

**JUDGEMENT : HIS HONOUR JUDGE SHELTON.** County Court of Victoria at Melbourne. Civil Division, Building Cases. 10<sup>th</sup> September 2008

1 I have before me a stay application by the defendants and a summary judgment application by the plaintiff.

### The Project

2 By a written contract dated 3 April 2006, which incorporated General Conditions of Contract AS 2124-1992 ("AS 2124-1992"), the plaintiff agreed to construct 103 residential units for the defendants on their land at 1-5 Grantham Street, Brunswick ("the Contract"). Adrian Corsello ("Corsello"), a director of the defendants, deposes in his affidavit of 20 August 2008, at paragraph 17:

*"In July 2006 the defendants decided to change the character of the Development to a 96 apartment residential hotel and serviced apartments complex."*

3 The contract price was \$10,555,809.00, exclusive of GST. The Superintendent under AS 2124-1992 was stated to be Dean Priester ("Priester").

### The Plaintiff's Claim

4 In its Statement of Claim, the plaintiff claims the sum of \$588,921.84. This sum is claimed pursuant to the provisions of the Building and Construction Industry Security of Payment Act 2002 ("the SOP Act") or alternatively pursuant to the Contract. Included in the sum of \$588,921.84 is the sum of \$159,670.00, being half of the retention sum retained by the defendants pursuant to the Contract. The plaintiff further seeks an order that the defendants pay the remaining half of the retention sum into a bank account in the joint names of the plaintiff and the defendants to be held on trust for the plaintiff.

### The Stay Application

5 At the conclusion of submissions, I indicated that I refused the stay application and that I would deliver reasons for so doing at a subsequent point in time. These are those reasons.

6 The defendants seek a stay of the proceeding pursuant to s.57 of the Domestic Building Contracts Act 1995 ("the DBC Act") other than with respect to the claim under the SOP Act. S.57 of the DBC Act relevantly provides:

*"Tribunal to be chiefly responsible for resolving domestic building disputes*

*(1) This section applies if a person starts any action arising wholly or predominantly from a domestic building dispute in the Supreme Court, the County Court or the Magistrates' Court.*

*(2) The Court must stay any such action on the application of a party to the action if –*

*(a) the action could be heard by the Tribunal under this Subdivision; and*

*(b) the Court has not heard any oral evidence concerning the dispute itself. . . ."*

7 "Tribunal" is defined as meaning Victorian Civil and Administrative Tribunal ("VCAT").

8 S.54 provides:

*"What is a domestic building dispute?*

*(1) A domestic building dispute is a dispute or claim arising –*

*(a) between a building owner and –*

*(i) a builder; . . . . .*

*in relation to a domestic building contract or the carrying out of domestic building work; . . . ."*

9 "Domestic Building Contract" is defined in s.3 as follows:

*"Domestic building contract means a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor."*

10 "Domestic Building Work" is defined in s.3 as follows:

*"Domestic building work means any work referred to in section 5 that is not excluded from the operation of this Act by section 6."*

11 Section 5 provides:

*"Building work to which this Act applies*

*(1) This Act applies to the following work –*

*(a) the erection or construction of a home . . . ."*

12 It was not suggested that s.6 was applicable.

13 "Home" is defined widely in s.3 as: *"Home means any residential premises . . . ."*

14 It was common ground that the two defendant companies were incorporated for the purpose of purchasing and developing the land at 1-5 Grantham Street, Brunswick and that they were developers. Mr Andrew, who appeared for the plaintiff, in opposing the stay application, contended that the DBC Act did not apply to owner-developers. Mr Frenkel, who appeared for the defendants, contended that it did.

15 A useful starting point for the consideration of whether or not an owner-developer is subject to the provisions of the DBC Act is the decision of Byrne J in *Fletcher Construction Australia Pty Ltd v Southside Tower Developments Pty Ltd* (unreported, VSC, No.6668 of 1996 (BC9604891)). There, His Honour stated, at pp 3 and 4:

