


Supreme Court of Victoria
**Citi-Con (Vic) Pty Ltd v Trojan Built Pty Ltd [2020] VSC 557
(1 September 2020)**

Last Updated: 2 September 2020

IN THE SUPREME COURT OF VICTORIA	Not Restricted
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AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

S ECI 2020 01564

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

Plaintiff

v

TROJAN BUILT PTY LTD (ACN 609 321 708)

First Defendant

and

Second Defendant

 ROBERT SUNDERCOMBE (IN HIS CAPACITY AS ADJUDICATOR
 APPOINTED UNDER [SECTION 20\(1\)](#) OF THE *BUILDING AND
 CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2002*
 (VIC)

JUDGE: Stynes J

WHERE HELD: Melbourne

DATE OF HEARING: 18 August 2020

DATE OF JUDGMENT: 1 September 2020

CASE MAY BE CITED AS: Citi-Con (Vic) Pty Ltd v Trojan Built Pty Ltd

MEDIUM NEUTRAL [\[2020\] VSC 557](#)
CITATION:

BUILDING CONTRACTS – Whether Adjudicator erred in determining the reference date applicable to the Payment Claim – Whether Payment Claim was served within prescribed time under the Act – Whether Payment Claim is a final payment claim – Whether Adjudicator failed to perform statutory function under Act – *Building and Construction Industry Security of Payment Act 2002* (Vic) ss 9, 10B, 13, 14, 22, 23 and 48 – *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52; (2016) 260 CLR 340, applied – *Shape Australia Pty Ltd v The Nuance Group Pty Ltd* [2018] VSC 808, applied – *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd* [2015] VSC 426, applied – *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* (2018) 54 VR 721, applied – *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, applied – *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156; (2009) 26 VR 112, applied – *Cat Protection Society v Arvio* [2018] VSC 757, applied – *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181, applied – *Wilson v Anderson* (2002) 213 CLR 401, applied – *Mackie Pty Ltd v Counahan* [2013] VSC 694, applied – *Levi Pty Ltd v Z&H Building Development Pty Ltd* [2019] VSC 633, applied – *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, applied.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Ms Christie Jones	EIDELWEISZ Lawyers
For the Defendant	Mr Nicholas Phillpott	Oldham Construction Lawyers

HER HONOUR:

Introduction

1 On 30 November 2018 the plaintiff as builder engaged the first defendant as subcontractor to supply and install a flooring system at the plaintiff's development at 2 The Crossing Caroline Springs for the sum of \$1,179,941.35 (exclusive of GST) (**Subcontract**).

2 This proceeding arises under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the **SOP Act**) in relation to an adjudication determination made by the second defendant (the **Adjudicator**)^[1] on 6 March 2020 (the **Adjudication Determination**) in relation to a payment claim issued by the first defendant dated 3 February 2020 (the **Payment Claim**) under the Subcontract.

3 By amended Originating Motion dated 30 March 2020, the plaintiff seeks, amongst other relief, an order quashing the Adjudication Determination on the basis that the Adjudicator:

- (a) did not have jurisdiction to make the Adjudication Determination; and
- (b) committed jurisdictional error.

4 The plaintiff relies on the following four grounds:

- (a) Ground 1 – there was no valid reference date for the Payment Claim;
- (b) Ground 2 – further to Ground 1, the Payment Claim was not served within the time prescribed by s 14(4)(b) of the SOP Act;
- (c) Ground 3 – alternatively to Grounds 1 and 2, the Payment Claim was a final payment claim and there was no valid reference date applicable to it; and
- (d) Ground 4 – the Adjudicator failed to determine the amount of the progress claim and failed to provide reasons.

5 The issues that arise for determination are:

- (a) in relation to Ground 1 – did the Adjudicator err in determining 25 January 2020 as the reference date applicable to the Payment Claim?
- (b) in relation to Ground 2 – was the Payment Claim served within the time prescribed by s 14(4)(b) of the SOP Act?
- (c) in relation to Ground 3 – is the Payment Claim a final payment claim?
- (d) in relation to Ground 4 – did the Adjudicator fail to perform his statutory function under s 23 of the SOP Act of:
 - (i) determining the amount of the progress payment, if any, to be paid to the first defendant; and
 - (ii) providing reasons in respect of his determination?

