

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

Not Restricted

S ECI 2019 4258

SHELLS VENTURE MANAGEMENT PTY LTD (ACN 612 291 782) Plaintiff

v

ADOLFO AGRESTA (ABN 77 573 033 067) First Defendant

and

JOHN McMULLAN Second Defendant

JUDGE: Digby J

WHERE HELD: Melbourne

DATE OF HEARING: 9 December 2019

DATE OF JUDGMENT: 9 December 2019

CASE MAY BE CITED AS: Shells Venture Management v Agresta

MEDIUM NEUTRAL CITATION: [2019] VSC 863

ADMINISTRATIVE LAW – Judicial review – Relief in the nature of *certiorari* – Whether adjudication determination is vitiated by jurisdictional error – Whether a Payment Claim was served was served by a person entitled to a progress payment – Whether the Adjudicator correctly determined there was a reference date – *Building and Construction Industry Security of Payment Act 2002* (Vic), ss 9, 14 , 28R and 51.

APPEARANCES: Counsel Solicitors

For the Plaintiff Mr B Reid Oldham Construction Lawyers

For the First Defendant Dr K Weston-Scheuber HFW Australia

HIS HONOUR:

Application

- 1 By Originating Motion and Summons dated 18 September 2019, Shells Venture Management Pty Ltd (plaintiff), seeks orders quashing the Adjudication Determination dated 25 August 2019¹ (Adjudication Determination) made by the second defendant, Mr John McMullan,² (Adjudicator), on the grounds that the Adjudicator committed jurisdictional error, alternatively erred in law:
 - (a) Ground 1
In finding that the Payment Claim was served on the plaintiff by a person entitled to a progress payment pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (SoP Act).
 - (b) Ground 2
In finding that there was a relevant reference date supporting the Payment Claim, when no such reference date had accrued in accordance with the provisions of the Contract.
 - (c) Ground 3
Determining that the due date for the Payment Claim was 7 August 2019.
- 2 On 25 August 2019, the Adjudicator provided his Adjudication Determination to the plaintiff and Mr Adolfo Agresta (first defendant).
- 3 The plaintiff seeks to set aside the Adjudication Determination, pursuant to which the plaintiff is obliged to pay the first defendant the Adjudicated Amount, namely the sum of \$191,053.90 (incl. GST).
- 4 In addition to written and oral submissions, the following affidavit material is relied upon by the parties:
 - (a) The plaintiff –
 - (i) Affidavit of Eddie Shell affirmed 18 September 2019 and exhibit thereto;³

¹ Adjudication Determination, CB34-84.

² By letter dated 18 September 2019 the second defendant advised the Court he does not intend to take any active role in the proceeding and will abide the decision of the Court, save for any costs order being considered against him.

³ CB85-463.

and

- (ii) Affidavit of Eddie Shell affirmed 29 October 2019 and exhibits thereto.⁴
- (b) The first defendant –
 - (i) Affidavit of Adolfo Agresta sworn 17 October 2019;⁵
 - (ii) Affidavit of Howard Junkeer sworn 17 October 2019 and exhibit thereto;⁶
 - (iii) Affidavit of Kyriakos Ioulianou sworn 4 November 2019 and exhibits thereto;⁷

Background

- 5 The first defendant is a builder of residential premises and the plaintiff is a developer in the business of developing residential premises.
- 6 The subject Adjudication Determination relates to a contract dated 29 June 2017 (Contract)⁸ between the plaintiff and the first defendant for the construction of two single storey brick veneer dwellings at 99 St Pauls Road, Sorrento in the State of Victoria (Project).
- 7 On about 29 June 2017, the plaintiff and the first defendant entered into the Contract pursuant to which the first defendant agreed to construct the Project.
- 8 The Contract was executed by the first defendant's project manager, Howard Junkeer (Junkeer). The first defendant deposed that since the outset of the Project, Junkeer was involved in and assisted the first defendant in relation to the Project, as project manager under his supervision carrying out tasks such as:

⁴ CB478-498.

⁵ CB464-467.

⁶ CB468-477.

⁷ CB499-513.

⁸ CB117-182.

- (a) managing the day to day running of various projects;
- (b) overseeing aspects of the building process; and
- (c) being the primary point of contact with the plaintiff as expressed in Special Condition 1 to the Contract.

9 The Works under the Project were carried out and a progress Payment Claim was issued by the plaintiff on 22 July 2019, in the sum of \$171,673.90 (incl. GST) (Payment Claim). The plaintiff however disputes the achievement of completion of the Works.

10 On 22 July 2019 the following documents were issued by the first defendant to the plaintiff:

- (a) a Notice of Completion pursuant to cl 36 of the Contract;
- (b) a Notice of Extension of Time pursuant to cl 36 of the Contract;
- (c) the Payment Claim in the sum of \$171,673.90 (incl. GST); and
- (d) a letter inviting inspection of the Project pursuant to cl 36 of the Contract.

11 On 29 July 2019, the plaintiff delivered a payment schedule, scheduling a payment of \$NIL.

12 On 12 August 2019 the first defendant made an adjudication application claiming the claimed amount (Adjudication Application) and on 19 August 2019 the plaintiff delivered an adjudication response (Adjudication Response). On 22 August 2019 the first defendant delivered further submissions pursuant to s 21(2B) of the SoP Act supplementary to its Adjudication Response.

13 On 25 August 2019, the Adjudicator provided his Adjudication Determination. The Adjudicator determined that the plaintiff was liable to pay the first defendant the sum of \$191,053.90 (incl. GST).

14 On 4 September 2019, the authorised nominating authority, Rialto Adjudications Pty

Ltd, issued an Adjudication Certificate pursuant to s 28Q of the SoP Act. That Certificate certified that the plaintiff was liable to pay the first defendant \$192,182.85 (incl. GST and interest to date, calculated at 10% per annum).⁹

- 15 On 11 September 2019, pursuant to s 28R of the SoP Act, the County Court of Victoria entered Judgment for the first defendant in the sum of \$192,465.09 (Judgment) in respect of the Adjudication Determination.
- 16 On 18 September 2019, the plaintiff issued this proceeding.

