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

Not Restricted

S ECI 2018 00125

VANGUARD DEVELOPMENT GROUP PTY LTD (ACN 167 084 648) AS TRUSTEE FOR THE TAYLOR FAMILY TRUST NO. 2 — Plaintiff

v

PROMAX BUILDING DEVELOPMENTS PTY LTD (ACN 114 054 741) — First Defendant

JOHN O'BRIEN — Second Defendant

JUDGE:	Kennedy J
WHERE HELD:	Melbourne
DATE OF HEARING:	12 July 2018
DATE OF JUDGMENT:	6 August 2018
CASE MAY BE CITED AS:	Vanguard Development Group Pty Ltd v Promax Building Developments Pty Ltd & Anor
MEDIUM NEUTRAL CITATION:	[2018] VSC 386

BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* (Vic) – Where 'final claim' issued after termination of contract – Whether valid reference date – No reference date existed such that jurisdictional error made – Whether further error committed in failing to assess alleged defects which existed at time of earlier adjudication but only identified subsequently – Further jurisdictional error found.

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M Robins QC	KCL Law
For the First Defendant	Mr J Twigg QC with Mr A Morrison	Brixton Legal
For the Second Defendant	No appearance	…

HER HONOUR:

1 This is an application for judicial review seeking an order in the nature of certiorari to quash an adjudication determination made by the second defendant (**Adjudicator**) on 24 May 2018 (**Adjudication Determination**) pursuant to s 23 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Act**).

2 In circumstances where grounds 1 and 2 were abandoned, the further amended originating process essentially raised two groups of grounds for review which will be set out more fully below.

3 First, that the Adjudicator did not have jurisdiction to make the Adjudication Determination given there was no valid reference date (grounds 3 and 6).

4 Second, that the Adjudicator erred in failing to consider and assess claims relating to alleged defects (grounds 4 and 5).

5 In relation to the first issue, the Adjudicator had proceeded on the premise that the plaintiff, Vanguard Development Group Pty Ltd (**Vanguard**), had validly terminated the contract at common law. This however was challenged by the first defendant, Promax Building Developments Pty Ltd (**Promax**), who claimed that it had validly terminated the contract. In the result, pursuant to an order made by the Honourable Justice Riordan on 2 July 2018, the hearing was not to include any issue as to whether the first defendant was entitled to terminate under the Contract. However, as will be seen below, the construction I have adopted means it will be unnecessary to resolve the issue of who validly terminated the contract.

6 The second defendant Adjudicator has indicated that he did not intend to take an active role in the proceeding but would seek to be heard prior to the making of any costs order against him.[1]

Background

7 Vanguard is a company formed in 2013 by its directors, Ms Helen Taylor and

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[1] See letter from Ms Lorraine Djuricin, General Manager of Adjudicate Today Pty Ltd dated 15 June 2018 and filed 20 June 2018.

Mr Richard Taylor. It is the trustee of the Taylor Family Trust No. 2 and was nominated as the purchaser of the property at 47 Dickens Street Elwood which, at the time of purchase, comprised 4 pre-war apartments.

8 Promax is a company which primarily carries out medium scale residential developments for commercial developers that has been in operation since 2005.

Contract

9 On 17 October 2016 Vanguard (as the owner) and Promax (as the contractor) entered into a building contract. The contract price was $2,961,750.00 (including GST).

10 The description of the works was stated as the construction of 10 apartments, (5 of which are located in an existing structure and 5 of which are located in a new structure), together with an undercover carpark.

11 The contract included certain special conditions as well as more general conditions set out in the contract. Pursuant to cl B2 and Schedule 3, the order of precedence of the contract documents was such that the special conditions had priority over the other conditions set out in the contract.

12 One of the special conditions contained in Schedule 2a was special condition 22 which read as follows:

> **Reference Date**
>
> In [sic] the extent that the Building and Construction Industry Security of Payment Act 2002 ('the Act') is applicable to this contract, and notwithstanding any other term of this contract and/or its termination, the '*reference date*' for the purposes of a *final claim for payment*, pursuant to section 9(2) of the Act, is the date the Contractor last undertook any works on the site (emphasis added).

13 The contract provided for cash retention by way of security with the owner entitled to withhold up to 10% of each progress payment until the value equated to 5% of the contract price. The contractor was then entitled to release of 50% on practical completion (cl C7) and the remaining security on issue of a final certificate under cl N12 or a certificate under cl Q9 or cl Q17 (cl C9.1).

14 The contract further provided for an ongoing obligation for the contractor to correct

defects, including during the defects liability period, which was 12 months commencing on the date of practical completion pursuant to cl M16 and item 31 of Schedule 1.

15 Clause N3 set out the procedure for making progress claims. Clause N3.2 (being the option signed by the parties) and item 32 of Schedule 1 provided for one claim for a progress payment in each month within 1 business day of the 15th day in each month. Such a claim was to set out Promax's valuation of the work completed; materials and equipment delivered to the site; the value of off-site plant or materials; and the percentage of the contract price claimed, all in relation to the cost of building work as adjusted, up to and including the date of the claim. Clause N5 also provided for the assessment of each claim for a progress payment by an architect.

16 Clause N11 was entitled 'Final claim - procedure for contractor' and dealt with the procedure for Promax to make a 'final claim.' Leaving aside the situation where an architect requested a final claim (see cls N11.4 and N11.5), the only circumstances in which a final claim could be both made and submitted (or served) was prescribed by cl N11.1 as being when:

(a) all defects liability periods have ended;

(b) Promax has rectified all defects and finalised all incomplete work; and

(c) the works have been completed in accordance with the contract.

17 After such a final claim was made Promax was not entitled to make any further claims under the contract pursuant to cl N11.6. An architect was then to assess the final claim and issue a final certificate under cl N12 which was to be paid within 14 days. Pursuant to cl N15 the final certificate was to state the architect's assessment of 'all outstanding entitlements under this contract' and was also to be evidence of the parties' 'entitlements under this contract' and that Promax had 'performed its obligations under this contract'.

