Court of Appeal
Supreme Court

New South Wales

Case Name:	BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd
Medium Neutral Citation:	[2022] NSWCA 82
Hearing Date(s):	04 May 2022
Date of Orders:	03 June 2022
Decision Date:	3 June 2022
Before:	Ward P; Leeming JA; White JA; Brereton JA; Basten AJA
Decision:	(1) Allow the appeal from the judgment in the Equity Division given on 30 November 2021. (2) Set aside orders 1, 2 and 4 entered on 30 November 2021. (3) In lieu thereof order that: (a) the proceedings in the Equity Division be dismissed, and (b) the plaintiff (Ventia) pay the costs of the first defendant (BSA) in the Equity Division. (4) Order that the first respondent (Ventia) pay the appellant's (BSA) costs in this Court.
Catchwords:	BUILDING AND CONSTRUCTION – adjudication – payment claim – existence of "one contract" rule – whether entitlement to serve payment claim must arise under one contract – whether "one contract" rule conditions validity of payment claim

CONTRACTS – construction – where contract provided that each work order constituted a new agreement – whether there was one or multiple construction contracts – characterisation by parties not determinative – other provisions inconsistent with each work order constituting new agreement

STATUTORY INTERPRETATION – jurisdictional constraints on function of adjudication – whether express constraints augmented by implied condition statutory context – focus on work performed under construction contract – no requirement that claim identify source of entitlement – reference to putative entitlements – legislative purpose – facilitation of money flow to subcontractors – Building and Construction Industry Security of Payment Act 1999 (NSW), Pts 2, 3

Legislation Cited:

Building and Construction Industry Security of Payment Act 1999 (NSW) ss 4, 5, 6, 7, 8,13,14,17, 20, 22, 23, 24, 25, 34
Building and Construction Industry Security of Payment Amendment Act 2018 (NSW)
Constitution, s 44(v)
Industrial Relations Act 1996 (NSW)
Interpretation Act 1987 (NSW), s 8

Cases Cited:

All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd [2017] NSWCA 289
Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd [2021] QCA 223
Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190
Fearnley v Australian Fisheries Management Authority [2006] FCAFC 3
Fish v Solution 6 Holdings Ltd (2006) 225 CLR 180; [2006] HCA 22
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1
Lewis v Bell (1985) 1 NSWLR 731
Matrix Projects (Qld) Pty Ltd v Luscombe [2013] QSC 4
Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) 64 NSWLR 462; [2005] NSWCA

	409 Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd (2017) 61 NSWLR 421; [2017] NSWCA 151 Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4 Radaich v Smith (1959) 101 CLR 209; [1959 HCA 45 Rail Corporation of NSW v Nebax Constructions Australia Pty Ltd [2012] NSWSC 6 Re Day (No 2) (2017) 263 CLR 201; [2017] HCA 14 Re Webster (1975) 132 CLR 270; [1975] HCA 22 Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales (2004) 60 NSWLR 558; [2004] NSWCA 200 Southern Han Breakfast Point Pty Ltd (in Liq) v Lewence Construction Pty Ltd (2016) 260 CLR 340; [2016] HCA 52 TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 93
Texts Cited:	Lewison and Hughes, The Interpretation of Contracts in Australia (2012, Thomson Reuters)
Category:	Principal judgment
Parties:	BSA Advanced Property Solutions (Fire) Pty Ltd (Appellant) Ventia Australia Pty Ltd (First Respondent) Edward Smithies/Australian Solutions Centre (Second Respondent)
Representation:	Counsel: Mr M Christie SC/Mr D Hume (Appellant) Mr L Shipway/Mr D Byrne (First Respondent) Solicitors: Vincent CCL Pty Ltd t/as Vincent Young (Appellant) Pinsent Masons (First Respondent)
File Number(s):	2021/00364260
Decision under appeal:	
Court or Tribunal:	Supreme Court
Jurisdiction:	Equity – Commercial List

Citation:	[2021] NSWSC1534
Date of Decision:	30 November 2021
Before:	Rees J
File Number(s):	2021/98498

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

In April 2016, Ventia Australia Pty Ltd ("Ventia") entered into an agreement with the NSW Land and Housing Corporation to provide various services for social housing properties. On 3 May 2016, Ventia entered into a subcontract with BSA Advanced Property Solutions (Fire) Pty Ltd ("BSA") for BSA to provide fire protection and maintenance services at the properties.

Clause 2.1(a) of the subcontract provided that "the Subcontractor must execute and complete the Services … in accordance with the terms of the Agreement". Clause 2.1(b) provided that "the terms set out in Annexure 4 will form part of this agreement". Relevantly, Annexure 4 cl (b) stated that "[a] separate Agreement will come into existence each time [Ventia] issues a Work Order".

On 8 February 2021, BSA served on Ventia a claim for a progress payment pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act"). The payment claim was made with respect to 25 invoices issued with respect to five work orders.

On 22 February 2021, Ventia served a payment schedule which asserted, inter alia, that the payment claim was invalid. Ventia contended that the payment claim did not comply with the Act because it was made with respect to multiple construction contracts and did not identify a single reference date.

On 31 March 2021, an adjudicator found that the payment claim was valid because it was made in relation to only one construction contract. The adjudicator concluded that Annexure 4 cl (b) was inconsistent with the general contract provisions, which did not contemplate separate agreements for each work order.

On 30 November 2021, the Supreme Court quashed the adjudicator's determination. The primary judge found that (i) each work order constituted a separate agreement and (ii) the Act precluded the service of a payment claim in relation to construction work performed under more than one contract.

On appeal, the primary issues before the Court were whether:

(1) the Act required that a payment claim could relate to work done under only one construction contract (the "one contract" rule);

(2) if there be a "one contract" rule, that is a precondition to the validity of a payment claim; and

(3) there was, for the purposes of the Act, one construction contract between BSA and Ventia.

The Court (Ward P, Leeming, White and Brereton JJA, and Basten AJA) held, upholding the appeal:

Issues 1 and 2: the "one contract" rule

(1) An entitlement to a progress payment arises in respect of construction work carried out under a contract. The legislative purpose is to ensure that persons carrying out construction work obtain regular payments. The legislation defines "construction contract" as including both a contract and some other arrangement, which directs attention to the carrying out of the work rather than the source of the obligation to carry out the work: [36].

Building and Construction Industry Security of Payment Act 1999 (NSW), ss 3, 4, 8, referred to.

(2) The legislation states where the contract is to govern and provides a default position where a matter is not provided for by the contract. Questions of compliance are matters for an adjudicator who must have regard to the

contractual provisions when determining a dispute. The Act does not contain an implied jurisdictional limitation on the functions of the adjudicator: [23]-[25], [37]-[39], [51].

All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd [2017] NSWCA 289; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190, applied.

Building and Construction Industry Security of Payment Act 1999 (NSW), ss 3, 8, 14, 17, 21, 22, referred to.

(3) Further, the putative "one contract" rule is imprecise. The scope of commercial arrangements under which goods and services may be supplied is expansive: [40].

(4) Even if a payment claim may relate to only one construction contract with one reference date, the validity of a payment claim is not conditioned on the existence of one construction contract: [36], [52].

Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd [2021] QCA 223; *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409; *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93; *Rail Corporation of NSW v Nebax Constructions Australia Pty Ltd* [2012] NSWSC 6; *Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4, discussed.

(5) It is strongly arguable that there is no "one contract" rule and that s 13(1) permits a person to serve a payment claim in relation to an entitlement under more than one contract so long as the claim is referable to one reference date: [52].

Issue 3: Number of construction contracts

(6) Contractual terms, such as Annexure 4 cl (b), do not determine the relationship of the parties with respect to the statutory scheme under which payment claims may be made: [80].

Lewis v Bell (1985) 1 NSWLR 731; *Radaich v Smith* (1959) 101 CLR 209; [1959] HCA 45; *Fearnley v Australian Fisheries Management Authority* [2006] FCAFC 3, applied.

Building and Construction Industry Security of Payment Act 1999 (NSW), s 34, referred to.

(6) Annexure 4 cl (b) was inconsistent with other provisions in the subcontract and did not create a separate contract for each work order. The subcontract required BSA to identify the "the part of the Fee claimed in relation to work orders worked on for that payment claim", allowing that a payment claim may refer to multiple work orders. Provisions for set-offs and defect rectification did not refer to separate contracts by which the work must be undertaken in relation to each work order. The subcontract also provided for variations to services that had not been requested under a work order: [82]-[84], [94].

