

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

S ECI 2022 04325

HUNTERS GREEN RETIREMENT LIVING PTY LTD
(ACN 107 006 520)

Plaintiff

v

J.G. KING PROJECT MANAGEMENT PTY LTD
(ACN 095 695 079)

First Defendant

SUSAN LEECH

Second Defendant

JUDGE:

Attiwill J

WHERE HELD:

Melbourne

DATE OF HEARING:

2 and 9 February 2023 and 1 May 2023 (further submissions of the parties 20 May 2023)

DATE OF JUDGMENT:

8 September 2023

CASE MAY BE CITED AS:

Hunters Green Retirement Living Pty Ltd v J.G. King Project Management Pty Ltd

MEDIUM NEUTRAL CITATION:

[2023] VSC 536

JUDICIAL REVIEW – Whether determinations made by the second defendant under s 23 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the **Act**) should be quashed or set aside or alternatively are void or of no effect – Whether the second defendant committed jurisdictional error – Whether the payment claims made by the first defendant upon the plaintiff are payment claims for the purpose of s 14(1) of the Act – Whether the payment claims are balancing claims and/or claims for retention moneys – Whether the payment claims are in respect of ‘construction work’ for the purposes of the Act – Whether the payment claims are in respect of a ‘reference date’ for the purposes of the Act – Whether the payment claims sufficiently identify the ‘construction work’ for the purposes of s 14(2)(c) of the Act – Whether the Court has jurisdiction to review the determinations for non-jurisdictional error of law on the face of the record in circumstances where judgment has not been entered pursuant to s 28R of the Act – Whether the second defendant committed non-jurisdictional error of law on the face of the record – Whether the contracts to which the payment claims relate contain terms for calculating the amount of a progress payment to which the first defendant is entitled and/or terms valuing the construction work and related goods and services – Adjudicator did not commit

jurisdictional error - The payment claims are claims for the unpaid amounts for construction work retained by the plaintiff as security in the form of retention moneys under the contracts - The payment claims are in respect of 'construction work' in respect of a 'reference date' for the purposes of the Act - The payment claims sufficiently identify the 'construction work' for the purposes of s 14(2)(c) of the Act - Adjudicator committed non-jurisdictional error on the face of the record - The contracts to which the payment claims relate contain terms for calculating the amount of the progress payments to which the first defendant is entitled - Adjudicator erred in law in not calculating the progress payments in accordance with the terms of the contracts - The unpaid amounts for construction work retained by the plaintiff as security in the form of retention moneys under the contracts were not due for release and return on the reference date - The error was material - Relief granted - *Building and Construction Industry Security of Payment Act 2002 (Vic) ss 9, 10, 11, 14, 23 and 28R, Cat Protection Society v Arvio [2018] VSC 757, Punton's Shoes Pty Ltd v Citi-Con (Vic) Pty Ltd [2020] VSC 514, John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd [2019] VSC 126 and Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd [2020] VSC 570.*

APPEARANCES:

For the Plaintiff

For the First Defendant

For the Second Defendant

Counsel

Mr B G Mason

Mr A R Morrison

No appearance

Solicitors

MinterEllison

Champions Lawyers

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	1
FOUNDATIONS OF JUDICIAL REVIEW	20
THE ACT	22
FOUNDATIONS 1 (STAGE 12), 2 (STAGE 12), 5 (STAGE 13) AND 6 (STAGE 13): DO THE PAYMENT CLAIMS ENGAGE THE ACT'S PROCESSES?	34
The issues.....	34
Were the Payment Claims 'balancing claims' and/or claims for amounts of retention moneys which Hunters Green held by reason of the terms of the Contracts?	35
Adjudicator's Determinations.....	35
Hunters Green's submissions	35
JG King's submissions.....	39
Analysis.....	41
What consequences flow from the proper characterisation of the Payment Claims? Were the Payment Claims in relation to 'construction work' or 'related goods and services'?	45
The issues.....	45
Adjudicator's Determinations.....	46
Hunters Green's submissions	46
JG King's submissions.....	49
Hunters Green's submissions in reply.....	52
Analysis.....	54
Were the Payment Claims made in respect of a reference date for the purposes of the Act?	65
Adjudicator's Determinations.....	65
Hunters Green's submissions	65
JG King's submissions.....	65
Analysis.....	66
Accordingly, were the Payment Claims 'payment claims' for the purposes of s 14(1) of the Act? What is the effect of the Adjudicator's Determinations in respect of the Payment Claims, if any?	67
FOUNDATIONS 3 (STAGE 12) AND 7 (STAGE 13): DO THE PAYMENT CLAIMS 'IDENTIFY THE CONSTRUCTION WORK OR RELATED GOODS AND SERVICES' TO WHICH THE PAYMENT CLAIMS RELATE WITHIN THE MEANING OF SECTION 14(2)(c) OF THE ACT?	68
The issues.....	68
Do Grounds 3 (Stage 12) and 7 (Stage 13) arise for determination only if the Court finds that the Payment Claims are in respect of 'construction work' or 'related goods and services' within the meaning of the Act?	69
If Grounds 3 (Stage 12) and 7 (Stage 13) arise for determination, did the Payment Claims sufficiently identify the 'construction work' or 'related goods and services' to which they relate for the purposes of s 14(2)(c) of the Act?	69
Adjudicator's Determinations.....	69
Hunters Green's submissions	70
JG King's submissions.....	72

Analysis.....	73
Accordingly, were the Payment Claims ‘payment claims’ for the purposes of s 14(1) of the Act? What is the effect of the Adjudicator’s Determinations in respect of the Payment Claims, if any?	83
FOUNDATIONS 4 (STAGE 12) AND 8 (STAGE 13): DID THE ADJUDICATOR INCORRECTLY CALCULATE THE ENTITLEMENT OF JG KING?.....	84
The issues.....	84
Does the Court have jurisdiction to review a security payment adjudication determination for non-jurisdictional error of law on the face of the record in circumstances where judgment has not been entered pursuant to s 28R of the Act?.....	85
Did the Contracts make express provision as to how the amount of a final ‘progress payment’ is to be calculated for the purposes of s 10(1)(a) of the Act; and/or how ‘construction work’ carried out or undertaken to be carried out or ‘related goods and services’ supplied or undertaken to be supplied under a ‘construction contract’ is to be valued for the purposes of ss 11(1)(a) or 11(2)(a) of the Act, in respect of a claim for final payment? If the Contracts did make such an express provision, is it relevant to the Adjudicator’s assessment of the Payment Claims?..	88
If the Contracts did make such an express provision, was the Adjudicator required by clauses 5, 37.2, 37.4 and, or alternatively 37.7 to apply to set off in respect of any retention money which Hunters Green was entitled to retain? Was that set off requirement permitted by s 48(2) of the Act? Did the arrangements entitle Hunters Green to retain the final tranche of retention money in the amount certified for payment?.....	88
Adjudicator’s Determinations.....	88
Hunters Green’s submissions	90
JG King’s submissions.....	91
Hunters Green’s submission in reply	94
Analysis.....	95
Relevant law	95
Clause 37.4 of the Contracts makes express provision for the calculation of the progress payments to which JG King is entitled under the Act.....	101
The calculation of the progress payments under the Act in accordance with clause 37.4 of the Contracts	104
Clause 5.4 is not void	110
Did the Adjudicator commit non-jurisdictional error of law on the face of the record when calculating the amount of the progress payment the subject of the claims for payment and valuing the ‘construction work’ or the ‘related goods and services’ the subject of the claims for payment? If so, was the error of a sufficient type and severity that, in the Court’s discretion, the adjudication determinations ought be quashed and should the Claims for Payment be remitted to the Adjudicator?	111
Parties’ submissions	111
Analysis.....	112
CONCLUSION AND ORDERS	115

HIS HONOUR:

INTRODUCTION

1 The plaintiff (**Hunters Green**) seeks judicial review of two adjudication determinations made by the second defendant (**the Adjudicator**)¹ under s 23 of the *Building and Construction Industry Security of Payment Act 2002* (**the Act**). The Adjudicator's determinations concern claims for payment made by the first defendant (**JG King**) upon Hunters Green for the construction of the Hunters Green Retirement Village in Cranbourne East (**the Project**).

BACKGROUND

2 On 13 August 2018, Hunters Green, a developer, entered into contracts with JG King, a builder, for the construction of Stage 12 of the Project (**Stage 12 Contract**)² and Stage 13 of the Project (**Stage 13 Contract**)³ (collectively, the **Contracts**).⁴ Stage 12 related to the design and construction of twenty-one retirement village residential units and Stage 13 related to the design and construction of twenty-eight retirement village residential units. The Contracts are identical, other than details specific to the separate stages of construction.

3 The contract sum of the Stage 12 Contract is \$4,637,944.41 (inclusive of GST) and the contract sum of the Stage 13 Contract is \$6,406,597.96 (inclusive of GST) (Item 1A of Part A). Hunters Green is named as the both the 'Principal' and the 'Superintendent' under the Contracts (Items 1 and 5 of Part A). JG King is named as the 'Contractor' under the Contracts (Item 3 of Part A).

4 Clause 5 of the Contracts concerns security. It provides:

5 Security
5.1 Provision

¹ The Adjudicator, by letters to the Prothonotary filed 3 November 2022 and 9 January 2023, advised that she did not intend to be represented at the hearing as she did not intend to take any active role in the proceedings and would abide by the decision of the Court, save as to costs.

² Exhibit NJM-1 to the affidavit of Nikki Miller sworn 26 October 2022 (*Miller affidavit*) 10-143.

³ Ibid 144-277.

⁴ The Contracts have amendments that are tracked. In this judgment, where provisions from the Contracts are set out, the original tracking is included as it appears in the Contracts.

~~Security shall be provided in accordance with Item 14 or 15. All delivered~~

Security provided in accordance with this clause 5 must remain valid and enforceable until the date of its return, in accordance with the Contract.

Should an *Insolvency Event* occur, or be likely to occur, in relation to the approved issuer who provides the security, the party providing the security must:

- (a) immediately notify the other than cash or retention moneys, shall be transferred in escrow party; and
- (b) as soon as practicable (but in any event within 5 business days or such later date as agreed by the parties) procure the issue to the other party a replacement security which:
 - (i) is in the form and in the amount of the security that it is replacing; and
 - (ii) otherwise satisfies and is governed by the terms and the requirements of this Contract for the provision of the security that it is replacing.

5.2 Recourse

Security shall be subject to recourse by a party (including by being converted into cash security that does not consist of cash, by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the, including:

- (a) any debt or other party of intention moneys due from the Contractor to have recourse the Principal; and
- (b) any good faith claim to money which the Principal may have against the Contractor whether for damages (including liquidated damages), under an indemnity or otherwise relating to the Works of the WUC.

The Contractor shall not take any steps, including seeking an injunction or other order of any court, to prevent the Principal from calling upon or the issuer from paying under the security or to prevent the Principal from enjoying the benefit of the security. If the Principal calls upon the security and it is subsequently determined that the Principal was not entitled to do so then the Principal's sole liability to the Contractor shall be to return or reinstate the security.

5.3 Change of security

At any time a party providing retention moneys or cash security may substitute another form of security. To the extent that another form of security is provided, the other party shall not deduct, and shall promptly release and return, retention moneys and cash security.

5.4 Reduction and release

Upon the issue of the certificate of practical completion and compliance by the Contractor with subclause 34.6A a party's entitlement to security (other than in Item 14(e)) shall be reduced by the percentage or amount in Item 14(f) or 15(d)

as applicable, and the reduction shall be released and returned within 14 days to the other party.

The *Principal's* entitlement to *security* in *Item 14(e)* shall cease 14 days after incorporation into *the Works* of the plant and materials for which that *security* was provided.

A party's entitlement otherwise to *security* shall cease 14 days after *final certificate*.

Upon a party's entitlement to *security* ceasing, that party shall release and return forthwith the *security* to the other party.

5.5 Trusts and interest

Except where held by a government department or agency or a municipal, public or statutory authority, any portion of *security* (and interest earned thereon) which is cash or retention moneys, shall not be held in trust for the party providing them until the *Principal* or the *Contractor* is entitled to receive them.

Interest earned on *security* not required to be held in trust shall belong to the party holding that *security*.

5.6 Deed of guarantee, undertaking and substitution

Where:

- (a) a party is a related or subsidiary corporation (as defined in the applicable corporations law of the jurisdiction); and
- (b) a form of *deed of guarantee, undertaking and substitution* was included in the tender documents, or is stated to be required in *Item 14(g)*,

that party shall, within 14 days after receiving a written request from the other party, provide such *deed of guarantee, undertaking and substitution* in the form of Annexure Part G or as included in the invitation to tender (as applicable) duly executed and enforceable.

5 The word 'security' is defined in clause 1 of the Contracts:

security means:

- (a) cash;
- (b) retention moneys;
- (c) bonds or inscribed stock or their equivalent issued by a national, state or territory government;
- (d) interest bearing deposit in a bank carrying on business at the place stated in *Item 9(c)*;
- (e) an approved unconditional undertaking (the form in Annexure Part B is approved) or an approved performance

undertaking given by an approved financial institution or insurance company; or

- (f) other form approved by the party having the benefit of the security;

6 The Contracts make provision for security to be provided by JG King as follows:

- (a) JG King to provide security in the form of retention moneys or two unconditional bank guarantees each for 2.5% of the total contract sum (clause 5.1 and Item 14 of Part A(a));
- (b) JG King to provide security to a maximum percentage of 5% of the contract sum (Item 14(b) of Part A);
- (c) if the security is provided in the form of retention moneys then it is to be 10% of each progress certificate (Item 14(c) of Part A);
- (d) the security upon the certificate of practical completion and compliance by JG King with clause 36.4A is reduced by 50% (clause 5.4 and Item 14(f) of Part A).

7 The Contracts make no provision for security to be provided by Hunters Green (Item 15 of Part A).

8 Clause 34.6 of the Contracts concerns practical completion. It provides:

34.6 Practical completion

The *Contractor* shall give the *Superintendent* at least 14 days written notice of the date upon which the *Contractor* anticipates that *practical completion* will be reached.

When the *Contractor* is of the opinion that *practical completion* has been reached, the *Contractor* shall in writing request the *Superintendent* to issue a *certificate of practical completion*. Within 14 days after receiving the request, the *Superintendent* shall give the *Contractor* and the *Principal* either a *certificate of practical completion* evidencing the *date of practical completion* or written reasons for not doing so.

If the *Superintendent* is of the opinion that *practical completion* has been reached, the *Superintendent* may issue a *certificate of practical completion* even though no request has been made.

34.6A Matters to be attended to after practical completion

Within 14 days of the issue of a notice of *practical completion*, the Contractor must:

- (a) deliver to the *Principal* the following:
 - (i) all *shop drawings* and as built drawings;
 - (ii) three sets of keys for:
 - (A) all locks for each apartment, forming part of the Works (including electronic swipe tags); and
 - (B) any other locks forming part of the Works,
fitted with plastic tags having approved label inserts have been supplied by the Contractor to the Superintendent and all construction locks have been replaced with the final lock barrels and have been checked and adjusted;
 - (iii) all original warranties,
as required by the Contract (including those set out in Annexure Parts I and J) or requested by the Superintendent;
- (b) ensure that all appliance and fittings (where applicable) including, but not limited to, all kitchen appliances (where applicable) are installed, completed and fully operational; and
- (c) provide evidence of compliance with all relevant aspects of the quality assurance system including having undertaken all final inspections and testing of the Works required by that system.

Nothing in this clause limits the Contractor's obligation to provide these items as a condition of satisfying paragraph (c) of the definition of *practical completion*.

9 Clause 37 of the Contracts concerns payment. It is central to the dispute between the parties. It provides:

37 Payment

37.1 Progress claims

The Contractor shall ~~claim~~ give the Superintendent claims for payment (*'progress claims'*) progressively in accordance with Item 33 while WUC is being carried out, at *practical completion* and at the time for making the final payment.

An early *progress claim* shall be deemed to have been made on the date for making that claim.

Each *progress claim* shall be given in writing to the Superintendent and be in a format the Superintendent reasonably requires and shall include details of the

value of *WUC* done and ~~may include~~ details of other moneys then due to the *Contractor* pursuant to provisions of the *Contract*, and must include a deduction for any liquidated damages for which the *Contractor* is liable in accordance with clause 34.7.

37.2 Certificates

The *Superintendent* shall, within ~~14 days~~ 10 Business Days after receiving such a progress claim, issue to the *Principal* and the *Contractor*:

- (a) a progress certificate evidencing the *Superintendent's* opinion of the moneys due from the *Principal* to the *Contractor* pursuant to the progress claim and reasons for any difference ('*progress certificate*'); and
- ~~(e)~~(b) a certificate evidencing the *Superintendent's* assessment of retention moneys and moneys due from the *Contractor* to the *Principal* pursuant to the *Contract*. This certificate may be separate to, or form part of, a *progress certificate*.

If the *Contractor* does not make a progress claim in accordance with *Item 33*, the *Superintendent* may issue the *progress certificate* with details of the calculations and shall issue the certificate in paragraph (b).

~~If the *Superintendent* does~~ Notwithstanding any other term of this *Contract*, the *Principal* is not obliged to make any payment until the *Superintendent* receives a *progress claim* that complies with this subclause 37.2.

The *Superintendent* shall, within 10 Business Days of receiving a *progress claim* that complies with this subclause 37.2, issue ~~the~~ to the *Principal* and the *Contractor* a *progress certificate* in final form ('*progress certificate*').

The *Contractor* shall, within 1410 business days of receiving a *progress claim* in accordance with subclause 37.1, that *progress claim* shall be deemed to be the relevant *progress certificate*, issue the *Superintendent* with a tax invoice which must be in the amount of the *progress certificate*.

If the tax invoice submitted by the *Contractor* is in an amount greater than the amount permitted by this subclause 37.2, the *Principal* shall not be required to pay the *Contractor* an amount in excess of the amount of the tax invoice permitted by this subclause 37.2.

The *Principal* shall ~~within 7 days after receiving both such certificates, or within 21 days~~ the time indicated in *Item 33A* after the *Superintendent* receives ~~the~~ a *progress claim* and tax invoice that comply with this subclause 37.2, pay to the *Contractor* the balance of the ~~*progress certificate*~~ tax invoice after setting off such of the certificate in paragraph 37.2(b) as the *Principal* elects to set off. If that setting off produces a negative balance, the *Contractor* shall pay that balance to the *Principal* within ~~7 days~~ the time indicated in *Item 33A* of receiving written notice thereof.

Neither a *progress certificate* nor a payment of moneys shall be an admission of liability or evidence that the subject *WUC* has been carried out satisfactorily. Payment other than *final payment* shall be payment on account only.

37.3 Unfixed plant and materials

The *Principal* shall not be liable to pay for unfixed plant and materials unless they are listed in *Item 34* and the *Contractor*:

- (a) provides the additional *security* in *Item 14(e)*; and
- (b) satisfies the *Superintendent* that the subject plant and materials have been paid for, properly stored, insured and protected, and labelled (and in fact) the property of the *Principal*.

Upon payment to the *Contractor* and the release of any additional *security* in paragraph (a), the subject plant and materials shall be the unencumbered property of the *Principal*.

37.4 Final payment claim and certificate

Within 28 days after the expiry of the last *defects liability period* and the satisfaction of all of the Contractor's obligations under the Contract, 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*. The Contractor must provide an executed deed of release before making the final payment claim.

Within ~~42~~10 *business* days after the ~~expiry~~ receipt of the last ~~defects liability period~~ a valid 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 75 business days after the ~~debtor receives~~ Superintendent issues the *final certificate*.

The *final certificate* shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the *Contract* except for:

- ~~(f)~~(a) fraud or dishonesty relating to *WUC* or any part thereof or to any matter dealt with in the *final certificate*;
- ~~(g)~~(b) any defect or omission in the *Works* or any part thereof which was not apparent at the end of the last *defects liability period*, or which would not have been disclosed upon reasonable inspection at the time of the issue of the *final certificate*;
- ~~(h)~~(c) any accidental or erroneous inclusion or exclusion of any work or figures in any computation or an arithmetical error in any computation; ~~and~~
- ~~(i)~~(d) unresolved issues the subject of any notice of dispute by the Principal pursuant to clause 42, served before the 7th day after the issue of the *final certificate*; and

- (e) third party claims brought against the *Principal* thereafter for damage, injury or death.

15.537.5 Interest

Interest in *Item 35* shall be due and payable after the date of default in payment.

Clause 37.5 is a cost escalation clause to which Section 15 of the *Domestic Building Contracts Act* applies. The *Principal* acknowledges receipt of the warning annexed to this *Contract* given by the *Contractor* explaining the effects of this clause.

Signed for and on behalf of the *Principal* [by Colin Greaves, Administration Manager, and Angela Victoria Elizabeth Buckley, EGM Retirement Living Communities].

37.537.6 Other moneys due

The *Principal* may elect that deduct from moneys due and owing otherwise than in connection with due to the subject matter of *Contractor*

- (a) any debt or other moneys due from the *Contractor* to the *Principal*, and
(b) any good faith claim to money which the *Principal* may have against the *Contractor* whether for damages (including liquidated damages), under an indemnity or otherwise relating to the *Works* or the *WUC*,

whether under the *Contract* or otherwise at law.

37.7 Security of Payment

This subclause 37.7 applies where the *Works* are carried out in Victoria and the *SOP Act* applies.

The *Contractor* agrees that:

- (a) the time prescribed in clause 37.2 for the *Superintendent* to receive a *progress claim* is the 'reference date' within the meaning and for the purposes of the *SOP Act*;
(b) the place specified in *Item 35A* is the *Principal's* 'ordinary place of business' for the purposes of section 50 of the *SOP Act* and the place provided under this *Contract* [sic] for service of every *SOP document* and any *SOP document* delivered to another place shall not be due to the *Principal* validly served under the *SOP Act*;
(c) payment of moneys for which the *Principal* has become liable to pay to the *Contractor* by reason of the *SOP Act* (including amounts which have been determined by an adjudicator or which are the subject of an adjudication under the *SOP Act*) shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily, but shall be a payment on account only;
(d) in determining the value of the work carried out by the *Contractor* in the performance of the *Contract* pursuant to the *Contract* clause 37, the *Superintendent* may determine a value which is less than the amount

previously paid or payable to the Contractor (including any amount for which the Principal has become liable to pay to the Contractor by reason of the SOP Act and any amount in respect of which security has been given under the SOP Act);

(e) in determining the amounts paid previously under the Contract as required by clause 37 the Superintendent may include, in that amount, the following:

(i) any amount which has been paid to the Contractor pursuant to the SOP Act;

(ii) any amount which has been paid to the Contractor in satisfaction of an adjudication under the SOP Act;

(iii) any amount in respect of which security has been given under the SOP Act; and

(iv) any amount that has been the subject of a debt certificate within the meaning of the SOP Act;

(f) in issuing any documents under the SOP Act (including payment schedules), the Superintendent acts as the Principal's agent. The Superintendent is not the Principal's agent for the purpose of receiving any documents under the SOP Act (including payment claims) and the Contractor must serve such documents on the Principal at the same time as the Superintendent; and

(g) for the purpose of section 18(4) of the SOP Act, any adjudication application is to be made to one of the following authorised nominating authorities:

(i) the Institute of Arbitrators and Mediators;

(ii) Rialto Adjudications Pty Ltd; or

(iii) the Australian Solutions Centre;

(h) the Contractor must, promptly and without delay, give the Superintendent a copy of any written communication of whatever nature in relation to the SOP Act that the Contractor receives from a subcontractor;

(i) the Contractor must indemnify the Principal against all damage, expense (including lawyers' fees and expenses on a solicitor/client basis), loss (including financial loss) or liability of any nature suffered or incurred by the Principal arising directly or indirectly out of:

(i) a suspension pursuant to the SOP Act by a subcontractor of work which forms part of the Works;

(ii) a failure by the Contractor to comply with this clause 37.7; or

- (iii) any lien claimed over unfixed plant or equipment forming part of the Works under section 12A of the SOP Act by a subcontractor of the Contractor.

37.8 GST

- (a) Terms defined in the GST Act have the same meaning in this subclause 37.8 unless provided otherwise.
- (b) The contract sum is, subject to this subclause 37.8, inclusive of all expenses of the Contractor, insurance, duties, imposts and taxes (other than GST). All such expenses, insurance, duties, imposts and taxes shall be paid by the Contractor.
- (c) The Contractor warrants that it is, and will remain registered for the purposes of Parts 2-5 of the GST Act.
- (d) The Contractor warrants that it has correctly disclosed its Australian Business Number to the Principal and shall immediately advise the Principal of any change to its Australian Business Number.
- (e) If the Principal becomes entitled to any payment by reason of reimbursement, indemnity or compensation by the Contractor, then such payment by the Contractor should exclude GST to the extent that the Principal can claim an input tax credit on the reimbursed, indemnified or compensated amount.
- (f) A tax invoice submitted under clause 37.2 must set out:
- (i) the Contractor's Australian Business Number;
 - (ii) the amount claimed by the Contractor and the basis for calculation of that amount;
 - (iii) the amount of any GST paid or payable by the Contractor with respect to the amount claimed;
 - (iv) the Contractor's address for payment; and
 - (v) the Principal's reference number.
- (g) If a tax invoice does not include the details described above then the claim is not, for the purpose of this Contract, a claim for payment. The date of receipt of a claim for payment is taken to be the later of the date of receipt of a compliant tax invoice or the date of receipt of the last of the details described above.
- (h) If there is an Adjustment Event in relation to a Supply which results in the amount of GST on the Supply being less than the amount in respect of which GST was charged or recovered by the Contractor then the Contractor shall refund to the Principal the amount by which the GST charged or recovered exceeds the adjusted GST on the Supply. The amount of the refund is a debt due and payable by the Contractor to the Principal.

Clause 37.8 is a cost escalation clause to which Section 15 of the *Domestic Building Contracts Act* applies. The *Principal* acknowledges receipt of the warning annexed to this *Contract* given by the *Contractor* explaining the effects of this clause.

Signed for and on behalf of the *Principal* [by Colin Greaves, Administration Manager, and Angela Victoria Elizabeth Buckley, EGM Retirement Living Communities].

