

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

Revised
Not Restricted
Suitable for Publication

Case No. CI-19-04613

Rudyard Pty Ltd

Plaintiff

v

ASEA 1 Pty Ltd

Defendant

JUDGE: His Honour Judge Woodward
WHERE HELD: Melbourne
DATE OF HEARING: 29 November 2019
DATE OF JUDGMENT: 6 December 2019
CASE MAY BE CITED AS: Rudyard Pty Ltd v ASEA 1 Pty Ltd
MEDIUM NEUTRAL CITATION: [2019] VCC 1995

REASONS FOR JUDGMENT

Subject: CONTRACTS

Catchwords: Building contract – contract to coordinate design work – payment claims – service by email and ordinary post – whether payment claim sufficiently identified the construction work to which it related – whether knowledge of third party about construction work is knowledge of defendant – reference dates – validity of payment claim including charges for future work

Legislation Cited: *Building and Construction Industry Security of Payment Act 2002* (Vic) ss4, 9, 12, 14(2), 16 and 50

Cases Cited: *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* (2009) 26 VR 112; *3D Flow Solutions Pty Ltd v LTP Armstrong Creek Pty Ltd* [2018] VCC 674; *John Beever v Roads Corporation* [2018] VSC 635; *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140; *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106; *John Beever (Aust) Pty Limited v Paper Australia Pty Ltd* [2019] VSC 126; *Lysaght Bros & Co Ltd v Falk* (1905) 2 CLR 421

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Dr M Wolff	Noble Lawyers Pty Ltd
For the Defendant	Mr A C Blair	Welner Lawyers

HIS HONOUR:

- 1 In this proceeding, the plaintiff (“Rudyard”) makes an application by summons on originating motion dated 30 September 2019, for judgment against the defendant (“ASEA 1”) under s16(2) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (“SOP Act”). The application arises out of works performed by Rudyard pursuant to a contract with ASEA 1 dated 10 April 2019 (“Contract”) concerning a proposed 28 residential apartment development at 552-558 Plenty Road, Preston (“development”). Rudyard asserts that it is entitled to judgment because no payment schedule was provided by ASEA 1 in response to Rudyard’s three payment claims totalling \$343,750 (including GST) (“payment claims”) dated 24 April (“PC 1”), 25 May (“PC 2”) and 29 June 2019 (“PC 3”).
- 2 ASEA 1 opposes the giving of judgment on the payment claims on three grounds, as follows:
 - the payment claims were not properly served on ASEA 1;
 - the payment claims fail to identify the construction work or related goods or services to which the progress payment relates, as required by s14(2)(c) of the SOP Act; and
 - the payment claims purport to include charges for future work to be performed under the Contract, and are thus a nullity under both the Contract and the SOP Act.
- 3 In my judgment none of the three grounds relied on by ASEA 1 in opposition to the payment claims is made out in respect of PC 3. The third ground is made out in respect of PC 1 and PC 2, but the total amount of all claims is payable under PC 3. My reasons in respect of each ground are set out below. I am otherwise satisfied of the circumstances in s16(1) of the SOP Act and that the amount claimed in PC 3 does not include any excluded amounts.

4 There will therefore be judgment for Rudyard in the proceeding in the sum of \$343,750, together with interest pursuant to s12(2) of the SOP Act at the rate of 20% per annum on and from 23 July 2019, compounding monthly. There will also be an order that ASEA 1 pay Rudyard the costs of and incidental to the proceeding on the standard basis, in default of agreement, unless either party has a basis for seeking a different order as to costs. I will invite the parties to prepare draft orders to give effect to these reasons, and will determine any issue concerning costs on the papers.

Facts

Pre-Contract discussions

5 The application is supported by three affidavits sworn by Lincoln Daley, the sole director of Rudyard, and an affidavit of John Hair of Artisan Architects sworn on 14 November 2019 (“Hair Affidavit”). Artisan Architects were the architects engaged for the development. According to Mr Daley’s third affidavit sworn on 14 November 2019 (“Third Daley Affidavit”), on 15 March 2019 he received an email from Michael Knight at michael.knight@knightjones.com.au. It was sent to both Mr Daley and Mr Hair. The email was also copied to Nick Bourke at nick.bourke@asea.com.au. The email stated as follows:

“John and Lincoln

Nick and I are hoping to arrange the first PCG [Project Control Group] meeting on 19 March 2019 at 9.00am at level 10, 606 St Kilda Road, Melbourne.

We are hoping that between yourselves you can agree on a preferred team to produce the construction drawings for the project.

We settle the acquisition on June 30 2019 and are desirous to have let the head contract and be on site on 1 July 2019.

The construction is to be undertaking utilising a D&C contract (AS version to be agreed). The contract will be in two stages, stage 1 being design and obviously stage 2 being the build.

We will require a fee proposal from each of the consultants plus a capability statement, corporate profile and details of their insurances.

Please advise if we [sic] think this timeline is possible as I am aware that Lincoln [Daley] is away from the 20th March for a few weeks and I don’t want to lose that time.”

6 There are a number of things to note about the email that are relevant to my findings below, as follows:

- it was sent by Mr Knight and copied to Mr Bourke;
- in the email, Mr Knight refers to “Nick and I” hoping to arrange the first Project Control Group meeting on 19 March 2019;
- it asks Mr Daley and Mr Hair to “agree on a preferred team to produce the construction drawings”;
- it refers to stage 1 of the contract being “design”;
- it is clearly stressing the need to commence and complete the design work quickly; and
- it refers throughout to “we” “hoping” and “requiring” that various things be done for the purposes of progressing the development.

7 The evidence is that a meeting did take place later in March at the offices of ASEA 1 at level 10, 606 St Kilda Road, Melbourne. However, the meeting was on 20 March 2019, not 19 March as proposed in Mr Knight’s email. There are four versions of what took place at the meeting. The first, is provided in the Third Daley Affidavit. In that affidavit, Mr Daley deposes that the meeting was attended by Mr Hair, Mr Knight and Peter Terrill. Mr Terrill is the sole director and secretary of ASEA 1. Mr Daley then deposed in paragraphs 28 and 29 of his third affidavit as follows (emphasis as in original):

“This was the only meeting that Peter Terrill attended. During the meeting, he shook hands with everyone and said words to the effect that he would be “absent from all other meetings and correspondence because he is ‘too busy and too important for the day-to-day [business]’”.

During that meeting, Peter Terrill introduced us to his “project team”, as he called them. He told us what each of them would be doing. He said words to the effect that Michael Knight was the “*point of contact for all the management and administrative items for this project*”, adding that “everything should be sent to him”. Peter Terrill said further words to the effect that Michael Knight would “be overseeing the project” and that we were “in good hands”. He then left the meeting.”

