

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

Not Restricted

S ECI 2023 03380

TARANEH NASSERI

Plaintiff

v

WELLINGTON BUILDERS PTY LTD (ACN 607 289 823)

First Defendant

and

JOHN MCMULLAN

Second Defendant

and

OLD BURKE ROAD PTY LTD (ACN 654 312 740) ATF
THE OLD BURKE RD UNIT TRUST (ABN 28 936 934 867)

Third Defendant

JUDGE: GARDE J
WHERE HELD: Melbourne
DATES OF HEARING: 4-5 March 2024
DATE OF JUDGMENT: 29 April 2024
CASE MAY BE CITED AS: Nasseri v Wellington Builders Pty Ltd & Ors
MEDIUM NEUTRAL CITATION: [2024] VSC 200

BUILDING CONTRACTS – Domestic building contract – Adjudication – Whether jurisdictional error – Effect of previous memorandum of understanding and development management agreement – Unit trust – Special purpose vehicle – Whether building owners were ‘in the business of building residences’ – Whether the adjudicator denied the plaintiff procedural fairness by refusing or failing to consider further submissions or a statutory declaration – *Building and Construction Industry Security of Payment Act 2002* (Vic) ss 1, 3, 7(2)(b), 9, 10, 14, 15, 18, 21, 23, 50(1) – *Corporations Act 2001* (Cth) s 127 – *Domestic Building Contracts Act 1995* (Vic) s 31(2) – *Dover Beach Pty Ltd v Geftine Pty Ltd* [2008] VSCA 248 – *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd* [2020] VSC 414 – *Saath Pty Ltd v Seascope Constructions Pty Ltd* [2021] VSC 358 – *Golets v Southbourne Homes* [2017] VSC 705 – *Piastrino v Seascope Constructions Pty Ltd* [2022] VSC 202 – *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSC 14 – *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)* [2015] VSC 500.

CONTRACTS – Effect of handwritten additions to the contract – Objective theory of contract – Surrounding circumstances – Purpose and object of the transaction – Post-contractual conduct – Identification of the parties to the contract – *Lederberger v Mediterranean Olives Financial Pty Ltd* (2012) 38 VR 509 – *Nurisvan Investment Ltd v Anyoption Holdings Ltd* [2017] VSCA 141 – *Molonglo Group (Australia) Pty Ltd v Cahill* [2018] VSCA 147 – *The Edge Development Group Pty Ltd v Jack Road Investments Pty Ltd* [2019] VSCA 91.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Dr S Baron Levi	Ray Abrahams & Associates
For the First Defendant	Mr A R Morrison	Ward & Co Legal Consultants
For the Second and Third Defendants	No appearance	

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HIS HONOUR:

Introduction

- 1 By a second further amended originating motion filed 18 December 2023 ('originating motion'), the plaintiff Taraneh Nasserri ('plaintiff') seeks judicial review of an adjudication determination made by the second defendant, John McMullan on 6 July 2023 ('determination') under the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('Act'). She seeks that the determination be quashed and declared to be void, and that a subsequent County Court judgment in favour of the builder, Wellington Builders Pty Ltd (ACN 607 289 823) ('builder') be set aside.
- 2 The determination followed an application by the builder for an adjudication because no payment schedule was received by it in respect of its payment claim. The payment claim was issued under a MBAV HC7 New Homes Contract dated 14 October 2022 ('contract').
- 3 The plaintiff claims that the determination was affected by jurisdictional error on grounds which may in simple terms be stated as:
 - (a) the contract did not identify one of the parties described as 'the owner', and was not signed by Old Burke Road Co Pty Ltd (ACN 654 312 740) ('the corporate trustee') as owner or any identified agent on its behalf;
 - (b) as a result, the contract contravened s 31(2) of the *Domestic Building Contracts Act 1995* (Vic) ('DBC Act');
 - (c) the adjudicator erred in his conclusion that the plaintiff was 'in the business of building residences' under s 7(2)(b) of the Act; and
 - (d) the adjudicator denied procedural fairness to the plaintiff by refusing or failing to consider the further submissions and statutory declaration of the plaintiff.
- 4 The plaintiff relies on her own affidavits and exhibits filed 28 July 2023 and 16 October 2023, and the affidavit and exhibits of her solicitor filed 12 September 2023. The

builder relies on the affidavit and exhibits of Candice Hammer, filed 22 August 2023, and of Jake Worrell, filed 26 October 2023. Both the plaintiff and Mr Worrell gave oral evidence and were cross-examined. Both parties relied on written and oral submissions. Insofar as there are differences between the plaintiff's evidence and that of Mr Worrell, I accept the evidence of Mr Worrell who appeared to me to have a much clearer and better recollection of past events and conversations.

Background

5 The plaintiff is an IT manager (now unemployed) with no previous building experience. Since 2012, she has been the registered proprietor of a property at 1531 Old Burke Road, Kew East, being the land described in Certificate of Title Volume 06730 Folio 946 ('property'). From about 2015, she had in mind to redevelop the property by demolishing the existing single storey dwelling and constructing two townhouses.

The MOU

6 On 28 September 2021, the plaintiff signed a memorandum of understanding ('MOU') with Candice Hammer, whose company Martello Property Pty Ltd (ACN 644 428 124) ('Martello') was an active property developer. The parties to the MOU are named as the plaintiff (who is described as Party A) and Ms Hammer and her nominated trust (who are described as Party B).

7 Clause 1 of the MOU stated in substance that the intention of the parties was to redevelop and subdivide the property, and create a profit from the subdivision and development, to be shared equally between Party A and Party B after all development costs and the agreed land price had been paid.

8 Clause 2 of the MOU stated in substance that Party A and Party B intended to demolish the existing residence and construct two townhouses. One townhouse would be the plaintiff's principal place of residence, while the other would be sold with profits to be shared equally after all development and ancillary costs were paid.

The plaintiff was to occupy one of the completed townhouses as her principal place of residence until she notified Party B that the townhouse was to be sold.

9 Clause 2 of the MOU also provided for:

- (a) an agreement to be signed for the property with a fixed price of \$2,300,000;
- (b) sales proceeds to be used:
 - (i) first, to pay down mortgage and project costs;
 - (ii) secondly, to pay Party A's agreed property price less the mortgage payment of Party A from the construction facility;
 - (iii) thirdly, to pay out any additional funds contributed by either Party A or Party B;
 - (iv) fourthly, to pay tax; and
 - (v) fifthly, to split the balance of net profit equally.

10 The MOU provided in substance that the joint venture project timeline was 33 to 38 months. A new special purpose vehicle ('SPV') was to be set up to carry out the development, with the shares of that vehicle to be equally owned by both parties.¹ Ms Hammer was to be the director and main guarantor of the SPV. The plaintiff was to remain the sole owner of the property during the project, but would also provide a guarantee over the property.

11 Within the joint venture, Party A's duties were limited. Party A, being the plaintiff, was to provide the land with no personal liability whatsoever for the construction facility or for project/development costs.

12 The responsibilities of Party B within the joint venture included in substance:

¹ The MOU uses both of the expressions 'special purpose entity' and 'special purpose vehicle'. In these reasons the expression 'special purpose vehicle' or 'SPV' is used.

- (a) acting as the property developer with responsibility to organise, coordinate and manage the day to day activities required for the success of the property development;
- (b) establishing a new bank account under the name of the SPV for the sole purpose of the development, with Party A and Party B to be signatories and to approve all transactions;
- (c) securing bank funding for the project;
- (d) acting as the architect for the project and supplying design documentation and specifications;
- (e) acting as project manager and development manager, and delivering the project from inception to completion when both properties were sold and settled;
- (f) maintaining records, evaluating all quotations and costs and assessing their accuracy and suitability;
- (g) as project manager, providing regular email updates to the plaintiff of progress and minutes of meetings with others;
- (h) providing all cash funds for the project outside of bank funding, including all associated consultant costs;
- (i) covering holding costs for the bank funding throughout the project, and paying accounts; and
- (j) providing \$10 million professional indemnity insurance (project management) and \$20 million public liability insurance details.

13 On 7 October 2021, the corporate trustee was incorporated with a principal place of business at the property. Ms Hammer was the sole director of the corporate trustee. 60 of the 120 ordinary shares in the corporate trustee were allotted to Nasserri

Investments Pty Ltd (ACN 654 302 208), a newly incorporated company controlled by the plaintiff, while the other 60 shares were allotted to Embelgo Family Pty Ltd (ACN 649 150 354), a company controlled by Ms Hammer. Nasser Investments Pty Ltd was registered on the same day as the corporate trustee with the 10 issued shares held by the plaintiff. The corporate trustee was the trustee of a unit trust known as the Old Burke Road Unit Trust (ABN 28 936 934 867) ('unit trust') which was established on the same day.

Development management agreement

14 A month later, the plaintiff and Martello signed a development management agreement for the property ('development agreement') prepared by solicitors. The development agreement gave effect to the MOU, and was dated 28 October 2021. The preamble recited that:

- A. The [plaintiff] is the registered owner of the [property].
- B. [Martello] has experience in property development and project management.
- C. The [plaintiff] wishes to engage [Martello] to carry out the development of the [property].
- D. [Martello] has agreed to carry out the Development Services in accordance with [the development agreement].

15 By cl 2 of the development agreement, the plaintiff appointed Martello, and Martello accepted the exclusive responsibility of developing the property, providing the development services, and completing the project.

16 The expression 'The Project' was defined in a schedule to the development agreement to mean:

... undertaking and managing the development, subdivision, marketing and sale of, the [property] primarily for residential purposes in accordance with the Business Plan which, as at the date of this Agreement includes:

- the demolishing of the existing house on the [property];
- the construction of two two-houses [sic] on the [property];
- the sub-division of the [property] into two separate titles;

- the transfer of one title and townhouse to the [plaintiff]; and
- the sale of the remaining title and townhouse at value.

17 The expression 'Development Services' was very widely defined to mean the management of all aspects of the project including matters such as feasibility updates, approvals, road and infrastructure management, budgeting, project and management accounting, appointment and management of consultants, business plan, records, variations, extension of time, negotiations with adjoining landowners, sales agents and marketing program, insurances, and third-party legal disputes.

18 Clause 3.2 of the development agreement is headed 'No joint venture' and provided that the development agreement did not constitute a partnership, agency, trust, nor any other arrangement. Clause 3.3 provided that, other than as specifically provided in the development agreement, Martello did not have any interest in the property.

19 Under cl 4.1, the development agreement was subject to Martello obtaining development approvals for the project in a form satisfactory to Martello and the plaintiff.

20 Under cl 5.1, the project was to be funded via an SPV. The plaintiff was to be a third-party security provider (but not in a personal capacity). Clauses 5.3.1 and 5.3.2 provided that the plaintiff was to provide the property as security for the project funding, with a project financier's rights being limited to enforcement action against the property only. Under cl 5.3.3(a), if Martello requested, the plaintiff was to consent to a mortgage against the property in favour of the project financier.

21 Under cl 6.1-6.7, Martello had wide-ranging obligations to provide the development services and retain consultants and contractors. Under cl 7.1-7.6, the plaintiff's obligations were largely limited to making the property available and executing documents.

22 Clause 12.3 of the development agreement provided in substance for sale receipts to be applied on completion of a sale of each subdivided lot in the following manner:

- (a) first, all amounts owed to secured creditors;
- (b) secondly, all amounts owing to unsecured creditors, including loans from the plaintiff or Martello and tax associated with the project which had been paid by the plaintiff or Martello;
- (c) thirdly, agreed guaranteed land value component and the landowner payments; and
- (d) fourthly, the balance was to be split equally between the plaintiff and Martello.

23 Under cl 12.4, the plaintiff authorised the payment of a development fee to Martello from project funding of 5% of the project costs (excluding the land value component) by way of monthly instalments throughout the duration of the development agreement.