(7) *Re Webster* did not assist in determining whether the subcontract was an agreement or a standing offer. What constitutes a "construction contract" under the Act may be different from an "agreement" under s 44(v) of the Constitution. In any event, *Re Webster* is not authoritative as to the operation of s 44(v) of the Constitution: [89]-[91].

Re Day [No 2] (2017) 263 CLR 201; [1975] HCA 22, referred to; *Re Webster* (1975) 132 CLR 270 at 282; [1975] HCA 22, not followed.

****

JUDGMENT

1 **THE COURT**: This appeal arises from an attempt by the appellant, BSA Advanced Property Solutions (Fire) Pty Ltd ("BSA"), to obtain a progress payment for work done under a construction contract by way of supplying goods and services in relation to construction work. The entitlement to serve a payment claim on the respondent, Ventia Australia Pty Ltd ("Ventia"), arose under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("Security of Payment Act"). The respondent filed a payment schedule declining to pay the amount claimed, in part on the ground that the payment

claim was invalid. An adjudicator determined that the claim was not invalid and that the bulk of the amount claimed was payable.

2 By a summons filed in the Equity Division, Technology and Construction List, Ventia sought an interim order restraining the appellant from obtaining an adjudication certificate or taking any other step to enforce the determination. By way of final relief, Ventia sought a declaration that the adjudication determination was void and an order that it be quashed or set aside. The summons invoked the supervisory jurisdiction of the Supreme Court, relying upon the alleged invalidity of the payment claim.

3 The principal argument relied upon by Ventia in the Court below was that a payment claim could be made only in respect of one construction contract and that the contractual arrangement between the appellant and the respondent required that the respondent issue "work orders" in relation to all work to be done under an overarching agreement and that each work order constituted a separate contract. Because the payment claim related to five separate work orders, it was therefore not a valid payment claim.

4 The hearing took place on 24 June 2021. While judgment was reserved, on 19 August 2021, the Queensland Court of Appeal heard a matter raising similar issues. Judgment in that matter was delivered on 15 October 2021: *Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd.*[1] The parties in this case filed further submissions on 22 and 27 October 2021, addressing the reasoning in *Ausipile.*

5 By a judgment delivered on 30 November 2021, the primary judge, Rees J, accepted Ventia's contentions and quashed the adjudicator's determination.[2] The primary judge was satisfied that (i) each work order constituted a separate agreement and (ii) the Security of Payment Act, at least by implication, precluded the service of a payment claim in relation to construction work undertaken under more than one contract. Those findings required that the judge also determine whether the element of non-compliance with the Act

[1] [2021] QCA 223 (Fraser and Morrison JJA, North J) ("Ausipile").
[2] Ventia Australia Pty Ltd v BSA Advanced Property Solutions (Fire) Pty Ltd [2021] NSWSC 1534 ("Ventia").

rendered the payment claim invalid. In concluding that it did, the judge declined to follow the reasoning in *Ausipile*.[3]

6 On the appeal, BSA contended that –

(i) the Security of Payment Act contained no requirement that a payment claim could only cover work done under a single construction contract;

(ii) if it did contain such a requirement, the requirement was not a precondition to the validity of the claim, but a matter to be considered by the adjudicator in the event that the claim was not paid, and

(iii) in any case, the payment claim in fact related only to construction work done under a single contract, namely the overarching agreement between the appellant and the respondent.

7 The appellant also contended that the primary judge ought not to have declined to follow an intermediate court of appeal. In any event, the appellant contended that the reasoning of the Queensland Court of Appeal was to be preferred. The respondent took a contrary view, which led to this appeal being heard by a five-judge bench.

Salient background

8 In April 2016, Ventia entered into an agreement with the NSW Land and Housing Corporation to provide various services, including property maintenance, for some 68,000 social housing properties within the areas of Greater Sydney, the Blue Mountains, Newcastle and the Hunter Valley. As described by the primary judge, part of Ventia's responsibilities encompassed the maintenance of fire protection at the properties, including the provision of fire extinguishers, emergency exit lighting and fire doors.[4] These were described as "building essential services" or "BES" in various documents. The BES work was subcontracted to the appellant.

9 The subcontract comprised 11 documents. The first was a covering letter dated 3 May 2016 signed on behalf of Ventia (then known as Broadspectrum) and stating:

[3] Ventia at [42].
[4] Ventia at [49].

> "We hereby award a Subcontract to you for works at [sic] the above Contract in accordance with Broadspectrum Service's Request for Tender documents and the requirements of the Subcontract Documents listed below.
>
> The work within this Subcontract comprises [Building] Essential Maintenance services as required by the following Project documentation provided with this letter.
>
> The work is being carried out as part of a Head Contract being the Asset Management Services Contract between NSW Land and Housing Corporation and Broadspectrum.
>
> Broadspectrum is employing the Subcontractor to carry out the Works and relies upon the Subcontractor and its employees' expertise, skill and experience in relation to the Subcontract Works."

10 The letter then specified the 11 documents which constituted the award, including the letter itself. The other documents included a "Subcontract Agreement", a "Price Schedule", and material extracted from the head contract with the Housing Corporation involving standards and specifications. The letter set out a number of other matters not presently relevant, and included, at the end, an acceptance clause which was signed on behalf of BSA.

11 The "Price Schedule" listed a large number of properties against which was identified "total $ per building per annum". What appeared to be a summary by region and contract area, also identified a total price per annum of $2,341,782. It noted a "mobilisation fee" of $330,657 said to be "amortised over the first year of contract". Some, but not all, of the other documents referred to in the letter were included in the evidence. The material extended over more than 500 pages.

12 It will be necessary to refer to further aspects of the subcontract in considering the respondent's argument that each work order constituted a separate construction contract. It is, however, convenient at the outset to identify the basis of that argument, by reference to the provisions relied on by Ventia. Clause 2 in the subcontract was headed "Services and remuneration". Clause 2.1 was as follows:

> "**2.1 Performance of Services**
>
> (a) The Subcontractor must execute and complete the Services in accordance with the Services Specification during the Term, and in accordance with the terms of this Agreement.
>
> (b) In performance of the Services in clause 2.1(a), the terms set out in Annexure 4 will form part of this Agreement."

13 Annexure 4, referred to in cl 2.1(b), provided for "work orders" by which it was said that Ventia would "initiate the Services by issuing specific Service Orders to the Subcontractor to perform discrete tasks".[5] Importantly for present purposes, cl (b) in Annexure 4 stated:

> "**(b) Formation of Agreement**
>
> A separate Agreement will come into existence each time Broadspectrum issues a Work Order. Each Agreement so created will be governed by the terms of the Agreement. In the event of any conflict between the terms of this Agreement and any express term in a Work Order, the express term of the Work Order will prevail in relation to the performance of Services under that Work Order only."

14 It appears that, for some years, invoices provided by BSA to Ventia were paid in due course. At some stage, perhaps in 2018, disagreements arose as to the work undertaken and the amounts claimed, which apparently led the respondent to terminate the subcontract with effect from 1 March 2021. On the date on which Ventia gave notice of termination, namely 8 February 2021, BSA served a payment claim on Ventia for an amount of $2,979,262.34. The payment claim identified the project as "LAHC Asset Maintenance Services" and the contract as:

> "LAHC Asset Maintenance Services Contract – Building Essential Services Agreement No 30000344-120."

The project name and the agreement number appeared on the subcontract.

15 The payment claim then identified the amount (noted above) and detailed it as falling within 3 categories of "work type", namely "SOU" (self-occupied units), variations, and "PM" (preventative maintenance). The first category involved four monthly invoices, each in the same amount of $21,417.64, dated October, November and December 2020 and January 2021. The second category (variations) identified 17 invoices dating from 30 September 2019 to 31 January 2021. Each invoice was in the same amount, namely $121,740.86. The third category ("PM – monthly maintenance contract") contained 4 invoices again dated in October 2020 to January 2021 and each in the same amount of $205,999.29. Although there were 25 invoices there were not 25 work orders; 23 invoices fell within three work orders, one for each category. (There were

[5] Annexure 4, cl (a)(i). Although the term "Service Orders" was not defined, it was treated in argument as referring to work orders.

two additional early invoices in categories one and two referrable to separate work orders.)

