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

Revised
Not Restricted
Suitable for Publication

Case No. CI-20-01673

Citi-Con (Vic) Pty Ltd (ACN 143 889 678) Plaintiff

v

8-10 New Street Richmond Pty Ltd (ACN 608 992 221) Defendant

JUDGE:	Judicial Registrar Burchell
WHERE HELD:	Melbourne
DATE OF HEARING:	On the Papers
DATE OF JUDGMENT:	05 August 2020
CASE MAY BE CITED AS:	Citi-Con (Vic) Pty Ltd v 8-10 New Street Richmond Pty Ltd
MEDIUM NEUTRAL CITATION:	[2020] VCC 1161

REASONS FOR JUDGMENT

Subject: CONTRACTS

Catchwords: Building contract – payment claim – whether accord and satisfaction extinguished liability under payment claim – whether agreement extended to rights under the Act – whether agreement failed to comply with formalities – whether agreement excludes, modifies or restricts the operation of the Act – whether agreement constitutes a contractual defence

Legislation Cited: *Building and Construction Industry Security of Payment Act* 2002 (Vic) ss 4, 9, 10A, 10B, 12, 14(2), 15, 16(2), 17(2) and 48; *Civil Procedure Act 2010* (Vic) s61

Cases Cited: *Fulconstruction Pty Ltd v ABP Consultants Pty Ltd* [2016] VCC 1732; *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* (2009) 26 VR 112; *Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd* [2011] VSCA 99; *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385; *3D Flow Solutions Pty Ltd v LTP Armstrong Creek Pty Ltd* [2018] VCC 674; *SJ Higgins v The Bays Healthcare Group Inc* [2018] VCC 805; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449; *John Beever v Roads Corporation* [2018] VSC 635; *Best Fab Pty Ltd v Australian High Bay Installations Pty Ltd* [2018] VCC 1053; *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616; *McDermott v Black* (1940) 63 CLR 161; *El-Mir v Risk* [2005] NSWCA

215; *Gadens Lawyers v Beba Enterprises Pty Ltd* [2012] VSC 519; *Beba v Gadens* (2013) 41 VR 590; *Able Demolitions and Excavations Pty Ltd v Barry Kenna & Co* [2016] VSC 96; *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523; *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153; *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68; *Currie v Misa* (1875) LR 10 Ex 153; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Simtec Group Pty Ltd v Ascot Building* [2016] VCC 1127; *A-Tech Australia Pty Ltd v Top Pacific Construction Aust Pty Ltd* [2019] NSWSC 404; *Fitzroy Shopfitting and Building Pty Ltd v Solene Investments Pty Ltd* [2016] VCC 1352; *Valeo Construction v Tiling Expert* [2019] VSC 291

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms C Jones	Eidelweisz Lawyers
For the Defendant	Mr A Morrison	Kalus Kenny Intelex

JUDICIAL REGISTRAR:

Introduction

1 In this proceeding, the plaintiff ("Citi-Con") applies for judgment against the defendant ("New Street") pursuant to s 17(2) of the *Building and Construction Industry Security of Payment Act* 2002 (Vic) ("SOP Act"). Citi-Con makes the application by summons on originating motion dated 17 April 2020. The application arises out of residential building works that Citi-Con performed at 8-10 New Street, Richmond.

2 Citi-Con submits that it is entitled to judgment because New Street failed to pay amounts certified by it as owing to Citi-Con on payment schedules.

3 New Street responds that an accord and satisfaction extinguished its liability to Citi-Con.

4 In my judgment, that ground is made out. My reasons in respect of this ground are set out below.

5 Accordingly, I order that the proceeding is dismissed. I order that Citi-Con pay New Street's costs of and incidental to the proceeding on the standard basis, in default of agreement (unless either party has a basis for a different order as to costs). I invite the parties to prepare draft orders to give effect to these reasons. I will determine any issue concerning costs on the papers.

The factual background

6 The plaintiff relies upon two affidavits of Ivan Krizmanic, a director of Citi-Con. In opposition, the defendant relies upon two affidavits of Benjamin Isard, the sole director of New Street.

7 On 9 September 2017, the parties entered a contract in relation to construction works at 8-10 New Street, Richmond. The works comprised the construction of a ground floor retail space, 18 apartments and 14 carpark spaces.