18 In terms of termination, there was provision for Vanguard to terminate following service of a default notice or on grounds of insolvency. Following such a termination the architect was to provide a certificate under cl Q9 as to the amount payable which

included the costs to Vanguard of completing the works, which was to take the place of a final certificate under cl N12.

19 There was also provision for Promax to terminate following service of a default notice and notice of suspension (cl Q13) or on grounds of insolvency (cl Q14). Pursuant to cl Q15 if there was a termination on either of these bases, Vanguard was to pay Promax the amount Vanguard would have had to pay if the Vanguard had wrongfully repudiated the contract. Pursuant to cl Q16 within a reasonable time of termination Promax was to submit to the architect a claim setting out its entitlement 'calculated on the same basis as if the owner had wrongfully repudiated the contract.' Pursuant to cl Q17 the architect must then assess the claim and issue a certificate which took the place of a final certificate under cl N12.

Payment claims

20 During the period between December 2016 and November 2017, 11 payment claims were issued and paid.

December progress claim

21 On 15 December 2017, Promax issued a progress payment claim in an amount of $292,976.26 (including GST) (**December Progress Claim**). The claim consisted of a tax invoice and an attached 'trade summary' which provided that the total sum of expenditure on certain items for 'this month' came to an amount of $253,500 (excluding GST). This amount was included in the invoice as the '12th monthly progress payment'. An amount for variations 'this month' was added as well as a proportion for retention withheld, giving a total claim of $266,342.05 (excluding GST).

22 15 December 2017 was also the date that Promax last performed work on the site.

23 No certificate was issued by the architect under cl N5.1 in response to this claim. On 22 December 2017, Vanguard issued a payment schedule under the Act in response to the December Progress Claim, proposing to pay $nil in a context where a building order appeared to be in place.

24 On 10 January 2018, Promax issued an adjudication application under the Act in respect of the December Progress Claim.

25 On 17 January 2018, Vanguard then lodged an adjudication response. The adjudication response included a progress payment recommendation from quantity surveyor Charter Keck Cramer which recommended a payment of only $101,452.85 (excluding GST) based on its estimate of the value of the work (taking into account incomplete works). The response also included a list of 8 defects prepared by Helen Taylor.

26 A number of rounds of submissions followed with the result that on 21 February 2018 the adjudicator, Mr Sundercombe (**First Adjudicator**) handed down a determination assessing that a sum of $229,944.03 (including GST) was payable together with interest and costs (**First Adjudication**). It was common ground that the First Adjudicator concluded that only one of the alleged defects cited by Ms Taylor had merit.

Termination and Relevant Payment Claim

27 On 27 February 2018, Promax served a notice of suspension under cl Q12 relying on Vanguard's failure to pay the December Progress Claim.

28 Later that same day, Promax served a notice of termination relying on cl Q13 of the contract.

29 Also on 27 February 2018, Vanguard's solicitors sent correspondence to Promax's solicitors which denied that Promax had a right to terminate and otherwise accepted Promax's repudiation and terminated the contract.

30 On 6 March 2018, Vanguard paid the amount due under the First Adjudication.

31 On 8 March 2018, Promax served a 'claim for final payment', which included the claim the subject of the Adjudication Determination.

32 The claim is said to be composed of 2 elements:

(a) a 'final claim' pursuant to cl Q16 of the contract calculated on the same

basis as if the owner had wrongfully repudiated the contract; and

(b) a claim for 'final payment' made pursuant to the Act.

33 Insofar as it was a claim under the Act, the claim for 'final payment' was an amount of $339,647.34 (including GST) (**Relevant Payment Claim**). The Relevant Payment Claim was constituted by the contract sum, adjusted for variations, less the value of defective works allowed by the First Adjudicator, the value of incomplete works and payments to date, plus a claim for the full amount then held in respect of retention monies.

34 Insofar as it was a claim under cl Q16 of the contract it was an amount of $1,115,077.19 (including GST) constituted by a loss of profit sum (constituted by the unpaid balance of the contract less cost for Promax to complete) together with other damages constituted by costs, for example, owing to contactors.

35 Critically, as properly conceded by Promax, this latter contractual claim under cl Q16 is not the subject of this proceeding.[2]

36 On 23 March 2018, Vanguard issued a payment schedule under the Act proposing to pay $nil in respect of the Relevant Payment Claim, citing 87 defective works, including defects which had not previously been identified, and attaching a report of Dome Consulting (Aust) Pty Ltd. Moreover, Vanguard claimed that, on the basis of a report of Charter Keck Cramer, the value of work completed was only $1,463,538.00 (excluding GST).

37 On 10 April 2018, Promax lodged an adjudication application claiming the sum of $339,647.34, the subject of the Relevant Payment Claim.

38 On 20 April 2018, Vanguard filed an adjudication response which made reference to a report from JWB & Associates Pty Ltd which provided a cost estimate to rectify the additional structural defects identified in the Dome Consulting report at $661,677.00 (including GST).

39 Following further submissions the Adjudicator gave the Adjudication Determination

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2 Outline of submissions of the First Defendant dated 10 July 2018 [22].

on 24 May 2018. Consistent with Promax's concession, the Adjudication Determination only dealt with the Relevant Payment Claim for $339,647.34 (including GST) made under the Act. The Adjudicator determined that the amount of $209,138.23 (including GST) was payable plus interest and costs.

The Act

40 The Act is designed to ensure prompt payment of progress payments to subcontractors and suppliers.[3] Pursuant to s 3(1) the objects of the Act include ensuring that any person who undertakes to carry out construction work under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work.

41 Subsection 3(2) further provides that the means by which the Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with the Act. The means by which this occurs is by establishment of a procedure that involves the making of a payment claim; the provision of a payment schedule by the person by whom the payment is payable; the referral of disputed claims to an adjudicator for determination; the payment of the amount of the progress payment determined by the adjudicator; and the recovery of progress payments in the event of a failure to pay.