16 On 22 February 2021 Ventia served a payment schedule which asserted, amongst many other matters, that no money was owing because BSA had been overpaid with respect to variation works an amount in excess of $2m. Two passages in the payment schedule are directly relevant for present purposes. First, the document stated:

> "The payment claim to which this Payment Schedule relates is BSA's payment claim dated 8 February 2021 (**Payment Claim**) made in respect of subcontract 3000 344-120 [sic] entered into between BSA and Ventia for the Building Essential Services works at NSW Land and Housing Corporation Properties dated 3 May 2016 as amended on 17 March 2020 (**Subcontract**)."

17 The second passage read:

> "BSA's Payment Claim is invalid for the following reasons:
>
> a it is impermissibly made with respect to multiple construction contracts, each Work Order being a separate construction contract; and
>
> b it is not served from an available reference date – it is unclear what reference date is relied on by BSA."

18 Given the dispute as to the whole amount of the claim, on 8 March 2021 BSA lodged an adjudication application under s 17 of the Security of Payment Act. On 18 March 2021 Ventia lodged an adjudication response under s 20 of the Act. The response maintained the invalidity argument in the following terms:

> "15. Ventia contends that the Payment Claim is invalid because it relates to multiple construction contracts. Given a single payment claim can (as BSA correctly acknowledges) only be made with respect to a single construction contract, Ventia submits that the Adjudicator should find that he has no jurisdiction."

19 On 31 March 2021 the appointed adjudicator delivered his adjudication determination. He devoted some 10 pages to dealing with jurisdictional matters. The adjudicator resolved the issue in favour of BSA on the basis that the statement as to separate agreements in Annexure 4 cl (b) was inconsistent with the structure provided by the general contract provisions, which did not contemplate separate agreements for each work order.[6] It will be convenient to return to that reasoning when considering the jurisdictional issue below.

[6] Adjudication determination, par 5.4.21.

Grounds 1 and 2: the "one contract" rule

Reasoning of primary judge

20 In a careful consideration of the so-called "one contract" rule, the primary judge commenced with the authorities from which the rule was said to derive.[7] It will be appropriate to return to those authorities, but, as the judge correctly observed, "the cases reviewed have limited precedential value".[8] That was because the issue either did not arise, the reasoning was obiter, or the rule was relied upon without challenge. Nevertheless, the judge noted that "a series of learned commercial judges have proceeded accordingly, presumably because such a construction of the Act seemed obviously correct."[9]

21 The second, and perhaps the primary, factor upon which the judge relied was the use of the term "construction contract", in the singular, throughout the operative provisions of the Act, being ss 8 and 13. Acknowledging that s 8(b) of the *Interpretation Act 1987* (NSW) provides that in any Act "a reference to a word or expression in the singular form includes a reference to the word or expression in the plural form", the primary judge nevertheless concluded that the plural form was not intended in these provisions. The reason for that conclusion was that a payment claim could only be made with respect to a particular "reference date", making it unlikely that the legislature intended to allow a situation where there might be more than one contract, and thus more than one reference date, in respect of which a single payment claim would be served.[10]

22 Thirdly, the judge considered that this construction of the Security of Payment Act was consistent with the object of the Act, namely that a scheme for progress payments had been designed to operate quickly and with clarity so that a respondent and an adjudicator could attend to their respective tasks within the short timeframes provided.[11]

---

[7] Ventia at [10]-[26].
[8] Ventia at [27].
[9] Ventia at [27].
[10] Ventia at [29]-[30].
[11] Ventia at [32].

Statutory scheme

23 While each step in this reasoning was orthodox and persuasive in its terms, there are other factors which support a different conclusion. To explain why that is so, it is convenient to start with the objects of the Act. The primary objects are stated in the following terms:

> **3 Object of Act**
>
> (1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
>
> (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

24 The claim process provided by the Act involves periods measured in days, not weeks or months. For example, where a claimant serves a payment claim, the respondent becomes liable to pay the claimed amount unless it provides a payment schedule within 10 business days after the payment claim is served: s 14(4). An adjudication application must be made by a claimant within 10 business days after receiving a payment schedule indicating that the respondent does not intend to pay the full amount of the claim: s 17(3)(c). Where an adjudication application is made, the adjudicator is to determine the application "as expeditiously as possible, in any case… within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application": s 21(3).

25 While it is no doubt true that a construction of the legislative scheme which would potentially increase the complexity of a claim might militate against the effectiveness of the regime to deliver fair outcomes, as a practical matter, the possible consequences are somewhat nebulous. On the other hand, the imposition of an additional jurisdictional condition, especially one of indeterminate scope, is likely to lead to increased litigation. One effect of such litigation is to render ineffective the tight timetable imposed on the parties by the statute. To engage the Equity Division in an exercise in the supervisory jurisdiction of the Court, based on jurisdictional error, is likely to delay for

months and even years the interim process of obtaining a progress payment. That undermines the object of transferring the risk of insolvency from the subcontractor to the contractor. The fundamental objective of maintaining the money flow and relieving subcontractors from undue financial pressures would be lost.

26 It is convenient to address the issue of statutory construction, before dealing with the discussion of the statute in earlier cases. First, there is a temporal factor to take into account: the subcontract commenced on 3 May 2016. On the appellant's case, that is the relevant contract. It preceded amendments to key provisions in 2019[12] and is therefore governed by the legislation prior to that time. However, on the respondent's case each relevant construction contract was created by the service on the appellant of a work order. On that view, the relevant legislation was that in force at the date of the issue of each work order. However, for the purposes of appeal, it is sufficient to have regard to the Act prior to its amendment. On the other hand, the primary judge noted that her construction of ss 8 and 13 (and thus the "one contract" rule) may not apply following the amendments.[13] Ironically, that would result in an unresolved puzzle: if the rule did apply only under the old legislation, but each work order gave rise to a new contract, the payment claim lodged in 2021 should have been valid in so far as it applied to post-amendment work orders. (This possibility was not addressed.) There is no basis for thinking the legislature intended such a result; it would in any event be a surprising outcome. Further reference will be made to the amending legislation in due course.

27 As in force in May 2016, ss 8 and 13 relevantly provided:

> **8 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.

[12] Building and Construction Industry Security of Payment Amendment Act 2018 (NSW).
[13] Ventia at [30].

(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 the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or

(b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

…

13 Payment claims

(1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim:

(a) must identify the construction work (or related goods and services) to which the progress payment relates, and

(b) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***), and

(c) if the construction contract is connected with an exempt residential construction contract, must state that it is made under this Act.

…

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

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

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

28 Section 8 provides to a person who has undertaken to supply goods and services under a construction contract a right to a progress payment. The entitlement crystallises at the "reference date". A reference date may be provided by the contract or, if there is no express provision in the contract, it is the last day of the month in which the construction work (or the supply of goods

and services) occurred. Section 13 then provides that a person who (relevantly) supplied goods and services and is thus entitled to a payment under s 8(1), may serve a payment claim. The fact that both the entitlement in s 13(1), and the concomitant liability under s 13(2), are expressed as actual or putative entitlements and liabilities demonstrates that their existence is not a condition of the right to make a claim.[14]

29 It is now established that the Act imposes few essential preconditions to the engagement of the entitlement under s 8 and the procedure under s 13. In particular, the validity of a claim does not depend on the existence of an entitlement; rather, a person was "able to make a valid payment claim even though it may ultimately be proved that no payment was due under the construction contract."[15]

30 In *Brodyn Pty Ltd v Davenport*[16] Hodgson JA (with the agreement of Mason P and Giles JA) noted that there were certain "basic and essential requirements" conditioning the existence of an adjudicator's determination.[17] Relevantly for present purposes, they included the following:

> "1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 8).
>
> 2. The service by the claimant on the respondent of a payment claim (s 13)."

31 Two points should be made with respect to the first requirement. First, s 7(1) provides that, subject to a number of exclusions which are not presently relevant, "this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales". Secondly, the definition of "construction contract" in s 4 is "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 phrase "construction work" is itself defined in broad terms in s 5, a definition which is engaged in the present case; so much was not disputed. Of more direct

---

[14] Southern Han Breakfast Point Pty Ltd (in Liq) v Lewence Construction Pty Ltd (2016) 260 CLR 340; [2016] HCA 52 at [57] (Kiefel, Bell, Gageler, Keane and Gordon JJ).
[15] Southern Han at [57].
[16] (2004) 61 NSWLR 421; [2004] NSWCA 394.
[17] Brodyn at [53].

relevance is the definition of the phrase "related goods and services" in s 6, which provides in part as follows:

> **6 Definition of "related goods and services"**
>
> (1) In this Act, ***related goods and services***, in relation to construction work, means any of the following goods and services:
>
> (a) goods of the following kind:
>
> (i) materials and components to form part of any building, structure or work arising from construction work,
>
> (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,
>
> (b) services of the following kind:
>
> (i) the provision of labour to carry out construction work,
>
> (ii) architectural, design, surveying or quantity surveying services in relation to construction work,
>
> (iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,
>
> (c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.

