IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
BUILDING CASES LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-21-02042

LANDMARK BUILDING SERVICES QLD PTY LTD (ACN 606 374 770) — Plaintiff

v

DEMETRIOS CHARALAMBE CARAKITSOS and MOABE FRANCO PEREIRA CARAKITSOS — Defendants

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| JUDGE: | His Honour Judge Woodward |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 9 December 2021 |
| DATE OF JUDGMENT: | 31 January 2021 |
| CASE MAY BE CITED AS: | Landmark Building Services Qld Pty Ltd v D & M Carakitsos |
| MEDIUM NEUTRAL CITATION: | [2022] VCC 41 |

**REASONS FOR JUDGMENT**

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| Subject: | CONTRACT – STATUTORY CONSTRUCTION |
| Catchwords: | Building and construction – statutory construction – construction of a defined term in a statute – proper construction of the term 'principal' in s31 of the *Building and Construction Industry Security of Payment Act* 2002 (Vic) – were land owners 'principals' when neither qualified or equipped to themselves carry out construction work under the head contract – was money payable by the principals under the terms of the head contract – proper construction of the head contract |
| Legislation Cited: | *Building and Construction Industry Security of Payment Act* 2002 (Vic), s31 |
| Cases Cited: | *De Martin & Gasparini Pty Ltd v Energy Australia* [2002] NSWCA 330; 55 NSWLR 577, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, *Owners of the Ship, Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404, *Singh v Lynch* (2020) 103 NSWLR 568, *Marine Power Australia Pty Ltd v Comptroller-General of Customs* (1989) 89 ALR 561, *Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd* [2011] VSCA 99; 32 VR 247, *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, *Jafari v 23 Developments Pty Ltd* (2019) 58 VR 288 |

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| APPEARANCES: | Counsel | Solicitors |
|---|---|---|
| For the Plaintiff | AR Morrison | Ward & Co Legal Consultants<br>(ref: MW:20886A) |
| For the Defendants | ATJ Baker | Aitken Partners<br>(ref: PMT:CAR707.1) |

HIS HONOUR:

**Summary and outcome**

1 The defendants ("owners") are registered proprietors of the land at 350 Ascot Vale Road, Moonee Ponds, Victoria ("Site"). On 16 June 2017, the owners appointed DM Belo Developments Pty Ltd ("Belo") to engage a builder to construct a multi-storey building on the Site ("Development Agreement"). The owners hold all the shares in Belo and the first defendant is its sole director. By a contract dated 20 April 2018, Belo engaged the plaintiff ("Landmark") to construct 13 apartments, two commercial spaces and a basement at the Site, for consideration of $4.8 million (ex GST) ("Building Contract").

2 On 14 September 2020, an adjudicator determined that the sum of $329,898.29 plus interest and fees ("adjudicated amount") was due by Belo to Landmark in respect of a payment claim dated 27 July 2020 under the *Building and Construction Industry Security of Payment Act 2002* ("Act"). Belo failed to pay any part of the adjudicated amount. On 12 October 2020 (in proceeding CI-20-04520), this court entered judgment in favour of Landmark requiring Belo to pay the sum of $348,481.08 ("judgment amount") pursuant to s28R of the Act. On 9 February 2021, the court issued a debt certificate under s33 of the Act in respect of the judgment amount ("debt certificate").

3 In this proceeding, Landmark sues the owners pursuant to s31 of the Act to recover the sum owing under the debt certificate. The owners deny any liability to Landmark on either or both of two bases. First, they say they are not "principals" within the meaning of s31 of the Act. Second, they deny that there is money that was payable or became payable by them to Belo on or after 17 March 2021, the date on which Landmark served the owners with the debt certificate and a notice of claim in the form prescribed by the Act.

4 For the reasons that follow, in my view, Landmark's submissions on the proper construction of the term "principal" as it appears in s31 of the Act and of clause 2.3 of the Development Agreement, are to be preferred. There will therefore be judgment for Landmark for the amount of the debt certificate, being $348,481.08, plus interest pursuant to statute. Subject to any offers or other matters relevant to the question of costs that the parties are able to bring to my attention, I will order that the defendants pay the plaintiff's costs of and incidental to this proceeding, including reserved costs, noting that such an order will extend to the costs of the application for preliminary discovery that commenced this proceeding and the costs under order 19 of the orders made on 12 November 2021. I will ask the parties to endeavour to agree orders to give effect to these reasons or, if they are unable to do so, provide brief written submissions on the orders they seek. I will thereafter determine the final orders on the papers.

**Path to trial**

5 The issues in this proceeding first came before me on 12 November 2021, as an application by Landmark for summary judgment, and a cross application by the owners for summary judgment for the defendants or, alternatively, for orders that particular paragraphs of Landmark's statement of claim be struck out. When the application was called on for hearing on 12 November 2021, it was apparent that there may be a need for amendments to pleadings and further evidence. It also seemed to me that the issues were confined and might be further narrowed by the preparation of agreed facts, issues and documents, with the result that a trial of the proceeding was likely to last less than one day.

6 In the circumstances, before hearing substantive submissions, I indicated to the parties that I could probably list the matter for trial in December and invited them to consider whether their interests may be better served by:

(a) having both applications dismissed by consent;

(b) making orders timetabling amendments to pleadings, a statement of agreed facts, issues and documents, any further evidence and further submissions; and

(c) listing the matter for trial on a convenient date in December.

7 The parties accepted the invitation, and orders were made by consent accordingly. The parties filed amended pleadings and the further documents contemplated by the orders, and the proceeding duly came on for trial before me on 9 December 2021, and occupied less than half a day. The parties and their legal advisers are to be commended for the cooperation they showed in consenting to orders and completing the statement of agreed facts, issues and documents, and the efficiency of their preparation for a trial at short notice.