42 Part 2 of the Act is headed 'Rights to Progress Payments'.

43 Section 4 of the Act relevantly defines a 'progress payment' as:

> …a payment to which a person is entitled under section 9, and includes (without affecting that entitlement)-
>
> (a) the final payment for-
>
> (i) construction work carried out under a construction contract; or
>
> (ii) related goods and services supplied under the contract;
>
> …

44 Section 9 is entitled 'Rights to Progress Payments' and is the pivotal provision

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3 *Southern Han Breakfast Point Pty Ltd (in Liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, 345–6 [4].

dealing with the setting of a reference date which is, in turn, critical to an entitlement to a progress payment under the Act.

45 The material parts of s 9 read:

> (1) On and from each reference date under a construction contract, a person—
>
> (a) who has undertaken to carry out construction work under the contract; or
>
> (b) who has undertaken to supply related goods and services under the contract—
>
> is entitled to a progress payment under this Act, calculated by reference to that date.
>
> (2) In this section, ***reference date***, in relation to a construction contract, means—
>
> (a) a date determined by or in accordance with the terms of the contract as—
>
> (i) a date on which a claim for a progress payment may be made; or
>
> (ii) a date by reference to which the amount of a progress payment is to be calculated—
>
> in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or
>
> …
>
> (d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following-
>
> (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
>
> (ii) the issue under the contract of a certificate specifying the final amount payable under the contract ***a final certificate***; or
>
> (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that-
>
> (A) construction work was last carried out under the contract; or

(B) related goods and services were last supplied under the contract.

46 Section 10 makes provision for the amount of a progress payment to which a person is entitled, which is the 'amount calculated in accordance with the terms of the contract' where there is express provision in the contract.

47 As explained by the High Court in *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence Construction Pty Ltd & Ors* (***Southern Han***)[4] (in relation to the equivalent NSW provisions), the service of a payment claim triggers the procedure set out in Pt 3 of the Act.

48 Part 3 of the Act is entitled 'Procedure for Recovering Progress Payments' and commences with s 14(1), which provides:

> A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

49 It is further noted that a claim referred to in s 14 is defined as a 'payment claim' (see definition in s 4). However, the concept of a 'final payment' or a 'claim for final payment' is not defined under the Act.

50 Insofar as the present case is concerned, following provision of a payment schedule for less than the claimed amount, the claimant was able to make an adjudication application in relation to the Relevant Payment Claim.

51 Following acceptance of the application, the jurisdiction of an adjudicator was then set out by s 23, which is set out below.

Grounds

Grounds 3 and 6

52 Grounds 3 and 6 read as follows:

Ground 3

[4] (2016) 260 CLR 340, 349 [14].

> The Adjudicator did not have jurisdiction to make the Adjudication Determination because there was no valid reference date, in that:
>
> (a) the Adjudicator proceeded on the basis that on 27 February 2018, the Contract was brought to an end by Vanguard's acceptance of Promax's repudiation of the Contract;
>
> (b) the Contract made no provision for the accrual of a reference date for the making of a Final Payment Claim following termination at common law.
>
> …
>
> **Ground 6**
>
> The Adjudicator erred in law in finding that there was a relevant reference date under the Contract even if Vanguard validly terminated the Contract at common law.

Adjudicator's reasons

53 The Adjudicator deals with the issue of a reference date at paragraphs 66 to 94 of the reasons in the Adjudication Determination (**Reasons**).

54 As indicated by the heading, the Reasons proceed on the assumption that the contract was terminated by Vanguard at common law. More particularly, at paragraph 76 of the Reasons, the Adjudicator states that he makes no determination as to whether Promax validly terminated the contract and further says he was 'content to accept that the Respondent's acceptance on 27 February 2018 of the Claimant's purported "repudiation" of the Contract effectively brought the Contract to an end.'

55 The Reasons cite special condition 22 before a finding is made (at paragraph 81) that the reference date for the Relevant Payment Claim was specifically set by special condition 22 and that it arises under that special condition by way of a 'separate and distinct contractual right.'

56 The Adjudicator also refers to the decision of Vickery J in *Gantley Pty Ltd v Phoenix International Group Pty Ltd*[5] (***Gantley***) wherein his Honour stated that a final payment claim may be made within the terms of the Act, following its substantial

[5] [2010] VSC 106.

amendments in 2007, so as to provide a 'final balancing of account.'[6]

57 The Adjudicator says (at paragraph 89) that he is satisfied that the Relevant Payment Claim sought to achieve such a 'final balancing of account' and accepts that special condition 22 provides for and creates a separate valid reference date for a final payment claim distinguishable from the contractual provisions relating to reference dates for progress claims. Further, given the last day work was performed was 15 December 2017, it followed that this was the reference date for the Relevant Payment Claim.[7]

58 At paragraph 90, the Adjudicator also finds that, even if special condition 22 had not been there to create a reference date, a reference date would have arisen pursuant to the default provisions in s 9(2)(d) of the Act, in particular under s 9(2)(d)(iii)(A), on the date immediately following the day construction work was last carried out i.e. 16 December 2017.

Vanguard's submissions

59 In written submissions Vanguard submitted that the starting point was the contract.

60 Further that special condition 22 does not indicate that other preconditions for entitlement to a final claim are removed and that all it does is provide for a reference date once other preconditions are met (as distinct from the default reference date for other progress payments contained in cl N3 and item 32 of Schedule 1).

61 Given the contract made no provision for a right to a final claim where there was termination by the owner it followed that special condition 22 was not engaged.

62 It was emphasized that Promax's construction would lead to a commercially absurd result which would enable a builder to ignore the defects liability period and accelerate rights to obtain retention even if it was in the wrong, i.e. place it in a better position than if it had not acted wrongfully.

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6 Ibid [181].

7 Although this appeared to be the same reference date as that which applied in relation to the December Progress Claim, no challenge was made that more than one payment claim was served in respect of a particular reference date in breach of s 14(8) of the Act.