32 It is readily apparent that, while the existence of a construction contract between the claimant and the respondent is an essential element of the legislative scheme, there may be scope for dispute as to whether a particular agreement falls within the statutory description. However, the breadth of the statutory language is apt to limit areas of disputation. In particular, the expansion of the ordinary meaning of "contract" to include some "other arrangement" under which one party undertakes to carry out construction work for another will limit the likelihood of disputes as to the legal character of the relationship between the parties.

33 That is not to say that such disputes may not arise. The boundaries of the Industrial Relations Commission's unfair contract jurisdiction under the *Industrial Relations Act 1996* (NSW) in relation to agreements "whereby a person performs work in any industry" gave rise to a series of cases preceding

Kirk v Industrial Court of New South Wales,[18] including *Fish v Solution 6 Holdings Ltd*[19] and *Solution 6 Holdings Ltd v Industrial Relations Commission of New South Wales*.[20] However, no issue arises in the present case as to whether the appellant supplied "related goods and services" to the respondent: it is common ground that it did. Nor is there any contention that they were not provided under a construction contract: the only question is whether there was one such contract or many.

34 Nor is there any dispute that the appellant served on the respondent a document purporting to be a "payment claim" seeking payments claimed to be due under a contract. Indeed, as has been noted, the respondent provided a payment schedule in response to the payment claim, thus submitting the existence of a valid payment claim as a matter to be determined by the adjudicator (whilst reserving its rights).

35 There are undoubtedly limits to the characteristics of a valid payment claim. It is commonly accepted that s 13(2) identifies such limits by use of the obligatory "must". However, conscious of the objects of the legislative scheme, the courts have been cautious in identifying these as "basic requirements",[21] precise compliance with which is a precondition to the exercise by the adjudicator of his or her function.[22] Spigelman CJ observed in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*:[23] "As Hodgson JA recognised in *Brodyn*, the purpose of the legislative scheme is best served by restricting the scope of intervention by the courts."

Absence of basis for a jurisdictional constraint

36 Three matters make it inherently implausible that there is any strict and precise "one contract rule". First, s 8(1) confers an entitlement to a progress payment in respect of construction work carried out under a contract. The object of the Act, as explained in s 3, is to ensure that persons carrying out such work (or

[18] (2010) 239 CLR 531; [2010] HCA 1.
[19] (2006) 225 CLR 180; [2006] HCA 22 at [16]-[20], [36]-[41] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).
[20] (2004) 60 NSWLR 558; [2004] NSWCA 200.
[21] See Brodyn at [55].
[22] See, for example, Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) 64 NSWLR 462; [2005] NSWCA 409 at [24]-[26] (Hodgson JA).
[23] (2010) 78 NSWLR 393; [2010] NSWCA 190 at [55].

supplying related goods and services) obtain regular payments on account, and subject to a final reckoning. The expansive definition of construction contract, to include both a contract and some other arrangement, directs attention to the carrying out of the work, for reward, rather than the legal characteristics of the source of the obligation to carry out the work and the source of the liability of the respondent to make a payment.

37 Secondly, the stated requirements for a valid payment claim do not include the identification of the source of the obligation to carry out the work or the source of the entitlement to payment. The Court has preferred not to read the Act as containing implied limitations, such as permitting the conditions of service of a payment claim to be qualified by the contract. In *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd*[24] the Court held that, for the purposes of the Act, a payment claim was served on the date on which it was received by the respondent, although under the contract it was deemed to have been served on the next reference date. That conclusion was supported by the following reasoning:

> "41 Further, we do not think that the applicant's construction promotes the purpose of the Act. There is sound reason, given the consequences for both parties of engaging the regime established by the Act, for there to be certainty as to precisely when a payment claim has been served. It is easy to see the scope for confusion that could arise if the applicant's construction were accepted. The Act requires people dealing with a builder's accounts to be very concerned to respond to 'payment claims' within 10 business days. On the applicant's construction, it would be necessary to have regard not merely to when a document styled a 'payment claim' is received, but also the terms of the particular contract. That is not enhanced by a construction which may give rise to debate as to the effect of a deeming provision on a notice which, at the time it was sent, could not have been an actual payment claim. Not lightly would we conclude that the time-critical regime established by the Act involving as it does a series of exchanges of claims and responses is engaged by the deemed or notional service of a document, rather than actual service."

38 Where the Act intends the contract to govern, it says so and provides a default position where the contract does not so provide. That is true with respect to progress payments under s 8. It is also true with respect to reference dates. If there were some doubt as to the reference date with respect to which the claim is made, that would be a matter to be determined by the adjudicator in determining an adjudication application.

[24] [2017] NSWCA 289 (Leeming and Payne JJA, White JA agreeing).

39 If there is an adjudication, one finds amongst the categories of material which the adjudicator is required to take into account, "the provisions of the construction contract from which the application arose": s 22(2)(b). The fact that the adjudicator is required to take such material into account, and thus determine whether the claim is made good under the terms of the construction contract, suggests that no specific constraint is imposed on the validity of a payment claim by reference to the terms of any particular construction contract or arrangement in the nature of a contract.

40 Thirdly, the phrase "the one contract rule" conveys a degree of precision as to its meaning which quickly dissolves on consideration of its possible application. The fact that it appears to reflect the phrase "under a construction contract", in ss 8 and 13, gives it a false sense of acceptability. As a practical matter, the scope of commercial arrangements under which goods and services may be supplied for construction work is expansive. The nature of such arrangements will be considered in more detail below in addressing the contention in ground 4 that there was in fact only one construction contract between the appellant and the respondent.

Discussion in case law

41 As the primary judge noted, the purported rule has been attributed to a case in which the issue did not arise because there was only one contract.[25] In fact, the origin was even more curious. *Rail Corporation of NSW v Nebax Constructions Australia Pty Ltd*[26] bore some likeness to the present matter in that the contractor (Nebax) was required to undertake platform resurfacing work at 25 railway stations under the control of Rail Corp. Nebax served a progress claim (No 18), attaching a number of invoices, and referrable to the month of September 2011.[27] The claim was referred to adjudication. It was the adjudicator who found that there were 25 separate contracts, contrary to the views of the parties. He described the contract as relating to "separable portions" which were subject to a single head contract.[28] The primary argument in the Court was that the adjudicator lacked jurisdiction because there could

[25] Ventia at [10].
[26] [2012] NSWSC 6 (McDougall J).
[27] Nebax at [2].
[28] Nebax at [6].

not be separate adjudication applications (as he assumed there to be) for separate portions of one payment claim: Security of Payment Act, s 17(1). The alternative was that 5 separate payment claims had been lodged under one contract and by reference to a single reference date, in breach of s 13(5). McDougall J, in an ex tempore judgment delivered during vacation, dealt with the operation of s 17(1) in the following passages. First, he stated:

> "42 In *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, Hodgson JA (with whom Mason P and Giles JA agreed) held at [53] that the 'basic and essential requirements' for validity of an adjudicator's determination included 'the making of an adjudication application by the claimant to an authorised nominating authority'. His Honour did not say in terms that s 17(1) authorised the making of only one adjudication application for one payment claim.
>
> 43 Nonetheless, it seems to me, when one considers the structure of the Act as a whole, it is reasonably clear that there should be one only application for adjudication of any one payment claim. Section 8(1) gives the right to a progress payment. Section 13 of the Act gives to a person claiming an entitlement to a progress claim the right to serve a payment claim. Section 14 provides for a response, through a payment schedule."

42 Having set out the relevant provisions, McDougall J continued:

> "44 It seems to me that, because s 13(5) prevents (with a presently irrelevant exception for which subs (6) provides) the service of more than one payment claim per reference date per construction contract, and because the right to adjudication 'of a payment claim' is clearly referable to a payment claim that complies with the various requirements of s 13, there can only be one adjudication application for any particular payment claim for any particular contract.
>
> 45 The proposition that there may be multiple adjudication applications in respect of different parts of a payment claim seems to me to be completely inconsistent with the underlying objective of the Act, which is to provide an enforceable right to progress payments and a speedy and relatively cheap and efficient means for enforcement of those rights. It also seems to me to be inconsistent, if not directly then at least by implication, with the approach of the plurality (Macfarlan JA and Handley AJA) in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* (2009) 74 NSWLR 190, where their Honours expressed a clear view against the repetitious lodging of payment claims seeking to enforce the same claim. It may be noted that Allsop P concurred in the result, although for somewhat different reasons."