8 The next version of what transpired at the meeting is provided by Mr Hair in the Hair Affidavit. Mr Hair's version is to similar effect as Mr Daley's, but more detailed. He deposes that:

- in addition to the individuals identified by Mr Daley, Mr Bourke also attended the meeting;
- at the commencement of the meeting, Mr Knight introduced Mr Terrill to Mr Daley and Mr Hair saying: "This is Peter Terrill. He is the man. He is in charge of the whole business", or words to that effect;
- Mr Terrill left the meeting shortly after he was introduced by Mr Knight, but before leaving he said: "I'm working on other elements of the business... Michael will be specific to this project and will be handling the job on a day-to-day basis and will be your contact for all aspects related to the project", or words to that effect;
- during the meeting, Mr Terrill also said words to the effect that he would "not be at other meetings because he was too busy" and: "All correspondences for this project should go through Michael Knight" or words that effect;
- after Mr Terrill left the meeting, Mr Knight said to Mr Daley words to the effect that Mr Daley was to "engage and pay all of the consultants and then invoice the client through me" and that "work on the design had to commence immediately because it was very important that we commence construction the day after settlement of the land".

9 The versions of what occurred at the meeting on behalf of ASEA 1 were provided by Mr Terrill and Mr Bourke. There is no affidavit by Mr Knight. Mr Terrill deals with the meeting in his second affidavit sworn on 19 November 2019 ("Second Terrill Affidavit"). He agrees that he attended a meeting on 20 March at level 10, 606 St Kilda Road, Melbourne with Mr Daley, Mr Hair and Mr

Knight. He essentially denies saying the things that Mr Daley attributed to him at paragraphs 28 and 29 of Mr Daley's third affidavit (extracted above). He reiterates paragraphs of his first affidavit sworn on 27 October 2019 ("First Terrill Affidavit") which essentially assert that Mr Knight was not, and never has been, a director, officer, employee or agent of ASEA 1, and that:

"At no time did Knight have authority to act for and on behalf of ASEA1, nor receive service of any document for and on behalf of ASEA1, in relation to Rudyard or the building contract the subject of this dispute. ASEA1, never held Knight out to do so or otherwise so represent to Rudyard".

10 In relation to the Hair Affidavit, Mr Terrill agrees that Mr Knight introduced Mr Terrill in the manner recalled by Mr Hair. However, he denies that he said words to the effect that Mr Knight will be specific to the development and will be handling the job on a day-to-day basis and will be their contact for all aspects of the development. On the other hand, he does not deny saying "all correspondence for this project should go through Michael Knight", or words to that effect. Mr Terrill does not otherwise describe what was discussed at the meeting, including what (if anything) was said by him or in his presence about Mr Knight's role or why Mr Knight was present at the meeting.

11 The final version is provided by Mr Bourke, who confirms in his second affidavit sworn on 19 November 2019 ("Second Bourke Affidavit") that he was present at the meeting. He deposes that he does not recall all of the other attendees at the meeting. He further deposes that he also does not recall Mr Terrill making the statements deposed to by each of Mr Daley and Mr Hair. But, unlike Mr Terrill, he does not deny that they did so. He also does not offer any alternative version of what, if anything, was said about the role of Mr Knight. Indeed, apart from describing it as a "meet and greet meeting" and identifying what he does not recall, Mr Bourke says nothing about what occurred at the meeting.

12 It appears that the only event of substance between the meeting on 20 March and the execution of the Contract on 10 April 2019, occurred on 8 April 2019. In the First Terrill Affidavit, Mr Terrill deposes that on that date, First Urban Pty

Ltd “was appointed superintendent of any prospective contract that was then yet to be executed between ASEA 1 and Rudyard”. The document said by Mr Terrill to constitute that appointment and exhibited to the First Terrill Affidavit, takes the form of a letter from First Urban Pty Ltd addressed as follows:

“C2 Capital Pty Ltd
C/O Mr Michael Knight
Level 10, 606 St Kilda Road
Melbourne VIC 3004
Email: Michael.Knight@Knightjones.com.au”

13 The letter commenced by thanking Mr Knight for his invitation to submit a fee proposal for the development, and then stated: “First Urban would welcome the opportunity to start a relationship with C2 Capital”. The “Authorisation of Engagement” comprising the last page of the letter identified the “Company (Billing Entity)” as ASEA 1, named the “Director” as Mr Peter Terrill, and was apparently signed by Mr Knight, with the annotation “per P Terrill”. I say “apparently”, because there is no direct evidence one way or the other about who signed the letter on behalf of ASEA 1. However, a comparison of the signature on the letter to the signatures appearing on the Contract, reveals that the former bears a close resemblance to the signatures of Mr Knight (who twice signed and printed his name as a witness to the Contract), but bears no resemblance to the signature of Mr Terrill appearing on the Contract.

14 I interpolate to note that there is evidence that another email address used from time to time by Mr Knight was michael.knight@c2capital.com. The company search for ASEA 1 shows that its sole shareholder is C2 Capital Pty Ltd. A company search for C2 Capital Pty Ltd shows that it has shared the same registered address as ASEA 1 (namely, formerly level 8, and currently level 10, 606 St Kilda Road Melbourne), and, like ASEA 1, has Mr Terrill as its sole director and secretary.

Post-Contract dealings

15 In his first affidavit sworn on 30 September 2019 (“First Daley Affidavit”), Mr Daley deposes that Rudyard commenced the works under the Contract on

about 11 April 2019 and that, throughout the course of those works, he was responsible for the coordination of all consultants and the overall management of the design. Mr Daley further deposes that “as of 29 May 2019”, following non-payment of PC 1 and PC 2, “Rudyard suspended the works”. Rudyard then served PC 3, “for works completed prior to the suspension and not claimed by payment claims [PC 1 and PC 2]”.

16 The Third Daley Affidavit exhibits a number of emails passing between both Mr Daley and Mr Hair (on the one hand) and Mr Knight and Mr Bourke (on the other), in relation to the progress of the development. For example, on 23 April 2019 Mr Hair sent an email to various consultants seeking to arrange a “DD” [presumably “Design Development”] meeting for Friday 26 April. At 7:38pm on 23 April 2019, Mr Knight emails Mr Daley stating “Nick and or I will attend”. Similarly, by an email dated 16 May 2019, Mr Daley notified Mr Knight and Mr Bourke giving a: “Quick update on the progress of the design for Plenty Road Preston”. The email provided a list of the design steps completed and then underway. The full text of this email is set out later in these reasons.

17 Finally, on 5 June 2019, Mr Daley sent an email to Mr Knight and Mr Bourke seeking to arrange a meeting “to review the status of the Plenty Rd project as it currently stands and what is happening with the project either moving forward or stopping all together if there are no funds in place to pay the outstanding claims”. Mr Knight responded confirming a meeting for Friday, 7 June 2019. In relation to that meeting, Mr Hair deposed that he attended that meeting along with Mr Daley, Mr Bourke and Mr Knight. He said that:

“The plaintiff’s outstanding payment claims were discussed in detail with me and Lincoln Daley, who was demanding assurances for payment of the outstanding invoices. I had an interest in seeing the plaintiff get paid for these invoices because Artisan Architects had carried out design work for it. I recall very clearly that, at the end of that conversation, both Michael Knight and Nicholas Bourke, upon being asked when payment would be made each said words to the effect that they “promise[d] that full payment [would] be made the following Friday”.

