Pty Ltd* [No 2] [2014] VSC 138.

⁷ *Ibid* [28]-[37].

the matter came on for trial on 1 June 2015 the only outstanding amount was the respondent's claim for interest and costs. However, the applicants also sought the declarations just noted.

41 At trial, the respondent contended that it had fulfilled its obligations to provide the required documents on 20 March 2013 and that the CPC was valid for the purposes of cl 2(e). It further contended that, on a proper construction of the deed of settlement, a Certificate of Practical Completion issued for the purposes of the construction contract, which had not been set aside by an arbitrator or a court, was a valid Certificate of Practical Completion for the purposes of the deed of settlement. Alternatively, the applicants were precluded from relying on, or had waived, any entitlement they had to assert that the CPC was invalid and that cl 2(e) had not been complied with.

42 The applicants contended at trial that cl 2(e) contained a two-part 'trigger' for the payment of the final instalment: the provision of a valid Certificate of Practical Completion and the provision of the drawings and documents described in that clause. The applicants submitted that neither trigger was satisfied. The CPC was invalid on its face or alternatively because (a) the Works had not reached Completion by 1 March 2013, when the CPC was issued, and (b) the issuing of the CPC was invalid on the grounds pleaded. The applicants relied on expert evidence in support of these claims. They further contended that the respondent had not complied with the second element of cl 2(e), as it had not provided the required drawings and documents to the applicants.

43 In his reasons for judgment, the trial judge began by construing the definition of 'Practical Completion' in cl 1.1 of the deed of settlement. In his view, there were three matters that were important to its construction. First, the phrase 'in accordance with the contractual arrangements for performance of the Works' was intended to go beyond the confines of the construction contract.⁸ It 'introduce[d] a quite different

⁸ Reasons [71].

concept'⁹ to the construction contract itself and included 'any "arrangements" the parties to the Construction Contract effected for the purpose of conducting the Project works in light of the issue of a Certificate of Practical Completion for the works'.¹⁰ Secondly, 'Works' was defined in the deed of settlement to mean 'all construction work for the redevelopment ... and extension of the St James Building'. That definition included rectification works to be undertaken by the builder during the Defects Liability Period (as defined in the construction contract), which period commenced on the issuing of the Certificate of Practical Completion.¹¹ Thirdly, the context of the deed of settlement was important. The deed was intended to record the parties' agreement in relation to the disputed sums by the applicants making instalment payments to the respondent. Schedule 1, which listed the dates at which instalment payments had to be made, showed that all instalments except the first were payable at a time that was referable, either directly or indirectly, to Practical Completion.¹² Given the parties' intention to settle their dispute by the making of instalment payments over time, the dates at which those payments were payable ought be capable of being determined with certainty. As such, a construction of cls 1.1 and 2(e) that best provided for certainty of the payment date was to be preferred.¹³

44 As far as the 'contractual arrangements' went, the trial judge found that neither the applicants nor the builder took steps to have the CPC set aside, either by an arbitrator or a court, and that the only CPC issued was that dated 1 March 2013.¹⁴ The protracted correspondence between Mr Werdiger and Case Meallin regarding

⁹ Ibid [66].

¹⁰ Ibid [72].

¹¹ Ibid [73].

¹² Each payment, other than the final payment, was due and payable at 'Handover' of various areas of the site. 'Handover' was defined in cl 1.1 to mean 'when the relevant area of the Works has reached Practical Completion and is able to be opened to the public or, in the case of tenancy areas, is able to be handed over to tenants or their contractors to commence fit out work'.

¹³ Reasons [76]-[80].

¹⁴ Ibid [91].

the validity of the CPC did not culminate in any formal challenge.¹⁵ The judge also referred to the draft letter from Mr Shinton to the builder disputing the CPC but accepting that Practical Completion had been reached.¹⁶ That letter was never sent, but the judge held that it evidenced the applicants' belief that they had grounds on which to dispute the validity of the CPC. Despite that belief, no formal steps were taken to dispute the CPC. The trial judge held, relying on Mr Werdiger's email to Mr Norbury dated 13 September 2013,¹⁷ that this was a commercial decision driven, at least in part, by the decision to terminate Case Meallin's appointment as superintendent.¹⁸