8 The contract included the following terms:

- no term or provision of the contract may be amended or varied unless such amendment or variation is reduced to writing and signed by the parties[1];
- the time for claims for payment is the 29th day of each month for works done to the end of that month[2];
- the superintendent shall, within 7 days after receiving a progress claim, issue to the principal and the contractor a progress certificate evidencing the opinion of the moneys due from the principal to the contractor pursuant to the progress claim and the reasons for any difference[3];
- if the superintendent does not issue the progress certificate within 7 days of receiving a progress claim, that progress claim shall be deemed to be the relevant progress certificate[4];
- the due date for payment of a payment claim is within 7 days after receiving the progress certificate or within 15 business days after the superintendent receives the progress claim[5];
- interest on overdue payments is calculated at 5 percent per annum[6];
- the defendant shall, in addition to the contract sum, pay Citi-Con an amount equal to any GST payable for that taxable supply as certified by the superintendent[7]; and
- any progress certificate given under the Contract is a payment schedule under the Act[8].

[1] Formal Instrument of Agreement cl 9.1.
[2] Part A of the Annexure to the Contract cl 37.1 and item 28.
[3] Part A of the Annexure to the Contract cl 37.2 and item 33.
[4] Ibid.
[5] Ibid.
[6] Part A of the Annexure to the Contract cl 37.5 and item 30.
[7] Part B of the Annexure to the Contract cl 51.3.
[8] Part B of the Annexure to the Contract cl 58(a)(ii).

9 During the works, Citi-Con encountered various delays and extended the practical completion deadline numerous times. Mr Krizmanic attributed the delays to New Street's failure to provide a complete set of drawings.

10 By reason of those delays, on 15 April 2019, the superintendent of New Street issued a notice to Citi-Con under clause 34.7 of the Contract claiming $179,999.40 in liquidated damages. On 16 April 2019, the superintendent issued a notice under clause 5.2, which evinced an intention to have recourse to security.

11 Mr Isard deposes that on or about 16 April 2018, he had a telephone conversation with Mr Krizmanic in relation to the liquidated damages. Mr Krismanic does not recall this conversation.

12 On 2 May 2019, the two men met at a café in Brighton and discussed the delays in the works. According to Mr Isard, the men resolved that if Citi-Con reached practical completion by 23 July 2019, New Street would not claim further liquidated damages. Mr Krizmanic recalls the meeting but denies that an agreement was reached.

13 The following morning, Mr Krizmanic referenced the meeting in an email to Mr Isard. He indicated that "*I have spoken to my team and asked for immediate action on the following…*" and listed various matters. The final matter was: "*LD's to be discussed further upon the 23 July Practical Completion achieved*." Mr Isard sought clarification on that matter as follows (and did not receive a response):

> *Ivan,*
>
> *The final point needs to be clarified and agreed.*
>
> *Which is;*
>
> *I won't charge any additional LD's from today's date until your current completion date of 23rd of July 2019 and the project is completed and handed over.*
>
> *In return for the above you with withdraw [sic] your current NOLD that have been issued.*

This is a critical point, as we focusing on completing the project together.

Otherwise the superintendent and citicon will be tied down on, where efforts should be focussed on administering and completion.

14 Mr Isard deposes that his reply email was conditional and referred to *additional* liquidated damages, not damages for which Citi-Con was already liable.

15 Later that day, the two men exchanged the following text messages:

Ben Isard: Ivan regarding the notice for 179k, I gather you cannot pay, you want to pay via GST?

Ivan Krizmanic: Sure

Ben Isard: For example if your claim is 1m plus gst so 1.1m you will just receive 1m, and the 100k would come 179k and become 79k

Ivan Krizmanic: That's cool

Ben Isard: Ivan, glad we have worked things out, and sincerely look fwd to completing the project together. Any issue just pick up the phone. Ben

Ivan Krizmanic: Ben, Thankyou , and yes we will finish the project. I'm away next week but I have planned with Dennis and Ronny has trades in hand. Cheers

16 Mr Krizmanic deposes that the text messages were mere preliminary discussions. He denies that they constitute an agreement.

17 In reliance on the text messages, New Street withheld GST from six payment claims of Citi-Con (for April, June, July, August, October and November). It issued payment schedules totalling $1,614,299.00 and part-paid Citi-Con $1,467,544.54.