He concluded that "the better view of s 17(1) is that there can only be one adjudication application for one payment claim".[29] Notwithstanding the references in [44] to "per construction contract" and "for any particular contract", McDougall J did not hold that the payment claim must only be in respect of work under one contract.

[29] Nebax at [46].

43 The next significant case was a decision of Douglas J in Queensland, dealing with relevantly identical legislation, in *Matrix Projects (Qld) Pty Ltd v Luscombe*.[30] The arrangement was described by the judge in the following terms:

> "[4] The parties signed a document dated 17 November 2011 called a 'Period Subcontract' by which Luscombe Builders agreed 'to perform and complete … works yet to be agreed' for a period of 12 months from the date of the contract. Because of the indeterminacy of that phrase it was argued persuasively for the applicant that the Period Subcontract was not, of itself, a construction contract under the Act because it did not contain an undertaking to perform construction work, something to which I shall refer later.
>
> [5] It was a lump sum agreement for repair works to be performed on buildings, required because of the damage caused by the 2011 floods in Brisbane. It also provided that a work order signed by the contractor for each project should be issued from time to time during the term of the contract and should be read in conjunction with the contract and that the work order issued from time to time should include project specific details. The Period Subcontract also provided that progress claims could be made fortnightly on the 15th or 30th of the month and that the time for payment was within 14 days of the date of the claim."

44 The payment claim identified what the judge described as 3 separate bases of claim, namely (i) claims with respect to at least nine properties where work orders were issued pursuant to the period subcontract, (ii) additional properties the subject of a verbal direction and undertaken on a "do and charge" basis, and (iii) a sponsorship of a local soccer team. The adjudicator found that the work carried out pursuant to work orders was undertaken under the period subcontract and the further verbal instructions were in effect a variation of the period subcontract and constituted one arrangement and there was, thus, one construction contract.[31] Douglas J concluded that the reasoning of McDougall J in *Nebax* was correct and rejected in part the contractual analysis of the adjudicator:

> "[19] … It seems to me, however, that the work done was divisible into work done pursuant to the Period Subcontract and the 'do and charge' work done pursuant to another regime where Luscombe Builders retained the right to decide whether to perform that work when it was offered. In respect of that work there would also have been differing reference dates between the two different types of arrangement, either the 15th or 30th of the month under the Period Subcontract or the end of the month as the default reference date under the Act for the 'do and charge' work.

[30] [2013] QSC 4.
[31] Matrix at [10], quoting the adjudication determination at [12].

> [20] Accordingly the payment claim made cannot be described as one being made under a single construction contract whether the relationship be described more generally as an arrangement or not. Therefore the variety of different types of contract for construction work relied upon in the payment claim is fatal to its validity."

45 There remained the question as to the effect of the inclusion of the soccer sponsorship arrangement. It did not involve construction work and was apparently not pressed before the adjudicator.

46 Douglas J was "inclined to accept" the submission that the inclusion of the soccer sponsorship claim did not invalidate the payment claim, "on the basis that it should be possible to treat the inclusion of such an obviously erroneous item in a payment claim as not depriving an adjudicator of jurisdiction".[32] The adjudication was, nevertheless, set aside, on the basis that the payment claim covered more than one contract or arrangement and was invalid.

47 The result in *Matrix* raises a significant issue as to the proper identification of a pre-condition as to the validity of a payment claim. If the inclusion of an obviously invalid claim does not invalidate the payment claim, on what basis does an arguably invalid claim give rise to invalidity? It is well-established that an adjudication cannot be reviewed on the basis that the adjudicator misconstrued the construction contract under which the claim was made.[33] Yet the question whether part of the claim was for work done under the period subcontract, or an arrangement which included the period subcontract, was an issue involving arguable questions of fact and law which the adjudicator addressed on the basis of the objection taken by *Matrix* in its payment schedule. While it must be accepted that the adjudicator cannot determine the limits of his or her own jurisdiction, the decision raises difficult questions as to why identifying the terms of the construction contract goes to the adjudicator's jurisdiction to act.

48 In *Ausipile*, the Queensland Court of Appeal adopted a test of facial non-compliance as the indicium of the invalidity of a payment claim. Where there was no reliance on more than one contract on the face of the payment claim, the issue was one which should, in an appropriate case, be raised by way of a

[32] Matrix at [24].
[33] Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4 at [38], [48] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

payment schedule and addressed by the adjudicator.[34] In broad terms, this approach was consistent with authority in this Court and may be accepted. Thus, in *Nepean Engineering*[35] this Court dealt with a case in which a payment claim was said not to satisfy the requirement of s 13(2)(a) because it failed to identify the construction work to which the payment related. Hodgson JA accepted that a sufficient identification was necessary in order to allow a respondent to formulate its payment schedule and to allow the adjudicator to determine the claim. However, Hodgson JA stated that if the payment claim were deficient in that respect, the payment schedule should say so and the adjudicator would need to determine whether the work was sufficiently identified. He concluded:

> "36 That is, I do not think a payment claim can be treated as a nullity for failure to comply with s 13(2)(a) of the Act, unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made."

49 In *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd*[36] this Court addressed a contention that a payment claim, which stated that certain amounts were progress payment of parts of the contract sum, and other amounts were for variations, was invalid because it sought to raise quantum meruit claims as to those parts not the subject of the contract sum. The Court rejected that submission as a ground of invalidity stating:

> "20 It is possible that the amounts claimed for variations did not properly arise under the contract because, for example, relevant procedural steps had not been followed. However, to pursue that issue would involve raising a defence in relation to matters arising under the construction contract, a course prohibited by s 15(4) of the Security of Payment Act. Had the principals wished to challenge the claim on that basis, they could have done so by way of a payment schedule provided pursuant to s 14, indicating the claimed items intended to be paid and the reason for non-payment of any item not accepted. Such an issue would then have been addressed by the adjudicator appointed to determine any dispute thus arising. However, that course was not taken."

50 It is not clear that the reasoning in *Matrix* was consistent with this approach. As the Queensland Court of Appeal noted in *Ausipile,* the judgment in *Matrix* involved "no examination of the proper construction of the then applicable

[34] Ausipile at [120].
[35] See fn 22 at [35]-[36] (Hodgson JA).
[36] [2020] NSWCA 93.

section governing a payment claim",[37] nor whether, it might be added, the payment claim did in fact identify "three distinct contracts".

51 On one view, the test of facial non-compliance may be inadequate as a test of jurisdictional error because s 13 of the Security of Payment Act does not require that the payment claim identify the construction contract; yet the claim must have such a basis. That there is no such identification required by s 13 demonstrates that the "one contract" rule involves a jurisdictional condition imposed by implication. The implication of such a requirement is inconsistent with the observation of Spigelman CJ in *Chase Oyster Bar* that "the purpose of the legislative scheme is best served by restricting the scope of intervention by the courts".[38] That approach, which may be justified by reference to the purpose and objects of the legislative scheme discussed above, works against an implication of the kind proposed.

52 It follows that, if it be necessary that a payment claim relate to one construction contract with one reference date, compliance with that statutory requirement is a matter to be addressed by the adjudicator: any such "one contract" rule is not a precondition to the service of a valid payment claim. That conclusion is sufficient to uphold grounds 1 and 2. However, it is strongly arguable that there is no "one contract" rule, as such, and that s 13(1) permits a person to serve a payment claim in relation to an entitlement under more than one contract so long as the claim is referable to one reference date, in compliance with s 8(1) in combination with s 13(5).

Grounds 3 and 4: Was there a single contract?

Reasoning of primary judge

53 As the primary judge stated, "[o]nce it is accepted that whether a payment claim is made in respect of one construction contract is a jurisdictional fact, then it is a matter for the Court to determine on the evidence before it".[39] Having determined that there was such a jurisdictional fact, it was necessary for the judge to proceed to determine that issue on the evidence, which she did.

---

[37] Ausipile at [106] (Morrison JA).
[38] See fn 23* at [55].
[39] Ventia at [42].

