

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

Not Restricted

S ECI 2021 02724

WHITEHORSE BOX HILL PTY LTD (ACN 602 569 013)

Plaintiff

v

ALLIANCE CG PTY LTD (ACN 162 853 563)

First Defendant

- and -

JOHN MCMULLAN

Second Defendant

JUDGE: Stynes J
WHERE HELD: Melbourne
DATE OF HEARING: 24 November 2021
DATE OF JUDGMENT: 1 February 2022
CASE MAY BE CITED AS: Whitehorse Box Hill Pty Ltd v Alliance CG Pty Ltd & Anor
MEDIUM NEUTRAL CITATION: [2022] VSC 22

ADMINISTRATIVE LAW – Judicial review – Adjudication conducted under Part 3 Division 2 of the Act – Certiorari sought in relation to an adjudication determination – Whether a reference date for the service of the final payment claim arose under a deed amending the relevant construction contract – Whether the Adjudicator had jurisdiction to determine when practical completion of the works under the construction contract had occurred – Whether the final payment claim was made with respect to a valid reference date – Whether the Adjudicator’s reasons in relation to his determination of a reference date were so inadequate as to render the adjudication determination void – Whether the final payment claim adequately identifies the construction work to which it relates – Whether the adjudicator determined the value of the construction work to which the final payment claim relates – *Building and Construction Industry Security of Payment Act 2002* (Vic) ss 14, 23, applied – *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, applied – *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd* [2020] VSC 414, applied – *Mount Bruce Mining Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, applied – *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337, applied – *Nuance Group (Australia) Pty Ltd v Shape Australia Pty*

Ltd [2018] VSC 362, applied – *CPB Contractors Pty Ltd v Heyday5 Pty Ltd* [2020] NSWSC 1625, applied – *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* [2018] NSWCA 107, applied – *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183, applied – *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 570, applied – *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd* [2020] NSWSC 1423, applied – *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385, applied – *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, applied – *David Hurst Constructions Pty Ltd v Helen Durham* [2008] NSWSC 318, applied – *Maxstra Constructions Pty Ltd v Joseph Gilbert* [2013] VSC 243, applied.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Toby Cogley

JBT Lawyers

For the First Defendant

Liam Connolly

HWL Ebsworth

HER HONOUR:

A Introduction

1 The plaintiff (**Principal**) seeks an order that the adjudication determination made by the second defendant (**Adjudicator**) dated 22 July 2021 (**Adjudication Determination**) be quashed or alternatively declared void. The Adjudication Determination was delivered under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SOP Act**).

2 The following six grounds were raised for consideration, each of which had been the subject of submissions to and consideration by the Adjudicator:

- (a) Ground 1 – whether a reference date for the service of a final payment claim arose under a deed amending the relevant construction contract;
- (b) Ground 2 – whether the Adjudicator had jurisdiction to determine when practical completion of the works under the construction contract had occurred;
- (c) Ground 3 – whether the final payment claim was made with respect to a valid reference date;
- (d) Ground 4 – whether the Adjudicator’s reasons in relation to his determination of a reference date were so inadequate as to render the Adjudication Determination void;
- (e) Ground 5 – whether the payment claim the subject of this proceeding adequately identified the construction work to which it relates; and
- (f) Ground 6 – whether the Adjudicator determined the value of the construction work to which the payment claim the subject of this proceeding relates.

B Background

3 The Principal was the developer of land situated at 997-1003 Whitehorse Road, Box Hill, in the State of Victoria (**Property**).

4 The first defendant is a commercial and residential builder (**Contractor**).

5 On around 19 June 2018, the Principal and the Contractor entered into a contract (**Contract**) for the design and construction of 90 apartments and car parking at the Property (**Project**). The Contract is constituted by:

- (a) a formal instrument of agreement;
- (b) AS4902-2000 General Conditions of contract for design and construct, as amended;
- (c) the Principal's project requirements; and
- (d) various annexures to the General Conditions.

6 Enzo Verga of ESV Building Co Pty Ltd was appointed superintendent under the Contract (**Superintendent**).

7 On 26 April 2021, Claudio Romano, sole director of the Contractor, sent the Superintendent the Contractor's purported final payment claim, attaching the following documents:

- (a) INV 338 dated 26 April 2021; and
- (b) INV 321B dated 26 April 2021

(**April Final Payment Claim**).

8 On 29 April 2020, the Principal's representative, Mr Wang, sent an email to Australia and New Zealand Bank Group (**ANZ**) copying in the Contractor's representative in which he stated, amongst other things, that:

[The Principal] agreed to release first half retentions and final claims which base on QS calculations.

[The Contractor] will release FRS reports which have been issued to [the

Contractor] on 22nd last week to building Surveyor for [occupancy permit].

[The Contractor] confirmed [occupancy permit] will be issued tomorrow 29th April.

All handover package, all master keys will hand over to [the Principal] tomorrow.

[The Contractor] will complete all incomplete works.

[The Contractor] will rectify all outstanding defects.

9 On 1 May 2020 at around 4:45pm, Mr Romano received an email from Alexander Trakas of Grimbo Building Surveyors attaching a copy of the occupancy permit in relation to the Project dated 24 April 2020.

10 Also on 1 May 2020 at around 5:00pm, representatives of the Contractor, the Principal and ANZ met at an ANZ branch in Richmond, Victoria. During this meeting:

- (a) Mr Wang of the Principal asked for the occupancy permit to be re-issued so that it was dated 1 May 2020, which the Contractor subsequently arranged for the registered building surveyor to do;
- (b) Mr Wang provided a representative of the Contractor with a bank cheque in the sum of \$818,181.82, which included the sum of \$619,982.08 representing the return of the first half of the retention money previously retained under the Contract; and
- (c) Mr Wang provided a representative of the Contractor with a copy of a draft letter to the Superintendent, which stated:

This is expressed to be an irrevocable direction to the [Superintendent] to issue the certificate of practical completion certifying practical completion to have occurred on 1st May 2020.

11 After the meeting, a representative of the Contractor handed to Mr Wang the handover packs for each of the apartments and keys for the Project. Mr Wang subsequently signed the handover checklist dated 1 May 2020 confirming that he had received the handover packs for the Project and that the Principal was

responsible for the Project.