**Agreed facts, issues and documents**

8 By a document dated 1 December 2021, the parties agreed various formal matters (incorporation of relevant entities, the authenticity of key documents and so on), the issues in dispute and a number of other relevant facts. The agreed issues are:

(a) Are the owners "principals" within the meaning of s31 of the Act?

(b) What amount (if any) was outstanding from the owners to Belo as at 17 March 2021?

9 The relevant agreed facts (in addition to the formal matters) are to the effect that:

(a) On 16 June 2017, the owners and Belo entered into the Development Agreement.

(b) On 20 April 2018, Belo and Landmark entered into the Building Contract.

(c) The owners, Belo, Landmark and Westpac Banking Corporation ("Westpac") entered into an agreement dated 25 July 2018 relating to

(among other things) the financing of the development of the Site ("Side Deed").

(d) On 14 September 2020, an adjudicator determined that the adjudicated amount was due by Belo to Landmark in respect of a payment claim dated 27 July 2020.

(e) Belo failed to pay the whole or any part of the adjudicated amount.

(f) On 12 October 2020, in proceeding CI-20-04520 the County Court ordered that Belo pay Landmark the judgment amount.

(g) The matters set out in s30 of the Act were satisfied on and from 12 October 2020.

(h) Belo failed to pay the whole or any part of the judgment amount.

(i) On 9 February 2021, in proceeding CI-20-04520 this court issued the debt certificate.

(j) The debt certificate was a debt certificate within the meaning of ss32(a) and 33 of the Act.

(k) Landmark served the debt certificate and a notice of claim, each in the prescribed form, on the owners on 17 March 2021.

(l) On 17 June 2021, in proceeding CI-21-02042, this court ordered the owners to produce any documents within their possession within various stated categories.

(m) Pursuant to the orders made 17 June 2021, the owners produced (among other documents):

(i) the Development Agreement;

(ii) the Side Deed; and

(iii) a bundle of invoices sent from Belo to the owners.

(n) The invoices listed in the column headed "Builder invoices to Developer" in schedule A to the amended statement of claim dated 12 November 2021 (also attached to the agreed facts) ("schedule A") were issued by Landmark to Belo.

(o) The invoices listed in the column headed "Developer invoices to Owners for Builder services" in schedule A:

(i) were issued by Belo to the owners; and

(ii) were produced by the owners pursuant to the orders for preliminary discovery orders made 17 June 2021.

(p) Landmark received the payments listed in the column headed "Payments" in schedule A.

10 I have been able to determine the issues in the proceeding based on these agreed facts, issues and documents and without the need to resort to the affidavits filed by the parties for the purposes of the summary judgment application, or the cross-examination at trial of the first defendant Mr Carakitsos on his affidavit.

**The Development Agreement**

11 As noted above, the Development Agreement is dated 16 June 2017 and is between the owners and Belo. The recitals to the Development Agreement include the following:

> "D. The Developer is intending on entering into a Contract for Design & Construct (the "**Contract**") for the construction of a multi-story building consisting of a medical centre, food and drink premises and dwellings on the Property.
>
> E. The Developer, with the consent of the Land Owners, wishes to engage Arrow International Pty Ltd … ("**the Builder**") to execute those building works in accordance with the terms of the Contract and the Builder accepts that engagement, or in the alternative has

indicated that it will accept engagement as the Builder on the terms prescribed in the Contract.

F. The Developer has the appropriate qualifications to undertake the development."

12 The key operative provisions of the Development Agreement are in clause 2, as follows:

> "2. It is agreed between the Parties that:
>
> 2.1 The Land Owners have grant [sic] their consent for the Developer to undertake the development on the Property on their behalf.
>
> 2.2 The Developer, on authority of the Land Owners, may instruct the Builder to undertake the development and construction of the Property in accordance with the terms of the Contract.
>
> 2.3 The Developer will pay the Builder the sum specified in Part A of the Contract for the due and proper performance of the work under the Contract in accordance with the terms of the Contract, unless otherwise mutually agreed between the parties."

**The Building Contract**

13 Contrary to what was contemplated under the terms of the Development Agreement, the builder ultimately engaged to undertake the development and construction at the Site was Landmark, not Arrow International Pty Ltd. The Building Contract entered into between Belo and Landmark was the AS 4300-1995, Australian Standard Design & Construct Contract. With one exception, the terms of the Building Contract are only peripherally relevant to the issues in the proceeding, given that the circumstances leading up to and resulting in the relevant payment claim and determination of the adjudicated amount are not in dispute.

14 The exception is Annexure Part A of the Building Contract. It was not in dispute that this is the "Part A" referred to in clause 2.3 of the Development Agreement, and that the "sum specified in Part A of the Contract" under clause 2.3 is the Contract Sum of $4.8 million in item 10 of Annexure Part A. It follows that the defined term "Construction Sum" incorporated by the amendments to the

Development Agreement introduced by the Side Deed (discussed below) refers to this $4.8 million.

15 Further, in the course of submissions, counsel for the owners drew my attention to the fact that the Building Contract uses the defined term "Principal" to refer to the developer, namely, Belo. Unsurprisingly, the Building Contract is replete with references to the "Principal". In particular, counsel for the owners drew my attention to passages in clause 42.1 of the Building Contract (dealing with certificates and payments) as follows:

> "When issued in response to a payment claim made by the Contractor under the Security of Payment Act, the Superintendent's payment certificate shall be deemed to be the payment schedule issued on behalf of the Principal under the Act, in response to that payment claim."
>
> …
>
> Unless, and only to the extent required to do so under the Security of Payment Act, the Principal is not obliged to make any payment to the Contractor under this clause 42.1 until not less than 15 days after the contractor has [complied with various pre-requisites to the making of a payment claim]."