54 Having briefly noted the factual background,[40] the judge turned to the content of the subcontract, noting the services provided under it, and the method of payment provided by the contract,[41] before turning to the "work orders".[42] The judge then identified the elements of the payment claim by reference to evidence given by witnesses for both parties.[43] Although there was no oral evidence, Ventia relied on an affidavit of Ms Jasiulec, dated 7 May 2021. In addition to exhibiting various documents, including the subcontract, much of the affidavit was devoted to explaining the commercial context of the relationship between the parties and in particular between Ventia and the head contractor, NSW Land and Housing Corporation. Significant parts of the affidavit described the deponent's understanding of how the contractual scheme operated, and was admitted on that basis only. Other parts provided detail as to the administrative arrangements with respect to the operation of the subcontract. It seems that no objection was taken to the relevance of such material, presumably because it identified matters to which the payment claim related. However, in some respects it may have been a distraction from the real question which was the basis upon which the appellant became entitled to progress payments, and whether they were properly described as "under" the subcontract.

55 BSA relied on an affidavit of 7 June 2021 of Mr Crossing, its mobilisation and contracts manager. The material covered the same broad issues as that of Ms Jasiulec. No doubt because the proceedings constituted a fresh application and not a review of the determination of the adjudicator, there was no clear indication as to how much of the material presented to the court was before the adjudicator. In addition, BSA filed an affidavit of its solicitor addressing the fees payable in respect of an adjudication.

56 The judge then set out the submissions for the parties as to whether there was one contract or numerous contracts constituted by each individual work order.

[40] Ventia at [47]-[49].
[41] Ventia at [50]-[64].
[42] Ventia at [65]-[69].
[43] Ventia at [70]-[76].

57 Ventia submitted that the "PM" (preventive maintenance) payment of $823,997 was for work arising from 1,860 work orders (apparently having an average value of $443). By contrast, BSA asserted that all of the work within the payment claim was "category B works", which BSA was obliged to undertake because they involved routine maintenance works in accordance with the "services specification" set out in clause 2.1(a) of the subcontract. The specification documents provided for six monthly or annual maintenance of assets.

58 Before turning to the judge's rejection of BSA's contentions, it is convenient to note that the judge found no need to have regard to the conduct of the parties, their communication or post-contractual conduct in order "to define the parties' intentions as to the effect of a work order". That was because Annexure 4 cl (b) provided that a separate agreement would come into existence each time Ventia issued a work order.[44]

59 The primary judge rejected the submission that BSA was required to do the work in any event because, "the work order identified the Services" and the "Services Specification set out *how* the services were to be performed, rather than *what* services were to be performed".[45] As a result, she concluded that there was a separate agreement which came into existence each time Ventia issued a work order so that the payment claim consisted of claims made under numerous construction contracts.[46]

60 The judge concluded that the payment claim was invalid and the decision of the adjudicator upholding it was void. She then turned to consider an alternative submission by BSA that even if each work order gave rise to a different contract, "that new contract remained part of one overarching of 'arrangement' within the meaning of that term as used in the definition of 'construction contract' in s 4(1) of the Act".[47]

61 The judge concluded that the term "arrangement" used in the definition of "construction contract" was "intended to capture dealings between parties

[44] Ventia at [82].
[45] Ventia at [81].
[46] Ventia at [83].
[47] Ventia at [84].

which fail to achieve that level of precision which the law of contract would not ordinarily recognise."[48] With respect to the alternative contention, the primary judge concluded:

> "88 Here, the parties executed a Subcontract Agreement which gave rise, in due course, to further contracts; each Work Order, when issued, gave rise to a separate contract. That is, by and large, how the parties to the Subcontract Agreement conducted themselves in the years which followed. What the Court is being asked to do is overlook the contractual regime and [identify] an 'arrangement'. I am not minded to ignore the contractual regime to see whether, perchance, there was something answering the description of an 'arrangement'. In other words, 'The obligations of written agreements between parties cannot simply be ignored or brushed aside': *Equuscorp Pty Ltd v Glengallen Investments Pty Ltd* (2004) 218 CLR 471; [2004] HCA 55 at [35]."

The contractual provisions

62 Clause 2.1 and the key passage in Annexure 4 relied upon by the primary judge have been set out above.[49] There are, however, numerous other provisions which need to be considered.

63 Clause 1 of the subcontract included definitions, by reference to Annexure 1. The term "agreement" was defined:

> **"Agreement** means the Subcontract Agreement General Terms and Conditions, any relevant work order to which it attaches, and all annexures (including all terms and documents reference therein). It is the agreement between Broadspectrum and the Subcontractor constituted by the Agreement Documents. The Agreement may be referred to as the Agreement within the Agreement Documents."

64 The definitions included the terms "Category A works" and "Category B [works]". Category A works meant "the Responsive Works Program, Vacant Restoration, Modifications (MODS)/Acquisitions/Major Fire Upgrades (MFU)/ Lease Refurbishments/Property Standard Assessments (PSA)." Category B (the word "works" was omitted) meant "Lawns, Grounds & Cleaning (LGC) and Building Essential Services (BES)".

65 There was also a definition of the term "claim", namely "an entitlement of the Subcontractor under or arising out of or connected with the Agreement, in tort, in equity, under any statute, or otherwise…."

66 Two further definitions may be noted:

---

[48] Ventia at [86].
[49] See at [12]-[13]

"**Payment claim** is a claim for payment made by the Subcontractor to Broadspectrum under Annexure 4.

Payment term means the payment term stated in Annexure 2."

67 Annexure 2 defined "payment term" by reference to cl 6.3 as "30 business days from receipt of payment claim". Clause 6 is important: the relevant provisions of cl 6 read as follows:

"**6.1 Broadspectrum' [sic] payment obligations**

(a) Subject to the proper performance of the Services, Broadspectrum must pay the Subcontractor the Fee.

(b) The Subcontractor acknowledges that the Fee includes all costs and expenses it may incur in performing the services and complying with all of its other obligations under this Agreement.

(c) The Parties acknowledge that the Fee will be claimed on issue of an approved claim, in accordance with this clause 6.

6.2 Payment claim procedures

(a) The Subcontractor must provide to Broadspectrum a statement in a form and using the method required by Broadspectrum, within:

(i) 5 Business Days after the date of Completion of the relevant Service, unless otherwise specified for Services designated as Category A Works; and

(ii) 5 Business Days after the last Business Day prior to the end of each calendar month for Services designated as Category B Works, which is referred to as 'Monthly Payment Claim', with the first Monthly Payment Claim to be made one month after the Commencement Date;

showing *the part of the Fee claimed in relation to Work Orders worked on for that Payment Claim*. The payment claim shall relate to work satisfactorily completed for the work order and shall be accompanied by any documentation that is required to support such claim, without the need for further information.[50]

If the event giving rise to the Claim is continuing, the Subcontractor must give the information required by Broadspectrum every 5 days after the Claim was made until the event or consequence of the event has ceased.

(b) The Subcontractor must include with each statement provided in accordance with clause 6.2(a), a statement that all remuneration or other amounts payable by the Subcontractor to any of its employees and suppliers, have been paid by Law or under an industrial instrument [sic] in respect of the Services.

…

6.3 Payment

(a) Following receipt of the statements [referred to in?] clause 6.2, Broadspectrum will review and either approve or reject the payment claim, whether in part or in full. Approval may be subject to approve of the Services

[50] Emphasis added.

by the Principal. Where Broadspectrum rejects a payment claim, in part or in full, Broadspectrum will inform the Subcontractor in writing of such rejection including reasons for the rejection.

6.4 Set-off

Broadspectrum may set-off or deduct from any payments due to the Subcontractor under this Agreement, any moneys due or which may become due from the Subcontractor to Broadspectrum under this Agreement or otherwise at Law relating to this Agreement or the Services.

…

6.6 Subcontractor's payment provisions

The terms set out in Annexure 10 form part of this Agreement."

68 Many of these provisions are consistent with requirements for a payment claim under the Security of Payment Act. For example, cl 6.2(b), requiring a statement that employees and suppliers have been paid, is a statement required with respect to a payment claim. Also noteworthy is the passage in cl 6.2(a) italicised above, referring to part of the fee claimed "in relation to Work Orders worked on for that payment claim". It expressly envisaged that a payment claim may relate to more than one work order.