- 10 The times for submission of progress claims pursuant to clause 37.1 of the Contracts is the 25th day of each month for 'WUC' (i.e. work under contract) done to the last day of that month during WUC, practical completion and at the time for making the final payment claim (Item 33(a) of Part A).
- 11 A draft deed of release, as provided for in clause 37.4 of the Contracts concerning the final payment claim, is set out as an annexure to the Contracts at Part F. Clause 4 of the draft deed of release provides:

4. Release

- 4.1 The total money due under or in any way connected with or arising out of the Works Contract or the carrying out of the Works executed by the Contractor under the Works Contract (including any moneys which might be due to the Contractor from the Principal by way of damages for negligence, breach of contract or other obligation) is the Amount Claimed.
- 4.2 Upon payment by the Principal to the Contractor of the Amount Claimed, the Contractor hereby releases and indemnifies the Principal, the Superintendent, or any employee, agent, servant or other contractor to the Principal or the Superintendent, from and against all claims which the Contractor, but for the execution of this Deed, may have had.
- 4.3 The release and indemnity provided for in the preceding paragraph applies:
- (a) irrespective of how or why a claim might have arisen, including any claim in respect of negligence, breach of contract or other obligation;
 - (b) irrespective of whether the Contractor is aware of the claim or the circumstances which would, but for the execution of this Deed, give rise to the claim; and
 - (c) in respect of all types of loss or damage including, without limiting the generality of his [sic] provision, direct, indirect or consequential loss or damage.

- 12 JG King made progress claims by issuing invoices to Hunters Green for Stage 12 prior to practical completion as follows:⁵

Date	'This Claim Invoice'	'Retention Held' (from this claim)	'Amount due this invoice'	'Less Retention Held' (to date)	'Balance Owed Inc GST'
11 October 2018 ⁶	\$79,953.52	\$7,995.36	\$79,153.96	\$7,995.36	\$87,149.32
11 October 2018 ⁷	\$160,766.06	\$16,076.61	\$159,158.38	\$24,071.97	\$262,384.31
12 November 2018 ⁸	\$332,555.06	\$33,255.55	\$329,229.50	\$57,327.52	\$386,557.02
11 December 2018 ⁹	\$565,122.64	\$56,512.27	\$559,471.41	\$113,839.79	\$673,311.20
24 January 2019 ¹⁰	\$777,299.47	\$77,729.95	\$769,526.47	\$191,569.74	\$961,096.21
4 February 2019 ¹¹	\$731,343.03	\$19,246.08	\$783,306.67	\$210,815.82	\$1,763,648.96
4 March 2019 ¹²	\$715,871.85	None specified ¹³	\$787,459.04	\$210,815.82	\$1,781,581.53
29 March 2019 ¹⁴	\$555,375.90	None specified	\$610,913.52	\$210,815.82	\$1,609,188.38
3 May 2019 ¹⁵	\$279,249.95	None specified	\$307,174.98	\$210,815.82	\$1,128,904.32
31 May 2019 ¹⁶	\$91,504.72	None specified	\$100,655.20	\$210,815.82	\$618,646.00

- 13 JG King made progress claims by issuing invoices to Hunters Green for Stage 13 prior to practical completion as follows:¹⁷

Date	'This Claim Invoice'	'Retention Held' (from this claim)	'Amount due this invoice'	'Less Retention Held' (to date)	'Balance Owed Inc GST'
12 October 2018 ¹⁸	\$381,314.36	\$38,131.46	\$377,501.18	\$38,131.46	\$415,632.64
12 November 2018 ¹⁹	\$234,671.81	\$23,467.24	\$232,325.06	\$61,598.70	\$293,923.76
11 December 2018 ²⁰	\$849,070.96	\$84,907.10	\$840,580.24	\$146,505.80	\$987,086.04
14 January 2019 ²¹	\$709,238.10	\$70,923.81	\$702,145.74	\$217,429.61	\$919,575.35
4 February 2019 ²²	\$859,858.62	\$85,711.26	\$851,562.07	\$303,140.87	\$1,856,848.62
4 March 2019 ²³	\$1,046,683.26	\$16,960.44	\$1,132,695.08	\$320,101.31	\$2,304,358.46

⁵ Exhibit NJM-1 to the Miller affidavit 278-348. See also Miller affidavit [11].

⁶ See Exhibit NJM-1 to the Miller affidavit 278.

⁷ Ibid 286.

⁸ Ibid 293-294.

⁹ Ibid 301-302.

¹⁰ Ibid 309-310.

¹¹ Ibid 317-318.

¹² Ibid 325. Note: the Tax Invoice on page 325 has an 'Invoice Date' of 4 March 2019 but is 'Dated by Claimant' as 4 February 2019.

¹³ No retention was specified. At this stage, the security (i.e. retention moneys) was already the maximum percentage of 5% of the contract sum under the Stage 12 Contract.

¹⁴ See Exhibit NJM-1 to the Miller affidavit 331.

¹⁵ Ibid 337.

¹⁶ Ibid 343.

¹⁷ Ibid 349-417. See also Miller affidavit [12].

¹⁸ See Exhibit NJM-1 to the Miller affidavit 349. Note: the Tax Invoice on page 349 has an 'Invoice Date' of 12 October 2018 but is 'Dated by Claimant' as 11 October 2018.

¹⁹ Ibid 356-357.

²⁰ Ibid 365-366.

²¹ Ibid 373-374.

²² Ibid 381-382.

²³ Ibid 389-390. Note: the Tax Invoice on pages 389-390 has an 'Invoice Date' of 4 March 2019 but is 'Dated by Claimant' as 4 February 2019.

29 March 2019 ²⁴	\$704,564.21	None specified ²⁵	\$775,020.65	\$320,101.31	\$2,227,817.04
3 May 2019 ²⁶	\$517,031.45	None specified	\$568,734.62	\$320,101.31	\$1,663,856.58
31 May 2019 ²⁷	\$564,755.77	None specified	\$621,231.37	\$320,101.31	\$1,510,067.32

14 Each of the invoices for Stage 12 and Stage 13 are in a similar terms. It is convenient to set out the terms of one of the invoices. The first invoice issued by JG King on 11 October 2018 concerning Stage 12 (**First Invoice**) was, inter alia, in the following terms:²⁸

Contract Summary (Ex GST)

Original contract amount	4,216,313.10
Approved variations	<u>0.00</u>
Revised contract amount	4,216,313.10
Value of Works Completed	79,953.52
Less Value of Previous Claims	0.00
Less Retention Held	7,995.36
This Claim Invoice	79,953.52
Balance to Contract Completion	4,136,359.58
Percentage Billed	1.90%
GST	7,195.80
Retention Held	7,995.36
Amount due this Invoice	<u>79,153.96</u>
Invoiced to Date Inc GST	87,149.32
Received to Date Inc GST	0.00
Balance Owed Inc GST	87,149.32

15 The First Invoice:

- (a) stated an amount for 'Value of Works Completed' which is the total value of the works completed to date;
- (b) stated an amount for 'This Claim Invoice' which is the value of the works the subject of the invoice supported by an Excel spreadsheet that identified a trade breakdown in relation to the value of the works;

²⁴ Ibid 397.

²⁵ No retention was specified. At this stage, the security (i.e. retention moneys) was already the maximum percentage of 5% of the contract sum under the Stage 13 Contract.

²⁶ See Exhibit NJM-1 to the Miller affidavit 404.

²⁷ Ibid 411.

²⁸ Ibid 278-285.

- (c) stated an amount for 'Retention Held'²⁹ which is the amount of retention moneys related to this invoice and stated an amount for 'Less Retention Held' which is the total amount of the retention moneys held to date;
- (d) stated an amount for 'Amount due this Invoice'. This is calculated by adding the amount for 'This Claim Invoice' and deducting the 'Retention Held', plus GST;
- (e) stated an amount for 'Invoiced to Date Inc GST'. This is calculated by adding the 'Amount due this Invoice' and the amount for 'Less Retention Held'. For subsequent invoices this is calculated by adding all the amounts in the invoices to date for 'Amount due this Invoice' and then adding the amount for 'Less Retention Held'; and
- (f) stated it was a payment claim under the Act.

16 There is no evidence that the parties followed the detailed procedure for progress claims set out in clause 37.2 of the Contracts. There is no evidence, for example, that:³⁰

- (a) Hunters Green, in its capacity as Superintendent, issued any certificates, including any progress certificate (as defined in clause 37.2(a) of the Contracts) or any certificate concerning an assessment of retention moneys;
- (b) JG King issued any invoice to Hunters Green in the amount of the progress certificate. The invoices I have referred to above were 'progress claims' made by JG King pursuant to clause 37.1 of the Contracts and not invoices issued

²⁹ Except for those invoices issued after the security (i.e. retention moneys) was already the maximum percentage of 5% of the contract sum under the Contracts.

³⁰ Upon this issue being raised by the Court, Hunters Green did not submit that there was any such evidence and submitted that what the parties might have done in the past is of no consequence: Transcript of Proceedings 2 February 2023 (n 31) 32.6-32.19 and 35.23-35.28 (Mr Mason). Hunters Green confined its analysis of the terms of the Contracts and did not take the Court to any document issued or made pursuant to clause 37.2 of the Contracts: Transcript of Proceedings 2 February 2023 (n 31) 32.20-35.22 (Mr Mason).

pursuant to clause 37.2 of the Contracts subsequent to progress certificates. This was accepted by Hunters Green;³¹ or

(c) Hunters Green paid any invoice after setting off any amount in any certificate concerning an assessment of retention moneys.

17 Hunters Green accepted that the parties did not follow the process in clause 37.2 of the Contracts.³² It is common ground between the parties that Hunters Green paid the invoices. The process adopted by the parties resulted in the following:

(a) JG King issued invoices to Hunters Green for the total amount of the value of the construction works it completed;

(b) JG King claimed lesser amounts from Hunters Green than the invoiced amounts as a result of deducting amounts for retention moneys;

(c) Hunters Green paid the amounts claimed.

18 Hunters Green submitted it “retained a sum amounting to 5% of the contract price from its payments to JG King as performance security”.³³ Hunters Green accepted, during the hearing, that JG King ‘deducted’ amounts for the retention.³⁴

19 The retention moneys progressively deducted formed a separate and distinct fund constituting the ‘security’ under the Contracts.³⁵ The separate and distinct character of the fund is apparent from clause 5 of the Contracts, that provides, inter alia, for the provision of security, the circumstances in which a party may have recourse to it, and its reduction and release.³⁶ The Contracts make provision for the release and return of the final 50% of the retention moneys within 14 days of the issue of a final

³¹ See Miller affidavit [11]-[12]; Transcript of Proceedings, *Hunters Green Retirement Living Pty Ltd v JG King Project Management Pty Ltd* (Supreme Court of Victoria, S ECI 2022 04325, Attiwill J, 2 February 2023) 31.11-31.17 (Mr Mason) (“Transcript of Proceedings 2 February 2023”).

³² Transcript of Proceedings 2 February 2023 (n 31) 71.19-72.8 (Mr Mason), especially at 72.1-12 (Mr Mason).

³³ Hunters Green’s submissions [5].

³⁴ Transcript of Proceedings 2 February 2023 (n 31) 65.15-65.17 (Mr Mason).

³⁵ See *Punton’s Shoes v Citi-Con* [2020] VSC 514 [110] (Digby J) (“*Punton’s Shoes*”).

³⁶ *Ibid.*

certificate upon a final payment claim under clause 37.4 of the Contracts. I address this further later in this judgment.³⁷

20 On 28 June 2019, practical completion was certified by the Superintendent for JG King's work for Stage 12 and Stage 13.³⁸ The certificate of practical completion provided for JG King to provide an invoice for the return of 50% of the retention moneys in relation to:

(a) Stage 12 in the sum of \$115,948.66 (inclusive of GST); and

(b) Stage 13 in the sum of \$176,055.67 (inclusive of GST).³⁹

21 On about 3 July 2019, JG King issued invoices for 'Retention Billed' in the amount of \$115,948.66 (inclusive of GST) for Stage 12⁴⁰ and \$176,055.67 (inclusive of GST) for Stage 13.⁴¹ The invoices for Stage 12 and Stage 13 were accompanied by schedules that stated they were a payment claim under the Act.⁴² Hunters Green paid these invoices.⁴³ On about 8 July 2019, JG King issued further invoices in the amounts of \$48,803.67 (inclusive of GST) for Stage 12⁴⁴ and \$92,278.32 (inclusive of GST) for Stage 13.⁴⁵ Hunters Green paid these invoices.⁴⁶ Again, there is no evidence that the parties followed the detailed procedure for progress claims set out in clause 37.2 of the Contracts.

22 On 19 August 2022, JG King provided by email to Hunters Green:⁴⁷

³⁷ Judgment [208]-[217].

³⁸ Miller affidavit [13]; Exhibit NJM-1 to the Miller affidavit 418.

³⁹ Note: there is a typographical error in that the final two entries in the letter at page 418 of exhibit NJM-1 to the Miller affidavit both refer to the return of retention moneys in relation to Hunters Green Stage 12. However, it appears that the bottom entry should refer to Stage 13.

⁴⁰ Exhibit NJM-1 to the Miller affidavit 422-429.

⁴¹ Ibid 433-441.

⁴² Ibid 427, 438.

⁴³ Miller affidavit [15], [18].

⁴⁴ Exhibit NJM-1 to the Miller affidavit 419-421.

⁴⁵ Ibid 430-432.

⁴⁶ Miller affidavit [16], [19].

⁴⁷ Ibid [22]; Exhibit NJM-1 to the Miller affidavit 442-453. The email was sent to an email address for AVEO. AVEO was the entity that provided the certificate of practical completion, being a step required to be undertaken by the Superintendent, being Hunters Green: see Exhibit NJM-1 to the Miller affidavit 418. It also provided a final payment claim for Stage 11 but that is not the subject of

- (a) a document titled 'Final Payment Claim' for Stage 12 that stated that the 'Current Contract Claim' was \$115,948.66 (inclusive of GST) and was a claim under the Act and a deed of release that stated the 'Amount Claimed' was \$115,948.66 (**Stage 12 Payment Claim**);⁴⁸
- (b) a document titled 'Final Payment Claim' for Stage 13 that stated that the 'Current Contract Claim' was \$176,055.64 (inclusive of GST) and was a claim under the Act and a deed of release that stated the 'Amount Claimed' was \$176,055.64 (**Stage 13 Payment Claim**);⁴⁹

(collectively, the **Payment Claims**). There is no evidence that JG King issued any invoices to Hunters Green concerning the Payment Claims. This is in contrast to the previous progress claims I have addressed earlier in this judgment that were each supported by an invoice.⁵⁰

23 The Payment Claims each contain a schedule that:

- (a) states they are a 'Final Payment Claim';
- (b) gives an itemised trade breakdown of the works (e.g. 'preliminaries', 'civil works', 'site works' etc) and lists them as being 100% complete and state a contract value for each item. They also list some works as being 0% complete but those works are struck through in the schedule;
- (c) states a cumulative value and a total value of the completed works;
- (d) states a total amount previously paid for the works;
- (e) states a 'current contract claim', being the difference between the total amount of the value of the completed works less the total amount previously paid. The current contract claim in the Stage 12 Payment Claim is \$115,948.66

these proceedings.

⁴⁸ Exhibit NJM-1 to the Miller affidavit 442-447.

⁴⁹ Ibid 442-443, 448-451.

⁵⁰ Judgment [12]-[13], [20]-[21].

(inclusive of GST). The current contract claim in the State 13 Payment Claim is \$176,055.64 (inclusive of GST);

- (f) gives an itemised breakdown of the variations and lists them as 100% complete and states a variation value for each variation;
- (g) states a cumulative value and a total value of the completed variations;
- (h) states a total amount previously paid for the variations;
- (i) states a 'current variation claim', being the difference between the total amount of the value of the completed variations less the total amount previously paid. In each Payment Claim this is \$0.00.

24 The schedules in the Payment Claims identify that no claim is made in relation to variations. This is because the amount claimed for variations (i.e. 'Current Variation Claim') is stated to be '\$0.00'.

25 The amounts stated in the Payment Claims are in the amounts of the remaining 50% of the retention moneys. As I have already said in this judgment, Hunters Green had paid 50% of the retention moneys to JG King by this time pursuant to the certificate of practical completion and the invoices of JG King dated 3 July 2022.⁵¹

26 There is no evidence that Hunters Green, in its capacity as Superintendent, issued certificates pursuant to clause 37.4 of the Contracts in relation to the Stage 12 Payment Claim or the Stage 13 Payment Claim.

27 Hunters Green accepted, during the hearing, that JG King was entitled to make a final payment claim under the Contracts.⁵²

28 On 2 September 2022, Hunters Green issued responses to the Stage 12 Payment Claim⁵³ and the Stage 13 Payment Claim⁵⁴ disputing them.

⁵¹ Ibid [20]-[21].

⁵² Transcript of Proceedings 2 February 2023 (n 31) 50.18-50.21 (Mr Mason).

29 On about 14 September 2022, JG King lodged, with the Resolution Institute, adjudication applications under s 18 of the Act in respect of the Payment Claims.⁵⁵

30 Hunters Green, JG King and the Adjudicator then exchanged various communications, including notices and submissions, in the period 15 September to 11 October 2022.⁵⁶

31 On 13 October 2022, the Adjudicator made the following adjudication determinations pursuant to s 23 of the Act:⁵⁷

(a) adjudication determination numbered RIVIC20221155 concerning the Stage 12 Payment Claim in which the adjudicated amount was \$114,932.07 (including GST) (**Stage 12 Determination**);⁵⁸ and

(b) adjudication determination numbered RIVIC20221156 concerning the Stage 13 Payment Claim in which the adjudicated amount was \$176,055.64 (including GST) (**Stage 13 Determination**);⁵⁹

(collectively, the **Adjudicator's Determinations**).

32 As at the date of the commencement of this proceeding, i.e. 26 October 2022:

(a) the Contract Sum under the Stage 12 Contract was \$4,333,409.18 (excluding GST)⁶⁰ and the Contract Sum under the Stage 13 Contract was \$5,951,077.95 (excluding GST)⁶¹; and

(b) Hunters Green held the amount of \$105,407.87 (excluding GST) as security in the form of retention moneys under the Stage 12 Contract⁶² and Hunters

53 Miller affidavit [23]; Exhibit NJM-1 to the Miller affidavit 454-459.

54 Miller affidavit [24]; Exhibit NJM-1 to the Miller affidavit 460-465.

55 Miller affidavit [25]-[26].

56 Ibid [27]-[38].

57 Note: both adjudication determinations are dated 13 October 2022, however Mr Miller gave evidence that these were issued on 18 October 2022.

58 Miller affidavit [39]; Exhibit NJM-1 to the Miller affidavit 859-893.

59 Miller affidavit [40]; Exhibit NJM-1 to the Miller affidavit 894-928.

60 Miller affidavit [20(a)].

61 Ibid [21(a)].

Green held the amount of \$160,050.59 (excluding GST)⁶³ as security in the form of retention moneys under the Stage 13 Contract.⁶⁴

GROUNDS OF JUDICIAL REVIEW

33 Hunters Green relied upon the following grounds of judicial review in relation to the Payment Claims:⁶⁵

- (a) the Adjudicator's Determinations should be quashed and, or alternatively, are of no effect by reason of the Adjudicator's jurisdictional error when concluding that the Payment Claims were each in respect of 'construction work'⁶⁶ within the meaning of s 5 of the Act and each therefore constituted a 'payment claim' for the purposes of s 14(1) of the Act (**Grounds 1 (Stage 12) and 5 (Stage 13)**);
- (b) the Adjudicator's Determinations should be quashed and, or alternatively, are of no effect by reason of the Adjudicator's jurisdictional error when concluding that a 'reference date' had arisen in respect of each of the Payment Claims and therefore that each of the claims constituted a 'payment claim' for the purposes of s 14(1) of the Act (**Grounds 2 (Stage 12) and 6 (Stage 13)**);
- (c) further, or alternatively, the Adjudicator's Determinations should be quashed and, or alternatively, are of no effect by reason of the Adjudicator's jurisdictional error when concluding that each of the Payment Claims sufficiently identified the 'construction work' to which they related for the purposes of s 14(2)(c) of the Act, and therefore that claim constituted a

⁶² Ibid [20(b)].

⁶³ Ibid [21(b)].

⁶⁴ Note: there is a typographical error in paragraph 21(b) of the Miller affidavit, as the reference to retention moneys under the Stage 12 Contract should be a reference to retention moneys under the Stage 13 Contract.

⁶⁵ Hunters Green's Originating Motion filed 26 October 2022.

⁶⁶ There is no reference in any of the grounds of judicial review to 'related goods and services' within the meaning of s 6 of the Act. This is only addressed in the particulars to the grounds of judicial review. Upon this being raised by the Court with Hunters Green, Mr Mason confirmed that the grounds of review are limited to 'construction work', see Transcript of Proceedings 2 February 2023 (n 31) 8.20-9.4 (Mr Mason).

‘payment claim’ for the purposes of s 14(1) of the Act (**Grounds 3 (Stage 12) and 7 (Stage 13)**);

- (d) alternatively, the Adjudicator’s Determinations should be quashed and, or alternatively, are of no effect by reason of the Adjudicator’s non-jurisdictional error of law on the face of the record when finding that the construction contracts to which each of the Payment Claims relate did not contain terms for calculating the amount of a progress payment to which JG King is entitled and, having regard to the matters set out in s 11(1)(b) of the Act, Hunters Green was not entitled to withhold retention moneys at any time from the point of view of the Act (**Grounds 4 (Stage 12) and 8 (Stage 13)**).

34 Hunters Green seeks the following relief:⁶⁷

- (a) an order or judgment pursuant to r 56 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**Rules**) and, alternatively in the Court’s inherent jurisdiction, in the nature of certiorari in respect of the Adjudicator’s Determinations, or that the Adjudicator’s Determinations are otherwise quashed or set aside;
- (b) further, or alternatively, in an exercise of the Court’s inherent jurisdiction, a declaration that the Adjudicator’s Determinations are void and of no effect;
- (c) further, or alternatively, a final injunction restraining JG King from seeking to enforce against Hunters Green the Adjudicator’s Determinations or any certificate issued in respect of the Adjudicator’s Determinations under s 28Q of the Act.

⁶⁷ Hunters Green’s Originating Motion filed 26 October 2022 and summons on originating motion filed 22 December 2022.

THE ACT

35 The main purpose of the Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.⁶⁸

36 The object of the Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.⁶⁹

37 Pursuant to the Act, subcontractors are in a position to promptly secure payment of progress payments with the aid of a statutory mechanism which compliments the provisions of the construction contract.⁷⁰ As observed by Vickery J in *Gantley Pty Ltd v Phoenix International Group Pty Ltd (Gantley)*:⁷¹

Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot stand in the way of prompt payment of a progress payment found to be due under the expeditious process provided for in the Act.⁷²

38 The Act was modelled on the New South Wales *Building and Construction Industry Security of Payment Act 1999* (NSW) (the **NSW Act**).⁷³ There are important differences between the Act and the NSW Act, and, also other similar Acts in other states and territories. For example, the NSW Act, *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (the **Queensland Act**), *Building and Construction Industry (Security of Payment) Act 2009* (ACT), *Building and Construction Industry Security of Payment Act 2009* (Tas) and *Building and Construction Industry Security of Payment Act 2009* (SA) (the **South Australian Act**), provide, in effect, for a claimed amount to include an amount that is held under the construction contract by a respondent and that a

⁶⁸ *Building and Construction Industry Security of Payment Act 2002* (Vic) ('Act') s 1.

⁶⁹ *Ibid* s 3(1).

⁷⁰ [2010] VSC 106 [19] (Vickery J) ('*Gantley*').

⁷¹ *Ibid*.

⁷² *Ibid*. See also at [28] (Vickery J).

⁷³ *Ibid* [21] (Vickery J).

claimant claims is due for release.⁷⁴ This includes retention moneys. The Act does not contain such a provision. The Act was amended by the *Building and Construction Industry Security of Payment (Amendment) Bill 2006 (Vic)* (the **Bill**). The Explanatory Memorandum to the Bill states:

Clause 9 amends section 9(2) of the Principal Act to relate reference dates to specific items of construction work or related goods and services.

This clause also inserts new paragraph (c) and (d) into section 9(2) of the Principal Act to provide a method for calculating a reference date where a progress payment is a single, one-off or final payment and the contract makes no express provision for a reference date. Paragraph (d) refers to the fact that a final payment may include money retained by the respondent for the rectification or omission of works or the supply of goods and services under the construction contract.

39 This does not, however, assist with a proper construction of the Act. This is because the Explanatory Memorandum to the Bill is incompatible with the Bill. Clause 9(d) of the Bill does not provide that a final payment may include moneys retained by a respondent for the rectification or omission of works or the supply of goods and services under the construction contract. Clause 9(d) of the Bill inserted a new s 9(d) into the Act that is limited to deeming a 'reference date' for a final payment if the contract makes no express provision for a reference date. It does not refer to including money retained by a respondent.

40 The Act grants a statutory entitlement to make a payment claim in accordance with the Act.⁷⁵ The means by which the Act ensures a person is able to recover a progress payment is by establishing a procedure that involves:

- (a) the making of a payment claim by the person claiming payment;
- (b) the provision of a payment schedule by the respondent to the payment claim;

⁷⁴ *Building and Construction Industry Security of Payment Act 1999 (NSW)* s 13(3)(b); *Building Industry Fairness (Security of Payment) Act 2017 (Qld)* s 68(2)(b); *Building and Construction Industry (Security of Payment) Act 2009 (ACT)* s 15(3)(b); *Building and Construction Industry Security of Payment Act 2009 (Tas)* s 17(3)(b); *Building and Construction Industry Security of Payment Act 2009 (SA)* s 13(3)(b).

⁷⁵ Act s 3(2).

- (c) the referral of any disputed claim to an adjudicator for determination;
- (d) the payment of the amount of the progress payment determined by the adjudicator; and
- (e) the recovery of the progress payment in the event of a failure to pay.⁷⁶

41 The Act does not limit any other entitlement that a claimant may have under a construction contract or any other remedy that a claimant may have for recovering that other entitlement.⁷⁷ A 'claimant' means the person who serves a payment claim under s 14 of the Act.⁷⁸ As observed by Stynes J in *Goldwind Australia Pty Ltd v Ale Heavylift (Australia) Pty Ltd (Goldwind)*:⁷⁹

42 However, the SOP Act is not intended to limit:

- (a) any other entitlement that a claimant may have under a construction contract; or
- (b) any other remedy that a claimant may have for recovering that other entitlement.