**The Side Deed**

16 The Side Deed is dated 25 July 2018. The role of the Side Deed is conveniently summarised in the recitals as follows:

> "A. The Owner owns the Site.
>
> B. The Owner has entered into the Development Agreement with the Developer to arrange for construction of the Works at the Site.
>
> C. The Developer has entered into a Building Contract with the Builder for construction of the Works at the Site.
>
> D. The Developer and the Owner have agreed that the Owner is required to fund the payments to the Builder under the Building Contract.
>
> E. The Financier [Westpac] has agreed to assist the Owner to fund payments to the Builder to construct the Works.
>
> F. The Developer and the Owner have agreed to give the Financier the Security.
>
> G. It is a condition of funding under the Facility Agreement that the parties enter into this Deed"

17 Counsel for Landmark submitted (and I accept) that "deeds of this kind are not uncommon" to overcome issues of privity between the financier and the builder that would otherwise arise.

18 The Side Deed includes definitions of both the Building Contract and the Development Agreement and, by clause 8.1, varies the terms of the Development Agreement (relevantly) by amending clause 2.3 and adding a new clause 2.6. As a result of these amendments, clauses 2.3 and 2.6 of the Development Agreement read as follows:

> "2.3 The Developer will pay the Builder the sum specified in Part A of the Contract for the due and proper performance of the work under the Contract in accordance with the terms of Contract *(**Construction Sum**)*, unless otherwise mutually agreed between the parties. The Owner must pay or reimburse the Developer the Construction Sum.
>
> …
>
> 2.6 The Owner and the Developer agree that the Owner may, if it elects, pay the Builder the Construction Sum directly in satisfaction of its obligations under clause 2.3."

19 There are mistakes in the Side Deed. First, while it amends the title of the Building Contract as it originally appeared in the Development Agreement, it identifies the wrong date and fails to amend the Development Agreement by substituting Landmark for Arrow International Pty Ltd as the "Builder" under the Building Contract. Second, it uses an incorrect defined term for the owners (referring to them as "Owner", rather than "Land Owners").

20 When this proceeding first came before me as a summary judgment application as referred to above, the parties had joined issue on the effect of the first of these mistakes. However, by the time of the trial, the owners no longer pressed this issue. By their amended defence, the owners conceded that, on its proper construction, the Side Deed varied the Development Agreement, such that "Builder" should be varied to mean Landmark. They noted by way of particulars that: "The construction is necessary to correct an obvious mistake and avoid absurdity in the [Development] Agreement as varied by the Side Deed".

21 That concession was well made. In my view, any argument that Landmark could not rely on the terms of the Side Deed, because it referred to the wrong builder, could not have been sustained.

**The Act**

22 Division 4 of Part 3 of the Act is headed "Recovery from principal". Counsel for Landmark aptly described the provisions of the division as allowing for a claimant with a judgment for a debt under the Act, to "leapfrog" a recalcitrant respondent by taking a statutory assignment of money owed to the respondent by a party higher up in the contractual chain. Counsel for Landmark also observed that the provisions were adopted from the *Contractors Debts Act* 1997 (NSW) ("CD Act") which provides for a similar process, but is not limited to security of payment claims.

23 Counsel for the owners submitted that the plaintiff had failed to establish any connection between the Act and the CD Act, but I reject that submission. The subject matter of the CD Act may be broader than the security of payment provisions under the Victorian Act, but the former clearly encompasses security of payment claims in New South Wales (as noted by Santow JA in the passage from *De Martin & Gasparini Pty Ltd v Energy Australia ("De Martin")*,[1] below). Moreover, the language of the provisions is, for the most part, identical, and the relationship is widely accepted by commentators on the security of payment legislation.

24 In oral submissions, counsel for Landmark noted that this part of the Act is "rarely seen in action". He observed that even if one has regard to the 140-year history of the CD Act, there is scarcely more than one decision each decade. He postulated (and I agree) that a contributing factor is the informational gap. There is little (if any) effective mechanism in the legislation that enables the affected subcontractor to compel disclosure of information concerning the existence of

[1] [2002] NSWCA 330; 55 NSWLR 577 at [31].

relevant obligations further up the contractual chain. In this case, the details only came to light following an application for preliminary discovery.

25 In *De Martin* ,[2] Santow JA said about the construction of the CD Act (citations omitted) that:

> "The Act was introduced as part of a broader strategy to resolve problems of security of payment of individuals such as subcontractors, labourers and suppliers involved in the building industry. The main objective of the Act is therefore "to provide a mechanism to enable persons such as … subcontractors … to recover debts owed to them for work carried out and materials supplied by them…Accordingly the Act sets in place a scheme for the recovery of such monies owed, by attaching monies in turn owed by the principal to the head contractor under their contract. Earlier in the Act are other provisions assisting that objective. They are in aid of unpaid subcontractors who have taken out … a judgment debt against the head contractor. They permit a debt certificate to be issued and a notice of claim to be taken out against the principal. This latter, on service, effects an assignment of an equal amount of any indebtedness owed by the principal to the head contractor, in payment of what is owed to the subcontractor by the head contractor."

26 The relevant provisions of the Victorian Act are as follows:

(a) Section 30: Division 4 of the Act applies (in substance) if an adjudication has occurred and the claimant has a judgement for the adjudicated amount. As noted above, in this proceeding these prerequisites to the application of the provisions are all admitted.