*"Before me the Proprietor relied on s.5(1)(a) and (e), saying that the work required under the contract between the parties in this proceeding was the erection or construction of a home, alternatively it was work associated with the*

construction or erection of a building on land zoned for residential purposes and for which a building permit is required. It was accepted on behalf of the Builder that 'home' covered a multi-residence building or multi-storey residential building since this was in fact a number of homes; the singular "home" in s.5(1)(a) including the plural 'homes': Interpretation of Legislation Act 1984 s.37. . . . There is, if I may say so, much to be said for this view. There are, however, some indications in the Act and in the Second Reading Speech which suggest that the definition may not be so wide; that it was the intention of Parliament to provide a legislative framework for contracts and disputes concerning building work of a more modest character and to protect parties to more conventional domestic building projects from the consequences of an inequality of bargaining power rather than to interfere with major commercial transactions. Nevertheless, this was not contended for before me, and I am content to proceed on the accepted basis expressing no view on the broad question: Counsel for the Builder submitted, however, that the work, the subject of this proceeding, was not the erection or construction of a home or homes."

- 16 The ruminations of Byrne J as to whether the DBC Act applied to "major commercial transactions", such as here, were, surprisingly, not seized upon in subsequent litigation. Mr Andrew, however, took me through the Second Reading Speech of 24 October 1995, which he submitted showed that the purpose of the legislation was to protect consumers and that it was to apply to individual owners and not owner-developers, as here. Likewise, he took me through the provisions of the DBC Act, again submitting that its purpose was to protect consumers and that many of its provisions were quite inappropriate to apply to the owner-developers of a 96-unit development. I thought there was some merit in his submissions.
- 17 I turn to the case of *Winslow Constructions Pty Ltd v Mt Holden Estates Pty Ltd* [2004] VSCA 159. There, the lead judgment was given by Hansen AJA. He stated, at paragraph 104:  
". . . the intent of the DBC Act is to protect individual home owners rather than commercial developers, a point which was noted by Eames JA in *HIA Insurance Services*."
- 18 Further on in the judgment, at paragraph 110, he stated:  
"I also accept the appellant's submission that the DBC Act was enacted to regulate the rights of home owners and builders as distinct from developers, having regard to the object of the DBC Act in s.4 and the Second Reading Speech."
- 19 Callaway and Buchanan JJA indicated in a short joint judgment that they generally agreed with the judgment of Hansen AJA. In their judgment they referred to various matters but made no reference to the comments of Hansen AJA on the DBC Act. Thus, it can be said at the very least that they did not disagree with his comments.
- 20 In *Kane Constructions Pty Ltd v Cole Sopov & Ors.* [2005] VSC 237, Warren CJ was concerned with the renovation and extension of a disused boiler house in Collingwood. The works consisted of the erection of 14 residential units, together with a gallery, office space and restaurant. Her Honour stated, at paragraphs 891-893:  
"While in *Winslow Constructions*, the views expressed by the Court of Appeal with respect to the limitations or application of the Domestic Building Contracts Act are confined to the narrow ambit before the Court on that occasion, and therefore obiter, the fact remains that the authority is of assistance in the present case. It was suggested at one point in argument that, given the fact that the present project encompassed a partially domestic building component, then it necessarily followed that the provisions of the Act applied. This cannot be so. There were components of the project that were intended for business purposes, for example, the area described as 'the gallery', and a virtually entire floor designated for office use.  
I have difficulty in accepting that in a project such as the present where it is a combined, mixed use development of residential, office and gallery and restaurant, developed by a developer, it should be subject to the protections enshrined in the Domestic Building Contracts Act. Picking up on the observations of Hansen AJA in *Winslow Constructions*, it seems to me that the Act was not intended to apply to developers, and for that reason alone the provisions have no bearing on the present case. . . .  
. . . I am of the view, therefore, that the Act does not apply to a project such as the present. . . ."
- 21 In *Shaw v Yarranova Pty Ltd & Anor.* [2006] VSC 45, Bell J stated, at paragraph 35:  
"In *Winslow Constructors Pty Ltd v Mt Holden Estates Pty Ltd* the Court of Appeal ascertained the meaning of 'associated work' in s.5(1)(a)(i) of the Domestic Building Contracts Act in this manner. This decision was applied by Warren CJ in *Kane Constructions Pty Ltd v Sopov* where her Honour considered that the provisions of the Domestic Building Contracts Act at issue in the case before her did not apply to developers."
- 22 Mr Frenkel sought to distinguish *Kane Constructions* on the basis that there the development had a commercial aspect, in that there was an office, gallery and restaurant which are not present in the matter before me. I do not accept this submission. In my view, the Chief Justice, as with Hansen AJA, was stating her conclusion in broader terms when she said: ". . . it seems to me that the Act was not intended to apply to developers."
- 23 Mr Frenkel sought to rely on *Mirvac (Docklands) Pty Ltd v Philp* [2004] VSC 301, where Byrne J was concerned with a contract for the sale of apartments off the plan at Docklands. He concluded that the contract of sale between a developer and an individual was a domestic building contract within the meaning of s.3 of the DBC Act. This decision is readily distinguishable, since there the builder was the developer, not the owner.
- 24 Mr Frenkel also referred to *Shaw v Yarranova Pty Ltd & Anor* [2006] VSCA 291, an appeal from the decision of Bell J referred to above. There, Neave and Eames JJA upheld the decision of Bell J, with the Chief Justice dissenting. At paragraph 18, Neave JA stated:

