

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

S ECI 2023 03302

RICHARD FRANCIS CURTIS

Plaintiff

v

RAMSAY BUILDERS PTY LTD (ABN 22 100 751 255)

First Defendant

and

JOHN MCMULLAN

Second Defendant

JUDGE:

GARDE J

WHERE HELD:

Melbourne

DATE OF HEARING:

6 March 2024

DATE OF JUDGMENT:

28 March 2024

CASE MAY BE CITED AS:

Curtis v Ramsay Builders Pty Ltd & Anor

MEDIUM NEUTRAL CITATION:

[2024] VSC 151

BUILDING CONTRACTS – Domestic building contract – Fixing stage – Whether works at fixing stage – Relevant principles relating to reference dates – Test in *Cardona v Brown* (2012) 35 VR 538 – *Building and Construction Industry Security of Payments Act 2002* (Vic) ss 1, 3, 9; *Domestic Building Contracts Act 1995* (Vic) ss 3, 40; *Domestic Building Contracts Regulations 2017* (Vic) r 13.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr B Reid with
Mr A Blunt

Colin Biggers & Paisley

For the First Defendant

Mr M Robins KC with
Mr A Morrison

Ward & Co

For the Second Defendant

No appearance

HIS HONOUR:

Introduction

- 1 The plaintiff, Richard Francis Curtis ('the owner') is the owner of a property at 64 Munro Avenue, Ashburton ('the property'). He carries on the business of building residences. On 12 August 2021, he engaged the first defendant, Ramsay Builders Pty Ltd (ACN 100 751 255) ('the builder') to construct two double storey townhouses on the property under an Australian Building Industry Contract Simple Works Contract ('contract'). The contract price was \$1,590,149.73 (including GST). The contract was a major domestic building contract under s 3 of the *Domestic Building Contracts Act 1995* (Vic) ('DBC Act').
- 2 On 26 May 2023, the builder served a progress claim ('payment claim') on the owner for the completion of the 'Fixing complete and Kitchen complete' stage of the contract ('fixing stage') in the amount of \$186,082.73 (including GST).
- 3 On 30 May 2023, Stephanus Coetzee, the project manager, and David Klein of Project Insite, the Superintendent, certified that an amount of \$149,543.04 was payable by the owner in relation to the fixing stage ('payment claim').
- 4 On 9 June 2023, the owner served a notice of termination of the contract.
- 5 On 14 June 2023, John McMullan, the second defendant ('adjudicator'), accepted appointment as adjudicator of the payment claim.
- 6 On 5 July 2023, the adjudicator published his determination ('determination') that an amount of \$198,452.25 (including GST) was payable on 14 June 2023 together with interest. The determination was made under the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('Act').
- 7 On 17 July 2023, the builder entered judgment ('judgment') against the owner in the County Court of Victoria in proceeding CC-23-03735 in the amount of \$202,007.56 including interest, and costs of \$2,000. Subsequently, the owner paid into court the amount of \$216,908.28 ('funds in court') to remain in court until further order or as

agreed between the parties.

8 In this proceeding, the owner seeks that:

- (a) the determination be quashed;
- (b) the judgment be set aside; and
- (c) the funds in court be returned to him.

The proceeding

9 The proceeding was commenced by originating motion for judicial review filed on 25 July 2023. The owner relies on one ground which is in substance:

[The adjudicator] committed jurisdictional error by determining that the [payment claim] relevant to the [determination] was made on and from ‘a reference date’ for the purposes of s 9(1) of the Act.

10 The owner relies on the owner’s affidavit and exhibits filed on 25 July 2023, the affidavit of the owner’s solicitor, Nathan Abbott filed 18 October 2023, a report dated 21 August 2023 (‘Lennon report’) and the evidence of William Lennon, of BSS Group, a building and engineering consultant.

11 The builder relies on the affidavits and exhibits of Brett Ramsay filed 27 September 2023 and 2 November 2023, and the affidavit and exhibit of its solicitor Zvinodaishe Kusangaya filed 21 November 2023. It also relied on the reports dated 27 June 2023 (‘first Jeffery report’) and 20 November 2023 (‘second Jeffery report’) and evidence of Trevor Jeffery, a building consultant and quantity surveyor of Construction & Asset Management Consultants.