18 Mr Daley also deposes in the Second Daley Affidavit that he attended a meeting

with Mr Bourke and Mr Hair on 7 June 2019. He says that the meeting took place at ASEA 1's office at Level 10, 606 St Kilda Road, Melbourne, and that during the meeting Mr Bourke said (among other things) words to the effect that ASEA 1 had received the payment claims and that each would be paid by close of business the following Friday, being 14 June 2019.

19 In contrast, in the Second Bourke Affidavit, Mr Bourke deposes that he had never seen a payment claim made by Rudyard to ASEA 1 and never said to Mr Daley or anyone else that ASEA 1 had received the payment claims. He deposes that he did attend a meeting with Mr Daley, Mr Hair and Mr Knight on 7 June 2019 and he recalls that "they were both unhappy and requesting to know when payment would be made for their works". He said that he told them that the payment would be dealt with after settlement of the purchase of the Preston property, "which I then understood was due to occur imminently".

The Contract

20 As noted above, the parties signed the Contract on 10 April 2019. In the "Formal Instrument of Agreement" comprising the introduction to the AS4300—1995, "Amended Form Australian Standard" terms, the address of ASEA 1 is shown as "L10, 606 St Kilda Road Melbourne 3004". This section of the Contract also includes as clause 3 "The Works" the following:

"The Works and the work under the Contract comprise the Contractor's Design Obligations of domestic building work comprising Twenty Eight (28) Residential Apartments, associated car parking spaces and related works as set out in the Contract Documents".

21 Moving to the standard terms, definitions of terms used in the Contract are found in clause 2 "Interpretation". "Superintendent" is defined as follows:

"'Superintendent' means the person stated in Annexure Part A as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent and notified as such in writing to the Contractor by the Principal and, so far as concerns the functions exercisable by a Superintendent's Representative, includes a Superintendent's Representative".

22 Other provisions of the Contract relevant to the issues in this proceeding are as

follows:

- Clause 7 “Service Of Notices”:

A notice shall be deemed to have been given when it is received by the person to whom it is addressed or is delivered to the address of that person stated in the Contract or last communicated in writing by that person to the person giving the notice, whichever is the earlier.

...

(a) A notice or other communication connected with this Contract...has no legal effect unless it is in writing and;

(i) Sent by post, postage prepaid, to the address of the addressee set out in this Contract or as subsequently notified...”

- Clause 42.1, “Payment Claims, Certificates, Calculations and Time for Payment”:

“At the times for payment claims or upon completion of the stages of the work under the Contract stated in Annexure Part A and upon the issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.5, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then otherwise due to the Contractor arising out of the Contract.

If the time for any payment claim under the preceding paragraph falls due on a day which is Saturday, Sunday, Statutory or Public Holiday the Contractor shall submit the claim either on the day before or next following that date which itself is not a Saturday, Sunday, Statutory or Public Holiday.

...

Subject to the provisions of the Contract, within 28 days of receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent’s payment certificate, whichever is the earlier, and within 14 days of the issue of a Final Certificate, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in such certificate as due to the Contractor or to the Principal, as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor’s claim.”

- Clause 42.7, “Interest on Overdue Payments”:

“If any moneys due to either party remain unpaid after the date upon which or the expiration of the period within which they should have been

paid, then interest shall be payable thereon from but excluding the date upon which or the expiration of the period within which they should have been paid to and including the date upon which the monies are paid. The rate of interest shall be the rate stated in Annexure Part A or if no rate is stated, the rate shall be 25 per cent per annum. Interest shall be compounded monthly.”

23 Part A of the Annexure to the Contract includes the following relevant items:

- Item 21, “Documents”: “Architectural, Structural, Services (MEP), FER, Landscape, Energy Report, Specifications, Building Permit, Architectural drawings”.
- Item 33, “Categories of Consultants”: “Builder to procure and provide copies of all consultant PI insurance policies”.
- Item 46, “Times under the Contract for payment claims (Clause 42.1)”: “On the 25th day of each month for payment 14 days from EOM [end of month]”.
- Item 49, “The rate of interest on overdue payments (Clause 42.7)”: “20% per annum”.

The Payment Claims

24 Each of the payment claims were in similar form. They comprise a brief covering email to Mr Knight at michael.knight@knightjones.com.au in the case of PC 1 and michael.knight@c2capital.com in the case of PC 2 and PC 3. Each email attached a document headed “Payment Claim Certificate”, a document headed “Contract Claim Schedule – All Items” and an invoice (although in the case of PC 1 the invoice was omitted and sent about two weeks later). Each “Payment Claim Certificate” names the “Client” as “ASEA Pty Ltd, L10, 606 St Kilda Road, Melbourne VIC 3004” and has (among other things) the following details:

“Claim Date:
Claim No:
Period To:
Payment Due:
Project Name: Plenty Rd Preston Design Works”

25 The next section of each Payment Claim Certificate comprises information on the contract value, payments claimed to date, the current payment due and the balance to contract completion. At the foot of the Payment Claim Certificate is the endorsement: "This is a Payment Claim under the Construction Securities of Payment Act VIC 2002".

26 The document headed "Contract Claim Schedule" attached to the Payment Claim Certificate is a table. For PC 1 the table comprises 11 columns. The second column lists a total of eight items as follows:

Preliminaries
Architectural
Services
Geotechnical
Structural
Building Surveyor
Fire Engineers Report
Compliance

27 The row beside each of these entries in the table includes:

- "Schedule Amount", which is the total sum attributed to the relevant item (with the total for each of the items equating to the total contract price of \$512,000);
- "Total Qty To Date", being the percentage of the "Schedule Amount" for each item claimed up to the date of that Payment Claim Certificate;
- "Less Prev Qty", being the total percentage of the "Schedule Amount" for each item claimed in previous Payment Claim Certificates (if any);
- "Qty This Claim", being the percentage of the "Schedule Amount" for each item claimed in that Payment Claim Certificate;
- "Total Claim To Date", being the total dollar figure claimed up to and including that Payment Claim Certificate;
- "Less Prev Claims", being the total dollar value of claims made in previous Payment Claim Certificates (if any);

- “Value This Claim”, being the total dollar value of the amount for that item claimed in that Payment Claim Certificate.

28 The final line in the table gives a total of each of the columns, including a total of the figure sought by the accompanying “Payment Claim Certificate”.

29 The tax invoice included with the payment claims is addressed to “ASEA Pty Ltd” at the same address as the Payment Claim Certificate and marked “Attention: Nick Bourke”. The invoice gives the description “Plenty Rd Preston Design Works, Progress Claim as per attached certificate for claim number” followed by the relevant payment claim number. The amount of the invoice is the total figure appearing in both the Payment Claim Certificate and the Schedule for the total value of that claim plus GST, not the accumulated total. The invoice also bears the endorsement: “This is a Payment Claim under the Construction Securities of Payment Act VIC 2002”.