Signing of the contract

24 Things did not go well for the project as described in the MOU and development agreement. On 19 November 2021, the project planning consultants were advised by a Boroondara City Council ('Council') planning officer that the Council had fundamental concerns about the project. They included concerns about side-by-side construction of the townhouses; ramp width; proposed use of site frontage and the adoption of flat roofs. In the circumstances, no planning application was ever lodged for the project in the form described in the MOU and development agreement. The project was transformed from the construction of two townhouses on the property to the construction of a single new double-storey home with swimming pool, retaining wall, and landscaping.

25 Ms Hammer subsequently introduced the plaintiff to Jake Worrell, a director of the builder. The plaintiff met with Mr Worrell and Ms Hammer at Martello's office in Brighton on 14 October 2022.

26 At the meeting, the contract was presented to the plaintiff for signature. She deposed that she had not previously seen or read the contract, or shown it to her lawyers.

According to the plaintiff, Ms Hammer insisted that the plaintiff sign the contract describing it as a standard building contract. The plaintiff said that she asked Ms Hammer about construction finance, and that Ms Hammer responded that there was no issue with the finance, and the risk of finance was on Ms Hammer. The plaintiff deposed that she then said to Ms Hammer that the plaintiff was not meant to take on any financial risk and that it was Ms Hammer who should be signing the contract. The plaintiff said that she asked Ms Hammer to call her finance broker. In a conversation over speaker phone with Faris Dedic, Ms Hammer's finance broker, the plaintiff said that she asked Mr Dedic why her name was on the contract. He replied that her name had to be on the contract because she was the landowner. The plaintiff said that she then agreed to sign the contract provided Ms Hammer also signed the contract.

27 Following this conversation, Ms Hammer handwrote the words '& Old Burke Rd Unit Trust' on the front page of the contract adjacent to the plaintiff's name and above the word 'Owner'. She also added the words:

& Old Bourke road unit trust

ABN 289 369 34867

email candice@martelloproperty.com.au

adjacent to the heading 'owner' in the Appendix to the contract.

28 The plaintiff and Ms Hammer then signed and dated the contract, initialling every page. Mr Worrell also signed and initialled the contract.

29 Following signature of the contract, the plaintiff deposed that she asked that the contract be subject to finance as no finance had been approved. According to her, Ms Hammer said that there was no need for this. The plaintiff said that she insisted that the contract be shown as subject to finance; Mr Worrell said that he had no objection to this and would take care of it.

30 On 18 October 2022, there was an exchange of emails to the effect that the contract was subject to finance.

- 31 A building permit was issued to Martello on 20 January 2023.
- 32 On 6 February 2023, Mr Dedic advised that a loan of \$2.8 million had been approved by La Trobe Financial ('La Trobe'). La Trobe offered the plaintiff and Ms Hammer construction finance of \$2.8 million at an interest rate of 8.99% fixed for 18 months. The interest-only monthly repayments amounted to \$20,976.67 per month.
- 33 The footings for the project were poured on 9 March 2023. They were followed by the pouring of the slab on 22 May 2023. The builder made a payment claim in the amount of \$150,500.50 (including GST) for completing the base stage of the project on the same day. No payment schedule was provided to the builder.
- 34 At around this time, the plaintiff and Ms Hammer fell into dispute. The dispute has continued to this day.

Relevant statutory provisions

- 35 Section 1 of the Act set out its purpose, and provides:

The main purpose of this 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.

- 36 Section 3 sets out the object of the Act and states:

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

37 Section 7(2)(b) of the Act provides in substance that the Act does not apply to a domestic building contract within the meaning of the DBC Act between a builder and building owner (within the meaning of the DBC Act)² for the carrying out of domestic building work (within the meaning of the DBC Act),³ other than a contract:

... where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business;

38 Section 9 of the Act provides for the builder to be entitled to progress payments in the following manner:

- (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
- ...
- 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—

² Section 3(1) of the DBC Act defines 'building owner' to mean 'the person for whom domestic building work is being or, is about to be carried out'.

³ Section 3(1) of the DBC Act defines 'domestic building work' to be 'any work referred to in section 5 [of the DBC Act] that is not excluded from the operation of [the DBC Act] by section 6 [of the DBC Act]'.

- (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

...

39 Section 10 of the Act sets out the amount of a progress payment to which a builder may be entitled in these terms:

- (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

...

40 Section 14 of the Act provides for payment claims to be served, and is in these terms:

- (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
 - (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.

41 Section 15 of the Act provides for respondents to claim for progress payments to provide a payment schedule to claimants. It is in these terms:

- (1) A person on whom a payment claim is served (the *respondent*) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule –

- (a) must identify the payment claim to which it relates; and
- (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the *scheduled amount*); and
- (c) must identify any amount of the claim that the respondent alleges is an excluded amount; and
- (d) must be in the relevant prescribed form (if any); and
- (e) must contain the prescribed information (if any).

42 Subsection 15(4) sets out the consequences of a failure to provide a payment schedule as follows:

- (4) If—
 - (a) a claimant serves a payment claim on a respondent; and
 - (b) the respondent does not provide a payment schedule to the claimant—
 - (i) within the time required by the relevant construction contract; or
 - (ii) within 10 business days after the payment claim is served;

whichever time expires earlier—

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

43 Section 18 deals with adjudication applications and provides:

- (1) A claimant may apply for adjudication of a payment claim (an *adjudication application*) if—
 - ...
 - (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1)(b) applies cannot be made unless—
 - (a) the claimant has notified the respondent, within the period of 10 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim; and

- (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 2 business days after receiving the claimant's notice.
- (3) An adjudication application –
- (a) must be in writing; and
 - (b) subject to subsection (4), must be made to an authorised nominating authority chosen by the claimant; and
 - ...
 - (e) in the case of an application under subsection (1)(b), must be made within 5 business days after the end of the 2 day period referred to in subsection (2)(b); and
 - (f) must identify the payment claim and the payment schedule (if any) to which it relates; and
 - (g) must be accompanied by the application fee (if any) determined by the authorised nominating authority; and
 - (h) may contain any submissions relevant to the application that the claimant chooses to include.

44 Section 21 of the Act provides for adjudication responses and is in the following form:

- (1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the *adjudication response*) at any time within –
 - (a) 5 business days after receiving a copy of the application; or
 - (b) 2 business days after receiving notice of an adjudicator's acceptance of the application –

whichever time expires later.
- (2) The adjudication response –
 - (a) must be in writing; and
 - (b) must identify the adjudication application to which it relates; and
 - (c) must include the name and address of any relevant principal of the respondent and any other person who the respondent knows has a financial or contractual interest in the matters that are the subject of the adjudication application; and
 - (ca) must identify any amount of the payment claim that the respondent alleges is an excluded amount; and

- (d) may contain any submissions relevant to the response that the respondent chooses to include.
- (2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).
- (2B) If the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant –
 - (a) setting out those reasons; and
 - (b) stating that the claimant has 2 business days after being served with the notice to lodge a response to those reasons with the adjudicator.
- (3) A copy of the adjudication response must be served on the claimant.
- ...

45 Section 23 of the Act provides:

- (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;
 - (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.

The determination

46 The adjudicator found that the works were at base stage when the payment claim was made. He determined that an amount of \$161,180.50 (including GST) was payable to the builder from 5 June 2023 with an applicable rate of interest of 10% per annum.

Grounds of review

47 In the originating motion, the plaintiff relies on five grounds to show that the determination was affected by jurisdictional error. It is convenient to consider ground 3A of the originating motion before considering the other grounds.

Ground 3A

48 Ground 3A is in substance as follows:

Alternatively, the Adjudicator engaged in jurisdictional error, and further in material error of law on the face of the record, in that (a) the [contract] does not identify (or identify with any certainty) the Owner; and (b) the Contract is not signed by the Owner, and is thus void *ab initio* and of no effect under s 31(2) of the [DBC Act] and under the general law. Contrary to the presumption of the Adjudicator, [the corporate trustee] ... is not identified or named as Owner under the [contract] and the [contract] has not been signed by the [the corporate trustee] or any persons stated to be signing on behalf of the [corporate trustee].

Post-contractual conduct of the parties

49 In an email to Mr Worrell dated 21 June 2023, the plaintiff's solicitor said:

I act for Taraneh Nasserri, the registered proprietor of [the property] upon which you are building a single story dwelling pursuant to [the contract] that you entered into with my client. The contract refers to a third contracting party, [the corporate trustee] and all parties have conducted themselves on the basis that the [corporate trustee] is a party to the contract. Candice Hammer is a joint director of the [corporate trustee] together with my client and one of her entities is a shareholder in the [corporate trustee], as is one of my client's entities.

You are no doubt aware that the agreement between my client and [Martello] pursuant to which the property was to be developed, has been cancelled and that my client and Martello are in dispute with each other and that I and Martello's solicitor are dealing with the dispute.

[The builder] has invoiced my client and the [corporate trustee] for work done to date, the most recent work being the laying of the slab. The builder has issued a suspension of work notice because the builder has not been paid.

To enable the building work to progress and payment to you, my client requests the following:

1. The building contract be novated such that the [corporate trustee] is no longer a party to the contract. Alternatively, that a new building contract is entered into between the builder and my client subject to the existing contract being cancelled.
2. The novated contract is to be varied to allow for the change of work and material from steel to timber and replace Belluxe with new suppliers, alternatively the new building contract is to reflect the costs of the work in accordance with a revised tender that the builder must provide to my client.
3. A new tender for the cost of the build to allow for the change of work and material from steel to timber and replace Belluxe with new suppliers.

4. A pro forma new domestic building contract containing the cost of the build using timber and not steel and replace Belluxe with new suppliers.

My client will apply for funding for the build and upon receipt of pre-approval and once she has secured the funding will be in a position to provide you with proof of her ability to fund the cost of the build subject to you providing a tender for the cost of the build and a pro forma domestic building contract. This is the most convenient and practical way for my client to obtain approval from her funder for a loan to pay for the cost of the build.

Upon approval and grant of the loan, money owing to the builder will be paid.

It is my client's intention to resolve her dispute with Martello as soon as possible. My client does not want you to become involved in her dispute with Martello. Provided you will co-operate with my client and adhere to her requests my client will indemnify you and hold you harmless against any claim that Martello may make against the builder arising from a new building contract between the builder and my client.

50 Importantly, the email noted that all parties had conducted themselves on the basis that the corporate trustee was a party to the contract. It requested that the contract be novated so that the corporate trustee would no longer be a party to the contract.

51 The adjudication application dated 23 June 2023 also proceeded on the basis that the corporate trustee was a party to the contract. It named the respondent collectively as 'Taraneh Nasserri & Old Burke Rd Co Pty Ltd atf the Old Burke Rd Unit Trust'. The builder's submissions similarly named the respondent as 'Taraneh Nasserri & Old Burke Rd Co Pty Ltd (ACN 654 312 740) atf the Old Burke Rd Unit Trust (ABN 28 936 934 867)'. The statutory declaration of Mr Worrell of 23 June 2023 gave the name of the corporate trustee established by the plaintiff and Ms Hammer as 'the Old Burke Rd Co Pty Ltd'.

52 Likewise, the plaintiff's written submissions to the adjudicator dated 29 June 2023 stated:

Old Burke Rd Co Pty Ltd is a corporate trustee of a unit trust and was established as a special purpose vehicle to develop the land.

53 In her statutory declaration of 29 June 2023, the plaintiff stated that:

On 7 October 2021, in anticipation of developing my property, Candice Hammer and I established a unit trust and registered Old Burke Rd Co Pty Ltd... as the corporate trustee of a unit trust and as a special purpose

vehicle through which the development of my property would run... A bank account, to be jointly operated by me and Candice Hammer was opened in the name of the corporate trustee.

54 The plaintiff then said that:

On or about 14 October 2022, I entered into a domestic building contract with Wellington Builders Pty Ltd ... to build 1 double storey home. The words ‘& Old Burke Rd Unit Trust’ are included as a party to the contract on the contract.