(b) Section 31(1) and (2):

> "(1) If the circumstances set out in section 30 apply, the claimant may obtain payment of the adjudicated amount or part of that amount in accordance with this Division out of money that is payable or becomes payable to the respondent by some other person (the principal) for construction work or goods and services that the principal engaged the respondent to carry out or supply under a contract.
>
> (2) However, the claimant can obtain payment from the principal under this Division only if the construction work carried out or the goods and services supplied by the claimant to or for the respondent under the construction contract are, or are part of or incidental to, the construction work or goods and services that the principal engaged the respondent to carry out or supply."

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2 [Ibid.

(c) Section 34:

> "(1) The service of a notice of claim on the principal operates to assign to the claimant the obligation of the principal to pay the money owed under the contract to the respondent.
>
> (2) The assignment is limited to the claimant's certified debt.
>
> (3) The assignment is subject to any prior assignment under this Division that is binding on the principal and the respondent."

(d) Section 35(2): The respondent's liability persists until the claimant provides a discharge notice or the payments are no longer payable under the contract between the principal and the respondent.

(e) Section 38: If the principal fails to pay, the claimant may sue for and recover the assigned debt in any manner which the respondent might have done if there had been no assignment. The right of recovery is subject to any defence that the principal would have had against recovery of the debt by the respondent (other than a defence based on something done by the principal after the notice of claim was served by the claimant).

**Are the owners principals within the meaning of s31 of the Act?**

27 Counsel for the owners submitted that "the key issue concerning the proper construction of s 31(1) of the Act is whether the owners are a 'principal' as defined", and that an application of the general principles of statutory construction leads to the conclusion that they are not. He argued that, contrary to the method employed by Landmark where its construction began with statutory antecedents, the proper interpretation of a statutory provision begins and ends with consideration of the statutory text.[3]

28 I interpolate that, while I agree with counsel's primary submission that constructions begins and ends with the statutory text, I do not accept that Landmark's method was to start with statutory antecedents. Counsel for Landmark did begin with a helpful summary of the history of the provisions but, to

[3] Citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

my observation, his submissions on constructions were no less focussed on the statutory text than those of counsel for the owners. Indeed, probably more so.

29 Counsel for the owners next argues that the meaning of the text also requires consideration of its context, which includes the general purpose and policy of a provision, citing the leading High Court authority of *Project Blue Sky Inc v Australian Broadcasting Authority*.[4] However, counsel then posits an approach to construction of the term 'principal' in s31 of the Act that seems to me to be a departure from his thesis of retaining a focus on text and context. He does this by reference to what he describes as conflicting High Court authorities on the extent to which the ordinary meaning of a defined term can be used in construing the definition, contrasting the decisions in *Owners of the Ship, Shin Kobe Maru v Empire Shipping Co Inc*[5] ("*Shin Kobe Maru*") on the one hand, and *Data Access Corporation v Powerflex Services Pty Ltd*,[6] on the other.

30 In *Shin Kobe Maru*, the High Court held that:

> "The use of the word 'proprietary' in the term to be defined [proprietary maritime claim] does not colour the meaning to be given to the definition which follows it. It would be quite circular to construe the words of a definition by reference to the term defined."[7]

31 Counsel for the owners cites this passage and then discusses later authorities suggesting a shift away from a strict application of this principle. These (as well as earlier decisions here and in the United Kingdom) are conveniently and comprehensively summarised and analysed by Leeming JA in the recent decision of the New South Wales Court of Appeal in *Singh v Lynch* ("*Singh*"),[8] a decision relied on by the owners. It is unnecessary for me to repeat what is there set out. Leeming JA concludes his analysis as follows:

> "Fundamentally, the statute is to be read as a whole, having regard to context in the first instance. If what was said in *Shin Kobe Maru* be applied literally, then regard should be had to every word of the statute

4 (1998) 194 CLR 355 at [69]-[71] (McHugh, Gummow, Kirby and Hayne JJ).
5 (1994) 181 CLR 404.
6 (1999) 202 CLR 1 at [34] (Gleeson CJ, McHugh, Gummow, Hayne JJ).
7 (1994) 181 CLR 404 at 419.
8 (2020) 103 NSWLR 568.

> and its context *except every reference to every defined term*. That seems improbable, especially since it is to be expected that parliamentary counsel will choose defined terms so as to assist, rather than trip up, the reader."[9]

32 However, his Honour was unwilling to express a concluded view. He noted that the issue had been inadequately explored in written and oral submissions and considered that:

> "There are very real limits on the ability of an intermediate appellate court to address all aspects of the matters mentioned above, but in the absence of anything like full argument on the point, it is inappropriate even to attempt to do so."[10]

33 Basten JA in *Singh* likewise accepted that a defined term may in some circumstances affect the construction of a definition without impermissible circularity, and agreed with Leeming JA's observations on the issue. But Basten JA also agreed that no firm principle could be stated in the absence of submissions as to the scope of the statement in *Shin Kobe Maru*.[11]

34 Importantly, all five judges (Basten, Leeming and Payne JJA dismissing the appeal, as well as McCallum JA and Simpson AJA in dissent on the result), concluded that the statutory definition of "recreational activity" could not be read down by the ordinary meaning of "recreational", even if it were accepted that the stricture in *Shin Kobe Maru* was inapplicable.[12] I say "importantly", because in my view the same applies in this case as discussed below.

35 Having laid the foundation for a more restrictive construction of the term "principal" in s31 of the Act, the owners' counsel submitted that:

(a) parliament chose to use the word "principal" when defining the party to whom a claimant may seek payment of an adjudicated amount;

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9 (2020) 103 NSWLR 568 at [129], Leeming JA (Basten and Payne JJA agreeing, McCallum JA and Simpson AJA also agreeing – at [191]-[192]).

10 (2020) 103 NSWLR 568 at [131].

11 (2020) 103 NSWLR 568 Basten JA at [34].