45 The trial judge went further and held that the applicants, the respondent and the builder all treated the CPC as valid. The builder gave up possession of the site to the applicants shortly after the CPC was issued, as it was required to under general condition 35.2 of the construction contract. The draft letter from Mr Shinton of 17 June 2013 was premised on the CPC's validity and the attendant commencement of the Defects Liability Period, pursuant to general condition 37 of the construction contract. And the respondent participated in the defects liability process by preparing reports after the issuing of the CPC.¹⁹

46 Ultimately, the trial judge held that the fact that the CPC might have been open to challenge was beside the point; no dispute was initiated and so the CPC remained valid and was accepted by the parties as such.²⁰ The critical passage in the judge's reasoning is as follows:²¹

In my opinion, applying the construction of Clause 2(e), when read alongside the definition of 'Practical Completion' in Clause 1.1 of the Deed of Settlement as found in *Metier3 Pty Ltd v Enwerd Pty Ltd & SHL Nominees 1965*

15 See [23]-[26] above.

16 See [29] above.

17 See [31] above.

18 Reasons [89].

19 Ibid [93]-[109].

20 Ibid [111].

21 Ibid [110]-[113].

Pty Ltd,²² the entitlement of the Architect to payment of the Final Payment under the Deed of Settlement arose when the CPC was issued by the Superintendent on 1 March 2013. This Certificate of Practical Completion was duly issued in accordance with the terms of the Deed of Settlement by reason that, pursuant to the contractual arrangements between the [applicants] and the Builder, it operated between them for all purposes, and was accepted by them as operating as a valid certificate of practical completion duly issued under the Construction Contract.

The fact that there may well have been grounds to set aside the CPC as between the [applicants] and the Builder is not to the point. The fact is that neither of those parties acted upon those potential grounds, and the CPC remained valid as between them and was accepted by them as regulating their rights under the Construction Contract.

Further, in my opinion, this construction serves to fix the obligation to make the Final Payment by the readily ascertainable date of issue of the CPC. Even though it suffered from exposure to potentially being set aside on a ground of invalidity, and therefore was voidable, its issuance and continued operation in the absence of any declaration as to invalidity by a court or arbitrator, served the ends of certainty in fixing an objectively ascertainable date upon which the Final Payment was to be made under the Deed of Settlement.

In these circumstances, pursuant to the Deed of Settlement on its proper construction, the CPC as issued amounted to a valid CPC for the purposes of Clause 1.1 and Clause 2(e), and remained so in the absence of being set aside by a court or in an arbitration.

47 The judge therefore did not address the applicants' arguments as to the validity of the CPC. There was also no need to deal with the respondent's claim that the applicants waived their right to challenge the CPC. However, the trial judge dealt with that issue in short compass. He held that the 'waiver' claim involved two conceptually distinct points: estoppel and election.²³ The judge would not have upheld the estoppel claim²⁴ and that issue is not pressed by the respondent.

48 The election claim, on the other hand, succeeded. The judge held that the applicants decided not to exercise their right to commence proceedings to set aside the CPC, but to the contrary, they insisted on pressing their contractual rights against both the builder and the respondent on the basis that the CPC was valid.

²² [2014] VSC 80.

²³ Reasons [120].

²⁴ Ibid [121]–[126].

Accordingly, the applicants were precluded from claiming that the CPC was invalid.²⁵

49 The first 'trigger' under cl 2(e) of the deed of settlement was therefore satisfied. The trial judge then turned to the second 'trigger', being the provision of documents.²⁶ Clause 17.3(i)(i) of the architect agreement, set out above,²⁷ referred to final design documents 'issued'. The judge held that, by its use of the past tense, cl 17.3(i)(i) did not give rise to any obligation to provide documents issued at a time beyond 14 days (or other agreed period) after the Date of Practical Completion.²⁸ The evidence given by Mr Werdiger as to outstanding categories of documents did not attest to whether those documents were 'final design documents issued for construction'.²⁹ Moreover, on 20 March 2013 the Case Meallin project manager, Mr Anthony Millicer, sent an email to Mr Shinton of the applicants and Mr White of the respondent in which he stated: 'Based on my review, I can confirm that the register of drawings represents the full set of construction documentation as required to be provided'.

50 The trial judge held that the email chain between the parties was sufficient to evidence the provision of the documents required by cl 2(e) of the deed of settlement, read together with cl 17.3 of the architect agreement.³⁰ As such, by 20 March 2013 the respondent had satisfied the second 'trigger' in cl 2(e) and was therefore entitled to payment of the final instalment of \$300,000.³¹

51 On 16 November 2015, the trial judge made the following orders:

25 Ibid [127]–[131].

26 Despite the answer to the preliminary question, which can be read as concluding that there was a single 'trigger', it is now accepted by both parties, and the trial appears to have proceeded on the basis, that there were two.