55 The builder’s written submissions to the adjudicator dated 4 July 2023 were made on the same basis. They refer to ‘the time that Taraneh and Old Burke Rd Co Pty Ltd... entered into the Construction Contract’, and to plaintiff’s submissions about ‘Old Burke Rd Co being established as a special purpose vehicle to develop the Site’.

56 In a statutory declaration made on 4 July 2023, Mr Worrell said:

As previously stated... Taraneh entered into a joint venture with [Martello] whereby Taraneh and Candice established a unit trust and a corporate trustee in order to develop the Site and sell the Property. By virtue of the joint venture, a special purpose vehicle was established and to finance the development of the Site, being the Old Burke Rd Co Pty Ltd... as trustee for the Old Burke Rd Unit Trust.

The findings in the determination

57 On its front page, the determination lists the parties to the adjudication. The respondent (expressed in the singular) is shown as ‘Taraneh Nasserri & Old Burke Rd Co Pty Ltd ATF The Old Burke Rd Unit Trust (ABN 28 936 934 867)’. The address of the respondent is the address of the plaintiff’s solicitors at the time. The term ‘respondent’ is often used in the determination. The determination refers on a number of occasions to the respondent as ‘collectively’ being ‘Ms Nasserri’ and ‘Old Burke Rd Unit Trust’.⁴

58 The findings in the determination record in substance that:

- (a) the respondent (i.e. the plaintiff and the unit trust) established an SPV for the project;⁵

⁴ For example, see *Wellington Builders Pty Ltd v Nasserri and anor* (Adjudication Determination, John McMullen, Rialto Adjudications Pty Ltd, case 38/2023, 6 July 2023), [84], [85], [87] (‘Determination’).

⁵ Ibid [85], [87(b)].

- (b) the shares in the corporate trustee were held by vehicles owned by Ms Nasseri (Nasseri Investments Pty Ltd) and Ms Hammer (Embelgo Pty Ltd);⁶ and
- (c) the contract was executed on 14 October 2022. Ms Nasseri and the unit trust executed the contract as owner.⁷

59 The issue now raised in Ground 3A was not an issue in the adjudication and is not mentioned in the determination. This is because all parties accepted that the reference in the contract to the 'Old Burke Rd Unit Trust' was intended and agreed by the parties to be a reference to the corporate trustee of the unit trust. There was no other entity to which it could possibly refer.

60 It was almost three months after the proceeding commenced that Ground 3A was added to the originating motion, pursuant to leave granted by Stynes J on 5 October 2023. Up to this time, the corporate trustee was treated as a party to the contract.

Plaintiff's submissions

61 Before me, the plaintiff submitted:

- (a) the adjudicator conflated the plaintiff and unit trust, treating them as a single legal person or entity for the purpose of factual determination and legal liability;
- (b) the unit trust is not a legal person at all. The unit trust is operated through the legal personality of the corporate trustee;
- (c) the name of the corporate trustee 'Old Burke Rd Co Pty Ltd' does not appear in the contract;
- (d) in signing the contract, Candice Hammer does not expressly or evidently sign in the capacity of director of the corporate trustee, and does not purport to invoke s 127 of the *Corporations Act 2001* (Cth) ('*Corporations Act*');

⁶ Ibid [82.6].

⁷ Ibid [82.7].

- (e) there was no determination that the corporate trustee was a party to the contract;
- (f) the identification of parties to a contract must be made in accordance with the objective construction of the contract;
- (g) there is no clear basis upon an objective construction of the contract in which the corporate trustee may be construed as a party to the contract or as having signed it;
- (h) there is no objective indicia that the corporate trustee is a party to the contract;
- (i) the contract has not been signed or adopted by the owner, and is void ab initio under s 31(2) of the DBC Act; and
- (j) alternatively, Ms Hammer is personally liable under the contract, or as an agent of an undisclosed principal.

Builder's submissions

62 The builder submitted that:

- (a) faced with a construction that gives the contract no legal effect and a construction that gives the contract legal effect, the court should prefer the construction giving the contract legal effect;
- (b) the contract identified 'Old Burke Rd Unit Trust ABN 289 639 348 67' as a party. There was no doubt that the relevant contracting party was the corporate trustee. The plaintiff does not suggest that there is any other entity to which it could refer;
- (c) any ambiguity can be resolved by extrinsic evidence;
- (d) for disputes about the identity of contracting parties, subsequent communications may be used against a party as an admission of the existence or non-existence of a subsisting contract; and

- (e) it is beyond sensible doubt that the plaintiff accepted that an enforceable contract was in place.

Relevant law

- 63 It is well established that the identification of the parties to a contract must be in accordance with the objective theory of contract.⁸ It is also well established that the process of construction requires consideration not only of the text of the documents, but also of the surrounding circumstances known to the parties and the purpose and object of the transaction.⁹ In turn, this presupposes knowledge of the genesis of the transaction, the background, and the context in which the parties were operating.¹⁰ It involves consideration of the intention that a reasonable person with knowledge of the words and actions of the parties communicated to each other, and the knowledge that the parties had of the surrounding circumstances, would conclude that the parties had.¹¹
- 64 In addition to taking into consideration the surrounding circumstances known to the parties and the purpose and object of the transaction, the issue arises whether the Court can take into consideration the post-contractual conduct of the parties whether by way of inference or admission.
- 65 This issue was also considered by the Court of Appeal in *Lederberger v Mediterranean Olives Financial Pty Ltd* ('*Lederberger*') where the Court said:

The admissibility of post-contractual conduct as an aid in construing the content of, or parties to, a contract was for a long time unsettled. However, in *FAI Traders Insurance Co Ltd v Savoy Plaza Pty Ltd*, Brooking J (with whom Nathan and Eames JJ agreed) stated in emphatic terms that evidence of subsequent conduct was not admissible in the construction of the contract. His Honour said that "[a]ny general principle that the conduct of the parties after a contract has been made may be used as throwing light on its meaning would be uncertain in its operation and mischievous in its effect". Subsequently, in *Ryan v Textile Clothing & Footwear Union of Australia*, Hayne JA (with whom

⁸ *Lederberger v Mediterranean Olives Financial Pty Ltd* (2012) 38 VR 509, 515 [19], (Nettle, Redlich JJA and Beach AJA) ('*Lederberger*'); *Nurisvan Investment Ltd v Anyoption Holdings Ltd* [2017] VSCA 141, [75] (Osborn, Santamaria and Kaye JJA) ('*Nurisvan*').

⁹ *Lederberger* (n 8) 515-516 [19]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 462 [22] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Nurisvan* (n 8) [75] (citations omitted).

¹⁰ *Lederberger* (n 8) 516 [19].

¹¹ *Lederberger* (n 8) 515 [19].

Brooking and Tadgell JJA agreed), citing Lord Diplock in *Gissing v Gissing*, stated that the “intention of the parties” that is to be ascertained by the process of construction is an objective intention, being that which was reasonably understood by the other parties to be manifested by that party’s words or conduct. Then, in *Brambles Holdings Ltd v Bathurst City Council*, Heydon JA (as he then was, Mason P and Ipp AJA agreeing), after referring to the first principle which related to pre-contractual conduct, drew upon *FAI Traders* and *Ryan* in summarising the principles governing the admissibility of post-contractual conduct:

The second relevant principle is that post-contractual conduct is admissible on the question of whether a contract was formed.

The third relevant principle is that post-contractual conduct is not admissible on the question of what a contract means as distinct from the question of whether it was formed. As explained by Priestley JA (Meagher JA agreeing) in *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* [...], the status of the relevant High Court authorities is unclear: hence unless it is demonstrated that the later decisions of the Victorian Full Court and Court of Appeal against admissibility, *Ryan v Textile Clothing & Footwear Union of Australia* [...] and *FAI Traders Insurance Co Ltd v Savoy Plaza Pty Ltd* [...], are clearly wrong or they are overruled, they should be followed in New South Wales. No attempt was made to demonstrate that they are clearly wrong.

The fourth relevant principle is that the construction of a contract is an objective question for the court, and the subjective beliefs of the parties are generally irrelevant in the absence of any argument that a decree of rectification should be ordered or an estoppel by convention found. No argument of these kinds was advanced in this case.

The third and fourth principles stated by Heydon JA in *Brambles Holdings* have been put beyond doubt by the High Court. The third principle has been affirmed by the clear statements in *Agricultural and Rural Finance Pty Ltd v Gardiner* that subsequent conduct is inadmissible as an aid in the construction of a contract as “the governing theoretical framework as to the determination of contractual rights and obligations is the objective theory”. The approach to issues of construction by reference to post-contractual conduct would be at odds with the general principle that “it is not legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made”.

In *Pethybridge v Stedikas Holdings Pty Ltd*, the case on which the sixth respondent relies, it was argued that even under the restrictive view of post-contractual conduct outlined in Heydon JA’s third principle above, subsequent conduct was admissible to determine the identity of the parties to the contract. Campbell JA (Beazley and Basten JJA agreeing) said that subsequent communications cannot be looked to as an aid to construction of a contract, but can be looked to as an aid to deciding whether a contract has been entered into at all.

Campbell JA also noted the submission that the question of who the parties were to the contract was in substance no different to a question whether there

was a contract entered into with the appellant at all, but found it unnecessary to form a view about the correctness of that argument.

Where there is an issue as to whether a particular person was a party to a contract, further questions may arise as to whether it is permissible to have regard to subsequent conduct, as constituting an admission by conduct as to the parties' rights, or whether inferences may be drawn from such conduct as to the existence of a subsisting contract. As the respondents did not seek to rely upon such arguments at trial or on appeal, we express no view about them.¹²

66 The Court then considered whether post-contractual conduct was available to identify the parties to a contract wholly in writing, and said:

The sixth respondent submitted that post-contractual conduct is not available to identify the parties to a contract wholly in writing as the identification must be made in accordance with the objective theory of contract by ascertaining what each party was reasonably entitled to conclude from the attitude of the other. Plainly, the general principle, affirmed by the High Court in *Agricultural Finance*, does not allow use of the subsequent conduct of the parties as an aid in the construction of a contract. But we are not inclined to think that this now well-settled principle has affected the second principle stated by Heydon J in *Brambles Holdings* so as to have precluded the trial judge from relying upon tax returns filed *after* the tax effective scheme contracts had been signed, in order to ascertain whether the respondents and the partners of the partnership had entered into the agricultural contracts.

Moreover, even if the tax returns filed by the partnership and the partners were inadmissible for the purpose of identifying the parties to the contracts, we consider that his Honour, in his detailed examination of the circumstances which led to the signing of the agricultural contracts, including the object and purposes of the agricultural contracts, was correct to have concluded from those circumstances and the suite of documents relating to the Blue Gum and Mediterranean Olives schemes that the partners were the contracting party.¹³

67 It will be seen from these paragraphs, as the law reporter for the Victorian Reports noted in the headnote, that the Court of Appeal considered that it was permissible for the trial judge to rely on tax returns filed after the contracts were signed, in order to ascertain the parties who had entered into the contracts.

68 In *Nurivan Investment Ltd v Anyoption Holdings Ltd* ('*Nurivan*'), the Court of Appeal observed that:

It is well established that, in an appropriate case, as part of that process, a court is entitled to have recourse to extrinsic evidence to identify the parties to a

¹² *Lederberger* (n 8) 517-519 [26]-[30] (citations omitted).

¹³ *Lederberger* (n 8) 519 [31]-[32] (citation omitted).

contract, or to clarify and determine the particular capacity in which a party, or parties, purported to execute a contractual document.¹⁴

69 After setting out extracts from *Lederberger* which I have also set out, the Court said:

Based on those principles, it was clearly permissible for the judge to determine the question, whether Nurisvan was a party to the Heads of Agreement, by a process both of imputation from the terms of the document itself, as well as inference from the surrounding circumstances. The more difficult question is whether it was permissible for her Honour also to have relied on the subsequent communications between the parties, and their actions, as a basis of an inference or imputation that Nurisvan was a party to the Heads of Agreement.