12 (2020) 103 NSWLR 568 Basten JA at [34], Leeming JA at [132], Payne JA at [142] and McCallum JA and Simpson AJA at [191]-[192].

(b) "principal" is a term of art in the building and construction industry used to refer to the counter-party to a builder in a construction contract;

(c) this is apparent (and reinforced) in the text of s31 of the Act where the "principal" is liable to pay the respondent "for construction work … the principal engaged the respondent to carry out or supply under a contract";

(d) it is further reinforced by the text of the Building Contract where Landmark is responsible for the construction of the building works on the Site, and Belo is described as the "Principal";

(e) it is obvious from the text of the provision and the definition of "principal" that the "claimant" is intended to refer to a subcontractor, and the respondent the head contractor:

> "The purpose of the provision, supported by its text, is clearly to provide for the subcontractor to garnish payments from the principal to the head contractor when the head contractor is liable to pay an adjudicated amount to the subcontractor"; and

(f) in light of the above, applying orthodox principles of statutory construction, the owners are not the "principal" for the purposes of s31(1) of the Act – Belo is in fact the "principal", being the party that engaged Landmark to perform construction work under the Building Contract.

36 There are two strands to this argument, as articulated by counsel for the owners in both his written and oral submissions. First, that the term "principal" is a term of art in the construction industry and refers to a head contractor. Second, that a party can only be a principal under s31 if that party is engaged under a contract to itself carry out some or all of the relevant construction work.

37 Counsel for the owners briefly developed the first strand in oral submissions, referring to the principle stated by Lockhart J in *Marine Power Australia Pty Ltd v Comptroller-General of Customs ("Marine Power")*[13] that where a word of phrase

[13] (1989) 89 ALR 561 at 572.

has a technical meaning in relation to any area of trade, business, technology or other non-legal expertise, in the absence of any indication to the contrary, it should be given its technical meaning. However, counsel then stepped back from the orthodox application of this principle in this case, submitting that:

> "Now 'principal' is not a technical term in the sense that one might say chemistry, or pharmacology and the like, but it is used widely and had a specific meaning in the building and construction industry. And it is my submission that as a counterparty to a construction contract as is used here."

38 Counsel for Landmark described the argument that "principal" was a term of art in the construction industry as lacking any support and "convenient, facile and wrong". He submitted that:

> "The Latin root conveys a meaning of *chief* or *first*. Vickery J in *Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd* [2009] VSC 425 at [28] equated it with the owner of the land. But whatever independent meaning it may have is not so clear as to overwhelm the wording of the statute."

39 In my view, the construction of the term "principal" advanced by counsel for the owners must be rejected. It is far from clear to me that the authorities since *Shin Kobe Maru* warrant any material departure from the clear statement articulated in that case. At most, it might be said that a more nuanced approach is justified where the statute itself creates uncertainty in relation to the meaning of the defined term, or where it is a composite expression requiring consideration of each of its component parts. But, paraphrasing the Court of Appeal in *Singh*, I am not persuaded that the statutory definition of "principal" can be read down in the manner suggested by the owners, even if it were accepted that the stricture in *Shin Kobe Maru* was inapplicable.

40 First, I agree with counsel for Landmark that there is no basis for the suggestion that "principal" is a term of art in the building and construction industry, in the sense suggested by the owners. It is undoubtedly widely used in building contracts and in other contexts in the industry, but (as the owners' counsel effectively conceded) it does not have a technical meaning of the kind that would

attract the operation of the principle stated Lockhart J in *Marine Power*.[14] It merely reflects the fact that hierarchies of engagement (including by owners of head contractors and by head contractors of sub-contractors) are a common feature of the industry.

41 Second, the suggestion that the use of the defined term "Principal" in an Australian standard building contract (including the Building Contract in this case) can in any way inform the meaning of the term in the Act is, indeed, facile. I accept that it would commonly be the case in a proceeding relying on s31 of the Act that the claimant would be a sub-contractor and the respondent the head contractor under an Australian standard construction contract. However, there is nothing in the text or context of Act that even remotely supports a conclusion that the term "principal" should be limited to a relationship so defined.

42 In my judgment, the defined term "principal" as it is deployed s31 of the Act, is entirely consistent with its plain meaning, as posited by counsel for Landmark above.[15] The question of whether there should be some modification of the stricture in *Shin Kobe Maru* is thus not engaged. And even if the authorities discussed by Leeming JA in *Singh* do operate to modify the stricture, there is nothing in those authorities that would permit a reading down of the term to the extent suggested by the owners (that is, applying only to construction company head contractors engaging a sub-contractor). In my view, the text and context of the Act and the plain meaning of the term, all point to it being given its defined meaning.

43 Thus the "principal" in s31 of the Act is "some other person" who is or becomes liable to pay money to the respondent for construction work or goods and services that the other person engaged the respondent to carry out or supply under a contract. Put another way, status as "principal" under s31 derives from

14 Marine Power at 572.

15 See also, for example, "First or highest in rank, importance, value, etc.; chief; foremost", *Macquarie Dictionary* (revised third ed, 2001); "First or highest in rank; most important, foremost; greatest", *Shorter Oxford Dictionary* (1993 ed).

the fact that the "other person" sits first or uppermost in the three-tier hierarchy of liability, being liable to pay money to the respondent at the second level, for construction work that the principal engaged the respondent to carry out, with the claimant being at the next level down.

44 However, that still leaves the second strand of the owners' argument on this issue, namely, whether Belo can be described as having been engaged by the owners under a contract to carry out construction work or supply goods and services. It seems not to be in dispute that the "contract" for this purpose is the Development Agreement, as amended by the Side Deed, not the Side Deed itself.