Relevant statutory background

12 The main purpose of the Act is set out in s 1 and 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.

13 Section 3 of the Act sets out its object, and describes the means by which the object of the Act is to be achieved:

- (1) The object of this 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.

- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves –
 - (a) the making of a payment and claim by the person claiming payment; and
 - (b) the provision of a payment schedule by the person by whom the payment is payable; and
 - (c) the referral of any disputed claim to an adjudicator for determination; and
 - (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.
- (4) It is intended that this Act does not limit –
 - (a) any other entitlement that a claimant may have under a construction contract; and
 - (b) any other remedy that a claimant may have for recovering that other entitlement.

14 The entitlement of a builder to a progress payment is calculated according to 'reference dates', and is governed by s 9 of the Act, which relevantly provides:

- (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.
- (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...

Applicable legal principles

15 The legal principles that relate to ‘reference dates’ and the resulting jurisdiction of adjudicators may be summarised in the following way:

- (a) the existence of a reference date under a construction contract is a precondition to the making of a valid payment claim under the Act;¹
- (b) the making of a valid payment claim under the Act is a precondition to an adjudication application and to the jurisdiction of the adjudicator;²
- (c) the existence of a reference date is a jurisdictional fact as it is a criterion the existence of which enlivens the power of an adjudicator;³
- (d) the existence of an available reference date to found a payment claim is a condition precedent to the adjudicator exercising his or her power to make a determination under the Act;⁴
- (e) on an application for judicial review, the Court must determine for itself whether the reference date exists;⁵
- (f) determination of whether a stage is completed is a mixed question of fact and

¹ *Southern Han Breakfast Point Pty Ltd (in liq) v Leweree Construction Pty Ltd* (2016) 260 CLR 340, 345 [2] (Kiefel, Bell, Gageler, Keane and Gordon JJ); *Whitehorse Box Hill Pty Ltd v Alliance CG Pty Ltd* [2022] VSC 22, [28] (Stynes J) (*Whitehorse*).

² *Whitehorse* [28]; *Shape Australia v The Nuance Group (Australia) Pty Ltd* [2018] VSC 808, [40] (Digby J) (*Shape Australia*).

³ *Whitehorse* [28].

⁴ *Shape Australia* [40].

⁵ *Shape Australia* [40].

law determined on the evidence before the court;⁶

- (g) if an adjudicator purports to exercise power under the Act despite the non-existence of a jurisdictional fact, whether the non-existence of that part of the adjudicator's jurisdiction and base is ignored or wrongly determined by the adjudicator, the adjudicator will have committed a jurisdictional error;⁷ and
- (h) the Court has power to make orders in the nature of certiorari in respect of an adjudicator's erroneous determination of a jurisdictional fact.⁸

16 The principles which apply when it is alleged that jurisdictional error arose on a question of fact are:

- (a) the court must determine the question of fact for itself on the evidence placed before it;⁹
- (b) the burden of establishing the facts which show an absence of jurisdiction always rests on the party applying for relief;¹⁰
- (c) the standard of proof is high, requiring 'clear proof leading unmistakably to [the] conclusion that there was an excess of jurisdiction';¹¹ and
- (d) the court will hesitate before interfering if the adjudicator has investigated the relevant facts and the decision is not manifestly wrong.¹²

Fixing stage

17 Section 40 of the DBC Act defines the stages of a contract for the construction of a

⁶ *Saath Pty Ltd v Seascope Constructions Pty Ltd* [2021] VSC 358, [115] (Stynes J) ('*Saath*'); *Watpac Constructions Pty Ltd v Collins and Graham Mechanical Pty Ltd* [2020] VSC 414, [39]-[40] (Riordan J) ('*Watpac*').

⁷ *Shape Australia* [46].

⁸ *Shape Australia* [47]-[48].

⁹ *Saath* [47]; *Watpac* [39]-[40]; *R v Marshall; Ex parte Baranor Nominees Pty Ltd* [1986] VR 19, 32 (Brooking J) ('*Marshall*').

¹⁰ *Watpac* [39]; *Marshall* 32-33; *Saath* [48]; *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138, 153 (Dixon, Fullagar and Kitto JJ).