Preliminary Issue

- 17 The first defendant submits that the plaintiff has failed to make an application in the County Court of Victoria to set aside the Judgment in relation to the subject Adjudication Determination and therefore cannot advance its application for judicial review in these proceedings. The first defendant further submits that as a result of the existence of the Judgment and the operation of s 28R of the SoP Act, the plaintiff should be confined to advancing its challenge to the subject Adjudication Determination on the basis of jurisdictional error alone and not also error of law on the face of the record.¹⁰
- 18 The relevant sequence of events in this regard has been that on 11 September 2019, prior to the filing of the plaintiff's present application for judicial review (issued on 18 September 2019) the first defendant entered judgment in the County Court of Victoria for the amount of \$192,465.09 under s 28R of the SoP Act.
- 19 The first defendant contends that although questions of jurisdictional error and error of law on the face of the record by the Adjudicator can be raised in a judicial review proceeding brought in the Supreme Court of Victoria, if judgment is entered in relation to an Adjudication Determination prior to an application being made for

⁹ CB502.

¹⁰ First Defendant's Submissions, 7 November 2019, CB24-33, (First Defendant Submissions); First Defendant Submissions, [1]; *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* (2015) 297 FLR 203, [24].

judicial review of the same Adjudication Determination, the scope of the judicial review is restricted by s 28R of the SoP Act so as to preclude any challenge to the Adjudication Determination other than on the basis of jurisdictional error.¹¹

- 20 At the hearing of this application on 9 December 2019, after submissions by Counsel and discussion as to the operation of s 28R(5) and s 51 of the SoP Act and the effect of Vickery J's decision in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd*,¹² the plaintiff undertook to issue proceedings expeditiously to set aside the subsisting Judgment dated 11 September 2019 in the County Court of Victoria in relation to the Adjudication Determination at issue herein and the plaintiff and the first defendant also accepted and agreed that in those circumstances it was appropriate and convenient for the Court to proceed to determine the plaintiff's Originating Motion and Summons for judicial review in this matter. Further, the plaintiff accepted and agreed that its Grounds in this application were solely founded on jurisdictional error and that its case would be so confined.¹³

Relevant Legislation

- 21 Section 9(1) of the SoP Act provides as follows:

- 9. Rights to progress payments**
(1) On and from each reference date under a Construction Contract, a person-
(a) who has undertaken to carry out construction work under the contract; or
(b) who has undertaken to supply related goods and services under the contract-
is entitled to a progress payment under this Act, calculated by reference to that date.

- 22 Section 14(1) of the SoP Act provides as follows:

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

¹¹ First Defendant Submissions, [9].

¹² (2015) 297 FLR 203 at [62], [64] and [94].

¹³ T3-27, in particular T18-19 and T23-27.

23 Section 28R of the SoP Act provides:

- 28R. Proceedings to recover amount payable under section 28M or 28N**
- (1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.
 - (2) A proceeding referred to in subsection (1) cannot be brought unless the person provided with the adjudication certificate files in the court-
 - (a) the adjudication certificate; and
 - (b) an affidavit by that person stating that the whole or any part of the amount payable under section 28M or 28N has not been paid at the time the certificate is filed.
 - (3) If the affidavit indicates that part of the amount payable under section 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.
 - (4) Judgment in favour of a person is not to be entered under this section unless the court is satisfied that the person liable to pay the amount payable under section 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.
 - (5) If a person commences proceedings to have the judgment set aside, that person-
 - (a) subject to subsection (6), is not, in those proceedings, entitled-
 - (i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or
 - (ii) to raise any defence in relation to matters arising under the construction contract; or
 - (iii) to challenge an adjudication determination or a review determination; and
 - (b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.
 - (6) Subsection (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.
 - (7) A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.
 - (8) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

24 Section 51 of the SoP Act provides as follows:

- 51. Supreme Court—limitation of jurisdiction**
- (1) It is the intention of section 46 to alter or vary section 85 of the *Constitution Act 1975*.
 - (2) It is the intention of section 28R to alter or vary section 85 of the *Constitution Act 1975*.

Ground 1 - Entitlement to a Progress Payment

Plaintiff's Submissions - Ground 1

- 25 The plaintiff submits that the Adjudicator, without expressly finding that the Payment Claim was served by Junkeer for and on behalf of the first defendant, found that:
- (a) the emails between the parties suggest that the plaintiff was aware of the relationship between the first defendant and Junkeer prior to entering into the Contract and entered the Contract on that basis;¹⁴
 - (b) all previous progress payments were issued under the name of the first defendant and the parties acted at all material times on the basis that the Contract was between the plaintiff and the first defendant. The Adjudicator also observed that the first defendant maintained the required home warranty insurance, public liability insurance, bank account, and building works were managed on behalf of the first defendant by Junkeer;¹⁵
 - (c) an Adjudicator should not take an overly technical view in relation to the validity of a Payment Claim;¹⁶ and
 - (d) the Payment Claim in issue was not invalid.¹⁷
- 26 Thus, by incorrectly focusing on the validity of the Payment Claim the Adjudicator erroneously conflated two separate concepts:
- (a) the validity of the Payment Claim on its face under s 14 and ss 2 to 9 of the SoP Act; and
 - (b) the entitlement to make a claim pursuant to s 9(1) and s 14(1) of the SoP Act which provides that the entitlement to serve a claim for progress payment accrues to the person who undertook to carry out the Works under the

¹⁴ Plaintiff's Submissions, 29 October 2019, CB10-23 (Plaintiff Submissions), [4(a)].

¹⁵ Ibid [4(b)].

¹⁶ Ibid [4(c)].

¹⁷ Ibid [4(d)].

Contract, namely the first defendant, not Junkeer.¹⁸

- 27 The plaintiff emphasises that the relevant Contract here was between the plaintiff and the first defendant¹⁹ and Special Condition 1 of the Contract provides:

Howard Junkeer ... will be appointed by the builder at the cost of the builder to manage the construction on a bi-weekly basis and will be responsible to ensure that the construction is progressing as per the agreed timeframe and to the agreed specifications and costs...²⁰

- 28 The plaintiff submits that on the proper construction of Special Condition 1 of the Contract, Junkeer is a subcontracted Project Manager or consultant to the first defendant. Junkeer is not actually undertaking the Works, but rather is engaged to check and/or identify departures from the scope of the Works, and cost or timing issues in relation to the Works being undertaken by the first defendant.²¹
- 29 The plaintiff submits that Junkeer has no authority to issue notices under the Contract, and is not identified, or named in the Contract or any subsequent correspondence, as the first defendant's agent or representative. The plaintiff also submits that Special Condition 1 of the Contract does not provide for any agency, ostensible or otherwise, which might otherwise permit Junkeer to act on behalf of the first defendant and/or make Payment Claims on its behalf.²²
- 30 The plaintiff notes that on 22 July 2019, the following correspondence was sent to the plaintiff:

- (a) completion notice under cl 36 of the Contract;
- (b) notification of an extension of time under cl 34 of the Contract; and
- (c) Payment Claim in which \$171,673.90 was sought for the Works.²³

¹⁸ Ibid [5].