18 Between May 2019 and December 2019, Citi-Con remained silent in relation to the GST shortfall. Whereas, by an email dated 25 April 2019, Citi-Con pursued Mr Isard for the GST of an earlier payment claim. Mr Isard claims that New Street paid the GST on that claim.

19 Between 9 and 10 August 2019, the two men exchanged the following text messages:

> *Ben Isard: Really…… Ivan your LD's on this job are going to be close to 450k*
>
> *how are you even going to pay that?*
>
> *Ivan Krizmanic: What do you want me to say? I'm trying my fckn hardest to have it finished. Not only will I lose about $600k, LD's will be $450k. Well Fck me , Brendon said walk away , lesson learnt. Have a good weekeed*
>
> *Ben Isard: There is circa 180k coming from gst, and circa 250k in retention that's 430k, I don't need the 450k Ivan, I just want, what's it cost me in the interest over run.*
>
> *Ivan Krizmanic: Ben, all I want to do is finish the job.*
>
> *Ben Isard: Well I am trying to give you a little relief Ivan I know your in …*

20 Citi-Con now claims the sum of $146,754.46 (GST inclusive), the amount which New Street withheld.

The legal context

21 The SOP Act seeks to ensure that persons who undertake to carry out construction work can recover progress payments for the performance of that work.[9]

22 Section 4 defines construction contract as 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*". The SOP Act applies to any construction contract whether written or oral, or partly written and partly oral.[10] It applies even if the contract is governed by the law of a jurisdiction other than Victoria.[11] There was no dispute that the works the subject of this proceeding is "*construction work*" within the meaning of s 5 of the SOP Act.

23 Section 17(2)(a) provides that a claimant may recover the unpaid portion of an

[9] SOP Act s 3.
[10] Ibid s 7.
[11] Ibid.

amount claimed (as a debt due) where the defendant fails to submit payment in accordance with a payment claim.

24 Section 14 enunciates the requirements of a payment claim:

- it must be in the relevant form;
- it must contain the prescribed information (if any);
- it must identify the construction work to which it relates;
- it must indicate the amount of progress payment claimed; and
- it must not contain excluded amounts.

25 The court must read s 14 with the reference date provisions in s 9. Section 9(1) stipulates that *on or from* a reference date, the claimant is entitled to a progress payment calculated by reference to that date. Section 9(2)(a)(i) provides that the reference date is a date on which a claim for a progress payment may be made in relation to a specific item of construction work or related goods and services and which is determined by or in accordance with the terms of the contract.

26 The SOP Act permits only limited defences, which include that:

- the claim does not relate to a "*construction contract*";
- the progress claim fails to satisfy the formal requirements of the Act (s14(2));
- the claim was made prematurely, before the applicable reference date;
- variations were not claimable variations; and
- the timing and sufficiency of the payment schedule failed to comply with

the Act.[12]

27 By reason of s 47, a judgment under ss 16 and 17 is a provisional judgment in what it grants and what it refuses.[13] The statutory context both contemplates and allows inconsistent judgments.[14]

28 This court has endorsed the hearing of SOP applications on a summary basis by summons on originating motion with affidavit evidence.[15] Such claims are properly assessed on the balance of probabilities.[16]

29 Where the plaintiff applies for *summary* judgment under s 16, it may be appropriate to apply the test in s 61 of the *Civil Procedure Act* 2010 (Vic) ("CPA").[17] However, in the present case, I will adopt the approach taken in *3D Flow Solutions* and recommended in *SJ Higgins*.

The issues

30 The parties agree that the payment claims are valid for the purpose of the Act. The defendant concedes it is indebted to the plaintiff in the sum of $146,754.46 (including GST).

31 However, the defendant submits that an accord and satisfaction extinguished its liability to the plaintiff. The plaintiff responds that:

- there was no agreement for accord and satisfaction;
- assuming there was an agreement, it does not affect rights under the Act;
- the agreement is void as it failed to comply with contractual formalities;

[12] *Fulconstruction Pty Ltd v ABP Consultants Pty Ltd* [2016] VCC 1732 [8] (Anderson J).
[13] *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor* (2009) 26 VR 112 [2] and [43]-[46] (Vickery J), cited with approval in *Pearl Hill Pty Ltd v Concorp Construction Group (Vic) Pty Ltd* [2011] VSCA 99 [11].
[14] *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385 [22] (Handley JA, with whom Santow JA and Pearlman AJA agreed).
[15] *3D Flow Solutions Pty Ltd v LTP Armstrong Creek Pty Ltd* [2018] VCC 674 [39]-[54]. See also *SJ Higgins v The Bays Healthcare Group Inc* [2018] VCC 805 [26].
[16] *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449-450 (Mason CJ, Brennan, Deane and Gaudron JJ).
[17] *John Beever v Roads Corporation* [2018] VSC 635; see also *Best Fab Pty Ltd v Australian High Bay Installations Pty Ltd* [2018] VCC 1053.