27 See [18] above.

28 Reasons [135].

29 Ibid [136]–[142].

30 Ibid [144].

31 Ibid [145]–[147].

1. There be judgment on the [respondent]'s claim in the proceeding for the [respondent].
2. Within 28 days, the [applicants] pay the [respondent] interest in the sum of \$48,069.86, representing interest on the Final Instalment Payment sum of \$300,000 calculated at the Supreme Court Penalty Rate from 21 March 2013 to 28 November 2014, when the final Instalment of \$300,000, plus GST, was paid by the [applicants].
3. The [applicants]' counterclaim be dismissed insofar as it relates to the claims for declaratory relief described in paragraph [148] of the reasons for judgment of the Honourable Justice Vickery dated 21 October 2015.
4. The [applicants] pay the [respondent]'s costs of the [applicants]' claim in the proceeding (including reserved costs).
5. The Proceeding, insofar as it relates to the remaining elements of the [applicants]' counterclaim which have not been dismissed, be adjourned for further directions on 20 November 2015.

The application for leave to appeal

52 The applicants now seek leave to appeal the trial judge's decision. The application for leave to appeal lists five grounds:

1. The trial judge erred in his construction of the relevant provisions of the Deed of Settlement by impermissible reference to post contractual conduct.
2. The trial judge erred in finding that the Respondent was entitled to the Final Payment because the Applicants did not take steps to have the CPC set aside, and that they accepted the CPC as a certificate of practical completion validly issued under the Construction Contract, thereby misapprehending the evidence; alternatively, failing to have any or any proper regard [to] or place sufficient weight on the Applicants' evidence of their repeated objections to the validity of the CPC to both the Respondent and the Builder.
3. The trial judge failed to determine whether the CPC was valid on its face.
4. The trial judge failed to apply the correct legal principles in his determination of the Respondent's claim of election, and based his finding that the Applicants were 'effectively precluded from asserting that the CPC was not a valid certificate of practical completion' on his misapprehension and/or erroneous consideration of the evidence as to the Applicants' repeated objections to the validity of the CPC.
5. The trial judge erred in finding that the Respondent had fulfilled the requirement for provision of documents in clause 2(e) by misapprehending; alternatively, failing to have any regard to, the second limb of the requirement, namely, provision of 'any other

documents required under the [architect agreement]', and the Respondent's failure to have done so.

Ground 1 – post-contractual conduct

53 The applicants submit that the trial judge construed the term 'contractual arrangements' in cl 1.1 of the deed of settlement by reference to post-contractual conduct, which was inadmissible for the purposes of contractual construction.³² They submit that the trial judge ought to have found that the 'contractual arrangements' were limited to the construction contract, being the only contractual arrangement that existed at the time of entry into the deed of settlement. The judge was said to have erred by relying on the following matters as shedding light on the construction of 'contractual arrangements' in the definition of 'Practical Completion' in the deed of settlement:

- (a) neither the applicants nor the builder taking steps to have the CPC set aside, either through litigation or arbitration, and the fact that no other Certificate of Practical Completion was issued; and
- (b) the applicants, the respondent and the builder accepting the CPC as having been validly issued for the purposes of the construction contract, the architect agreement and the deed of settlement, and arranging their rights and obligations for the performance of the remaining works on that basis.

54 Further, it is contended that the trial judge's approach to construction was not pleaded, not the subject of submissions at trial and not the subject of an opportunity for the parties to be heard.

55 The respondent contends that it has argued throughout that the parties to the construction contract chose to treat the CPC as valid. The trial judge did not construe the deed by reference to post-contractual conduct; rather, he took into account post-contractual conduct to determine whether the parties accepted the

³² See, eg, *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 164 [26] (Heydon JA); *Regreen Asset Holdings Pty Ltd v Castricum Brothers Australia Pty Ltd* [2015] VSCA 286 [133] (Warren CJ, Kyrou and McLeish JJA).

validity of the CPC for the purposes of the construction contract. There was therefore no error in the construction process.