69 Annexure 10, referred to in cl 6.6, imposed on BSA an obligation to give notice to Ventia if it received a notice from one of its subcontractors under various provisions of the Security of Payment Act. In particular, it provided that Ventia might make a payment due to a subcontractor of BSA in order to avoid a suspension of work under the Security of Payment Act.

70 Clause 6.1 referred to "the Fee", a term defined in Annexure 3 by reference to rates set out in "Appendix A of this Agreement". What appears to be Appendix A in the material before this Court,[51] sets out a total price per annum according to regions and contract areas, a mobilisation fee and a table of "total $ per building per annum" with respect to a large range of buildings, perhaps running into the hundreds. Many addresses appear to include multiple occupancies.

71 Annexure 1 also contained a definition of "Services", namely, "the services set out in Annexure 8 or in any Work Order, and any other services which the Subcontractor and Broadspectrum agree from time to time". The primary judge discounted the significance of the definition of "Services" because she did not

[51] Commencing at p 68 of the subcontract and running for some 15 pages as a spreadsheet.

read Annexure 8, referred to in that definition, as identifying relevant services. There is some force to the observation: although Annexure 8 is headed "Services", cl 1 provided:

> "**1. Nature of the Agreement**
>
> (a) The Subcontractor must perform the Services for Broadspectrum on the basis of the rates and prices in the relevant Tender Schedules (as adjusted in accordance with the Agreement) and in accordance with the terms of this Agreement (Annexure 3)…."

(Annexure 3 identified the Fee.)

72 Annexure 9, however, was headed "Services Specification" and referred to specification documents in the following terms:

> "2.1 G1.1 Maintenance Work Requirements
>
> 2.2 G1.4 Property Standard Assessments
>
> 2.3 G2.1 Maintenance Specification
>
> 2.4 G2.2 Service Specification
>
> 2.5 G3 Asset Performance Standards
>
> 2.6 G4.1 Work Identification Codes
>
> 2.7 G4.2 Service Delivery Program, Scope of Work and Quotation Template
>
> 2.8 G4.4 Facilities List
>
> 2.9 G4.6 Lawns, Grounds and Cleaning Maps."

The relevant specifications, taken from the head contract between Ventia and the Land and Housing Corporation, were those applicable to the subject-matter of the subcontract with BSA.

73 Clause 4 was also relevant, and read in part:

> "**4. Scope of the Services and Variations**
>
> **4.1 General**
>
> …
>
> (b) The Subcontractor agrees that it has included in the Fee any associated and complementary services which are not shown in the Services Specifications but which are necessary for the satisfactory completion and performance of the Services in accordance with Good Industry Practice.
>
> **4.2 Variations**
>
> (a) Broadspectrum may vary the Services or any condition of the Services Specification, and the Subcontractor must carry out any such variation as directed by Broadspectrurn. The Subcontractor's fee for any variation is to be agreed between the Parties prior to the Subcontractor carrying out any such

variation. However, in the event that agreement cannot be reached, then Broadspectrum may direct the Subcontractor to proceed with the variation and the variation will be valued proportionately using the Fee as a base rate.

(b) The Subcontractor must not vary the Services or any condition of the Services Specification, except as directed and approved by Broadspectrum in writing.

…

4.4 Defects Liability

(a) In addition to clause 4.3(b), the Subcontractor will be responsible, at its own cost, for the rectification of any defects, faults or omissions in the Services during the Defects Liability Period. At any time, prior to the expiration of the Defects Liability Period, Broadspectrum may direct the Subcontractor to rectify any defect, fault or omission. …"

74 In terms of the underlying documentation, it remains to consider the form of the work orders. The examples of orders contained in the evidence are best explained by reference to the document which is attached to this judgment. The document is largely meaningless read in isolation. The top half of the document is entirely formal stating addresses, ABNs and similar details of Ventia and BSA. A "shipping address" is given, but not in terms applicable to the particular work order. There are three items listed, each is described as "AFSS Access Inspection Net Diff", followed by each of three consecutive months. The order is dated 22 February 2021 but, as each refers to an item "completely delivered", it may be inferred that the order relates to the months of June, July and August of 2020. (Ventia cancelled the subcontract in February 2021, some 14 days before the date of the work order.)

Assessment of contractual documentation

75 The reasoning of the primary judge focused upon the statement in Annexure 4 that a separate agreement would come into existence each time the respondent issued a work order. Each individual agreement would be governed by the terms of the subcontract. That approach was challenged on two bases. First, it involved characterising the arrangement for the purposes of the Security of Payment Act entirely by reference to a term of the agreement. Secondly, it extracted one provision from the agreement, which, reading the document as a whole was inconsistent with the overall effect of the agreement.

76 The first criticism is sound in principle. As Mahoney JA explained in *Lewis v Bell*:[52]

> "It is necessary … to consider the significance of the parties' intention at two stages in the court's reasoning: that in which it decides what is the nature of the rights which are granted by the transaction; and that in which, the nature of the rights having been determined, it decides whether the relationship is to be classified as one of lease or licence.
>
> At the first stage … intention has the function which ordinarily it has in accordance with the accepted rules of interpretation and construction.
>
> …
>
> At the second stage … the significance of intention will, in Australia, be less. Once the nature of the rights granted is finally determined, the classification of the transaction, as lease or licence, will depend upon whether the rights are or are not those of exclusive possession."

77 Mahoney JA relied upon the reasoning of Windeyer J in *Radaich v Smith*[53] to the effect that the parties cannot "escape the legal consequences of one relationship by professing that it is another".

78 Although those cases concerned the classification of an agreement as a lease or a licence, the principle has been applied in many circumstances where the particular classification is legally significant. Thus, in *Fearnley v Australian Fisheries Management Authority*,[54] Finn and Sundberg JJ stated:

> "There are many examples in the law where the court rejects the label that parties have attached to that contract. If the true relationship between parties revealed by that contract is that of partners, a declaration by them that they are not partners will avail them nothing."

79 As noted by Lewison and Hughes, *The Interpretation of Contracts in Australia*:[55]

> "Similarly, in *Hollis v Vabu Pty Ltd,*[56] Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ said of a clause stating that a relationship between an owner driver and a courier company was one of independent contractor and not employee: '[T]erms are not of themselves determinative, parties cannot deem the relationship between themselves to be something it is not'.
>
> Indeed, a clause purporting to deem the existence of a particular relationship between the parties may cause the court to scrutinise the contract with greater care."

---

[52] (1985) 1 NSWLR 731 at 736-737
[53] (1959) 101 CLR 209 at 222; [1959] HCA 45.
[54] [2006] FCAFC 3 at [27].
[55] Thomson Reuters, 2012 at [9.07]; see also at [4.03].
[56] (2001) 207 CLR 21; [2001] HCA 44 at [58].

80 In the present case, the legal question is whether the payment claim served by the appellant was a claim for a progress payment "under" a construction contract, for the purposes of the Security of Payment Act. That question cannot be finally determined by the parties affixing a label or identifying the nature of the relationship under which construction work was undoubtedly undertaken. Were it otherwise, a contractor would be able to impose terms, the effect of which might be to exclude, modify or nullify the practical benefit of the Act, contrary to the prohibition on contracting out contained in s 34 of the Security of Payment Act. It is not necessary to address the operation of s 34 in the context of the present case: it is sufficient to note that s 34 assumes the need to classify a contract or arrangement for the purposes of the Act and negates any provision which might adversely affect the intended effects of the Act.

81 Secondly, it was necessary to address the construction of Annexure 4 cl (b) in the context of the whole subcontract. Reaching a conclusion contrary to the view taken by the primary judge, the adjudicator addressed precisely the same issue based on similar submissions by identifying "a fundamental inconsistency in the contract in respect of the concept of each work order creating a separate contract versus the general contract provisions".[57] His reasoning focused on the various elements in cl 6.

82 The reasoning may be summarised (with some augmentation) in the following manner. First, if Annexure 4 cl (b) was to be given its apparent literal effect, no services were to be undertaken by the appellant except in response to separate work orders, each of which established a separate agreement. Nevertheless, cl 6.2(a) distinguished between work orders for category A and category B works. A payment claim was to be lodged for category A works within 5 business days after the completion of the relevant service, whereas for category B works the claim was to be lodged 5 business days after the last business day prior to the end of each calendar month for services rendered in that month. In each case, the statement was to be in a form showing "the part of the Fee claimed in relation to work orders worked on for that payment claim". The use of the plural, "work orders", was manifestly inconsistent with the conclusion that each work order required a single payment claim.

[57] Adjudication determination, par 5.4.12.