42 In *Grocon Constructors v Planit Cocciardi Joint Venture (No 2) (Grocon)*,⁸⁰ Vickery J said:⁸¹

The *Building and Construction Industry Security of Payment Act 2002* was introduced in Victoria to allow for the rapid determination of progress claims under construction contracts or sub-contracts, and contracts for the supply of goods or services in the building industry. The process was designed to ensure cash flow to businesses in the building industry, without parties getting tied up in lengthy and expensive litigation or arbitration. It was intended to establish a process for the fast recovery of progress payments payable under a construction contract. This was to be achieved by a novel procedure which provided for the rapid adjudication of payment disputes at a low cost to the parties. The amendments introduced into the Act which operate from 31 March 2007 reinforce the scheme by creating, *inter alia*, a fast track system for enforcing payment in the courts through an expedited process for the entry of judgment founded on a certificate evidencing the adjudication determination and an affidavit of non-payment.

⁷⁶ Ibid s 3(3).

⁷⁷ Ibid s 3(4).

⁷⁸ Ibid s 4.

⁷⁹ [2021] VSC 625 [42] (Stynes J) (citations omitted) ('*Goldwind*').

⁸⁰ (2009) 26 VR 172 ('*Grocon*').

⁸¹ Ibid 180 [33] (Vickery J).

43 The Act places a claimant in a privileged position in the sense that the claimant acquires rights that go beyond the claimant's contractual rights.⁸² The premise that underlies the Act is that cash flow is the lifeblood of the construction industry and that the principal under a construction contract should pay now and argue later.⁸³

44 The term 'construction contract' is expansively defined and means a contract or other arrangement under which one party undertakes to carry out construction work, or supply related goods and services, for another party.⁸⁴

45 Subject to particular exemptions, the Act applies to any construction contract, whether written or oral, or partly written and partly oral, and applies even if the contract is expressed to be governed by the law of a jurisdiction other than Victoria.⁸⁵ It was common ground between the parties that none of the exemptions in s 7(2)-(6) of the Act applied in the circumstances of this case.

46 Part 2 of the Act concerns rights to progress payments. Section 9(1) of the Act provides for a statutory right to a progress payment:

9 Rights to progress payments

- (1) On and from each reference date under a construction contract, a person –
- (a) who has undertaken to carry out construction work under the contract; or
 - (b) who has undertaken to supply related goods and services under the contract –

is entitled to a progress payment under this Act, calculated by reference to that date.

47 The term 'progress payment' is defined and means a payment to which a person is entitled under s 9 of the Act.⁸⁶ It includes, inter alia, the final payment for

⁸² *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 [7] (Finkelstein J) ('*Protectavale*').

⁸³ *Ibid.*

⁸⁴ *Act* s 4.

⁸⁵ *Ibid* s 7(1).

⁸⁶ *Ibid* s 4.

construction work carried out on a construction contract or related goods and services supplied under the contract.⁸⁷

48 Section 9(2) of the Act provides for the meaning of 'reference date':

(2) In this section, *reference date*, in relation to a construction contract, means—

(a) a date determined by or in accordance with the terms of the contract as—

(i) a date on which a claim for a progress payment may be made; or

(ii) a date by reference to which the amount of a progress payment is to be calculated—

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or

(b) subject to paragraphs (c) and (d), if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after—

(i) construction work was first carried out under the contract; or

(ii) related goods and services were first supplied under the contract; or

(c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that—

(i) construction work was last carried out under the contract; or

(ii) related goods and services were last supplied under the contract; or

(d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following—

(i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in

⁸⁷ Ibid.

related goods and services supplied under the contract, unless subparagraph (ii) applies; or

- (ii) the issue under the contract of a certificate specifying the final amount payable under the contract *a final certificate*; or
- (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that—
 - (A) construction work was last carried out under the contract; or
 - (B) related goods and services were last supplied under the contract.

49 In *Watpac Constructions v CGM (Watpac)*,⁸⁸ Digby J said:⁸⁹

156 It is to be noted that s 9 of the SoP Act is centrally concerned with:

- (a) progress payment claims for items of construction work carried out (or to be carried out) and items of related goods and services supplied;
- (b) the date on which a claim for a progress payment may be made.

50 Section 10 of the Act provides for the calculation of a progress payment under s 9 of the Act:

10 Amount of progress payment

- (1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—
 - (a) the amount calculated in accordance with the terms of the contract; or
 - (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of—
 - (i) construction work carried out or undertaken to be carried out by the person under the contract; or
 - (ii) related goods and services supplied or undertaken to be supplied by the person under the contract—
- as the case requires.

⁸⁸ [2020] VSC 637 (*Watpac*).

⁸⁹ *Ibid* [156] (Digby J) (citations omitted).

- (2) Despite subsection (1) and anything to the contrary in the construction contract, a claimable variation may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.
- (3) Despite subsection (1) and anything to the contrary in the construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

51 The term 'claimable variations' in s 10(2) of the Act is defined and set out in s 10A of the Act. The term 'excluded amount' in s 10(3) of the Act is defined in s 10B of the Act and includes, inter alia, any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract.⁹⁰

52 Section 11 of the Act provides for the valuation of construction works and related goods and services:

11 Valuation of construction work and related goods and services

- (1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued –
 - (a) in accordance with the terms of the contract; or
 - (b) if the contract makes no express provision with respect to the matter, having regard to –
 - (i) the contract price for the work; and
 - (ii) any other rates or prices set out in the contract; and
 - (iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.
- (2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued –
 - (a) in accordance with the terms of the contract; or

⁹⁰ Act s 10B(2)(c).

- (b) if the contract makes no express provision with respect to the matter, having regard to—
 - (i) the contract price for the goods and services; and
 - (ii) any other rates or prices set out in the contract; and
 - (iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and
 - (iv) if any goods are defective, the estimated cost of rectifying the defect.
- (3) For the purposes of subsection (2)(b), the valuation of materials and components that are to form part of any building, structure or work arising from construction work is to be on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

53 Section 12 of the Act provides that a progress payment under a construction contract becomes due and payable on the date on which the payment becomes due and payable in accordance with the terms of the contract or if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.⁹¹

54 Part 3 of the Act sets out the procedure for recovering progress payments. Section 14 of the Act provides for payment claims. Sections 14(1) and (2) of the Act provide:

14 Payment claims

- (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
- (2) A payment claim—
 - (a) must be in the relevant prescribed form (if any); and
 - (b) must contain the prescribed information (if any); and
 - (c) must identify the construction work or related goods and services to which the progress payment relates; and

⁹¹ Ibid s 12.

- (d) must indicate the amount of the progress payment that the claimant claims to be due (the *claimed amount*); and
- (e) must state that it is made under this Act.

55 The term 'claimed amount' in s 14(2)(d) of the Act is defined and means "an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 14".⁹²

56 As observed by Digby J in *Punton's Shoes Pty Ltd v Citi-Con (Vic) Pty Ltd (Punton's Shoes)*⁹³ concerning ss 9 and 14 of the Act:⁹⁴

99 Consistent with the purpose and object of the SoP Act it is clear on the natural meaning of the language employed in the above sections of the Act that a potential claimant's entitlement to a progress payment, and to serve a payment claim under s 14 of the SoP Act, is in respect of construction work and related goods and services undertaken under the relevant construction contract.

100 Further, the requirement in s 14(2) of the SoP Act that a payment claim must identify the construction work and related goods and services to which the progress payment relates and the requirements in s 15(1)(c) and s 15(3) that any payment schedule responding to a payment claim must identify the amount of the claim which the respondent alleges is an excluded amount, and explain why (if applicable) a scheduled amount is less than the claimed amount, also reflect the intent of the Act that:

- (a) a progress claim under the Act is to be a claim in respect of construction work or related goods and services undertaken or supplied under the construction contract; and
- (b) the content of a progress claim is to be sufficiently detailed in relation to claimed construction work and related goods and services so as to enable the respondent by its payment schedule to comply with the above requirements of s 15(1)(c) and s 15(3) of the SoP Act.

57 In *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd (Southern Han)*,⁹⁵ the High Court said of s 13 of the NSW Act:⁹⁶

44 There is no dispute between the parties that service of a payment claim under s 13(1) of the Act is an essential precondition to taking

⁹² Ibid s 4.

⁹³ *Punton's Shoes* (n 35).

⁹⁴ Ibid [99]-[100] (Digby J) (citations omitted).

⁹⁵ (2016) 260 CLR 340 ('*Southern Han*').

⁹⁶ Ibid [44] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

subsequent steps in the procedure set out in Pt 3 of the Act. There is accordingly no dispute that, unless a payment claim answering that description is served, there can be no adjudication application and hence no adjudication within the jurisdiction conferred by s 22 of the Act. That shared understanding of the relationship between ss 13(1) and 22 is undoubtedly correct.

58 A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.⁹⁷ This does not prevent a claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.⁹⁸

59 A person on whom a payment claim is served may reply to the claim by providing a payment schedule to the claimant.⁹⁹ Section 15(2) of the Act sets out the matters that must be included in a payment schedule.

60 Relevantly, a claimant may apply for adjudication of a payment claim if the respondent provides a payment schedule but the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim.¹⁰⁰ Section 18(3) of the Act sets out what an adjudication application must contain.

61 Section 23 of the Act provides:

Adjudicator's determination

- (1) An adjudicator is to determine –
 - (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the *adjudicated amount*); and
 - (b) the date on which that amount became or becomes payable; and
 - (c) the rate of interest payable on that amount in accordance with section 12(2).
- (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only –
 - (a) the provisions of this Act and any regulations made under this Act;

⁹⁷ Act s 14(8).

⁹⁸ Ibid s 14(9).

⁹⁹ Ibid s 15(1).

¹⁰⁰ Ibid s 18(1)(a)(i).

- (b) subject to this Act, the provisions of the construction contract from which the application arose;
- (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;
- (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
- (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

(2A) In determining an adjudication application, the adjudicator must not take into account –

- (a) any part of the claimed amount that is an excluded amount; or
- (b) any other matter that is prohibited by this Act from being taken into account.

(2B) An adjudicator's determination is void –

- (a) to the extent that it has been made in contravention of subsection (2);
- (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

(3) The adjudicator's determination must be in writing and must include –

- (a) the reasons for the determination; and
- (b) the basis on which any amount or date has been decided.

(4) If, in determining an adjudication application, an adjudicator has, in accordance with section 11, determined –

- (a) the value of any construction work carried out under a construction contract; or
- (b) the value of any related goods and services supplied under a construction contract –

the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work or the goods and services the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value of the work or the goods and services has changed since the previous determination.

62 Section 28R of the Act relevantly provides:

28R Proceedings to recover amount payable under section 28M or 28N

(1) If an authorised nominating authority has provided an adjudication certificate to a person under section 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under section 28M or 28N.

...

(5) If a person commences proceedings to have the judgment set aside, that person –

(a) subject to subsection (6), is not, in those proceedings, entitled –

(i) to bring any cross-claim against the person who brought the proceedings under subsection (1); or

(ii) to raise any defence in relation to matters arising under the construction contract; or

(iii) to challenge an adjudication determination or a review determination; and

(b) is required to pay into the court as security the unpaid portion of the amount payable under section 28M or 28N pending the final determination of those proceedings.

...

63 Section 46 of the Act provides:

Liability of adjudicator

An adjudicator (including a review adjudicator) is not personally liable for anything done or omitted to be done in good faith –

(a) in the exercise of a power or the discharge of a duty under this Act or the regulations; or

(b) in the reasonable belief that the act or omission was in the exercise of a power or the discharge of a duty under this Act or the regulations.

64 Section 48 of the Act provides:

No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement, whether in writing or not –

- (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or
- (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act –

is void.

GROUND 1 (STAGE 12), 2 (STAGE 12), 5 (STAGE 13) AND 6 (STAGE 13): DO THE PAYMENT CLAIMS ENGAGE THE ACT'S PROCESSES?

The issues

65 The Payment Claims claim amounts in the amounts of the remaining 50% of the retention moneys held by Hunters Green as security under the Contracts. The Payment Claims do not expressly claim payment of the retention moneys but set out the value of the completed works, including variations, under the Contracts, less the total amount paid.

66 As a result, the following issues arise for determination:

- (a) Were the Payment Claims 'balancing claims' and/or claims for amounts of retention moneys which Hunters Green held by reason of the terms of the Contracts?
- (b) What consequences flow from the proper characterisation of the Payment Claims? Were the Payment Claims in relation to 'construction work' or 'related goods and services'? Were the Payment Claims made in respect of a reference date for the purposes of the Act?
- (c) Accordingly, were the Payment Claims 'payment claims' for the purposes of s 14(1) of the Act? What is the effect of the Adjudicator's Determinations in respect of the Payment Claims, if any?

Were the Payment Claims ‘balancing claims’ and/or claims for amounts of retention moneys which Hunters Green held by reason of the terms of the Contracts?

Adjudicator’s Determinations

67 The Adjudicator found that the ‘proper context’ of the Payment Claims is all of the construction work performed on the Contracts up until the ‘reference date’ for the Act in August 2022.¹⁰¹ The Adjudicator found that the claimed amount is properly the sum of two sub-totals (i.e. for construction works and variations) exclusive of the payments to date.¹⁰² The Adjudicator found that the ‘whole of the works’ was the basis for the Payment Claims.¹⁰³

Hunters Green’s submissions

68 Hunters Green submitted that the Payment Claims are claims solely to recover retention moneys.¹⁰⁴ It submitted:¹⁰⁵

The [Payment Claims], when properly construed, were claims for amounts which [Hunters Green] held by reason of the terms of the Contracts. These amounts constitute a discrete fund serving the purpose of performance security, and were set off from [JG King’s] previous progress payments to [JG King]. Clause 37.2 of the Contracts provided [Hunters Green] with that right, and [JG King] did not challenge that deduction in its previous claims for progress payments. No other basis was identified for [Hunters Green’s] entitlement to hold that amount ... Accordingly, given the legal character of a set-off, these amounts cannot, therefore, be characterised as ‘balancing claims’ or [Hunters Green] releasing unpaid components of the contract sum. They are, instead, claims to reverse that set-off.

69 It submitted that JG King’s contractual entitlement to receive the retention moneys cannot be conflated with its entitlement to receive payment for the construction work it performed, as they are different entitlements.¹⁰⁶ They have a different character.¹⁰⁷ The contractual arrangements for deducting, having recourse to, reducing and releasing retention moneys operate outside the contractual payment

101 Exhibit NJM-1 to the Miller affidavit 859-893 [10], [19] (*‘Stage 12 Determination’*), 894-928 [10], [19] (*‘Stage 13 Determination’*).
102 Stage 12 Determination [10]; Stage 13 Determination [10].
103 Stage 12 Determination [19]; Stage 13 Determination [19].
104 Hunters Green’s submissions [30]. See also at [35]. See also Annotated List of Issues [1] 1-3.
105 Annotated List of Issues [1] 1-2. See also [2] 4, [3] 10.
106 Hunters Green’s submissions [28]-[29].
107 Ibid [29].

arrangements.¹⁰⁸ The contractual arrangements at issue provided for the establishment and accumulation of a discrete fund to ensure the due and proper performance of JG King's obligations.¹⁰⁹ It referred, inter alia, to:¹¹⁰

- (a) Hunters Green's entitlement to hold the retention moneys was reduced by 50% upon the certificate of practical completion being issued and upon JG King satisfying the additional requirements imposed by clause 34.6A of the Contracts. It submitted that this arrangement was not coextensive with JG King's entitlement to receive a progress payment upon achieving practical completion. The time for Hunters Green to make that progress payment was prescribed by clause 37.2 of the Contracts. It was contingent upon the Superintendent issuing a progress certificate and JG King then issuing an invoice for the certified amount. It submitted that in contrast the time for Hunters Green to return half the retention moneys was separately prescribed by clause 5.4 of the Contracts;
- (b) Hunters Green's entitlement to hold the remaining retention moneys ceased 14 days after the final certificate pursuant to clause 5.4 of the Contracts. It submitted that again this arrangement was not coextensive with JG King's entitlement to receive its final payment. JG King's claim for that payment was made while Hunters Green remained entitled to hold the retention moneys. The final certificate was to be issued within 10 business days of Hunters Green receiving a valid final payment claim pursuant to clause 37.4 of the Contracts. It submitted the amount certified as payable in the final certificate was to be paid within 5 business days and that this was before Hunters Green's entitlement to remaining performance security expired under clause 5.4 of the Contracts; and

¹⁰⁸ Ibid [21]. See also at [22]-[27].

¹⁰⁹ Ibid [28].

¹¹⁰ Ibid [22]-[27].

- (c) the Contracts do not make provision for JG King to make discrete claims for the release of the retention moneys.

70 It submitted that this distinct contractual purpose of retention moneys precludes JG King's purported payment claims being characterised as in respect of construction work.¹¹¹

71 It submitted that clause 37.2 of the Contracts provided Hunters Green with a right to set off the retention moneys and JG King did not challenge that deduction in previous claims for progress payments. It submitted that no other basis was identified for Hunters Green's entitlement to hold that amount. It submitted that given the legal character of a set off, these amounts cannot, therefore, be characterised as balancing claims or Hunters Green releasing unpaid components of the contract sum. It submitted that they are, instead, claims to reverse that set off.¹¹² It submitted that JG King's contractual entitlement to recover retention moneys does not comprise part of its entitlement to payment in respect of any construction work it carries out, or any related goods and services it supplies.¹¹³ The contractual arrangements provide for the establishment and accumulation of retention moneys as a discrete fund to ensure the due and proper performance of JG King's obligations. The contractual arrangements by which the retention moneys were certified, accumulated, reduced and released to JG King operated separately to the arrangements pursuant to which JG King was paid for the construction work it performed.¹¹⁴

72 It submitted that JG King sought to overcome the true character of the amounts that it claimed.¹¹⁵ It submitted that JG King prioritised form over substance as the absence of the term 'retention moneys' from the Payment Claims does not alter the

¹¹¹ Hunters Green's reply submissions [16].

¹¹² Annotated List of Issues [1] 1-2.

¹¹³ Hunters Green's submissions [21].

¹¹⁴ *Ibid* [28].

¹¹⁵ *Ibid* [32].

character of the amounts claimed.¹¹⁶ There has been no suggestion that any other amount is payable by Hunters Green to JG King under, or in connection with, the Stage 12 Contract or the Stage 13 Contract.¹¹⁷ Hunters Green referred to the fact that JG King submitted its Payment Claims before any final certificate was issued.¹¹⁸ As a result, pursuant to clause 5.4 of the Contracts, Hunters Green retained its entitlement to hold the retention moneys when JG King submitted its Payment Claims.¹¹⁹ Consequently, JG King's claims concerned its receipt of retention moneys which Hunters Green continued to hold under the Contracts.¹²⁰ Hunters Green submitted that given clause 5.4 of the Contracts, the Payment Claims cannot be characterised as claims for payment in respect of construction work JG King had performed.¹²¹

73 Hunters Green submitted that, in considering this issue, the Court can also have regard to JG King's previous claims for payment.¹²² It submitted that in the case of both Stage 12 and Stage 13 these claims for payment had already sought payment of the entire amount of the contract sum and had been paid in full, subject to the permitted set off.¹²³

74 It submitted:¹²⁴

The very notion of a setoff is two amounts payable, one from A to B, the other from B to A, and those amounts being used to nullify each other. It's just a means of effecting the two separate payments. And that's of significance in this case because it means J.G. King is actually paid for the construction work it's performed in full. An amount is not withheld. In practical terms, what is happening is J.G. King is being paid in full and J.G. King is paying to Hunters Green a separate sum for the purposes of retention monies.

116 Ibid [33].

117 Ibid.

118 Ibid [35].

119 Ibid.

120 Ibid.

121 Ibid.

122 Annotated List of Issues [3] 10.

123 Ibid.

124 Transcript of Proceedings 2 February 2023 (n 31) 31.1-31.10 (Mr Mason).

75 Hunters Green submitted that “monies held as retention are not in relation to construction work, because if that were the case, you could see it giving rise to some fairly bizarre results”.¹²⁵ It provided the following example:¹²⁶

Let’s just assume, as J.G. King contends, that retention monies are a portion of the contract sum payable for construction work that’s been performed that’s withheld. So they’re, for example, to use your previous illustration, they’re owed \$100, but they’re only paid \$80. The principal is holding back 20 of an amount that is otherwise payable to them. Now, if the principal draws down on that 20 to satisfy other amounts that are payable to another contract – let’s use an easy example of liquidated damages – the principal then loses its pool of \$20, but then there would still be the obligation to pay to the contractor that remaining \$20 when everything’s finished, because it’s to be paid for its work in full.

JG King’s submissions

76 JG King submitted that there are several ways in which the Payment Claims may be viewed.¹²⁷ It submitted:¹²⁸

The Payment Claims can be viewed as both balancing claims for the balance of the contract sums and as claims for retention. These are not strict alternatives. They are merely different ways of looking at the same facts... Having said that, the first defendant’s primary contention is that the Payment Claims are best viewed as balancing claims...

77 It submitted that the fact that the only amount outstanding corresponded to the amount of retention withheld does not detract from the fundamental character of the claim as a balancing claim.¹²⁹

78 It submitted that the amounts previously withheld as retention moneys were not in substance or in form in the nature of a set off.¹³⁰ It submitted that there is no evidence upon which such a finding could be made.¹³¹

125 Ibid 43.1-43.5 (Mr Mason).

126 Ibid 43.6-43.19 (Mr Mason).

127 JG King’s submissions on formulation of disputed questions [21].

128 Annotated List of Issues [1] 3.

129 Ibid.

130 Ibid [1] 4.

131 Ibid.

79 It submitted that a claim for final payment has been described as, inter alia, the final balancing of account between the contracting parties.¹³² It submitted that the Payment Claims sought payment for the balance unpaid of the contract sum.¹³³

80 It submitted that Hunters Green's entitlement to withhold the retention moneys under clause 5.4 of the Contracts was coextensive with JG King's entitlement to receive its final payment under clause 37.4 of the Contracts.¹³⁴ It submitted that if Hunters Green was only obliged to return the balance of any cash retention after the final certificate, then Hunters Green would be released from that obligation prior to it ever arising.¹³⁵ It submitted that the finality of the final payment claim procedure was clear.¹³⁶ JG King was required to include in its final payment claim all claims for payment due to it.¹³⁷ Failure to do so meant its rights would be lost, either by operation of a deed of release or by accord and satisfaction.¹³⁸ It follows that Hunters Green was not permitted to withhold the final tranche of the retention money from the final payment.¹³⁹ It submitted that this construction of clause 37.4 of the Contracts causes no relevant incongruity with the third paragraph of clause 5.4 which provides that "[a] party's entitlement otherwise to security shall cease 14 days after final certificate".¹⁴⁰

81 It further submitted:¹⁴¹

- (a) the word 'otherwise' signifies that it is a long stop or catch-all provision. It submitted that it does not prevent the entitlement to security ceasing at an earlier point in time under some other provision of the Contracts;

132 JG King's submissions [20].

133 Ibid [24].

134 Ibid [37].

135 Ibid [38].

136 Ibid [39].

137 Ibid.

138 Ibid.

139 Ibid.

140 Ibid [40].

141 Ibid [40]-[42].

- (b) alternatively, it submitted that to the extent that there is any inconsistency, clause 5.4 of the Contracts ought to be read down as it would otherwise work a commercial nonsense by providing in substance for the indefinite retention of security;
- (c) it would be anomalous and entirely inconsistent with the primary purpose of the Act if in a claim for final payment, expressly contemplated by the Act, a claimant was not permitted to recover a substantial part of the contract price for the work. It submitted that there is no justification for treating retention any differently from other clauses that determine the value of progress payments to be made under the Contracts.

Analysis

82 I have concluded that the Payment Claims are claims for the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts.

83 Firstly, the Payment Claims claim the unpaid amounts for the construction work. This is set out in the schedule of the Payment Claims.¹⁴² The Payment Claims are each stated to be a 'Final Payment Claim'. A final payment claim is a "final balancing of account between the contracting parties".¹⁴³ I also refer to the matters I set out earlier in this judgment concerning the process followed by the parties concerning payment for the construction work and the deduction of retention moneys.¹⁴⁴ Hunters Green did not pay JG King the full amount for the construction work. This is because amounts were deducted for retention moneys. As a result, I do not accept Hunters Green's submissions that:¹⁴⁵

¹⁴² Judgment [23].

¹⁴³ *Jemzone v Trytan* [2002] NSWSC 395 [37] (Austin J) ('*Jemzone*'). Referred to with approval in *Protectavale* (n 82) [17] (Finkelstein J).

¹⁴⁴ Judgment [16]-[18].

¹⁴⁵ Annotated List of Issues [1] 1-2. See also Transcript of Proceedings 2 February 2023 (n 31) 30.22-31.10, 35.5-35.16 (Mr Mason).

- (a) the parties followed the process in clause 37.2 of the Contracts and that Hunters Green paid the full amount for the construction work as the retention moneys were set off against the amounts Hunters Green owed JG King for construction work; and
- (b) the Payment Claims are claims to “reverse that set-off” and not claims for the amounts unpaid for the construction work.

84 For the same reasons, I do not accept Hunters Green’s submissions that the Payment Claims “are made solely to recover retention moneys”.¹⁴⁶ The reference in clause 5.4 of the Contracts to a party’s obligation to ‘release and return’ the security is not inconsistent with the retention moneys being unpaid amounts for the construction work.¹⁴⁷ I do not accept Hunters Green’s submission that JG King ‘separately provided’ the retention moneys to Hunters Green.¹⁴⁸

85 I also refer to my conclusion and reasons later in this judgment that the Payment Claims are for ‘construction work’ for the purposes of the Act.¹⁴⁹

86 Secondly, the Payment Claims also claim the amounts retained by Hunters Green as security in the form of retention moneys under the Contracts. There is a direct and obvious relationship between the unpaid amounts for the construction work and the amounts held by Hunters Green as security in the form of retention moneys under the Contracts. I refer to and repeat the matters I set out earlier in this judgment concerning the process followed by the parties concerning payment for the construction work and the deduction of retention moneys.¹⁵⁰ The retention moneys are amounts payable to JG King for construction work retained by Hunters Green as security in the form of retention moneys under the Contracts until:¹⁵¹

¹⁴⁶ Hunters Green’s submissions [30].