30 The dates of the covering email and included in each of the Payment Claim Certificates are important. For PC 1, the covering email is dated 28 April 2019, the “Claim Date” is 24 April 2019 and the “Period To” date is 30 April 2019. 24 April was a Wednesday and the day before ANZAC Day. Thus the “Claim Date” was three business days before the “Period To” date. The Schedule comprising PC 1 shows “Preliminaries” of 20%, to a total value of \$30,000, “Architectural” of 35% to a total value of \$45,000, “Structural” of 30% to a total value of \$21,000, “Building Surveyor” of 10% to a total value of \$3000, “Fire Engineers Report” of 10% to a total value of \$3,000 and “Compliance” of 20% to a total value of \$1,400. The total amount claimed by PC 1 is \$103,400 (not including GST).

31 PC 2 has a “Claim Date” of 25 May 2019 (a Saturday) and a “Period To” date of 31 May 2019, five days later than the “Claim Date”. The attached Schedule had somewhat different column headings, but the overall effect is essentially the same as the Schedule attached to PC 1. For example in relation to

“Architectural”, the “Schedule Amount” remained at \$135,000, the “% Complete” column showed “50%”, the “Total Claim To Date” for this item was \$67,500, the “Less Prev Claims” was \$45,000, leaving “Value This Claim” as \$22,500. There were similarly updated amounts provided for a number of the other lines in the schedule (although no further claim for “Services” “Building Surveyor” or “Fire Engineers Report”). The total of the “Value This Claim” column was \$119,600 (not including GST).

32 The Schedule attached to PC 3 repeated the column headings as in PC 1, with updated percentages and amounts for most lines, giving a total claim for \$89,500 (not including GST).

33 In relation to service of the payment claims, Mr Daley deposes in the First Daley Affidavit that on various times and dates, “I served a payment claim pursuant to the Act upon ASEA by email to Mr Knight”. After ASEA 1 put in issue whether the payment claims were validly served on it, Mr Daley swore a further affidavit on 28 October 2019 (“Second Daley Affidavit”) in which he deposed in general terms to having mailed each of the payment claims to ASEA 1 by pre-paid ordinary post, the same day as he sent them by email to Mr Knight. Notably, it appears from the cross-references in the Second Daley Affidavit to the pages of the exhibit to the First Daley Affidavit, that the documents mailed by Mr Daley did not include the covering emails.

34 In the Third Daley Affidavit, Mr Daley elaborated on the circumstances of his posting each of PC 1, PC 2 and PC 3 to ASEA 1 by ordinary pre-paid post on (respectively) 28 April, 30 May and 5 July 2019. In particular, he deposed that there are only a few documents that require mailing in hard copy after they have been sent by email and, for that reason, he tends to remember them. He said that these documents include “formal quotes, invoices, payment claims, creditors’ statutory demands, and similar important documents”. He gave a step-by-step description of his usual practice for mailing these types of documents. He then deposed that he mailed each of the payment claims by

printing each of them out, checking they were addressed correctly, folding them so that the address was visible through the envelope window, placing them in an envelope, sealing the envelope, affixing a \$1 postage stamp and, later in the day, dropping each envelope in the mail box located near 13 Hayes Road in Strathmore.

35 Mr Terrill and Mr Bourke have deposed to the effect that they have not seen any of the payment claims. Mr Bourke's evidence about this is summarised above. In the First Terrill Affidavit, Mr Terrill deposed that "Knight did not pass on the disputed claims to me or to ASEA 1 at any time" and that "Rudyard did not serve any payment claim under the Act on me or ASEA 1". However, the basis for his assertion that Mr Knight did not pass on the payment claims to ASEA 1 and the non-receipt by ASEA 1 is not stated, and is clearly open to question as discussed further below.

36 Despite Mr Daley's lengthy explanation in the Third Daley Affidavit of his practice in relation to mailing payment claims both generally and in this case, Mr Terrill does not elaborate on this issue in the Second Terrill Affidavit sworn in response to the Third Daley Affidavit. In particular, he says nothing about how documents sent by ordinary pre-paid post addressed to "Asea Pty Ltd" at Level 10, 606 St Kilda Rd are received, sorted and distributed within his company.

The SOP Act and legal test

37 The object of the SOP Act is to ensure that anyone who undertakes to carry out construction work, or to supply goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the performance of that work and the supply of those goods and services (SOP Act s3). A construction contract is defined by s4 of the SOP Act to mean a "contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services for another party". There was no dispute that the work the subject of the proceeding, fell

within the definition of “construction work” in SOP Act s5.

38 SOP Act Part 2 is concerned with rights to progress payments for the performance of work or supply of goods and services under a construction contract. Part 3 (commencing with s14) deals with the procedure for recovering progress payments. The provisions of SOP Act Parts 2 and 3 relevant to the issue in this case are as follows:

4 Definitions

...

construction contract means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods or services, for another party...

9 Rights to progress payments

(1) On and from each reference date under a construction contract, a person—

- (a) who has undertaken to carry out construction work under the contract; or
- (b) who has undertaken to supply related goods and services under the contract—

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

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

- (a) a date determined by or in accordance with the terms of the contract as—
 - (i) a date on which a claim for a progress payment may be made; or
 - (ii) a date by reference to which the amount of a progress payment is to be calculated—

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

...

12 Due date for payment

(1) A progress payment under a construction contract becomes due and payable—

- (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or
 - (b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.
- (2) Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with subsection (1) at the greater of the following rates—
- (a) the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983**; or
 - (b) the rate specified under the construction contract.

14 Payment claims

(1) A person...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—

...

- (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.

...

(8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

16 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent —

- (a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and
- (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

- (2) In those circumstances, the claimant—
- (a) may—
- (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
- ...
- (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—
- (a) judgment in favour of the claimant is not to be given unless the court is satisfied—
- (i) of the existence of the circumstances referred to in subsection (1); and
- (ii) that the claimed amount does not include any excluded amount; and
- (b) the respondent is not, in those proceedings, entitled—
- (i) to bring any cross-claim against the claimant; or
- (ii) to raise any defence in relation to matters arising under the construction contract.

50 Service of notices

- (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—
- ...
- (c) by sending it by post or facsimile addressed to the person's ordinary place of business; or
- ...
- (e) any other manner specified in the relevant construction contract.

39 Reference should also be made to SOP Act s47. Sections 47(2) to (4) preserve rights in any proceedings arising under a construction contract and provide that in any such proceedings, the court or tribunal must make allowances (and, where appropriate, restitution) for any amount paid to a party to the construction contract under the recovery provisions of the SOP Act. The place of s47 in the scheme of the SOP Act has been said to be “to reinforce the interim nature” of

determinations under Part 2 of the SOP Act:¹

“The legislature intended the process of dealing with progress claims to be speedy. In many human activities, speed and error are natural companions. Section 32 [the NSW equivalent of s47 under the SOP Act] is the legislative recognition of the potential application of that truism to the scheme of adjudication of disputes.”²

40 Thus a judgment entered under SOP Act s16 is, by reason of s47, effectively a provisional judgment, both in what it grants and what it refuses. The specific statutory context is one in which inconsistent judgments are contemplated and allowed.³ In summarising the effect of the SOP Act and the above provisions in particular, Vickery J in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor*⁴ held (citation omitted):

“The Act has had a substantial effect in shifting the power balance between principals and subcontractors in construction contracts in Victoria and in other States and Territories where legislation in similar terms and with the same objects has been enacted. Subcontractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which compliments the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, but cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act.