¹¹ *Saath* [47]; *Watpac* [39]; *Marshall*, 32-33.

¹² *Watpac* [39]; *Saath* [47]; *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54, 92 (Fullagar J).

home, and imposes a cap on the progress payments that may be claimed by builders.

18 Section 40 is relevantly as follows:

(1) In this section –

...

fixing stage means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position.

(2) A builder must not demand or recover or retain under a major domestic building contract of a type listed in column 1 of the Table more than the percentage of the contract price listed in column 2 at the completion of a stage referred to in column 3.

...

TABLE

Column 1	Column 2	Column 3
<i>Type of contract</i>	<i>Percentage of contract price</i>	<i>Stage</i>
...		
Contract to build all stages	10%	Base stage
“	15%	Frame stage
“	35%	Lock-up stage
“	25%	Fixing stage

...

(4) Subsections (2) and ... do not apply if the parties to a contract agree that it is not to apply and do so in the manner set out in the regulations.

...

19 Under s 40(4) of the DBC Act, the parties to a contract may agree that the provisions in s 40(2) and (3) do not apply. However, they can only do so if they comply with the requirements of r 13 of the *Domestic Building Contracts Regulations 2017* (Vic) ('Regulations'). This was not done in the present case with the result that the progress payments are governed by s 40 of the DBC Act and not by special condition

9 of the contract which also deals with progress claims.

20 The definition of 'fixing stage' in s 40(1) requires that all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position.

21 In *Cardona v Brown*, the Court of Appeal held:

It is necessary for there to be 'effective and satisfactory completion of the required stage...[as] a condition of any instalment payment' and while trivial failures, or failures borne of impracticalities, do not preclude effective and satisfactory completion...¹³

22 Citing *Hudson's Building and Engineering Contracts*,¹⁴ the Court of Appeal made it clear that effective and satisfactory completion had been achieved despite 'trivial failures' or 'failures borne of impracticalities'.¹⁵

23 The Macquarie Dictionary Online gives the primary meanings of the word 'trivial' as 'of little importance, trifling; insignificant' while the primary meaning ascribed to the adjective 'impractical' is simply 'not practical'. Stroud's Judicial Dictionary of Words and Phrases gives examples as to the meaning of the word 'impracticable' which show that it is a protean word which derives its meaning at least in part from its context.¹⁶ Notably 'impracticality' is described as a conception different from that of impossibility; the latter is absolute, the former introduces at all events some degree of reason and involves some regard for practice.¹⁷

24 The issue whether the fixing stage has been completed needs to be approached with common sense. Under a contract to build a home, the fixing stage is an intermediate stage to be followed as a later stage by practical completion of the works in accordance with the plans and specifications. Ultimately an occupancy permit, or a

¹³ (2012) 35 VR 538, 556 [74] (Tate JA, Bongiorno JA agreeing at [1], Osborn JA agreeing at [102]) ('*Cardona*').

¹⁴ Nicholas Dennys, Mark Raeside and Robert Clay (eds), *Hudson's Building and Engineering Contracts* (12th ed, 2010), para 3-076.

¹⁵ *Cardona* 556 [74].

¹⁶ Daniel Greenberg (ed), *Stroud's Judicial Dictionary of Words and Phrases* (Sweet & Maxwell, 10th ed, 2020) 317.

¹⁷ Referring to *Jayne v National Coal Board* [1963] 2 All ER 220 (Veale J).

certificate of final inspection will be issued. During this period, the builder will most likely be in possession of the site. It does not matter if trivial failures or failures due to impracticalities are completed immediately following the fixing stage rather than before provided, of course, that they are completed before practical completion and to the requisite standard.

25 A similar view was expressed by Judge Anderson sitting as a Vice-President of the Victorian Civil and Administrative Tribunal in *Metricon Homes Pty Ltd v To (No 2)*, where his Honour had to consider whether a final payment was due under a domestic building contract:

In the present case, the processes in the building contract anticipate the likelihood of defective and incomplete work being found during the processes, and the possibility of differences of opinion between the builder and the owner about what is defective or incomplete work.