6 For the reasons that follow, the plaintiff's amended Originating Motion will be dismissed.

Background

7 The following facts are not disputed.

8 On 30 November 2018, the parties entered into the Subcontract.

9 The first defendant last performed works under the Subcontract in August 2019.

10 On 16 September 2019, the plaintiff issued a payment schedule certifying a scheduled amount of \$365,002.65 owing to the plaintiff. This schedule was issued by the plaintiff but not in response to any payment claim.

11 Practical completion of the works under the Subcontract has not been certified.

12 On 3 February 2020, the first defendant issued the Payment Claim in the sum of \$239,606.74 (including GST). The Payment Claim was made in respect of works completed in August 2019. It was the first progress claim issued by the first defendant expressed to be a payment claim.

13 Also on 3 February 2020, the plaintiff issued a payment schedule in response to the Payment Claim assessing the amount payable as NIL (the **Payment Schedule**).

14 On 17 February 2020, the first defendant commenced an adjudication application in respect of the Payment Claim.

15 On 9 March 2020, the Adjudication Determination was delivered by the Adjudicator.

16 The Subcontract remains on foot between the parties.

Ground 1 – Did the Adjudicator err in determining 25 January 2020 as the applicable reference date?

17 By its Originating Motion, the plaintiff alleges that the Adjudicator erred in determining that 25 January 2020 was the reference date applicable to the Payment Claim.

Adjudicator’s Determination of the applicable reference date

18 The first defendant submitted to the Adjudicator that under cl 13(a) and Schedule 1 of the Subcontract, the reference date applicable to the Payment Claim was 25 January 2020.^[2]

19 The plaintiff submitted to the Adjudicator that the reference date applicable to the Payment Claim was 25 August 2019 ‘or alternatively a date three months from that reference date for which the first defendant made a claim under the SOP Act’.^[3]

20 The Adjudicator’s consideration of this issue is set out in paragraphs [24]–[32] of the Adjudication Determination. In summary he determined:

- (a) the reference date is to be determined in accordance with the terms of the Subcontract;^[4]
- (b) the first defendant is entitled to ongoing reference dates of the 25th of each month;^[5]
- (c) he preferred the first defendant’s submissions;
- (d) there was a valid reference date to submit the Payment Claim; and
- (e) the fact the first defendant last attended the site in August 2019 did not prevent it from making the Payment Claim in reliance on a reference date of 25 January 2020.^[6]

Relevant provisions of the Subcontract

21 The following provisions of the Subcontract are relevant to the determination of this issue.

22 Clause 12.2 states:

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

23 Clause 13(a) states:

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

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

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

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

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

24 Part A of Schedule 1 relevantly states:

'Time for payment claims - 25th of each month projected to end of month.' (emphasis added)

Plaintiff's submissions

25 The plaintiff submitted, in summary, that:

(a) a valid reference date is a necessary precondition for a valid payment claim under the SOP Act. This is not in dispute;^[7]

(b) the Adjudicator erred in determining that a valid reference date arose on 25 January 2020;^[8]

(c) the reference date is to be determined in accordance with the Subcontract.^[9] Again, this is not in dispute;^[10] and

(d) by cl 12.2 and Part A of Schedule 1 of the Subcontract the reference date relevant to the Payment Claim was 25 August 2019.^[11]

26 In essence, the plaintiff's submissions were that:

(a) the wording of the Subcontract, in particular the words 'completed' in cl 12.2 and 'projected to the end of month' in Schedule 1 (both underlined in paragraphs 22 and 24 above) give rise to a threshold requirement that the first defendant complete works in a relevant month to trigger a reference date.¹² Reference dates will continue to arise only while there are works being completed;¹³

(b) the task of the Adjudicator was to identify the work the subject of the Payment Claim, identify the latest date relating to that work and identify the reference date that next followed the latest date on which work was completed;^[14]

(c) as works were last completed in August 2019, the last reference date triggered under the Subcontract was 25 August 2019;^[15] and

(d) the Adjudicator erred in finding that the first defendant was entitled to ongoing reference dates on the 25th of each month in the absence of any work being completed.^[16]