12 It is noteworthy that property searches conducted by the Contractor and exhibited to the affidavit of Ms Torrens affirmed on 4 November 2021 reveal that:

- (a) 70 of the apartments were settled on or before 18 May 2020;
- (b) 10 of the apartments were settled on or before 29 May 2020;
- (c) 6 of the apartments were settled on or before 30 July 2020; and
- (d) 10 of the apartments were settled between November 2020 to 28 September 2021.

13 On 4 May 2021, the Superintendent purported to issue a certificate of practical completion dated 4 May 2021, certifying that practical completion of the works occurred on 30 June 2020 (**Purported Certificate of Practical Completion**).

14 On 5 May 2021, the Principal's solicitor sent an email to the Contractor disputing the validity of the April Final Payment Claim on the basis that, in summary:

- (a) the date for practical completion was 30 June 2020;
- (b) therefore, the defects liability period had not yet expired;
- (c) a reference date for a final payment claim arose within 28 days of the expiry of the last defects liability period; and
- (d) therefore, the April Final Payment claim was premature.

15 On 13 May 2021, the Contractor's solicitor sent the Superintendent another final payment claim pursuant to the Contract attaching INV 339 dated 13 May 2021 (**May Final Payment Claim**).

16 On 18 May 2021, the Contractor issued an adjudication application in respect of the May Final Payment Claim pursuant to the SOP Act (**May Adjudication Application**).

17 On 25 May 2021, the Contractor and Principal entered into a deed of amendment and standstill (**Amending Deed**) whereby the parties agreed:

- (a) to withdraw and not rely on the April Final Payment Claim and the May Final Payment Claim;
- (b) the Contractor would withdraw the May Adjudication Application; and
- (c) 'there will be a further date for the [sic] either party to claim under [sic] the Contract (and so a "reference date" under [the SOP Act]) 8 days after the date of execution of this Deed'.

18 On 3 June 2021, the Contractor delivered to the Superintendent a final payment claim in the sum of \$1,001,693.09 (inclusive of GST) (**Final Payment Claim**). The Contractor claimed:

- (a) \$197,416.00, for the balance of the contract works;
- (b) \$712,648.92, for the return of the second half of the retention money; and
- (c) \$565.11, for the balance of other unpaid amounts under the Contract.

19 The Final Payment Claim was a claim endorsed under the SOP Act.

20 On 18 June 2021, the Principal responded to the Final Payment Claim with a payment schedule certifying that there is 'no payment due to the Contractor by the Principal' (**Final Payment Schedule**). In the Final Payment Schedule, the Principal sought to adjust the sum claimed by the Contractor by the deduction of the following sums:

- (a) \$409,304.93, for alleged overpayments by the Principal to the Contractor; and
- (b) \$423,555.00, for the alleged 'estimated cost of rectifying defects'.

21 On 25 June 2021, the Principal delivered a further payment schedule in respect of

the Final Payment Claim. The amount proposed to be paid was nil.

22 On 30 June 2021, the Contractor issued its adjudication application in respect of the Final Payment Claim.

23 On 8 July 2021, the Principal issued its adjudication response.

24 Further submissions were made by the parties to the Adjudicator as follows:

- (a) on 13 July 2021 by the Contractor;
- (b) on 20 July 2021 by the Contractor; and
- (c) on 20 July 2021 by the Principal.

25 On 22 July 2021, the Adjudicator issued the Adjudication Determination. The Adjudicator determined the amount payable to the Contractor was \$898,366.65 (inclusive of GST) in respect of the Final Payment Claim.

26 The Adjudicator identified and addressed 11 separate issues for determination in the Adjudication. The Principal has made submissions in respect of six grounds of review.

C Ground 1 – Whether a reference date for the service of the Final Payment Claim arose under the Amending Deed

C.1 The Issue

27 A key issue in dispute is whether a reference date attaches to the Final Payment Claim. This issue is raised in grounds 1, 2 and 3.

28 The existence of a reference date under a construction contract is a statutory precondition to the making of a valid payment claim,¹ which is in turn a precondition to an adjudication application and hence the jurisdiction of the

¹ *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, 345 [2] (*Southern Han*).

adjudicator.² The existence of a reference date may be labelled a 'jurisdictional fact' in the sense that it is a criterion, satisfaction of which enlivens the power of the decision maker.³

29 The determination of this issue rests upon whether the Amending Deed provided a reference date for the service of a final payment claim. If a reference date for the Final Payment Claim does not arise under the Amending Deed, then the Adjudicator had no jurisdiction to make the Determination and it ought to be quashed.

C.2 Adjudication Determination

30 The Adjudicator determined that on the proper construction of the Contract as varied by the Amending Deed, the reference date in respect of the Final Payment claim (dated 3 June 2021) was the date that occurred eight days after the date of the Amending Deed (namely 2 June 2021). This was the date provided for in cl 2.3 of the Amending Deed and was consistent with the objective intention of the parties as described by the Amending Deed.

C.3 Parties' submissions

31 The Principal submits:

- (a) the terms of the Amending Deed are clear and there is no need to consider matters extraneous to the Amending Deed to construe it;
- (b) the Amending Deed created a new reference date of 2 June 2021 on and from which the Contractor was entitled to make a 'regular' progress claim under the SOP Act;
- (c) the Amending Deed did not otherwise amend the terms of the Contract;
- (d) significantly, the Amending Deed did not amend the terms of the Contract

² Ibid 356 [44].

³ Ibid 357 [47].

concerning the making of a final payment claim (principally cl 36.4);

- (e) by operation of cl 36.4 of the Contract, a final payment claim was only able to be made upon the expiration of the defects liability period which, according to the Principal, will occur on 4 May 2022; and
- (f) therefore, the Final Payment Claim was premature.

32 The Contractor submits:

- (a) the Adjudicator correctly construed cl 2.3(b) of the Amending Deed as providing a further reference date for the Contractor to submit the Final Payment Claim. This interpretation accords with the plain and natural meaning of the words employed in the Amending Deed as well as its context and purpose;
- (b) the word 'claim' in cl 2.3(b) encompasses both a monthly payment claim and a final payment claim; and
- (c) the Amending Deed must be construed by reference to its purpose and context, namely to resolve a dispute between the parties regarding the April Final Payment Claim and the May Final Payment Claim.