The authorities make it plain that post-contractual conduct is not admissible on the question of the meaning of a contract, and for the purpose of construing a contract. On the other hand, it is recognised that, where no formal contract exists, post-contractual conduct is admissible on the question as to whether a contract was in fact formed. However, there is no settled view in the authorities whether post-contractual conduct may be relied on to found or support an inference as to the identity of a party to the contract.

In *Pethybridge v Stedikas Holdings Pty Ltd*, the issue whether post-contractual conduct may be used to infer that the respondent was a party to the contract in question, was raised in argument. However, the New South Wales Court of Appeal did not consider it necessary to determine the question.¹⁵

70 The Court then referred to *Lederberger* and observed that:

[T]he Court did not find it necessary to resolve that issue, because, even if the post-contractual tax returns of the appellants were inadmissible for the purpose of identifying the parties to the contracts, the evidence relating to the circumstances in which the contracts were originally signed was a sufficient basis for the trial judge to have concluded that the appellants were the contracting party.

The tentative view, thus expressed in *Lederberger*, does gain some support from the decision of the Court of Appeal of New South Wales in *Tomko v Palasty* and the judgment of Robb J in *Harold R Finger & Co Pty Ltd v Karellas Investments Pty Ltd*. In each of those cases, post-contractual conduct by an alleged party was regarded as an admission by it that it was in fact a party to the contract.

In *Tomko*, the appellant and the respondent were engaged in a business venture, which involved a number of companies, including Liverpool Hotels Pty Ltd. The appellant provided funds to the venture pursuant to two oral agreements, by way of loan, rather than by way of a capital contribution. At trial an important issue was whether the monies were provided to or at the direction of the respondent, or provided to or at the direction of Liverpool Hotels. The trial judge found in favour of the respondent on that issue. Einstein JA (with whom Mason P agreed) rejected the complaint by the

¹⁴ *Nurisvan* (n 8) [74] (citation omitted).

¹⁵ *Nurisvan* (n 8) [76]–[78] (citations omitted).

appellant as to the use by the judge of post-contractual communications for the purpose of determining the party with whom the appellant had entered into the relevant loan agreement. His Honour stated:

... subsequent communications may legitimately be used against a party as an admission by the conduct of the existence or non-existence, as the case may be, of a subsisting contract, where an issue concerns whether a particular person was a party to that contract.

In the circumstances before the trial judge the so-called 'post-contractual conduct' evidence which was adduced on the question of whether or not a contract of loan was formed as between the appellant and the respondent was admissible. The appellants' challenge to such use of this material in the particular circumstances which obtained during this trial is without substance.

In *Harold R Finger*, the plaintiff claimed damages against the defendants for alleged repudiation by one of them of a contract. The two defendants were Karellas Investments Pty Ltd and Karellas Group Pty Ltd. An issue arose as to which defendant was a party to the relevant contract, because the document in question referred, on most occasions, to 'Karellas Group'. Robb J held that that conduct by the parties, subsequent to the entry into the contract, constituted an admission by Karellas Investments Pty Ltd that it was a party to the agreement. His Honour stated:

The proposition that Karellas Group was intended to be the contracting party, even though Karellas Investments or nominee was identified as a proposed tenant, would suggest that it was Karellas Group that had the right and obligation to participate in the settlement of the terms of the formal documentation. However, the subsequent conduct that appears in the evidence suggests that the settlement of the terms was done on behalf of Karellas Investments. Karellas Investments actually exercised the rights to agree aspects of the necessary documents. These actions are capable of being admissions made by Karellas Investments, because they were undertaken by its solicitor or by its consultant ...¹⁶

71 The Court of Appeal again considered the issue in *Molonglo Group (Australia) Pty Ltd v Cahill*, where the Court quoted *Nurisvan* in part and held:

Where the issue is not the meaning of a term in a document to which the parties have agreed, but whether the parties intended that document to be a binding contract, the issue is 'to be determined, objectively, from the text of the document, construed in the context of the circumstances in which it came into being'. It is relevant to take into account the commercial context and surrounding circumstances of the parties' dealings. The parties' pre-contractual conduct is relevant and admissible on the issue of what each party by words and conduct would have led a reasonable person in the position of the other party to believe.

Post-contractual conduct can also be admissible on the issue of whether the parties intended a document to be a binding contract, but only in limited

¹⁶ *Nurisvan* (n 8) [80]-[83] (citations omitted).

circumstances, such as where the conduct constitutes an admission against interest.¹⁷

72 The Court of Appeal returned to the issue as to whether post-contractual conduct is admissible in *The Edge Development Group Pty Ltd v Jack Road Investments Pty Ltd*, where the Court said:

Finally, post-contractual conduct can also be admissible on the issue of whether the parties intended a document to be a binding contract, but only in limited circumstances, such as where the conduct constitutes an admission against interest. Otherwise, the general position is that post-contractual conduct is not admissible for the purpose of construing a contract. The Court in *Nurisoan* explained that it may be relevant to examine correspondence and communications between the parties, including subsequent to the document in question, to place that document in the context of the negotiations and determine whether the parties intended it to constitute the terms of a binding agreement. Alternatively, even where there was no chain of correspondence providing context to the creation of the relevant document, subsequent negotiations and communications between the parties may be relevant to demonstrate the nature and extent of the terms that might be necessary for the conclusion of a binding agreement but which were not included in the document in question.¹⁸

Was the corporate trustee a party to the contract?

73 When consideration is given to the text of the contract, the surrounding circumstances known to the parties, and the purpose and object of the parties, it is plain that the parties intended that the corporate trustee to be a party to the contract.

74 The same conclusion is reached when consideration is given to the post-contractual conduct of the parties whether by way of inference or admission.

75 I will now list the major considerations which give rise to this conclusion.

The parties to the contract

76 The handwritten changes to the contract and appendix to the contract made it clear that the parties intended that the unit trust have an important role under the contract and be subject to the rights and liabilities set out in its provisions. The handwritten amendments to the previously prepared contract point strongly to the conclusion that

¹⁷ [2018] VSCA 147, [131]-[132] (Maxwell ACJ, Whelan and Kyrou JJA) (citations omitted).

¹⁸ [2019] VSCA 91, [47] (Kaye, McLeish and Hargrave JA) (citations omitted).

the parties intended that the corporate trustee be a party to the contract. If this were not the case, the handwritten changes to the contract would be nugatory and ineffective because the unit trust as such was not a legal person and could have no rights under the contract. This would defeat and frustrate the intention of the parties. It would render nugatory the corporate and trust structure that the parties brought into existence for the distribution of profits from the project and the provision of finance.

Execution of the contract

77 The contract was signed by the plaintiff and Ms Hammer as owner. Both initialed every page of the contract. The plaintiff signed the contract because she was the landowner. Ms Hammer was the sole director of the corporate trustee and had authority to act on its behalf in accordance with its constitution. There is nothing to suggest that there was any company other than the corporate trustee involved in the contract as owner. There is nothing in the contract or the surrounding circumstances that suggests that Ms Hammer intended to be a contracting party in her personal capacity. Ms Hammer's signature of the contract is entirely consistent with the parties' intention that the corporate trustee be a party to the contract.

78 The plaintiff submits that the manner in which Ms Hammer signed the contract does not comply with s 127 of the *Corporations Act* for execution of a document by a sole director company. I disagree. Ms Hammer was the sole director of the corporate trustee and had all the decision making powers ordinarily exercised by a board of directors in a multi-director company. She had authority and was empowered to execute the contract as the authorized agent of the corporate trustee as she did.

Surrounding circumstances

79 The MOU provided for an SPV to be established to carry out the development. The parties incorporated the corporate trustee about a week after signing the MOU to fulfil this role. They established the unit trust at the same time. Likewise the development agreement provided for the development to be funded via an SPV. The plaintiffs'

statutory declaration of 29 June 2023 set out her intention and understanding that she and Ms Hammer had established the unit trust and incorporated the corporate trustee as an SPV through which the development of the property would proceed. Her written submissions to the adjudicator dated 29 June 2023 show the same intention and understanding. These are all consistent with an intention by the parties that the corporate trustee be a party to the contract.

80 Ms Hammer's affidavit filed 22 August 2023 is to the same effect. The corporate trustee was incorporated to act as an SPV for the development of the property, as the trustee of the unit trust.

81 In his affidavit filed 26 October 2023, Mr Worrell states that he was informed by the plaintiff and Ms Hammer that they had established a trust and corporate trustee in furtherance of their intention to develop and sell the property. He deposed that he had multiple conversations with the plaintiff and Ms Hammer where they said that they were developing the property as a joint venture for financial gain. Mr Worrell's knowledge and understanding also points to the intention of the parties that the corporate trustee be a party to the contract.

82 In cross-examination, the plaintiff referred to the corporate trustee as a 'special purpose vehicle', and agreed that she had a 50-50 interest in the units of the trust. She said that there was no other entity that she was aware of, other than the SPV, to which the reference in the contract to 'Old Burke Rd unit trust', with an ABN, could refer.

83 The plaintiff accepted that she confirmed to Mr Worrell that the plan was for the unit trust to build the property and then sell it straight away. Likewise, Mr Worrell said in evidence that the plaintiff wanted the development company added to the contract, and it was added.

84 I conclude that the circumstances surrounding the execution of the contract and the mutual intention of the parties at that time all suggest that they intended that the corporate trustee should be a party to the contract.

Purpose and object of the transaction

85 The purpose and object of the contract was to engage the builder to construct a double storey home as described in the extensive plans and specifications attached to the contract. The plaintiff was the registered proprietor of the property. The project was to be funded through the corporate trustee. Profit was to be distributed in accordance with the development agreement. It is obvious that the intention of the parties, and the purpose and object of the contract can only be achieved if the corporate trustee is a party to the contract.

86 Consideration of the purpose and object of the contract only serves to confirm that the parties always intended that the corporate trustee would be a party to the contract.

What would a reasonable person conclude?

87 Given the facts that I have described, I conclude that a reasonable person with the knowledge of the parties as to the surrounding circumstances, would conclude that the parties intended that the corporate trustee would be a party to the contract. A reasonable person would conclude that the parties did not intend that the plaintiff be the sole owner party to the contract. A reasonable person would note that the parties adopted a commercial structure for the project. They brought the corporate trustee into existence and arranged for their own companies to be equally issued with shares in the corporate trustee. They must have intended that the corporate trustee be a party to the contract because they intended to engage the unit trust. A reasonable person would also note that the use of an SPV was always integral to the project.

Post-contractual conduct

88 The post-contractual conduct of the parties overwhelmingly and compellingly points to the same conclusion – namely, that the corporate trustee was always intended to be an owner party to the contract. It does so both by way of inference and admission.

89 The plaintiff and Ms Hammer raised construction finance for the project on the basis that the corporate trustee was a party to the contract. La Trobe approved a loan of \$2.8 million to the corporate trustee on behalf of the unit trust with the plaintiff and

Ms Hammer acting as guarantors. An initial advance of \$1,136,700 was to be made to assist with refinance and loan set up costs. The balance of \$1,663,300 could be drawn down periodically on a cost to complete basis.

90 The email sent by the plaintiff's solicitor dated 21 June 2023 states that 'all parties have conducted themselves on the basis that [the corporate trustee] is a party to the contract'. The plaintiff's written submission to the adjudicator of 29 June 2023 is to like effect. The plaintiff's statutory declaration of 29 June 2023 is consistent with the same position.

91 I conclude on the facts that all parties to this proceeding conducted themselves on that basis that the corporate trustee was a party to the contract until about 18 December 2023 when the originating motion was amended to add Ground 3A. The addition of Ground 3A reflects the ingenuity of legal advisers and was not indicative of the position or conduct of the parties at any prior time including the time when the contract was made.

92 In the circumstances, I find that the post-contractual conduct of the parties points very strongly to the conclusion that the corporate trustee was a party to the contract.