63 Reference was also made to *Southern Han*[8] for the proposition that there must be a contractual right to the claim post termination and that the Act does not create such a right absent a contractual right to do so.

64 In oral submissions Vanguard made three major submissions.

65 First, that the final claim for payment cited in special condition 22 could only refer to a 'final claim' that may be made under the contract. There was no right to make a final claim under the contract in the case of a common law termination. Rather, the only clauses 'potentially engaged' were cls N11, Q16 and Q19 (which dealt with frustration).[9] Insofar as cl N11 was concerned, a final claim could only be made once the defects liability period concluded and there were no outstanding defects or incomplete works.

66 Secondly, it was submitted that to find otherwise would effectively destroy other provisions under the contract and in particular the right to retain retention.

67 Finally, it was suggested that the construction advanced by the Adjudicator and Promax offended the principles in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd & Anor*,[10] in particular, by being commercially absurd in allowing the builder to be in a better position in a case of wrongful repudiation (by bringing forth an entitlement to all retention monies), than it would be absent such wrongful conduct.

Promax's submissions

68 It was submitted that special condition 22 prevails over other conditions and makes it clear that a right to a final payment survives termination.

69 Even if it did not apply, a right would arise under the default provisions in s 9(2)(d) of the Act.

70 *Southern Han* was cited. However, Promax submitted that the case was distinguishable given the claim for final payment provisions had been inserted in the

8 (2016) 260 CLR 340.
9 Transcript of Proceeding (12 July 2018) 149.
10 (2015) 256 CLR 104.

Victorian provisions; there was an express entitlement in special condition 22; and there was no clause suspending entitlement to payment.

71 In relation to the 'final payment' provisions, the decision of *Gantley* was cited for the proposition that a final payment claim may be made under the current Act where a contract had been terminated.[11] Further, in the case of termination, it may be taken that s 9(2)(d)(iii) applies to set a notional reference date.[12]

72 In oral submissions, Promax submitted that special condition 22 constituted a clear intention that there was a statutory entitlement to make a final payment claim regardless of any contractual entitlements. Counsel highlighted s 3(2) such that the purpose of the Act was to grant a statutory entitlement.

73 The position of Promax was that special condition 22 was a 'standalone' provision which gave a freestanding right to an entitlement to make a final claim on the last day of performance, regardless of other circumstances (including whether there was a contractual right to do so and/or any kind of termination).

74 Various passages of *Southern Han* were cited for the proposition that special condition 22 makes clear that there is a statutory entitlement on a fixed date regardless of any contractual entitlement.

75 There were two further submissions.

76 First, it was submitted that, even if there was no provision for a final claim in the contract, the Adjudicator was correct to rely on s 9(2)(d)(iii) to supply a reference date.

77 Second, a submission was made (only late on the day of the hearing), that given the Act includes a final payment in the definition of a progress payment in s 4, that the Relevant Payment Claim could be read as a claim for an ordinary progress payment. In such circumstances, two further reference dates arose pre-termination on 15 January 2018 and 15 February 2018.

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11 [2010] VSC 106 [181].
12 Ibid [183].

78 Given the lateness of this submission, Vanguard was given leave to respond to this position by way of further written submissions.

79 Vanguard then submitted that Promax had clearly made an election to treat the Relevant Payment Claim as a final claim and should be bound by that election. Thus the suggestion that the payment claim could be seen as a progress claim under cl N3.2 was inconsistent with the express words of the claim itself, with the submissions to the Adjudicator, and with written submissions dated 10 July 2018. Further, if Promax was permitted to resile from that election then retention monies would need to be returned.[13]

Southern Han and Gantley

80 Given the reference by both parties to the decisions of *Southern Han*[14] and *Gantley*[15] these will be considered prior to resolution of the appropriate construction of special condition 22.

81 In *Southern Han*, cl 37.1 of the relevant contract provided for progress claims to be made on the 8th day of each month for work done to the 7th of each month. Clause 39.2 then provided that, in the event of a substantial breach of the contract, the owner (**Southern Han**) was entitled to give the builder (**Lewence**) a 'show cause notice'. In the event that Lewence failed to show reasonable cause, cl 39.4 allowed Southern Han to take the work remaining to be completed out of Lewence's hands and to 'suspend payment' until it became due and payable pursuant to a certification process provided for in cl 39.6.

82 Following service of a show cause notice, on 27 October 2014, Southern Han purported to exercise its rights under cl 39.4 to take the work remaining out of Lewence's hands. However, Lewence treated that notice as a repudiation and, on 28 October 2014, purported to accept that repudiation and terminate the contract. On 4 December 2014, Lewence purported to serve a payment claim for work carried out up to 27 October 2014 (in circumstances where there had already been a payment

13 Further submissions of the Plaintiff dated 13 July 2018.
14 (2016) 260 CLR 340.
15 [2010] VSC 106.

claim served on about 8 October 2014).

83 The High Court held that – contrary to the finding of Ward JA in the New South Wales Court of Appeal – there was no reference date of 8 November 2014 on either of the two hypotheses put forward by the parties. In the case of a valid exercise of rights on 27 October 2014 (put forward by Southern Han), cl 39.4 provided for a suspension of all rights to payment until completion of the final certification process. This included rights to make progress claims for work carried out up to the time of the work being taken out of its hands. It followed that there could be no reference date of 8 November 2014. In the case of an acceptance of repudiation and termination on 28 October 2014 (put forward by Lewence), Lewence's rights under the contract were limited to those which had already accrued. However, the right to make a progress claim under cl 37.1 of the contract in relation to work carried out to 27 October 2014 had not accrued as at 28 October 2014, since it only accrued on 8 November 2014. Therefore, there was no reference date in circumstances where the contract had been terminated before that time.