C.4 The Contract and Amending Deed

33 The provisions of the Contract⁴ relevant to this issue include:

- (a) clause 1.1 which includes the definition of practical completion;
- (b) clause 33.6 which sets out the process to be employed by the parties in relation to the issue of a certificate of practical completion;
- (c) clause 34 which addresses defects liability and, relevantly, provides that the defects liability period will commence on the date of practical completion;

⁴ The following references are to the general conditions of the Contract in the form of AS4902-2000 General Conditions of contract for design and construct, as amended by the parties.

- (d) item 32 of Annexure A to the General Conditions which specifies a defects liability period of 12 months;
- (e) clause 36 which addresses payment claims and relevantly provides that the 'Contractor shall claim payment progressively in accordance with Item 33, each being a "reference date" for the purposes of the [SOP Act]';
- (f) item 33 of Annexure A to the General Conditions which states that reference dates under the Contract for progress claims are the 25th day of each calendar month (or the next business day thereafter) for work carried out to the end of the month; and
- (g) clause 36.4 which provides, in relation to the final payment claim:

Within 28 days after the expiry of the last defects liability period (a reference date for the purposes of the Security of Payment Act), the Contractor shall give the Superintendent a written final payment claim endorsed 'Final Payment Claim' being a progress claim together with all other claims whatsoever in connection with the subject matter of the Contract.

...

Within the later of 42 days after the expiry of the last defects liability period (if no final payment claim is made by the Contractor) or 14 days after receipt of the Contractor's final payment claim, the Superintendent shall issue to both the Contractor and the Principal a final certificate evidencing the moneys finally due and payable between the Contractor and the Principal on any account whatsoever in connection with the subject matter of the Contract.

Those moneys certified as due and payable shall be paid by the Principal or the Contractor, as the case may be, within 7 days after the debtor receives the final certificate.

34 The provisions of the Amending Deed of particular relevance to this issue are:

- (a) the Recitals which state:
 - A. The Principal and the Contractor entered into an amended AS 4902 contract (the Contract).
 - B. A dispute has arisen between the parties in relation [to] the Payment Claims and Payment Schedules and Certificates.
 - C. The parties have agreed to withdraw the Payment Claims and

the Payment Schedules and Certificate[s], and amend the Contract on the terms set out in this Deed.

- (b) clause 1.1 which sets out the definitions of:
- (i) the Payment Claims which are defined by reference to the documents making up the April Final Payment Claim and the May Final Payment Claim;
 - (ii) the Payment Schedules and Certificates which are defined to include, amongst other documents, the Purported Certificate of Practical Completion and the email sent by the Principal's solicitor to the Contractor dated 5 May 2021 disputing the validity of the April Final Payment Claim;

- (c) clause 2.1 which provides:

The Contract is amended as set out in this Deed, but otherwise continues to have full force and effect.

However the parties reserve all of their rights in law and equity under the Contract.

- (d) clause 2.2 which provides:

- (a) The parties, by this deed:
 - (i) withdraw and will not rely upon the Payment Claims and the Payment Schedules and Certificates under the [SOP Act] and under the Contract; and
 - (ii) agreed that the Payment Claims and the Payment Schedules and Certificates under the [SOP Act] and under the Contract presently have no force or effect.
- (b) The Principal will immediately write to the Superintendent confirming that the Payment Claims and the Payment Schedules and Certificates have been withdrawn by the Parties.
- (c) The Contractor:
 - (i) will notify the Adjudicator not to issue any Determination in relation to the Adjudication Application; and
 - (ii) will bear the cost of the Adjudicator's fees.

(e) clause 2.3 which provides:

The parties agree that:

- (a) there will be no further “reference dates” under the [SOP Act] or the Contract for a period of 7 days from the date of execution of this Deed; and
- (b) there will be a further date for the [sic] either party to claim unders [sic] the Contract (and so a “reference date” under the [SOP Act]) 8 days after the date of execution of this Deed.

C.5 The applicable legal principles

C.5.1 Determining jurisdictional facts

35 As conveniently summarised by Riordan J in the decision of *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd*,⁵ if jurisdiction depends on a matter of fact, as it does in this case:

- (a) the Court must determine the question of fact for itself on the evidence placed before it;⁶
- (b) the burden of establishing the facts which show an absence of jurisdiction always rests on the party applying for relief;⁷
- (c) the standard of proof is high, requiring ‘clear proof leading unmistakably to [the] conclusion’ that there was an excess of jurisdiction;⁸ and
- (d) the Court will hesitate before interfering if the adjudicator has investigated the facts upon which the jurisdiction depends and the finding is not manifestly wrong.⁹

⁵ [2020] VSC 414 (*Watpac*).

⁶ *Ibid* [39(a)] (Riordan J), citing *R v Marshall; Ex parte Baranor Nominees Pty Ltd* [1986] VR 19, 32–3 (Brooking J) (*Marshall*).

⁷ *Watpac* (n 5) [39(b)] (Riordan J), citing *Marshall* (n 6) 32–3 (Brooking J); *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138, 153 (Dixon, Fullagar and Kitto JJ).

⁸ *Watpac* (n 5) [39(c)] (Riordan J), citing *Marshall* (n 6) 32–3 (Brooking J).

⁹ *Watpac* (n 5) [39(c)] (Riordan J), citing *R v Yaldwyn* (1899) 9 QJL 242, 244 (Griffiths CJ); *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54, 92 (Fullagar J).

C.5.2 Construction of the Amending Deed

36 Whether or not a reference date arises under the Amending Deed, entitling the Contractor to serve the Final Payment Claim, is to be determined objectively by reference to the Amending Deed's text, context (including any contract, document or statutory provision referred to in the text of the Amending Deed) and purpose.¹⁰

37 Evidence of surrounding circumstances is admissible to assist in the interpretation of the Amending Deed if the language is ambiguous or susceptible of more than one meaning.¹¹ However, it is not admissible to contradict the language of the contract when it has a plain meaning.¹²

38 In some instances, recourse to events, circumstances and things external to a contract is necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding of the genesis of the transaction, the background, the context and market in which the parties are operating.¹³

C.6 Consideration

39 The purpose of the Amending Deed is revealed in the Recitals, specifically to resolve the dispute that had arisen between the parties in relation to the 'Payment Claims and Payment Schedules and Certificates' and to amend the Contract on the terms set out. The resolution of the dispute was given effect by the parties' agreement:

- (a) to withdraw and not rely upon the Payment Claims and the Payment Schedules and Certificates under the SOP Act and under the Contract; and
- (b) that a reference date under the SOP Act would be provided for a claim eight

¹⁰ *Mount Bruce Mining Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [46] (French CJ, Nettle and Gordon JJ) (*Mount Bruce*).