*"The single issue to be decided in this appeal is whether a contract of sale 'off-the-plan' of an apartment to be built as part of a residential development in the Docklands area in Melbourne, is a 'major domestic building contract' under the Domestic Building Contracts Act 1995."*

- 25 Again, a developer was the builder not the owner. The judgment was principally concerned with the meaning of the words "manages or arranges the carrying out of domestic building work" in the definition of "builder" (paragraph (b) contained in s.3(1) of the DBC Act).
- 26 Mr Frenkel further relied upon the fact that the Contract contains provisions which are required in a domestic building contract under the DBC Act.
- 27 Corsello, in paragraph 51 of his affidavit, deposes that the Contract was prepared by Steven Foley ("Foley"), an independent quantity surveyor engaged by the defendants. In my view, the fact that the parties entered into the Contract on the mistaken belief that the DBC Act applied to the Contract does not affect the question of whether as a matter of law the DBC Act does apply to owner-developers.
- 28 I follow the approach of Hansen AJA, the Chief Justice and Bell J, and conclude that the DBC Act does not apply to owner-developers.
- 29 There is, in my view, another reason to refuse the stay application.
- 30 The plaintiff's claim under the SOP Act is brought under s.16 of that Act since the plaintiff alleges that the defendants have not provided a payment schedule pursuant to s.15 in response to its payment claim served under s.14. In these circumstances, any proceedings by the plaintiff to recover the amount stated in the payment claim must be brought "in any court of competent jurisdiction": (s.16(2)(a)).
- 31 It was not in dispute that the Victorian Civil and Administrative Tribunal, where the proceeding would be heard were I to grant a stay under s.57 of the DBC Act, is not a court of competent jurisdiction. It could therefore not hear the claim under the SOP Act.
- 32 In *Domaine Homes (Vic) Pty Ltd v RIA Building Pty Ltd* [2005] VCC 111, a judgment I delivered on 15 February 2005, I concluded that "action" in s.57(1) of the DBC Act meant "proceeding", that is, that action did not mean "cause of action".
- 33 Adopting this reasoning, it would be not be possible to stay the action or proceeding under s.57(2) since only the whole action or proceeding and not part only of the action or proceeding could be heard by VCAT.
- 34 Further, in *Domaine Homes*, the plaintiff's claim against the defendant was brought under the SOP Act or, alternatively, under a building contract. I held there that the claim under the SOP Act did not arise "from a domestic building dispute" as required by s.57(1) of the DBC Act, but rather was a recovery claim for a debt due. I further held that in the circumstances the action was 35 For the above reasons I refuse the stay application by the defendants.

#### Summary Judgment Application

- 36 The plaintiff's summary judgment application brought pursuant to Order 22 of the County Court Rules is based upon the provisions of the Contract or, alternatively, as mentioned, upon s.16(2)(a) of the SOP Act.
- 37 The approach to be taken to a summary judgment application is stated by the High Court in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, at 89, as follows:  
*"The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried."*

#### Under the Contract

- 38 Clause 42.1 of AS 2124-1992 relevantly provides:  
*"At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, 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 due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof.*  
*Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal. . . .*  
*Subject to the provisions of the Contract, within 28 days after 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, 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 the 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. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable. . . ."*

39 Under the Contract, the plaintiff is the Contractor and the defendants are the Principal.

40 It is not in issue that the plaintiff forwarded a claim for payment to the Superintendent on 30 May 2008. It read:

**“Re: Grantham Street/Brunswick Road Claim for Payment by Glenrich Builders Pty Ltd (Glenrich) under Contract for Works at Grantham Street/Brunswick Road**