- the agreement excludes, modifies or restricts the operation of the Act; and
- the agreement constitutes a contractual defence.

32 I will consider each of these issues in turn.

Was there an accord and satisfaction?

33 The defendant submits that the text messages of 3 May 2019 constitute an agreement for accord and satisfaction. It submits that:

- there was an offer ("*…regarding the notice for 179k, I gather you cannot pay, you want to pay via GST?*");
- there was an acceptance ("*Sure*");
- the agreement was certain as Mr Isard explained how the agreement would operate ("*For example if your claim is 1m plus gst so 1.1m you will just receive 1m, and the 100k would come 179k and become 79k*"), and Mr Krizmanic confirmed his understanding ("*That's cool*"); and
- there was a concluded bargain ("*Ivan, glad we have worked things out, and sincerely look fwd to completing the project together. Any issue just pick up the phone. Ben*" which Mr Krizmanic confirmed: "*Ben, Thankyou, and yes we will finish the project*").

34 The defendant indicates that whereas Citi-Con pursued New Street for GST before the agreement, it failed to do so after the agreement. For the defendant, this reinforces the existence of the agreement.

35 The defendant submits that the agreement and the performance of that agreement constitute an accord and satisfaction, which extinguish its GST liability to Citi-Con. In support of that proposition, it referred to *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd*[18]*; McDermott v*

[18] [1933] 2 KB 616, 643 (Scrutton LJ).

Black[19]*;* and *El-Mir v Risk*[20].

36 The plaintiff submits that the text messages did not constitute an agreement. It contends that there was no offer, acceptance, or an intention to create legal relations. It refers to Mr Krizmanic's evidence that the text messages were mere '*preliminary discussions*'.

37 The defendant responds that the text messages were not preliminary discussions. It reiterates that Citi-Con made no complaint about the GST until February the following year.

Analysis

38 The principles of accord and satisfaction are well-settled. In *Gadens Lawyers v Beba Enterprises Pty Ltd*,[21] Emerton J summarised the principles as follows (with reference to the reasons of McColl JA in *El-Mir v Risk*[22]):

(a) The essence of accord and satisfaction is the acceptance of something in place of a cause of action; the accord is the agreement or consent to accept the satisfaction; upon provision of the satisfaction, there is a discharge which extinguishes the cause of action;

(b) Where there is an agreement to accept a promise in satisfaction of a cause of action, the original cause of action is discharged from the date on which the promise is made;

(c) Where there is an accord and satisfaction, only the agreement for compromise may be enforced because the previous cause of action has gone; it has been 'satisfied' by the making of the new agreement constituted by abandonment of the earlier cause of action in return for the promise or other benefit;

(d) In other words, the role of an accord is to replace the former contract with a new one;

(e) The question of whether there has been an accord and satisfaction is one of fact. It turns upon determining the parties' intentions, which may be discerned from the terms of the document said to constitute all or part of the agreement or from the surrounding

[19] (1940) 63 CLR 161, 183-5 (Dixon J).
[20] [2005] NSWCA 215 [54] (McColl JA, with whom Handley and Ipp JA agreed).
[21] [2012] VSC 519.
[22] (2006) 22 BCL 16, 24–5 [48]–[54]. See also *McDermott v Black* (1940) 63 CLR 161, 183–184.

circumstances.[23]

39 On appeal, the parties accepted that those passages accurately distilled the relevant principles.[24]

40 An accord and satisfaction may extend to rights which accrue in future.[25] Further, a dispute need not have materialised prior to the accord and satisfaction.[26]

41 In my view, the text messages constitute an accord and satisfaction. The first issue is whether there was an agreement. This is an objective test, from the perspective of a reasonable person in the position of the parties.[27] There must be an offer and an acceptance. An offer is an expression of willingness to enter a contract on certain terms.[28] An acceptance requires an *unequivocal* assent to the terms of an offer.[29]

42 Mr Isard's first text message stipulated that: "*…regarding the notice for 179k, I gather you cannot pay, you want to pay via GST?*". Upon receipt of that message, a reasonable person would perceive an offer to reconcile the liquidated damages by way of GST. The explanation contained in the following text message: "*For example if your claim is 1m plus gst so 1.1m you will just receive 1m, and the 100k would come 179k and become 79k,"* reinforces that offer.