The Victorian Act also preserves a claimant’s right to commence proceedings under the relevant construction contract, including proceedings in a court, and any arbitration proceedings or other dispute resolution proceedings: s48 [sic - s47]. Further, in any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal is required to make allowance for any sum paid pursuant to the Act in any order which is made: s 48(3) [sic – s47(3)].

The principle that the respondent to a payment claim for a progress payment “should pay now and argue later” is given full effect under the Act. This regime promotes the object of the Act, being to facilitate timely payments between the parties to a construction contract and to provide for the rapid resolution of disputes arising in respect of progress claims under construction contracts.

From this analysis, I readily accept the observation made in a number of recent authorities that the Act places the claimant in a privileged position

¹ *John Holland Pty Ltd v Roads & Traffic Authority (NSW)* (2006) 66 NSWLR 624, per McDougall J at [33]

² *Ibid* at [37]

³ *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385, per Handley JA (with whom Santow JA and Pearlman AJA agreed) at [22]

⁴ (2009) 26 VR 112 at [2] and [43]-[46]

in the sense that it acquires rights that go beyond its contractual rights.

The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality. The *Building and Construction Industry Security of Payment Act 1999* (NSW) has led to a spate of litigation in its relatively short life. If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.”

41 This last passage was cited with approval by the Court of Appeal in *Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd*.⁵

42 When the Victorian SOP Act was amended with effect from 30 March 2007, the Minister for Planning made clear in the Second Reading speech that:

“The main purpose of this bill is to amend the *Building and Construction Industry Security of Payment Act 2002* to make it more effective in enabling any person who carries out building or construction work to promptly recover progress payments.

...

Cash flow is the lifeblood of the construction industry. It is critical that industry participants obtain prompt interim payment, pending a final determination of the matters in dispute.”⁶

43 This Court has previously endorsed the hearing of cases under SOP Act s16 as determinable on a summary basis by proceedings on summons with affidavit evidence.⁷ I concluded that such claims were properly assessable on the balance of probabilities, noting (after quoting from the High Court decision in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*⁸):

“Subject to the note of warning in [the] above... passage, to my mind there is no obvious reason why s140(2) of the EA cannot be applied in a way so that the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary in both directions. The “nature of a cause of action or defence” in a proceeding under s16 of the SOP Act is one:

- that is brought under legislation plainly intended to enable a right

⁵ [2011] VSCA 99 at [11]

⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 9 February 2006, 220 (Rob Hulls, Minister for Planning)

⁷ *3D Flow Solutions Pty Ltd v LTP Armstrong Creek Pty Ltd* [2018] VCC 674 at [39]-[54]. See also *SJ Higgins v The Bays Healthcare Group Inc* [2018] VCC 805 at [26]

⁸ *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449, 449-450 (Mason CJ, Brennan, Deane and Gaudron JJ)

to payment to be determined informally, summarily and quickly;

- where the right to defend the cause of action is expressly constrained by that legislation; and
- where the consequences flowing from a finding are not grave and are, indeed, temporary.

Thus, if there were a scale for the strength of the evidence necessary to establish facts on the balance of probabilities, an allegation of fraud or criminal conduct would sit at the high end of that scale, whereas proof of facts to establish a claim under s16(2) of the SOP Act would be at the low end.”

44 Where the plaintiff applies for *summary* judgment under s16, it may be appropriate to apply the test for s61 of the *Civil Procedure Act 2010* (Vic): see *John Beever v Roads Corporation*,⁹ But in the present case I will adopt the approach taken in *3D Flow Solutions* and recommended in *SJ Higgins*.

Analysis

Were the payment claims properly served on ASEA 1?

45 By the First Daley Affidavit, Rudyard sought to establish service of the payment claims by relying on Mr Daley’s emails to Mr Knight attaching the payment claims. ASEA 1 submitted in substance that service by email on Mr Knight was not effective service on ASEA 1 under the Contract, under s50 of the SOP Act or pursuant to s109X of the *Corporations Act 2001* (Cth). There is considerable force in these submissions, in so far as they relate to the formal requirements for service of payment claims under the SOP Act. For the reasons discussed below, in my judgment, the strictures affecting service do not apply with the same force to assessing the role of Mr Knight in relation to ASEA 1’s understanding of the content of the payment claims.

46 In the Second Daley Affidavit, Mr Daley deposed to also serving the payment claims by ordinary post, and he elaborated at length on the circumstances of that service in the Third Daley Affidavit, as explained above. In light of that additional evidence, ASEA 1 stated in its written reply submissions as follows:

“ASEA1 concedes that if the Court finds as a matter of fact that Rudyard sent the Payment Claims at the time alleged and to the address so

⁹ [2018] VSC 635

identified, that service has been effected by operation of section 50 of the Act. The only issue to be considered in such circumstances is the due date of payment of any valid payment claim and thus the date from which interest commences running.”

- 47 That concession was appropriately made. There can be no doubt that if the payment claims were sent by post in the manner deposed to by Mr Daley in the Third Daley Affidavit, that service was effective under clause 7 of the Contract (having been sent to ASEA 1’s address stated in the Contract), and thus under SOP Act s50(1)(e). It was also effective under SOP Act s50(1)(c). It may not have been effective under s109X of the *Corporations Act* 2001 (Cth), because at the time of service ASEA 1’s registered office was on Level 8, not Level 10, of 606 St Kilda Rd, Melbourne, but nothing turns of this.
- 48 Accepting that concession, do I find as a matter of fact that Mr Daley posted the payment claims in the manner and at the times he deposes? I so find. Counsel for ASEA 1 Mr Blair made a number of submissions as to why I should doubt the reliability of the evidence of Mr Daley, but in my view none of those submissions were convincing. And I have no other reason to question the veracity of Mr Daley’s account. In contrast, ASEA 1 failed to descend to any detail as to why I should conclude that the payment claims were not delivered. As noted above, Mr Terrill’s affidavits give no account of the mail handling systems at ASEA 1 or other evidence that might provide a cogent basis for rejecting Mr Daley’s evidence. This is not a case where any formal presumption of service operates in Rudyard’s favour,¹⁰ but in my view there must be something beyond a mere denial of receipt to justify a finding of non-delivery.¹¹
- 49 There are two further issues relevant to service that were raised by ASEA 1. The first issue relies on the First Terrill Affidavit and the letter to First Urban Pty Ltd, executed on behalf of ASEA 1, exhibited to that affidavit. Essentially, ASEA 1 argues that this shows that a Superintendent had been appointed under the Contract and thus payment claims under the Contract were required to be

¹⁰ Compare the discussion in the matter of *Kornucopia Pty Ltd (No 1)* [2019] VSC 756, per Sifris J at [42]-[44]

¹¹ In the matter of *Kornucopia Pty Ltd (No 1)* [2019] VSC 756, per Sifris J at [47]

served on the Superintendent, not on ASEA 1. To my mind, this document is important, but not for the reasons submitted by ASEA 1, as explained below.