¹¹ *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337, 352 (Mason J).

¹² *Ibid.*

¹³ *Mount Bruce* (n 10) [49] (French CJ, Nettle and Gordon JJ).

days after the date of execution of the deed.

40 The Payment Claims the subject of the dispute were the April Final Payment Claim and the May Final Payment Claim. As set out in the letter from the Principal's solicitor to the Contractor dated 5 May 2020, the Principal disputed the Contractor's entitlement to serve a final payment claim until after the expiry of the defects liability period.

41 It is plain from the text of the Amending Deed that the objective intention of the parties was to provide a reference date under the SOP Act for either party to make a claim.¹⁴ There is nothing in the use of the words 'reference date' or 'claim' in the Amending Deed that limits their application to a monthly progress claim to the exclusion of a final payment claim. On a literal reading, the term 'claim' encompasses monthly progress claims and a final payment claim.

42 Had the parties intended to exclude an entitlement to a final payment claim, they could have done so expressly by, for instance, using the words 'monthly payment claim' instead of 'claim'. The fact that they did not, having regard to the context and purpose of the Amending Deed, strongly supports the objective intention that the reference date could apply to a final payment claim.

43 Consequently I find, as the Adjudicator did, that the Amending Deed provided a reference date in respect of the Final Payment Claim (dated 3 June 2021) eight days after the date of execution of the Amending Deed (namely 2 June 2021).

D Ground 2 – Whether the Adjudicator had jurisdiction to determine when practical completion of the works under the Contract had occurred

D.1 The Issue

44 This issue requires me to consider:

- (a) whether practical completion of the works was dependent on the

¹⁴ Clause 2.3(b) of the Amending Deed.

Superintendent's opinion or was to be determined by the Adjudicator based on the evidence before him; and

- (b) if it was to be determined by the Adjudicator, whether he erred in determining that practical completion occurred on 1 May 2021.

45 As set out in Part C.5 above, under the Contract the date of practical completion is a precondition to a reference date for a final payment claim. That is, the defects liability period of 12 months is to commence on the date of practical completion. Clause 36.4 then provides, amongst other things that:

Within 28 days after the expiry of the last defects liability period (a reference date for the purposes of the [SOP Act]), the Contractor shall give the Superintendent a written final payment claim endorsed "Final Payment Claim" being a progress claim together with all other claims whatsoever in connection with the subject matter of the Contract.

D.2 Adjudication Determination

46 The Adjudicator found at [78]–[89] that:

- (a) the 'legal authorities'¹⁵ required him 'under the [SOP] Act, to make [his] own assessment of the matters to be determined, rather than simply adopt the assessment of the Superintendent'; and
- (b) practical completion occurred 'no later than 1 May 2020' because:
 - (i) the occupancy permit was issued on 24 April 2020;
 - (ii) the parties expressly agreed that, under the Contract, practical completion was achieved on 1 May 2020 despite certain pre-conditions to practical completion not yet having occurred; and
 - (iii) the parties acted on the basis that practical completion had been achieved including the Principal taking possession of the Project and

¹⁵ The Adjudicator cited *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119, [75]–[83] (Vickery J) (*SSC Plenty Road*).

returning part of the retention monies.

D.3 Parties' submissions

47 The Principal submits that the Adjudicator lacked capacity to determine when practical completion occurred and wrongly determined that practical completion occurred on 1 May 2021 because:

- (a) relying on the authority of *Abergeldie Contractors Pty Ltd v Fairfield City Council*,¹⁶ practical completion occurred on the date the Purported Certificate of Practical Completion was issued by the Superintendent, being 4 May 2021, rather than the date specified by the Superintendent, being 30 June 2020; and
- (b) the consequence of the certificate is that the defects liability period commenced on 4 May 2021. Therefore, no reference date has arisen in relation to the Final Payment Claim issued on 3 June 2021.

48 Further, the Principal contends that even if the date of practical completion was 1 May 2020, this would mean that the Defects Liability Period ended on 1 May 2021. By operation of cl 34.6 of the Contract, a final payment claim was required to be issued within 28 days, being 31 May 2021. Therefore, the time for issuing the Final Payment Claim under the Contract had expired.

49 By its written submissions, the Contractor contended that the Adjudicator correctly decided that the works reached practical completion on 1 May 2020 because of an agreement that was reached between the parties on that day. However, during the hearing, counsel for the Contractor did not develop its submissions in relation to this point. Sensibly, counsel submitted that the Contractor's primary position was that the reference date for the final payment claim is governed by the Amending Deed.

¹⁶ [2017] NSWCA 113 (*Abergeldie*).

D.4 Analysis

50 The key issue in dispute is whether a reference date attaches to the Final Payment Claim. Having regard to the submissions of the Contractor and my determination in relation to Ground 1 that the reference date for the Final Payment Claim is governed by the Contract as amended by the Amending Deed, it is unnecessary for me to determine this ground. No purpose is served by me determining the Adjudicator's capacity to determine the date of practical completion or whether he erred in doing so.

E Ground 3 – Whether the Final Payment Claim was made with respect to a valid reference date

51 It follows from my determination in relation to Ground 1 that the Final Payment Claim was made with respect to a valid reference date.

F Ground 4 – Whether the Adjudicator's reasons in relation to his determination of a reference date were so inadequate as to render the Adjudication Determination void

F.1 The Issue

52 The matter that arises for determination is whether the Adjudicator provided sufficient reasons for his determination of the reference date applicable to the Final Payment Claim.