43 Mr Krizmanic's text messages of "*Sure*" and "*That's cool*" convey an equivocal response to that offer. The messages which follow are equally equivocal: "*Ivan, glad we have worked things out, and sincerely look fwd to completing the project together. Any issue just pick up the phone. Ben*" to which Mr Krizmanic responded "*Ben, Thankyou, and yes we will finish the project*".

44 However, the court may infer the formation of a contract (including an

[23] *Gadens v Beba* [2012] VSC 519 [35].
[24] *Beba v Gadens* (2013) 41 VR 590, 600 [56].
[25] *Able Demolitions and Excavations Pty Ltd v Barry Kenna & Co* [2016] VSC 96 [24] (Tate and Kyrou JJA and Riordan AJA).
[26] Ibid.
[27] *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523, 531.
[28] *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 [261].
[29] *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 197 [173].

acceptance) from post-agreement conduct.[30] The post-agreement conduct of New Street was consistent with an acceptance of the offer. As the defendant indicates, whereas Citi-Con pursued New Street for GST before the agreement, it failed to do so after. Accordingly, there was an acceptance.

45 The next issue is consideration. Plainly, the agreement was supported by fresh and valuable consideration. Citi-Con promised not to claim GST on its payment claims. In return, New Street deferred its pursuit of liquidated damages. There was a benefit to Citi-Con and a detriment to New Street.[31]

46 The following issue is whether there was an intention to create legal relations. This is an objective test, having regard to all the circumstances of the case.[32] The use of presumptions is no longer permissible.[33] Previously, the court presumed an intention in commercial transactions and a lack of intention in social arrangements.[34]

47 In my view, there was an intention to create legal relations. On one view, the use of informal language ("*Yep*", "*Sure*", "*That's cool*") and the informal context (text messages), tends against an intention to create legal relations. However, the fact that the parties discussed a significant sum of liquidated damages ($179,000), a way to resolve that debt, and an arrangement in respect of future payment claims, militates strongly towards an intention. On the balance of probabilities, I find that there was an intention.

48 The final issue is certainty. The agreement must contain all essential terms, clearly expressed. Here, the terms of the agreement were sufficiently certain. The defendant does not dispute that the agreement is certain. It was clear that:

- Citi-Con would pay the liquidated damages by way of GST ("*regarding the 179K notice… you want to pay by GST?*"); and

- Citi-Con would forego its right to GST on future payment claims: "*For*

[30] Ibid 163-4 [25]-[26] (Heydon JA); *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68, 77.
[31] *Currie v Misa* (1875) LR 10 Ex 153, 162.
[32] *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, 105-6 [25]-[26].
[33] Ibid.
[34] Ibid.

example if your claim is 1m plus gst so 1.1m you will just receive 1m, and the 100k would come 179k and become 79k."

49 Accordingly, the text messages constitute an accord and satisfaction.

Does the agreement affect rights under the SOP Act?

50 The plaintiff submits that the agreement does not affect rights under the Act. It indicates that the text messages did not mention that New Street would pay the plaintiff the scheduled amounts in full. It also indicates that they omit any arrangement whereby Citi-Con would not seek to enforce its rights in respect of unpaid amounts under s 17(2)(a)(i). The defendant does not address this submission.

Analysis

51 In my view, this submission is wholly without merit. Plainly, the agreement affects the plaintiff's right to make payment claims under the Act. It prevents the plaintiff from claiming GST under the Act.

52 There is no basis in the authorities nor as a matter of logic that the agreement should contain the degree of specificity which the plaintiff requires.

Did the agreement fail to comply with contractual formalities?

53 The plaintiff contends that the agreement varied or amended the express terms of the contract. It submits that the agreement varied or amended the defendant's obligation to pay the plaintiff amounts in the payment schedules, and its obligation to pay GST. It refers to clause 9.1 of the Contract, which provides that any variation or amendment of the contract must be in writing and signed. It indicates that although the texts were in writing, they were not signed.