¹⁴⁷ Transcript of Proceedings 2 February 2023 (n 31) 26.3-26.22 (Mr Mason).

¹⁴⁸ Ibid 36.13-36.14 (Mr Mason).

¹⁴⁹ Judgment [111]-[135].

¹⁵⁰ Ibid [17].

¹⁵¹ I address the entitlement of JG King to claim the retention moneys upon final payment claim under the Contracts later in this Judgment.

- (a) Hunters Green has recourse to them pursuant to clause 5.2 of the Contracts;
- (b) the retention moneys are substituted by another form of security pursuant to clause 5.3 of the Contracts; or
- (c) the retention moneys are released and returned by Hunters Green to JG King pursuant to clause 5.4 of the Contracts.

87 The Payment Claims are in the precise amounts of the retention moneys. As submitted by JG King:¹⁵²

So the fact that the gap between what had been paid to date and what's now being claimed was an equivalent amount to the amount of retention that had been retained, I don't think that was lost on the parties.

88 The Payment Claims claim 100% of the construction contract sum less amounts paid. As observed by Henry J in *Vannella Pty Ltd v TFM Epping Land Pty Ltd (Vannella)*,¹⁵³ where a party claims 100% of the construction contract sum, it must include retention moneys.¹⁵⁴

89 Hunters Green accepted that the "amounts claimed represented, in essence, the retention moneys Hunters Green continued to hold".¹⁵⁵ JG King also accepted that "the Payment Claims can be viewed as both balancing claims for the balance of the contract sums and as claims for retention. These are not strict alternatives. They are merely different ways of looking at the same facts".¹⁵⁶ Similarly, JG King also accepted that "[t]he Payment Claims could be construed as balancing claims that sought the return of retention money previously withheld".¹⁵⁷

¹⁵² Transcript of Proceedings, *Hunters Green Retirement Living Pty Ltd v JG King Project Management Pty Ltd* (Supreme Court of Victoria, S ECI 2022 04325, Attiwill J, 9 February 2023) 131.7-131.11 (Mr Morrison) ("Transcript of Proceedings 9 February 2023").

¹⁵³ *Vannella Pty Limited atf Capitalist Family Trust v TFM Epping Land Pty Ltd; Decon Australia Pty Limited v TFM Epping Land Pty Ltd; Vannella Pty Limited v TFM Epping Land Pty Ltd* [2019] NSWSC 1379 (*Vannella*).

¹⁵⁴ *Ibid* [125] (Henry J).

¹⁵⁵ Hunters Green's submissions [7].

¹⁵⁶ Annotated List of Issues [1] 3.

¹⁵⁷ JG King's submission on formulation of disputed questions [6].

90 I do not accept JG King's submission that "the Payment Claims are best viewed as balancing claims"¹⁵⁸, being claims for "for the whole contract sum less amounts paid to date"¹⁵⁹. This is because this does not recognise that the "balance" is the security in the form of retention moneys under the Contracts. I accept Hunters Green's submission that, in this context, "JG King prioritised form over substance. The absence of the term 'retention moneys' from JG King's claims does not alter the character of the amounts claimed".¹⁶⁰ JG King relied upon the decision of Stynes J in *Goldwind* to submit that the fact that the only amount outstanding corresponded to the amount of retention withheld does not detract from the fundamental character of the claim as a balancing claim.¹⁶¹ *Goldwind* does not assist JG King. In *Goldwind*, Stynes J determined whether the fact that a subcontractor failed to challenge a delay deduction when it was first applied had the effect of changing the character of the payment claim from a claim for work done to a claim to recoup the delay deduction.¹⁶² Justice Stynes held that properly understood the payment claim was a claim for work done that remains unpaid and that against that claim the head contractor asserted an entitlement to the delay deduction.¹⁶³ This case does not assist JG King as there is no dispute between the parties that JG King provided retention moneys under the Contracts. Upon practical completion it had also made a claim for the release and return of 50% of the retention moneys and they were released and returned to it. In the present case, properly understood, the Payment Claims are claims for the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts. JG King also submitted that it "... was required to include within its final payment claim all claims for payments due to it".¹⁶⁴ I accept this submission but this does not mean that the Payment Claims are best viewed as balancing claims for the whole contract sum less

¹⁵⁸ Annotated List of Issues [1] 3.

¹⁵⁹ *Ibid.*

¹⁶⁰ Hunters Green's submissions [33].

¹⁶¹ Annotated List of Issues [1] 3.

¹⁶² *Goldwind* (n 79) [76] (Stynes J).

¹⁶³ *Ibid* [81] (Stynes J).

¹⁶⁴ JG King's submissions [23] (emphasis added).

amounts paid to date. I address later in this judgment the issue of whether the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts were, in fact, due to it, as at the 'reference date' under the Act.¹⁶⁵

91 Finally, I do not accept Hunters Green's submission that if retention moneys relate to construction work this may give rise to "some fairly bizarre results"¹⁶⁶. The concerns of Hunters Green do not arise in the present circumstances. This is because the Payment Claims concern unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts. This means, for example, that if Hunters Green has recourse to all or part of the retention moneys pursuant to clause 5.2 of the Contracts, the retention moneys to be released and returned by Hunters Green to JG King pursuant to clause 5.4 of the Contracts would be accordingly reduced.

What consequences flow from the proper characterisation of the Payment Claims? Were the Payment Claims in relation to 'construction work' or 'related goods and services'?

The issues

92 The parties agreed that, upon a proper construction of the Act, a claim for a progress payment must be in relation to 'construction work' or 'related goods and services' within the meaning of the Act, to constitute a 'payment claim' for the purposes of s 14(1) of the Act.¹⁶⁷ I agree. This is because, inter alia, a payment claim under the Act must identify the construction work or related goods and services to which the progress payment relates.¹⁶⁸

93 The issue that arises is whether the Payment Claims relate to 'construction work' for the purpose of the Act.

¹⁶⁵ Judgment [141]-[144].

¹⁶⁶ Transcript of Proceedings 2 February 2023 (n 31) 43.1-43.5 (Mr Mason).

¹⁶⁷ Annotated List of Issues 1.

¹⁶⁸ Act s 14(2)(c).

Adjudicator's Determinations

94 The Adjudicator found that “the wider case law is supportive of the view that amounts that may relate to retentions can be claimed in a payment claim”.¹⁶⁹ The Adjudicator:

- (a) distinguished *Punton's Shoes* and *Foursquare v Chevron (Foursquare)*¹⁷⁰ on the basis that the claimant in those cases expressly claimed for the retention moneys and nothing else.¹⁷¹ The Adjudicator said that the observations of Digby J in *Punton's Shoes* were obiter and that Burchell JR in *Foursquare* had incorrectly disregarded case law in other states;¹⁷²
- (b) observed that Digby J's comments on the wider exclusion of retentions from payment claims under the Act in *Punton's Shoes* are also contradicted by Vickery J in *Gantley* in which Vickery J “stated that final payment claims could reasonable [sic] include amounts that relate to the return of retentions”.¹⁷³ The Adjudicator observed that Stynes J took a similar view to Vickery J in *Whitehorse Box Hill v Alliance CG (Whitehorse)*^{174;175} and
- (c) applied the decisions of Bond J in *EHome Construction Pty Ltd v GCB Constructions Pty Ltd (EHome)*¹⁷⁶ and of McDougall J in *John Goss Projects Pty Ltd v Leighton Contractors & Anor*^{177,178}

Hunters Green's submissions

95 Hunters Green submitted that since the Payment Claims are claims for retention moneys which Hunters Green holds by reason of the Contracts, the Payment Claims do not relate to ‘construction work’ which JG King carried out or ‘related goods and

¹⁶⁹ Stage 12 Determination [23]; Stage 13 Determination [23].

¹⁷⁰ *Foursquare Construction Management Pty Ltd v Chevron Corporation Pty Ltd* [2020] VCC 1928 (*Foursquare*).

¹⁷¹ Stage 12 Determination [16]-[18], [21]-[22]; Stage 13 Determination [16]-[18], [21]-[22].

¹⁷² Stage 12 Determination [21]-[22]; Stage 13 Determination [21]-[22].

¹⁷³ Stage 12 Determination [21]; Stage 13 Determination [21].

¹⁷⁴ *Whitehorse Box Hill Pty Ltd v Alliance CG Pty Ltd & Anor* [2022] VSC 22 (*Whitehorse*).

¹⁷⁵ Stage 12 Determination [21]; Stage 13 Determination [21].

¹⁷⁶ [2020] QSC 291 (*EHome*).

¹⁷⁷ (2006) 66 NSWLR 707.

¹⁷⁸ Stage 12 Determination [22]; Stage 13 Determination [22].

services' JG King supplied for the purposes of the Act.¹⁷⁹ On a proper construction of the Act, the Payment Claims do not engage the Act's processes.¹⁸⁰ As a result, it submitted that the Adjudicator's Determinations are affected by jurisdictional error as the Adjudicator disregarded this fact.

96 Hunters Green relied upon its submissions that the Payment Claims are for retention moneys and not a balancing of the account for the construction works.¹⁸¹ It submitted that retention moneys are held as a discrete fund and as a result of a set off under the Contracts and the Payment Claims sought to reverse that set off.

97 It then submitted that properly construed, the Act's arrangements are not directed towards enforcing a contractor's contractual entitlement to receive retention moneys provided as security for the proper performance of its work.¹⁸² That entitlement does not have the necessary quality of being a progress payment entitlement in relation to construction work or related goods and services.¹⁸³ It submitted that a contractual entitlement to have retention moneys released is not an entitlement under the Act to receive payment for the value of construction work carried out or related goods and services supplied.¹⁸⁴ It submitted that the Act expressly provides that the entitlement it creates to progress payments is in respect of construction work or related goods and services and referred to ss 1 and 9(1) of the Act in this context.¹⁸⁵ It submitted that the nexus between progress payments, on the one hand, and the construction work or related goods and services to which they relate, on the other, permeates the Act's arrangements.¹⁸⁶ It submitted that:¹⁸⁷

- (a) the Act applies to 'construction contracts' (s 7), subject to certain specified exceptions;

179 Annotated List of Issues [2] 4.
 180 Hunters Green's submissions [30].
 181 Annotated List of Issues [2] 4, 6, [3] 10.
 182 Hunters Green's submissions [13].
 183 Ibid.
 184 Ibid [29].
 185 Ibid [15].
 186 Ibid [16].
 187 Ibid [16]-[18].

- (b) a 'construction contract' means a contract or other arrangement under which one party "undertakes to carry out construction work, or to supply related goods and services, for another party" (s 4);
- (c) the terms 'construction work' and 'related goods and services', in relation to construction work, are exhaustively identified in ss 5 and 6 of the Act;
- (d) retention moneys are not identified amongst the exhaustive lists of items comprising construction work and related goods and services at ss 5 and 6 of the Act;
- (e) s 10 of the Act identifies the amount of a progress payment to which a person is entitled in respect of a construction contract; s 11(1) of the Act provides for the valuation of construction work carried out or undertaken to be carried out under a construction contract and s 11(2) of the Act provides for the valuation of related goods and services supplied or undertaken to be supplied under a construction contract.

98 It submitted that while the progressive withholding and release of retention moneys can inform the valuation of progress payments, it cannot confer retention moneys with the statutory label of 'construction work' or 'related goods and services'.

99 It submitted that the process of enforcing a contractor's interim entitlement to a progress payment under the Act is linked to the carrying out of construction work or the supply of related goods and services.¹⁸⁸ It submitted that:¹⁸⁹

- (a) the process is initiated by issuing a payment claim. The party issuing that claim must be, or must claim to be, entitled to a progress payment under s 9(1) of the Act;

¹⁸⁸ Ibid [20].

¹⁸⁹ Ibid.

- (b) a payment claim must identify the construction work or the related goods and services to which the payment claim relates (s 14(2)(c)); and
- (c) the Act's subsequent arrangements cannot apply in the absence of a valid payment claim.

100 It submitted that JG King's entitlement to receive the retention moneys cannot be conflated with its entitlement to receive payment for the construction work it performed as they are different entitlements.¹⁹⁰ They have a different character.¹⁹¹ It submitted that a contractual entitlement to have retention money released is not an entitlement under the Act to receive payment for the value of construction work carried out or related goods and services supplied.¹⁹²

101 It submitted that a claim for retention money is not a payment claim related to construction work or related goods and services for the purposes of the Act and relied upon a number of authorities, including *Punton's Shoes*, *Watpac* and *Foursquare*.¹⁹³

JG King's submissions

102 JG King submitted that the Payment Claims are valid even if the Court construes the Payment Claims to be strictly claims for the return of retention money.¹⁹⁴

103 It submitted that 'retention money' is not specifically described in sections 5 or 6 of the Act.¹⁹⁵ It submitted that those sections, concerning the definitions of 'construction work' and 'related goods and services' respectively, refer to physical aspects of the work and not valuation mechanisms.¹⁹⁶ It submitted that although retention money is not construction work or related goods and services itself it is an important part of the contractual machinery for valuing how much a claimant is

¹⁹⁰ Ibid [29].

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Annotated List of Issues [2] 4, 7.

¹⁹⁴ Ibid [2] 7.

¹⁹⁵ JG King's submissions [27].

¹⁹⁶ Annotated List of Issues [2] 7.

entitled to be paid for construction work and related goods and services at any point in time.¹⁹⁷ It submitted that the progressive withholding and release of retention money from or within progress payments as contractual security, where required by the contract, ought to be taken into account when valuing payment claims.¹⁹⁸ It submitted that it follows that if a claimant has become entitled to the return of cash retention that was previously withheld from older progress payments, it is entitled to use the machinery of the Act to seek to recover the cash retention and the payment claims served in respect of a subsequent reference date.¹⁹⁹ It submitted that the ability to claim 'retention money' under the Act is no different from the ability to claim preliminaries, profit, mobilisation/demobilisation or overheads, none of which are expressly mentioned in the Act.²⁰⁰

104 It submitted that the possibility of retention money in a claim under the Act:²⁰¹

- (a) is expressly mentioned in clause 9 of the Explanatory Memorandum to the Bill;
- (b) was accepted in considered dicta of Vickery J in *Gantley*;²⁰²
- (c) was accepted in considered dicta of Digby J in *Cat Protection Society v Arvio* (*Cat Protection Society*);²⁰³
- (d) was accepted without comment in *Levi v Z&H Building Development*,²⁰⁴ *Whitehorse*,²⁰⁵ *Citi-Con (Vic) Pty Ltd v Trojan Built Pty Ltd*,²⁰⁶ and *Maxcon Constructions Pty Ltd v Vadasz* (*Maxcon*);²⁰⁷

197 JG King's submissions [27].

198 Ibid.

199 Ibid [28].

200 Annotated List of Issues [2] 7.

201 JG King's submissions [29]-[35]; Annotated List of Issues [2] 7-9.

202 See *Gantley* (n 70) [187] (Vickery J).

203 See *Cat Protection Society v Arvio* [2018] VSC 757 [51] (Digby J) ('*Cat Protection Society*').

204 See [2019] VSC 633 [92]-[96] (Digby J).

205 See *Whitehorse* (n 174) [74] (Stynes J).

206 See [2020] VSC 557 [59]-[60] (Stynes J).

207 See (2018) 264 CLR 46.

- (e) was expressly accepted by judges in the County Court in *Zulin Formwork Pty Ltd v Valeo Construction Pty Ltd*,²⁰⁸ and *Cool Logic Pty Ltd v Citi-Con (Vic) Pty Ltd (Cool Logic)*;²⁰⁹
- (f) was expressly accepted in the New South Wales decisions of *Vannella*,²¹⁰ *John Goss Projects Pty Ltd v Leighton Contractors & Anor*²¹¹ and in the Queensland decision of *EHome*.²¹² JG King submitted that the differences in the wording of the NSW Act and the Queensland Act are not material;
- (g) the High Court in *Maxcon* found that a clause permitting the respondent to withhold retention moneys was invalid as a 'pay when paid' clause as it was dependent on the completion of the head contract. It submitted that the fact that the High Court said nothing about the broader issue of whether retention money may be taken into account at all is tacit acceptance that the deduction of retention money would have otherwise been uncontroversial.

105 It submitted that Digby J's decision in *Punton's Shoes* stands for the proposition that the provisions of a contract which govern the return of security do not generate a standalone and independent 'reference date' for the purpose of the Act.²¹³ JG King submitted:²¹⁴

- (a) Digby J did not consider the broader proposition of whether a payment claim could seek payment for that part of the contract price previously withheld as retention moneys;
- (b) *Punton's Shoes* may be distinguished as the claimant in that case had not sought a balancing claim but rather sought to rely upon security provisions (equivalent to clause 5.4 in the Contracts) that provided a discrete reference

²⁰⁸ See [2019] VCC 936 [15] (Ryan J).

²⁰⁹ See [2020] VCC 1261 [84]-[88] (Woodward J) ('*Cool Logic*').

²¹⁰ See *Vannella* (n 153) [119]-[130] (Henry J).

²¹¹ See (2006) 66 NSWLR 707 [38] (McDougall J).

²¹² See *EHome* (n 176) 6 (Bond J).

²¹³ Annotated List of Issues [2] 8.

²¹⁴ *Ibid* [2] 8-9; JG King's submissions [33]-[35].

date and valuation mechanism separate from the progress payment mechanisms in the Contracts;

- (c) Digby J rightly held that what had been issued was not a payment claim and that this was so regardless of whether there was a reference date arising elsewhere under the contract;
- (d) Digby J was not asked to decide, and did not express an opinion, on whether a balancing claim properly issued under a final claim reference date could have the effect of recovering moneys previously withheld as retention moneys;
- (e) the comments of Digby J should not be taken to have departed from the many previous authorities on this issue, including the decision of Digby J in *Cat Protection Society* without making any mention of them whatsoever;
- (f) Digby J reached the same conclusion in *Watpac* on similar facts. It submitted that Burchell JR (as her Honour then was) in *Foursquare* found against the validity of a claim on the basis that it included retention money. It submitted that the decision was wrongly decided.

106 It submitted that the fact that the balance unpaid had previously been withheld as cash retention does not alter the character of the claim as one of payment for construction work and relied upon observations made by Stynes J in *Goldwind* at [75]-[76] and [81].²¹⁵ It submitted that the Payment Claims relate to the “entire body of work” completed to date.²¹⁶

Hunters Green's submissions in reply

107 Hunters Green submitted that JG King's reliance in this context on the decision of Stynes J in *Goldwind* is misplaced.²¹⁷ It submitted that that case involved several

²¹⁵ JG King's submissions [24].

²¹⁶ Annotated List of Issues [8] 22.

²¹⁷ Hunters Green's reply submissions [14].

payment claims that a subcontractor had submitted seeking payment for its work.²¹⁸ It submitted that the head contractor answered those claims with payment schedules which included in each case a 'delay deduction' on account of the subcontractor's delay.²¹⁹ It submitted that the head contractor contended on the judicial review of the adjudicator's determination that the subcontractor sought to recoup the delay deduction which was an excluded amount under s 10B of the Act, such that the adjudicator erred by taking it into account.²²⁰ Justice Stynes held that those considerations did not arise as the subcontractor's claims did not seek to recoup the delay deduction, but instead were subsequent payment claims for unpaid work previously performed.²²¹ Hunters Green submitted that that reasoning does not apply to this case.²²²

108 It submitted that no consequence attaches to the application and output of the Act's interim payment arrangements not necessarily aligning with that of the Contracts' payment arrangements.²²³ It submitted that they are separate processes and produce separate rights and liabilities.²²⁴ It submitted that the Act operates without prejudice to the parties' contractual processes.²²⁵

109 It submitted that JG King's argument that payment claims for retention moneys attract the Act's consequences is misconceived.²²⁶ It submitted that retention moneys are not identified amongst the exhaustive list of items comprising construction work and related goods and services at ss 5 and 6 of the Act.²²⁷ It submitted that while progressive withholding and release of retention moneys can inform the valuation of

218 Ibid.
 219 Ibid.
 220 Ibid.
 221 Ibid [15].
 222 Ibid [16].
 223 Ibid [17].
 224 Ibid.
 225 Ibid.
 226 Ibid [18].
 227 Ibid [19].

progress payments, it cannot confer retention moneys with the statutory label of 'construction work' or 'related goods and services'.²²⁸

110 In relation to the authorities upon which JG King relies, Hunters Green submitted that JG King gives insufficient attention to the distinct features of the equivalent legislation in other jurisdictions and the particular issues before the courts in each case.²²⁹ For example, Hunters Green submitted that the NSW Act and the Queensland Act expressly countenance that payment claims may comprise claims for retention money.²³⁰ Hunters Green sought to distinguish the authorities relied upon by JG King.²³¹ It submitted that assistance is instead provided by the previous instances where this Court has analysed the very question again before it.²³² It submitted that when doing so, the Court concluded that claims for retention moneys do not engage the Act's arrangements because they are not in respect of construction work, and that such claims are not a claim "for the value of materials supplied and work done by the Contractor under this Contract".²³³

Analysis

111 I have concluded that the Payment Claims are for 'construction work' for the purposes of the Act.

112 This is because, as I have already said, the Payment Claims are claims for the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts.²³⁴

113 Upon a proper construction of the Act, a payment claim under the Act for unpaid amounts for construction work retained by a respondent as security in the form of retention moneys under a contract, is a payment claim for 'construction work' for the purposes of the Act. This is because in those circumstances:

228 Ibid.
 229 Ibid [20].
 230 Ibid [21].
 231 Ibid [25].
 232 Ibid [26].
 233 Ibid.
 234 Judgment [82]-[91].

- (a) there is a direct and obvious nexus between retention moneys and unpaid amounts for construction works;
- (b) retention moneys are not 'excluded amounts' in s 10B of the Act;
- (c) it is not relevant that 'retention moneys' are not listed in ss 5 or 6 of the Act. This is because those sections are limited to defining the actual 'construction work' and 'related goods and services'. Those sections do not identify what may be claimed in a payment claim;
- (d) this construction facilitates the main purpose of the Act. This is because such a construction provides for entitlements to final payments for persons who carry out construction work. This construction also facilitates the object of the Act. This is because such a construction ensures that any person who undertakes to carry out construction work under a construction contract is entitled to receive, and is able to recover, a progress payment in relation to the carrying out of that work. The calculation and/or valuation of the progress payment is governed by ss 10 and 11 of the Act and, as a result of ss 10(1)(a) and 11(1)(a) and (b) of the Act, is to be calculated and/or valued in accordance with the terms of the contract if the contract makes express provision with respect to these matters. The actual calculation of a payment claim under the Act that is for, or includes, unpaid amounts for construction work retained by a respondent as security in the form of retention moneys under a contract may be a nil amount;
- (e) a payment claim for unpaid amounts for construction work retained by a respondent as security in the form of retention moneys under a contract, may readily identify the construction work for the purposes of s 14(2)(c) of the Act;
- (f) a payment claim under the Act for unpaid amounts for construction work retained by a respondent as security in the form of retention moneys under a contract, may readily identify the amount a claimant claims to be due for the purposes of s 14(2)(d) of the Act. Section 14(2)(d) of the Act provides that a

payment claim “must indicate the amount of the progress payment that the claimant claims to be due” (emphasis added).

114 There have been a number of decisions in which judges have recognised the direct and obvious nexus between retention moneys and construction work and have also recognised that a payment claim for retention money may be made under the Act (or the equivalent legislation in other jurisdictions).

115 In *Gantley*, Vickery J said, in obiter, that a payment claim under the Act may include “retention monies due under the security arrangements provided for under the contract”.²³⁵

116 In *Cat Protection Society*, Digby J considered payment claims under the Act in the context of provisions for the contractor to make progress claims for the value of construction work (i.e. clause 25.1(a)) and a claim upon practical completion for the unpaid balance (clause 25.1(c)). Digby J in obiter stated:²³⁶

51 This entitlement arises as a result of cl 25.1(c) obliging the proprietor to pay the contractor the unpaid balance of the Contract price upon Practical Completion, and by operation of cl 26.4 which also obliges the specific payment of one half of the Retention Fund to the contractor shortly after Practical Completion. Such a claim would, when able to be made, be supported by s 9(2)(a)(ii) of the SOP Act which establishes a reference date in respect of a date by reference to which the amount of a progress payment is to be calculated. The occurrence of practical completion is such a date pursuant to cl 25.1(c) of the Contract, and a payment made by the Proprietor thereunder is a progress payment as defined by cl 4 of the SOP Act, and thereby any Contractor’s claim for payment under cl 25.1(c) is a progress payment claim under that specific clause.

117 In *Cool Logic*, Woodward J in the County Court of Victoria (as he then was) considered whether there should be judgment in favour of a plaintiff who had made a payment claim under the Act. The payment claim included a claim for retention

²³⁵ *Gantley* (n 70) [187] (Vickery J).

²³⁶ *Cat Protection Society* (n 203) [51] (Digby J) (emphasis added).

moneys.²³⁷ Woodward J considered whether a payment claim for retention moneys is a claim for 'construction work' under the Act and said in obiter:²³⁸

88 As a general observation, it seems to me surprising that a claim for retention moneys (providing that it meets the other statutory requirements) would not generally be treated as relating to construction work given that, almost by definition, it is retained from sums otherwise due for that work...

118 In *Whitehorse*, Stynes J considered a claim for judicial review of a determination of an adjudicator by a recipient of a final payment claim under the Act that included, inter alia, a claim for retention moneys. Stynes J said:²³⁹

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.

119 In *EHome*, Bond J considered a payment claim under the Queensland Act that claimed for all work that had been carried out by the claimant less amounts previously paid. Section 68(2)(b) of the Queensland Act expressly provides, and did at the relevant time of the decision in that case, that an amount claimed in a payment claim may include an amount that is held under the construction contract by the respondent and that the claimant claims is due for release. Bond J referred to the requirements for a payment claim in s 68(1) of the Queensland Act and said:²⁴⁰

Payment claim is a term defined in s 68 which provides that:

A payment claim, for a progress payment, is a written document that –

- (a) *identifies the construction work or related goods and services to which the progress payment relates; and*
- (b) *states the amount (the **claimed amount**) of the progress payment that the claimant claims is payable by the respondent; and*

²³⁷ *Cool Logic* (n 209) [9] (Woodward J).

²³⁸ *Ibid* [88] (Woodward J).