¹⁹ Ibid [6]-[7].

²⁰ CB156, [1].

²¹ Plaintiff Submissions, [10].

²² Ibid [11].

²³ Ibid [12].

- 31 The three pieces of correspondence sent on 22 July 2019, were on the first defendant's letterhead and signed by Junkeer, for and on behalf of the first defendant.²⁴ The plaintiff also observes that the Payment Claim served on 22 July 2019 was unique because that claim differed from all previously issued progress claims for payment in that no previous claims were under Junkeer's hand nor endorsed 'for and on behalf of' the first defendant.²⁵
- 32 The plaintiff argues that Junkeer is not entitled to issue notices under the Contract and it also relies on s 9(1) of the SoP Act.²⁶ Section 9 of the SoP Act provides that the person who may be entitled to a progress payment is a person 'who was undertaken to carry out construction work under the Contract'²⁷ and thereby provides that the person who undertakes construction works is entitled to a progress payment. The plaintiff's assertion is that this entitlement is expressed only as existing in respect of the person who has undertaken the work under the Contract.²⁸ Further the plaintiff argues that ss 14(1) and 9(1) of the SoP Act link the 'person' and the 'construction contract' together.²⁹
- 33 The plaintiff also relies on *Baron Forge Contractors Pty Ltd v Vaughan Constructions Pty Ltd*,³⁰ (*Baron Forge*) in which Judge Cosgrave adopted the reasoning of McDougall J in the New South Wales Court of Appeal decision in *Grave v Blazevic Holdings Pty Ltd*,³¹ (*Grave*) and in particular endorsed a passage in *Grave* where McDougall J noted that the object of the New South Wales Security of Payment Act was limited in its operation to the parties to a construction contract and that statutory obligation does not extend to imposing obligations on others who are not parties to the construction contract.³²
- 34 The plaintiff ultimately submitted that because it was the first defendant, an

²⁴ Ibid [13].

²⁵ Ibid [14].

²⁶ Ibid [15]-[16].

²⁷ Ibid [17].

²⁸ Ibid [18].

²⁹ Ibid [19]-[20].

³⁰ [2015] VCC 1424 at [30].

³¹ (2010) 79 NSWLR 132.

³² Plaintiff Submissions, [21].

individual, who had undertaken to carry out the construction work under the Contract it is unequivocally clear that ‘the person’ who serves the claim has to be the first defendant, the person named in the Contract. It therefore follows, that the Adjudicator lacked jurisdiction to determine the Payment Claim³³ and accordingly ss 9(1) and/or 14(1) of the SoP Act give rise to jurisdictional error and it follows that the Adjudication Determination is void and the Court should make a declaration to that effect, or in the alternative, make an order in the nature of *certiorari* quashing the Adjudication Determination.³⁴

First Defendant’s Submissions – Ground 1

- 35 The first defendant submits the plaintiff’s first ground of review seeks to rely on an unduly technical approach to the interpretation of s 14 of the SoP Act. The first defendant contends such an approach is at odds with that elucidated in SoP Act decisions such as *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor*,³⁵ where Vickery J stated:

The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality.³⁶

- 36 The first defendant contends that whilst the ‘claimant’ referred to in s 14 of the SoP Act is a person ‘who is or who claims to be entitled to a progress payment’, the section says nothing about the mechanism by which a Payment Claim may be served.³⁷
- 37 The first defendant submits in relation to the plaintiff’s observations concerning the Adjudicator’s construction of the Contract, in particular Special Condition 1 thereof, that even assuming that the Adjudicator was in error in relation to Junkeer’s role under or in relation to the Contract, an error in the construction or application of

³³ Ibid [22].

³⁴ Ibid [23].

³⁵ (2009) 26 VR 112.

³⁶ Ibid [46].

³⁷ First Defendant Submissions, [12].

contractual provisions would constitute an error of law,³⁸ and therefore cannot be the subject of challenge in this proceeding, including for the reasons referred to above.

- 38 The first defendant also submits that it is not necessary for the Court to give any consideration to the interpretation of Special Condition 1 of the Contract because the document in controversy signed by Junkeer on behalf of the first defendant is not the first defendant's Payment Claim. The Payment Claim was the claim attached to the documents signed by Junkeer and the Payment Claim is on the letterhead of the first defendant.
- 39 The first defendant also submits that nothing in the SoP Act requires a Payment Claim to be signed by a particular person, or indeed at all.³⁹

Reasons and Decision - Ground 1

- 40 Section 14(1) of the SoP Act relevantly 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.

- 41 The 'claimant' referred to in s 14 of the SoP Act is a person 'who is or who claims to be entitled to a progress payment'. Such a person may serve a Payment Claim on the person who, under the construction contract, is or may be liable to make the payment. However, s 14 of the SoP Act says nothing about the mechanism by which a Payment Claim may be served.
- 42 The Payment Claim at issue under the Contract was issued on the letterhead of the first defendant as an attachment to a letter which was also on the letterhead of the first defendant and which was signed by Junkeer 'for and on behalf of Adolfo Agresta'. Junkeer was the first defendant's Project Manager undertaking that role under the first defendant's supervision.⁴⁰

³⁸ *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd and Anor* [2009] NSWCA 157 [74]-[75]; *Bergemann v Varley Power* [2011] NSWSC 1039 [52]-[53]. See reference to *Amasya* (above).

³⁹ First Defendant Submissions, [15].

⁴⁰ CB464, [6].