54 The defendant submits that the agreement was not an amendment or a variation. Rather, it was a separate agreement as to what Citi-Con would accept as performance of New Street's liabilities under the Act. On that basis, the agreement need not have complied with clause 9.1.

55 In the alternative, the defendant contends that the plaintiff is estopped from relying upon clause 9.1 to deny the enforceability of the agreement. It submits that the agreement induced New Street to conduct itself in a way that exposed it to liability under the Act if the agreement were unenforceable. In support of those propositions, the defendant referred me to the seminal case of *Walton Stores (Interstate) Ltd v Maher*.[35]

Analysis

56 I accept the submissions of the defendant. In my view, the agreement did not amend or vary the contract. As the authorities indicate, an accord and satisfaction creates a new and separate contract.

57 In *Gadens Lawyers* (outlined above), Emerton J held that [emphasis added]:

> (c) Where there is an accord and satisfaction, only the agreement for compromise may be enforced because the previous cause of action has gone*; it has been 'satisfied' by the making of the new agreement* constituted by abandonment of the earlier cause of action in return for the promise or other benefit;
>
> (d) In other words, *the role of an accord is to replace the former contract with a new one* […]

58 Accordingly, clause 9.1 of the contract does not apply. Even if it applied, I would accept that the plaintiff is estopped from denying the existence of the agreement. As the defendant indicates, the High Court enunciated the principles of common law estoppel in *Walton Stores*[36]:

- Citi-Con, by clear and unequivocal words or conduct, induced New Street to assume a particular state of affairs exist between them;
- New Street relied on that assumption to its detriment;
- It would be unconscionable to permit departure from the assumption.[37]

[35] (1988) 164 CLR 387.
[36] Ibid 428-9 (Brennan J).
[37] *Commonwealth v Vermayen* (1990) 170 CLR 394.

59 In this proceeding, New Street adopted an assumption that it would not be liable if it failed to pay GST. Mr Krizmanic induced that assumption by his responses of "*Sure*" and "*That's cool*" to Mr Isard's proposal. New Street relied to its detriment upon the assumption by failing to pay GST on the payment claims. Mr Krizmanic plainly knew and intended that Mr Isard would rely upon his text messages. Citi-Con departed from the assumption by denying the existence of the agreement and pursuing New Street for GST. In those circumstances, it is unconscionable for Citi-Con to deny the existence of the agreement. Accordingly, I find that Citi-Con is estopped from denying the accord and satisfaction.

Does the agreement exclude, modify or restrict the operation of the Act?

60 The plaintiff submits that the text messages exclude, modify or restrict the operation of the Act, contrary to s 48. The plaintiff indicates that s 48 extends to provisions of a contract that purport to exclude, modify or restrict the operation of the Act, and to provisions that may reasonably be construed as an attempt to defer a person from taking action under the Act.

61 In support of those propositions, the plaintiff referred to *Simtec Group Pty Ltd v Ascot Building*[38]. In *Simtec*, Anderson J rejected the defendant's submission that a settlement agreement restricted a party's right to make further payment claims.

62 The defendant responds that *Simtec* in fact assists the *defendant*. It refers to the obiter dicta of Anderson J at [16]-[17]:

> [16] If a broad interpretation of the Act were to be applied, it may have the effect of preventing parties from compromising a proceeding brought under the Act. Such a result would appear to be inconsistent with the provisions of the Civil Procedure Act 2010 which encourages parties to resolve their disputes at the earliest possible stage.
>
> [17] It is useful to consider the likely consequences if the facts of the present case had
>
> been slightly different. There may have been no dispute or ambiguity in the terms as to payment in the agreement, and Ascot might have actually performed its obligations under the agreement, for example by making the first payment of $35,000 it says was

[38] [2016] VCC 1127.

> required of it. In those circumstances, it would be surprising, if a court were not to uphold the agreement and prevent the action proceeding. In such circumstances, that result might be achieved by a party making an application for the proceeding to be dismissed as an abuse of process.