93 For these reasons, I reject the plaintiff's submissions that the corporate trustee was not a party to the contract. For the reasons that I have given, when the text of the contract and the handwritten additions to the contract are considered objectively, together with the surrounding circumstances known to the parties, and the purpose and object of the transaction, it is plain that the parties intended that the corporate trustee be a party to the contract. The same conclusion is abundantly clear from the parties' post-contractual conduct.

Section 31(2) of the DBC Act

94 There is one additional submission that remains to be considered under Ground 3A. The plaintiff submitted that the contract was void ab initio under s 31(2) of the DBC Act for want of signature by the building owner or authorised agent. This submission must fail as the contract was signed by both the plaintiff acting in her own right, and

Ms Hammer as authorised agent of the corporate trustee. The plaintiff was the owner of the property and Ms Hammer the sole director of the corporate trustee who had power to execute the contract on its behalf.¹⁹

The determination

95 The plaintiff's submissions regarding Ground 3A were not put to the adjudicator. The plaintiff criticized the determination when it referred to the plaintiff and the corporate trustee as the respondent to the application.

96 I reject this criticism. The plaintiff and the corporate trustee were the owner parties to the contract. The adjudicator was plainly correct when he treated the plaintiff and the corporate trustee as the respondents to the adjudication application. It is of no consequence that the adjudicator described the plaintiff and the corporate trustee collectively as the 'respondent'. The adjudicator acted on the basis at all times that the corporate trustee was a party to the contract and the adjudication. No submission was put to him to the contrary. The adjudicator was correct in what he did.

Conclusion as to Ground 3A

97 For these reasons, I reject the submissions made on behalf of the plaintiff regarding Ground 3A. The plaintiff has failed to show jurisdictional error as alleged in Ground 3A.

Grounds 1, 2 and 3

98 Grounds 1, 2 and 3 of the originating motion each raise the same or similar issues. They are conveniently considered together.

99 Grounds 1, 2 and 3 state:

1. The Adjudicator engaged in jurisdictional error, and further in material error of law on the face of the record, in concluding that the plaintiff was 'in the business of building residences' within the meaning of

¹⁹ See also *Dover Beach Pty Ltd v Geftine Pty Ltd* [2008] VSCA 248, [73]-[89] (Ashley JA, Coghlan AJA agreeing at [137]); [130] (Redlich JA); *Colin R Price and Associates Pty Ltd v Four Oaks Pty Ltd* (2016) FCA 764, 86 [262] (Moshinsky J).

section 7(2)(b) of the [Act].

2. On all the material available to the Adjudicator the Adjudicator should have concluded that the plaintiff was not “in the business of building residences” within the meaning of section 7(2)(b) of the [Act].
3. Alternatively, the Adjudicator engaged in jurisdictional error, and further in material error of law on the face of the record, in that no basis for the Adjudicator’s conclusion that the plaintiff was “in the business of building residences” within the meaning of section 7(2)(b) of the [Act] is disclosed on the face of the record (see paragraphs 81 – 88 of the Adjudication Determination). The conclusion is conclusory only.

The determination

100 The issues raised by these grounds were put to the adjudicator in submissions and were extensively considered by him.²⁰

101 After setting out the text of s 7(2)(b) of the Act, the adjudicator referred in some detail to recent Victorian decisions as to the meaning and application of s 7(2)(b) particularly relating to the question whether the building owner was ‘in the business of building residences’.²¹

102 The adjudicator then set out 12 propositions which he distilled from the decisions that he had cited. The propositions included the following:

1. The test is whether there is a commercial enterprise engaged in for the purpose of profit on a continuous and repetitive basis, in the nature of a going concern.
2. In each case this is an issue of fact to be determined on a case by case basis. [...]
3. The application of the exception is to be adjudged by reference to its own language, when applied to the facts of each case. The facts relevant to the issue will vary from case to case [...].
4. A single joint venture may be sufficient to fall within the concept, in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business.
5. The determination of the question of whether a “building owner is in the business of building residences” does not depend on the scale of the business, the success of the business, the number of projects undertaken

²⁰ Determination (n 4) [68]-[89].

²¹ Ibid [75]-[78].

either in the past or at any one time, or as contemplated for the future.

6. The exemption in s 7(2)(b) of the [Act] applies must be assessed at the date the contract was entered into.
7. The expression 'in the business of building residences' connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.
8. Section 7(2)(b) of the [Act] 'speaks in terms of the actual business which the builder owner undertakes, not whether a party in the position of the building owner has the power to undertake the activity.
9. The determination of the question of whether a 'building owner is in the business of building residences' does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future.
10. What constitutes being "in the business of building residences" for the purposes of s 7(2)(b) of the [Act] is in each case an issue of fact to be determined on a case by case basis'.
11. A single joint venture may be sufficient to fall within the concept [of carrying on a business], in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis.
12. An essential feature of a business, assessed at the time the construction contract was entered into, is that it is engaged in for the purpose of profit.²²

103 The adjudicator then set out his reasons for concluding that on balance, the respondent was 'in the business of building residences' within the meaning of s 7(2)(b) of the Act. The reasons were:

Firstly, in my view, the [contract] was entered into for the purpose of profit. In this case, the respondent (collectively, [the plaintiff and the unit trust]) entered into the [contract], as Owner, with the aim of performing works to build 2 townhouses, selling one of the townhouses, retaining the other townhouse for [the plaintiff] to live in, procuring the project management role for Martello Group, and making a profit on the project. In my view, the respondent (collectively, [the plaintiff and the unit trust]) at the time that they executed the [contract], were entering into the [contract] for the purpose of profit.

Secondly, the respondent (collectively, [the plaintiff and the unit trust]) created a special vehicle for the Project.

Thirdly, the text messages exhibited to the Second Statutory Declaration of Jake Worrell sworn 4 July 2023 suggest, to me, that [the plaintiff] at least indicated to the [builder], on occasion, that the respondent was performing this project for the purpose of profit, and intended to perform future projects for

²² Ibid [79].

the purpose of profit.

I record the factors militating against my finding that the respondent was “in the business of building residences”:

- (a) The [contract] was the first (on the material before me, the only) construction contract entered into by Nasser Investments Ltd (and the [plaintiff]), or, Embelgo Pty Ltd. In my view, albeit a factor suggesting that a single project is less consistent with describing a business as “a going concern”, or as “engaged in for the purpose of profit on a continuous and repetitive basis”, the legal authorities are to the effect that a single venture may be sufficient to fall within the concept, in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis, and that a single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business.
- (b) [The plaintiff] has, at all material times, lived in the property. In my view, however, the party that entered into the [contract], as Owner, (collectively, [the plaintiff and the unit trust]), a special purpose vehicle created for this purpose, entered into the commercial with the claimant, for a business venture, in relation to which one aspect was that [the plaintiff] then live in one of the townhouses.

In my view, the legal authorities are to the effect that each case is to be judged on its merits. In this case, taking into account the above facts, on the basis of the legal authorities set out above, I conclude that the respondent was in the business of building residences, for the purpose of [s 7(2)(b)] of the Act.²³

104 These considerations led the adjudicator to conclude that the contract was a construction contract to which the Act applied.²⁴

Plaintiff’s submissions

105 The plaintiff did not in terms challenge the 12 propositions distilled by the adjudicator from the authorities cited by him. In challenging the adjudicator’s finding that the respondent was ‘in the business of building residences’, and excluding matters that I have already dealt with under Ground 3A, the plaintiffs’ main submissions were:

- (a) the adjudicator failed to make any determination in relation to the plaintiff as a separate legal person;
- (b) notice of the adjudication was not properly given to the corporate trustee;

²³ Ibid [84]-[88].

²⁴ Ibid [89].

- (c) there was no proper basis for the adjudication finding that the plaintiff or corporate trustee was in the 'business of building residences';
- (d) there is nothing in the facts as found by the adjudicator that leads to the conclusion that the plaintiff was engaged in the construction of dwelling houses on the basis of a going concern or for the purpose of profit on a continuous and repetitive basis;
- (e) the plaintiff retained a developer to construct the project;
- (f) the demolition of the plaintiff's permanent residence and the building of two townhouses, or one house, in its place could not be found to be a venture of such 'scope' that it satisfied the test of being in the business of building residences;
- (g) even if the purpose of entering into the contract was to make profit, that did not of itself lead to the conclusion that the plaintiff was in the business of building residences;
- (h) the creation of an SPV does not lead to the conclusion that there was a commercial enterprise engaged in on a continuous and repetitive basis in the nature of a going concern. The SPV was created for the purpose of a single project only, and was under the control of Ms Hammer, as its sole director;
- (i) while the plaintiff expressed an aspiration to become a property developer in the future, s 7(2)(b) looks to the actual business that the building owner undertakes at the date when the contract was entered into; and
- (j) the adjudicator's reasons are inadequate and do not sufficiently evince the reasoning process that resulted in the conclusion.

Builder's submissions

106 The main submissions made by the builder were that:

- (a) the plaintiff, Ms Hammer, and the corporate trustee had a business purpose in

- conducting the development;
- (b) the plaintiff and Ms Hammer intended to develop the property for profit as the first of many developments;
 - (c) the plaintiff and Ms Hammer adopted a commercial structure incorporating the corporate trustee as an SPV and conducting their affairs at arms lengths on commercial terms via the MOU and development agreement;
 - (d) the plaintiff and Ms Hammer intended to sell the property once the development was complete; and
 - (e) the property was advertised as an ‘off the plan’ completed development.

Relevant principles

107 In *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd*, Riordan J adopted the following principles where jurisdiction depended on a matter of fact:

- (a) The Court determines the question of fact for itself on the evidence placed before it.
- (b) The burden of establishing the facts which show an absence of jurisdiction always rests of the party applying for relief.
- (c) The standard of proof is high, requiring ‘clear proof leading unmistakably to [the] conclusion’ that there was an excess of jurisdiction. The Court will hesitate before interfering if the tribunal has investigated the facts upon which the jurisdiction depends and the finding is not manifestly wrong.²⁵

108 In *R v Marshall; Ex parte Baranor Nominees Pty Ltd*, Brooking J adopted the following approach:

[The] Court is to determine the question of fact for itself on the evidence placed before it, it being for the applicant to establish excess of jurisdiction by clear proof leading unmistakably to that conclusion, and the Court giving weight in an appropriate case to the special experience of the [inferior court or tribunal].²⁶

109 In *Saath Pty Ltd v Seascope Constructions Pty Ltd* (‘*Saath*’), Stynes J held that:

²⁵ [2020] VSC 414, [39] (citations omitted) (‘*Watpac*’).

²⁶ [1986] VR 19, 32-33, quoted in *Watpac* (n 25) [40].

...[T]he evidentiary onus of proof lies on the plaintiff to establish that the building owner was not ‘in the business of building residences’.

Whether the exemption in s 7(2)(b) of the Act applies must be assessed at the date the contract was entered into.²⁷

110 Her Honour then reviewed previous authority and extracted the following principles:

- (a) the expression ‘in the business of building residences’ connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis;
- (b) s 7(2)(b) of the SOP Act ‘speaks in terms of the actual business which the builder owner undertakes, not whether a party in the position of the building owner has the power to undertake the activity;
- (c) the determination of the question of whether a ‘building owner is in the business of building residences’ does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future;
- (d) ‘what constitutes being “in the business of building residences” for the purposes of s 7(2)(b) of the [SOP] Act is in each case an issue of fact to be determined on a case by case basis’;
- (e) a single joint venture may be sufficient to fall within the concept [of carrying on a business], in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis. In *Ian Street Developer Pty Ltd v Arrow International Pty Ltd*, Riordan J confirmed that special purpose entities or companies incorporated for a single project may be ‘in the business of building residences’ even where the entity or company intends to sell the residences through another entity or company. It was considered relevant in *Ian Street Developer* that a special purpose vehicle was incorporated with the sole purpose of constructing the project and the units in the project being resold to a related corporation for profit.²⁸

111 In *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*, Edelman J observed:

The existence of a power of review for non-jurisdictional error does not mean that the power must always be exercised to quash a decision when error is found. The policy of the Security of Payment Act would be a powerful consideration in favour of the discretionary refusal of certiorari in many cases, including where the error is trivial or where the same result would occur without the error. These discretionary grounds for refusal of certiorari have “been in existence for centuries”. To those well-known grounds could be added the circumstance where there is no real injustice likely to arise from an error of law due to an imminent determination of final rights with no substantial prejudice to the payer in the interim, and no likelihood of

²⁷ [2021] VSC 358, [48]-[49] (citations omitted) (*‘Saath’*).