*As you know, there has been a lot of discussions and arguments about this job. Glenrich wants to put the emotional arguments behind us and move forward. Glenrich claims payment under the contract in the sum of \$588,921.84 (inc GST) as explained in this letter, and the reasons why this claim is justified is set out as follows:*

1. An amount of \$124,498.10 for works done finishing off the job as follows:

Painting balance of painting work to buildings A, B and C internal and external to 100%	12,000.00
Prime Cost items adjustment	24,753.00
Water damage adjustment (as previously estimated by SJ Foley QS for the burst pipe between building B and building C to first floor roof — amount payable to Glenrich following rectification	65,000.00
Variation 75 Unit C8 extra works — installation of extra window and associated works as required to achieve occupancy permit as per instruction by Superintendent — see memo from Superintendent dated 26/2/08	5,896.00
Balance of Preliminaries to 100%, including works to achieve occupancy permit	12,000.00
Electrical works carried out as per our quotation dated 4/1/08 — 30 AMP circuits to laundry and data patch panels	\$10,199.09
Repairs carried out at the principal’s request due to damage caused by furniture including touch up walls, for buildings A, B and C, touch up doors, Building A11, 14, 15, 16, 28, 42 and 44, building B21, 22, 29, 38, 40, 41 45 and 46, Building C11, 12, 32, 50 and 51, walls in conference room Building B	\$2500.00
<b>Sub-total</b>	<b>\$132,348.09</b>
Less	
Variation 74 Building C roof repairs prime cost item	(9415.00)
Variation 76 Landscape works prime cost Item	(9753.00)
<b>Sub-total</b>	<b>\$113,180.09</b>
Plus GST	11,318.01
<b>Total</b>	<b>\$124,498.10</b>

2 Delay costs. This issue has been discussed many times in the past, but no allowance or adjustment of either time or money for any delay costs has been made, despite the fact that there have been numerous variations totalling \$1,056,569.00. The principal is in breach of the contract and Glenrich claims delay costs as follows:

The project critical path was through the activities of Building A then through the activities of the Building C part 2 programs.

The construction works commenced onsite on 10th of June 2006 following the sequence illustrated in the original construction program. During the Months of May and June Glenrich where instructed to suspend works to building B.

The principal issued a site instruction with substantially revised approved for construction drawings for building B on the 15th of August 2006. A milestone was introduced into the program (activity 63) illustrating the issued date of the revised approved for construction drawings. A further lead time activity was introduced representing remobilization of subcontractor and reordering of materials to recommence works. Activity 64 was assumed to approximately 3 weeks in duration. These activities where then linked into the building activity network through ‘activity 65 Footings’. This resulted in significant delays to the completion of building B. Consequently, suspending the building works to Building B and revising the construction drawings has delayed the overall project by 66 days.

Taking the preliminaries rate (less builder’s margin) and dividing the net result by the number of working days in the original program gives a daily cost as follows:

Original Preliminaries	\$2,605,388.00
Deduct the builders Margin	\$ 750,000.00
Net Preliminaries	<u>\$1,855,388.00</u>
Divided by	442 days
Equals	\$4,197.71 per day
Therefore the delay claim for this item alone is:	
$\$4,197.71 \times 66 \text{ days} =$	<b>\$277,048.86 plus GST, being \$304,753.74</b>

3 Retention money. Glenrich has already asked for 50% of the retention money (\$159,670.00) to be released which should have happened after the works reached practical completion on 22 February 2008. This has not happened, even though Glenrich had a solicitor write a letter asking that this be paid. In fact, this letter was ignored. Glenrich does not feel it is being taken seriously." [sic]

41 The sum of \$588,921.84 claimed in the letter is the sum now claimed in this proceeding.

42 Again, it is not in issue that the Superintendent did not issue a payment certificate within 14 days of receipt of the plaintiff's claim as required by Clause 42.1. The plaintiff submits that therefore, since 28 days have elapsed since receipt by the Superintendent of the plaintiff's claim for payment, the defendants are required to pay the sum claimed of \$588,921.84 pursuant to Clause 42.1.