However, protections are provided. So long as the owner complies with their responsibilities under the processes, the builder must rectify the defects identified by the owner and the final claim is not payable until 7 business days after the builder gives notice that it has completed the listed defective or incomplete work. Further, neither party, by following the processes, concedes conclusiveness of, or admits the description of, the listed works. These matters do, therefore, anticipate that the processes themselves may give rise to disputes or leave some matters unresolved, even if the processes are followed.¹⁸

Adjudicator's findings

26 The adjudicator accepted Mr Jeffery's opinion as set out in the first Jeffery report. He made findings which included the following extract from the first Jeffery report:

2.2.3 Fixing Stage as defined by the *Domestic Building Contracts Act 1995* (Vic):

...

2. At the time of my inspection, it was my opinion that the Fixing Stage had been reached in accordance with the *Domestic Building Act*,...

3. I acknowledge that in accordance with special condition 9.1, skirtings had not been installed to timber floor areas. It is my opinion this does not detract from the Fixing Stage as these works are minor in nature and that the works have been constructed this way to ensure best industry practice is achieved which results in:

¹⁸ [2023] VCAT 912, [308]-[309].

- a. the skirting not being damaged by the flooring installation; and
- b. providing a better aesthetic finish as an additional quad or splay moulding is not required to be installed in addition to the skirting as the skirting alone will cover the gap left when the flooring is installed.

I note the installation of skirting after timber flooring is common practice within the building industry.

4. I also acknowledge that in accordance with special condition 9.1 sinks had been installed in a manner allowing them to be re-installed when the stone benchtops are ready for installation. It is my opinion this does not detract from the Fixing Stage as these works are minor in nature and that the works have been constructed this way to ensure best industry practice is achieved which results in:

- a. the stone bench tops can be installed at the latest possible stage to ensure they are not damaged by the completion stage works; and
- b. the sinks need to be removed after a template has been made for the stone manufacturer to cut the benchtops to the required size with the exact size openings for the sinks to be installed. Without such a process the stone benchtops could not be installed.

I note the temporary installation of sinks to enable stone benchtop manufacturer to make its template is common practice within the building industry.

- 27 The adjudicator then considered the effect of minor incomplete works on completion of the fixing stage and said:

In my view, the Contract does not require perfect completeness of the works comprising a stage, but rather, completion for this purpose envisages minor omissions and/or incompleteness.

Firstly, in my view, the legal authorities are to this effect. In [*Cardona*], the Victorian Court of Appeal ... was considering whether a particular stage had been completed in a domestic building contract. The court alluded to the exception of '*trivial failures, or failures borne of impracticalities*' when assessing whether a particular stage had been completed...

Secondly, in my view, of the two alternative interpretations (ie on the one hand, slightly less than complete, versus perfectly complete, to be the requirement for achieving a stage), the slightly less than complete interpretation would be the preferred interpretation, because that interpretation avoid consequences which are in the circumstances capricious, unreasonable, unjust or not consonant with business efficacy.

- 28 These considerations led the adjudicator to hold:

In my view, the Works were at Fixing Stage at the date of the Payment Claim.

For the reasons set out above, I adopt the stage payment regime set out in Section 40 of the DBC Act...

On the material before me, save for:

- a) certain items that had been, on the material before me, agreed between the parties to be deferred, specifically the architraves to timber floors, and the stone benchtop and those sinks associated with the stone benchtops; and
- b) minor items in the nature of trivial failures, or failures borne of impracticalities, as alluded to by Tate JA in *Cardona*.

all of the internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards, were fitted and fixed in position.

Firstly, the Jeffery Report supports this. Mr Jeffery is an experienced quantity surveyor, carpenter, and registered building practitioner. Mr Jeffery expresses the opinion that at the time of his inspection (9 May 2023), Fixing Stage had been reached in accordance with the DB Act. Mr Jeffery attaches 107 photos in relation to Town House 1 and 127 photos in relation to Town House 2. Those photos appear to me, to verify Mr Jeffery's opinion that Fixing Stage had been reached in accordance with the DB Act.