27 In other words, the plaintiff construes the Subcontract to limit:

- (a) the occurrence of reference dates to those months in which work is carried out; [17] and
- (b) the works that can be claimed in respect of a reference date to works completed in the month of that reference date. [18]

First Defendant's submissions

28 In summary, the first defendant submitted:

- (a) pursuant to s 9(2)(a) of SOP Act, reference is to be made to the terms of the Subcontract for the purpose of determining a reference date, an issue which is addressed squarely by the parties in cl 13(a) of the Subcontract;
- (b) cl 13 and Schedule 1 of the Subcontract give rise to a reference date on the 25th of each month until either certification of practical completion or the termination of the Subcontract; [19] and
- (c) as the Subcontract remains on foot and practical completion has not been certified, the reference dates accrued and continue to accrue on the 25th of each month.

Consideration

29 The following applicable principles are not in dispute:

- (a) an essential component to a valid payment claim is the occurrence and available foundation for a valid reference date; [20] and
- (b) further, a valid payment claim, sustained by a valid reference date is a precondition to the Adjudicator exercising powers under the SOP Act. [21]

30 Further, it is not in dispute that in this case, pursuant to s 9(2) of the SOP Act, the reference date relevant to the Payment Claim is to be determined by or in accordance with the terms of the Subcontract.

31 By cl 13 of the Subcontract the parties have squarely addressed available reference dates. That clause provides that for the purpose of the SOP Act 'reference dates' are the dates in Schedule 1 of the Subcontract. There are two exceptions to the occurrence of reference dates as set out in Schedule 1. The first exception relates to dates arising during the Christmas period. The second exception arises once practical completion is certified. Neither exception arises in this case.

32 Clause 12.2 is also relevant to the determination of the applicable reference date under s 9(2)(a)(i) of the SOP Act, being a provision that prescribes the dates on which a claim for a progress payment may be made. Consistent with cl 13, it also refers to the dates in Schedule 1 of the Subcontract.

33 Schedule 1 of the Subcontract states that the 'Time for payment claims' is the '25th of each month projected to the end of month'.

34 Plainly the Subcontract thereby provides for a reference date on which a claim for a progress payment may be made on the 25th of each month, subject to the exceptions described in cls 13(a)(i) and (ii) of the Subcontract.

35 The issue raised by the plaintiff is whether the words 'projected to the end of the month' in Schedule 1 or the word 'completed' in cl 12.2 operate:

- (a) to limit available reference dates to those months in which work is done; and
- (b) to limit the works which may be claimed in respect of a reference date to works completed in the month of the reference date.

36 It is relevant that s 9 of the SOP Act does not impose such a limit. As stated by Vickery J in *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd*:^[22]

The text 'calculated by reference to [the relevant reference date]' in s 9(1) of the Act simply means that a payment claim for a progress payment made under the Act is to be calculated in respect of work done up to and including the relevant reference date and not beyond it. Payment for all such work is claimable, regardless of whether or not the work had been performed since the preceding reference date or prior to the preceding reference date.

As long as the claimed work had been done or the materials supplied on or before the relevant reference date, the progress claim made under the Act can be calculated by reference to the reference date for the purposes of s 9(1) of the Act. The statutory scheme for the making of valid payment claims provides for no other requirement in relation to the time when the work the subject of the payment claim was performed, or when the materials were supplied.^[23]

Neither party disputes this proposition.

37 The issue in dispute in this case is whether the limitation asserted by the plaintiff is imposed by the words used in the Subcontract.

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

39 Contrary to the plaintiff's submissions,

- (a) the phrase used in Schedule 1, 'projected to end of month'; and
- (b) the phrase used in cl 12.2, 'considers to be completed',

serve only to describe works that may be included in the payment claim. They do not, on a plain reading of Schedule 1 and cl 12.2, operate to impose either of the limits described in paragraph 35 above.

40 In light of my construction of the Subcontract it is not necessary for me to determine the matter, however I note that a provision of the Subcontract that purported to limit the occurrence

of reference dates as contended for by the plaintiff, and thereby modified the first defendant's entitlement to progress payments under s 9 of the SOP Act, could well be void under s 48.^[24]

41 Under s 9 of the SOP Act and, having regard to the terms of cls 12 and 13 of the Subcontract:

- (a) the first defendant is entitled to claim a progress payment under the SOP Act on and from each reference date, set out in Schedule 1 of the Subcontract; and
- (b) pending the certification of practical completion, that entitlement subsists while the Subcontract remains on foot.