43 Corsello, in his affidavit sworn 20 August 2008, deposes, at paragraph 42, that the plaintiff owes the defendants \$74,800.00 in liquidated damages, approximately \$88,000.00 being the cost of rectifying defects and \$181,500.00 for interest losses suffered by the defendants. In addition, he deposes at paragraph 43 that the plaintiff's claim for \$304,753.74 "is completely without foundation". Mr Frenkel contended that the defendants were entitled to set off the three sums mentioned, that there was dispute over the claim for delay costs, that there were no monies payable by the defendants to the plaintiff and that therefore there was a real question to be tried and that the defendants should be given leave to defend.

44 In **Novawest Contracting Pty Ltd v Taras Nominees Pty Ltd** [1998] VSC 205, Gillard J was considering an appeal from the entry of summary judgment by a Master pursuant to Order 22 of the Rules of Court. As here, AS 2124-1992 formed part of the Contract. There, unlike here, a payment certificate had been issued.

45 Referring to Clause 42.1, His Honour stated, at paragraphs 96 and 97:

"The sub-clause contains two very important and significant provisions to the question in issue. They are -

(a) 'A payment made pursuant to this clause shall not prejudice the right of either party to dispute under cl.47 whether the amount so paid is the amount properly due and payable' and goes on to provide that after determination there will be an accounting between the parties.

*It is appropriate at this stage to refer to cl.47 which is a dispute resolution clause. The important point to note is that notwithstanding the existence of any dispute the parties shall continue to perform the contract. More importantly the parties are obliged to continue to comply with cl.42.1.*

(b) 'Payment of money shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by cl.42.8.'

*This is again a very significant provision. The reference to cl.42.8 is the final certificate. But taken with the right to dispute the certificate and the power to correct certificates under cl.42.4 the parties have the right despite payment to contest the matter thereafter."*

46 His Honour stated, at paragraphs 99 and 100:

"In my opinion the provisions of clause 42.1 which I have summarised and referred to make it clear that once the certificate is issued it must be paid without deduction.

*That conclusion is based upon the plain meaning of the words used which is the primary source of the common intention of the parties. There is no necessity to refer to other provisions or the fact that the contract envisages a steady flow of money to the contractor."*

47 His Honour concluded, at paragraph 134:

"I am satisfied that there is no real question to be tried and that the plaintiff is entitled to final judgment."

48 Here, there is no payment certificate issued by the Superintendent. Further, it is common ground that no part of the claim for \$588,921.84 has been paid.

49 I see no reason to depart from the logic of Gillard J in **Novawest** as to the construction of Clause 42.1 in the case where no payment certificate has been issued, in which case "the Principal shall pay the amount of the Contractor's claim". Here we are dealing with a default, or fallback, situation where the Superintendent has failed to exercise the duty imposed upon him to issue a payment certificate within 14 days. There is no reason why a Contractor such as the plaintiff should be in a worse position on account of this, particularly given the clear intention of the parties as stated that where a certificate is not issued within 14 days by the Superintendent, the plaintiff is entitled to payment of the amount claimed in default at the expiration of 28 days.

50 Mr Frenkel submitted that such an approach would enable a Contractor to lodge a grossly exorbitant claim and the Principal would be required to pay it if the Superintendent did not issue a certificate. A payment claim must be "supported by evidence of the amount due to the Contractor" (Clause 42.1) and there must be a contractual basis for the claim. If the occasion arose, it may be necessary to imply a term that the claim was bona fide. No such consideration arises here.

51 Corsello deposes in paragraph 10 of his affidavit sworn 20 August 2008:

"Dean Priester was appointed Superintendent [sic] for the Development pursuant to the Contract. Priester was also a director of Axion Constructions Pty Ltd, the company appointed by the Defendants to act as project manager. At the time the Contract was entered into however, Hopkins and I had a discussion in which we agreed to appoint an independent quantity surveyor Steven Foley ("Foley") to make final decisions in the event of a dispute or where it was considered expedient."