56 In our opinion, the applicants' argument under this ground should be rejected. In referring to events which took place after the signing of the deed of settlement, the judge was seeking to identify what were the 'contractual arrangements' for the performance of the works. The question being addressed was whether a Certificate of Practical Completion had been issued in accordance with those arrangements. The judge did not ascertain the meaning of 'contractual arrangements' in the deed of settlement by having regard to events that had happened after the deed of settlement was entered into. He merely found that the deed of settlement was to be applied by having regard, when the time came for its performance, to the whole of the contractual arrangements at that time, including the manner in which the construction contract was being performed.

57 It would have been relevant to have regard to such events on any view of the construction of the deed of settlement. A Certificate of Practical Completion had been issued and, as the judge held, there had been no step taken by any party to the construction contract to have it set aside. Even if the 'contractual arrangements' were confined to the construction contract, it was highly relevant to consider those two facts, because the definition of 'Date of Practical Completion' in the construction contract was such that, unless a Certificate of Practical Completion were successfully challenged in arbitration or litigation, Practical Completion would be treated as having occurred on the date certified in the Certificate.³³ Therefore, even if the applicants' construction argument under this ground were accepted, the essential approach of the trial judge to the facts would stand unaffected.

58 In so far as the applicants contended that they had been taken by surprise by the judge taking what was said to be a different approach to the construction of the deed of settlement, the contention should be rejected. Counsel for the applicants in this

³³ See [16] above. The respondent contended at trial that a Certificate of Practical Completion that had not been set aside was necessarily valid for the purposes of the deed of settlement.

Court accepted that the factual issues regarding how the parties conducted themselves after the issue of the CPC were fully argued at trial and there was no additional evidence which the applicants would have sought to adduce had these issues been designated at the trial as issues relevant to the construction of the deed of settlement. There would therefore be no reason why this Court should not address the suggested novel construction itself.³⁴

59 In any event, in our opinion the judge did not adopt any new construction. It is true, as the applicants submit, that the judge said in the preliminary judgment that it was 'common ground' that the 'contractual arrangements' meant the construction contract.³⁵ But in the context of addressing the preliminary question the judge was only deciding a question of construction of the deed of settlement. As the respondent submitted, the real question was whether the issue of a Certificate of Practical Completion, as distinct from proof of Practical Completion, sufficed to satisfy the requirement in cl 2(e) of the deed of settlement; and that very question was duly heard and determined at trial. In looking at the whole of the circumstances of the case in his final reasons, the judge was not articulating any construction of cl 2(e) different to that ruled upon in answer to the preliminary question.

Ground 2 – objections to the validity of the CPC

60 Next, the applicants submit that the trial judge, in finding that the applicants did not take steps to have the CPC set aside, either misapprehended the evidence or failed to have proper regard to, or place sufficient weight on, the applicants' evidence of their repeated objections to the respondent and the builder as to the validity of the CPC.

61 In particular, it is said that appropriate weight was not given to the evidence of Mr Werdiger, to the effect that the applicants repeatedly objected to the validity of

³⁴ Cf *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 438 (Latham CJ, Williams and Fullagar JJ); *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, 439–40 [38] (Allsop J; Drummond and Mansfield JJ agreeing).

³⁵ *Metier3 Pty Ltd v Enwerd Pty Ltd* [2014] VSC 80 [10].

the CPC and endeavoured to resolve their differences with the builder in relation to the state of the works, as well as with the respondent. The agreement with the builder as to the builder's claims was not an admission of the CPC's validity for all purposes; rather, it was an expression of 'business common sense' and 'commercial reality'.

62 The respondent disputes this contention. It submits that there was overwhelming evidence at the trial that the CPC was accepted by the applicants as valid for the purposes of the construction contract and that the parties to that contract regarded Practical Completion as having been reached on the date certified in the CPC. As it did at trial, the respondent contends that a Certificate of Practical Completion issued under the construction contract and not set aside by the parties to that contract must, as a matter of construction, also be a valid Certificate of Practical Completion for the purposes of the deed of settlement. It submits that it would be commercially and logically untenable if a Certificate of Practical Completion issued by the superintendent were treated as valid for the purposes of the construction contract yet was invalid under the deed of settlement.

63 It is not necessary to deal with the applicants' arguments in this respect because they proceed on the premise that the issue was whether the parties to the construction contract, and in particular the applicants, affirmatively accepted the validity of the CPC. The premise is mistaken because, as the respondent submitted, the first issue was whether the CPC was successfully challenged under the construction contract, that is to say, in a court or in an arbitration. The judge was correct to hold that the CPC was operative under the construction contract so long as it was not subject to such a challenge.