F.2 Adjudication Determination

53 In his determination, the Adjudicator:

- (a) at [222], extracted s 9(2) of the SOP Act;
- (b) at [223], determined the reference date in relation to the Final Payment Claim was 2 June 2021 '[f]or the reasons set out above';
- (c) at [96], concluded that 'on a proper interpretation of the Contract, there was

a reference date under the Contract on the date that was 8 days after the date of execution of the Amending Deed, namely 2 June 2021’;

- (d) at [97], extracted cl 2.3 of the Amending Deed which states:
- (i) there will be no further reference dates under the [SOP Act] or the Contract for a period of 7 days from the date of execution of the Deed; and
 - (ii) there will be a further date for either party to claim under the Contract or SOP Act eight days after the date of execution of the Deed;
- (e) at [98], cited Vickery J in *SSC Plenty Road* in relation to the principles to be followed by an adjudicator in assessing a payment claim under the SOP Act;
- (f) at [99], summarised the principles to be applied in construing written documents as expressed by Garde AJA in *Plenary Research Pty Ltd v Bioscience Research Centre Pty Ltd*;¹⁷
- (g) at [100], found that the Contract, as amended by the Amending Deed, provided for a ‘fresh reference date, to occur 8 days after the date of execution of the Amending Deed’;
- (h) at [101], found that cl 2.3 of the Amending Deed expressly provides for a fresh reference date;
- (i) at [102], referred to the context of the parties deciding that there was a need for the Amending Deed, being that:
- (i) the Contractor would withdraw certain payment claims and the Principal would withdraw certain payment schedules; and
 - (ii) the parties expressly providing for a further reference date; and

¹⁷ [2013] VSCA 217.

(j) at [103], reiterated the finding at [96].

F.3 Parties' submissions

54 The Principal submits, in summary, that the Adjudicator failed to provide a sufficient basis for determining that the 2 June 2021 reference date is applicable to the Final Payment Claim and that this failure is of such magnitude that it ought render that finding void which will have the necessary impact of rendering the entire Adjudication Determination void.

55 The Contractor submits it is evident from paragraphs [100]–[103] of the Adjudication Determination that the Adjudicator applied established principles of contractual interpretation to construe the Amending Deed as creating a further reference date for the submission of the Final Payment Claim on 2 June 2021.

F.4 The applicable legal principles

56 An adjudicator is obliged by s 23(3) of the SOP Act to provide reasons and by s 23(3)(b) to provide the basis upon which any date has been decided. A failure to do so will render the Adjudication Determination void.¹⁸

57 Relevantly, Hammerschlag J in *CPB Contractors Pty Ltd v Heyday5 Pty Ltd* stated:¹⁹

An adjudicator's determination is not a judgment of a court. Often, adjudicators are not lawyers. The Act imposes tight time limits on them and they are regularly, as in this case, called to dispose of complex issues, factual and legal, within those limits. As with arbitrators and their awards (and perhaps, even more so because adjudication determinations do not have the final effect of an arbitrator's award), the procedural behaviour of adjudicators and their adjudication determinations should not be scrutinised with an overcritical or pedantic eye but should be viewed with common sense and without undue legality. Adjudication determinations are to be read as a whole and should not be viewed through the prism of legal concepts or examined with a fine-tooth comb.

58 Further, Basten JA in *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd*

¹⁸ *Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd* [2018] VSC 362, [76] (Digby J).

¹⁹ [2020] NSWSC 1625, [35], citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 291; *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 735, [47]; *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* [2018] NSWCA 107, [17] (Basten JA) (*Cockram*).

stated:²⁰

... if the [adjudicator's] conclusion cannot be challenged as legally erroneous, the reasoning cannot be challenged as legally inadequate to justify the conclusion.

F.5 Consideration

59 I reject the submission that the Adjudicator has failed to include reasons for his determination that the reference date applicable to the Final Payment Claim was 2 June 2021. The reasons summarised in paragraph 53 above reveal that the Adjudicator applied established principles of contractual interpretation to construe the Amending Deed as creating a reference date for the submission of the Final Payment Claim.

60 In any event, the existence of a reference date is a jurisdictional fact. It was common ground that it was a matter that I was required to determine based on the material before me. As set out above, I have determined that the applicable reference date was, as determined by the Adjudicator, 2 June 2021.

G Ground 5 – Whether the Final Payment Claim adequately identified the construction work to which it relates

G.1 The Issue

61 Section 14(2)(c) of the SOP Act requires a payment claim to identify the construction work or related goods and services to which the payment claim relates. Failure to comply with this requirement will render the payment claim invalid and any adjudication based upon it a nullity.

62 The issues raised by the Principal for determination are:

- (a) whether the Final Payment Claim is invalid because it does not sufficiently identify the work to which it relates; and

²⁰ *Cockram* (n 19) [17], cited in *Saath Pty Ltd v Seascapes Constructions Pty Ltd* [2021] VSC 358, [70(g)] (Stynes J).

- (b) whether the Adjudicator failed to provide reasons for his determination that it was sufficiently described.

G.2 Adjudication Determination

63 The Adjudicator determined that on the material before him, the Final Payment Claim sufficiently describes the work the subject of the Final Payment Claim.

G.3 Parties' submissions

64 The Principal submits that the Final Payment Claim does not identify the construction work to which the claim relates because there is no itemisation or schedule describing:

- (a) the variations claimed in the sum of \$1,853,332.71;
- (b) the claim for unpaid amounts from previous claims in the sum of \$565.11; and
- (c) the claim for the balance of retention in the sum of \$712,648.92.

65 It further submits that:

- (a) reference to extraneous evidence is not admissible for the purpose of demonstrating that the Final Payment Claim complies with s 14(2) of the SOP Act; and
- (b) the Adjudicator's reasons are inadequate as the Adjudicator does not make the 'slightest attempt to engage with either of the parties' submissions or to otherwise explain how he has arrived at his conclusion'.²¹ This failure is of such magnitude that it ought render the Adjudication Determination void.

66 The Contractor contends the Adjudicator correctly determined that the Final Payment Claim sufficiently described the work the subject of the claim. It submits:

²¹ Plaintiff, 'Outline of Submissions of Plaintiff', Submission in *Whitehorse Box Hill Pty Ltd v Alliance CG Pty Ltd*, S ECI 2021 02724, 22 November 2021, [68].

- (a) the Adjudicator noted the contract sum, the amount for variations and the amounts that the Contractor claimed in respect of the contract works;
- (b) if the Principal can establish that there any particular items which have been insufficiently described, such amounts do not render the entire claim invalid, rather they should be excluded from consideration.