84 Insofar as the present case is concerned a number of observations may be made.

85 First, although the Court made reference to the s 3(2) objects provisions (which made provision for the grant of a 'statutory entitlement' to make a progress claim)[16] the Court makes clear that the 'freestanding' reference date is applicable only where the contract contains 'no express provision for determining a date for making a contractual claim'.[17] In so applying, s 8(2)(b) (equivalent to the Victorian ss 9(2)(b)-(d)) fulfils the statutory promise of granting a statutory entitlement regardless of the contract. This provision however does not 'alter the nature of a progress payment in respect of which a claim can be made.'[18]

86 Secondly, it is true that some passages refer to an entitlement even though it may ultimately turn out that no payment may be due. However, the Court makes clear that there is a 2 stage process: the first stage concerned with a person to whom s 8

16 Note that s 3(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) was actually in a different form and explicitly provided for the grant of a statutory entitlement regardless of whether the relevant construction contract makes provision for progress payments.

17 *Southern Han* (2016) 260 CLR 340, 363 [71].

18 Ibid.

makes entitled to a progress payment and the second stage concerned with the amount to which that person is entitled (which might be ascertained through the statutory processes). However, the critical first inquiry is whether a person is able to make a payment claim which turns on the application of s 8 (which is s 9 of the Victorian Act).[19]

87 Thirdly, the Court generally emphasises that there is a limitation in the Act which is concerned to provide a statutory mechanism for payment in discharge of an obligation to pay for work 'imposed by the contractual force of a construction contract' not to provide security for payment of damages or restitution.[20]

88 Finally, as is apparent from the above summary, the Court found no freestanding right arose on the facts in *Southern Han*. In particular, even if there was a common law termination, the Court found that no right to a payment had already accrued 'under the Contract.'[21]

89 It follows that the decision of *Southern Han* does not assist Promax. In particular, it does not support the existence of a freestanding (extra) right to a progress payment where the contract already makes provision for a date on which a claim for a progress payment may be made.

90 The decision in *Gantley*[22] was concerned with claims made under the Act before substantial amendments were introduced in 2007 (**Old Act**). Justice Vickery held that if the payment claims were final payment claims they were not permitted to be made under the Old Act. However, he also found that they were not in fact 'final payment claims' under the contracts because the contractual mechanism for the making of a final claim in each case was not engaged.[23] This was because the early terminations resulted in the contractual mechanisms for the making of a final payment claim in each case being extinguished. His Honour also went on to find that they were also not ordinary progress claims with the result that they fell outside the operation of the Old Act.

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19 Ibid, 360 [60].
20 Ibid, 362 [66].
21 Ibid, 365 [79].
22 [2010] VSC 106.
23 Ibid [234].

91 Insofar as his Honour considered the current Act following the substantial amendments, he did opine that a final payment claim may be made within the terms of the Act post termination.[24] This is no doubt true, but his Honour says nothing about the circumstances that govern whether such a final payment claim has in fact been made (since he did not need to). Insofar as his Honour suggests that s 9(2)(d)(iii) may apply in the case of termination, this is also true. However, as highlighted already, such a provision will only apply if the contract makes no express provision with respect to the matter. His Honour was not called upon to consider a case where a contract does make express provision for a reference date for a final payment claim, as special condition 22 does in this case.

92 Overall, then, the remarks of Vickery J in relation to the current Act were obiter dicta and did not deal with a situation where a contract makes specific provision for a reference date for a final payment claim. Thus, there is nothing in that decision to suggest that there may be a final payment claim irrespective of the contractual mechanisms in the contract. To the contrary, his Honour highlights (albeit under the Old Act) that the relevant claim in that case was not in fact a final payment claim because the relevant contractual mechanism was not engaged.[25]

Resolution

93 I reject the submissions of Promax to the effect that there was some statutory entitlement to make a final payment claim regardless of the contract. Rather, consistent with the passages in *Southern Han* cited above, the 'freestanding' reference date under s 9(2)(d) is only applicable for the making of a final payment claim if the contract makes no express provision with respect to the matter. It also does not alter the nature of a progress payment in respect of which a claim can be made.

94 Otherwise, pursuant to s 9(2)(a), the reference date means the date determined 'by or in accordance with the terms of the contract' as a date on which a claim for a progress payment 'may be made.' A 'progress payment' is in turn defined in the definitions contained in s 4 (somewhat unhelpfully) as a payment to which a person

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24 Ibid [181].
25 Ibid [234], [246].

is entitled under s 9. However, the definition again focuses on the contract by including the final payment for construction work carried out 'under a construction contract.'

95 In the present case, then, the critical question turns on the construction of special condition 22 and, in particular, the meaning of 'final claim for payment' contained therein. Pursuant to the principles set out in the judgment of French CJ, Nettle and Gordon JJ in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd & Anor* the meaning of this clause is to be determined objectively, by reference to its text, context and purpose.[26] Moreover, in determining the meaning it is necessary to ask what a reasonable businessperson would have understood the terms to mean.[27]

96 In this respect, cl N11 explicitly makes provision for the making of a 'final claim.' Save for when there is a request from the architect, cl N11.1 provides for such an entitlement to arise only in 3 circumstances, namely when all defects liability periods have ended; all defects are rectified and incomplete works finished; and the 'works' (defined in cl S as 'the completed construction set out in the contract documents') have been completed.

97 I consider that a reasonable business person would understand that the meaning of the phrase 'final claim for payment' is provided by the circumstances set out in the contract, in particular, in cl N11.

98 First, there was no reason to ignore the contractual mechanisms for the making of a final claim simply because special condition 22 was concerned with identification of a reference date under the Act. As highlighted already, the Act does not alter the nature of a progress payment (which includes a final payment) in respect of which a claim can be made. Rather, recourse may be given to the contract to determine whether what is claimed to be a progress payment is 'in fact' a progress payment.[28]

99 Special condition 22 may also work with cl N11 to provide certainty as to a reference date (so as to give rise to an entitlement to a progress payment under the Act). Even

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26 (2015) 256 CLR 104, 116 [46].
27 Ibid, 116 [47].
28 Ibid [224] citing *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 [18]; *Jemzone v Trytan Pty Ltd* (2002) 42 ACSR 42,49; *De Martin & Gasparini Pty Ltd v Energy Australia* (2002) 55 NSWLR 577, 590-591.

if it turns out that the reference date predates a contractual entitlement this is of no consequence. Thus, prior to the expiration of the defects liability period, the date that Promax will last undertake any works on the site will likely be unknown. Moreover, service of a final claim for payment may still be effected subsequently pursuant to cl N11 (consistent with s 14(5)(a)).