45 In his initial written submissions, the owners' counsel put the argument as follows:

> "'Construction work' is defined in s 5 of the Act. It is accepted that Landmark performed 'construction work' so defined. However, DM Belo is not a registered builder. It did not and could not perform the construction work on the Land. It engaged Landmark to do so. Accordingly, any liability that the Owners could have to pay DM Belo under the Development Agreement is not 'money that is payable or become payable to [DM Belo] by [the Owners] for construction work … that [the Owners] engaged DM Belo to carry out or supply under the [Development Agreement]'. This is because the Development Agreement is not an agreement for DM Belo to carry out or supply 'construction work' for the Owners."

46 The owners' counsel developed these arguments in oral submissions, emphasising that:

(a) Landmark had failed to identify what construction work it says Belo was contracted to perform under the Development Agreement;

(b) it is clear that "construction work" as defined by s5 of the Act does not include some "back-office" role;

(c) Belo is not a registered builder – it could not, and did not, perform construction work;

(d) this is confirmed by the text of the Development Agreement, which does no more than permit Belo to have access to the Site and to enter into a construction contract with Landmark; and

(e) the Development Agreement gives the owners no express remedies for any failure by Belo to carry out construction work under the Development Agreement, which would ordinarily be part of any agreement to carry out construction work

47 Landmark's counsel submitted that the limitation on the operation of s31 of the Act contended for by the owners does not arise from the text of the section. In particular, he submitted that:

> "There is no requirement in the Act that the head contractor be physically capable of carrying out the work itself. Indeed, a head contractor will rarely be able to carry out all parts of the head contract work. It will instead engage a host of specialist subcontractors (such as plumbers, electricians, engineers) who are qualified. A head contract, in that scenario, is no less a contract to carry out construction work for the principal.
>
> The Court of Appeal in *Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd* [2011] VSCA 99; 32 VR 247 at [26] held that a party who enters into a construction contract may seek a progress payment under the Act regardless of whether it, or another entity on its behalf, carried out the relevant work."

48 Landmark's counsel also pointed to s31(2) of the Act which, he argued, expressly envisages the head contractor contracting out the whole of the work assigned to it by the principal. He referred in particular to the sub-section providing that the claimant can obtain payment from the principal only if the construction work carried out or goods and services supplied by the claimant "are, or are part of or incidental to, the construction work" that the principal engaged the respondent to carry out. That is, the use of "are, or are part of or incidental to", envisages that the claimant could be contracted to undertake the whole or any part of the construction work that the principal engaged the respondent to undertake.

49 In both his written and oral submissions, Landmark's counsel argued that whether Belo held appropriate qualifications to do the work itself is irrelevant. It is a gloss on the construction of s31 of the Act which is not justified either by the text or context of the section. In answer to the question posed by the owners of what construction work Belo was engaged by the owners to do under the Development Agreement, Landmark's counsel said the answer was:

> "The whole thing. It just didn't do it itself. It engaged someone else to do the work. And then it sent its claims up the chain to the principal. The principal entered into a contract with the developer to have the work performed and the developer entered into a contract down the chain to have the work performed. That's the work that DM Belo did. That's the construction work."

50 I agree. In my view, the liability of the principal under s31 Act does not depend on the respondent being either qualified or equipped to carry out any of the construction work that the principal has engaged it to carry out. It is simply necessary that the principal engages the respondent to carry out construction work, and the respondent then engages the claimant to carry out all or part of that same work. I am not persuaded that the decision in *Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd*[16] cited by Landmark's counsel relevantly advances the argument,[17] but it certainly does not support a contrary view.

51 Again, it is more commonly the case that an owner contracts directly with a qualified construction company as head contractor to undertake the construction work, and the construction company sub-contracts parts of the work to specialist sub-contractors (engineers, plumbers, electricians and so on). But there is nothing in the section that limits the application of the provisions to that more common arrangement. In particular, I agree with Landmark's counsel that s31(2) by its terms expressly contemplates a pass through of the whole of the construction work.

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16 [2011] VSCA 99; 32 VR 247 at [26].

17 Essentially because it is dealing with discrete provision of the Act.

52 Here, the recitals and operative provisions of the Development Agreement (as amended by the Side Deed) make clear that the owners engaged Belo to in turn engage Landmark under the Building Contract, to undertake all of the development and construction on the Site. Thus there was a complete pass through (or correlation) of the work contracted for under the relevant head contract (here, the Development Agreement) with that contracted for under the sub-contract (here, the Building Contract). Some degree of correlation in the work contracted for under the head contract and sub-contract is all that s31 of the Act requires. I am satisfied that there is nothing in the text or context of the section that justifies reading it down to apply only to a contractual hierarchy where the head contract provides that the contractor will itself perform all or part of the contracted construction work.

53 I do not overlook the oral submissions by Landmark's counsel that what he termed a "daisy-chain of obligations" (and what I have described as the hierarchy of liability) is reinforced by the provisions of the Side Deed. He referred in particular to clause 13(a) which (in effect) facilitates payments by the financier directly to Landmark from funds available to the owners, with Belo accepting that those payments are to be treated as if made directly by Belo to Landmark. In my view, these add little of substance to what is sufficiently clear from the terms of the Development Agreement (as amended) alone.

**Was there money payable or that became payable by the owners to Belo after 17 March 2021?**

54 The source of this issue is found in paragraph 23A of Landmark's amended statement of claim filed on 17 November 2021, which is as follows:

> "23A. By reason of:
>
> (a) the Reimbursement Condition;
>
> (b) clauses 2.3 and 2.6 of the Owner-Developer Agreement as varied by clause 8.1 of the Side Deed; or
>
> (c) clause 13(a) of the Side Deed,

> the Owners were liable to pay or reimburse the Developer (whether by direct payment to the Builder or by reimbursing the Developer) for the Builder's charges and/or the construction works as were due from time to time.
>
> 24. As at 17 March 2021, the Owners owed the Developer the sum of $604,483.85 (including GST) pursuant to the Reimbursement Condition, the Owner-Developer Agreement and/or clause 13(a) of the Side Deed (**Owner-Developer Debt**)."