83 There are also provisions for set-offs (cl 6.4) and defect rectification (cl 4.4) in which no reference is made to the separate contracts by which the work must be undertaken in relation to each work order.

84 The term "Variation" in Annexure 1 to the subcontract is defined to mean "a change to the Services that is deemed to be outside the scope of the Services required to be performed under the agreement at the proposed time of change". The kinds of variation which might be anticipated might relate to the nature of the services generally, or the location at which they are to be performed, having regard to the list of premises contained in the agreement. It would be a perverse reading of that term to limit it to a variation of services which have already been requested under a work order.

85 As the adjudicator specifically pointed out, Annexure 4 cl (c)(ii), inconsistently with Annexure 4 cl (b), required that the subcontractor "must ensure that each work order is invoiced separately, but in accordance with cl 6 of this Agreement".[58] He continued:[59]

> "In contrast cl 6.2(a)(ii) of the subcontract contemplates a single monthly payment for Category B works, with the only requirement being that the work order numbers are identified in the payment claim. In this form, the work orders are no different to the typical payment claim which describes the work being claimed under the items of work."

86 The adjudicator noted the evidence of Ms Jasiulec (for Ventia) to the following effect:[60]

> "For Category B works under the Subcontract, Work Orders are issued to track the completion of the monthly services. The 'completion' of the Work Order as well as the underlying Service Record generated for the purposes of the Work Order is required for us to be able to see exactly which services have or have not been done. It is also critical to the program that the services are completed at the required points in time. If we did not issue a Work Order for these months, we have no ability to track these services each month."

The nature of the work order set out as an appendix to this judgment illustrates circumstances which conform to that description.

87 The adjudicator was prepared to accept that, for category A works, there might be separate contracts with respect to specific work orders which involved the

[58] Adjudication determination, par 5.4.21.
[59] Adjudication determination, par 5.4.22.
[60] Adjudication determination, par 5.4.24.

purchase (and possibly installation) of goods. However, as the payment claim before him related only to category B works, it was not necessary to determine the situation with respect to category A works. At least reading Annexure 4 cl (b) literally, such a distributive operation might not be tenable. However, it is not necessary for this Court to determine that question either.

Standing offers

88 In resisting this reasoning, the respondent sought to rely upon the distinction between "the mere quotation of a price and an offer to sell and deliver" goods and services, referring to the judgment of Barwick CJ in *Re Webster,*[61] a case involving the possible disqualification of a senator on the basis that he had a "direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth", contrary to s 44(v) of the Constitution. The respondent submitted that the arrangement in that case was analogous to that in the present case. Senator Webster's company having submitted a tender, it was a special condition of the contract that the Department was not bound to order "the whole of the quantities listed herein", but the successful tenderer was required to supply, in full, all orders placed during the currency of the contract. Barwick CJ held that there was "no standing agreement, each order [creating] a separate and distinct agreement".[62]

89 For a number of reasons, the assistance to be gained from *Re Webster* is limited. First, whilst a distinction drawn between a standing offer and the circumstances in which a legal contract results may be accepted, each case will turn upon the proper construction of the documentary material and the circumstances of the case.

90 Secondly, what constituted an "agreement" for the purposes of s 44(v) of the Constitution, and what may constitute a "construction contract" for the purposes of the Security of Payment Act, may well be quite different.

91 Thirdly, at least in so far as *Re Webster* concerned the proper construction and operation of s 44(v) of the Constitution, it is no longer good law. Each of the

[61] (1975) 132 CLR 270 at 282; [1975] HCA 22.
[62] Re Webster at 286.

separate judgments of the High Court in *Re Day [No 2]*[63] rejected the approach taken in *Re Webster* to the operation of s 44(v). The agreement in *Re Day [No 2]* was a lease taken by the Commonwealth over property owned by an entity associated with Mr Day, as a result of which rent was payable. There was no issue that the lease was a legal contract, rather the case concerned the interposition of a trust between the recipient of the payments and Mr Day. The Court held that he did not have to have a legal interest in the payments by the Commonwealth.

92 In those circumstances, there was no necessary consideration of the scope of the term "agreement" in s 44(v). However, the purpose underlying s 44(v) may well affect the understanding of the term "agreement" in that provision. Gageler J said of the section that "[a]t its core lie agreements for the procurement of services or property negotiated and entered into for or on behalf of the Commonwealth...".[64] As s 44(v) "looks to the personal financial circumstances of a parliamentarian and the possibility of conflict of duty and interest",[65] it may be that an agreement which is not legally enforceable against the Commonwealth but provides for benefits to a parliamentarian, or an entity associated with that person, would fall squarely within a provision, the purpose of which "is not limited to preventing executive influence upon a parliamentarian, but extends to preventing the influence of a member's private financial interests upon the discharge of his or her parliamentary functions".[66] As Keane J further noted, the animating concern may be that "the parliamentarian might seek to exert a corrupting influence on officers of the administration with whom he or she comes into contact".[67]

93 No doubt *Re Webster* exemplified the important principle that context and purpose may be critical in determining the meaning of statutory terms, although, as Gageler J warned in *Re Day [No 2]*, they properly inform that construction but do not take the place of the statutory language.[68] Further, it may be accepted that a party who is an accepted tenderer with respect to a

[63] (2017) 263 CLR 201; [2017] HCA 14.
[64] Re Day [No 2] at [106].
[65] Re Day [No 2] at [66] (Kiefel CJ, Bell and Edelman JJ).
[66] Re Day [No 2] at [167] (Keane J).
[67] Re Day [No 2] at [170].
[68] Re Day [No 2] at [100].

procurement arrangement may have no legally enforceable right to supply goods or services except in response to a specific request. None of that suggests that the provisions for progress payments in the Security of Payment Act are dependent upon a single contract under which construction services are provided or goods supplied. Rather, these examples support the conclusion that the basis of the entitlement to payment is a matter which will need to be considered by the adjudicator.

Conclusion – claim under one contract

94 In our view, the proper classification of the contract for the purposes of the Security of Payment Act requires a reading of its substantive provisions as a whole. To the extent that there is inconsistency, that inconsistency cannot be resolved by a statement of intention. What is uncontroversial is that there was a contractual agreement between the parties. The work orders may have been an integral part of some aspects of the contractual relationship, but, like many directions to persons undertaking work for another, they did not give rise to a separate contract each time a work order was issued, at least in respect of the Category B works.

95 It follows that, even if the requirement for one contract were a jurisdictional requirement for a valid payment claim, the respondent did not demonstrate that the payment claim in this case was not issued under the subcontract agreement to which it referred by number on its face. Grounds 3 and 4 should be upheld.

Orders

96 In the event of success, on the appeal, the appellant sought an order that the moneys which had been paid into court by the respondent, and then paid out again to the respondent upon its success in the Equity Division, should be "repaid to the appellant". In oral submissions, the appellant suggested that the appropriate order was a judgment in its favour for the amount of the adjudication determination, together with interest. The statutory process, however, provides for the issue of an adjudication certificate, which may be filed as a judgment for a debt in a court of competent jurisdiction and is enforceable accordingly: Security of Payment Act, s 25(1). The judgment

creditor (in this case the appellant) then has certain protections against attempts by the respondent to set aside such a judgment.

97 In the circumstances, the proper course is to set aside the judgment in the Equity Division so as to allow the appellant to complete the process available under the Security of Payment Act to enforce the adjudication determination. Although the entitlement under s 24(1) to an adjudication certificate turns on the failure of the respondent to pay the adjudicated amount within the 5 business days specified in s 23 of the Security of Payment Act, it is clear that that condition has been satisfied because the respondent did not pay the adjudicated amount "to the claimant" as required by s 23(2).

98 The money paid into court having been returned to Ventia, order 3 made in the Equity Division is now spent. The other 3 orders, namely order 1 (declaring the adjudication determination void), order 2 (quashing the adjudication determined) and order 4 (requiring that BSA pay Ventia's costs of the proceedings) should be set aside.

99 The Court makes the following orders:

(1) Allow the appeal from the judgment in the Equity Division given on 30 November 2021.

(2) Set aside orders 1, 2 and 4 entered on 30 November 2021.

(3) In lieu thereof order that:

(a) the proceedings in the Equity Division be dismissed, and

(b) the plaintiff (Ventia) pay the costs of the first defendant (BSA) in the Equity Division.

(4) Order that the first respondent (Ventia) pay the appellant's costs in this Court.

****