- 52 In paragraph 24 of that affidavit, he deposes:  
*"I am informed by Foley and believe that on 1 March 2007 the Plaintiff through its consultant Complexity Project Services made a claim for variations to Foley, alleging delay and other matters, in the sum of \$914,721.00. Now produced and shown to me and marked with the letters 'ASC12' is a true copy of the abovementioned claim dated 1 March 2007."*
- 53 This claim is stated to be a "Preliminary Submission".
- 54 Corsello further deposes, at paragraph 25:  
*"I am informed by Foley and believe that on 15 May 2007, by email, he rejected the Plaintiff's claim for delay and only certified \$59,584.00 of the Plaintiffs claim, none of which related to delay (see in particular note 9). Now produced and shown to me and marked with the letters 'ASC13' is a true copy of the abovementioned email from Foley dated 15 May 2007."*
- 55 The response of 15 May 2007 addressed to the plaintiff states:  
**"RE: 1-5 GRANTHAM STREET BRUNSWICK**  
**Variation measurement for serviced apartment changes**  
*Following our measurement of the changes associated with the serviced apartments on the 1-5 Grantham Street Brunswick development we have met with the developer regarding the draft submission from Glenrich Builders, under the Complexity Project Services preliminary submission, dated the 1st March 2007, and have outlined herein the preliminary review on the submission.*  
*This assessment is interim at present as there are several items still the subject of ongoing discussions. The recent Glenrich correspondence regarding our measurement and review has not been assessed within this report at present.*  
*In summary, with the inclusion of Glenrich additional pricing of the 8th May, for the site instruction on the finishes and the building B roof:*
- |                                |           |
|--------------------------------|-----------|
| - Glenrich Builders submission | \$899,373 |
| - assessed review              | \$56,284  |
- Should you have any queries please do not hesitate to contact us."*
- 56 It will be noted that the plaintiff's claim is stated to be a "draft" submission and a "preliminary" submission and his response a "preliminary" review. Foley states that his assessment is "interim" and it was not "certified", as Corsello deposes at paragraph 25 of his affidavit.
- 57 Corsello deposes that there was further contact between Foley and representatives of the plaintiff in May and June 2007. There is no evidence before me of any further contact between Foley and the plaintiff after this time.
- 58 Mr Frenkel, as I understand him, submits that Foley had, to some extent, supplanted Priester as Superintendent under the Contract. As appears from paragraph 10 of Corsello's affidavit referred to above, Foley was given a specific role under the Contract at the time it was entered into, the same time as Priester was appointed as Superintendent. Clearly Foley was at that time to have a different role from the Superintendent.
- 59 In Clause 2 of AS 2124-1992, "the Superintendent" is stated to mean:  
*"The person stated in the Annexure 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 . . ."*
- 60 There is no evidence before me of Foley being appointed in writing to be the Superintendent in lieu of Priester. His activities in May and June of 2007, in my view, do not show him acting in the role of a Superintendent. I note that when a Practical Completion Notice dated 22 February 2008 was issued by Priester as Superintendent, he forwarded a copy of it to Foley, indicative of their playing separate roles. In my view, Foley has not supplanted Priester by adopting a quasi or actual Superintendent role under AS 2124-1992.
- 61 The claim for \$159,670.00, being 50 per cent of the retention money, can be put on an alternative basis. The Practical Completion Notice refers to defective and other works to be attended to by the plaintiff. As mentioned, Corsello estimates the cost of rectifying these defects at approximately \$88,000.00. At paragraph 35 of his affidavit, he states that he needed to have a Practical Completion Notice issued so that he could take possession and complete sales of some of the units and that the plaintiff was not entitled to payment of the sum of \$159,670.00 on account of the numerous defects that require rectification. Clause 5.7 of AS 2124-1992, however, relevantly provides:  
*"Upon issue of the Certificate of Practical Completion, the Principal's entitlement to security and retention moneys shall be reduced to the percentage thereof stated in the Annexure or, if no percentage is stated, to 50 per cent thereof. . . .*  
*The Principal shall, within 14 days of the Superintendent making such a determination, release security and retention moneys in excess of the entitlement."*
- 62 The Annexure states that the retention monies are to be reduced to 50 per cent "when Administrative Practical Completion is reached".
- 63 An addendum to AS 2124-1992 adds as a Special Condition:  
*"Administrative Practical Completion means to the satisfaction of the Superintendent the Contractor having satisfied the following requirements:*



(a) *The contractor is required as a condition precedent for practical completion of the project to have obtained the required certificate of occupancy for all units, and to have obtained as required all matters under their control, all relevant certificates and approvals to assist the superintendent in obtaining settlement of the units on behalf of 1-5 Grantham Street Pty Ltd & 415 Brunswick Road Pty Ltd.*