50 Mr Daley deposed in the Third Daley Affidavit in response to Mr Terrill's reliance on the document, that he had never previously seen the document, nor had he received any notification or correspondence from ASEA 1 advising of the appointment of a Superintendent. Further ASEA 1 has produced no email, letter or other document to the contrary, and the Second Terrill Affidavit does not contradict Mr Daley's account. In those circumstances, I am satisfied that First Urban Pty Ltd was not appointed "Superintendent" within the meaning of the Contract. It is not "stated in Annexure Part A" to the Contract, and nor is there any evidence of it being "notified as such in writing" to Rudyard. These are both pre-requisites to the appointment as contemplated under the definition of "Superintendent" in the Contract.

51 The second issue was raised in oral submissions by counsel for ASEA 1 Mr Blair, apparently as something of an afterthought. He noted that the payment claims name "ASEA Pty Ltd", not ASEA 1, and thus were not validly served on the defendant ASEA 1. I reject this submission. While the payment claims each contained an error in the name of ASEA 1, it was minor. There was no evidence of the existence of an entity "ASEA Pty Ltd" and thus no basis for concluding that any recipient of the payment claims could have been confused about whether they may have been intended for a different entity. Nor was there any evidence that the error in fact led to the payment claims being misdirected. Further, as the discussion of the authorities below show, minor errors of this kind in payment claims should not be permitted to thwart the clear objects of the SOP Act.

Did the payment claims adequately identify the construction work?

52 ASEA 1 commences its written submissions on this issue by citing the well-known passage from the decision of Vickery J in *Gantley Pty Ltd v Phoenix*

International Group Pty Ltd (“Gantley”),¹² as follows:

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

53 ASEA 1 then submits that the payment claims fail to properly identify the construction work or related goods and services to which the progress payments relate. It submits that it is not apparent from the payment claims what works were purportedly performed by Rudyard under the Contract:

“Bare assertions of completion of various percentages of generic classes of work did not enable ASEA 1 to comprehend what work, and the extent thereof, was said to have been performed. Further, it is not possible to ascertain what works were said to have been performed during the period of claim but up to the purported ‘Claim Date’, and what works were yet to be performed during the period of claim, but after the ‘Claim Date’, but the value of which was still included in each of the Payment Claims.”

54 ASEA 1 further argues that the Contract obliged Rudyard to progressively submit to ASEA 1 design documents including, amongst other things, services drawings and specifications. Thus, in order to understand each of the payment claims, Rudyard ought properly to have “provided documentation to enable ASEA 1 to understand the ill-defined bare assertions of progress contained therein”. According to ASEA 1, examples of such documentation would include copies of the documents that were required to be furnished to ASEA 1 under the Contract, or invoices sent to Rudyard from the various consultants that it had engaged. In its written reply submission, ASEA 1 accepts that “the requisite threshold to be met by Rudyard is not taxing”, but argues that it has failed to achieve it.

55 For its part, Rudyard relies in its written submissions on the discussion of the form of payment claims in *Multiplex Constructions Pty Ltd v Luikens and Anor*

¹² [2010] VSC 106 at [51]

as follows:¹³

“A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant’s payment claim. [A] payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.”

56 The question of whether a payment claim satisfies s14(2) is objective, but is not assessed from the perspective of a complete stranger to the development. The relevant context comprises both industry conventions and “the usage adopted by parties in their earlier contractual dealings”. In the recent decision of Lyons J in *John Beever (Aust) Pty Limited v Paper Australia Pty Ltd*,¹⁴ His Honour summarised in some detail the jurisprudence as to what is the standard required of information in a payment claim. After extracting and summarising the relevant passages from the leading authorities (which I would respectfully adopt without repeating),¹⁵ His Honour distils the following principles:¹⁶

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

¹³ [2003] NSWSC 1140, per Palmer J at [76]

¹⁴ [2019] VSC 126

¹⁵ *John Beever (Aust) Pty Limited v Paper Australia Pty Ltd* [2019] VSC 126, per Lyons J at [60]-[82]

¹⁶ *Ibid* at [83]

before and at the time of the payment claim. To that extent, the Court may go beyond the face of the document itself.”

57 An important preliminary issue in applying these principles is whether “the recipient party” (namely, ASEA 1) in this case includes Mr Knight and Mr Bourke (and particularly the former). Put another way, is the knowledge and involvement of Mr Knight and Mr Bourke part of the background knowledge of ASEA 1? As noted above, most of the argument concerning the role of Mr Knight (and to a lesser extent, Mr Bourke), centred around whether that role extended to having authority to accept service of payment claims on behalf of ASEA 1. In this context, ASEA 1 submitted that:

“While a third party may have apparent or ostensible authority to conduct business for and on behalf of a principal, this does not mean, without more, that the third party has authority to accept service of a document or commencement of a proceeding on behalf of a principal.”

58 Here the situation is reversed. It is not whether Mr Knight could accept service, but rather whether he had apparent or ostensible authority to engage with Rudyard for and on behalf of ASEA 1. In my view, the objective evidence establishes that he did. That evidence starts with the email from Mr Knight of 15 March 2019 set out above seeking to engage Rudyard in relation to the development. The many other emails and documents in relation to the development passing between Mr Knight (copied to Mr Bourke) and both Mr Daley and Mr Hair referred to above, reinforce the ongoing role of Mr Knight and his knowledge of the work being coordinated by Rudyard.

59 But perhaps most compelling of all is the document purporting to appoint First Urban Pty Ltd as Superintendent under the Contract. As noted above, Mr Terrill as sole director of ASEA 1 exhibits this to his affidavit and relies on it as evidence of ASEA 1’s appointment of First Urban Pty Ltd. It is executed by Mr Knight on behalf of ASEA 1. To my mind, despite being ineffective to appoint the Superintendent for the reasons discussed, that document is a clear acknowledgement by Mr Terrill that Mr Knight had authority to conduct dealings on behalf of ASEA 1 in relation to the development. There is also the less direct,

but nevertheless relevant, evidence of Mr Knight's association with C2 Capital Pty Ltd, and the connections between that company, Mr Terrill and ASEA 1 noted above.

60 Against the background of that objective evidence, in my judgment Mr Daley and Mr Hair's accounts of the discussion at the meeting on 20 March 2019 are more plausible than those of Mr Terrill and Mr Bourke (noting that Mr Bourke could not recall, but did not deny, Mr Daley's and Mr Hair's version). I am particularly persuaded by the account given by Mr Hair, for two reasons. First, because it is more detailed and logical. And, second, because he does not have a direct vested interest in the outcome of this application. The evidence was that his accounts in relation to the development have already been paid by Rudyard.