64 That conclusion is supported by the consideration, upon which the judge relied, that cl 2(e) of the deed of settlement was intended to facilitate certainty of payment. An equal emphasis on the need for certainty is apparent in the construction contract itself. The concept of Practical Completion was important in that context for a number of reasons, including the commencement of the Defects Liability Period and

the handover of the site to the applicants. Provision for this stage to be designated by a certificate was calculated to achieve certainty, qualified only by the possibility, to which express reference was made, that arbitration or litigation ensuing from the issuing of a certificate might yield a different outcome. It is obvious, when one contemplates the extensive list of contractual requirements to be satisfied in order to reach Practical Completion, that the device of the certificate was critical to enabling the contract to be performed with relative certainty as to the parties' rights and obligations. As the judge held in answering the preliminary question, the deed of settlement likewise operated upon the certificate, rather than upon 'Practical Completion' in fact.

65 On this basis, reliance upon the applicants having made objections regarding the issuing of the CPC is misplaced. It is not in issue that the applicants did not pursue those objections. The parties to the construction contract proceeded therefore by reference to the CPC and its issue in turn satisfied cl 2(e) of the deed of settlement.

Ground 3 – failure to determine validity of CPC

66 The applicants submit that the judge was required, and failed, to determine whether the CPC was valid on its face. The applicants contend that their evidence and submissions on that point were barely contested by the respondent, who preferred to focus on the election and waiver issues. The judge ought to have found that the CPC was invalid on its face because it was not a Certificate of Practical Completion as contemplated by the construction contract, it lacked an intelligible justification and its issue was beyond the superintendent's power conferred by the construction contract.

67 Counsel submitted that the judge had departed from his judgment on the preliminary question, in which he had specified that the Certificate of Practical Completion had to be duly issued under the construction contract. That was the issue which the applicants had pursued at trial. It was submitted that, without the parties having had an opportunity to make submissions, the judge had construed the deed of settlement differently and held that it did not matter if there were available

grounds of invalidity in respect of the CPC, unless those grounds had been acted upon by the parties to the construction contract.

68 The respondent again says that, as a matter of construction, a Certificate of Practical Completion issued and not set aside through either arbitration or litigation (as contemplated by the definition of 'Date of Practical Completion' in the construction contract) must be valid for the purposes of the deed of settlement. The crucial question is not the facial validity of the CPC but whether the CPC was effective for establishing the Date of Practical Completion. It is submitted that without a clearly ascertainable Date of Practical Completion the construction contract would become practically unworkable. The decision by the superintendent to issue a Certificate of Practical Completion 'prevails until it has been set aside by an arbitrator or a court'.³⁶

69 The respondent submitted that the applicants had mischaracterised what was decided on the preliminary question. Counsel submitted that the preliminary question had been addressed to an argument as to whether cl 2(e) of the deed of settlement required the issue of a Certificate of Practical Completion (as the respondent had argued) or whether the respondent had to establish that Practical Completion had in fact been reached (which was the applicants' contention). The question had been answered in favour of the respondent, and the judge's observations as to the possible grounds of challenge of a Certificate of Practical Completion were *obiter dicta* and had not been the subject of argument.

70 Enough has already been said to indicate that the respondent's contentions should be upheld and this ground must be rejected. Aside from proceeding on the false premise previously identified, there is a distinct air of unreality in the suggestion that the validity of the CPC could be determined, as between the applicants and the respondent, for the purpose of their own relations, while the CPC remains unimpeached as between the applicants and the builder under the

³⁶ *FFE Minerals Australia Pty Ltd v Vanadium Australia Pty Ltd* [2000] WASC 1 [11] (Heenan J).

construction contract. The architect agreement and the deed of settlement operated in the context of, and depended on, the framework of rights and obligations established under the construction contract. The applicants' attempt to disaggregate the two sets of contractual arrangements is wholly unmeritorious.

71 It is true that, in his preliminary ruling, the judge adverted to grounds upon which the validity of a certificate of practical completion might potentially be impugned. To some extent, the judge's reasons for final judgment departed from that analysis. However, as noted above, the respondent submitted that the judge's earlier observations were by way of *obiter dicta* and that they proved not to be relevant when the deed was properly construed along the lines it submitted at trial. For the reasons already set out, those submissions are correct.