- 43 Further, the document signed by Junkeer ‘on behalf of Adolfo Agresta’ was not the Payment Claim. The Payment Claim was attached to that letter so endorsed and was also on the letterhead of the first defendant.⁴¹
- 44 No stipulation of the SoP Act requires a Payment Claim to be signed by a particular person, or indeed at all. The Payment Claim here was authorised and approved by the first defendant⁴² and it is abundantly clear that Junkeer was the first defendant’s agent, including for the purpose of communicating the subject Payment Claim to the Principal.
- 45 Further, in my view, to accept the plaintiff’s submission as to the requirements of s 14(1) of the SoP Act, namely to the effect that only the person performing the work is able, personally, to serve a Payment Claim, would be in disharmony with the main purpose and object of the SoP Act. The SoP Act seeks to provide for progress payment entitlements to the person who carried out construction work, or who supplied related goods and services, and to ensure such person’s entitlement to receive, and ability to recover such progress payments, on an interim basis via the fast track regime established by the SoP Act, and do so free from excessive legal formality and unnecessary technicality.⁴³
- 46 In my view the progress Payment Claim dated 22 July 2019 was one which was submitted to the plaintiff on the first defendant’s letterhead, and one which fairly read could not have been reasonably construed as other than a Payment Claim made by the first defendant. Indeed, consistent with the Payment Claim being accepted in that way, the plaintiff treated it as such and provided its Payment Schedule in response, wholly rejecting the first defendant’s claims, on 29 July 2019.
- 47 I reject that it is relevant to argue here, as the plaintiff has, that the SoP Act is limited in its operation to those who are parties to a construction contract and that the SoP Act’s statutory impositions do not extend to imposing obligations on others who are

⁴¹ CB210-211.

⁴² CB466, [18].

⁴³ (2009) 26 VR 112, [46].

not parties to the construction contract.⁴⁴

- 48 The judgments of *Baron Forge*⁴⁵ and *Grave*⁴⁶ are, in my view, not to the point. In substance, those cases, in the parts referred to by the plaintiff, recognised that the Security of Payment legislation is limited in its operation to the rights and entitlements of the parties to the relevant construction contract and does not extend to imposing obligations or establishing rights in those who are not parties to that construction contract.
- 49 Neither *Baron Forge* nor *Grave* assist in respect of questions as to the way in which a progress Payment Claim may be served under the SoP Act. Neither does the first defendant in this case seek to claim in any respect that the subject Payment Claim gave rise to any rights or obligations other than between himself and the plaintiff, as parties to the contract.
- 50 The language of Special Condition 1 of the Contract, which provides for Junkeer's role as project manager, does not preclude the first defendant from employing Junkeer as his servant or agent for the purpose of serving a claim, other document, or the like, on the plaintiff. Neither the SoP Act nor the Contract impinge in that regard.
- 51 As I have elsewhere briefly addressed, it was open to the Adjudicator to find that Junkeer was authorised to serve the Payment Claim of 22 July 2019 on the plaintiff. Further, I accept the first defendant's submission that even if the Adjudicator was in error in this regard, or in relation to his interpretation of Special Condition 1 of the Contract, such error would be in relation to the merits and would not go to jurisdiction.⁴⁷
- 52 Finally, the communication of the 22 July 2019 Payment Claim to the plaintiff did not in my view warrant the conclusion that Junkeer had made a progress claim in his own

⁴⁴ Plaintiff Submissions, [21].

⁴⁵ [2015] VCC 1424 at [30].

⁴⁶ [2010] NSWCA 324.

⁴⁷ *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd and Anor* [2009] NSWCA 157 [74]-[75]; *Bergemann v Varley Power* [2011] NSWSC 1039 [52]-[53]. See reference to *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* (2015) 297 FLR 203 (above).

right. Clearly enough, on the facts referred to above, Junkeer submitted the 22 July 2019 progress claim as the servant or agent of the first defendant; so much was expressly stated by Junkeer in the letter of the same date accompanying the Payment Claim and there is no suggestion that upon receipt there was any doubt on the part of the plaintiff's management that the 22 July 2019 Payment Claim was other than a claim by the first defendant for payment. Furthermore, the evidence established that the first defendant had authorised and approved the 22 July 2019 Payment Claim.

- 53 At all events the Adjudicator's Determination that the Payment Claim of 22 July 2019 was validly and effectively served by the first defendant as the person entitled, or claiming to be entitled, to the relevant progress payment was a decision on the merits, and as matters of fact and law, and as such was within the Adjudicator's remit to determine, as the Adjudicator did at [52]-[62] of his Determination.
- 54 I consider that for the above reasons Ground 1 fails.

Ground 2 - No Valid Reference Date

Plaintiff Submissions – Ground 2

- 55 The plaintiff submits that the Adjudicator:
- (a) determined that the RBS checklist provided on 7 June 2019, identified various items that would have to be rectified in order for an occupancy permit to be issued and that all matters listed in the checklist relate to construction work not part of the building works under the Contract;
 - (b) implicitly held that the first defendant issued a notice of completion and final claim on 22 July 2019;
 - (c) held that the Works were at completion on 22 July 2019;
 - (d) held that, 'lack of an occupancy permit does not have the effect, in this case, that the claimant was not entitled to demand final payment pursuant to cl 36.1 ...' given that, 'minor items yet to be completed by Agresta, if any'

remained; and

- (e) determined that here, 'the claimant is not disentitled to deliver the Final Claim merely because it is not in a position to provide an occupancy permit'.⁴⁸

56 Clauses 36.0 and 36.1 the Contract provide as follows:

- 36.0 When the Builder considers that the Building Works have reached Completion the Builder is to give to the Owner:
- a Notice of Completion; and
 - the Final Claim.

- 36.1 Notwithstanding any other provision of this Contract, the Builder must not demand Final Payment until after the Builder has given to the Owner either:
- a copy of the occupancy permit under the *Building Act 1993*, if the building permit for the Building Works requires the issue of an occupancy permit; or
 - in any other case, a copy of the certificate of final inspection.

57 The plaintiff notes that the Contract provided that upon completion, as contractually defined, the first defendant was entitled to make a written claim for payment.⁴⁹

58 The plaintiff asserts that there were, and still are, defects and incomplete Works in respect of the Works performed by the first defendant, as outlined in the plaintiff's expert report from BSS.⁵⁰

59 The plaintiff also relies upon the Statutory Declaration of Mr Eddie Shell dated 19 August 2019, which forms part of the Adjudication Response, and makes reference to the BSS reports and notes that 'many of the defects from the first two reports had not been fixed'. The plaintiff points out that the first defendant agreed that the plaintiff would withhold the sum of \$10,000 from the fixing stage claim until all defects were rectified. The first defendant agreed and acknowledged that there were defects in the Works performed by him.⁵¹

60 The plaintiff contends that not all of the Works were completed as at 22 July 2019, and

⁴⁸ Plaintiff Submissions, [24].

⁴⁹ Ibid [27].

⁵⁰ Ibid [29].