42 Consequently:

- (i) 25 January 2020 was an available reference date; and
- (ii) the first defendant was not prevented by the SOP Act or the terms of the Subcontract from including in the Payment Claim works completed in August 2019.

Conclusion

43 In summary:

- (a) the Adjudicator did not err in determining that the reference date applicable to the Payment Claim was 25 January 2020;
- (b) the Payment Claim is not invalid for want of a reference date; and
- (c) Ground 1 must fail.

Ground 2 – Was the Payment Claim served within the time prescribed by s 14(4)(b)?

Submissions

44 The plaintiff submitted that:

- (a) under s 14(4) of the SOP Act a payment claim may only be served within the period determined by the Subcontract or a period of 3 months after the reference date applicable to that progress payment;
- (b) the reference date applicable to the Payment Claim is 25 August 2019; and
- (c) therefore the Payment Claim, which was served on 3 February 2020 was served out of time.

Consideration

45 The success of this ground of review is inextricably linked with Ground 1. In light of my determination that the reference date relevant to the Payment Claim was 25 January 2020 and the fact that it was served on 3 February 2020, the Payment Claim was served within the time required by s 14(4) of the SOP Act.

Conclusion

46 Ground 2 must fail.

Ground 3 – Is the Payment Claim a final payment claim served within the prescribed time?

47 By its Originating Motion the plaintiff alleges that the Payment Claim was not valid on the alternative ground that it was a final payment claim and that a reference date had not arisen in respect of it under cl 12.4 of the Subcontract.

Submissions

48 The plaintiff submitted that:

- (a) determined objectively, the Payment Claim is a final payment claim;^[25]
- (b) under the Subcontract, the time for the submission of a final progress claim is tied to the expiry of the defects liability period. As the defects liability period has not expired, the time for making a final payment claim under the Subcontract has yet to accrue;^[26]
- (c) it is likely that the contractual mechanism for a final payment is void under the pay when paid prohibition enshrined in s 13 of the SOP Act and of no effect;^[27]
- (d) in the absence of a valid provision in the Subcontract providing a reference date for the final payment claim, s 9(2)(d)(iii) of the SOP Act provides that the applicable reference date for a final payment claim is the day after work was last carried out under the Subcontract;^[28]
- (e) work was last carried out in late August 2019 and therefore the reference date applicable to the final payment claim was in late August 2019; and
- (f) the Payment Claim was not served by late November 2019 as required by s 14(5) of the SOP Act and is therefore invalid.^[29]

49 Central to the plaintiff's submission is that the Payment Claim is a final payment claim.

50 The plaintiff relies on the following matters in support of its proposition that the payment claim is a final payment claim:

- (a) the first defendant had ceased works in August 2019;
- (b) in September 2019 the plaintiff served a payment schedule titled 'Final Claim';
- (c) by that September 2019 payment schedule, the plaintiff purported to have recourse to the retention held under the Subcontract to discharge, in part, the first defendant's liability for liquidated damages (as alleged by the plaintiff) and therefore there were no further retention moneys to be claimed;^[30] and
- (d) the Payment Claim was a final balancing of account between the parties.

Consideration

51 What is a final payment claim is not defined for the purpose of the SOP Act.

52 Whether a payment claim is a final payment claim is to be determined objectively.^[31] The Court should ascertain the meaning that the documentation would convey to a reasonable person having the background knowledge that should reasonably be ascribed to the parties at the time the document was served.^[32] The parties' background knowledge is deemed to include experience in the building industry and a familiarity with specific construction project and any issues regarding payment.^[33]

53 The Subcontract provides for two types of payment claims:

- (a) periodic progress claims described in cl 12.2; and
- (b) final payment claim described in cl 12.4.

54 A precondition to a final payment claim under cl 12.4 is the expiry of the defects liability period. The timing of the defects liability period is governed by the terms of cl 11.7 and is said to extend for a period of 12 months commencing on the Date of Project Practical Completion.

55 The defects liability period has yet to expire.^[34] Consequently, cl 12.4 has not been engaged and service of a final payment claim under it would be premature.