²³⁹ *Whitehorse* (n 174) [72] (Stynes J) (citations omitted) (emphasis added).

²⁴⁰ *EHome* (n 176) 6 (Bond J) (emphasis added).

- (c) requests payment of the claimed amount; and
- (d) includes the other information prescribed by regulation.

Payment claim 15 fell within that definition. The only reason suggested to justify the conclusion that it would not fall within that definition was that it claimed, in effect, return of retention monies because of the way that it calculated the claim. The notion is that it is not a claim “for” construction work. That argument seems to me to be flawed. The claim expressed in the way that it was, as I have already described, was a claim for payment for construction work. Retention amounts were amounts that had been deducted from the value of construction work already completed. So a claim expressed as this one was simply cannot be characterised as other than a payment claim within the meaning of this Act.

120 In *S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd (S.H.A. Premier Constructions)*,²⁴¹ Bond J considered final payment claims under the Queensland Act. Bond J found that the contract did not provide for the calculation of the final payment claim calculated from the date of termination of the contract or the valuation of such a claim.²⁴² The contract had been terminated so no final payment claim was able to be made pursuant to the terms of the contract. The final reference date was the date the contract was terminated, as provided by s 67(2) of the Queensland Act. Bond J stated:²⁴³

66 In my view, the criticisms which SHA made of the adjudicator cannot be accepted. It was evident from his reasoning that he had performed his task in the manner contemplated by the Act. He appreciated that the contract did not give a right to recover the value of the retention sums. He reasoned that once Niclin had established a right to make a final payment claim, the provisions of the Act were such that the final payment claim could be calculated in such a way that permitted an effective recovery of retentions (or, using his words, having completed the works and defects, Niclin was “entitled to include the release of the cash retention in the amount [Niclin] says is payable”). That was so because of the nature of a final payment claim, and of cash retentions (which represent a withholding of payment from the value of work which has already been completed).

...

73 In the present case, Niclin presented its payment claim in a way which demonstrated that, insofar as its claim sought return of the retentions, that was because its payment claim was based upon the value of all

²⁴¹ [2020] QSC 307 (*S.H.A. Premier Constructions*’).

²⁴² *Ibid* [72] (Bond J).

²⁴³ *Ibid* [66], [73] (Bond J) (emphasis added).

work done including variations less previous payments, and that value necessitated payment of retentions which had previously been withheld from the value of work done...

121 Section 71 of the Queensland Act provided:

The amount of a progress payment to which a person is entitled under a construction contract is –

- (a) if the contract provides for the matter – the amount calculated in accordance with the contract; or
- (b) if the contract does not provide for the matter – the amount calculated on the basis of the value of construction work carried out, or related goods and services supplied, by the person in accordance with the contract.

122 In consideration of s 71(b) of the Queensland Act, Bond J in *S.H.A. Premier Constructions* stated:²⁴⁴

75 A similar proposition applies in relation to the final payment claim, which the Act authorises to be made when a contract has been terminated, and even though the fact of the termination means that there can never be a final payment claim advanced pursuant to the contract. In the present case, it does not matter that the amount which represents the retentions withheld under the contract cannot be said to be an amount which has yet accrued due and payable under the contract. The contractor has a statutory entitlement to a final payment claim, calculated under s 71(b) and valued under s 72(1)(b). If the adjudicator values that claim in accordance with the provisions of the Act, the effect of that valuation may well be to enable the claimant to be paid an amount of money which includes the value of cash retentions withheld from work already done (and even though under the contract there was no accrued right to the return of cash retentions), but that seems to me to be made permissible by the terms of the Act.

123 The observations of Bond J in *EHome* and *S.H.A. Premier Constructions* set out at [119] and [120] above are not based upon s 68(2)(b) of the Queensland Act. They are based upon the nexus between retention moneys and unpaid amounts for construction works.

124 Finally, Hunters Green relied upon decisions of Digby J in *Punton's Shoes* and *Watpac* and a decision of Burchell JR (as she then was) in *Foursquare*.²⁴⁵

²⁴⁴ Ibid [75] (Bond J).

125 In *Punton's Shoes*, Digby J considered a payment claim for 50% of the retention moneys after practical completion. Digby J said:²⁴⁶

109 By this agreed contractual mechanism a discrete fund in the nature of retention moneys was established and accumulated to ensure due and proper performance of the Contract by the Contractor.

110 Under the scheme of the Contract the retention moneys progressively deducted formed a separate and distinct security fund to ensure performance by the Contractor. The separate and distinct character of the contractual security fund created by the deduction of retention moneys is apparent from the terms and operation of cls 5.1, 5.2, 5.5, 5.6 and 42.8 of the Contract which establish the purpose of that security fund, the contractual mechanism for its accumulation and reduction and the bases upon which recourse may be had to that security fund by the Principal. The Contract makes no provision for a claim in respect of, or for payment to the Contractor in relation to the security fund. Accordingly, any implied right or entitlement there may be in the Contractor to return of a portion of retention moneys is different in character and distinct from either a claim under the Contract for the value of work carried out or an entitlement under the SoP Act for the value of construction work carried out and related goods and services.

111 In distinction to a payment claim entitlement, the Contract does provide a mechanism to adjust the parties' entitlements in relation to moneys deducted by way of retention. Any sum held by way of retention is to taken into account in the Final certification process under cl 42.6 of the Contract and thereby accounted for in the amount ultimately payable as between the Contractor and the Principal on the final reconciliation of each parties entitlements under the Contract. The retention deduction, reduction, recourse and security related provisions of the Contract do not contemplate or accommodate payment claims by the Contractor for contract work undertaken or related goods and services supplied.

112 For the above reasons, and in particular because the Contract, including the progress payment provisions in cl 42.1 of the Contract make no provision for the return or payment of retention moneys, any implied entitlement to return of retention moneys upon the issue of the Certificate of Practical Completion under the Contract, or adjustment under cl 42.6, is not in the nature of a progress payment entitlement in relation to work carried out by the Contractor in the performance of the Contract.

113 Neither, for the same above reasons, is the first defendant's September 2019 Payment Claim under the Contract for return or payment of half retention moneys in the nature of a payment claim under the SoP Act for construction work or related goods and services undertaken and

²⁴⁵ Hunters Green's reply submissions [26]. See also Annotated List of Issues [2] 7, [3] 11-12.

²⁴⁶ *Punton's Shoes* (n 35) [109]-[114] (Digby J) (citations omitted).

provided under the Contract. This is so irrespective of whether the first defendant was able to establish a valid reference date, and any implied or other foundation for its claim to be paid half the deducted retention moneys.

114 Further, it follows from the conclusions in the last three preceding paragraphs that there can also be no relevant reference date under s 9 the SoP Act because a relevant reference date under the Act is determined on the basis of a progress payment entitlement in respect of construction work undertaken or the supply of related goods and services under the construction contract. The September 2019 Payment Claim does not make a claim for an entitlement of this type.

126 JG King submitted that Digby J's observations in *Punton's Shoes* are limited to matters concerning a 'reference date'.²⁴⁷ I do not accept this submission. This is because it is clear from his Honour's reasons at [113] that his observations were not so confined: "... [t]his is so irrespective of whether the first defendant was able to establish a valid reference date, and any implied or other foundation for its claim to be paid half the deducted retention moneys". His Honour found:²⁴⁸

- (a) the security provisions of the contract do not contemplate or accommodate payment claims by the contractor for contract work undertaken or related goods and services supplied; and
- (b) the progress payment provisions make no provision for the return or payment of retention moneys.

127 The critical element of his Honour's reasoning was that the contract in *Punton's Shoes* made no provision for a progress payment for the return or payment of retention moneys and, as a result, any implied entitlement to return of the retention moneys was not in the nature of a progress payment entitlement in relation to work carried out by the contractor in performance of the contract.²⁴⁹

128 In *Watpac*, Digby J considered, inter alia, an application for summary judgment on a cross-claim by a defendant who had made payment claims under two separate

²⁴⁷ Annotated List of Issues [2] 8; JG King's submissions [33].

²⁴⁸ *Punton's Shoes* (n 35) [111]-[112] (Digby J).

²⁴⁹ *Ibid* [112] (Digby J).

contracts under the Act. The payment claims claimed the remaining 50% of the retention moneys under those contracts.²⁵⁰ The issue in dispute between the parties was whether the payment claims were made pursuant to a 'reference date' for the purposes of the Act. The first defendant submitted that it was entitled to make a claim for return of retention pursuant to clause 5.6, read together with Schedule 1, of the contracts and s 9 of the Act.²⁵¹ The plaintiff submitted that no relevant reference date existed in relation to the payment claims.²⁵² The case did not concern a final payment claim that was expressly provided for by the contract. Digby J held that, assuming that the first defendant's payment claims for the release and return of the security came within the Act (which he stated they did not), no reference date arose pursuant to clause 5.6, read together with Schedule 1, of the contracts and s 9 of the Act.²⁵³ Digby J also separately held:²⁵⁴

179 Further, in my view the 18 March 2019 Payment Claims are not valid claims for progress payment under the SoP Act.

180 I consider that the first defendant's Payment Claims are claims which do not come within the scope of the SoP Act because the claims made by the first defendant in its 18 March 2019 Payment Claims are not claims in relation to construction work or related supply of goods and services undertaken under the Contracts, but rather are claims in each case for reduction of security pursuant to cl 5.6 of the Contracts.

181 Consequently I am satisfied that, for this further reason, that no reference date was available under the SoP Act to found the first defendant's Payment Claims as required by s 9 of the SoP Act.

129 Digby J cited his decision in *Punton's Shoes* at [75]-[85] and [94]-[114] in support.²⁵⁵ Similarly in *Watpac*, Digby J held:²⁵⁶

186 On the proper construction of the first defendant's Payment Claims and the SoP Act, in particular ss 9(1) and 14(2)(c), I consider, for the reasons earlier outlined, that the first defendant's Payment Claims are non-compliant with, and do not fall within the SoP Act, as generally argued by the plaintiff, because the Payment Claims do not claim

²⁵⁰ *Watpac* (n 88) [134] (Digby J).

²⁵¹ *Ibid* [144] (Digby J).

²⁵² *Ibid* [149]-[153] (Digby J).

²⁵³ *Ibid* [171]-[172] (Digby J).

²⁵⁴ *Ibid* [179]-[181] (Digby J) (citations omitted).

²⁵⁵ *Ibid* [180] (Digby J). See also *Cat Protection Society* (n 203) [64] (Vickery J).

²⁵⁶ *Watpac* (n 88) [186] (Digby J) (citations omitted).

progress payment entitlements in relation to construction work or the supply of related goods and services as required by the SoP Act, including in ss 9(1), 10(1) and 14(2)(c) of the Act.

130 Digby J's findings, in *Watpac*, that the first defendant's payment claims were not claims in relation to construction work or related supply of goods and services undertaken under the contracts were separate to, and not dependent upon, the issues concerning the matters relied upon by the first defendant to constitute a 'reference date'. This is clear from his Honour's observations at [171], [179]-[181] and [186]. His Honour's observations concerned retention moneys and that they are not claims in relation to construction work or related goods and services as required by, inter alia, ss 9(1) and 14(2)(c) of the Act.

131 In *Foursquare*, Burchell JR said:²⁵⁷

... the claim for return of retention monies was not a claim for construction work as defined by s5 of the Act.

132 Burchell JR found that she was bound to follow the decision of Digby J in *Punton's Shoes*.²⁵⁸ Burchell JR stated:²⁵⁹

54 Applying the relevant authorities, the purpose of retention moneys is to provide security for defective work; it is not to compensate a person for construction work. Therefore, a claim for retention moneys does not facilitate the purpose of the [Act] regime, namely to compensate persons who have undertaken to carry out construction work under the contract or to supply related goods and services under the contract (s 9(1)).

133 Burchell JR also stated that, "[o]n a literal construction, retention moneys 'relate to the construction work'," but followed the observations of Digby J in *Punton's Shoes* that retention moneys are a "separate and distinct security fund".²⁶⁰

134 I refer earlier in this judgment to the separate and distinct nature of the retention moneys as security.²⁶¹ The Contracts make provision for the release and return of the

²⁵⁷ *Foursquare* (n 170) [57] (Burchell JR).

²⁵⁸ *Ibid* [53] (Burchell JR).

²⁵⁹ *Ibid* [54] (Burchell JR).

²⁶⁰ *Ibid* [56] (Burchell JR).

²⁶¹ Judgment [19].

final 50% of the retention moneys within 14 days of the issue of a final certificate upon a final payment claim under clause 37.4 of the Contracts.²⁶² JG King had no contractual entitlement to the retention money as part of its entitlement to a final payment under clause 37.4 of the Contracts.²⁶³ I do not accept, however, Hunters Green's submissions that, as a result of these matters, "... JG King's entitlement to receive the retention moneys cannot be conflated with its entitlement to receive payment for the construction work it performed."²⁶⁴ Similarly, I do not accept Hunters Green's submission that JG King's entitlement to receive the retention moneys is not an entitlement under the Act to receive payment for the value of construction work.²⁶⁵ This is because, as I have already said, there is a direct and obvious relationship between the unpaid amounts for the construction work and the amounts held by Hunters Green as security in the form of retention moneys under the Contracts. The absence of a contractual entitlement of JG King to make a claim for the retention money as part of its claim for a final payment under clause 37.4 of the Contracts does not mean that the Payment Claims are not for construction work. The absence of such a contractual entitlement does not alter the nature of the Payment Claims as claims for the unpaid amount for construction work retained by Hunters Green as security in the form of retention moneys under the Contracts. In *Punton's Shoes and Watpac*, Digby J expressed a contrary view.²⁶⁶ For the reasons I have just given, I do not agree, with respect, with Digby J on this matter. The absence of such contractual entitlement is relevant, in the present case, to the calculation of the payment claim under the Act. I address that issue later in this judgment.²⁶⁷

135 In conclusion, in my view, for the reasons I have just addressed in this judgment, the Payment Claims are for 'construction work' within the meaning of the Act.

²⁶² Ibid [207]-[218].

²⁶³ Ibid.

²⁶⁴ Hunters Green's submissions [29].

²⁶⁵ Ibid.

²⁶⁶ *Punton's Shoes* (n 35) [110], [112] (Digby J).

²⁶⁷ Judgment [207]-[218].

Were the Payment Claims made in respect of a reference date for the purposes of the Act?

Adjudicator's Determinations

136 The Adjudicator determined that the Payment Claims were made pursuant to clause 37.4 of the Contracts and, as a result, were made in relation to a 'reference date' for the purpose the Act.²⁶⁸

Hunters Green's submissions

137 Hunters Green submitted that as the Payment Claims do not relate to construction work or related goods and services it supplied, no reference date arose to which the Payment Claims can attach.²⁶⁹

138 It subsequently submitted that "... the temporal requirement of a reference date was satisfied in this case".²⁷⁰ During the hearing Hunters Green also submitted:²⁷¹

I agree, there's no dispute that there is a reference date, and that in this case comes from paragraph (d), s9 sub-s.2(d), because we're in the case of a final payment. And it says there, 'if the contract makes no express provision with respect to the matter at the date immediately following those things'. So, it's contemplating that if the contract expressly provides for a final payment, then that is a reference date for the purposes of the statute. And that's how the statute is engaged in this case.

139 Hunters Green subsequently sought to put these submissions into further context. It submitted:²⁷²

That passage of transcript was directed towards assisting the Court to address an issue the Court had raised regarding the application of s 9(2)(a) and the requirement under that provision that a reference date be in relation to a 'specific item' of construction work carried out or a 'specific item' of related goods and services supplied. [Hunters Green] made express submissions regarding Grounds 2 and 6, which kept those grounds open.

JG King's submissions

140 JG King submitted that in the present case, clause 37.4 of the Contracts provided for an entitlement to make a payment claim "[w]ithin 28 days after the expiry of the last

²⁶⁸ Stage 12 Determination [50]-[53], [55]-[58]; Stage 13 Determination [46]-[49], [51]-[54].

²⁶⁹ Hunters Green's submissions [31].

²⁷⁰ Hunters Green's reply submissions [8].

²⁷¹ Transcript of Proceedings 9 February 2023 (n 152) 184.10-184.19 (Mr Mason).

²⁷² Annotated List of Issues [4] 12.

defects liability period and the satisfaction of all of the Contractor's obligations under the Contract".²⁷³ It submitted that there was no dispute that this precondition was satisfied and that it follows that a reference date existed and JG King is entitled to issue the Payment Claims.²⁷⁴ It submitted that Hunters Green admitted that there was a reference date albeit that it arose pursuant to s 9(2)(d) of the Act.

Analysis

141 I have concluded that the Payment Claims were made in relation to a 'reference date' within the meaning of s 9(2)(a)(i) of the Act. This is because the Payment Claims were made on a date determined by the terms of the Contracts as a date on which a claim for a progress payment may be made in relation to a specific item of construction work carried out or a specific item of related goods and services supplied under the Contracts.²⁷⁵

142 First, the Contracts provide for a final payment claim to be made (clause 37.1, Item 33 of Part A and clause 37.4). The Payment Claims are expressly stated to be 'final payment claims'. The Contracts provide for a final payment claim to be a 'progress claim' together with all other claims whatsoever in connection with the subject of the Contracts (clause 37.4). As a progress claim it must include the value of 'WUC' done (i.e. work under contract) and, inter alia, details of other moneys then due to JG King pursuant to the provisions of the Contracts (clause 37.1). Hunters Green accepted that JG King was entitled to make a final payment claim.²⁷⁶ That is, it did not dispute that the Payment Claims were made "[w]ithin 28 days after the expiry of the last defects liability period and the satisfaction of all of [JG King's] obligations under the Contract...".²⁷⁷ I otherwise refer to the matters I have addressed in this judgment concerning the nature of the proper characterisation of the Payment Claims.²⁷⁸

²⁷³ JG King's submissions [10].

²⁷⁴ Ibid.

²⁷⁵ See Act s 9(2)(a)(i).

²⁷⁶ Transcript of Proceedings 2 February 2023 (n 31) 50.17-50.21 (Mr Mason).

²⁷⁷ See Contracts cl 37.4.

²⁷⁸ Judgment [82]-[91].

143 Secondly, clause 37.7(a) of the Contracts provides that “the time prescribed in clause 37.2 for the Superintendent to receive a progress claim is the ‘reference date’ within the meaning and for the purposes of the [Act]”. In my view, the reference to ‘clause 37.2’ is obviously a typographical error and should be a reference to clause 37.1 of the Contracts. This is because clause 37.2 of the Contracts does not prescribe the time for the Superintendent to receive a progress claim. It is clause 37.1 of the Contracts that prescribes such a time for all progress claims, including a final payment claim. Hunters Green submitted that the reference in clause 37.7(a) of the Contracts to ‘clause 37.2’ might be a ‘cross-referencing error’.²⁷⁹

144 Finally, I otherwise refer to the matters I have addressed earlier in this judgment that the Payment Claims are for construction work for the purposes of the Act.²⁸⁰

Accordingly, were the Payment Claims ‘payment claims’ for the purposes of s 14(1) of the Act? What is the effect of the Adjudicator’s Determinations in respect of the Payment Claims, if any?

145 I have found that the Payment Claims are in relation to ‘construction work’ and were made in relation to a ‘reference date’. As a result, the Payment Claims are ‘payment claims’ for the purposes of s 14(1) of the Act. It is not necessary for me to consider the effect of the Adjudicator’s Determinations if the Payments Claims are not ‘payment claims’ for the purposes of s 14(1) of the Act.

146 Accordingly, Grounds 1 (Stage 12), 2 (Stage 12), 5 (Stage 13) and 6 (Stage 13) must be dismissed.

²⁷⁹ Transcript of Proceedings 9 February 2023 (n 152) 183.2-183.6 (Mr Mason).

²⁸⁰ Judgment [111]-[135].

GROUND 3 (STAGE 12) AND 7 (STAGE 13): DO THE PAYMENT CLAIMS 'IDENTIFY THE CONSTRUCTION WORK OR RELATED GOODS AND SERVICES' TO WHICH THE PAYMENT CLAIMS RELATE WITHIN THE MEANING OF SECTION 14(2)(c) OF THE ACT?

The issues

147 Section 14(2)(c) of the Act provides that a payment claim must identify the construction work or related goods and services to which the progress payment relates.

148 The Payment Claims, inter alia, identified:

- (a) the value of the completed construction work, including variations, by 'trade breakdown', including the total value;
- (b) the total amount paid by Hunters Green; and
- (c) the claim being the difference between the value of the completed construction work, including variations, and the total amount paid by Hunters Green.

149 As a result, the following issues arise for determination:

- (a) Do Grounds 3 (Stage 12) and 7 (Stage 13) arise for determination only if the Court finds that the Payment Claims are in respect of 'construction work' or 'related goods and services' within the meaning of the Act?
- (b) If Grounds 3 (Stage 12) and 7 (Stage 13) arise for determination, did the Payment Claims sufficiently identify the 'construction work' or 'related goods and services' to which they relate for the purposes of s 14(2)(c) of the Act?
- (c) Accordingly, were the Payment Claims 'payment claims' for the purposes of s 14(1) of the Act? What is the effect of the Adjudicator's Determinations in respect of the Payment Claims, if any?

Do Grounds 3 (Stage 12) and 7 (Stage 13) arise for determination only if the Court finds that the Payment Claims are in respect of ‘construction work’ or ‘related goods and services’ within the meaning of the Act?

150 It was common ground between the parties that Grounds 3 (Stage 12) and 7 (Stage 13) arise for determination only if the Court finds that the Payment Claims are in respect of ‘construction work’ and/or ‘related goods and services’ within the meaning of the Act.²⁸¹ I agree, for the reason that if the Court finds that the Payment Claims are not in respect of ‘construction work’ or ‘related goods and services’ within the meaning of the Act, then they are not ‘payment claims’ within the meaning of s 14(1) of the Act and therefore do not engage the Act’s processes.

151 I have found that Hunters Green did not succeed on Grounds 1 (Stage 12), 2 (Stage 3), 5 (Stage 12) and 6 (Stage 13). Accordingly, Grounds 3 (Stage 12) and 7 (Stage 13) arise for determination.

If Grounds 3 (Stage 12) and 7 (Stage 13) arise for determination, did the Payment Claims sufficiently identify the ‘construction work’ or ‘related goods and services’ to which they relate for the purposes of s 14(2)(c) of the Act?

Adjudicator’s Determinations

152 The Adjudicator concluded that the proper context of the Payment Claims is all of the construction work performed up until the reference date in August 2022.²⁸² The Adjudicator found that JG King set out in the Payment Claims the different components of the claim and the claimed amount with sufficient clarity.²⁸³ The Adjudicator concluded that JG King identified the relevant construction work and the amount of the claim in compliance with ss 14(2)(c) and (d) of the Act.²⁸⁴

153 The Adjudicator noted the absence of any submissions to the contrary from Hunters Green concerning compliance with ss 14(2)(c) and (d) of the Act.²⁸⁵ Hunters Green

²⁸¹ Hunters Green’s submissions [37]; Annotated List of Issues [7] 18.

²⁸² Stage 12 Determination [10]; Stage 13 Determination [10].

²⁸³ Stage 12 Determination [12]; Stage 13 Determination [12].

²⁸⁴ Ibid.

²⁸⁵ Ibid.

submitted to the Adjudicator that the Payment Claims concerned retention moneys.

It submitted:²⁸⁶

8.2.7 The Payment Claim is clearly a claim for retention monies only, as:

- (a) the Payment Claim is for \$105,407.87 (excluding GST) and the remaining retention monies held by Hunters Green in respect of the Contract is \$105,407.88 (excluding GST), being 2.5% of the Contract Sum (as the first half of the retention monies was returned following Practical Completion); and, further
- (b) there is no further amount of the Contract Sum yet to be claimed and paid to the Contractor as:
 - (i) the Contract Sum (in respect of non-variation works only) is \$4,216,313.10 (excluding GST);
 - (ii) by the amounts claimed by the Contractor up to and including the previous payment claim made at Practical Completion, the Contractor claimed the full amount of the Contract Sum (excluding any variation works);
 - (iii) that amount was certified and paid by Hunters Green in the progress certificate issued in response to the previous payment claim made at Practical Completion, with \$105,407.87 (excluding GST) withheld as net retention monies as at that time,

and therefore the amount claimed in the Payment Claim cannot be in respect of any uncertified / unpaid amount of the Contract Sum (as there is no uncertified / unpaid amount of the Contract Sum), but rather must be the remaining retention monies withheld.

Hunters Green's submissions

154 Hunters Green submitted that the Payment Claims did not identify the construction work or related goods and services to which they purportedly relate.²⁸⁷ It submitted that the Payment Claims failed to satisfy the requirement of s 14(2)(c) of the Act, and, as a result, they did not engage the Act's requirements.²⁸⁸ It submitted that this is an essential precondition to a valid payment claim.²⁸⁹ As a result, it submitted that the Adjudicator committed jurisdictional error by making a determination in respect of

²⁸⁶ Exhibit NJM-1 to the Miller affidavit 513 [8.2.7], 554 [8.2.7] (citations omitted).

²⁸⁷ Hunters Green's submissions [47].

²⁸⁸ Ibid.

²⁸⁹ Ibid [38].

the Payment Claims which did not satisfy the requirements of s 14(2) of the Act.²⁹⁰ It submitted that the Payments Claims do not identify the construction work or related goods and services to which the Payment Claims relate for the purposes of s 14(2)(c) of the Act as:

- (a) they merely provide a trade breakdown where every line item against which an amount is ascribed is identified as 100% complete;²⁹¹
- (b) they do not state that the amounts claimed are the retention moneys that Hunters Green holds;²⁹²
- (c) they do not state that the amounts claimed are the construction works to which the retention moneys relate;²⁹³ and
- (d) Hunters Green paid the claims for payment at practical completion and at that time all works were listed as 100% complete or as 0% complete as they were not applicable.²⁹⁴

155 Hunters Green also referred to the previous payment claims made upon practical completion and the invoices dated 3 and 8 July 2019, and accompanying documents, for Stages 12 and Stage 13. It submitted these invoices show the works as being 100% complete or not applicable and therefore 0% complete. It also submitted that these invoices show the “Balance to Contract Completion” as \$0.00.²⁹⁵ As a result, it submitted, “these payment claims do not identify the construction work to which they relate and therefore are not valid payment claims for the purposes of the Act”²⁹⁶ that is, they do not identify any additional construction work completed since the invoices dated 3 and 8 July 2019. It submitted that having regard to JG King’s previous claims for payment, which were paid in full subject to the deducted

²⁹⁰ Ibid [48].