63 The plaintiff also referred to *A-Tech Australia Pty Ltd v Top Pacific Construction Aust Pty Ltd.*[39] In *A-Tech,* the New South Wales Supreme Court dismissed a submission that an agreement prevented the plaintiff from obtaining judgment and observed that:

> [63] But the effect of any prohibition against contracting out depends ultimately on the terms of the Act. In the present case, the provision is express. And the Act does not stop at the creation of substantive rights. It expressly goes on to deal with a matter of procedure, namely whether a cross-claim can be maintained against a claim under s 15(4). Thus the "operation of the Act" extends to the conduct of proceedings under s 15(4) and specifically to the bringing of cross-claims.
>
> [64] An agreement made prior to the institution of proceedings that, should ATA make a claim for judgment under s 15(2)(a), TPC would be entitled to bring a crossclaim for damages for breach of contract, would clearly be caught by s 34. It is hard to see how an agreement in these terms made after the commencement of proceedings could be in a different position.
>
> [65] Had I considered that there was an otherwise enforceable contractual obligation on ATA preventing ATA from proceeding to judgment on its claim, such an obligation would have been nullified by s 34.

64 The defendant distinguishes the agreement in *A-Tech* from the present case. It notes that the agreement in *A-Tech* stipulated that the claimant would not seek judgment under s 15(4) of the NSW Act until a cross-claim was determined. It submits that such an agreement clearly sought to contract out. It contends that the agreement at issue is disparate.

65 The defendant relied upon other authorities. The first is *Fitzroy Shopfitting and Building Pty Ltd v Solene Investments Pty Ltd*[40]*.* In that case, the plaintiff had obtained judgment under s 28R of the Act. The defendant sought to set aside the judgment on the basis that it proffered a cheque in full satisfaction of the claim which the plaintiff had accepted, which extinguished any further liability.

[39] [2019] NSWSC 404.
[40] [2016] VCC 1352.

Anderson J held that there was insufficient evidence of an accord and satisfaction. However, His Honour held that if an accord and satisfaction had arisen, s 48 of the Act would not prevent the defendant from relying upon that agreement.[41]

66 His Honour relied upon the reasoning of authorities that had considered whether a settlement of a dispute about the quantum of a costs order was a "*costs agreement*" which, if it purported to exclude the right to a "*costs review*" (*cf* s 3.4.31 of the *Legal Profession Act 2004* (Vic)) was void.[42] In *Beba, the* Court of Appeal held that Parliament could not have intended that s 48 prevent non-associated third parties desiring to settle legal proceedings from reaching "*agreements settling costs issues (whether solely relating to costs, or part of a wider resolution) [which otherwise might] be at risk of being partly set aside at the instance of the payer*"[43].

67 His Honour concluded that:

> "In my view, the policy considerations raised by the Court of Appeal are relevant in thepresent case. Notwithstanding the special nature of the *Building and Construction Industry Security of Payment Act 2002* (Vic), and the clear and direct wording of section 48, if the parties by their words and conduct have shown that their agreement was not directed to the exclusion, modification or restriction of the operation of the Act but rather the genuine resolution of a dispute, the parties should be bound by their agreement and section 48 would have no application.[44]"

68 The second authority on which the defendant relied is *Valeo Construction v Tiling Expert*[45]. In *Valeo*, Digby J held that a settlement agreement which prevented a claimant from relying upon rights under the Act did not exclude, modify or restrict the operation of the Act. His Honour relied on *Beba*, *Simtec* and *Fitzroy Shopfitting* (supra) in support of the following conclusion:

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[41] At [30].
[42] See *Gardens Lawyers v Beba Enterprises Pty Ltd* [2012] VSC 519 (Emerton J); *Beba Enterprises Pty Ltd* v *Gardens Lawyers* [2013] VSCA 136; and *GLS v Goodman Group Pty Ltd* [2015] VSC 627 (Macaulay J).
[43] *Beba Enterprises Pty Ltd* v *Gardens Lawyers* [2013] VSCA 136 [79] (Ashley JA, Redlich and Priest JJA agreeing).
[44] At [28].
[45] [2019] VSC 291 [111]-[120].

> [117] Furthermore, the language of s 48 of the SOP Act in my view does not reflect Parliament's intention to thereby prevent parties from resolving disputes which they may have in relation to construction contracts to which the SOP Act would otherwise apply.
>
> [118] As an example, if it were otherwise a claimant builder asserting a progress payment entitlement, and the respondent party under the relevant construction contract which was arguably obliged to pay all or part of that progress payment claim, may be prevented from effectively resolving such a claim including by agreement to pay part of the claim rather than submitting the claim to the SOP Act regime for determination.
>
> [119] I consider it unlikely that Parliament intended s 48 of the SOP Act would operate in a reflexive way so as to inhibit the potential resolution of issues which have arisen between the claimant and respondent, or potential claimant and respondent, under the SOP Act regime. To interpret the SOP Act in a way which brought about such strictures would, I consider, impede the settlement of payment disputes in relation to the work done and/or goods and services undertaken and supplied under a construction contract of the type regulated by the SOP Act.