⁵¹ Ibid [30].

further submitted that the Building Surveyor's letter of 7 June 2019, identified the items preventing the issuance of the occupancy permit, including items that were clearly within the first defendant's scope of Works.⁵²

61 The Adjudicator found that all of the Works included in the Building Surveyor's letter dated 7 June 2019, did not fall within the first defendant's scope of Works. The plaintiff contends that such a finding lacked reasoned justification, is unsound, without basis and contrary to the evidence, namely:

- (a) Schedule 5 of the Contract excludes each of the retaining walls, pools, decking, fencing and gates, and hard and soft landscaping, sheds were not excluded Works; and
- (b) the first defendant was in the process of supplying the garden sheds, which were detailed in the building permit plans.⁵³

62 The plaintiff relies upon *Cardona & Anor v Brown & Anor*,⁵⁴ in which the Victorian Court of Appeal considered staged completion in domestic building contracts and concluded that:

There are multiple indicia in the Act and the contract that point to a builder's entitlement to make a claim for a progress payment being dependent upon a consecutive and incremental completion of each stage of construction. Collectively, those indicia confirm the proposition that it is the consecutive and incremental completion of the construction of the home which triggers the builders' staged entitlement to payment⁵⁵

It is necessary for there to be 'effective and satisfactory completion of the required stage ... [as] a condition of any instalment payment'⁵⁶ and while trivial failures, or failures borne of impracticalities, do not preclude effective and satisfactory completion...⁵⁶

63 The plaintiff submits that because the uncompleted Works include bushfire screening to windows and the installation of a storage shed were delaying the occupancy permit,

⁵² Ibid [31].

⁵³ Ibid [32].

⁵⁴ [2012] VSCA 174.

⁵⁵ Plaintiff Submissions, [60].

⁵⁶ Ibid [74].

those Works cannot fairly be described as being ‘trivial’ or ‘failures born of impracticalities’. Accordingly, the relevant stage of ‘completion’ had not been achieved and thus no reference date was capable of arising.⁵⁷

- 64 Moreover, the plaintiff contends the lack of an occupancy permit prevents the reference date from arising and no final claim could be issued by the first defendant.⁵⁸
- 65 The plaintiff observes that it was common ground between the parties that no occupancy permit has been provided for the Works.⁵⁹
- 66 The plaintiff submits that the existence of a reference date is a pre-condition to the making of a valid Payment Claim under the SoP Act.⁶⁰ The plaintiff further submits in *Vanguard Developments Group v Promax Building Development*,⁶¹ (*Vanguard*) Kennedy J rejected the submission that there was a statutory entitlement to make a final claim regardless of what was expressed in the Contract.⁶² The relevant question was whether a reference date had arisen, which was to be determined in accordance with s 9(2)(a) of the SoP Act. Moreover, were the Works at the ‘completion’ stage and had an occupancy certificate been issued.⁶³
- 67 The plaintiff submits because no occupancy certificate had been issued, the effect of cl 36.1 of the Contract is that no reference date arises by which the first defendant could make a claim for final payment.⁶⁴
- 68 The plaintiff also submits that there was no finding by the Adjudicator that cl 36.1 of the Contract was inoperable. The plaintiff asserted that the Adjudicator determined the Adjudication Application on the basis that cl 36.1 of the Contract did not apply to the Works undertaken by the first defendant, because the occupancy certificate

⁵⁷ Ibid [34].

⁵⁸ Ibid [35].

⁵⁹ Ibid [36].

⁶⁰ Ibid [38].

⁶¹ [2018] VSC 386, [93] and [97].

⁶² Plaintiff Submissions, [39].

⁶³ Ibid [40].

⁶⁴ Ibid [41].

referred to in cl 36.1 of the Contract related to Works that were specifically excluded from the first defendant's scope. The plaintiff contends that if this reason is sound the Adjudicator should have applied s 9(2)(d)(i) of the SoP Act to calculate a valid reference date.⁶⁵ Section 9(2)(d)(i) of the SoP Act is predicated on there being no express final payment claim provision in the Contract. In that situation s 9(2)(d)(i) provides for one of several relevant dates as being the date immediately following the expiry of the defects rectification period.

- 69 The plaintiff also submits that as the 3 month defect liability period had not expired on 22 July 2019 in relation to the Works undertaken by the first defendant, no reference date had accrued or could possibly arise until 22 September 2019.⁶⁶
- 70 The plaintiff submits that the want of a reference date is jurisdictional.⁶⁷ Accordingly, the plaintiff submits the Adjudication Determination is void and the Court should make a declaration to that effect.

First Defendant's Submissions – Ground 2

- 71 The first defendant agrees that the existence of a reference date is a jurisdictional requirement. However, the first defendant contends that the findings of the Adjudicator in relation to whether completion had occurred were factual findings and are therefore not properly the subject of a judicial review application, in particular one limited to jurisdictional error as has been conceded by the plaintiff in this matter.⁶⁸
- 72 The first defendant submits that at the time the Payment Claim was submitted, all building work under the Contract had been completed in accordance with the plans and specifications. Moreover, the first defendant points out that the Adjudicator has made a factual finding that as at 22 July 2019, the building Works were at 'completion' within the meaning of cl 1 of the Contract.⁶⁹

⁶⁵ Ibid [42].

⁶⁶ Ibid [43].

⁶⁷ *Southern Han Breakfast Point Pty Ltd (In Liq) v Lewence* [2016] HCA 52.

⁶⁸ First Defendant Submissions, [17].

⁶⁹ Ibid [18].

- 73 The first defendant refutes the plaintiff's entitlement to dispute the factual findings of the Adjudicator as the plaintiff seeks to do at paragraphs [29] to [34] of its submissions. The first defendant contends that it is clear from the plaintiff's reference at paragraph [32] to the Adjudicator's finding being 'unsound, without basis and contrary to the clear evidence to the contrary', that the plaintiff seeks to mount a factual challenge.⁷⁰
- 74 The first defendant also contends the present matter is factually distinguishable to *Vanguard*,⁷¹ relied upon by the plaintiff, because in *Vanguard* cl N11 of the Contract provided that a 'final claim' could be made when:
- (a) all defects liability periods had ended;
 - (b) Promax had rectified all defects and finalised all incomplete work; and
 - (c) the Works had been completed in accordance with the Contract.⁷²
- 75 The first defendant contends that in *Vanguard* there was no question that Promax could not have met those requirements, because Vanguard had terminated the contract while the Works were at an incomplete stage. It therefore follows that it was impossible for Promax to meet the requirements for a 'final claim' as provided by cl N11.1.⁷³
- 76 Conversely, in the present case, the Adjudicator has made a factual finding that the contractual requirements for completion have been met. Moreover, that finding is not properly the subject of challenge on judicial review for jurisdictional error.⁷⁴
- 77 Further, the first defendant contends that the requirement for issuing a Final Payment Claim as set out in cl 36.0 of the Contract is not that completion had occurred, but rather that the builder considers that the building Works have reached completion.⁷⁵

⁷⁰ Ibid [19].