61 Based on both the objective evidence discussed above and Mr Hair's account of the 20 March meeting, I am satisfied that ASEA 1 by Mr Terrill (and by Mr Terrill allowing Mr Knight to hold himself out as having authority) represented to Rudyard that Mr Knight (with the assistance of Mr Bourke) had authority to manage and supervise the development on behalf of ASEA 1. Indeed, it is more likely than not on the evidence that Mr Knight in fact had that authority. I hasten to add that I do not rely in reaching this conclusion on Rudyard having seen the document purporting to appoint First Urban Pty Ltd as Superintendent. I have found that it did not. I rely on that document as evidencing that Mr Terrill in fact conferred relevant authority on Mr Knight in relation to the development, and in doubting the veracity of his assertions to the contrary.

62 Of course I do not need to go as far as finding that Mr Knight had actual authority to act as ASEA 1's agent in relation to the development. It is sufficient for present purposes that I find that the representation was made, and that Rudyard (through Mr Daley) relied on it in continuing to deal with Mr Knight in connection with the development. ASEA 1 is thus estopped from denying the fact of Mr Knight's authority under the general law of estoppel, and it is immaterial whether

Mr Knight as ostensible agent to undertake those dealings had no authority.¹⁷ In this case, the holding out is by acts of ASEA 1 (notably at the meeting on 20 March 2019) and by ASEA 1 allowing Mr Knight to hold himself out as having authority.

63 It is then necessary to consider what the documents show that Mr Knight knew about the engagement and work of Rudyard that is likely to have informed his (and therefore ASEA 1's) knowledge about the matters disclosed in the payment claims. I have set out above the email of 15 March 2019 in relation to the initial engagement of Rudyard. Among other things, that email asked Mr Daley to "agree on the preferred team" to work on the design and construction drawings and stressed the need to work quickly. Other emails provided further information about the work being undertaken by Rudyard while the Contract was on foot.

64 Most notably, Mr Daley's email to Mr Knight and Mr Bourke dated 15 May 2019 gives a: "Quick update on the progress of the design for Plenty Rd Preston". It continues:

"We met with the architect and engineers on Monday afternoon just gone and walked through the;

1. Final structural methodology overall to all levels including wall types, thicknesses, slab profiles, basement final configuration, piling details etc
2. Perimeter wall types required for structure and current fire rating codes to maintain the external face finish as per the 3D images provided
3. Balustrade and window details
4. FFE
5. Build over requirements to adjoining properties and their trees
6. etc

The working engineering will be provided by the end of this month allowing us to start going out to market and locking away the sub grade trades ready to kick off July coming."

¹⁷ *Lysaght Bros & Co Ltd v Falk* (1905) 2 CLR 421

65 This email was sent about 10 days before Rudyard sent PC 2 to Mr Knight by email and, according to the First Daley Affidavit, about two weeks before Rudyard suspended works on the development. Mr Knight also received each of the covering emails sent with the payment claims. These relevantly identified:

- in the email dated 28 April 2019 sent with PC 1, that Mr Daley had discussed the payment claim with Mr Knight two days earlier and “taken the punt” that the engineers were roughly 30% of the way through their works;
- in the email dated 30 May 2019 sent with PC 2, that “the consultants have confirmed that the drawings are all at the stage of being able to go out to market and getting trade feedback” and that Rudyard had “done the initial geotechnical report and issued this to the guys and determined the final scope for the super structure, perimeter skin and interiors schedule”;
- in the email dated 5 July 2019 sent with PC 3, that PC 3 covered “costs associated with the works completed by all parties involved in the design works up to the date we sent through the ‘stop works notice’ for the design phase”.

66 For reasons explained below in relation to the third issue, I have concluded that I cannot be satisfied on the evidence that PC 1 and PC 2 are payment claims under the Contract or within the meaning of SOP Act s14. Thus it is not necessary to consider whether those payment claims sufficiently identify the construction work under the Contract, except to the extent that they inform an understanding of PC 3. Turning to PC 3, I am satisfied that a reasonable observer in the position of ASEA 1 (including with the knowledge of Mr Knight), would have readily comprehended from PC 3 and their past dealings and prior exchanges of information that:

- PC 3 claimed for the cost of the work of the various consultants providing design services and Rudyard itself, as encompassed by the descriptions listed in the schedule to the payment claim (that is, architectural, geotechnical, structural, and so on), being descriptions largely consistent with those used in Item 21 of Annexure Part A to the Contract;
- those consultants had been engaged by Rudyard, and so engaged under significant time pressure, as contemplated by the email of 15 March 2019 and as discussed at the meeting on 20 March 2019;
- the nature and extent of the work was broadly as described in the email of 15 May 2019 set out above, supplemented by the covering emails to each of the payment claims;
- work on the design phase of the development had ceased in around the end of May 2019, and in any event well before 25 June, being the relevant reference date for PC 3;
- the percentage of that work completed up to the date of PC 3 was the figure in the “Total Qty To Date” column, having the total value as shown in the “Total Claim to Date” column; and
- the total figure claimed up to and including PC 3 was \$312,500 (not including GST).

67 I am also satisfied that the information above was sufficient to enable ASEA 1 to issue a payment schedule in respect of PC 3 had it determined to do so, and was otherwise a sufficient description of the construction work as required by SOP Act s14(2)(c). I accept that it may have been prudent and would have assisted ASEA 1’s understanding, if Rudyard had also provided, for example, invoices from the consultants detailing the work they had done. However, ASEA 1 had expressly engaged Rudyard to coordinate and supervise this work, and if it had any doubts about whether the work charged for had been done by

the consultant concerned (or by Rudyard), it was open to it to issue a payment schedule identifying those doubts. In my view, the “abbreviated summary” (taking the form in this case of a percentage of the work completed by each relevant consultant), was sufficient to enable this to occur.

Do the payment claims include charges for future work and thus a nullity?

68 ASEA 1 submits in relation to this issue that, subject to the requirement that the parties’ statutory entitlements are preserved, parties are afforded the contractual freedom to adopt any particular mechanism for determining progress payments, because the framework of the SOP Act is to create a statutory system alongside the contractual regime: “In this regard, it was aptly stated that the statutory progress payment regime should ‘underwrite’ the parties’ contractual entitlements”.¹⁸ I agree. I also agree with ASEA 1’s submissions that:

- reference dates under the Contract, and for the purposes of the SOP Act, arose by operation of clause 42.1 and item 46(a) of Annexure Part A to the Contract; and
- the Contract limited Rudyard’s entitlement to make progress claims to those works already performed on or by the relevant reference date.

69 In the case of the latter submission, this follows from the last sentence of the first paragraph under clause 42.1 of the Contract as follows (emphasis added): “Claims for payment shall include the value of work *carried out* by the Contractor in the performance of the Contract *to that time* together with all amounts then otherwise due to the Contractor arising out of the Contract”. Counsel for Rudyard, Dr Wolff argued in oral submissions that use of the word “include” in this sentence meant that the payment claim was not restricted to the items identified, and could cover future work.