G.4 The applicable legal principles

67 A payment claim will not be a nullity for failure to comply with s 14(2)(c) of the SOP Act, unless the failure is patent on its face, and this will not be the case if the claim, in a reasonable way, identifies the particular work in respect of which the claim is made.²²

68 Riordan J in *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd*²³ considered the operation of s 14(2)(c) and stated:²⁴

Principles to be applied in determining the validity of a payment claim

On the basis of the above analysis, I would state the relevant principles as follows:

- (a) A payment claim is construed objectively. A payment claim will comply with s 14(2)(c) if a reasonable building practitioner in the position of the recipient would have understood the payment claim to be bona fide and to purport in a reasonable way to identify the particular work in respect of which the claim is made.
- (b) The payment claim will include documentation expressly or impliedly referred to on the face of the payment claim. Documentation will be impliedly incorporated by reference if a reasonable building practitioner in the position of the recipient would have understood the payment claim to refer to such supporting documentation. By way of example:
 - (i) In this case, the Payment Claim included a claim for \$20,475 relating to Invoice 1109. It referenced Invoice 1109, but contrary to the notation in the Payment Claim, the invoice and supporting documents were not issued with the Payment Claim. However, a reasonable building practitioner in the position of the recipient would have understood that the

²² *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183, [141(e)] (Vickery J).

²³ [2020] VSC 570.

²⁴ *Ibid* [40]–[41]. See also [34], [38]–[39].

Payment Claim related to Invoice 1109 and its supporting documents, which had been sent to the respondent by email on 4 June 2019.

- (ii) In *John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd*, a payment claim sent to the respondent on 11 August 2014 identified the construction work as follows:

Project No: 20,139 PE705 - DIP Plant Mechanical Package 03

Order No / Contract: 50030556

...

Description:

Progress Claim 6 (MAY 2014).

A reasonable building practitioner in the position of the recipient would have understood that the payment claim related to the 'May 2014' claim and its supporting documents, which had been sent to the respondent by email on 3 June 2014.

The objective approach requires reference to the context, being the construction contract and the entire payment claim, together with documentation expressly or impliedly referred to in the payment claim. This process of reference to the context is '[o]rdinarily ... possible by reference to the [construction] contract alone', together with the abovementioned documentation. The plurality in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* said 'ordinarily' because:

[S]ometimes, recourse to events, circumstances and things external to the contract is necessary [for the purpose of facilitating] ... an understanding 'of the genesis of the transaction, the background, the context and the market in which the parties are operating'.

However, for the reasons expressed in paragraph 36(d) above, the courts should be wary to ensure that the exception allowing for evidence of context is not used as a Trojan horse to admit extrinsic evidence of surrounding circumstances, including prior dealings and the subjective intentions or understanding of parties, which is irrelevant.

G.5 The Final Payment Claim

69 The Final Payment Claim comprises:

- (a) an email from Mr Yao, the financial controller of the Contractor, on 3 June 2021 to the Superintendent attaching a cover letter and the claim;
- (b) the aforementioned cover letter from the Contractor to the Superintendent

attaching the claim and, amongst other things, identifying it as the '[Contractor's] final claim pursuant to clause 36.4 of the Contract for all outstanding amounts under the Contract';

- (c) Invoice No 340 dated 3 June 2021 marked 'Final Payment Claim' claiming the sum of \$910,630.03 (excluding GST). The work description is 'Progress Claim as per attached certificate';
- (d) Final Payment Claim No 31 applying for a final progress payment of \$910,630.03 in accordance with the following calculation:

Value of contract completed to date	\$28,505,956.71
Less retention withholding	\$0.00
Total	\$28,505,956.71
Less Prev Payments totalling	\$27,595,327.68
Current claim	
Unpaid balance of contract	\$197,416.00
Balance of retention	\$712,648.92
Unpaid amounts from previous claims	\$565.11
AMOUNT NOW APPLIED FOR	\$910,630.03

SUMMARY OF CONTRACT AND CLAIMS TO 3 June 21

Trade	Contract Amount	Last Claim %	This Claim %	Total Claim
Schedules	\$26,122,624.00	100.00%	100.00%	\$26,122,624.00
CONSULTANTS	\$530,000.00	100.00%	100.00%	\$530,000.00
Variations	\$1,853,332.71	100.00%	100.00%	\$1,853,332.71

Total **\$28,505,956.71** **Total Claimed** **\$28,505,956.71**

- (e) a spreadsheet entitled 'SCHEDULE BREAKDOWN DETAILS'.

G.6 Consideration

70 There is no dispute that:

- (a) the unpaid balance of the Contract in the sum of \$197,416.00; and
- (b) the sum claimed for consultants in the sum of \$530,000.00,

are adequately identified. The calculation of those sums and the works to which they relate are set out in the spreadsheet.

71 The amounts the subject of this ground are:

- (a) \$1,853,332.71 in respect of variations;
- (b) \$565.11 in respect of unpaid amounts from previous claims; and
- (c) \$712,648.92 in respect of the balance of retention.

72 In relation to the balance of retention, it is apparent that it represents 2.5% of the claimed value of the contract works completed in the sum of \$28,505,956.71. By cl 5 of the Contract and item 15 of Part A of the Annexure to the General Conditions, the security to be provided by the Contractor to the Principal was a cash retention in the amount of 5% of the 'Fixed Sum'. The Fixed Sum is defined to be \$26,652,624.00. The Principal's criticism of this claim is not that it did not understand the nature of the claim but rather the Principal has concerns about how it has been calculated.²⁵

73 What I must determine is whether a reasonable building practitioner in the position of the Principal would have understood the Final Payment Claim in a reasonable way to identify the particular work in respect of which the claim is made.

74 By reference to the description of that claim on the face of the Final Payment Claim, it is plain what the claim for the return of the retention relates to. Whether or not the amount claimed has been calculated correctly is a matter to be assessed by the Superintendent but it is not a matter that impacts the validity of the Final Payment Claim under s 14 of the SOP Act.

²⁵ Transcript of Proceedings, *Whitehorse Box Hill Pty Ltd v Alliance CG Pty Ltd* (Supreme Court of Victoria, Stynes J, 24 November 2021) 30.21–24 (**Transcript**).

75 In relation to the claim for unpaid amounts from previous claims, again, by reference to the words used it is clear what the claim relates to.

76 In relation to the claim for variations, there is no breakdown in the Final Payment Claim itself. However, the sum claimed appears in a table headed 'SUMMARY OF CONTRACT AND CLAIMS TO 3 June 2021'.