⁷¹ [2018] VSC 386.

⁷² First Defendant Submissions, [20].

⁷³ Ibid [21].

⁷⁴ Ibid [22].

⁷⁵ Ibid [23].

- 78 The plaintiff relies upon cl 36.1 of the Contract, which provides that a final claim cannot be served and called upon until the builder has given the owner a certificate of occupancy, or a certificate of final inspection.⁷⁶ In addition to the provisions relied upon by the plaintiff, the first defendant contends there are further provisions of the Contract which are relevant, namely cl 1.0 (final claim) and (final payment), and cl 29 of the Contract.⁷⁷
- 79 The first defendant submits that cl 36.1 of the Contract does not constitute a contractual precondition to issuing a final claim. The only condition which must be met for the issue of a final claim is set out in cl 36.0 of the Contract, namely, that the builder considers the building works to have reached completion. The first defendant also submits cl 36.1 of the Contract is a contractual precondition to demanding final payment, and not to issuing a final claim.⁷⁸
- 80 The first defendant contends that even if the plaintiff's interpretation were correct, a claimant cannot be deprived of entitlement to payment under the SoP Act because a condition precedent has not been met. In *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor*,⁷⁹ (Plaza West) Hodgson JA, referring to the New South Wales equivalent of s 10(1) of the SoP Act, said:

I adhere to the view I expressed in *Transgrid v Siemens Ltd* [2004] NSWCA 395 ; (2004) 61 NSWLR 521 at [35] and *John Holland Pty Ltd v Road and Traffic Authority of New South Wales* [2007] NSWCA 19 at [38], to the effect that "calculated in accordance with the terms of the contract" in s 9(a) of the *Building and Construction Industry Security of Payment Act 1999* (the Act) does not engage contract mechanisms determining what is due under the contract, independently of calculations referable to the work performed.

This means that contractors are not deprived of entitlement to payment under the Act because a condition precedent, such as the obtaining of a superintendent's certificate, has not been satisfied; and it means equally that contractors are not ipso facto entitled to payment because of the operation of a deeming provision such as cl 37(2) of the contract in this case.⁸⁰

- 81 Similarly, the first defendant contends that a requirement to obtain an occupancy

⁷⁶ Ibid [24].

⁷⁷ Ibid [25].

⁷⁸ Ibid [26].

⁷⁹ [2008] NSWCA 279.

⁸⁰ [2008] NSWCA 279 at [53]-[54].

certificate prior to issuing a Final Payment Claim is a condition precedent, the non-fulfilment of which does not deprive a claimant of its entitlement to payment.

- 82 The first defendant contends that there is nothing in the language of s 9 of the SoP Act giving rise to any loss of the entitlement to a progress payment arising from contractual preconditions.⁸¹
- 83 The first defendant also submits, even if the Adjudicator erred in his interpretation of cl 36.1 of the Contract, an error of fact or law by an Adjudicator in, or in relation to, the construction of a contractual provision is non-jurisdictional,⁸² and non-justiciable in this proceeding.⁸³
- 84 Additionally, the first defendant contends that if cl 36.1 of the Contract did constitute a prerequisite for making a Final Payment Claim, it would be rendered invalid as a 'pay when paid' provision under s 13 of the SoP Act because the issue of an occupancy permit was, under the Contract, contingent upon work to be carried out by others.⁸⁴

Considerations - Ground 2

Factual findings as to completion

- 85 The Adjudicator made findings and determinations of fact and law in relation to the following:
- (a) certain checklist times which RBS identified as defective or incomplete, were items of work outside the scope of Works required to be undertaken under the Contract;
 - (b) the stage of 'completion' of the Works under the Contract had been reached, notwithstanding the items of work alleged by the plaintiff to be incomplete;

⁸¹ Ibid [29].

⁸² *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 [56]; *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor* [2008] NSWCA 279 [27]; *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd and Anor* [2009] NSWCA 157 [74]; *Bergemann v Varley Power* [2011] NSWSC 1039. See also reference to *Amasya* (above).

⁸³ First Defendant Submissions, [30].

⁸⁴ Ibid [31].

- (c) completion of the Works had occurred, and had occurred on 22 July 2019;
- (d) the absence of an occupancy permit did not prevent the claimant from demanding final payment under cl 36.1 of the Contract, in part because certain works otherwise required for an occupancy certificate were deleted from the first defendant's scope of Works.
- 86 The above findings and determinations were in the nature of findings of fact and determinations of law which are not properly the subject of this judicial review application, including because the grounds in this application are limited to jurisdictional error.⁸⁵
- 87 At the time the Payment Claim was submitted, all building work under the Contract had been completed in accordance with the plans and specifications.⁸⁶ The Adjudicator made a factual finding that as at 22 July 2019 the building Works were at completion within the meaning of cl 1 of the Contract.⁸⁷
- 88 The plaintiff, at paragraphs [29] to [34] of its submissions, refers to affidavit material and seeks to dispute the factual findings of the Adjudicator, which is beyond the scope of what the plaintiff can legitimately argue in this particular application. The initially proposed nature and extent of the plaintiff's arguments is clear from the plaintiff's reference to the Adjudicator's finding being 'unsound, without basis and contrary to the clear evidence to the contrary'.⁸⁸ What was foreshadowed as being advanced by the plaintiff was largely a factual challenge.
- 89 The present matter is very different factually to *Vanguard*,⁸⁹ relied upon by the plaintiff. In that case, cl N11 of the Contract provided that a 'final claim' could be made when:
- (a) all defects liability periods had ended;

⁸⁵ Paragraph [19] above; T3–27, in particular T3.18–19, T3.23–27 and T25.24–29.

⁸⁶ CB470, [18].

⁸⁷ CB429, [93].

⁸⁸ Plaintiff Submissions, [32].

⁸⁹ [2018] VSC 386.