²⁸ *Ibid* [51].

insolvency of the recipient of the payment.²⁹

112 The adjudicator undertook a helpful review of past decisions which offered guidance as to the meaning of the phrase ‘in the business of building residences’ found in s 7(2)(b) of the Act in the determination:

The meaning of the phrase, ‘in the business of building residences’, as it relates to the Act, has been discussed and clarified by way of, *inter alia*, the following decisions:

- a. in *Director of Housing of the State of Victoria v Structx Pty Ltd (t/as Bizibuilders) & Anor* [2011] VSC 410 at [28] (*Structx*) Vickery J accepted that the phrase, “...connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.” This definition has been the subject of subsequent approval pursuant to *Promax Building Developments Pty Ltd v Pearol & Co Pty Ltd* [2017] VSC 495 (*Promax*) at [18] (per Anderson J) and *Maxcon Constructions Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1382 (*Maxcon*) at [8]-[9] (Burchell JR);
- b. in *Promax* at [25]-[27] (per Anderson J) and *Maxcon* at [18] (per Burchell JR), it was recognized that whether a developer is in the business of building, “does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future”. Accordingly, an entity which derives no profit from development projects may nevertheless be considered in the business of building;
- c. in *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSC 14 (*Ian Street*) at [102] (per Riordan J), quoting *Union Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49 at [6] (per Dawson J), it is well established that an entity may be considered to be in the business of building notwithstanding that they have only conducted one development activity because, “it is well recognised that a single venture may constitute a carrying on of a business.” That is, it may be sufficient that an entity commenced a single development project with the intent of making a profit to fall within the definition of in the business of building pursuant to *Promax* at [28] (per Anderson J); *Golets v Southbourne Homes & Anor* [2017] VSC 705 (*Golets*) at [40]-[41] (per Vickery J); and
- d. in *Golets* Vickery J noted at [36] that:

[U]ltimately, the only ‘test’ to be applied to determine whether or not the [s 7(2)(b)] exception applies is that prescribed by the Act. Application of the exception is to be adjudged by reference to its own language, when applied to the facts of each case. The facts relevant to this issue will vary from case to case. These relevant facts may be referred to as the ‘salient features’. [sic]
- e. in *Golets*, Vickery J referred to the following as, ‘salient features’, which

²⁹ [2018] HCA 4, [101] (citations omitted) (*Probuild*).

tend to indicate that an entity is in the business of building [54] [sic]:

- i. the existence of a profit-making purpose associated with the building project(s), with profit meaning “*financial gain, that is to say money received over and above the money expended*”;
 - ii. enterprise on a continuous and repetitive basis;
 - iii. the presence of a vehicle established to structure the building project; and
 - iv. whether profit-making is a primary purpose of the building project or entity.
- f. Vickery J at [32]-[34], referring to the decision in *Structx* nevertheless emphasised that indicia for the purposes of section 7(2)(b) of the Act, and presumably the ‘salient features’, ought not to be seen as a “*prescriptive, comprehensive and exclusive test [to be] superimposed on the statutory definition of the exception*”, within section 7(2)(b) of the Act.³⁰

113 The adjudicator cited relevant authority as to a profit-making intention or purpose, which he described as at the core of the definitions of being ‘in the business of building residences’. The adjudicator referred to *Brandt v WG Tatham Pty Ltd*, where Ferguson J held that:

In ordinary parlance profit means financial gain, that is to say money received over and above the money expended. In the Oxford Dictionary the following meanings are given: “pecuniary gain in any transaction; the amount by which value acquired exceeds value expended; the excess of returns over outlay of capital”.³¹

114 The adjudicator also made reference to *Promax* and *Maxcon* where Judge Anderson, and later Burchell JR adopting his Honour’s words, said that being ‘in the business of building residences’:

does not depend on the scale of the business, the success of the business, the number of projects undertaken either in the past or at any one time, or as contemplated for the future.³²

115 As to the need for the business enterprise to be undertaken on a continuous and repetitive basis, the adjudicator referred to the decision in *Golets v Southbourne Homes* (‘*Golets*’), where Vickery J stated:

³⁰ Determination (n 4) [72(6)].

³¹ [1965] NSW 126, 127.

³² *Promax Building Developments Pty Ltd v Pearol & Co Pty Ltd* [2017] VCC 495, [25]-[27] (Judge Anderson); *Maxcon Construction Pty Ltd v Ily Australia Pty Ltd* [2017] VCC 1382, [8]-[9] (Burchell JR).

[In] cases where the phrase ‘carrying on a business’ has been considered, it was recognised that a single joint venture may be sufficient to fall within the concept, in spite of the apparent absence of the element of a going concern conducted on a continuous and repetitive basis. In *United Dominions Corp Ltd v Brian Pty Ltd*, Dawson J observed:

A single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business. Whilst the phrase “carrying on a business” contains an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated, the decision of this Court in *Canny Gabriel Castle Jackson Advertising Pty. Ltd. v. Volume Sales (Finance) Pty. Ltd* suggests that the emphasis which will be placed upon continuity may not be heavy.³³

116 In *Piastrino v Seascope Constructions Pty Ltd*, Delany J also cited the above dicta of Dawson J, noting that:

Although the fact that the activities are carried on in a continuous and repetitive basis may be consistent with the conduct of a business, it is well recognised that a single venture may constitute a carrying on of the business.³⁴

117 This observation reflected a similar observation made by Riordan J in *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* (*‘Ian Street’*).³⁵

Threshold issues

Who was the respondent to the adjudication application?

118 The plaintiff raised two threshold issues, neither of which were put to the adjudicator. First, she submitted that the plaintiff alone was the respondent to the adjudication application rather than both the plaintiff and the corporate trustee.

119 Under s 3(1) of the DBC Act, the expression ‘building owner’ is defined to mean ‘the person for whom domestic building work is being or is about to be carried out’. This meaning is adopted into s 7(2)(b) of the Act and applies when considering whether the exception in that provision is made out. In the present case, the building owners for the purpose of s 3(1) of the DBC Act are the plaintiff and the corporate trustee, for the reasons that I have already given. Both are parties to the contract, and can be taken as the persons for whom the domestic building work is or is about to be carried out.

³³ [2017] VSC 705, [37] (citations omitted) (*‘Golets’*).

³⁴ [2022] VSC 202, [196(d)].

³⁵ [2018] VSC 14, [102(d)] (*‘Ian Street’*).

They were collectively the respondent or the respondents to the adjudication application.

Was the corporate trustee given notice of the adjudication application?

120 The second threshold issue related to the notice given of the adjudication application. It was suggested that the corporate trustee was not given notice of the adjudication application. The corporate trustee makes no such complaint.

121 Section 50(1) of the Act provides for service of notices and documents in these terms:

- (1) Any notice or document that by or under this Act is authorised or required to be given to or served on a person may be given to or served on the person –
 - (a) by delivering it to the person personally; or
 - (b) by lodging it during normal office hours at the person's ordinary place of business; or
 - (c) by sending it by post or facsimile addressed to the person's ordinary place of business; or
 - (d) in such manner as may be prescribed for the purposes of this section; or
 - (e) in any other manner specified in the relevant construction contract.

122 In turn, cl 24.2 of the contract provides:

Methods of service for notices and other documents

Unless otherwise stated in this **Contract**, any written notice, report, order or other document required by this **Contract** or by the **Act** to be given by the **Builder** to the **Owner** or by the **Owner** to the **Builder** may be given or served upon the other by any of the following methods:

- by hand to the person to whom it is required to be given; OR
- by pre-paid or registered post to the address of the person to whom it is required to be given, as stated in the **Appendix**; OR
- by facsimile to the facsimile number (if any) stated in the **Appendix**; OR
- by email to the electronic address (if any) stated in the **Appendix**.

123 The appendix lists the email addresses of the plaintiff and Ms Hammer as the

electronic addresses for service of the building owners.

124 On 16 June 2023, the builder's notice under s 18(2) of the Act was served on the plaintiff and Ms Hammer at their email addresses. The corporate trustee and Ms Hammer did not dispute the builders notice or payment claim. On 21 June 2023, Ms Hammer responded by email to Mr Worrell and legal advisers among things advising Mr Worrell to do what he needed to do to recoup his unpaid invoices. On 27 June 2023, the adjudicator served his notice of acceptance of the adjudication to multiple persons and legal advisers including the plaintiff and her solicitors, and Ms Hammer and her solicitors at the email address that she had written in the appendix to the contract. The notice of acceptance also dated 27 June 2023 was addressed to the plaintiff and her solicitors, and to Ms Hammer's email address amongst others. On 29 June 2023, the plaintiff's solicitor responded to the application for adjudication advising that he acted for the plaintiff, and serving the plaintiff's submissions and statutory declaration dated 29 June 2023 on the adjudicator, Ms Hammer and her solicitors Appian Lawyers.

125 I am satisfied that Ms Hammer, as the sole director of the corporate trustee, and her legal advisers were fully aware of the adjudication application and the steps taken by the adjudicator during the adjudication. Their non-participation in the adjudication was deliberate and not the result of an oversight – this is particularly evident by the 21 June email and the use of the words 'You do what you need to do re: recouping your unpaid invoices'. The corporate trustee and Ms Hammer did not, and have never opposed the builder's payment claim and have no complaint about the adjudication. As Ms Hammer subsequently deposed in her affidavit filed 22 August 2023, to the best of her knowledge and belief the payment claim made by the builder was due and owing to him.

126 I am of the view that there is no substance in the threshold issues raised by the plaintiff. Even if one or both grounds were correct, I would not set aside the adjudication in the exercise of my discretion, as no injustice or disadvantage has been suffered by any person as a consequence of the matters raised. The plaintiff provided

a statutory declaration and made submissions to the adjudicator. She actively participated in the adjudication and was represented by legal advisers. Her submissions and evidence were taken into account by the adjudicator and addressed in the determination.

Salient features

127 In *Golets*, Vickery J observed that the only test to be used in determining whether the exception in s 7(2)(b) of the Act applies is that ‘prescribed by the Act... adjudged by reference to its own language, when applied to the facts of the case’. His Honour stated that the facts relevant to the issue will vary from case to case and may be referred to as the ‘salient features’.³⁶

128 I now turn to the salient features of the current case, assessed as at the date of the contract.

Formation of a commercial syndicate

129 An important feature in this case is the formation of a commercial syndicate between the plaintiff and Ms Hammer, and their respective entities, to develop the property. Ms Hammer was a sophisticated and experienced property developer. Her company, Martello, had undertaken many residential developments.

130 By contrast, the plaintiff was unsophisticated and inexperienced in property development. Her goal was to become a property developer, and she needed more experience to do so. The upshot was that the plaintiff and Ms Hammer formed a commercial syndicate with Ms Hammer providing the expertise and knowhow, and the plaintiff providing the land to be developed by the syndicate. The plaintiff and Ms Hammer saw that, by operating together, they had all that was necessary to successfully develop the property.

Sophisticated commercial context and legal documentation

131 In the ordinary case, the owner of a residential allotment signs a standard-form

³⁶ *Golets* (n 33) [36].

domestic building contract with a builder for the construction of a home. This is far from such a case.

132 In this case, the plaintiff and Ms Hammer first signed the MOU to record their commercial relationship. The MOU describes them as undertaking a joint venture. The MOU addresses the agreed arrangements for the joint venture - project timeline, finance, land ownership, project responsibilities, management fees, and distribution of net profits. It describes a commercial and not a domestic relationship.