Secondly, the assessment of the Contract Administrator in Progress Payment Certificate No 10 dated 30 May 2023 includes an assessment of \$144,559.07 (including GST) for construction work, and assesses the Fixing complete and Kitchen complete stage at 100% complete. In my view, that assessment of \$144,559.07 (inc GST) for contract work, and the Fixing complete and Kitchen complete stage at 100% complete, by the Contract Administrator, is consistent with Mr Jeffery's assessment in relation to the fixing work being complete.

Thirdly, the assessment of the Contract Administrator in Progress Payment Certificate No 9 dated 21 March 2023 includes an assessment of 100% complete in relation to plasterboard. In my view, that 21 March 2023 assessment by the Contract Administrator is consistent with Mr Jeffery's assessment in relation to the plasterboard work being complete.

I determine that the Works were at Fixing Stage at the time of the Payment Claim dated 26 May 2023.

Mr Lennon's evidence

29 Before me, the owner relied on paragraph 2.1 of the Lennon report which states:

- (b) The s40 Stage is complete when "all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position." This stage is incomplete:
 - i) Plasterboard has not been installed to the Stair area of Unit 2, at the balustrading dwarf walls, at the upper section of the

southern section of the stairwell, at the first floor frame level, and at the return balustrade wall at the landing on the First Floor [...]

- ii) Architraves have not been installed at bathrooms, ensuites and laundries, probably due to being programmed to occur after floor and wall tiling works [...]
 - iii) If Architraves are required as part of this stage, then the precursor Floor and Wall Tiling trade is required.
 - iv) Floor and wall tiling have not been installed at bathrooms, ensuites and laundries. No tiling works have commenced anywhere on the project (excepting the roof tiles) [...]
 - v) Baths are installed *temporarily* (tiling will require removal for access) but basins, troughs, sinks, etc are not installed, due to the benchtops being absent [...]
 - vi) Cabinets and cupboards are substantially installed; however the benchtops are not installed. The agreed stages in SC9 make the benchtops an exclusion, but the Act does not [...]
 - vii) Floor and wall tiling have not been installed at bathrooms, ensuites and laundries. No tiling works have commenced anywhere on the project (excepting the roof tiles) [...]
- (c) In summary the Fixing Stage of the Act has not been achieved.

Cross-examination

30 When shown a photograph of an unpainted door, Mr Lennon had no difficulty in accepting that the fixing stage was complete even when a door was intended to be removed, painted and reinstalled. As for basins, Mr Lennon considered that they had to be installed, plumbed and tested by putting water through them, so that the drain was seen to convey the water to the right destination. When taken to special condition 9 of the contract, Mr Lennon observed that the completion of stone benchtops and skirting board over timber floor areas was excluded from the 'Fixing complete' and 'Kitchen complete' stages and was instead required to be installed by practical completion.

31 In re-examination, Mr Lennon observed from photographs that while it appeared that a basin was in position in the upstairs main bathroom, there did not appear to be any pipework connected to the basin. There was no slot in the removal shelf below the basin.

Mr Jeffery's evidence

First Jeffery report

32 In the first Jeffery Report, Mr Jeffery concluded that the fixing stage had been reached in accordance with s 40 of the DBC Act.

33 While skirting had not been installed to timber floor areas, Mr Jeffery said that this did not detract from the fixing stage as these works were minor, and the works have been constructed this way to ensure that best industry practice was achieved. Mr Jeffery stated that this resulted in:

- (a) the skirting not being damaged by the flooring installation; and
- (b) a better aesthetic finish as an additional guard or splay moulding is not required to be installed in addition to the skirting which alone covers the gap left when the flooring is installed.

34 Mr Jeffery observed that the installation of skirting after timber flooring is common practice within the building industry.

35 Mr Jeffery said that sinks had been installed in a manner that allowed them to be re-installed when the stone benchtops are ready for installation. Mr Jeffery said that this did not detract from the fixing stage as these works were minor in nature, and the works had been constructed this way to ensure best industry practice was achieved. Mr Jeffery said that:

- (a) the stone bench tops can be installed at the latest possible stage to ensure that they are not damaged by completion stage works; and
- (b) the sink needs to be removed after a template has been made for the stone manufacturer to cut the benchtops to the required size with the exact size openings for the sinks to be installed. Without such a process the stone benchtops could not be installed.