- (b) Promax had rectified all defects and finalised all incomplete work; and
- (c) the Works had been completed in accordance with the contract.
- 90 In *Vanguard* it was obvious that Promax could not have met those requirements because Vanguard had terminated the contract before completion of the Works. Promax was therefore prevented from fulfilling all the pre-requisites for a 'final claim' in cl N11.1 of that contract.
- 91 By contrast, in the present case, the Adjudicator has made a factual finding that the contractual requirements for completion have been met. As I have earlier emphasised that finding is not properly the subject of challenge on judicial review confined to jurisdictional error.
- 92 Further the Adjudicator found, as he was entitled to do on the merits, that the requirement for issuing a Final Payment Claim, as provided for in cl 36.0 of the Contract, was not that completion had occurred, but that the builder considered that the building Works have reached completion.
- 93 That finding as to the proper interpretation of the Contract is also not properly the subject of challenge on judicial review confined to jurisdictional error.

Certificate of Occupancy

- 94 The plaintiff relies upon cl 36.1 of the Contract, which provides that a final claim cannot be demanded until the builder has given the owner a certificate of occupancy, or a certificate of final inspection.
- 95 In addition to the provisions relied upon by the plaintiff, there are further provisions of the Contract that are relevant, namely:

Clause 1.0

'Final Claim' means the Builder's claim setting out the balance of the Contract Price due for payment by the Owner to the Builder, taking into account all monies paid by the Owner and all other amounts to be added to or deducted from the Contract Price under this Contract.

'Final Payment' means the payment of the amount of the Final Claim.

Clause 29.0

The Builder must give the Owner a written claim for each Progress Payment when each stage has been completed, as set out in Schedule 3. The claim must set out each of the following:

- The amount paid or to be paid for the stage or stages completed to date;
- The amount paid or to be paid for, and details of, any variations made and other amounts paid or to be paid by the Owner under this Contract;
- The sum of those amounts;
- Payments that have already been made by the Owner; and
- The total claimed, taking into account the payments already made.

- 96 Clause 36.1 of the Contract, set out in full above,⁹⁰ does not constitute a contractual precondition to issuing a final claim. The only requirement which must be met for the issue of a final claim is as set out in cl 36.0 of the Contract, namely that the builder considers that the building Works have reached completion. Here the first defendant, as builder, so considered. The Adjudicator has affirmed that view by finding that the Works have reached completion
- 97 Clause 36.1 of the Contract is a contractual precondition to demanding Final Payment, not to the builder issuing or claiming a Final Claim.
- 98 Furthermore, even if the plaintiff's above argued interpretation was correct, a claimant is not to be deprived of an entitlement to payment under the SoP Act because a contractual condition precedent has not been satisfied.
- 99 In *Plaza West*,⁹¹ Hodgson JA, referring to the New South Wales equivalent of s 10(1) of the SoP Act, said:⁹²

I adhere to the view I expressed in *Transgrid v Siemens Ltd*⁹³ and *John Holland Pty Ltd v Road and Traffic Authority of New South Wales*,⁹⁴ to the effect that "calculated in accordance with the terms of the contract" in s 9(a) of the *Building and Construction Industry Security of Payment Act 1999* (the Act) does not engage contract mechanisms determining what is due under the contract, independently of calculations referable to the work performed.

This means that contractors are not deprived of entitlement to payment under the Act because a condition precedent, such as the obtaining of a superintendent's certificate, has not been satisfied; and it means equally that contractors are not ipso facto entitled to payment because of the operation of a

⁹⁰ Refer to [56] of these Reasons.

⁹¹ [2008] NSWCA 279.

⁹² *Ibid* [53]-[54].

⁹³ (2004) 61 NSWLR 521, [35].

⁹⁴ [2007] NSWCA 19, [38].

deeming provision such as cl 37(2) of the contract in this case.

- 100 Similarly, a requirement to obtain an occupancy permit prior to issuing a Final Payment Claim is, in this particular instance, a contractual requirement in the nature of a precondition to payment, which, as explained in *Plaza West* and in the following paragraph below, does not deprive a claimant builder of the entitlement to progress payments referred to in the SoP Act.
- 101 The first defendant's entitlement to a progress payment under s 9(1) and 10(1) of the SoP Act is to be determined by calculation in accordance with the terms of the contract or on the basis of the value of construction works carried out or related goods and services supplied as provided by s 10(1) of the SoP Act and valued in accordance with the terms of the contract or as provided by s 11 of the SoP Act.
- 102 The foregoing provisions of the SoP Act do not countenance the application of contractual terms which might otherwise deny the builder's entitlement to a progress payment on the basis of the non-fulfilment of contractual preconditions to payment.
- 103 In *Age Old Builders Pty Ltd v John Arvanitis & George Arvanitis*,⁹⁵ Judge Shelton found that the SoP Act did not oblige the plaintiff to demonstrate compliance with the provisions of the Contract for making progress claims prior to making a Payment Claim.⁹⁶ His Honour noted that entitlement to a progress payment is referable, pursuant to s 9(1)(a) of the SoP Act, to a person 'who has undertaken to carry out construction work under the contract' and that there is nothing in s 9 of the SoP Act to fetter this right by reference to contractual preconditions.
- 104 Further, even if the Adjudicator erred in his interpretation of cl 36.1 of the Contract, such an error of fact or law by an Adjudicator in relation to the construction of a contractual provision would not here give rise to jurisdictional error,⁹⁷ and would be

⁹⁵ [2006] VCC 1827.

⁹⁶ *Ibid* [17].

⁹⁷ *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 [56]; *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor* [2008] NSWCA 279 [27]; *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd and Anor* [2009] NSWCA 157 [74]; *Bergemann v Varley Power* [2011] NSWSC 1039. See reference to *Amasya* (above).

non-justiciable in this proceeding for the reasons outlined above.

105 Additionally, if cl 36.1 of the Contract were to constitute a pre-requisite for the builder demanding Final Payment by submitting a Final Claim, such a contractual provision would be invalid as a ‘pay when paid’ provision, by force of s 13 of the SoP Act.