133 Shortly after the execution of the MOU, the parties incorporated new entities including the corporate trustee, executed a unit trust deed, and issued shares and units as necessary to their respective entities (Nasseri Investments Pty Ltd and Embelgo Pty Ltd). There would have been numerous documents to sign, including the directors and shareholders resolutions and ASIC forms and returns.

134 The parties' next step was to instruct lawyers to prepare the development agreement between the plaintiff and Martello. The recital to this agreement recorded Martello's experience as a developer, and agreement to carry out development services. The development agreement was exclusive to Martello and made provision for development approvals, funding and the disposition of project assets by sale. The development agreement dealt with receipts, payments, and distribution of profits.

135 These steps and matters show the sophisticated commercial context and legal documentation which preceded the making of the contract.

Use of an SPV

136 Under the MOU joint venture structure, a new SPV was to be set up to carry out the development, with shares to be equally owned by the plaintiff and Ms Hammer or her nominated trust. Ms Hammer was to open a new Westpac bank account in the name of the SPV for the sole purpose of the development.

137 The development agreement defined the term 'Special Purpose Vehicle' or 'SPV' to mean 'the body corporate incorporated by the parties for the purposes of setting up

and managing on behalf of [the plaintiffs and Martello] to receipt funds and pay Project Costs and receive Receipts'. Under cl 4.2.3 of the development agreement, Martello was required to incorporate the SPV 'within a reasonable time' and to nominate the sole director of the SPV with the plaintiff's approval. A bank account would be opened for the 'specific and sole' use of the project in the name of the SPV. Both parties were to be joint signatories of the SPV bank account.

138 The corporate trustee was established by the plaintiff and Ms Hammer on 7 October 2021 together with the unit trust. Careful attention was given to the structuring of the unit trust, with a new company incorporated to hold the plaintiff's interests and an existing company (Martello) controlled by Ms Hammer to hold her interests in the investment.

139 As held by Riordan J in *Ian Street*, and cited with approval by Stynes J in *Saath*, the creation of an SPV specifically for the purpose of constructing the development project is a relevant factor in determining whether the party or parties in question are in the business of building residences.³⁷

Profit-making intention

140 In her statutory declaration of 29 June 2023, the plaintiff states that from around 2015, she had in mind to demolish the house on the property and construct two titled townhouses. One townhouse was to be sold and the other used as her principal place of residence. In her affidavit filed 16 October 2023, the plaintiff deposes that she is not a property developer but aspired to learn about property development and become a developer.

141 The provisions of the MOU signed by the plaintiff and Ms Hammer on 28 September 2021 provide for one townhouse to be sold and one townhouse retained by the plaintiff as her principal place of residence, until she notifies Ms Hammer that this townhouse is to be sold. When the second townhouse is sold, the profits are to be shared equally after all development and ancillary costs are paid. The total sale and

³⁷ *Ian Street* n (35) [102(a)]; cited in *Saath* n (27) [51].

settlement period was to be approximately five months.

- 142 The development agreement executed on 28 October 2021 describes the project as the demolition of the existing house, the construction of two houses, the subdivision of the property into two separate titles, the transfer of one title and townhouse to the plaintiff, and the sale of the remaining title and townhouse.
- 143 In an email dated 7 July 2022 from Ms Hammer to the plaintiff, Ms Hammer referred to the plaintiff having mentioned a change in the profit split from the 50/50 split originally discussed. Ms Hammer rebuffs this suggestion, observing that the project would not be viable to her if the profit share were to change. The email invites the plaintiff to let Ms Hammer know 'if you don't see it this way'.
- 144 In her affidavit filed 22 August 2023, Ms Hammer deposes that she discussed with the plaintiff undertaking further developments in the future. Ms Hammer also deposes that on 'several occasions' the plaintiff told her that 'the reason she wanted to undertake this joint venture was so that, in addition to making a profit, the plaintiff would also learn how to better undertake such developments in the future'.
- 145 In his affidavit filed 26 October 2023, Mr Worrell deposed that when he was first introduced to the plaintiff in 2022, both the plaintiff and Ms Hammer presented themselves as 'property developers whose intention was to develop a single high-end dwelling' on the property for the purposes of selling the development as a 'commercial venture'. He deposed that during one meeting in or about mid-2022, the plaintiff and Ms Hammer 'made it clear that neither of them intended to occupy or live in the dwelling following the completion of the development'. He also said that both the plaintiff and Ms Hammer said 'on several occasions that this property development would not be their last'. Mr Worrell said that he was never told that there was an earlier intention to develop two townhouses on the property or provided with any documents to this effect.
- 146 Mr Worrell deposed that he had been told by both the plaintiff and Ms Hammer that they were developing the property as a joint venture for financial gain as property

developers, intending to sell the property, and develop more properties in the future.

147 On or about 19 May 2023, Mr Worrell had a text message exchange with the plaintiff about the possibility of obtaining a 20-30% share in the development to ensure the project could recommence. The notable aspects of that exchange are as follows:

- (a) Mr Worrell asked 'Was the plan for trust to build it then sell straight away onto the next one[?]', and the plaintiff replied 'Yeah'.
- (b) When Mr Worrell inquired 'Would you consider me to purchase a 20-30 percent of the project to help it back on?', the plaintiff responded 'Yes open to all options at this stage'.
- (c) When asked as to the buy in cost of the land, the plaintiff stated 'Well, the conservative valuation has come at 4 mil'.

148 In a text message on 20 May 2023, the plaintiff stated in part:

We have to perhaps get a new valuation anyway, as that one expired. It may very well sell at 4.5 but we can't be certain...

149 In cross-examination, Mr Worrell stated that the plaintiff told him when they met to sign the contract that she and Ms Hammer were building the property so 'they could sell it and split their profit'. Mr Worrell conveyed that the plaintiff stated to him that this was 'just the start of her journey... [with] lots more ongoing and potentially to be invested in... other developments going forward'.

150 In evidence, the plaintiff said she told Mr Worrell that she was interested in observing how property development was done as 'it would be a nice thing to do in the future if the opportunity arose'. The plaintiff said that while originally Ms Hammer was supposed to fund the entire construction, Ms Hammer's position changed over time. At the start of their dealings, there were to be two units constructed with the plaintiff keeping one. The plaintiff also deposed that it was originally intended that she and Ms Hammer would each receive approximately \$2.3 million from the completed project. However, after the change in plan to a single dwelling, it was intended that

profits would be paid to Ms Hammer 'pro rata as to the cash' that she had put in.

151 The plaintiff agreed that she had described herself on LinkedIn as an employee of RightCost, an online property sales platform created by her ex-husband. She listed the property for sale on RightCost on 6 August 2020 as available for sale.

152 Prior to 2023, Martello advertised the property for sale off the plan on the basis that construction would commence in early 2023 and be completed in late 2023. Illustrations of the likely appearance of the completed project were shown in the advertisement. The plaintiff said that the advertisement must have been created by Ms Hammer. The plaintiff said that she was aware that Ms Hammer was advertising the property for sale on Instagram.

153 I conclude that the purpose and intent of the plaintiff and the corporate trustee at the time when the contract was made, and at all relevant times, was profit-making. That was the principal reason for the plaintiff and Ms Hammer, and their respective entities, in seeking to redevelop the property. At different times, the plaintiff expressed a desire to live in one of the units, or the house on the property. However, this was intended to be of short duration only, as debts, expenses and interest would need to be paid and profits taken. When this issue was put to the plaintiff in cross-examination, she could not satisfactorily explain how she could indefinitely live in the completed dwelling and also pay Ms Hammer the monies due to her.

154 I accept that when the contract was signed, it was the intention of the parties to sell the high-end dwelling that was to be constructed on the property. Only if the home was sold could expenses be recouped, the mortgage debt and interest repaid, and profits realised.

155 At all times, it was the intention of the plaintiff and Ms Hammer that the property would be developed for mutual profit. Mr Worrell's evidence, which I accept, is significant in this respect. The mutual profit-making intention between the plaintiff and Ms Hammer endured until disputation between them caused the project to come to a standstill.

Project management and oversight

156 While Ms Hammer and Martello oversaw the project and spoke with the builder during the build, the plaintiff also had a significant role. As she said in her affidavit filed 16 October 2023, she tried to bring down the cost of construction by requesting changes to the plans to remove some items. Mr Worrell said that he took instructions from both parties, and spoke to both parties throughout the build. Although in cross-examination he acknowledged that Ms Hammer played a larger role at the beginning of the build, he ultimately insisted that he took direction from the plaintiff and Ms Hammer.

Marketing and advertising

157 The marketing and advertising of the property for sale ‘off the plan’ was professional and commercial in character, using website and Instagram promotion including images and renderings of the expected appearance of the completed development. The depicted development was substantial and involved the construction of a high-end residence after the demolition of the existing house.

Continuous and repetitive

158 I accept the plaintiff’s evidence that this was the first property development that she had undertaken. As Mr Worrell said when the contract was signed, the plaintiff and Ms Hammer stated that they intended to complete many more property developments in the future. Although there was only one venture at the time that the contract was signed, it is well recognised that a single venture such as this may be sufficient to constitute a carrying on of a business of building residences.³⁸

Conclusion on salient features

159 The plaintiff and Ms Hammer or Martello were a commercial syndicate working together to achieve a profit-making objective. Both Ms Hammer and Martello were in the business of building residences. The corporate trustee was an SPV with Ms Hammer as its sole director. As sole director, Ms Hammer’s profit-making intention

³⁸ See above at [110], [112], [115]-[117].

can be ascribed to the corporate trustee under the contract. Ms Hammer's mind and intention were that of the corporate trustee.³⁹

Adequacy of reasons

160 In support of Ground 3, the plaintiff submitted that the standard of reasons in the determination was inadequate, in that it 'does not contain sufficient reasoning on its face to enable the parties to determine how the Adjudicator arrived at the determination'. I reject that submission.

161 As contended by the builder, the standard of reasons required of an adjudicator is not exacting or demanding. I agree, noting the following principles:

- (a) adjudication under the Act is intended to operate in a 'rough and ready' manner, due to the limitations and tight deadlines imposed by the statutory scheme;⁴⁰
- (b) an adjudicator is to determine an adjudication application as expeditiously as possible⁴¹ and only consider those matters set out in the Act;⁴²
- (c) the fact that an adjudication application is assessed under tight time constraints, and many adjudicators are not lawyers, requires that reasons for a determination are not to be analysed 'pedantically with a predisposition to discerning error'⁴³ or with a 'fine-tooth comb';⁴⁴
- (d) as issues of weight are committed to the adjudicator for determination and are not subject to judicial review, there ought to be little, if any, grounds to review a determination for failing to record in the reasons its consideration of the

³⁹ See *Bernard Elsey Pty Ltd v FCT* (1969) 121 CLR 119, 121; *Mesa Minerals Ltd v Mighty River International Ltd* (2016) 241 FCR 241, [44] (Katzmann J); see also LexisNexis Australia, *Ford, Austin & Ramsay's Principles of Corporations Law* (online as at April 2024) [18.180].

⁴⁰ *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, [208] (McDougall J); *Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd* [2022] ACTCA 42, [54] (Lee J); whilst these cases dealt with the NSW and ACT legislation respectively, those Acts are equivalent as is this principle.

⁴¹ *Building and Construction Industry Security of Payment Act 2002* (Vic), s 22(4).

⁴² *Ibid* s 23(2); *Probuild* (n 29), [80] (Edelman J).

⁴³ *Southern Cross Electrical Engineering v Steve Magill Earthmoving* [2018] NSWSC 1027, [34] (McDougall J).

⁴⁴ *Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd* [2018] NSWCA 107, [17] (Basten JA).

consistency and probative value of evidence;⁴⁵ and

- (e) the failure to identify a particular claim or response in reasons will not of itself demonstrate that the adjudicator failed to consider it.⁴⁶

162 I am satisfied that the determination makes clear the chain of reasoning adopted by the adjudicator as to each of the principal issues decided. In addition, the adjudicator extensively and accurately cites and applies decisions of this court and other courts as necessary.