36 Mr Jeffery observed that the temporary installation of sinks to enable the stone

benchtop manufacturer to make the template was common practice within the building industry. He also noted that the Superintendent had assessed the 'Fixing complete and Kitchen complete' stage as having been achieved.

Second Jeffery report

37 In the second Jeffery report, Mr Jeffery noted that the builder had claimed 85% of the contract price for all stages up to and including the fixing stage. Under s 40 of the DBC Act, the maximum claimable would have been 90% for the same stage.

38 Mr Jeffery said that he also had undertaken a preliminary assessment and valued the work completed by the builder as worth more than the amount it claimed up to and including the 'Fixing complete and Kitchen complete' stage. The builder had already purchased and delivered to the site all timber flooring for both townhouses, purchased all appliances and tapware and stored them offsite.

Cross-examination

39 Referring to Mr Lennon's photographs of an area directly below the skylight in Unit 2, Mr Jeffery said that he was told by the builder on site on 9 May 2023 that plasterboard had been installed to this area but subsequently removed. Mr Jeffery said that he was told that there were still some incomplete details as to a variation relating to the skylight. The plasterboard around the skylight had been removed so that this could be finalised. Mr Jeffery was taken to Belle Skylights invoice no. 214349 dated 9 May 2023 for the supply of glazed panels, and works to complete final skylight installation in accordance with revised drawings received on 6 March 2023. Variation No. 20 dated 17 March 2023 ('Variation No 20') required the cut back of render capping and replastering so that plaster could abut the frame on all four sides. This involved a return trip for plasterers to remove the temporary void and plaster up the skylight frames.

40 Referring to skirting boards, Mr Jeffery initially said that skirting board had not been installed where there were timber floorboards, and that all other rooms had skirting installed. However when taken to photographs, Mr Jeffery agreed that at the time of his inspection on 9 May 2023, there was no skirting in the garages, on the ground

floor of the units, or in some of the rooms on the top floor.

41 Mr Jeffery agreed that installation of a basin required that the basin be fitted and fixed in position. However, in this case the basin had been fitted so that a template could be accurately prepared for the stone benchtop to be installed. When taken to photographs, Mr Jeffery agreed they showed in one case that there was no pipe connected to a sink. He said that no builder would send off templates for stone benchtops to be cut unless the templates had been properly aligned. Mr Jeffery said that he was told by the builder that the templates had been sent to the stonemason who had not yet done the work.

Re-examination

42 In re-examination, Mr Jeffery confirmed his view that the fixing stage was complete when he inspected the work on 9 May 2023. He reiterated his earlier view that the lack of installation of skirting boards was trivial.

43 Mr Jeffery said that cutting of stone benchtops was never done on site, but in a factory using special 'CMC' or waterjet machines according to a template prepared with the sinks or basis installed or perfectly aligned.

Had the works reached the fixing stage when the progress claim was made on 26 May 2023?

44 I accept Mr Jeffery's opinions where they differ from those of Mr Lennon. Mr Jeffery was the better informed expert, and was more familiar with the plans and works than Mr Lennon.

45 In his report, Mr Lennon opined that the fixing stage was incomplete referring to a number of subjects. I will address each of these in turn.

Plasterboard

46 I accept that the plasterboard was fully installed as certified by the Superintendent as complete in Progress Payment Certificate No. 9 dated 21 March 2023. Some plasterboard surrounding the skylight in Unit 2 was removed due to a variation relating to the skylight.

47 Variation No 20 required the installation of two double-glazed skylight panels with a white frame in lieu of the original design of a single piece of glass with cushions and caulking bead. The variation extended to the framing of the skylight and the installation of weatherboard under raked flashing below the skylight.

48 I accept the builder's submission that the removal of part of the plasterboard in connexion with a variation does not transform completed work into uncompleted work. The plasterboard work had been fully installed but part of the plasterboard had to be removed to perform the variation.

49 The same issue arose in *Nerwa Constructions Pty Ltd v Koka*, where Member Edquist (now Senior Member Edquist) of the Victorian Civil and Administrative Tribunal held that the fixing stage had been completed where a toilet had been installed in a master bedroom ensuite, but the owner later changed the specification for the toilet. In the case of two basins where the owner required a larger bath to be installed which required the adjoining basins to be shifted to one side, the completion of the fixing stage was unaffected. They had been installed more than a week earlier. The building plumber did not rectify the basins because the owner sent him a message asking him to stop work.¹⁹

Architraves

50 The contract plans, drawings and specifications do not include the installation of architraves in the townhouses. There was no requirement to install architraves.