²⁹¹ Ibid [44].

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Annotated List of Issues [8] 18.

²⁹⁵ Transcript of Proceedings 2 February 2023 (n 31) 61.30-61.31 (Mr Mason).

²⁹⁶ Ibid 58.9-58.12 (Mr Mason).

retention, the Payment Claims do not sufficiently identify the construction work or related goods and services to which they relate. It submitted that since the progress claims issued at practical completion were paid in full, a reasonable party in the position of Hunters Green has no way of ascertaining which line items are the subject of the amounts JG King claim in the Payment Claims.²⁹⁷

156 Hunters Green submitted that this failure to identify the construction work or related goods and services to which the Payment Claims relate is, in essence, a reflection on the nature of JG King's claims for retention moneys, which cannot be attributed to specific construction work or related goods and services.²⁹⁸ It submitted, as a result, a reasonable party in Hunters Green's position:

- (a) has no way of ascertaining which line items are the subject of the amount claimed in the Payment Claims;²⁹⁹
- (b) cannot ascertain the work to which the claim is said to relate;³⁰⁰
- (c) cannot make a suitably informed decision whether to pay the amount claimed or whether and how to respond with a payment schedule indicating the extent of any payment;³⁰¹ and
- (d) has no way of ascertaining which line items are the subject of the amounts JG King claims since the payment claims issued at practical completion were paid in full.³⁰²

JG King's submissions

157 JG King submitted that a final claim has a 'special role' and, as a result, it may have a lesser level of detail for the purposes of s 14(2)(c) of the Act than other claims under the Act.³⁰³ JG King submitted that it is the nature of a balancing claim for final

²⁹⁷ Annotated List of Issues [8] 18.

²⁹⁸ Hunters Green's reply submissions [28].

²⁹⁹ Hunters Green's submissions [45].

³⁰⁰ Ibid [46].

³⁰¹ Ibid.

³⁰² Annotated List of Issues [8] 18.

³⁰³ JG King's submissions on formulation of disputed questions [20].

payment under the Act that it will seek payment for the whole contract sum less amounts paid to date.

158 JG King submitted that the Payment Claims described themselves as final payment claims, they confirmed that the work was complete, and set out with sufficient clarity a calculation of the amount claimed referable to the contract sum and the amounts paid to date.³⁰⁴ It also submitted that where the work is 100% complete and a balancing claim is sought, it follows that the subject matter of the payment claim is the entire body of work done to date.³⁰⁵

159 It also submitted that the fact that the gap between what had been paid to date and what was now being claimed in the Payment Claims was equivalent to the amount of the retention was not “lost on the parties”.³⁰⁶ It submitted that the Payment Claims were “built off a deduction of the amount paid off the total amount of the work that had been performed”.³⁰⁷ It also relied upon the decision of Henry J in *Vannella*, in particular at [119]-[124], and submitted the exact same point raised by the defendants in that case concerning retention moneys was rejected by the court.³⁰⁸

Analysis

160 Pursuant to the identification requirement in s 14(2)(c) of the Act, the relevant construction work must be identified in a payment claim under the Act sufficiently to enable the recipient to understand the basis of the claim.³⁰⁹ There must be sufficient specificity in the payment claim for its recipient to be able to identify a ‘payment claim’ for the purposes of determining whether to pay, or to respond by way of a payment schedule indicating the extent of payment, if any.³¹⁰ A recipient must be in a position to determine whether to make payment or else dispute it with

³⁰⁴ Annotated List of Issues [8] 22.

³⁰⁵ Ibid.

³⁰⁶ Transcript of Proceedings 9 February 2023 (n 152) 131.7-131.11 (Mr Morrison).

³⁰⁷ Ibid 133.24-133.26 (Mr Morrison).

³⁰⁸ Annotated List of Issues [8] 23.

³⁰⁹ *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 [25] (Hodgson JA) concerning the equivalent identification requirement in the NSW Act.

³¹⁰ *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* [2005] NSWCA 409 [48] (Santow JA).

reasons so as to permit adjudication of the dispute.³¹¹ The identification requirement has been described as a 'relatively undemanding test'.³¹²

161 In *Gantley*, Vickery J said of the identification requirement in s 14(2)(c) of the Act:³¹³

51 What is necessary is an identification of the work which is sufficient to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is not an overly exacting exercise. It is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively, that is from the perspective of a reasonable party who is in the position of then recipient. In evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information.

162 In *Protectavale Pty Ltd v K2K Pty Ltd (Protectavale)*,³¹⁴ Finkelstein J said of the former identification requirement in s 14(3)(c) of the Act:³¹⁵

12 Nonetheless a payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim. If a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. That is to say, a payment claim must put the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule... That is not an unreasonable price to pay to obtain the benefits of the statute.

163 Justice Lyons in *John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd (John Beever)*³¹⁶ reviewed the recent authorities on the identification requirement in s 14(2)(c) of the Act and observed:³¹⁷

From my review of these authorities, many are of which are appellate authorities, the following principles are clear:

- (1) the test of whether a claim is a payment claim for the purpose of the Act is objective;

311 Ibid.

312 Ibid.

313 *Gantley* (n 70) [51] (Vickery J).

314 *Protectavale* n (82).

315 Ibid [12] (Finkelstein J) (citations omitted).

316 [2019] VSC 126 ('*John Beever*').

317 Ibid [83] (Lyons J).

- (2) however, the manner in which compliance is tested is not overly demanding and should not be approached in an unduly technical manner or from an unduly critical point of view;
- (3) for the purposes of the identification requirement, it is necessary that the payment claim reasonably identifies the construction work to which it relates such that the basis of the claim is reasonably comprehensible to the recipient party when considered objectively i.e. from the perspective of a reasonable party who is in the position of the recipient;
- (4) in evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties from their past dealings and prior exchanges of information including correspondence passing between them before and at the time of the payment claim. To that extent, the Court may go beyond the face of the document itself.

164 The parties each relied upon these observations of Lyons J in *John Beever*. Justice Lyons held that a number of the payment claims satisfied the identification requirement even though on the face of the payment claims they were not sufficient to identify the construction work to which the claims related.³¹⁸ This is because Lyons J found that the objective context and circumstance in which they were prepared, including previous emails exchanged between the parties, objectively made clear to the recipient (i.e. the defendant) the nature of the works which were the subject of the claim and the amount ultimately claimed by the claimant (i.e. the plaintiff) for those works.³¹⁹

165 In *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd (Façade Designs)*,³²⁰ Riordan J referred to *John Beever* but did not apply it. Justice Riordan set out a different test concerning the identification requirement:³²¹

40. 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

³¹⁸ Ibid [84]-[85] (Lyons J).

³¹⁹ Ibid [85]-[89] (Lyons J).

³²⁰ [2020] VSC 570 (*Façade Designs*’).

³²¹ Ibid [40]-[41] (Riordan J) (citations omitted). This was referred to with approval by Stynes J in *Whitehorse* (n 174) at [68].

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 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.

41. 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 'ordinarily ... 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.

166 In *Façade Designs*, the parties adduced extensive evidence during an 8 day trial relating to their subjective knowledge of employees, including whether employees understood or were able to calculate various claim items.³²²

167 It is also important to consider a number of the other cases relied upon by the parties:

- (a) in *Mackie Pty Ltd v Counahan & Anor (Mackie)*,³²³ Vickery J observed that a final payment claim under the Act may provide a final balancing of account. Justice Vickery considered a payment claim in which the value of the work was stated less four payments. His Honour said:³²⁴

87 The work to which this invoice relates is the balance of the work done to complete the project. The work earlier completed is identified in a general way by reference to the sums already paid which, by clear inference, are referable to work already done...

Justice Vickery held that the final payment claim related to the “balance of the work done to complete the project” and not to earlier completed work that had been paid. JG King relied upon the following observations made by Vickery J in *Mackie* to submit that a final claim has a ‘special role’:³²⁵

74 As far as the qualitative considerations embodied in s 14(2)(c), it is sufficient if the construction work (or related goods and services) to which a final payment claim relates is defined at least in the following manner:

- A statement (express or implied) that the claim is a final payment claim;

³²² Ibid [35] (Riordan J).

³²³ [2013] VSC 694.

³²⁴ Ibid [87] (Vickery J).

³²⁵ Ibid [74]-[75] (Vickery J).

- A statement (express or implied) that the works under the construction contract are complete; and
- A statement of account which sets out with sufficient clarity precisely what is claimed, and how the claim has been calculated or arrived at.

75 This may be contrasted with a payment claim made in respect of a progress payment, where it will be necessary to identify the construction work (or related goods and services) to which the progress claim relates, defined at least by reference to the item or items of work or categories of work done, and quantifying sufficiently the amount of work done for which payment is claimed, so as to differentiate the work claimed for from previous progress claims made (and from further progress claims to be made in the future) and enable valuation of the work to be undertaken by the respondent for the purposes of preparing a payment schedule pursuant to s 15 and by an adjudicator (if appointed) in undertaking a determination pursuant to s 23(1) of the Act.

His Honour confirmed that a final claim must set out with sufficient clarity precisely what is claimed and how the claim has been calculated or arrived at. I do not consider that Vickery J stated, in effect, that it is not necessary for a final payment claim to identify the construction work (or related goods and services) to which it relates. In the case of any payment claim under the Act, including a final payment, section 14(2)(c) of the Act specifically provides that a payment claim must identify the construction work or related goods and services to which the progress payment relates. No distinction is made in the Act between a final payment claim and a claim for other progress payments;

(b) in *S.H.A. Premier Constructions*, the claimant provided additional information in its payment claim under the heading 'SCHEDULE OF VALUES CLAIMED IN THIS PAYMENT CLAIM' that provided details of the particular amounts claimed.³²⁶ The claim for 'Contract Works' set out in this schedule was supported by a further schedule and retention moneys were separately identified, i.e. not under the heading 'Contract Works';³²⁷

³²⁶ *S.H.A. Premier Constructions* (n 241) [73] (Bond J).

³²⁷ *Ibid.*

- (c) in *Protectavale*, Finkelstein J observed that a final payment claim may be defined as a final balancing of account between contracting parties. Finkelstein J held that the final payment claim in that case did not identify the work previously completed and paid for and the work the subject of the final payment claim and, as a result, did not meet the identification requirements then set out in s 14(3) of the Act;³²⁸
- (d) in *Gantley*, Vickery J considered a payment claim calculated by taking the amount said to be the “value of the work completed and payment due to date under the contract (contract value)” and deducting an amount said to have been paid by the respondent.³²⁹ It was not a final payment claim. Justice Vickery nonetheless accepted that the payment claim was invalid as it did not identify the construction work or related goods and services. Justice Vickery said:³³⁰

117 In my opinion, the Gantley Payment Claim did not identify the work to which the claim for \$388,214 was said to relate for the purposes of s.14(3)(a). This claim did not satisfy the statutory requirement to identify the construction work to which the particular payment claim related. There is no breakdown or explanation of the work apart from a calculation which is referable to the "contract value" and "payments to date" and the other items claimed. It was thus impossible to determine the basis of the claim for \$388,214, and any reasonable party in the position of Gantley could not determine the composition of the claim. The claim lacked the necessary content to identify the work to which the progress payment related, indeed, in this respect, it lacked content completely.

118 To satisfy s.14, it was incumbent upon Phoenix to either identify the particular construction work the subject of the claim (if that was the position) or to state that the claim did not relate to construction work but was simply a contractual entitlement akin to a milestone payment. The omitted information was critical. Without it, Gantley could not value the work (if any) to which the claim related, make its own assessment of the amount payable and provide a payment schedule which, if the matter were to be disputed, would enable the dispute to be properly resolved by an adjudicator.

³²⁸ *Protectavale* (n 82) [10]-[15] (Finkelstein J).

³²⁹ *Gantley* (n 70) [54] (Vickery J).

³³⁰ *Ibid* [117]-[118] (Vickery J).

In my view the Gantley payment claim did not meet the requirement in s.14(3)(a).

- (e) in *Vannella*, Henry J considered a final payment claim in which the works were identified as being 100% complete. The payment claim specifically identified the unpaid portions of amounts previously claimed by the plaintiff in respect of the construction works.³³¹ As observed by Henry J:³³²

92 Further, table 3 to Progress Claim 10 identifies the date and value of each of Decon's nine previous progress claims and the date and value of each of the payments made by the defendants in response to those claims. These details enable the defendants to identify both the total amount that remains unpaid (being \$3,649,208.39 incl. GST), as well as the amounts in respect of each prior claim which remains unpaid (see column 7 of table 3).

Henry J held that although the relevant claim must include retention moneys as the plaintiff claimed 100% of the contract sum, only the amount of the progress payment must be indicated, not that release of retention moneys are claimed, or the amount of those moneys as a separate item;³³³

- (f) in *Whitehorse*, Stynes J considered a final payment claim that included a claim for the unpaid balance of the contract. The parties in that case accepted that the unpaid balance was adequately identified. Justice Stynes observed that the calculation of that sum and the works to which they related were set out in a spreadsheet;³³⁴
- (g) in *Jemzone v Trytan*,³³⁵ Austin J considered a payment claim. His Honour held that it did not comply with the identification requirements in s 13(2)(a) of the NSW Act that requires the payment claim to identify the construction work to which the progress payment relates. Justice Austin said:³³⁶

³³¹ *Vannella* (n 153) [18]-[22], [81]-[83] (Henry J).

³³² *Ibid* [92] (Henry J).

³³³ *Ibid* [123]-[125] (Henry J).

³³⁴ *Whitehorse* (n 174) [70] (Stynes J).

³³⁵ *Jemzone* (n 143).

³³⁶ *Ibid* [43] (Austin J).

In my opinion, this requires the claimant to identify the particular work that is the subject of the progress payment, rather than simply to identify in general terms the work that is the subject of the construction contract as a whole. The document in question refers to "motel construction for Jemzone Pty Ltd". That falls well short of satisfying the requirement of s13(2)(a). The letter sets out a table which calculates the amount due, but the table does not identify any particular construction work other than variations. It merely begins by specifying a balance owing as at 9 February 2001, and then makes adjustments for variations and payments and other matters. At no stage is there any statement purporting to identify the work carried out since the making of the last payment claim.

168 I have concluded that the Payment Claims satisfy the identification requirement in s 14(2)(c) of the Act. This is because the Payment Claims sufficiently identify the construction work to which the Progress Claims relate. A reasonable building practitioner in the position of Hunters Green would have understood the Payment Claims are claims for the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts. This is because:

- (a) the covering email of the Payment Claims stated that it attached 'final claim documents' in relation to, inter alia, Stage 12 and Stage 13;
- (b) the Payment Claims stated they were a 'Final Payment Claim';
- (c) the Payment Claims give an itemised trade breakdown of the works (e.g. 'preliminaries', 'civil works', 'site works' etc) and lists them as being 100% complete and state a contract value for each item. They also state a cumulative value and a total value of the completed works;
- (d) the Payment Claims state a total amount previously paid for the works;
- (e) the Payment Claims state a 'current contract claim', being the difference between the total amount of the value of the completed works less the total amount previously paid;
- (f) the Payment Claims do not make any claim for any amounts for variations as these are stated to have been paid;

- (g) the Payment Claims do not make any claim for any additional works since the invoices issued by JG King to Hunters Green upon practical completion. This is because the invoices issued by JG King to Hunters Green upon practical completion identified that the construction work was 100% complete at that time;³³⁷
- (h) the Payment Claims each make a claim for 100% of the construction contract sum less payments. As I have already said in this judgment, as observed by Henry J in *Vannella*, where a party claims 100% of the construction contract sum, it must include retention moneys;³³⁸ and
- (i) the background knowledge of the parties from their past dealings and prior exchanges of information concerning Stages 12 and 13 included relevantly the following:
- (i) JG King issued invoices to Hunters Green for the total amount of the value of the completed construction works;
 - (ii) JG King claimed lesser amounts from Hunters Green than the invoiced amounts as a result of deducting amounts for retention moneys until the security (i.e. retention moneys) attained the maximum percentage of 5% of the contract sum under the Contracts;
 - (iii) Hunters Green paid the amounts claimed;
 - (iv) as a result, Hunters Green knew that it did not pay all of the invoiced amounts. As a result, I do not accept Hunters Green's submission that an objective recipient of the Payment Claims would know that "100 per cent has previously been claimed and paid"³³⁹;

³³⁷ See the invoices upon practical completion: Judgment [21].

³³⁸ *Vannella* (n 153) [125] (Henry J).

³³⁹ Transcript of Proceedings 2 February 2023 (n 31) 60.5-60.14 (Mr Mason) (emphasis added).

- (v) JG King issued invoices for 50% of the retention moneys on 3 July 2019 in which the retention moneys were stated as being \$115,948.66 (inclusive of GST) for Stage 12 and \$176,055.67 (inclusive of GST) for Stage 13;
- (vi) the amounts claimed in the Payment Claims are in the amounts of the retention moneys held by Hunters Green, being the remaining 50% of the retention moneys under the Contracts.

169 The parties in the present case did not refer the Court to *Façade Designs*. The present case, however, may be readily distinguished from *Façade Designs*. This is because, in this case, there are a limited number of documents that relate to the Payment Claims (i.e. the previous invoices) and there is no dispute between the parties concerning those invoices, including the payments made by Hunters Green to JG King. For the same reasons, this case is not one in which the Court should be 'wary' in the sense described by Riordan J in *Façade Designs*. Hunters Green, in the present case, relied upon evidence relevant to the background to the Payment Claims, including the invoices issued upon practical completion and before the Payment Claims.³⁴⁰ Hunters Green also submitted, in this context, "it's permissible to go beyond the face of the document to take into account the party's prior knowledge."³⁴¹

170 As a result, I have concluded that the Payment Claims sufficiently identify the construction work to which they relate for the purposes of s 14(2)(c) of the Act.

Accordingly, were the Payment Claims 'payment claims' for the purposes of s 14(1) of the Act? What is the effect of the Adjudicator's Determinations in respect of the Payment Claims, if any?

171 I have found that the Payments Claims sufficiently identify the construction work to which they relate for the purposes of s 14(2)(c) of the Act. As a result, the Payment Claims are 'payment claims' for the purposes of s 14(1) of the Act.

³⁴⁰ Annotated List of Issues [8] 18-21.

³⁴¹ Transcript of Proceedings 2 February 2023 (n 31) 51.28-51.31 (Mr Mason).

172 Accordingly, Hunters Green must fail on Grounds 3 (Stage 12) and 7 (Stage 13).

GROUND 4 (STAGE 12) AND 8 (STAGE 13): DID THE ADJUDICATOR INCORRECTLY CALCULATE THE ENTITLEMENT OF JG KING?

The issues

173 The following key issues arise for determination:

- (a) Does the Court have jurisdiction to review a security payment adjudication determination for non-jurisdictional error of law on the face of the record in circumstances where judgment has not been entered pursuant to s 28R of the Act?
- (b) Did the Contracts make express provision as to how the amount of a final 'progress payment' is to be calculated for the purposes of s 10(1)(a) of the Act; and/or how 'construction work' carried out or undertaken to be carried out or 'related goods and services' supplied or undertaken to be supplied under a 'construction contract' is to be valued for the purposes of ss 11(1)(a) or 11(2)(a) of the Act, in respect of a claim for final payment?
- (c) If the Contracts did make such express provision, was it relevant to the Adjudicator's assessment of the Payment Claims? If so, was the Adjudicator required by clauses 5, 37.2, 37.4 of the Contracts and, or alternatively 37.7 of the Contracts to apply to set off in respect of any retention money which Hunters Green was entitled to retain? Was that set off requirement permitted by s 48(2) of the Act?
- (d) If the Contracts did make such express provision, did those express provisions entitle Hunters Green to retain the final tranche of retention money in the amount certified for payment?
- (e) Did the Adjudicator commit non-jurisdictional error of law on the face of the record when calculating the amount of the progress payment the subject of the claims for payment and valuing the 'construction work' or the 'related

goods and services' the subject of the claims for payment? If so, was the error of a sufficient type and severity that, in the Court's discretion, the adjudication determinations ought be quashed and should the Claims for Payment be remitted to the Adjudicator?

Does the Court have jurisdiction to review a security payment adjudication determination for non-jurisdictional error of law on the face of the record in circumstances where judgment has not been entered pursuant to s 28R of the Act?

174 It was common ground between the parties that the Court has jurisdiction to review a security payment adjudication determination for non-jurisdictional error of law on the face of the record in circumstances where judgment has not been entered pursuant to s 28R of the Act.³⁴² Counsel for the parties made joint submissions on this issue, which may be summarised as follows:³⁴³

- (a) the NSW Court of Appeal in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor* held, as a matter of necessary implication that certiorari was not available to quash a determination under the NSW Act, which was not void;³⁴⁴
- (b) Vickery J in dicta in *Hickory Developments Pty Ltd v Schiavello (Hickory)*³⁴⁵ and subsequently in ratio in *Grocon* found that a similar construction was not available in Victoria on account of s 85(5) of the *Constitution Act 1975 (Vic) (Constitution Act)*, which prevents the implied ouster of the Supreme Court's jurisdiction, including its powers of judicial review, unless sub-sections 85(5)(a) to (c) of the *Constitution Act* are satisfied. Vickery J said there was no reference in the Act to altering or varying s 85 of the *Constitution Act* in relation to the Court's powers of judicial review and, therefore, there could be

³⁴² Joint submission on Court's power of review [12(c)]. JG King initially submitted "...if we're wrong about everything we've said so far, the adjudicator's error was within jurisdiction and is not reviewable": Transcript of Proceedings 9 February 2023 (n 152) 163.13-163.16 (Mr Morrison). JG King then subsequently submitted "...error of law on the face of the record is open to the court": Transcript of Proceedings 9 February 2023 (n 152) 165.9-165.10 (Mr Morrison).

³⁴³ Joint submission on Court's power of review [3]-[11].

³⁴⁴ (2004) 61 NSWLR 421 [51]-[59] (Hodgson JA).

³⁴⁵ *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* (2009) 26 VR 112.

- no implied ouster of the Court's jurisdiction to order relief in the nature of certiorari for error on the face of the record;
- (c) the Bill, when enacted (*Building and Construction Industry Security of Payment (Amendment) Act 2006* (Vic)) made several substantial amendments to the Act, including a streamlined procedure in s 28R of the Act for entering judgment following an adjudication determination. Counsel for the parties noted that s 28R(5) of the Act provided that “[if] a person commences proceedings to have the judgment set aside, that person ... is not, in those proceedings, entitled ... to challenge an adjudication determination or a review determination” and s 51(2) of the Act provided that “[i]t is the intention of section 28R to alter or vary section 85 of the Constitution Act 1975”;
- (d) Vickery J considered these provisions in *Amasya Enterprises v Asta Developments (Amasya)*,³⁴⁶ finding that s 28R of the Act was a privative clause and that it met the requirements set out in s 85 of the *Constitution Act*. His Honour held that, where it was engaged, it would operate to deny the availability of relief for non-jurisdictional error of law, but not for jurisdictional error (for the reasons explained by the High Court in *Kirk v Industrial Court (NSW)*³⁴⁷). His Honour recognised that s 28R(5) of the Act operated only *after* a judgment had been entered, and only in respect of a proceeding to have that judgment set aside;
- (e) subsequently, the High Court in *Probuild Constructions v Shade Systems (Probuild)*³⁴⁸ held that the NSW Act implicitly ousts the jurisdiction of the Supreme Court of New South Wales to make an order in the nature of

³⁴⁶ *Amasya Enterprises Pty Ltd & Anor v Asta Developments (Aust) Pty Ltd & Anor* [2015] VSC 233.

³⁴⁷ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [99]-[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁴⁸ *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 (*Probuild*’).

certiorari to quash a determination by an adjudicator for error of law on the face of the record;³⁴⁹

- (f) in *Maxcon*, which was heard at the same time as *Probuild*, the High Court held that the same reasoning applied to the South Australian Act as its scheme and purposes are not materially different;
- (g) counsel were not aware of any decision which has re-considered the principles discussed in *Hickory*, *Grocon* and *Amasya* in light of the High Court's reasoning in *Probuild* and *Maxcon*;
- (h) to the extent this issue has been addressed, it does not go beyond a footnote in Digby J's judgment in *Shape Australia v The Nuance Group*,³⁵⁰ where his Honour said he would "leave for another day" the question of whether the High Court's decisions in *Probuild* and *Maxcon* "... have ousted this Court's jurisdiction to grant certiorari for non-jurisdictional error of law on the face of the record".³⁵¹ In doing so, his Honour noted, "that the effect of those decisions in Victoria will likely require consideration in light of s 85 of the *Constitution Act 1975 (Vic)*".³⁵²

175 In conclusion, counsel for the parties jointly submitted that:³⁵³

- (a) *Hickory*, *Grocon* and *Amasya* remain good law;
- (b) the presence of s 85 of the *Constitution Act* is a distinguishing feature of the Victorian landscape from the legislation considered in *Probuild* and *Maxcon* with respect to the availability of judicial review for non-jurisdictional error; and

³⁴⁹ Ibid 13 [30] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

³⁵⁰ [2018] VSC 808.

³⁵¹ Ibid: see footnote 117.

³⁵² Ibid.

³⁵³ Joint submission on Court's power of review [12].

- (c) where, as in this case, judgment has not been entered pursuant to s 28R of the Act, the Supreme Court of Victoria has jurisdiction to review a security of payment adjudication determination for error of law on the face of the record.

176 I agree with the parties' joint submissions on this issue. In summary, the Act does not evince a clear legislative intention to exclude the jurisdiction of this Court, where judgment has not been entered pursuant to s 28R of the Act, to make an order in the nature of certiorari to quash an adjudicator's determination for non-jurisdictional error of law on the face of the record.³⁵⁴ This is because of the operation of ss 85(1) and 85(5)(a)-(c) of the *Constitution Act*.

Did the Contracts make express provision as to how the amount of a final 'progress payment' is to be calculated for the purposes of s 10(1)(a) of the Act; and/or how 'construction work' carried out or undertaken to be carried out or 'related goods and services' supplied or undertaken to be supplied under a 'construction contract' is to be valued for the purposes of ss 11(1)(a) or 11(2)(a) of the Act, in respect of a claim for final payment? If the Contracts did make such an express provision, is it relevant to the Adjudicator's assessment of the Payment Claims?