70 In my view, it is arguable that the word “include” should be read as

¹⁸ *Beever (Aust) Pty Ltd v Roads Corporation* [2018] VSC 635 at [15]

encompassing only the two items identified. That is, a payment claim can “include” both the work done up to the date of the payment claim as well as amounts otherwise then due. Although I accept that may be an unnecessarily restrictive reading of the words, I am not persuaded that the Contract contemplates charges for future work being included in payment claims. As Mr Blair observed, if it were otherwise, Rudyard could in theory have issued a payment claim for the full amount of the contract price immediately after execution of the Contract. The common sense construction of the sentence is that it does not cover future work.

71 ASEA 1 next submits that, by operation of the SOP Act and by reference to the Contract, Rudyard was entitled on and from each reference date under the Contract (the 25th day of each month) to issue a payment claim for works done up to, but not beyond, that reference date. ASEA 1 then sets out the relevant part of SOP Act s14(4) and submits that the effect of the section “is to establish a relationship between the progress payment that is the subject of a payment claim made under the [SOP] Act, with a particular reference date that has already arisen”.

72 ASEA 1 argues that assuming the “Claim Date” referred to in each of the payment claims is a reference to a purported reference date arising under the SOP Act by operation of the Contract, “each of the payment claims claim entitlement to works not then properly earned, or otherwise not yet entitled to be claimed, by including works whose provision are after the relevant reference date”. ASEA 1 also points out that none of the payment claims draw a distinction between that part of the claim that relates to works after the reference date from works up to and including the reference date, and so there is no opportunity to sever the invalid part of the payment claims from the balance.

73 In my judgment, these are valid criticisms of both PC 1 and PC 2. In the case of each of these payment claims, there are three or more business days between the “Claim Date” stated in the payment claim and the date on which

the payment claim was issued. Further, there is nothing in the correspondence or other documents apparently available to ASEA 1 at the time these payment claims were issued (or available to me at the time of the hearing) to confirm that all of the work covered by the payment claims predates the “Claim Date”. Thus, based on the evidence presently available, I cannot be satisfied that each of PC 1 and PC 2 is a valid claim under the SOP Act.

74 However, in my view, the same criticism does not apply to PC 3. This payment claim has a “Claim Date” of 29 June 2019 (a Saturday) and a “Period To” date of 30 June 2019 (a Sunday). It follows that the reference date under the Contract for PC 3 (and applicable by operation of SOP Act s9(2)(a)(i)) is 25 June 2019. The question then is whether any part of the sums claimed in PC 3 relates to work done between 25 and 29 June 2019. In my view the evidence establishes that the answer to this question is no, and a reasonable recipient of PC 3 in the place of ASEA 1 would have known it to be so.

75 That evidence comprises, first, the covering email that made plain that it related to “works completed” up to the date of a “stop works notice” and, second, Mr Daley’s statement that the notice was given in around late May or early June 2019. I am prepared to infer for the purposes of this proceeding and in the absence of evidence to the contrary, that ASEA 1 (probably through Mr Knight), knew that Rudyard and the consultants engaged by it had stopped work well before 25 June 2019. I draw that inference both from Mr Daley’s evidence about the stop works notice and also from the evidence of each of Mr Daley, Mr Hair and Mr Bourke of the discussion at the 7 June 2019 meeting summarised above. I again prefer Mr Hair’s version of this meeting for the same reasons that I gave for preferring his version of the 20 March 2019 meeting. But even on Mr Bourke’s version, it is safe to conclude that everyone at that meeting knew that Rudyard and the consultants it had engaged would not be doing any further work on the development until all outstanding claims were paid.

76 Thus I am satisfied that PC 3 is a valid payment claim and that Rudyard is

entitled to judgment at least for the amount of PC 3, being \$98,450 (including GST). The final question then is whether PC 3 can also operate as a payment claim within the meaning of the Contract and the SOP Act for the amounts claimed in PC 1 and PC 2, but as at the PC 3 reference date of 25 June 2019. In my view, it can. The Contract clearly contemplates that payment claims can include the value of the work carried out “together with all amounts then otherwise due to Rudyard arising out of the Contract”. Section 14(9) of the SOP Act is to similar effect. I note in this regard that the sums claimed in PC 1 and PC 2 both became “due to Rudyard arising out of the Contract”, by reason of the invoices and regardless of the validity of PC 1 and PC 2 as payment claims under SOP Act s14.

77 Further, to the extent that PC 1 and PC 2 may have included future work relative to the reference dates applicable to those payment claims, that was no longer the case as at the reference date applicable to PC 3. Thus PC 3 does not offend SOP Act s9 in respect of all of the construction work by Rudyard under the Contract as at 25 June 2019. As to whether PC 3 otherwise satisfies SOP Act s14(2) in respect of all of the work under the Contract as at 25 June 2019, in my view it does. By reference to the relevant provision of s14(2), PC 3:

- identifies the construction work, because “previous correspondence” includes PC 1 and PC 2 and these, together with their covering emails and the other information listed above, are by the time of PC 3 a sufficient description of the construction work completed by Rudyard as at 25 June 2019;
- indicates the total amounts of the progress payment that Rudyard claims to be due (\$312,500), including the amount of previous claims as permitted under SOP Act s14(9); and
- it states that it is made under the SOP Act.

78 Turning to the question of interest, I consider that the due date for payment of

PC 3 is to be determined by reference to SOP Act s12(1). SOP Act s12(1)(a) provides that a progress payment becomes due and payable on the date on which the payment becomes due and payable in accordance with the Contract. It is arguable that clause 42.1 of the Contract provides for a date on which PC 3 becomes due and payable, based on the provision in clause 42.1 to the effect that the Superintendent is to assess payment claims within 10 days of receipt. However, there is sufficient doubt about the application of the provision that I can safely conclude that the Contract “makes no express provision with respect to the matter”, as provided for in SOP Act 12(1)(b). Under that section, a progress payment becomes due and payable “on the date occurring 10 business days after the payment claim is made”.

79 The effect of the Second and Third Daley affidavit is that he posted PC 3 on the date of the covering email, being Friday 5 July 2019. The Contract provides in clause 7(b)(i) that a notice sent by post “must be treated as being...received” on “the 2nd Business Day...after posting”. SOP Act s50(2) provides that service of a notice or document by post is taken to have been effected “2 business days after the notice or document was posted”. Thus in both cases, service of PC 3 is taken as being effected on Tuesday, 9 July 2019. The date occurring 10 business days after 9 July 2019 is 23 July 2019. Thus, by operation of SOP Act s12(2) and clause 42.7 of the Contract, I consider that interest on the \$312,000 claimed by PC 3 (plus GST) is payable by ASEA 1 at the rate of 20% per annum, compounding monthly, on and from 23 July 2019 to the date of judgment.

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Certificate

I certify that these 34 pages are a true copy of the judgment of His Honour Judge Woodward delivered on 6 December 2019.

Dated: 6 December 2019

Simone Karmis