64 It was not submitted before me that Administrative Practical Completion had not been reached.

65 In Clause 2 of AS 2124-1992, date of practical completion is defined as:

*"Date of Practical Completion means –*

*(a) the date certified by the Superintendent in a Certificate of Practical Completion issued pursuant to Clause 42.5, to be the date upon which Practical Completion was reached; or . . . ."*

66 "Practical Completion" is defined in Clause 2 of AS 2124-1992 as:

*"Practical Completion' is that stage in the execution of the work under the Contract when –*

*(a) the Works are complete except for minor omissions and minor defects –*

*(i) which do not prevent the Works from being reasonably capable of being used for their intended purpose; and*

*(ii) which the Superintendent determines the Contractor has reasonable grounds for not promptly rectifying; and*

*(iii) rectification of which will not prejudice the convenient use of the Works; and*

*(b) those tests which are required by the Contract to be carried out and passed before the Works reach Practical Completion have been carried out and passed; and*

*(c) documents and other information required under the Contract which, in the opinion of the Superintendent, are essential for the use, operation and maintenance of the Works have been supplied."*

67 As appears, Administrative Practical Completion is a condition precedent to Practical Completion.

68 In particular, it will be noted that practical completion does not require that there are no defects in the work.

69 Mr Frenkel sought to rely upon *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, where Finkelstein J stated, with respect to a contract which contained general conditions fairly similar to those before me, that:

*"[The builder] is not entitled to call for the money held upon trust until the conditions are fulfilled. It will be entitled to the fund absolutely when it has performed all of its contractual obligations (which, after practical completion, relate wholly to the rectification of defects in the work)."*

70 It would appear that His Honour was referring rather to the release of the remaining retention monies upon the grant of a final certificate. His Honour's comments are not consistent with Clause 5.7 of AS 2124-1992.

71 Pursuant to the above provisions, the plaintiff has an independent entitlement to the payment of half the retention amount of \$159,670.00, quite apart from its entitlement to this sum pursuant to Clause 42.1.

72 I conclude that there is no real question to be tried with respect to the plaintiff's claim for summary judgment pursuant to the Contract. The plaintiff is entitled to summary judgment in the sum of \$588,921.84.

73 So far as the balance of 50 per cent of the retention sum is concerned, Clause 5.9, alternative 1, of AS 2124-1992 which is stated in the Annexure to AS 2124-1992 to be applicable, relevantly provides:

*"A party holding retention moneys and/or cash security shall forthwith deposit the moneys in an interest bearing account in a bank. That party shall nominate the bank and the type of account. The account shall be in the joint names of the Principal and the Contractor and shall be one from which moneys can only be drawn with the signatures of two persons, one appointed by each of the Principal and the Contractor. The moneys shall be held until the Principal or the Contractor is entitled to receive them."*

74 Apart from indicating that he had no instructions in the matter, Mr Frenkel did not otherwise oppose the application by the plaintiff that such moneys be paid into a trust account. I make the order sought. Mr Andrew sought an order generally in accordance with the form of the order made by Kellam J, President of VCAT, in *R V Walpole Pty Ltd v Rangeville Manor Pty Ltd* (judgment dated 21 March 2000).

#### **Under the SOP Act**

75 For the sake of completeness, I deal with the alternate basis upon which summary judgment is sought by the plaintiff, although in the circumstances there is no necessity to do so.

76 As mentioned, the claim is brought under s.16 of the SOP Act since the plaintiff contends that no payment schedule was provided by the defendants.

77 On 30 May 2008, the plaintiff forwarded to the defendants a claim which was identical in wording to that forwarded to the Superintendent and with the same date except that the heading was as follows:

*"Re: Grantham Street/Brunswick Road – Payment Claim by Glenrich Builders Pty Ltd (Glenrich) under the Building and Construction Industry Security of Payment Act 2002 ("the Act") – Claim number 2."*

78 Service on the defendants was in compliance with s.14(1) of the SOP Act which requires a payment claim to be served "on the person who under the contract is liable to make the payment". The heading was altered, no doubt, to comply with s.14(3)(c) of the SOP Act which requires that a payment claim must state that it is made under the SOP Act.