If the Contracts did make such an express provision, was the Adjudicator required by clauses 5, 37.2, 37.4 and, or alternatively 37.7 to apply to set off in respect of any retention money which Hunters Green was entitled to retain? Was that set off requirement permitted by s 48(2) of the Act? Did the arrangements entitle Hunters Green to retain the final tranche of retention money in the amount certified for payment?

Adjudicator's Determinations

177 I have already set out in this judgment that the Adjudicator determined that the Payment Claims were made pursuant to clause 37.4 of the Contracts and, as a result, were made in relation to a 'reference date' for the purpose of the Act.³⁵⁵ The Adjudicator determined in relation to each of the Payment Claims as follows:³⁵⁶

73. In the first instance, the process of s.10 and s.11 defers to express provisions of the contract that provide a calculation of the either amount of the progress payment or the value of the construction

³⁵⁴ In contrast, see *Probuild* (n 348) at [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon J), [83] (Gageler J) and [108] (Edelman J).

³⁵⁵ Stage 12 Determination [50]-[53], [55]-[58]; Stage 13 Determination [46]-[49], [51]-[54].

³⁵⁶ Stage 12 Determination [73]-[77]; Stage 13 Determination [69]-[73].

work. I find that the provisions of the contract that relate to the assessment of progress payments are as follows:

- (i) Clause 37.1 sets out the amounts that may be claimed: - value of the works, other monies due to the Claimant under the contract and deductions for liquidated damages;
- (ii) The first paragraph of Clause 37.2 requires that the Respondent, as Superintendent arrive at an opinion of the amount due in reply to the claim as well as assessing the amount of any retentions and other monies due from the Claimant to the Respondent pursuant to the contract; and
- (iii) The seventh paragraph of Clause 37.2 requires the Respondent, as Principal, to pay the amount assessed by the Superintendent except that it may elect to forego some or all of the set offs in regard to retentions and 'other monies due'.

74. In the first instance, I'm required to calculate the amount of the progress payment by applying the express terms of the contract, if available. See s.10(1)(a) & (e) of the Act. In this case, it is clear that no such terms are available. As a minimum, the Principal's right to choose the amount that it sets off is contrary to an express term.

75. In the second instance, I am required to calculate the value of the construction work by applying the express terms of the contract, if available. See s.11(1)(a) & (b) of the Act. In this case, I am not satisfied that such terms are available. I find the operation of the Superintendent's opinion is contrary to an express term. On a broader view, I find that the Principal's right to choose the amount that it sets off involves another opinion on the proper value of the construction work. This also undermines the possibility of an express term.

76. Consequently, I find that neither of the options for express provisions apply. Therefore, I must apply s.11(1)(b) of the Act to calculate the value of the construction work having regard to items (i), (ii), (iii) & (iv).

77. In my view, the s.11(1)(b) of the Act has been the relevant provision to assess all of the progress payments under the contract to date. I am not satisfied that the withholding for retentions fits any of the categories of s.11(1)(b)(i), (ii), (iii) or (iv). Consequently, I am not satisfied that the Respondent has been entitled to withhold retentions at anytime from the point of the view of the Act. For this reason also, I find that the payment claim is not a claim for the return of retentions. From the point of the view of the Act, it appears to be a claim for work for which the Respondent has only made part payments for in the past.

Hunters Green's submissions

178 Hunters Green submitted that the Contracts contain detailed arrangements for determining the amounts payable to JG King at the various stages of the parties' relationship.³⁵⁷ Hunters Green referred, by example, to clauses 2.1, 36.4, 37.2, 37.3, 37.4, 37.6, 37.7 and 37.8 of the Contracts.³⁵⁸ Hunters Green submitted that ss 10(1)(a), 11(1)(a) and 11(2)(a) of the Act apply.³⁵⁹ In Grounds 4 and 8 of its Originating Motion, it stated that the Adjudicator erred when finding that the Contracts "did not contain terms for calculating the amount of a progress payment to which [JG King] is entitled"³⁶⁰ as the Contracts "contained at clause 37 terms for calculating the amount of any progress payment to which [JG King] was entitled"³⁶¹. It submitted that JG King's submissions (i.e. that there is dichotomy between a contractual pathway and a statutory pathway when valuing a payment claim under the Act) would render ss 10(1)(a), 11(1)(a) and 12(1)(a) of the Act redundant and this would preclude retention moneys ever being considered as part of the valuation process.³⁶²

179 Hunters Green submitted that the Adjudicator was required by clauses 5, 37.2, 37.4 and 37.7 of the Contracts to apply Hunters Green's right to set off and or withhold amounts, including in relation to any retention money which Hunters Green was required to retain.³⁶³ It submitted that it was not for the Adjudicator to subvert the parties' contractual risk allocation, which sees Hunters Green entitled to security for the proper performance of JG King's obligations, by disregarding the mechanism by which Hunters Green could hold that security.³⁶⁴ The focus of Hunters Green's submissions was on the Adjudicators' calculation of the Payment Claims and the alleged error of the Adjudicator in not applying in that calculation a 'set off' in respect of the retention money that Hunters Green was entitled to retain as it was not due for release pursuant to clause 5.4 of the Contracts. It submitted that Hunters

357 Annotated List of Issues [12] 26. See also Hunters Green's submissions [53], [63].

358 Annotated List of Issues [12] 26.

359 Ibid.

360 Hunters Green's Originating Motion filed 26 October 2022 [4], [8].

361 Ibid.

362 Annotated List of Issues [12] 26.

363 Ibid [14] 31.

364 Ibid.

Green's entitlement to hold the remaining retention moneys ceased 14 days after the final certificate and that this arrangement was not co-extensive with JG King's entitlement to receive its final payment.³⁶⁵ It submitted that the Payments Claims were made when Hunters Green was entitled to hold the retention moneys.³⁶⁶ Hunters Green submitted:³⁶⁷

So what it means then in the circumstances of this case, Your Honour, is we do have a contractual mechanism for working out the amount of this payment to the contractor at this stage of the process. The adjudicator didn't have regard to that. Had the adjudicator done so, then one way or another, it would have taken into account that there was this retention that the contractor remained entitled to hold until 14 days after the issuing of the final certificate, and that should have been taken into account such that no amount was payable on the adjudication termination.

180 Hunters Green also submitted that such a set off cannot be construed as contracting out of the Act's arrangement which is prohibited by s 48(2) of the Act.³⁶⁸

JG King's submissions

181 JG King submitted that the progress claim provisions in clause 37 of the Contracts are relevant for generating a progress payment entitlement under the Act but once the entitlement arises the statutory and contractual progress payment pathways diverge.³⁶⁹ It submitted that the contractual processes in clauses 2.1, 36.4, 37.2, 37.3, 37.4, 37.6, 37.7 and 37.8 of the Contracts are referable to an assessment of a claim made pursuant to the Contracts.³⁷⁰ It submitted that they do not apply to the valuation of a claim under the Act.³⁷¹

182 JG King submitted that if clause 37.2(b) of the Contracts affects the valuation of a final claim for the purposes of the Act, the Adjudicator was still right not to apply a

³⁶⁵ Hunters Green's submissions [26]. See also Annotated List of Issues [15] 35.

³⁶⁶ Hunters Green's submissions [26].

³⁶⁷ Transcript of Proceedings 2 February 2023 (n 31) 89.12-89.22 (Mr Mason). See also at 83.3-89.11 (Mr Mason) with respect to the operation of clause 37.4 in this context. See also Transcript of Proceedings 9 February 2023 (n 152) 175.26-176.7, 182.4-182.31 (Mr Mason).

³⁶⁸ Annotated List of Issues [14] 32.

³⁶⁹ Ibid [12] 28.

³⁷⁰ Ibid.

³⁷¹ Ibid.

set off.³⁷² It submitted that an adjudicator cannot rely on a superintendent's certificate in place of the adjudicator's own analysis.³⁷³ It relied upon the decision of the Court of Appeal in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*.³⁷⁴ It also submitted that any contractual right of Hunters Green to elect to set off various sums under the Contracts is a separate exercise from the valuation of payment claims for the purposes of the Act.³⁷⁵ It submitted that if clause 37.2(b) of the Contracts had the effect contended for by Hunters Green, the practical effect would be to permit the offsetting of Hunters Green's cross-claims against JG King's interim payment rights under the Contracts, regardless of whether they are permissible matters that ought to be taken account in the valuation process.³⁷⁶ It submitted that this would be 'contracting out of the Act' pursuant to s 48(2) of the Act.³⁷⁷ It further submitted that there is no evidence before the Court that the parties ever engaged in the set off process in clause 37 of the Contracts.³⁷⁸ The only evidence is that JG King deducted amounts referable to retention in previous payment claims.³⁷⁹ It submitted that there is nothing in clause 37.2 of the Contracts that would limit the amount of any set off to retention moneys.³⁸⁰ JG King submitted that if Hunters Green's submissions are accepted then it would permit a respondent, via its superintendent, to raise a contractual set off that could entirely stymie a claimant's rights under the Act.³⁸¹

183 JG King submitted that if a claimant has become entitled to the return of cash retention that was previously withheld from older progress payments then it is

³⁷² Ibid [14] 34.

³⁷³ Ibid.

³⁷⁴ Ibid. See [2016] VSCA 119 [83] (Santamaria, Beach and McLeish JJA) ('*SSC Plenty Road*').

³⁷⁵ Annotated List of Issues [14] 34.

³⁷⁶ Ibid.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ Ibid.

³⁸⁰ Ibid.

³⁸¹ Ibid.

entitled to use the machinery of the Act to seek to recover the cash retention in a payment claim served in respect of a subsequent reference date.³⁸²

184 It submitted that Hunters Green's entitlement to withhold retention moneys under clause 5.4 of the Contracts was coextensive with JG King's entitlement to receive its final payment. It relied upon the following matters:³⁸³

- (a) The claim under clause 37.4 is to include "all other claims whatsoever in connection with the subject matter of the *Contract*" (emphasis added). There is no suggestion that the payment of monies that had previously been withheld as retentions is to be excluded from this exhaustive category.
- (b) The final certificate was to "evidence[e] the monies finally due and payable between the *Contractor* and the *Principal* on any account whatsoever in connection with the subject matter of the *Contract*" (emphasis added).
- (c) The final certificate would operate as "conclusive evidence of accord and satisfaction" and as a discharge "of each party's obligations in connection with the subject matter of the *Contract*".

185 It submitted:³⁸⁴

38. If Hunters Green were only obliged to return the balance of any cash retention after the final certificate, then Hunters Green would be released from that obligation prior to it ever arising.
39. The finality of the final payment claim procedure was clear. JG King was required to include within its final payment claim all claims for payments due to it. Failure to do so meant its rights would be lost, either by operation of the deed of release or by accord and satisfaction. It follows that Hunters Green was not permitted to withhold the final tranche of the retention money from the final payment.
40. It is submitted that this construction of clause 37.4 causes no relevant incongruity with the 3rd paragraph of clause 5.4 which provides that "A party's entitlement otherwise to security shall cease 14 days after *final certificate*". The word *otherwise* signifies that it is a long stop or catch all provision. It does not prevent the entitlement to security ceasing at an earlier point in time under some other provision of the contract.

³⁸² JG King's submissions [28].

³⁸³ Ibid [37(a)]-[37(c)] (citations omitted). It is noted that the emphasis added in underlining and the reference to it herein is as appeared in JG King's submissions.

³⁸⁴ Ibid [38]-[41]. See also Annotated List of Issues [15] 35-36; Transcript of Proceedings 9 February 2023 (n 152) 160.11-160.25 (Mr Morrison).

41. In the alternative to this submission, to the extent there is any inconsistency, clause 5.4 ought to be read down as it would otherwise work a commercial nonsense by providing in substance for the indefinite retention of security.

186 JG King relied upon the 'finality' of the final claim procedure in clause 37.4 of the Contracts.³⁸⁵ It submitted:³⁸⁶

The three relevant factors in clause 37.4 are the need for J.G. King to include all claims whatsoever in the final claim, the final certificate being conclusive evidence of the court and satisfaction and the need for an executed deed of release which provides for the total money due under or in any way connected with or arising under the work's contract being released. So, what we say is it is implicit in the final claim entitlement under the contract if it binds the adjudicator. It is implicit in that requirement that J.G. King is entitled to the return of its security in that process or its cash retention in that process. There's no relevant incongruity with the third paragraph of clause 5.4. The two of them can work together on our construction.

187 JG King submitted:³⁸⁷

The final certificate is intended to cover the moneys finally due and payable on any account whatsoever. It's intended to signify the discharge of each party's obligations under the contract why it be construed to contain a carve out for any retention money.

188 Alternatively, it submitted:³⁸⁸

Or, the provisions of clause 5 which postpone the entitlement to recovery of the final claim until after the relevant releases have taken effect (thereby rendering them nugatory) ought to be found to be void under s 48 of the Act. Section 47(1) of the Act is expressly drafted as "[s]ubject to section 48". If the construction of the Contract to which the Plaintiff contends is correct, clause 5.4 would have the effect of excluding, modifying or restricting the operation of the Act and ought to be severed from each Contract to the extent necessary: *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd* [2020] VSC 414 at [73].

Hunters Green's submission in reply

189 Hunters Green submitted in reply:³⁸⁹

41. There is also no merit to JG King's submission regarding the interaction between cl 5.4 and 37.4. That submission disregards that the Hunters Green's entitlement to the performance security ceases 14 days after the final certificate is issued: cl 5.4. The use of the word

³⁸⁵ Transcript of Proceedings 2 February 2023 (n 31) 108.9-109.6 (Mr Morrison).

³⁸⁶ Transcript of Proceedings 9 February 2023 (n 152) 160.11-160.25 (Mr Morrison).

³⁸⁷ Ibid 162.27-163.1 (Mr Morrison).

³⁸⁸ Annotated List of Issues [15] 36.

³⁸⁹ Hunters Green's reply submissions [41]-[45]. See also at [12]; Hunters Green's submissions [26], [35].

'otherwise' in this context contrasts the cessation of Hunters Green's entitlement to hold this tranche of JG King's performance security with the cessation of Hunters Green's entitlement to hold other tranches which cl 5.4 also contemplates. It does not operate as a 'long stop or catch all provision'. Indeed, on JG King's construction, that long stop would not perform any function, because it would always be pre-empted by the final certificate being issued.

42. Relatedly, the significance JG King attaches to the 'accord and satisfaction' evidenced by the final certificate is overstated. It has no bearing on the parties' rights and liabilities under the Act.
43. That accord and satisfaction also cannot capture payment of any amounts certified in JG King's favour in the final certificate. This is because payment of these amounts is to be made 5 business days after the final certificate is issued: cl 37.4. Obviously, Hunters Green cannot pay JG King a certified amount until that amount is so certified.
44. Similarly, any accord and satisfaction cannot capture any retention moneys which remain to be released, because this also is to occur after the final certificate is issued: cl 5.4. Again, and evidently, the final certificate is to be issued before Hunters Green can ascertain whether it has any final basis to call upon the performance security to satisfy amounts certified as owing to it.
45. There is no basis for the Court to order a remitter back to the Second Defendant. A remitter would serve no utility when, once the retention moneys are taken into account under the valuation arrangements that should have been applied under ss 10(1)(a) and 11(1)(a), the adjudicated amount in each case must be \$nil.

Analysis

Relevant law

190 JG King was entitled to progress payments under the Act calculated by reference to 'the reference date' under the Contracts.³⁹⁰ The amount of the progress payments under the Act to which JG King was entitled in respect of the Contracts is an amount calculated in accordance with the Contracts, or if the Contracts make no express provision with respect to the matter, the amount calculated based upon, inter alia, the value of the construction work.³⁹¹ I accept JG King's submission that once an entitlement arises under the Act the statutory and contractual payment pathways diverge.³⁹² This does not mean that a progress payment under the Act is not to be

³⁹⁰ Act s 9(1).

³⁹¹ Ibid s 10(1).

³⁹² Judgment [181]. See also Transcript of Proceedings 2 February 2023 (n 31) 104.27-104.31 (Mr

calculated in accordance with the terms of the contract as such a calculation is expressly provided for by s 10(1)(a) of the Act.

191 In *Multiplex Constructions Pty Ltd v Luikens and Anor*,³⁹³ Palmer J said concerning similar provisions in the NSW Act:³⁹⁴

When s.9(a) and s.10(1)(a) and (2)(a) speak of calculating a progress payment or valuing construction work and related goods and services “in accordance with the terms of the contract” they must mean “in accordance with the relevant or applicable terms of the contract”. What are the relevant or applicable contractual terms which affect the calculation or valuation which the adjudicator must make might depend on the construction of the express terms of the contract, or upon whether a term is to be implied in order to give the contract business efficacy, or it might depend on whether a term has been waived or cannot be relied upon because of an estoppel.

192 As observed by the New South Court of Appeal in *Thiess Pty Ltd & Anor v Lane Cove Tunnel Nominee Company Pty Ltd & Anor*:³⁹⁵

[43] It may be accepted that a contractual provision in relation to progress payments can be taken up for a matter which under the Act may be determined in accordance with the construction contract, without express reference in the provision to the Act or to the particular matter under the Act. That does not licence taking up a provision because it is analogous to the matter under the Act. It depends on the terms of the Act dealing with the matter and the contractual provision.

193 An adjudicator appointed under the Act is not bound by a calculation and/or valuation undertaken by others under the contract (e.g. by an architect or superintendent). This does not mean that terms of a contract that provide for a calculation and/or valuation to be undertaken by others are not to be applied by an adjudicator appointed under the Act. This may be readily illustrated by reference to two authorities, *Transgrid v Siemens Ltd & Anor (Transgrid)*³⁹⁶ and *Abacus v Davenport & Ors (Abacus)*³⁹⁷. In *Transgrid*, the Court of Appeal of New South Wales considered

Morrison).

³⁹³ [2003] NSWSC 1140.

³⁹⁴ Ibid [58] (Palmer J).

³⁹⁵ [2009] NSWCA 53 [43] (Giles JA, Tobias JA and Handley AJA agreeing). This was accepted by JG King: Transcript of Proceedings 9 February 2023 (n 152) 145.21-146.9 (Mr Morrison).

³⁹⁶ [2004] NSWCA 395 (*Transgrid*’).

³⁹⁷ [2003] NSWSC 1027 (*Abacus*’).

whether the contract made express provision for the amount of a progress payment to be “calculated in accordance with the terms of the contract” for the purpose of s 9(a) of the NSW Act.³⁹⁸ In that case, clauses 42.1-3 of the contract were in the following terms:³⁹⁹

42.1 Payment Claims

On the first day of each month and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall be entitled to deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include all amounts then due to the Contractor under the Contract or for breach thereof.

The Contractor shall not be entitled to claim payment for:

- (a) variations which have not been approved in writing by the Superintendent;
- (b) any extra costs which have not been valued under Clause 40.5 or otherwise agreed to in writing by the Superintendent;
- (c) any materials (including imported items) not delivered to Site;
- (d) work performed off Site (including design and factory fabrication) unless specifically provided for in the Contract.

42.2 Progress Payment Certificates and Time for Payment

Within 10 business days after receipt of a claim for payment the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor.

If the Contractor fails to make a claim for payment, the Superintendent may nevertheless issue a payment certificate.

The Principal shall pay to the Contractor the amount certified by the Superintendent within **42 days** after receipt of the claim for payment.

Payment of moneys shall not be evidence of the value of work or an admission of liability or that work has been executed satisfactorily but shall be a payment on account only.

42.3 The Calculation of Payment

³⁹⁸ *Transgrid* (n 396) [34]-[35] (Hodgson JA, Mason P and Giles JA agreeing). Also referred to with approval in *SSC Plenty Road* (n 374) [79], [83] (Santamaria, Beach and McLeish JJA).

³⁹⁹ *Ibid* [19] (Hodgson JA, Mason P and Giles JA agreeing).

The amount certified by the Superintendent as due to the Contractor at the time of a claim for payment shall be the value of the work carried out by the Contractor in performance of the Contract to that time together with any moneys due to the Contractor under any other provision of the Contract or for breach of Contract less -

- (a) amounts which the Principal is entitled to deduct under Clause 42.4 and 42.11;
- (b) amounts already paid or certified under the Contract.

Where work is defective or omitted, the estimated cost of rectifying the defect or omission may be deducted from moneys otherwise due to the Contractor or otherwise taken into account.

If the Contract provides that the Contractor must complete a specified task, submit a specified document or fulfil some other requirement before it is entitled to make a claim for payment then notwithstanding this Clause 42, the Contractor shall not be entitled to make a claim for payment and the Principal shall not be obliged to make payment until the Contractor has complied with that provision of the Contract.

194 Hodgson JA (with whom Mason P and Giles JA agreed) said in obiter:⁴⁰⁰

Accordingly, it is not necessary to decide whether, on the true construction of s.9(a) and the contract, the amount "calculated in accordance with the terms of the contract" is the amount certified (cl.42.2 of the contract) or the value of the work less deductions (cl.42.3 of the contract). However I would express the view that the latter follows from what I think is a preferable interpretation of s.9(a) and the contract, consistent with the use of the word "calculation" and consistent with the provisions against contracting out (s.34); that is, on this matter, I prefer the view of McDougall J in *Abacus v. Davenport* [2003] NSWSC 1027 to that tentatively expressed by the Master in the present case.

195 Similarly, in *Abacus*, McDougall J considered, inter alia, a clause of a contract (i.e. clause 10.02) that dealt with the payment and adjustment of a contract sum. McDougall J said "[u]nder cl 10.02.02, the architect, in calculating the amount for which a progress certificate should be issued, is required to "determine the amounts of any other adjustments to the Contract Sum in terms of this Agreement"."⁴⁰¹ McDougall J said:⁴⁰²

[38] ... It is correct to say that the amount of a progress payment is to be "the amount calculated in accordance with the terms of the contract"

⁴⁰⁰ Ibid [35] (Hodgson JA, Mason P and Giles JA agreeing) (emphasis added).

⁴⁰¹ *Abacus* (n 397) [43] (McDougall J). See also [44]-[48] (McDougall J). See also *PPK Willoughby v Eighty Eight Construction* [2014] NSWSC 760 [68] (McDougall J) ('*PPK Willoughby*').

⁴⁰² *Abacus* (n 397) [38] (McDougall J) (emphasis added).

where the contract makes provision for that matter (s 9(a)). It is equally correct to say that construction work is to be valued “in accordance with the terms of the contract” where the contract makes provision for that matter (s 10(1)(a)). However, a reference to calculation or valuation “in accordance with the terms of the contract” is a reference to the contractual mechanism for determination of that which is to be calculated or valued, not to the person who, under the contract, is to make that calculation or valuation. In the present case, it means that Mr Davenport [i.e. the adjudicator] was bound to calculate the progress payment in accordance with cl 10.02 of the contract. It does not mean that Mr Davenport was bound by the architect’s earlier performance (or attempted or purported performance) of that task.

196 In *S.H.A. Premier Constructions*, Bond J held that the contract in that case did not provide for the calculation or valuation of a final payment claim.⁴⁰³ This is because the contract had been terminated, and Bond J held that the contract did not provide for the calculation of a final payment claim calculated from the date of termination of the contract or for the valuation of such a claim.⁴⁰⁴ In those circumstances, his Honour held that the claimant was entitled to a progress payment calculated under s 71(b) of the Queensland Act, and valued under s 72(1)(b) of the Queensland Act.⁴⁰⁵

197 The determination of the issues I have identified above involve the proper construction of the Contracts. In *Argyle Lending Pty Ltd v Lantouris*,⁴⁰⁶ the Court of Appeal said:⁴⁰⁷

47 The general principles to be applied in the construction of commercial contracts were summarised by French CJ, Nettle and Gordon JJ in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* in the following terms:

The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.

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 language used

⁴⁰³ *S.H.A. Premier Constructions* (n 241) [72] (Bond J).

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid* [75] (Bond J). See also at [74] in which Bond J refers to s 72(1)(b)(i) of the Act.

⁴⁰⁶ [2022] VSCA 60.

⁴⁰⁷ *Ibid* [47]-[49] (Niall, Walker and Macaulay JJA) (citations omitted).

by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.

Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.

However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be 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] the market in which the parties are operating'. It may be necessary in determining the proper construction where there is a constructional choice. ...

Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.

Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties ... intended to produce a commercial result'. Put another way, a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'.

48 In *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd*, Kiefel, Bell and Gordon JJ said:

It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.

Clause 4 is to be construed by reference to the commercial purpose sought to be achieved by the terms of the lease. It

follows, as was pointed out in the joint judgment in *Electricity Generation Corporation v Woodside Energy Ltd*, that the court is entitled to approach the task of construction of the clause on the basis that the parties intended to produce a commercial result, one which makes commercial sense. It goes without saying that this requires that the construction placed upon cl 4 be consistent with the commercial object of the agreement.

49 In addition, the Court must have regard to all of the words used in the agreement 'so as to render them all harmonious one with another' and to ensure the 'congruent operation [of] the various components [as] a whole'.

Clause 37.4 of the Contracts makes express provision for the calculation of the progress payments to which JG King is entitled under the Act

198 Clause 37.4 of the Contracts makes express provision for the calculation of the progress payments to which JG King is entitled under the Act. I do not accept JG King's submission that clause 37.4 of the Contracts does not provide for the calculation of progress payments to which JG King is entitled under the Act as clause 37.4 of the Contracts is only "referable to contractual entitlements" and the "contractual stream of payment".⁴⁰⁸

199 First, I accept that the Contracts do not expressly state that clause 37.4 of the Contracts makes provision for the calculation of a progress payment under the Act.⁴⁰⁹ Clause 37.7 of the Contracts is titled 'Security of Payment' and provides for a number of matters under the Act. This is not, however, determinative.⁴¹⁰ Clause 37.7 does not purport to provide for every matter under the Act. A contractual provision in relation to progress payments can be taken up for a matter which under the Act may be determined in accordance with the construction contract, without express reference in the provision to the Act or to the particular matter under the Act.⁴¹¹

200 Secondly, clause 37.4 of the Contracts concerns a final payment claim. The present case concerns a statutory right to a 'progress payment' under the Act which is a 'final payment'.