55 The "Reimbursement Condition" is pleaded in paragraph 6 of the amended statement of claim as being either a term implied to give business efficacy to the Development Agreement or by law.

56 However, by the time of the trial, the arguments on the issue seem to have narrowed, apparently because of the owners' concession in relation to the mistakes in the Side Deed, discussed above. That concession effectively meant Landmark could focus its submissions on clauses 2.3 and 2.6 of the Development Agreement as amended by the Side Deed (paragraph 23A(b) of its amended statement of claim above).

57 I accept that counsel for Landmark did not expressly abandon paragraphs 23A(a) and (c) of the amended statement of claim, but the so-called "Reimbursement Condition" did not rate a mention in either his written or oral submissions and clause 13(a) was only faintly advanced in oral submissions as an independent basis for a claim against the owners. Subject to the fact that Landmark also relied on clause 13(a) of the Side Deed as relevant to the proper construction of clauses 2.3 and 2.6 of the Development Agreement, I therefore do not propose to say more about those aspects of Landmark's claim.

58 The substance of the owners' argument on this second issue was first developed in their counsel's written opening submissions filed and served the day before the trial, as follows:

> "Relevantly, section 31(1) speaks of 'money that is or becomes payable'. It is submitted that this phraseology is analogous to that which is used in r 71.02(a) of the *County Court Civil Procedure Rules 2018* in respect of attachment of debts. In this sense, money that *is* payable is a debt that

is due, and money that *becomes* payable is a debt that is accruing. Associate Justice Derham in *Jafari v 23 Developments Pty Ltd* explained the distinction:

> A debt 'due' is a debt which is due and payable (in respect of which the creditor could immediately sue), and a 'debt accruing' is a debt which is due, in the sense that it is represented by an existing obligation (an actual present debt), but not immediately payable. Thus, it has been held that a debt is not 'accruing due' if it is payable only on the performance of a condition precedent. In *Webb v Stenton* Lindley LJ expressed the meaning of a debt due or accruing to the judgment debtor as follows:
>
> I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in presenti, solvendum in futuro*. An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation.
>
> …
>
> Here, there is no such debt as required by s 31(1) – either that is or will become payable: the Owners have not been invoiced by DM Belo in respect of the Debt Certificate, or the $604,483.85 asserted in paragraph 24 of the ASOC."

59 Landmark's counsel characterised the owners' argument as, in substance, that clause 2.3 of the Development Agreement prevents the owner-developer debt arising until the developer (Belo) invoices the owners. The owners say that this has not happened in respect of the invoices that form the basis of Landmark's debt certificate, therefore no debt arises as between the owners and Belo for the purposes of s31 of the Act. The owners' counsel broadly accepted this characterisation. Both counsel approached the issue as turning on the proper construction of clause 2.3 of the Development Agreement, as amended by the Side Deed.

60 The principles of construction, at least in so far as they are to be applied to a commercial contract of the kind constituted by the Development Agreement, are well established.[18] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the

[18] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, per French CJ, Nettle and Gordon JJ at [46]-[52].

language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract. Unless a contrary intention is indicated, the court is entitled to approach the task of giving a commercial contract a businesslike interpretation, on the assumption that the parties intended to produce a commercial result. Put another way, a commercial contract is to be construed so as to avoid it making commercial nonsense or working commercial inconvenience.

61 Counsel for Landmark submitted that there are four potential constructions of when a debt arises under clause 2.3 of the Development Agreement, as amended by the Side Deed,[19] and addressed each of the four constructions in his oral submissions. The owners' counsel likewise directed his oral submissions to each of these four possible constructions. Briefly, they were as follows:

(a) the full $4.8 million "Construction Sum" stated in Part A of the Building Contract was payable by the owners to Belo immediately on execution of the Side Deed;

(b) that the obligation for the owners to make payment to Belo arises only after Belo makes payment down the chain to Landmark;

(c) the owners' liability is triggered only upon being invoiced by Belo for sums it has paid to Landmark; and

(d) that the owners' obligation to pay the developer arises at the same time that Belo's obligation to make payment to Landmark arises – operating, in effect, as an indemnity.

19 "The Developer will pay the Builder the sum specified in Part A of the Contract for the due and proper performance of the work under the Contract in accordance with the terms of Contract *(**Construction Sum**)*, unless otherwise mutually agreed between the parties. The Owner must pay or reimburse the Developer the Construction Sum."

62 Neither party contended for the first of these possible constructions. And while I accept that it is open on a literal construction, it clearly does not produce a commercial result.

63 In relation to the second construction, Landmark's counsel submitted that this construction is difficult to reconcile with the clause as a whole and the balance of the Development Agreement. First, the words "pay or reimburse" in the final sentence of the clause, suggest two discrete circumstances when funds could pass from the owners to Belo. If the owners were only obliged to pay Belo after Belo had paid Landmark, then "reimburse" would have been sufficient to describe that circumstance. In other words, the second construction gives "pay or" no work to do. Second, clause 2.6 permits the owners to skip Belo and pay Landmark direct. This provision would be entirely redundant if the owners' obligation under the Development Agreement did not crystallise until after Belo had paid Landmark.

64 The owners' counsel argued that this second construction could be sustained on the basis that Landmark could invoice Belo, then Belo invoice the owners and the owners pay Belo before Belo is due to pay Landmark's invoice. On that basis, "pay" described the circumstance when the owners paid Belo after Landmark had invoiced Belo and Belo had invoiced the owners, but Belo had not yet paid Landmark. And "reimburse" described the circumstance when the invoicing occurred and Belo had paid Landmark.