Conclusion as to Grounds 1, 2 and 3

163 I have reached the same conclusion as the adjudicator as to whether the plaintiff and corporate trustee were in the business of building residences. After considering the salient features and relevant matters, I find that the plaintiff and the corporate trustee were in the business of building residences. The contract was entered into in the course of, or in connection with, that business.

164 The burden of proof in respect of s 7(2)(b) lies with the plaintiff, who has failed to prove that the exception applies.

165 Grounds 1, 2 and 3 fail.

Ground 4

166 Ground 4 states:

Alternatively, the Adjudicator engaged in jurisdictional error in denying procedural fairness to the plaintiff by refusing to consider the further submissions and statutory declaration of the plaintiff.

167 This ground is plainly misconceived as the adjudicator did not refuse to consider the plaintiff's submission or statutory declaration. They were provided to him on 29 June 2023, and are extensively discussed in the determination. The plaintiff did not provide any further or other submission or statutory declaration to the adjudicator during or

⁴⁵ Ibid [17] (point 1).

⁴⁶ *Ceerose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSWCA 215, [51], see also [52]-[61], (Payne JA).

after the adjudication. Ground 4 must fail for this reason alone.

168 During the trial, the plaintiff did not advance any oral argument in support of Ground 4.

169 In her written submissions, the plaintiff advanced a new and different argument not embodied in Ground 4.

170 Although the originating motion was amended twice, the plaintiff did not apply to add a new ground or to amend Ground 4 to accord with the argument advanced in her written submissions. In her written submissions, the plaintiff sought to contend that she was denied procedural fairness. This was said to be because the adjudicator should have postponed the publication of the determination to allow her to respond to the builder's submissions made on 4 July 2023, which in turn responded to her adjudication response dated 29 June 2023. The adjudicator published the determination on 6 July 2023.

171 In an email dated 5 July 2023, the plaintiff's solicitor stated that he was interstate, and the plaintiff was overseas. The plaintiff' solicitor then stated that:

My client is currently overseas. I need to take instructions from my client to enable me to respond to the many new statements by the claimant, including those that impugn my client's credibility in respect of the original 2 townhouse development that was planned and those relating to the assertion that my client/respondent builds residences. My instructions are clearly at odds with this. I will be back in Melbourne on Monday 10 July 2023. I think my client is flying back from overseas on either Sunday or on Monday 10 July. Subject to your direction I should be able to respond to the claimant's response by 13 July 2023.

172 The email was sent the day before the adjudicator published the determination. The adjudicator did not respond to the email.

173 The builder submitted that:

- (a) the opportunity for a respondent to an adjudication to make additional submissions was not without limit;
- (b) if an adjudication response includes 'any reasons for withholding payment that

were not included in the payment schedule', the adjudicator must serve a notice under s 21(2B) allowing the claimant a further 2 business days to respond;

- (c) the adjudicator was required by s 23(1)(c) of the Act only to consider submissions that were 'duly made';⁴⁷
- (d) the plaintiff had failed to show how further submissions and a statutory declaration in reply to the builder's adjudication response would or could have impacted the adjudicator's decision; and
- (e) the plaintiff had not proven the facts necessary to enable the court to be satisfied that there was a realistic possibility that a different decision could have been made by the adjudicator, had there been an extension of time and further submissions lodged.⁴⁸

Adjudicator's reasons

174 The determination sets out the procedural steps relating to the adjudication. They were:

By email dated 22 May 2023, the claimant delivered Wellington Builders Tax Invoice No INV-2276 dated 22 May 2023 ('the Payment Claim'). The amount claimed in the Payment Claim was \$150,500.00 (incl GST).

No payment schedule was received by the claimant in respect of the Payment Claim dated 22 May 2023.

By email dated 16 June 2023, the claimant served a Section 18(2) Notice dated 16 June 2023 pursuant to Section 18(2) notifying the respondent of its intention to apply for adjudication and giving the respondent a further 2 business days to provide a payment schedule.

No payment schedule was received by the claimant in response to the Section 18(2) Notice dated 16 June 2023.

By Application dated 23 June 2023, delivered to Rialto Adjudications Pty Ltd by email on 23 June 2023, copied to the respondent, the claimant applied to

⁴⁷ Referring to *Ceeroose Pty Ltd v A-Civil Aust Pty Ltd* [2023] NSW 215, [53] under the *Building and Construction Industry Security of Payment Act 1999* (NSW).

⁴⁸ Relying on *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, 524 [39]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 135 [31]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 445 [45].

Rialto Adjudications Pty Ltd, as an Authorised Nominated Authority under the Act, for adjudication.

By email dated 27 June 2023, Rialto Adjudications Pty Ltd referred the Adjudication Application to me as Adjudicator.

By letter dated 27 June 2023 from me to the claimant and to the respondent, sent by express post and by email to the claimant and the respondent, I served notice of my acceptance of the Adjudication Application.

By email dated 29 June 2023 from the respondent to me, copied to the claimant, the respondent delivered an Adjudication Response dated 29 June 2023.

By email dated 30 June 2023 from me to the parties, pursuant to Section 21(2B) of the Act, I notified the claimant that, in my opinion, the Adjudication Response included reasons for withholding payment that were not included in the Payment Schedule, as set out in my letter dated 30 June 2023, and I gave the claimant 2 business days to lodge a response to those reasons.

By email dated 4 July 2023, the claimant delivered to me, copied to the respondent, pursuant to my Section 21(2B) Notice dated 30 June 2023, a response to the reasons for withholding payment, provided by the respondent in the Adjudication Response, that were not included in the Payment Schedule.⁴⁹

175 Section 21(2A) of the Act provides that:

The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2)(b).

176 The respondent did not provide a payment schedule to the claimant, and on the ordinary meaning of s 21(2A) had no right to lodge an adjudication response at all. Nonetheless, in order to afford natural justice to the plaintiff, the adjudicator decided to take the plaintiff's adjudication response made by email on 29 June 2023 into account.⁵⁰ The adjudicator referred to an extra-curial paper by Robert McDougall and the decision of Vickery J in *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd (No 2)*⁵¹ as justifying this course of action.

177 The adjudicator gave the following reasons for entertaining the plaintiff's adjudication response:

⁴⁹ Determination (n 4) [3]-[12].

⁵⁰ Determination (n 4) [17]-[21].

⁵¹ Robert McDougall, 'Natural Justice and the Building and Construction Industry Security for Payments Act 1999 (NSW)' (Conference Paper, Royal Institute of Chartered Surveyors Seminar, 13 May 2014), [1]-[5], [22], [81]; [2015] VSC 500, [128]-[138].

In my view, an adjudicator is required to balance the express language of the Act, and the requirement that he/she exercise a discretion to, consistent with those express provisions, ensure that each party is accorded natural justice. On balance, though the Act provides that a respondent who fails to deliver a payment schedule may not deliver an Adjudication Response, as a matter of natural justice, I would err on the side of allowing that material to be provided.

For that reason, albeit that the respondent did not provide a payment schedule, in this instance, on balance, I have taken the respondent's Adjudication Response into account.⁵²

178 Having acted to the plaintiff's advantage in this way and having received her adjudication response, the adjudicator still had to comply with the requirements of the Act and afford procedural fairness to the builder.

179 Section 21(2B) of the Act provides in substance that if the adjudication response includes any reasons for withholding payment that were not included in the payment schedule, the adjudicator must serve a notice on the claimant setting out those reasons and allowing the claimant two business days to lodge a response to those reasons with the adjudicator. The plaintiff did not provide a payment schedule to the builder, and the adjudicator took the course of serving a notice on the builder allowing it 2 business days to respond. The builder responded to the notice on 4 July 2023.

Observations

180 In the circumstances of this case there is no statutory provision for the acceptance of a further response by the respondent to the adjudication. Section 22(4) of the Act requires the adjudicator to determine an adjudication application as expeditiously as possible, also imposing strict time limits on the determination of the adjudication application.

181 Section 22(3) provides that an adjudicator is not to consider an adjudication response unless it was made before the end of the period in which the respondent may lodge the response. There was no such period in the present case and the adjudicator accepted the plaintiff's adjudication response dated 29 June 2023 as a matter of natural justice and not because he was required to do so under any specific provision of the

⁵² Determination (n 4) [20]-[21].

Act.

182 The adjudicator was not required by the Act to receive a second adjudication response from the plaintiff. Given the purpose of the Act and the statutory imperative for expedition, and having already given the plaintiff the opportunity to make an adjudication response, the adjudicator and the builder were not required to wait and see if a second adjudication response was forthcoming from the plaintiff.

Was there a realistic possibility that a different decision could have been made by the adjudicator?

183 The principal issues that were contested before the adjudicator were recontested before me including the issue of whether the respondents to the adjudication application were in the 'business of building residences' within the meaning of s 7(2)(b) of the Act.

184 The builder's response on 4 July 2023 is directed to the matters raised in the plaintiff's adjudication response dated 29 June 2023. Very largely, it concerned the issue of whether the respondents to the adjudication are in the 'business of building residences' within the meaning of s 7(2)(b) of the Act. It also refers to the background of the adjudication application. Mr Worrell's statutory declaration of 4 July 2023 addresses the plaintiff's response and the matters set out in the plaintiff's statutory declaration of 29 June 2023.

185 I have perused the plaintiff's affidavits filed in the court and the oral evidence as to these matters, as well as all of the material before the adjudicator. I note that the plaintiff's affidavit of 28 July 2023 filed in this proceeding does no more than produce the documents before the adjudicator and deal with formal matters. The plaintiff's affidavit of 12 October 2023 filed in this proceeding replies to Ms Hammer's affidavit of 22 August 2023, and produces documents relating to Ms Hammer. The affidavit of the plaintiff's solicitor deals with matters of legal representation. There is no other affidavit material filed in this proceeding by the plaintiff. In addition to the material before the adjudicator, I also have the MOU and the development agreement which

support the builder's case. There is nothing in the affidavit material that advances the plaintiff's case beyond that before the adjudicator. I also have the benefit of the plaintiff's submissions prepared by counsel in this proceeding. While they develop the legal submissions relied on by the plaintiff in some detail, they do not introduce any new facts or matters which might have affected the adjudicator's determination.

186 I am not satisfied that there were any new facts or matters not already before the adjudicator which offered a realistic possibility that a different decision could have been made by the adjudicator, had a further opportunity of reply been afforded to the plaintiff. If there were, they have not been put in evidence before me. On the material before me, including all of the plaintiff's material, I have arrived at the same conclusion as the adjudicator.

187 There has been no injustice or disadvantage to the plaintiff in the procedure adopted by the adjudicator. There is no basis for the exercise of the court's discretion in favour of the plaintiff as a re-examination of the same issues in the court with the assistance of counsel and oral evidence from the plaintiff and Mr Worrell gives the same result as was arrived at by the adjudicator.

188 For these reasons also, Ground 4 fails.

Conclusion

189 All of the grounds relied on by the plaintiff fail. The plaintiff has not shown any jurisdictional error by the adjudicator. The proceeding must be dismissed.

Entry of judgment

190 By order made on 18 July 2023, judgment was entered in favour of the builder against the plaintiff by her Honour Judge Burchell of the County Court of Victoria in the adjudicated amount of \$150,500, with further interest and costs bringing the judgment debt to \$162,035.48.

191 Pursuant to an undertaking given to Stynes J on 15 September 2023, the amount of \$165,009.84 was paid in to court by the plaintiff. The monies in court were paid in

four tranches with the final tranche received on 25 September 2023.

192 I will make orders to the effect that the monies in court and interest be paid to the builder less any amount required to be withheld for taxation.

CERTIFICATE

I certify that this and the 58 preceding pages are a true copy of the reasons for judgment of Justice Garde of the Supreme Court of Victoria delivered on 29 April 2024.

DATED this 29th day of April 2024.



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Associate