⁴⁰⁸ Transcript of Proceedings 9 February 2023 (n 152) 141.22-141.29 (Mr Morrison). See also 152.30-153.2 (Mr Morrison).

⁴⁰⁹ See Contracts cll 37.4, 37.7.

⁴¹⁰ Judgment [191]-[192].

⁴¹¹ Ibid.

201 Thirdly, clause 37.4 of the Contracts provides for the Superintendent to issue a final certificate “evidencing the moneys finally due and payable between the Contractor [JG King] and the Principal [Hunters Green] on any account whatsoever in connection with the subject matter of the [Contracts]”. This provides for the calculation of the final payment under the Act. The reference to the Superintendent does not mean that clause 37.4 does not provide for a calculation within the meaning of section 10(1)(a) of the Act.⁴¹² An adjudicator is required to undertake their own calculation.⁴¹³ Pursuant to s 10(3) of the Act, upon such a calculation, an adjudicator is not entitled to take into account any ‘excluded amounts’ as defined by s 10B of the Act.

202 Fourthly, in my view, clause 37.2 of the Contracts is not relevant to a final payment claim. Clause 37.4 of the Contracts provides for a separate and distinct process for a final payment claim:⁴¹⁴

- (a) within 28 days after the expiry of the last defects liability period and the satisfaction of all of JG King’s obligations under the Contract, JG King shall give the Superintendent a written final payment claim endorsed ‘Final Payment Claim’.⁴¹⁵ JG King must provide an executed deed of release before making the final payment claim.⁴¹⁶ There are no such requirements in clause 37.2 of the Contracts; and
- (b) within 10 business days after the receipt of a valid payment claim, the Superintendent must issue a final certificate evidencing the moneys finally due and payable between JG King and Hunters Green on any account whatsoever in connection with the subject matter of the Contract.⁴¹⁷ The final

⁴¹² Ibid [193]-[195]. See also Transcript of Proceedings 9 February 2023 (n 152) 150.16-150.19 (Mr Morrison).

⁴¹³ Judgment [193]-[195].

⁴¹⁴ See *Protectavale* (n 82) [20] (Finkelstein J) in which Finkelstein J considered a similar final payment claim clause. See also *Adcon v Icon* [2020] VSC 165 [98] (Digby J).

⁴¹⁵ Contracts cl 37.4.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

certificate shall also be conclusive evidence of accord and satisfaction,⁴¹⁸ and in the discharge of each party's obligations in connection with the subject matter of the Contracts save for a number of exceptions.⁴¹⁹ Whereas, with respect to a progress claim, neither a progress certificate nor a payment of moneys shall be an admission of liability or evidence that the subject works under contract has been carried out satisfactorily.⁴²⁰

203 Fifthly, it is not relevant that clause 37.4 of the Contracts requires JG King to give a final payment claim to the Superintendent but clause 37.7 of the Contracts provides that JG King must serve any documents under the Act upon Hunters Green.⁴²¹ This submission of JG King was not further explained. It is not relevant to whether clause 37.4 of the Contracts provides for a calculation of the progress payment under the Act.

204 Sixthly, I do not accept JG King's submission that clause 37.4 of the Contracts does not provide for the calculation of the progress payment under the Act as "[t]he superintendent doesn't take into account just the value of the work but makes an assessment in respect of all moneys finally due and payable between the two parties... It deals with finality... It evidences moneys finally due and payable between the relevant parties on any account whatsoever. Instead of Hunters Green serving a payment schedule setting out its opinion as to the proper value of the work the superintendent issues a final and binding certificate."⁴²² A calculation in accordance with the terms of a contract under s 10(1)(a) of is not limited to a calculation of the 'value of the construction work'. It may include a calculation of other moneys due and payable.⁴²³ The contractual effect of the certificate is not

⁴¹⁸ In *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 Gummow J explained at 610 that: "Accord and satisfaction (the former being the agreement or consent to accept the latter) requires acceptance of something in place of the full remedy to which the recipient is entitled, coupled with provision of the consideration agreed upon."

⁴¹⁹ Contracts cl 37.4.

⁴²⁰ Ibid cl 37.2.

⁴²¹ Transcript of Proceedings 9 February 2023 (n 152) 143.9-143.15 (Mr Morrison).

⁴²² Ibid 141.16-141.19, 141.30-142.5 (Mr Morrison). See also 150.16-150.23 (Mr Morrison).

⁴²³ See Judgment [193]-[195].

relevant to whether clause 37.4 of the Contracts provides for a calculation of the progress payment under the Act. A calculation by an adjudicator in accordance with clause 37.4 of the Contracts does not involve an adjudicator taking any contractual step (e.g. issuing a final certificate).

205 Finally, I do not accept JG King’s submission, in effect, that the Queensland Court of Appeal held in *Gambaro Pty Ltd v Rohrig (Qld)*⁴²⁴ that a similar provision to clause 37.4 of the Contracts did not “relate to the statutory payment scheme”.⁴²⁵ Fraser JA at [5] stated the main issue was whether, in the absence of any determination of the contractual remuneration to which [the builder] will be entitled upon final completion of the contract, [the principal] was arguably entitled to restitution of the amount by which the adjudicated amount in respect of variations exceeded the total amount in respect of variations in progress payments assessed under the contract, on the ground that it is unjust for the [builder] to retain the excess because that was not payable as a progress payment under the contract. The Queensland Court of Appeal did not consider the issue of whether the relevant clause (i.e. clause 37.4) made provision for a calculation of a progress payment under the Queensland Act.

The calculation of the progress payments under the Act in accordance with clause 37.4 of the Contracts

206 Upon a calculation of the progress payments under the Act in accordance with clause 37.4 of Contracts the Adjudicator was required to determine the moneys due and payable between JG King and Hunters Green, excluding any ‘excluded amounts’ under s 10B of the Act.

207 The unpaid amounts for construction work retained by Hunters Green as security in the form of retention moneys under the Contracts formed a separate and distinct fund constituting the ‘security’ under the Contracts.⁴²⁶ This fund is constituted by the remaining 50% of the retention money under the Contracts. Pursuant to clauses 5

⁴²⁴ *Gambaro Pty Ltd as Trustee for the Gambaro Holdings Trust v Rohrig (Qld) Pty Ltd; Rohrig (Qld) Pty Ltd v Gambaro Pty Ltd* [2015] QCA 288 [34] (Fraser JA, Morrison JA and Boddice J agreeing).

⁴²⁵ Transcript of Proceedings 9 February 2023 (n 152) 149.18-149.29 (Mr Morrison).

⁴²⁶ See *Punton’s Shoes* (n 35) [110] (Digby J).

and 37.4 of the Contracts the final 50% of the retention moneys are not due to be released and returned to JG King until 14 days after the final certificates are issued, subject to any earlier recourse to them by Hunters Green. As a result, I do not accept JG King's submission that, upon a proper construction of the Contracts, Hunters Green had no entitlement to withhold retention moneys at the final certificate stage (i.e. under clause 37.4) and that, as a result, JG King was entitled to recover the full balance of the contract price in the final certificate process.⁴²⁷

208 This is clear from the text, context and purpose of the Contracts.

209 Clause 5.1 of the Contracts provides that the security must remain valid and enforceable until the date of its return in accordance with the Contracts. Clause 5.2 provides that the security shall be subject to the recourse by a party who remains unpaid after the time for payment. Clause 5.4 provides for the release and return of the security by a party. Clause 5.4 relevantly provides in the third paragraph that "[a] party's entitlement otherwise to *security* shall cease 14 days after final certificate" (emphasis added). The reference to 'otherwise' is a reference to a party's entitlement to security ceasing 'otherwise' than in the two circumstances provided for in the two immediately preceding paragraphs of clause 5.4. This is clear from the text of clause 5.4.

210 JG King submitted that upon a proper construction of clause 5.4, the words "[a] party's entitlement otherwise to *security* shall cease 14 days after *final certificate*" is a 'long stop' provision which is enlivened in the circumstances described by Brown J in *Tomkins Commercial & Industrial Builders Pty Ltd v Majella Towers One Pty Ltd & Anor (Tomkins)*⁴²⁸ at [95]-[105].⁴²⁹ It made this submission to counter a submission of Hunters Green that upon JG King's proper construction these words in clause 5.4 would not perform any function in the event that the retention moneys were taken

⁴²⁷ Annotated List of Issues [15] 35-36. See also Transcript of Proceedings 9 February 2023 (n 152) 153.7-153.10, 159.17-163.13 (Mr Morrison).

⁴²⁸ [2017] QSC 202 (*Tomkins*).

⁴²⁹ Annotated List of Issues [15] 36.

into account as part of the moneys due and payable. This does not, however, address the clear text of clause 5.4 which I have already addressed. *Tomkins* also does not assist JG King. This is because it did not concern retention moneys but a bank guarantee. In *Tomkins*, Brown J considered provisions closely mirroring the terms of clauses 5.4 and 37.4 of the Contracts. The contractor had filed a notice of dispute after the issue of the final certificate by the superintendent which certified that the contractor owed money to the principal. The contractor's notice of dispute related to the entirety of the amount the subject of the final certificate. The contractor submitted that, as a result of the construction of clause 37.4(d), the final certificate did not have the effect that the money was due and payable. Subsequent to this, the principal then gave notice of its intention to have recourse to the bank guarantee it maintained possession of, which was provided by the contractor, as 'security' under the contract. Justice Brown found that the trigger for the return of the bank guarantee under clause 5.4 ('Reduction and release') was the issue of the final certificate.⁴³⁰ Justice Brown held that the bank guarantee should have been returned 14 days after the final certificate on the basis that no amount remained unpaid pursuant to which the principal could have recourse to the security given the operation of clause 37.4(d).⁴³¹ In my view, her Honour's reasoning is correct. In the present case, it is also the issue of a final certificate that triggers the release and return of the retention moneys within 14 days pursuant to clause 5.4, subject to any prior recourse to them by Hunters Green pursuant to clause 5.2.

211 JG King submitted that it is implicit in clause 37.4 of the Contracts that JG King is entitled to the return of the security in the final payment process. It referred to the need for JG King to include all claims whatsoever in connection with the subject matter of the Contracts in its final payment claim (and the need for JG King to execute a deed of release) and that the final certificate is conclusive evidence of the 'accord and satisfaction' and 'in discharge' of each party's obligations in connection

⁴³⁰ *Tomkins* (n 428) [96]-[98] (Brown J).

⁴³¹ *Ibid* [103] (Brown J).

with the subject matter of the Contracts (except for some exceptions in clause 37.4(a)-(e)).⁴³²

212 In my view, the 'accord and satisfaction' referred to in clause 37.4 is an agreement between the parties, in place of the parties' causes of action on their claims,⁴³³ in the following terms as expressly provided in clauses 5 and 37.4 of the Contracts:

- (a) the Superintendent is to determine the moneys finally due and payable under the Contracts and issue a final certificate evidencing those monies;
- (b) the moneys certified as due and payable are to be paid by JG King or Hunters Green as the case may be within 5 business days after the issue of the final certificate, except in the case of the matters in sub-clause 37.4(a)-(e);
- (c) the issue of the final certificate triggers the release and return of the security within 14 days pursuant to clause 5.4;
- (d) a party may have recourse to the security within 14 days of the final certificate pursuant to clause 5.2 if that party remains unpaid after the time for the final payment (i.e. after 5 business days from the date of issue of the final certificate).

213 This process applies with respect to all forms of security provided for in the Contracts, including retention moneys or bank guarantee, being the alternate form of security expressly provided for in the Contracts (see Item 14(a) of Part A of the Contracts). In *Tomkins*, as I have already said, clause 37.4 of the contract closely mirrored clause 37.4 of the Contracts. It provided "[t]he final certificate shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the Contract...".⁴³⁴ Brown J said, in obiter, that if there is no dispute as to the final certificate and the contractor did

⁴³² JG King's submissions [22].

⁴³³ See *McDermott v Black* (1940) 63 CLR 161, 183-184 (Dixon J); *Able Demolitions and Excavations Pty Ltd v Barry Kenna & Co* [2016] VSCA 312 [21]-[24] (Tate, Kyrou JJA and Riordan AJA).

⁴³⁴ *Tomkins* (n 428) [22] (Brown J).

not pay the amount in the final certificate within 5 business days then the principal and holder of the bank guarantee would have had time to give notice of its intention to have recourse to the bank guarantee before the expiry of 14 days after the certificate.⁴³⁵ Again, in my view, her Honour's reasoning is correct. As I have already said in the present case, it is also the issue of a final certificate that triggers the release and return of the retention moneys within 14 days pursuant to clause 5.4, subject to any prior recourse to them by Hunters Green pursuant to clause 5.2.

214 This construction of clauses 5 and 37.4 accords with the purpose of the Contracts to finally determine the monies due and payable by the parties except in the case of the matters in sub-clause 37.4(a)-(e) and to trigger the date for the release and return of the security upon the issue of a final certificate. The purpose of Contracts is not to obtain a return and release of the security as part of the payment to be made within 5 business days of the final certificate. This is expressly provided for by clause 5.4.

215 This construction also accords with the purpose of clause 5 to provide for a recourse by a party to the security if it remains unpaid after the time for the payment, including after the time for final payment.

216 JG King submitted that it was required to include within its final payment claim "all claims for payment due to it".⁴³⁶ This is undoubtedly correct. For reasons I have already addressed in this judgment, JG King did not have an entitlement to make a claim for the retention money as part of its claim for a final payment under clause 37.4 of the Contracts. JG King did not adequately explain how or when the unpaid amounts for construction work retained by Hunters Green as security in the form of retention moneys under the Contracts became due to it or why it was entitled to make a claim for them as part of the final payment claim. It relied upon this being implicit in clause 37.4.

⁴³⁵ Ibid [100] (Brown J).

⁴³⁶ JG King's submissions [39].

217 Finally, I do not accept JG King's submission that it would be anomalous and entirely inconsistent with the primary purpose of the Act if, in a claim for a final payment expressly contemplated by the Act, a claimant was not permitted to recover a substantial part of the contract price for the work.⁴³⁷ This is because in the context of the Payment Claims:

- (a) JG King was entitled to progress payments under the Act calculated by reference to 'the reference date' under the Contracts;
- (b) the amount of the progress payments under s 10(1) of the Act to which JG King was entitled in respect of the Contracts was to be the amount calculated in accordance with the Contracts, or if the Contracts make no express provision with respect to the matter, the amount calculated based upon, inter alia, the value of the construction work;
- (c) clause 37.4 of the Contracts makes express provision for the calculation of the progress payments to which JG King is entitled under the Act;
- (d) JG King's claims concern the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts. For the reasons I have already given, it was not a claim only for the unpaid amounts for the construction work;
- (e) the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts formed a separate and distinct fund constituting the 'security' under the Contracts;
- (f) upon a proper construction of clauses 5.4 and 37.4 of the Contracts, the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts were not, at the reference date under the Act, payable to JG King;

⁴³⁷ Ibid [42].

- (g) upon a proper construction of clauses 5.4 and 37.4 of the Contracts, the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys under the Contracts are payable to JG King 14 days after the issue of final certificates. This is subject to any recourse to the security by Hunters Green pursuant to clause 5.2 as a result of JG King not paying any amount stated in the final certificate as being due and payable to Hunters Green;
- (h) as a result, the amount of the progress payments under s 10(1) of the Act to which JG King was entitled in respect of the Contracts was a nil amount calculated in accordance with the Contracts.

218 Further, such an outcome upon a progress payment under the Act was expressly recognised by the High Court. In *Southern Han*, a majority of the High Court said of NSW Act:⁴³⁸

... the amount of the progress payment to which that person is entitled might ultimately be ascertained, according to the procedure set out in Pt 3, to be less than the amount that the person claims to be due and might even be ascertained according to that procedure to be nothing.

Clause 5.4 is not void

219 I do not accept JG King's alternate submission that clause 5.4 of the Contracts are void pursuant to s 48 of the Act. It submitted that this is because clause 5 of the Contracts has the effect of postponing JG King's entitlement to recovery of a final payment under the Act to after the relevant releases have taken effect.⁴³⁹ I refer to the matters I have addressed earlier in this judgment, including the operation of the accord and satisfaction provided for in clause 37.4.⁴⁴⁰ As a result, in my view, clause 5 is not void pursuant to s 48 of the Act. The Adjudicator was required to calculate the moneys due and payable between JG King and Hunters Green as at the reference date, excluding any 'excluded amounts' under s 10B of the Act. As at the reference

⁴³⁸ *Southern Han* (n 95) [60] (Kiefel, Bell, Gageler, Keane and Gordon JJ).

⁴³⁹ See Annotated List of Issues [15] 36.

⁴⁴⁰ Judgment [212], [217].

date, the unpaid amounts for the construction work retained by Hunters Green as security in the form of retention moneys were not due and payable.

220 As a result, JG King was entitled to nothing (i.e. a nil amount) for its payment claims under the Act as at the 'reference date'.

Did the Adjudicator commit non-jurisdictional error of law on the face of the record when calculating the amount of the progress payment the subject of the claims for payment and valuing the 'construction work' or the 'related goods and services' the subject of the claims for payment? If so, was the error of a sufficient type and severity that, in the Court's discretion, the adjudication determinations ought be quashed and should the Claims for Payment be remitted to the Adjudicator?

Parties' submissions

221 Hunters Green submitted that the Adjudicator applied the wrong mechanism when calculating the amount of the progress payments under the Act the subject of the Payment Claims and valuing the 'construction work' and the 'related goods and services' the subject of the Payment Claims.⁴⁴¹ In particular, Hunters Green submitted that it was not open to the Adjudicator to disregard the provisions of the Contracts.⁴⁴² It submitted that it was only open to the Adjudicator to apply the alternative mechanisms if the Contracts did not make express provision with respect to the matter.⁴⁴³ It submitted that this does not amount to reviewing the Adjudicator's reasons with a 'fine tooth comb' in search of error.⁴⁴⁴

222 Hunters Green submitted that a remitter would serve no utility when, once the retention moneys are taken into consideration under the contractual arrangements the Adjudicator should have applied under sections 10(1)(a) and 11(1)(a) of the Act, the adjudicated amount in each case must be nil.⁴⁴⁵

⁴⁴¹ Annotated List of Issues [16] 37.

⁴⁴² Ibid.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid [17] 38.

223 JG King submitted that if the Adjudicator did commit error, it was an error within jurisdiction and is not reviewable.⁴⁴⁶ It relied upon *S.H.A. Premier Constructions* in which Bond J said:⁴⁴⁷

... an adjudicator's erroneous failure to appreciate the correctness of the contended-for construction of the contract would be an error within jurisdiction.

224 It also submitted that while it is accepted that error of law is an available ground of review in Victoria in certain circumstances, it does not follow that every error ought to result in a decision being quashed.⁴⁴⁸

225 JG King submitted that remitter to the Adjudicator is available.⁴⁴⁹ It submitted that as the utility of a remitter depends upon the grounds on which the decision may be quashed, it submitted that any further submissions in relation to this matter ought to be made after any decision.⁴⁵⁰

Analysis

226 In *PPK Willoughby*,⁴⁵¹ McDougall J stated:⁴⁵²

59 It is well established that courts, in reviewing administrative decisions, should not be too concerned with looseness in the language used, nor with unhappy phrasing, in the reasons given by the decision-maker. Such reasons "are not to be construed minutely and finely with an eye keenly attuned to the perception of error". See *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287, cited with approval by Brennan CJ, Toohey, McHugh, and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

60 In the latter case, Kirby J (who agreed with the orders proposed by the plurality) made a number of relevant points at 291 (I omit citations):

1. The reasons under challenge must be read as a whole. They must be considered fairly. It is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a

⁴⁴⁶ Ibid [16] 37.

⁴⁴⁷ *S.H.A. Premier Constructions* (n 241) [76] (Bond J).

⁴⁴⁸ Annotated List of Issues [16] 37.

⁴⁴⁹ Ibid [17] 38.

⁴⁵⁰ Ibid.

⁴⁵¹ *PPK Willoughby* (n 401).

⁴⁵² Ibid [59]-[60] (McDougall J) (citations omitted).

verbal slip will be found warranting the inference of an error of law.

2. This admonition has particular application to the review of decisions which, by law, are committed to lay decision-makers, ie tribunals, administrators and others. This is not to condone double standards between the reasons and decisions of legally qualified persons and others. It is simply to recognise the fact that where, by law, a decision is to be made by a person with a different, non-legal expertise, or no special expertise, a different mode of expression of the decision may follow. It must be taken to have been contemplated by the lawmaker.
3. Specifically, the reviewing judge must be careful to avoid turning an examination of the reasons of the decision-maker into a reconsideration of the merits of the decision where the judge is limited to the usual grounds of judicial review, including for error of law.

227 The record for the purposes of considering non-jurisdictional error of law on the face of the record, in the circumstances of this case, each comprise, inter alia, for each of the Adjudicator's Determinations the following:⁴⁵³

- (a) the Payment Claim;
- (b) the Payment Schedule; and
- (c) the Adjudicator's Determinations.

228 I have concluded that the Adjudicator committed non-jurisdictional error of law on the face of the record when calculating the amount of the progress payment the subject of the Payment Claims. The Adjudicator did not apply clause 37.4 of the Contracts to calculate the amount of the Payment Claims pursuant to s 10(1)(a) of the Act. This was an error of law.⁴⁵⁴ I do not accept JG King's submission that, in relation to this matter, the Adjudicator had a 'discretion'⁴⁵⁵.

⁴⁵³ *Grocon* (n 80) [159] (Vickery J).

⁴⁵⁴ See *Transgrid* (n 396) [34] (Hodgson JA, Mason P and Giles JA agreeing); *S.H.A. Premier Constructions* (n 241) [76] (Bond J). The parties also accepted that such an error was an error within jurisdiction and made submissions to the Court on this basis.

⁴⁵⁵ See Transcript of Proceedings 9 February 2023 (n 152) 153.11-153.14 (Mr Morrison).

229 The jurisdiction of this Court to make an order in the nature of certiorari is an aspect of its jurisdiction as “the superior Court of Victoria” as provided for by s 85 of the *Constitution Act*.⁴⁵⁶ The exercise of that jurisdiction is regulated by Order 56 of the Rules.⁴⁵⁷ The High Court in *Wingfoot Australia Partners Pty Ltd v Kocak* said:⁴⁵⁸

The function of an order in the nature of certiorari is to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power. Thus, an order in the nature of certiorari is available only in respect of an exercise or purported exercise of power which has, at the date of order, an “apparent legal effect”. An order in the nature of certiorari is not available in respect of an exercise or purported exercise of power the legal effect or purported legal effect of which is moot or spent. An order in the nature of certiorari in those circumstances would be not simply inutile; it would be unavailable.

230 A material, non-trivial, error of law on the face of the record may attract relief in the nature of certiorari, subject to any applicable discretionary factors.⁴⁵⁹ Keogh J in *Combined Enterprises Pty Ltd v Brister*⁴⁶⁰ said:⁴⁶¹

Although relief in the nature of certiorari may not be available in respect of an error of law on the face of the record if the error in question is immaterial or trivial, it has been held that a ‘material, non-trivial error of law on the face of the record’ will attract such relief subject to ‘any applicable discretionary factors’. As Mason CJ said in *Australian Broadcasting Tribunal v Bond*:

A decision does not ‘involve’ an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different.

And as Toohey and Gaudron JJ noted in the same case:

For an error of law to be involved in a decision something more than the mere occurrence of error is necessary. The error must have contributed to the decision in some way or, at the very least, it must be impossible to say that it did not so contribute. Conversely, an error is not involved in a decision if it did not contribute to the decision or if the decision must have been the same regardless of the error. Thus, to show that an error of law is involved in a decision it is necessary, at

⁴⁵⁶ *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 [24] (French CJ, Crennan, Bell, Gageler and Keane JJ).

⁴⁵⁷ *Ibid.* N.B. At that time, the relevant rules were the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

⁴⁵⁸ *Ibid* [25] (French CJ, Crennan, Bell, Gageler and Keane JJ) (citations omitted).

⁴⁵⁹ *Wilson v County Court & Anor* (2006) 14 VR 461 [43] (Cavanough J). See also *Grocon n (80)* [121] (Vickery J); *Combined Enterprises Pty Ltd v Brister* [2016] VSC 807 [21] (Keogh J).

⁴⁶⁰ [2016] VSC 807.

⁴⁶¹ *Ibid* [21] (Keogh J) [21] (citations omitted).

the very least, to show that the decision may have been different if the error had not occurred.

231 The grant of certiorari is discretionary, it is not a right.⁴⁶² As a result, I accept JG King's submission that not every error of law ought to result in a decision being quashed.⁴⁶³

232 I am, however, satisfied that the errors of law are 'material' to the Adjudicator's Determinations. This is because:

- (a) the calculations of the Payment Claims were central to the Adjudicator's Determinations;
- (b) the Adjudicator did not calculate the amount of the progress payments to which JG King was entitled under the Act in accordance with clause 37.4 of the Contracts;
- (c) but for the errors of law, the Adjudicator would have calculated the progress payments under the Act in accordance with clause 37.4 of the Contracts as nil.

233 As a result, I have concluded that it is appropriate to exercise my discretion and to grant certiorari and quash the Adjudicator's Determinations. It is not appropriate to remit the Payment Claims for further determination by the Adjudicator or another adjudicator. This is because, as I have already said, but for the errors of law, the Adjudicator would have calculated the progress payments as nil.

234 Hunters Green has succeeded on Grounds 4 (Stage 12) and 8 (Stage 13).

CONCLUSION AND ORDERS

235 In conclusion, I have found Hunters Green has failed on Grounds 1-3 (Stage 12) and Grounds 5-7 (Stage 13) and succeeded on Grounds 4 (Stage 12) and 8 (Stage 13).

⁴⁶² *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372, 415 [95], 417 [98], 421 [106] (McHugh J). See also *Jordan v Kotsios & Ors* [2022] VSC 332 [31] (Cavanough J); *Musico & Ors v Davenport & Ors* [2003] NSWSC 977 [126] (McDougall J); *Grocon* (n 80) [161] (Vickery J).

⁴⁶³ Annotated List of Issues [16] 37.

236 I will hear from the parties on the precise form of orders, including costs. The parties are directed to confer and provide a draft form of order to Chambers, or in the absence of agreement, forms of orders together with filed submissions in support (limited to 3 pages) by 4:00pm on 15 September 2023. The Court may then list the matter for hearing.