72 A further consequence of the applicants' preferred approach became clear in oral submissions. Counsel for the applicants accepted that, on his argument, not only had no valid Certificate of Practical Completion been issued, but because events had overtaken the parties, none would ever be issued. In effect, the parties had done without a valid certificate. It followed that the respondent would never be entitled to payment under cl 2(e), in the absence of any agreement between the parties.

73 The conclusion to which the applicants' argument leads attributes uncommercial, and even bizarre, intentions to the contracting parties. It confirms our opinion that the judge correctly construed and applied cl 2(e), and that arguments that might be made about the validity of the CPC were 'not to the point'.³⁷

Ground 4 – election

74 Ground 4, which raises the question of election, strictly does not arise. However, it may be dealt with shortly. The applicants contend that the trial judge failed to identify the alternative and inconsistent rights that arose from the issuing of the CPC, the unequivocal act of election by the applicants and the communication of the

³⁷ Reasons [111].

choice to the respondent.³⁸ They submit that there were different contracts and contracting parties, and what the applicants said under one contract did not necessarily give rise to an inconsistent outcome under the other. There was no unequivocal act by the applicants in respect of their contractual rights as against the respondent. Further, they submit that the trial judge erred in relying on evidence that the respondent performed duties during the defects liability period when it was always required, under cl 2(f) of the deed of settlement, to perform those obligations. As such, there was no detriment to the respondent.

75 According to the respondent, the applicants elected to treat the CPC as valid under the construction contract. The respondent performed its obligations under cl 2(f) of the deed of settlement following the issuing of the CPC. In so doing, it suffered detriment in its reliance on the assumed validity of the CPC.

76 The applicants' contention has no merit. The judge's finding that the respondent performed its duties under cl 2(f) entails a conclusion that the parties to the deed of settlement proceeded as if the defects liability period had commenced. The respondent participated fully in the defects liability process. Yet that process by definition commenced upon the Date of Practical Completion. The applicants could not simultaneously insist on the respondent's performance under cl 2(f) and deny that Practical Completion has been reached under cl 2(e). This was a plain case of election between two mutually exclusive alternatives, namely treating Practical Completion as having been achieved and treating it as not having happened.³⁹

77 In so far as the applicants submit that there was a lack of detriment, the respondent's performance of cl 2(f) indicates the contrary. In any event, detriment is not necessary in order for a choice between inconsistent alternatives to constitute a binding election.⁴⁰

³⁸ See, eg, *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 ('*Sargent*').

³⁹ See *ibid* 642 (Stephen J); *Fried v National Australia Bank Ltd* [2000] FCA 910 [28]-[33] (Weinberg J).

⁴⁰ *Sargent* (1974) 131 CLR 634, 646-7 (Stephen J); *Commonwealth v Verwayen* (1990) 170 CLR 394, 421-2 (Brennan J); *Macquarie Bank Ltd v Beaconsfield* [1992] 2 VR 461, 469 (Ormiston J).

Ground 5 – provision of documents by the respondent

78 Finally, the applicants contend that the documents that the respondent was required to provide pursuant to cl 2(e) of the deed of settlement were not so provided, and that the trial judge erred by failing to have proper regard to the evidence of Mr Werdiger in respect of certain documents that were not provided.

79 The respondent contends that it provided all such documents on 20 March 2013. In that respect, it relies on the chain of emails between the applicants, the respondent and Case Meallin mentioned above.⁴¹ It also contends that the documents adverted to in Mr Werdiger's evidence were found by the trial judge not to be 'final design documents' (and were therefore outside the scope of cl 2(e)).

80 In oral argument, counsel for the applicants accepted that, if he failed in his argument that Practical Completion had not been reached under cl 2(e), he could not impugn the judge's finding that the documents in dispute had not been 'issued' at Practical Completion within the meaning of cl 17.3(i)(i) of the architect agreement. That is because the relevant documents concerned work done only after the issue of the CPC. In the circumstances, this ground must fail.

Conclusion

81 In our opinion, there was no substance in the grounds sought to be agitated by the applicants. The applicants were bound to pay the last payment of the final instalment upon the issue of the CPC, unless it was set aside, and the ensuing provision of the documents referred to in cl 2(e). Since the CPC was not set aside, the application for leave to appeal had no real prospect of success and leave to appeal should be refused.

⁴¹ See [22] above.