56 Nevertheless, I am required to assess the character of the Payment Claim objectively and by reference to the meaning the documentation served would convey to a reasonable person at the time it was served.

57 I reject the plaintiff's characterisation of the Payment Claim as a final payment claim.

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

- (a) the Payment Claim was served under cover of an email identifying it as a 'Payment Claim'. There was no suggestion in that email that it was a final payment claim;
- (b) the Payment Claim was titled and referred throughout as 'Payment Claim', not as a final payment claim;
- (c) the service of a periodic payment claim was consistent with the first defendant's continuing entitlement to such progress payments on and from each reference date identified in Schedule 1 of the Subcontract;
- (d) the Subcontract was still on foot;
- (e) practical completion had not been certified; and
- (f) the first defendant had continuing obligations under the Subcontract, specifically in relation to defect liability under cl 11.7, relevant to the final accounting between the parties.

59 While the Payment Claim does claim 100% of the contract price, in the circumstances described in paragraph 58 above, a claim for the completion of the contract works without

more does not render the payment claim, construed objectively and not in an overly technical or unduly critical way, a final payment claim under the Subcontract.^[35]

60 The Payment Claim does seek the return of 50% of the retention monies held by the plaintiff. However, the inclusion of a claim for the return of retention moneys is not itself determinative of the status of the Payment Claim.^[36] Of greater significance is that the obligations of the parties under the Subcontract are continuing, making it unlikely that a reasonable person would understand the Payment Claim to represent the final accounting between the parties.

Conclusion

61 The Payment Claim was not a final payment claim.

62 Ground 3 must fail.

Ground 4 - Did the Adjudicator fail to perform his statutory function under s 23?

63 The plaintiff claims the Adjudicator failed to determine the amount of the progress payment and, further and alternatively, failed to provide reasons for his determination pursuant to s 23 of the SOP Act.

Submissions

64 It was submitted by the plaintiff that the Adjudicator fell into jurisdictional error by merely adopting the first defendant's assessment of claimed amounts rather than undertaking the basic and essential task of determining what work had been done and the value of that work.

Consideration

65 I reject the plaintiff's submission.

66 The principles applicable to the task of an Adjudicator under the SOP Act have been addressed in some detail by Vickery J in *SSC Plenty Road Pty Ltd*.^[37] I don't propose to repeat that analysis here but rather have extracted from it the following principles relevant to my review of the task undertaken by the Adjudicator:

(a) the absence of relevant material from the respondent, or the presentation of material in an incoherent fashion, does not entitle an adjudicator to simply award the amount of the claim. As a minimum, the adjudicator is obliged to determine whether the construction work identified in the payment claim has been carried out, and what is its value.^[38] The adjudicator is obliged to make these findings on the evidence before him or her;

(b) nevertheless, if the claimant has put on material as to the value of a claim, but the respondent has not, the adjudicator in assessing the value is entitled to draw any necessary inference from the absence of controverting material from the respondent, including an inference that no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may not be conclusive, but it may be taken into account in assessing the evidence of value overall;^[39]

- (c) an adjudicator is not required to act as an expert building valuer; ^[40]
- (d) what is required is for an adjudicator in each case to consider and assess the valuation evidence presented in the course of the adjudication, and arrive at a rational assessment of value on the basis of that evidence; ^[41]
- (e) given the severe statutory time constraints placed on adjudicators to perform their tasks, ^[42] an analysis undertaken on judicial review of the valuation exercise documented in the adjudicator's adjudication determination ought not to be approached from an unduly critical viewpoint. ^[43] Rather, the SOP Act calls for a practical and robust approach to the assessment process on the part of adjudicators and their expressed reasons; ^[44]
- (f) the adjudicator must proceed with their task by:
- (i) fairly assessing and weighing the whole of the evidence which is relevant to each issue arising for determination at the adjudication;
 - (ii) drawing any necessary inferences from the evidence, or from the absence of any controverting material provided by the respondent, including an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may be considered in the context of the evidence as a whole;
 - (iii) arriving at a rational conclusion founded upon the evidence;
 - (iv) in so doing, is not called upon to act as an expert; and
 - (v) is not entitled to impose an onus on either party to establish a sufficient basis for payment or sufficient basis for withholding payment; ^[45] and
- (g) the legislative scheme is such that the standard of reasons delivered by an adjudicator within the time constraints required by the Act, and given the nature of the decision to be delivered in this demanding context, and by persons who are often not legally qualified, of necessity means that it falls towards the lower end of the scale. ^[46]