106 Section 13 of the SoP Act provides as follows:

13. Effect of *pay when paid* provisions

- (1) A pay when paid provision of a construction contract has no effect in relation to any payment for—
 - (a) construction work carried out or undertaken to be carried out under the contract; or
 - (b) related goods and services supplied or undertaken to be supplied under the contract.
- (2) In this section—
money owing, in relation to a construction contract, means money owing for—
 - (a) construction work carried out under the contract; or
 - (b) related goods and services supplied under the contract;
pay when paid provision of a construction contract means a provision of the contract—
 - (a) that makes the liability of one party (the first party) to pay money owing to another party (the second party) contingent on payment to the first party by a further party (the third party) of the whole or any part of that money; or
 - (b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or
 - (c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

107 Section 13 of the SoP Act thus renders such a *pay when paid* provision void and of no effect.⁹⁸

108 The effect of cl 36.1 of the Contract, applied in these circumstances as asserted by the plaintiff, would mean that the issuing of an occupancy permit, which the plaintiff in effect argues was a necessary pre-requisite to the builder demanding Final Payment and thereby accruing the right to serve a Final Claim, was contingent and dependent

⁹⁸ This issue was raised in adjudication by the first defendant, however the adjudicator did not make a ruling on the point. See Affidavit of Eddie Shell, Exhibit ‘ES-1’, page 336. See also Affidavit of Howard Junkeer, 17 October 2019, [21].

upon the operation of another contract, and possibly a number of other contracts, and performance of the work thereunder.

- 109 Here, in my view, the plaintiff's liability to pay the Final Payment Claim to the first defendant was contingent and dependent upon the completion of work excised from the first defendant's contract. Therefore to the extent such work was required to be completed in order that an occupancy permit could issue, that work was contingent or dependent on another contract, or contracts, and its performance.⁹⁹
- 110 The Adjudicator also made the unreviewable finding that cl 36.1 of the Contract did not apply to the first defendant's Works because the issue of the occupancy permit required the performance of work which had been excised from the first defendant's scope of Works. The Adjudicator thereby found for that additional reason, that in any event, it was also not possible for the first defendant to satisfy the first limb of cl 36.1 of the Contract.
- 111 Accordingly, cl 36.1 of the Contract is, by operation of s 13 of the SoP Act, of no effect in the respect relied upon by the plaintiff.
- 112 The plaintiff submits that if one of the pre-requisites of cl 36.1 of the Contract was not met then final payment could not be demanded by the first defendant and as a result the contractual date for payment upon *completion* would not arise. The plaintiff argues that therefore there could be no contractual reference date for the Final Payment Claim.
- 113 The plaintiff argues that as a result, s 9(2)(d)(i) of the SoP Act should have been applied to calculate a valid reference date. Under s 9(2)(b)(i) of the SoP Act, upon application of that provision, the expiry of the defects liability period under the Contract would fix the final payment reference date. The plaintiff argues that such a reference date could not have arisen because the defects liability period had not expired.¹⁰⁰
- 114 However, in the instant case the Contract does make express provision for a reference

⁹⁹ CB336, [6]-[12], [21] and [22].

¹⁰⁰ Plaintiff's submissions, [42].

date upon completion.

115 Clause 29.0 of the Contract provides:

The Builder must give the Owner a written claim for each Progress Payment when each stage has been completed, as set out in Schedule 3. The claim must set out each of the following:

- the amount paid or to be paid for the stage or stages completed to date;
- the amount paid or to be paid for, and details of, any variations made and other amounts paid or to be paid by the Owner under this Contract;
- the sum of those amounts;
- payments that have already been made by the Owner; and
- the total claimed, taking into account the payments already made.

116 The plaintiff appears to overlook the effect of cl 29.0 of the Contract which provides that the builder must give the owner a written claim for each progress payment when each stage has been completed, as set out in Schedule 3. The final stage provided for in Schedule 3 of the Contract is '*completion*'. Therefore, the date of completion is the relevant reference date for the purpose of the SoP Act.

117 Further, cl 36.0 of the Contract specifies when a final claim may be issued.

118 Accordingly, s 9(2)(d)(i) of the SoP Act is inapplicable here because that subsection applies only where the contract does not 'otherwise provide'.

119 Further, I do not accept the plaintiff's submission that the present proceeding is indistinguishable with the case of *Vanguard*. As noted above, in *Vanguard*, Promax did not meet the requirements for a final claim because *Vanguard* had terminated the Contract and thus prevented Promax from doing so.

120 For the above reasons I also consider that Ground 2 fails.

Ground 3 - no due date for payment

Plaintiff's Submissions - Ground 3

121 In summary the plaintiff submits that the Adjudicator, without expressly finding that cl 36.1 of the Contract was inoperable, determined that the due date for payment was

7 August 2019.¹⁰¹ The plaintiff also contends that the Adjudicator failed to articulate his reasons for not applying cl 36.1 of the Contract. The plaintiff contends that no final claim could be made by the first defendant until an occupancy certificate was issued. Consequently, there was no obligation on the plaintiff to pay the first defendant and no due date for payment could arise in the circumstances.¹⁰²

First Defendant's Submissions – Ground 3

- 122 In response to the plaintiff's submission that no due date for payment could arise in circumstances where no occupancy certificate had been issued, the first defendant submits that the plaintiff's third ground of review is in effect a reiteration of the second ground of review and that it relies upon its above outlined submissions in relation to Ground 2.¹⁰³
- 123 The first defendant submits that there was no error in the Adjudicator's calculation of the due date for payment. The first defendant also submits that even if the Adjudicator made an error in this regard, which the first defendant disputes, any such error would not be a jurisdictional error and is therefore not properly the subject of challenge in this proceeding.

Reasons and Decision - Ground 3

- 124 During argument at trial the plaintiff conceded that Ground 3 of its Motion was in substance a duplication of its second ground of review.¹⁰⁴
- 125 I also consider Ground 3 is in substance the same as Ground 2.
- 126 I therefore consider that the plaintiff's third Ground should fail for the same reasons that Ground 2 was unsuccessful.

¹⁰¹ Ibid [46]; see Adjudication Determination [163]-[164], CB82-83.

¹⁰² Ibid [47].

¹⁰³ First Defendant Submissions, [34]-[35].

¹⁰⁴ T46.17 and T47.1-10.

Orders

127 Accordingly I order that:

1. The proceeding is dismissed.
2. Pursuant to Rule 79.02 of the *Supreme Court (General Civil Procedure) Rules 2015*, the Senior Master of the Supreme Court of Victoria pay out to the first defendant the sum of \$191,053.90 (subject to any taxation liability), which amount was paid into Court by the plaintiff by orders made on 14 October 2019, and any interest allocated or received in respect of that amount.
3. The plaintiff is to pay the first defendant further interest on the judgment sum in the amount of \$4,815.61 from 12 September to 12 December 2019.
4. The plaintiff is to pay the first defendant's costs of the proceeding, to be assessed on the standard basis in default of agreement.
5. The amount of \$21,563.41, which amount was paid into Court by orders made 13 November 2019, is retained in Court pending a determination of the first defendant's costs of the proceeding.