77 At the hearing, counsel for the Principal referred me to the following claims that had been made to 3 June 2021:

- (a) Progress Payment Claim No 30 dated 27 April 2020 (**Progress Payment Claim No 30**). It is in the same form as the Final Payment Claim. It includes a table titled 'SUMMARY OF CONTRACT AND CLAIMS TO 22 APR 2020' which sets out sums claimed in relation to 'Schedules', 'CONSULTANTS' and 'Variations'. In relation to variations, the Principal claims the sum of \$1,853,332.71, the same sum claimed in the Final Payment Claim. Attached to that claim was a variation report setting out the details of eight variations including: variation number; description; value; status; percentage complete; amount claimed previously; and the amount claimed in that claim. It records the total value of the variations to be \$1,853,332.71, but notes that an amount of \$1,654,776.00 had been claimed previously. The amount claimed in that payment claim in relation to variations, according to that variation report was \$198,556.71;
- (b) Progress Payment Claim No 31 dated 26 April 2021 which claimed \$712,648.92, referred to above as the April Final Payment Claim. Again it included a table referring to the sums claimed in relation to Schedules, Consultants and Variations; and
- (c) Progress Payment Claim No 32 dated 13 May 2021 in the sum \$910,630.03, referred to above as the May Final Payment Claim. Again it included a table setting out the same information in relation to the variations as appeared in the Final Payment Claim.

78 It became apparent during oral submissions that the Principal's position was not that it could not identify the work the subject of the claim for variations but rather it was unclear about the amounts claimed.²⁶ Principal's counsel submitted that the earlier claims caused more confusion and less clarity.²⁷

79 To the contrary, it is apparent, by reference to the Final Payment Claim that in relation to variations the Contractor claims the sum of \$1,853,332.71. Whether or not it is entitled to that amount is not a matter relevant to my determination of this ground. Further, and in any event, I find that having regard to earlier claims, specifically the table of variations attached to Progress Payment Claim No 30, the work to which the claim for variations relates is sufficiently identified for the purpose of s 14(2)(c) of the SOP Act.

80 I have reached the same conclusion as the Adjudicator that the Final Payment Claim sufficiently describes the work the subject of the Final Payment Claim. As the Adjudicator's conclusion cannot be challenged as legally erroneous, his reasoning cannot be challenged as legally inadequate to justify the conclusion.²⁸

H Ground 6 – Whether the Adjudicator determined the value of the construction work

H.1 The Issue

81 The issue that arises for determination is whether the Adjudicator properly performed the valuation task required of him under s 23(1)(a) of the SOP Act in relation to works that the Principal alleged were defective.

H.2 Adjudication Determination

82 In its adjudication response, the Principal purported to set off against the Final Payment Claim \$423,500.00 for costs to rectify alleged defects. In support of that

²⁶ Ibid 32–3.

²⁷ Ibid 35.11–13.

²⁸ *Cockram* (n 19) [17].

set off, the Principal relied on a schedule attached to the Final Payment Schedule prepared by the Superintendent. That schedule provides a brief description of each defect and an estimate of the cost of rectification.

83 The Contractor disputed the existence of the alleged defects. It submitted, amongst other things, that the Principal had failed to explain:

- (a) what works were allegedly defective or incomplete;
- (b) why they were allegedly defective or incomplete;
- (c) what rectification works, if any, were required to rectify the allegedly defective works;
- (d) how the estimated cost of rectifying each item of work was calculated; and
- (e) whether that work had actually been performed, noting that 'all properties were settled shortly after practical completion'.

84 The Contractor relied on the statutory declarations of John Nave and James Hale.

85 Mr Hale was the site supervisor for the Contractor and gave evidence in relation to three of those defects.

86 Mr Nave was the project manager for the construction of the Project. In preparation for his statutory declaration, he attended the Project to view the purported defects on 11 May 2021. During the course of that inspection he took a number of photos, which accompany his statutory declaration. Further, by his statutory declaration he addressed each of the alleged defects identified in the Superintendent's schedule.

87 The Adjudicator:

- (a) noted that under s 11(1)(b)(iv) of the SOP Act, he was required to take into account, in assessing the amount to be paid in respect of the Final Payment Claim, the estimated cost of rectifying any defective work;

- (b) referred to the decision of Vickery J in *Maxstra Constructions Pty Ltd v Gilbert*,²⁹ underlining the following passage for emphasis:³⁰

If he [ie the adjudicator] determined that there was defective work, and if he was in a position to estimate the cost of rectification, he was obliged to give weight to the matter in arriving at his valuation. On the other hand, if he found that there was no defective work, or that he was not in a position to estimate the cost of rectification, he would be entitled to disregard the matter.

- (c) observed that the Principal did not make any submissions and/or provide material in support of its claimed deductions in respect of the defects; and
- (d) concluded that the amount to be deducted from the Final Payment Claim in respect of the claim by the Principal in respect of defects is nil.

88 The Adjudicator then went further and assessed each claimed defect in turn. In relation to each he:

- (a) extracted a description of the alleged defect from the Superintendent's schedule referred to in the Final Payment Claim;
- (b) summarised the Contractor's response to that defect supported by the statutory declarations; and
- (c) set out his conclusions.

89 In relation to all but three of the defects he concluded that:

- (a) the alleged defect is disputed by the Contractor;
- (b) the Contractor provided evidence by statutory declaration in support of its position;
- (c) there was no material sufficient to identify that the work was defective, or to estimate the cost of rectifying the defective works; and

²⁹ [2013] VSC 243.

³⁰ Ibid [70].

(d) the amount to be paid in respect of the item is nil.

90 The Adjudicator did allow a total of \$2,475.00 in relation to three of the alleged defects. In relation to each of these matters:

(a) the Contractor disputed the alleged defect and further provided an estimate of the cost of rectification in the event the Adjudicator was of the opinion that the works were defective;

(b) the Principal provided little more material than the Superintendent's schedule to establish the existence of the defect; and

(c) the Adjudicator found the material was sufficient to identify that the work was defective and determined the amount payable was the amount estimated by the Contractor.

H.3 Parties' submissions

91 The Principal contends that the Adjudicator has not properly performed the valuation task required by the SOP Act. In support of this proposition, the Principal submits:

(a) the Adjudicator has not undertaken a detailed valuation exercise in relation to each alleged defect;

(b) there has been no actual assessment of the position of the parties; and

(c) the Adjudicator adopted, at each and every instance, the 'fall back' position made by the Contractor and failed to make an actual assessment of the position of the parties.