Analysis

69 In my view, the submissions of the defendant must succeed. On a literal interpretation of s48, the text message agreement restricts the operation of the Act. It restricts the right of the plaintiff to claim for GST under s17.

70 However, that is not the preferred interpretation. I adopt the reasoning of Anderson J in *Fitzroy Shopfitting*. This is the most apposite authority because it addressed an accord and satisfaction in the context of the SOP Act.

71 Judge Anderson dealt with a contracting party who had had an amount awarded against it. Under an adjudication determination the parties can settle the dispute for a lesser amount than the amount awarded without breaching s 48 of the SOP Act, so long as the parties have shown that their agreement was not directed to the exclusion, modification or restriction of the SOP Act, but rather to the genuine resolution of a dispute.

72 Thus, s 48 does not prevent a defendant from relying upon an accord and satisfaction. The relevant question is whether the agreement was directed to the genuine resolution of the dispute rather than to the exclusion, modification or restriction of the operation of the Act.

73 The text message exchange dated 9 May 2019 evinced a concern for the genuine resolution of the dispute about liquidated damages and any future payment claims. Indeed, Mr Isard communicated that: *"Ivan, glad we have worked things out, and sincerely look fwd to completing the project together. Any issue just pick up the phone. Ben."* Mr Isard reinforced his desire to avoid a dispute in the text message exchange dated 8 and 9 August 2019: *"Well I am trying to give you a little relief Ivan I know your in the …"*

74 The authorities (*Simtec, Fitzroy Shopfitting and Valeo*) indicate that the court should not deter parties from resolving disputes under the Act. This is consistent with the overarching purpose of the CPA: to '*facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute*'[46]. It is consistent with the purpose of the SOP Act: to facilitate the efficient resolution of payment disputes[47]. Accordingly, on a proper construction of s48, the agreement does not exclude, modify or limit the operation of the Act.

75 For completeness, I note that the agreement did not resolve the claim for liquidated damages in equity. It merely deferred and limited that claim. The defendant promised not to pursue the liquidated damages which had accrued, and promised not to claim *further* liquidated damages. Nonetheless, the agreement resolved a claim under the Act. That is sufficient reason to enforce the agreement.

76 I also accept the defendant's submission that *A-Tech* is distinguishable from this case. An agreement that the claimant would not seek judgment under s15(4) of the NSW Act until a cross-claim was determined is distinct from an agreement about liquidated damages and the payment of GST on payment claims.

77 Accordingly, s48 does not apply in this proceeding.

Is the agreement a contractual defence?

78 The plaintiff submits that s 17(4)(b) of the Act prohibits the defendant from raising a contractual defence.

[46] CPA s 1(c).
[47] *Fitzroy Shopfitting* [23] citing *Simtec Group Pty Ltd v Ascot Building Pty Ltd* [2016] VCC 1127 [15].

79 The defendant responds that the agreement does not arise under the construction contract. Rather, it operates to satisfy Citi-Con's entitlement to payment under the Act. The defendant contends that the defence is no more in contravention of s 17(4)(b) than a defence of payment would be.

Analysis

80 I agree with the submissions of the defendant. Crucially, the wording of s17(4)(b) is as follows [emphasis added]:

> (4) If the claimant commences proceedings under subsection 9(2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt—
>
> (a) Judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1); 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***.

81 As noted above, an accord and satisfaction is not a matter that arises under the construction contract. It is a new and separate contract which satisfies a debt owed, or a debt which will accrue in future.

82 Further, none of the authorities which are apposite (in particular, *Fitzroy Shopfitting*) hold that s 17(4)(b) applies.

83 Accordingly, s 17(4)(b) does not apply.

Conclusion

84 For the reasons set out above, the proceeding is dismissed with costs.

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Certificate

I certify that these 20 pages are a true copy of the judgment of Judicial Registrar Burchell delivered on 05 August 2020.

Dated: 05 August 2020

Randa Rafiq

Associate to Judicial Registrar Burchell