67 The Adjudicator determined that a sum of \$239,606.68 was payable to the first defendant, which is 6 cents less than the sum claimed. ^[47] In reaching that determination the Adjudicator considered the following items:

- (a) claim for items that were not disputed in the sum of \$23,256.70;
- (b) claim for the contract sum of \$1,179,941.37. The plaintiff assessed this sum at \$1,179,941.32, being just 5 cents less than the sum claimed by the first defendant;
- (c) variations under invoice 1072 in the sum of \$2,999.72;
- (d) variations under invoice 1077 in the sum of \$12,770;

(e) liquidated damages deducted by the plaintiff in its schedule in the sum of \$450,000;

(f) the first defendant's entitlement to the release of 50% of the retention monies held by the plaintiff in the sum of \$10,761.11; and

(g) the sum paid to the date of the determination of \$1,089,419.91.

68 The plaintiff did not, by written or oral submission, seek to challenge the Adjudicator's assessment of the undisputed items or the claim for contract work (the parties being only 5 cents apart). Further, the criticism levelled against the Adjudicator's determination, being a failure to determine what work had been done and the value of that work, is not applicable to the Adjudicator's assessment of liquidated damages (which he determined to be an excluded amount under s 10B), retention monies or the sum paid to date.

69 In relation to variations under invoice 1072 in the sum of \$2,999.72, the Adjudicator noted in the Adjudication Determination,^[48] and it was confirmed by plaintiff's counsel, that these items were not addressed in the plaintiff's schedule. By its adjudication application the first defendant asserted that the works the subject of this invoice were requested orally but noted that some reference was made to them in an email exchange attached to the adjudication application. That email exchange records that on 12 April 2019, the first defendant asked for invoice 1072 be approved and paid. In response the plaintiff stated 'Dennis – approve the 3k'.

70 Contrary to the plaintiff's assertion, the Adjudicator did not merely adopt the first defendant's assessment of value. Rather, he had regard to the totality of the evidence and submissions before him and on that basis satisfied himself that the first defendant had carried out the work that had been claimed and was entitled to be paid for it.^[49] It is apparent by his express reference to it, that the Adjudicator had regard to the evidence available to him in relation to this issue. Having regard to that evidence, and in the absence of any material from the plaintiff contradicting it, it is my opinion that the Adjudicator's conclusion that the work had been carried out and his valuation of it was rational and founded on the evidence presented. The reasons for his conclusion are brief but adequately explain the basis of his determination.

71 In relation to the variations under invoice 1077 in the sum of \$12,770, the Adjudicator recorded in the Adjudication Determination that these items were not addressed by the plaintiff in its schedule. By its adjudication application the first defendant noted there were two items included in that invoice, being joists (\$11,870) and 12 sheets of ply (\$900).

72 In support of the claim for the joists, the first defendant referred the Adjudicator to an email exchange between the parties, which it identified as being relevant to the purchase of the level 4 joists. The subject line of the email correspondence was marked 'level 4 grid 0-1'. That email exchange records:

- (a) a request from the plaintiff as to how long it will take to get the joists to site;
- (b) the first defendant's position that it required the plaintiff's approval of a variation cost before ordering the level 4 joists;

(c) the plaintiff's response to the first defendant in the following terms 'Approved. Place order tonight.'; and

(d) a further email from the plaintiff stating 'As a matter of urgency I require written confirmation that all joists for the entire level 4 are on order with Speed Floor Tomorrow.'^[50]

73 In relation to the claim for ply in the sum of \$900, the first defendant informed the Adjudicator that the sheets of ply were taken by the respondent and used for 'other purposes'.

74 The Adjudicator referred to the evidence and submissions relied on by the first defendant and then noted that the plaintiff made no submission in relation to those items. Having had regard to the totality of the evidence and submissions before him, the Adjudicator expressed that he was satisfied that the claimant had carried out the work and was entitled to be paid.