92 The Contractor submits that the Adjudicator was in a position to estimate the cost of rectification as a result of evidence adduced by the Contractor. The Adjudicator arrived at a rational conclusion based upon the lack of evidence adduced by the Principal in relation to the works it alleged to be defective.

H.4 The SOP Act

93 An adjudicator is required by s 23(1)(a) of the SOP Act to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant. Section 23(2) sets out the matters that he must consider in determining the adjudication application.

94 Section 4 provides that '[t]he amount of a progress payment is calculated in accordance with sections 10, 10A, 10B and 11'.

95 Section 10(1) provides that the amount of a progress claim is to be calculated in accordance with the Contract, or if the Contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of the construction work carried out or undertaken to be carried out by the claimant under the contract.

96 Section 11(1) provides that an adjudicator is required to consider, among other things, whether the works are defective and if so, the estimated cost of rectifying the defect.

H.5 The applicable legal principles

97 The legal principles applicable to the function of an adjudicator can be summarised as follows:

- (a) an adjudicator is obliged to come to a view as to what is properly payable and cannot accede to a payment claim without considering the merits of the claim;³¹
- (b) an adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent, but the absence of such material does not mean that the adjudicator can simply award the

³¹ *Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd* [2020] NSWSC 1423, [40] (Henry J); *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385, 399 [52] (Hodgson JA) (Ipp and Basten JJA agreeing) (*Coordinated Construction*).

amount of the claim without any addressing of its merits;³²

- (c) 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;³³
- (d) it is clear from the scheme of the SOP Act that what is called for is some process of balancing or evaluating the competing materials supplied by the parties. It is not a matter of calling evidence. Nor is it a matter of conducting some mini-trial. But at the same time, if an adjudicator is to determine the amount of a progress payment, it is implicit in the requirement to do so that they be satisfied that the amount so determined is in fact fairly or properly payable, having regard to the provisions of the Act and of the relevant construction contract (and any other relevant material duly put forward);³⁴ and
- (e) given the severe statutory time constraints placed on adjudicators to perform their tasks, an analysis undertaken on judicial review of the valuation exercise documented in the adjudicator's determination ought not to be approached from an unduly critical view point. Rather the SOP Act calls for a practical and robust approach to the assessment process on the part of adjudicators and their express reasons.³⁵

98 In relation to an adjudicator's task in assessing defective works, Vickery J in

³² *Coordinated Construction* (n 31) 399 [52] (Hodgson JA) (Ipp and Basten JJA agreeing)).

³³ *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, [82] (Vickery J).

³⁴ *David Hurst Constructions Pty Ltd v Helen Durham* [2008] NSWSC 318, [69] (McDougall J).

³⁵ *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2015] VSC 631, [99]-[100] (Vickery J).

Maxstra Constructions Pty Ltd v Joseph Gilbert stated:³⁶

If he [the adjudicator] determined that there was defective work, and if he was in a position to estimate the cost of rectification, he was obliged to give weight to the matter in arriving at his valuation. On the other hand, if he found that there was no defective work, or that he was not in a position to estimate the cost of rectification, he would be entitled to disregard the matter. Either way, he was obliged to make findings on these issues.

H.6 Consideration

99 The Principal submits that the Adjudicator's assessment of the claimed defective works in the Adjudication Determination 'amount[s] to nothing more than a holus bolus adoption of the Defendant's position under a formulaic set of words calculated to give the impression that an assessment of the alleged defects has actually been undertaken'.³⁷

100 It is true that the reasoning of the Adjudicator is recorded in a formulaic manner. However, the presentation of his reasoning in that way does not operate to establish a failure on his part to fulfil his obligation.

101 In relation to each defect the Adjudicator has identified the material relied on by each party. The material relied on by the Principal, as recorded by the Adjudicator, comprises a short description of the alleged defect as set out in the Superintendent's schedule attached to the Final Payment Schedule.

102 During the hearing, I asked the Principal's counsel about the evidence relied on by the Principal in support of the existence of each defect as summarised by the Adjudicator. The transcript recorded the following exchange:³⁸

HER HONOUR: Do you think his summaries of submissions in relation to those matters capture the evidence put on by the plaintiff? I suppose I'm trying to understand what evidence you rely on in support of the existence of the defect, as did the adjudicator.

MR COGLEY: Yes. Well, it is the table put forward by the

³⁶ [2013] VSC 243, [70].

³⁷ Plaintiff, 'Outline of Submissions of Plaintiff', Submission in *Whitehorse Box Hill Pty Ltd v Alliance CG Pty Ltd*, S ECI 2021 02724, 22 November 2021, [77].

³⁸ Transcript (n 25) 44.14-29.

superintendent in payment schedules that sets them out. There are, in some instances, further items of correspondence in the materials.

HER HONOUR: How was that manifested in the written submissions of the plaintiff? I'm trying to work out what material – maybe the better question to ask is what evidence do you rely on to establish the existence of the defects?

MR COGLEY: Yes. It is the superintendent's schedule attached to the payment schedule.

HER HONOUR: Thank you.

103 I am mindful that I ought not approach my analysis of the Adjudication Determination from an unduly critical point of view. In any event, it is apparent from the Adjudicator's summary of the materials relied on by the parties that the Adjudicator had regard to that material. Further, it is apparent from the words he used that, as he was required to do, he undertook some process of balancing or evaluating the competing materials submitted by the Contractor. Given the very limited material put on by the Principal in support of its position, he was persuaded by the Contractor's material in all but three cases that the alleged defect did not exist.

104 In relation to those three cases, the Contractor itself adduced evidence of the cost of carrying out rectification works thereby enabling the Adjudicator to estimate and therefore account for the cost of rectification.

105 In these circumstances and contrary to the submissions of the Principal, I am not satisfied that all the Adjudicator did was reject the Principal's contentions without determining whether the construction work was performed.

106 To the contrary, it is apparent from his reasons that he considered the evidence and submissions before him and reached a conclusion about the existence of each defect and the cost of rectification (in relation to three of them) as a result of his evaluation of those materials.

I Orders

107 I propose to order that the proceeding be dismissed.

I will hear the parties in relation to the form of order and costs.