79 It was not in issue that the plaintiff's letter to the defendants dated 30 May 2008 was a payment claim under s.14 of the SOP Act. What was in issue, and in fact is the only matter in issue, is whether the defendants provided

a payment schedule as required by s.15 of the SOP Act. The defendants forwarded a letter to the plaintiff dated 3 June 2008 which, omitting formal parts only, stated:

*“Re: Brunswick Road/Grantham Street - Payment Claim by Glenrich Builders Pty Ltd (Glenrich) under the Building and Construction Industry Security of Payment Act 2002 (“the Act”) - Claim Number 22*

*Further to your letter of the 30 May 2008, 415 Brunswick Road Pty Ltd and 1-5 Grantham Street Pty Ltd dispute the claim that you have made for \$588,921.84 (inclusive of GST).*

*Regarding the items listed in your letter, my comments are as follows:*

- *Item 1: We dispute this part of your claim. Your contract completion date was 2 December 2007; however, your actual Practical Completion date as issued by the Superintendent was 22 February 2008.*

*Therefore, liquidated damages can be applied under the contract.*

*We dispute the Practical Completion date, as a small number of keys were handed over in between the 22 February 2008 and 1 April 2008 and the vast majority (including remote control access to the car park) were not received until 11 April 2008 – this hindered the settlements with our purchasers, which began in March 2008. We further dispute the Practical Completion date of 22 February 2008 as the condition that defects were to be finished by 5 March 2008 was not satisfied. The only reason Dean Priester issued Practical Completion was because 415 Brunswick Road Pty Ltd and 1-5 Grantham Street Pty Ltd were taking occupation to lease the premises to mitigate their losses for Glenrich Builders failing to complete the project in line with the contract. Clearly, with over 2000 defects on 22 February 2008, Practical Completion should not have been issued and a partial completion certificate issued for the units that were complete.*

*The extent of liquidated damages that should be applied cannot be finally determined until all the defects are complete; and I mean all the defects are complete, not another 300 or so which are still outstanding.*

*Another reason for Glenrich Builders not completing the project within the contract period was because of the removal of labour resources including site supervision from the project without our approval and prior to the project being completed.*

- *Item 2: We dispute this part of your claim as S J Foley & Associates who both parties agreed would make an independent assessment of this issue previously rejected this.*
- *Item 3: We dispute this part of your claim. Conditions of Practical Completion included having all defects rectified by 5 March 2008 and keys handed over on 22 February 2008. As stated previously in Item 1, the handing over of keys was a stalled process and defects of approximately 300 in number are still outstanding on the project. You have stated on a number of occasions that the defects to the building were complete and yet time and time again after multiple follow-up inspections, these items remain outstanding.”*

80 Mr Andrew submitted that this letter did not comply with s.15(2)(b) of the SOP Act since it did not indicate the amount of the payment (if any) that the defendants proposed to make, and in particular indicated that the plaintiffs had not determined the amount that should be deducted for liquidated damages.

81 Mr Frenkel submitted that although no dollar figure was mentioned in the letter nor the fact that the defendants did not intend making any payment, the plaintiff would have been in no doubt, particularly taken in the context of previous discussions, that the defendants did not intend making any payment.

82 In **Walter Construction Group Limited v CPL (Surry Hills) Pty Ltd** [2003] NSWSC 266 (9 April 2003), Nicholas J stated, considering the form of a payment claim, at paragraph 82:

*“In deciding the meaning conveyed by a notice a court will ask whether a reasonable person who had considered the notice as a whole and given it fair and proper consideration would be left in any doubt as to its meaning.”*

83 In **Protectavale**, Finkelstein J, at paragraph 11, quoted, with approval, the comment of Chesterman J in **Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)** [2007] QSC 333, at paragraph 20:

*“The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint.”*

84 Here, adopting this approach, it is, in my view, at least arguable that the letter of 3 June 2006 indicated that the defendants would not be making any payment and complied with s.15 of the Act. In my view there is therefore a question to be tried.

85 I would give leave to defend the summary judgment application so far as it was based upon the SOP Act.

#### **Conclusion**

86 There will be judgment for the plaintiff in the sum of \$588,921.84. The defendants are required to pay the balance of the retention sum, \$159,670.00 into a trust account.

87 I will hear from the parties upon the precise wording of the order with respect to the balance of the retention sum and on the question of interest, costs and any other orders sought.

Mr R Andrew For the Plaintiff instructed by Nobel Lawyers  
Mr N Frenkel For the Defendants instructed by MGA Lawyers