100 Second, the concept of a 'final claim' contained within cl N11 is consistent with the ordinary meaning of that concept which involves a 'final balancing of account' or simply the last of the payment claims to discharge the principal from further obligations to pay money under the construction contract.[29] Generally, such a claim may only properly be made when everything required of the contractor under a construction contract has been fulfilled.[30] Finality will also be indicated when the totality of the work is complete once rectification of defects and other outstanding matters have been addressed.[31]

101 This may be compared with the form of the Relevant Payment Claim in this case which purports to seek a final payment (including retention) although the totality of the works had not yet been completed. It also does not constitute a discharge of obligations under the contract in circumstances where it is accompanied by a further claim under that contract (under cl Q16).

102 Third, although it is true that special condition 22 is a priority provision which applies 'notwithstanding any other terms of this contract and/or its termination' I do not consider that a reasonable businessperson would understand that it provided a completely separate freestanding right to a final claim for payment regardless of the terms of the contract. Thus, all it purports to do, consistent with its heading and reference to s 9(2), was supply a reference date, which date was only given 'for the purposes of' and where there existed, a 'final claim for payment.' Although it also applies 'notwithstanding termination', this appears to be inserted out of an abundance of caution to ensure that the reference date would be retained even if there was a termination post a contractual claim for final payment. In any event,

29 *Protectavale Pty Lt v K2K Pty Ltd* [2008] FCA 1248 [17], cited in *Gantley* [2010] VSC 106 [180].
30 *Mackie Pty Ltd v Counahan and Anor* [2013] VSC 694 [65].
31 Ibid.

those words do not purport to create a right - merely to preserve a right. A reasonable businessperson would not consider that this reference intended to supply some completely different right to a 'final claim for payment' inconsistent with the contract, in undefined circumstances.

103 Finally, such a construction also avoids a commercial nonsense or inconvenience.[32] Thus, as highlighted by Vanguard, it would appear to make the requirements in the contract for the making a final claim and obtaining release of security redundant if a contractor could wrongfully terminate and still make a claim for 'final payment' (regardless of the defects liability period/whether works were completed).

104 Given this construction, it remains to consider whether the Adjudicator erred in finding that there was a relevant reference date.

105 As identified above, the ultimate question is whether there was a 'final claim for payment' pursuant to the contract for the purposes of special condition 22.

106 In terms of cl N11, the contractual process for the making of a final claim was not initiated or complied with. It could not be, given the early termination – at common law or otherwise. It follows that the Relevant Payment Claim was not a 'final claim for payment' under cl N11.

107 The only other contractual clauses identified as having potential application were cls Q16 and Q19.

108 Clause Q19 did not apply absent any finding of frustration.

109 Clause Q16 also would not apply on the premise adopted by the Adjudicator (i.e. that there was a common law termination by the owner). However, it makes no difference even if there was a termination by Promax, as Promax asserts.

110 Thus, first, insofar as cl Q16 makes provision for the making of a 'claim' following contractual termination by the contractor, I do not consider that this makes provision for a 'final claim'. This is because, as highlighted already, it provides for a claim calculated on the basis of a damages claim i.e. on the same basis as if the owner had

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32 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd & Anor* (2015) 256 CLR 104, 117 [51].

wrongfully repudiated the contract. Thus, consistent with the way both claims were framed in this case, the contractual claim under cl Q16 was quite different from the Relevant Payment Claim. Even if this claim did not offend s 10B(2)(c) (which excludes damages claims from being taken into account in calculating progress payments), it was not a final claim. Rather, in substance, it constituted a claim for damages rather than a final balancing of account and/or the last payment claim for the unpaid balance of the contract.

111 In any event, even if this construction is wrong, cl Q16 can have no application in this case. This is because, consistent with the concession of Promax, it is only the Relevant Payment Claim under the Act which was before the Adjudicator,[33] and hence, was the subject of this proceeding.

112 The Relevant Payment Claim before the Adjudicator was therefore not a 'final claim for payment' within the contract, specifically it did not come within cl N11 or cl Q16.

113 It follows that there was no relevant reference date provided pursuant to special condition 22. The Adjudicator was therefore in error to find otherwise, in circumstances where there was no contractual entitlement to a final claim for payment, regardless of whether Vanguard or Promax terminated the contract.

114 For reasons given above, the Adjudicator was also in error in finding, as a fall-back position, that s 9(2)(d) supplied a reference date. Rather, pursuant to *Southern Han*, s 9(2)(d) is applicable only where the contract contains no express provision for determining a date for making a contractual claim. Here, then, it has no application where special condition 22 makes express provision for determining a reference date.

115 Finally, I reject the (late) submission of Promax in attempting to reclassify the Relevant Payment Claim as an ordinary progress claim (so as to obtain further reference dates). The contract clearly distinguishes between an ordinary progress claim (under cl N3) and a final payment claim (under cl N11). Not only does the Relevant Payment Claim include the word 'final' in multiple places, but the claim

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33 See Reasons of the Adjudicator [21].

was in the nature of a final accounting comprised of outstanding monies accumulated over the life of the contract. The fact that the Relevant Payment Claim purported to include a claim for retention as well as the timing of the claim (post termination) also confirm that it purported to be a final payment claim.[34] This may be compared, for example, with the December Progress Claim which only sought an individual (12th) instalment or milestone progress payment.