75 Again, contrary to the plaintiff's assertion, the Adjudicator did not merely adopt figures put forward by the first defendant. The Adjudicator considered the totality of the evidence and submissions before him such that his determination in relation to the works claimed, was rational and founded on the evidence presented. His reasons adequately explain the basis of his determination.

Conclusion

76 There was no failure on the part of the Adjudicator to discharge his statutory duty under s 23 of the SOP Act.

77 Ground 4 must fail.

Orders

78 Accordingly, I shall order that the plaintiff's amended Originating Motion be dismissed.

79 The plaintiff pay the first defendant's costs of and incidental to this proceeding, to be taxed on a standard basis if not agreed.

[1] By letter dated 3 April 2020, the second defendant informed the Court that he did not intend to take any active role in the proceeding and will abide by the decision of Court save as to costs.

[2] Adjudication Determination at [21].

[3] Ibid [22].

[4] Ibid [29].

[5] Ibid [31].

[6] Ibid [32]; plaintiff's submissions at [4].

- [7] First defendant's submissions at [8]; *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52; (2016) 260 CLR 340, 360–1 [61] (Kiefel, Bell, Gagelar, Keane and Gordon JJ).
- [8] Plaintiff's submissions at [9].
- [9] Ibid [10]; s 9(2)(a) SOP Act.
- [10] First defendant's submissions at [9]; s 9(2)(a) SOP Act.
- [11] Plaintiff's submissions at [11].
- [12] Ibid [10]–[11].
- [13] Transcript at T11.
- [14] Plaintiff's submissions at [17].
- [15] Ibid.
- [16] Ibid; Transcript at T11.
- [17] Plaintiff's submissions at [5(a)]; Transcript at T14.20.
- [18] Transcript at T15.05.
- [19] First defendant's submissions at [12(a)].
- [20] Section 9(1) SOP Act; *Shape Australia Pty Ltd v The Nuance Group Pty Ltd* [2018] VSC 808, [23] (Digby J).
- [21] *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* [2016] HCA 52; (2016) 260 CLR 340, 360–1 [61] (Kiefel, Bell, Gagelar, Keane and Gordon JJ); *Shape Australia Pty Ltd v The Nuance Group Pty Ltd* [2018] VSC 808, [24] (Digby J).
- [22] *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd* [2015] VSC 426. See also *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* (2018) 54 VR 721, 751–2 [110]–[112] (Riordan J).
- [23] *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd* [2015] VSC 426, [101]–[102] (Vickery J).
- [24] *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* (2018) 54 VR 721, 753 [116] (Riordan J).
- [25] Plaintiff's submissions at [28].
- [26] Ibid [29].
- [27] Ibid [29].
- [28] Ibid [30].

[29] Ibid [31].

[30] Transcript at T24.29.

[31] *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, [10] (Finkelstein J); *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156; (2009) 26 VR 112, 123–4 [53] (Vickery J); *Cat Protection Society v Arvio* [2018] VSC 757, [61] (Digby J).

[32] *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181, 188 [11] (Gleeson CJ, Gummow and Hayne JJ); *Wilson v Anderson* (2002) 213 CLR 401, 418–9 [8]–[9] (Gleeson CJ); *Cat Protection Society v Arvio* [2018] VSC 757, [61] (Digby J).

[33] *Mackie Pty Ltd v Counahan* [2013] VSC 694, [46], [55] (Vickery J).

[34] Plaintiff's submissions at [29].

[35] *Levi Pty Ltd v Z&H Building Development Pty Ltd* [2019] VSC 633, [84] (Digby J).

[36] Ibid [96].

[37] *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, [76]–[108] (Vickery J).

[38] Ibid [81].

[39] Ibid [82].

[40] Ibid [96].

[41] Ibid.

[42] The time within which an adjudicator is to deliver a determination (including in relation to claimable variations) is strictly limited, namely within 10 business days of the adjudicator accepting nomination or within a shortly extended period of 15 days if agreed to by the claimant (s 22(4) SOP Act).

[43] *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, [99] (Vickery J).

[44] Ibid [100].

[45] Ibid [101(j)].

[46] Ibid [107].

[47] Adjudication Determination at page 419 of the Courtbook.

[48] Adjudication Determination at [64].

[49] Ibid [67].

[50] Courtbook at 280–2.