65 I agree with counsel for Landmark's submissions on this construction, essentially for the reasons he gives. The effect of the owners' counsel's contrary submissions is that "pay" recognises that the owners may elect to pay Belo before Belo is obliged to pay Landmark. That is undoubtedly so, but to my mind (as discussed below in relation to the third construction) the suggested requirement for invoices as an element of the owners' obligation to pay, is

introducing a pre-condition to that obligation that is neither necessary nor justified, on the proper construction of the clause.

66 Turning to the third construction, counsel for Landmark contends (correctly, in my view) that an invoice in this context is essentially a demand. This is the substance of what the owners are arguing by their reliance on the reasoning of Derham AsJ in *Jafari v 23 Developments Pty Ltd*[20] ("*Jafari*") in the passage of their counsel's written submissions extracted above. That is, the issuing of an invoice by Belo to the owners is a condition precedent to the moneys becoming payable by the owners for the purposes of s31 of the Act, in the same way that in some circumstances (most commonly under loan agreements) a debt is not repayable until a demand is made.

67 The owners' counsel argued in substance that this construction should be preferred because it recognises the practical reality that owners and developers under arrangements of this kind may not always be related entities. On the facts in this proceeding, they are related and the owners are therefore likely to know that there is a debt between Landmark and Belo. However, this may not always be so. Thus, clause 2.3 should be construed as incorporating a requirement for a demand or other mechanism for the owners to be given notice that a liability to Belo has crystallised. In this case, the mechanism is an invoice from Belo to the owners.

68 In my view, this argument is misconceived. As Landmark's counsel submitted, a demand is not a condition precedent to a debt becoming payable unless the relevant contract requires it. There is nothing in the Development Agreement that imposes such a condition, either expressly or by implication. Further, the practical reality on the facts of this proceeding is that the owners and Belo are closely related – indeed the former are the alter-egos of the latter.

[20] (2019) 58 VR 288 at [20].

69 Against that background, it is entirely plausible (and commercially sensible) that the Development Agreement would reflect the fact that the parties would not see the need for provisions for Belo to give formal notice to the owners of claims by Landmark. Again, clause 2.6 reinforces this reality by allowing the owners to pay directly without providing any mechanism for the owners to notify Belo that they have done so.

70 Finally, in relation to the fourth construction, Landmark's counsel described this as the only sensible construction, and the one that arises (I interpolate, naturally) from the terms of clause 2.3 itself. If extraneous words are omitted, the clause reads: "Belo will pay Landmark the $4.8 million Construction Sum in accordance with the terms of Building Contract. The owners must pay or reimburse Belo that sum". The owners' counsels response to this construction was essentially to repeat the argument he made in support of the third construction which, for the reasons above, I reject.

71 In my judgment, the fourth construction is to be preferred. In addition to the reasons given by Landmark's counsel (which I adopt), it is the construction that best gives effect to the circumstances addressed by the Development Agreement and the commercial purpose to be secured by that agreement, as amended by the Side Deed. That purpose was to ensure that Belo had the wherewithal to engage Landmark to undertake the development at the Site, namely, access to the Site and funds. Access was provided under the original terms of Development Agreement as originally executed. The funds were facilitated by the Side Deed, including the amendments to the Development Agreement.

72 More particularly, the amendments to the Development Agreement by the Side Deed did two things, each of which was fundamental to the funding arrangements with Westpac. First, they tied the owners into Belo's obligation under clause 2.3 to pay Landmark. Second, by clause 2.6, they gave the owners

the right to elect to pay Landmark the Construction Sum directly "in satisfaction of [their] obligations under clause 2.3". In other words, the owners could satisfy their obligation under clause 2.3 to pay or reimburse Belo for the payments due by Belo to Landmark, by making those payments to Landmark directly.

73 These two things were fundamental to the funding arrangements with Westpac, because Westpac was lending to the owners, not to Belo. Thus Westpac needed the owners to be "on the hook" for payments due to Landmark, so that Westpac could (by clause 13 of the Side Deed) pay Landmark directly "out of funds that would otherwise be payable to the [owners] under any financial accommodation made available" to the owners by Westpac.

74 I therefore agree with Landmark's counsel that the only way to make commercial sense of clauses 2.3 and 2.6, is to construe the owners' obligations to Belo under 2.3 as arising simultaneously with Belo's obligation to Landmark under that clause. It produces the commercial result of facilitating ongoing funding for the development, regardless of Belo's capacity or willingness to pay.

75 Accordingly, in my judgment, by operation of clause 2.3 of the Development Agreement as amended by the Side Deed, the sums payable by Belo to Landmark under invoices 181, 258 and 269 listed in schedule A, was money that was payable to Belo by the owners as at the date of the invoices, for construction work that the owners engaged Belo to carry out under the Development Agreement. It follows that the requirements of s31 of the Act were satisfied as at 17 March 2021, and the amount stated in the debt certificate is payable by the owners to Landmark.

76 Finally, I should note that Landmark advanced an alternative basis for generating the owner-developer debt under s31 of the Act. This was, in substance, that such amounts included sums that became payable by the owners to Belo after 17 March 2021, for Belo's liabilities to the builder Belo had engaged to replace Landmark. My tentative view is that there was some force in Landmark's

submissions on this issue, and little was said on behalf of the owners in answer. However, in view of my findings above, it is unnecessary for me to reach a concluded view on this issue.

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**Certificate**

I certify that these 27 pages are a true copy of the judgment of His Honour Judge Woodward delivered on 31 January 2022.

Dated: 31 January 2022

Claire Findlay
Associate to His Honour Judge Woodward