116 Thus, consistent with the approach taken by Promax throughout the adjudication process (and in this Court until the day of hearing), the Relevant Payment Claim contains a purported final payment claim, rather than a claim for a progress payment by way of instalment under cl N3.

117 It follows that, similar to the claims in *Gantley*, the Relevant Payment Claim was not, as a matter of fact, a final payment claim, nor an ordinary (milestone) progress payment claim under the contract with the result that it fell outside the operation of special condition 22, and also the Act.

118 My conclusions are therefore that:

(a) special condition 22 does not apply to provide a reference date given there was no 'final claim for payment' pursuant to the contract;

(b) s 9(2)(d) also does not apply to provide a reference date given it was inapplicable in circumstances where the contract contains express provision for determining a date for making a final payment claim; and

(c) there is also no reference date provided by cl N3 (and item 32 of Schedule 1) which only applies in respect of a claim for ordinary ('milestone') progress payments.

119 The end result is that no reference date arose at all and the Adjudicator erred in law in finding that there was a relevant reference date.

120 Ground 6 is therefore established (it being unnecessary to consider ground 3).

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34 *Gantley* [2010] VSC 106 [238]-[239].

121 The existence of a reference date is a precondition to the making of a valid payment claim,[35] which, in turn, is an essential precondition to the subsequent steps under Pt 3 of the Act.[36] The absence of a reference date therefore meant that the Adjudicator made a jurisdictional error.[37] In such circumstances, the Adjudication Determination ought be quashed.

122 It is unnecessary in such circumstances to consider the other grounds for review though they will be considered, briefly, below, for the sake of completeness.

Grounds 4 and 5

123 Grounds 4 and 5 read as follows:

> **Ground 4**
>
> The Adjudicator erred in law on the face of the record or committed a jurisdictional error in finding that section 23(4) of the Act prevented the Adjudicator from assessing the value of defective work.
>
> **Ground 5**
>
> The Adjudicator erred in law on the face of the record or committed a jurisdictional error in finding that it is not open to Vanguard to claim for alleged defects in the Second Adjudication where those defects existed at the time of an earlier adjudication but have only subsequently been identified in the adjudication.

Adjudicator's reasons

124 The Adjudicator's reasons relevant to grounds 4 and 5 appear at paragraphs 212 to 226 of the Adjudication Determination.

125 The Adjudicator accepts in general that he must take into account the estimated costs of rectifying defects when assessing a payment claim under the Act. He then cites at paragraph 214 the submissions of the claimant including to the effect that '[t]he sheer number of spurious issues raised by the Respondent does not add to their significance'. His reasons then go on:

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35 *Southern Han* (2016) 260 CLR 340, 345 [2], 360-361 [61].

36 Ibid 356 [44].

37 Although ground 6 does not explicitly allege jurisdictional error it is consistent with paragraph 7(c) of the Further Amended Originating Process dated 12 July 2018.

215. In my view, it is difficult to accept, having regard to the strained relations between the parties that existed by mid December 2017, that the Respondent was unaware of the extensive defects it now alleges exist, prior to 15 December 2017 when the Claimant last carried out work on the Site. It is equally unlikely that, considering the last work performed by the Claimant was carried out on 15 December 2017, the Respondent was unable to identify and document the alleged numerous defects prior to the Dome Report dated 22 March 2018 or to value them prior to the Report of JWB & Associates (the JWB Report) dated 12 April 2018.

216. In any event, as the Claimant submits, the Respondent raised defective work as a set off in the submissions it made to Mr. Sundercombe when he was determining the Claimant's entitlements pursuant to Payment Claim #12. Mr. Sundercombe assessed the value of the defective work in the Sundercombe Determination. No work was subsequently carried out by the Claimant after 15 December 2017; the reference date for Payment Claim #12. Therefore, no new defects could have arisen.

…

219. I accept the Claimant's submissions in respect of this re-agitation of the issue of defective work. Section 23(4) prevents me from revisiting the value of defective work determined by Mr. Sundercombe in the Sundercombe Determination. That is because the value of the work has not changed since that Determination, the Claimant having carried out its last works on 15 December 2017. That was the date up until which Mr. Sundercombe determined the efficacy and value of the alleged defective works alleged by the Respondent at that time.

220. In my view, in general terms and in the normal course, the Respondent would not be precluded from raising more (but different) defects in relation to a subsequent Payment Claim as it has sought to do here, albeit some alleged defects appear to be re-agitated here. ***However, I do not accept that it is open to the Respondent to claim for alleged defects that existed at the time of the previous Adjudication but have only subsequently been identified.***

221. ***Crucially, the newly alleged defects have not arisen since Mr. Sundercombe determined the legitimacy and worth of alleged defects in the Sundercombe Determination.*** That is because no work has been performed by the Claimant since 15 December 2017.

222. The actual value has not changed since the Sundercombe Determination. ***Issue estoppel and section 23(4) of the Act thus prevent the Respondent from re-arguing the value of the defective work,*** in effect the value of the Claimant's Works, in the current Adjudication.

223. For the reasons given above, I determine that the second reason given in the Payment Schedule is not a valid reason for non-payment of the amounts claimed in the Final Payment Claim (emphasis added).

126 As is apparent from the above, the Adjudicator had regard to s 23 of the Act.

Subsections 23(2) and (4) relevantly provide as follows:

> (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only —
>
> (a) the provisions of this Act and any regulations made under this Act;
>
> (b) subject to this Act, the provisions of the construction contract from which the application arose;
>
> (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;
>
> (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.
>
> …
>
> (4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined —
>
> (a) the value of any construction work carried out under a construction contract; or
>
> (b) the value of any related goods and services supplied under a construction contract —
>
> the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work or the goods and services the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous determination.

Vanguard's submissions

127 In written submissions Vanguard submitted that the fact that the passage of time enabled identification of additional defects did not absolve the Adjudicator of his statutory obligation under s 23(2).