Floor and wall tiling

51 The fixing stage as defined in s 40 of the DBC Act makes no reference to the completion of floor and wall tiling. Mr Lennon suggested that floor and wall tiling might be necessary before architraves could be constructed. However, no architraves are required and no floor or wall tiling was needed for this purpose. I accept Mr Jeffery's evidence that it is not standard practice for builders to complete tiling work as part of the fixing stage.

¹⁹ [2023] VCAT 1137 [22]-[29].

Baths, basins, troughs and sinks

52 Mr Jeffery said that baths were installed temporarily as tiling would require their removal for access. Basins, troughs and sinks were not installed because stone benchtops had to be made offsite. After the stone benchtop templates were prepared, the basins, troughs, and sinks were removed and stored so that they could not be damaged during the installation of the stone benchtops and tiling works. Once the stone benchtops had been installed and tiling works completed, the baths, basins, troughs, and sinks could be reinstalled.

53 Mr Jeffery said that it was typical and best industry practice for builders to install these items in this way to achieve the relevant stage, and then to remove and store the items to avoid damaging them as other works were carried out.

54 The evidence shows that baths, basins, troughs and sinks were fitted and left in position or stored. To the extent that they were not fixed in position, this was a trivial failure or failure due to impracticality. Any fixing of these facilities was impractical because if fixed they would have to be unfixed and removed in order for stone benchtops to be installed when they were made. Likewise, baths, basins, troughs and sinks would have to be unfixed and removed for tiling or paint works, and then reinstalled. Removal of these items obviated the risk that they might be damaged while other works were conducted.

55 I find that any failure to install baths, basins, troughs and sinks was of very minor significance and cost, and fell within the exceptions identified in the *Cardona* decision.

Cabinets, cupboards and benchtops

56 Mr Lennon was of the opinion that cabinets and cupboards had been substantially installed with the exception of benchtops. Mr Jeffery was of the opinion that the fixing stage did not require benchtops to be installed.

57 Section 40 of the DBC Act does not require that benchtops be installed as part of the fixing stage. I accept Mr Jeffery's opinion that it is best industry practice to complete

installation of stone benchtops after the fixing stage to avoid them being damaged or stained.

Skirting

58 Mr Jeffery expressed the opinion that the lack of installation of skirting board over the room with timber flooring was minor and trivial in nature. He said that the works were programmed in accordance with industry best practice. I accept that the failure to install skirting where timber flooring was intended to be installed was trivial. I accept Mr Jeffery's evidence that the time required for a carpenter to cut and nail skirting to the wall was approximately three to four hours at \$75 per hour in each unit, and would have cost a total of \$450-\$600 (\$225-\$300 per unit) to complete. The skirting work yet to be completed was extremely minor and insignificant as against the contract price of \$1,590,149.73 (including GST) stated in the contract.

59 For these reasons, I accept Mr Jeffery's opinion that the works had reached the fixing stage as defined by s 40 of the DBC Act.

Other submissions

60 The owner also advanced various other submissions. He submitted that the adjudicator had not properly instructed himself as to the test adopted in *Cardona*.²⁰ He submitted that the payment claim was not issued on and from a reference date, and that the adjudicator should have identified and fixed a reference date. He submitted that the adjudicator was in error when he found that the fixing stage was complete on 26 May 2023.

61 I reject these submissions. I have arrived at the same conclusions on the facts as the adjudicator. The payment claim was issued on and from a reference date - namely 26 May 2023. The fixing stage was complete on or by this date.

Conclusion

62 I find that the works had reached fixing stage when the progress claim was made by the builder on 26 May 2023. Insofar as any works were incomplete, I find that they

²⁰ *Cardona* 556 [74].

were trivial failures or failures borne of impracticalities. The owner who has the burden of proof has failed to show jurisdictional error by the adjudicator.

63 As a result, the proceeding must be dismissed.