128 Further that s 23(4) did not prevent the Adjudicator giving the work a different value but that in the Adjudication Determination there was no assessment at all of the

additional defects. This despite the fact that Promax had raised no substantive submission in opposition.

129 There was also a failure to appreciate a difference between a progress claim and a final claim involving a full assessment of defects.

130 Finally, that the findings regarding 'awareness' of the defects (at paragraph 215) did not absolve the Adjudicator of his statutory obligation to assess the value of the work, (highlighting that Promax did not have possession of the site until 27 February 2018).

131 In oral submissions, Vanguard submitted that s 23(4) was not engaged at all because the new defects had not been the subject of any earlier valuation. Thus the First Determination only dealt with 8 defects which were valued at around $50,000 (of which only 1 had merit). This was to be compared with the extensive defects with total estimated rectification costs valued at some $660,000 placed before the Adjudicator.

132 In any event, even if s 23(4) was engaged, there was a total failure to engage with the question posed by the provision.

Promax's submissions

133 In written submissions Promax highlighted that the Adjudicator ultimately did decide that the value of the works had not changed since the earlier determination (at paragraph 219 of the Adjudication Determination). This was said to be a conclusion of fact based on his earlier findings, firstly, that he did not accept that Vanguard was not aware of the defects (at paragraph 215), and secondly, that given no further work was carried out post 15 December 2017, that no new defects could have arisen (at paragraph 216). Moreover, once having made these findings, he was required by s 23(4) not to depart from the valuation set out in the First Adjudication.

134 In oral submissions Promax submitted that the relevant question was whether the Adjudicator was satisfied that there had been a change in value, rather than an engagement in a revaluation. Further, it was claimed that the Adjudicator had expressly asked himself the correct question and that the Court should read

paragraph 215 of the Adjudication Determination as a determination that he did not believe the defects existed.

135 Crucial emphasis was therefore placed on paragraph 215 which suggested that the Adjudicator had rejected the existence of the defects.

Resolution

136 Both parties accepted that, in valuing the work, s 11(1)(b)(iv) applied such that construction work was to be valued having regard to 'the estimated cost of rectifying the defect' if any of the work was defective.[38]

137 I will presume that the Adjudicator was correct to find that s 23(4) applied (there being a lack of precision about which work was valued in the First Adjudication). However, even if s 23(4) applied, this also required the Adjudicator to direct himself to the question of the 'value of the works' i.e. to give those works the same value *unless satisfied that the 'value of the works' had changed.*

138 In the present circumstances, Vanguard presented extensive material to suggest that the 'value' had changed since the date of the First Adjudication by reason of the presence of 87 alleged defects (which had, mostly, not previously been identified).

139 I do not accept that the Adjudicator has properly considered and rejected that the defects delineated in the expert reports existed by reason of his statements in paragraph 215. Those statements certainly contain criticisms against Vanguard, but make no attempt to deal with the extensive material provided in the expert reports. Moreover, as made clear by the subsequent paragraphs, the essence of the Adjudication Determination is that the claim cannot be assessed at all in circumstances where, though the defects may have existed, they have only been subsequently identified.

140 Thus, paragraph 220 of the Adjudication Determination suggests that it was not '*open*' to claim for defects that existed at the time of the First Adjudication but have only been subsequently identified. Further, paragraph 221 highlights that no new

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38 Transcript of Proceeding (12 July 2018) 144.

defects had arisen since the First Adjudication because no new work had been performed. Finally, paragraph 222 states that issue estoppel and s 23(4) prevents Vanguard from 're-arguing' the value of the defective work.

141 By taking this approach the Adjudicator has failed to address the correct questions. Thus, in *valuing* the works under s 11, the Adjudicator was to consider whether any of the work the subject of the Relevant Payment Claim was in fact defective as well as the estimated cost of rectifying any such work.[39] Even if s 23(4) applied, the Adjudicator was required to ask himself whether he was satisfied that the 'value' of the works had altered by reason of the existence of the further alleged defects.

142 These tasks were not undertaken. Instead, the Adjudicator disabled himself from considering any pre-existing defects which were only subsequently identified.

143 This error in turn led to the Adjudicator's conclusion that issue estoppel and s 23(4) prevented Vanguard from re-arguing the value of the work. Even if issue estoppel applies in this context, which is doubtful,[40] it will be subject to any qualification by statute.[41] Given the statute (in s 23(4)) clearly provided for the matter to be reargued in certain circumstances, issue estoppel could not be determinative in this case.

144 In circumstances where Vanguard invited the Adjudicator to be satisfied that the value had changed, the Adjudicator did not have to be so satisfied, but was bound to consider whether he was. No such consideration however took place given he excluded from consideration any defects which existed at the time of the earlier adjudication, but which had only subsequently been identified.

145 I am thereby satisfied that a further error is evident in the Adjudication Determination as set out in ground 5 (it being unnecessary to also consider ground 4).

146 Given the Adjudicator failed to address the issue raised by s 23(4) and thereby

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39 *Maxtra Constructions Pty Ltd v Joseph Gilbert & Ors* [2013] VSC 243 [69].

40 See *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) NSWLR 190, 205-206 [68]-[72] and CF *Caltex Refineries (Qld) Pty Ltd & Anor v Allstate Access (Australia) Pty Ltd & Ors* [2014] QSC 223 [41]-[55].

41 *Caltex Refineries (Qld) Pty Ltd & Anor v Allstate Access (Australia) Pty Ltd & Ors* [2014] QSC 223 [54].

ignored relevant material, the error is also jurisdictional.[42]

Conclusion

147 I am satisfied that ground 6 has been established with the result that the Adjudication Determination ought be quashed.

148 I am also satisfied that ground 5 is established.

149 I consider, subject to hearing further from the parties, that the following orders are appropriate:

(a) the Adjudication Determination be quashed; and

(b) the first defendant pay the plaintiff's costs of the proceeding to be taxed on a standard basis in default of agreement.

42 *Craig v State of South Australia* (1995) 184 CLR 163, 179.