

Court of Appeal
Supreme Court
New South Wales

Case Name: Black Label Developments Pty Ltd v McMenemy

Medium Neutral Citation: [2025] NSWCA 114

Hearing Date(s): 14 April 2025

Date of Orders: 27 May 2025

Decision Date: 27 May 2025

Before: Bell CJ at [1];
McHugh JA at [2];
Griffiths AJA at [174].

Decision: (1) Grant leave to appeal with respect to proposed Grounds 2 and 4 in the amended draft notice of appeal.
(2) Direct the appellant to file a notice of appeal pursuant to the leave granted within seven days.
(3) Dismiss the appeal.
(4) Otherwise dismiss the summons for leave to appeal.
(5) The appellant pay the respondent's costs in this Court.

Catchwords: BUILDING AND CONSTRUCTION — Building and Construction Industry Security of Payment Act 1999 (NSW) — stay of execution of judgment obtained under s 25 of the Act pending determination of other proceedings — role of statutory policies in discretion to grant a stay of execution — where construction contract for consumer residential building work — where adjudicator did not determine aspects of principal's response to payment claim — where other proceedings involve issue of whether construction contract void or voidable — where primary judge found principal has strong prima facie case in other proceedings

Legislation Cited: Building and Construction Industry Security of Payment Act 1999 (NSW), ss 3, 4, 7, 8, 9, 10, 11, 13, 22, 25, 32,

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Civil Procedure Act 2005 (NSW), ss 67, 56, 58, 59, 60, 135

Contracts Review Act 1980 (NSW)

Competition and Consumer Act 2010 (Cth), Sch 2, ss 21, 22

Home Building Act 1989 (NSW), Sch 1, s 2

Building and Construction Industry Security of Payment Regulation 2008 (NSW) (repealed), reg 3A

Building and Construction Industry Security of Payment Regulation 2020 (NSW), reg 4

Cases Cited:

A-Civil Aust Pty Ltd v Ceerose Pty Ltd [2023] NSWCA 144

Alexander v Cambridge Credit Corporation Ltd (1985) 2 NSWLR 685

Bitannia Pty Ltd v Parkline Constructions Pty Ltd (2006) 67 NSWLR 9; [2006] NSWCA 238

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394

Greenwood Futures v DSD Builders (No 2) [2018] NSWSC 1471

Hakea Holdings Pty Ltd v Denham Constructions Pty Ltd; BaptistCare NSW & ACT v Denham Constructions Pty Ltd [2016] NSWSC 1120

House v The King [1936] HCA 40; (1936) 55 CLR 499

In the matter of the Will of F B Gilbert (dec) (1946) 46 SR (NSW) 318

In the matter of Webuildem Pty Limited [2012] NSWSC 708

Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66; [2008] HCA 42

Martinus Rail Pty Ltd v Qube RE Services (No. 2) [2025] NSWCA 49

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24

New South Wales Bar Association v Stevens (2003) 52 ATR 602; [2003] NSWCA 95

PPK Willoughby Pty Ltd v Baird [2019] NSWCA 48

Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4

RJ Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R

390; [2008] QCA 397
Shade Systems Pty Ltd v Probuild Constructions (Aust)
Pty Ltd [2018] NSWCA 33
TFM Epping Land Pty Ltd v Decon Australia Pty Ltd
[2020] NSWCA 118
Veolia Water Solutions & Technologies (Australia) Pty
Ltd v Kruger Engineering Australia Pty Ltd (No 3) [2007]
NSWSC 459

Texts Cited: Australian Government Department of Jobs and Small
Business, Review of Security of Payment Laws:
Building Trust and Harmony, (December 2017)
New South Wales Legislative Assembly, Parliamentary
Debates (Hansard), 8 September 1999

Category: Principal judgment

Parties: Black Label Developments Pty Ltd (Applicant)
Nicholas John McMenemy (Respondent)

Representation: Counsel:
M Christie SC; B Le Plastrier; S Powrie (Appellant)
S Robertson SC; C Hartcher (Respondent)

Solicitors:
Doyles Construction Lawyers (Appellant)
Legal Made Easy Pty Ltd (Respondent)

File Number(s): 2024/00415961

Publication Restriction: Nil.

Decision under appeal:

Court or Tribunal: District Court of New South Wales

Jurisdiction: Civil

Citation: Black Label Developments Pty Ltd v McMenemy [2024]
NSWDC 516

Date of Decision: 18 October 2024

Before: Judge G R Waugh SC

File Number(s): 2024/00250069

[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]

The respondent, Mr McMenemy, contracted with the appellant (**the Builder**) to renovate his family's home. On 7 September 2023, Mr McMenemy informed the Builder that his family needed to move back into the home on 22 September 2023. On 22 September, the Builder's principal, Mr Black, informed Mr McMenemy that moving into the house would not be permitted until a deed of variation (**the Deed**) was executed. Among other things, the Deed substantially increased the contract price. Mr McMenemy executed the Deed.

On or about 26 March 2024, the Builder served a payment claim on Mr McMenemy pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**) claiming moneys said to be owed under the contract as varied by the Deed. Mr McMenemy responded by submitting a payment schedule and the claim was subject to adjudication. The adjudicator made a determination that \$264,575.99 including GST was payable to the Builder. In the reasons for the adjudication, the adjudicator said, "In respect of the reasons provided by the Respondent, for example, duress and unconscionability, these are not the type of matters that I can make a determination on." The Builder filed an adjudication certificate in the District Court which, by reason of s 25(1) of the Act, resulted in a judgment in favour of the Builder against Mr McMenemy.

On 8 July 2024, Mr McMenemy and his wife, Ms Webster, commenced proceedings against the Builder, Mr Black and Mr Dane Melcum (the Builder's site supervisor) in the District Court of New South Wales (**the Other proceedings**). Their statement of claim alleges, among other things, that when

Mr McMenemy executed the Deed, he did so under duress and undue influence and by reason of the Builder's misleading or deceptive and unconscionable conduct. They seek relief including that the Deed be declared void or unenforceable pursuant to, *inter alia*, the Australian Consumer Law and the *Contracts Review Act 1980* (NSW).

On 2 September 2024, Mr McMenemy filed a notice of motion in the District Court seeking orders that execution of the s 25 judgment in favour of the Builder be stayed pending resolution of the parties' rights in the Other proceedings. The primary judge granted the stay on condition that Mr McMenemy pay into court the s 25 judgment sum. The Builder appealed, relying on the statement in **A-Civil Aust Pty Ltd v Ceerose Pty Ltd** [2023] NSWCA 144 at [21]: "the power [to stay] must be exercised in accordance with the policy of the Security of Payment Act".

The Court held (McHugh JA, Bell CJ and Griffiths AJA agreeing), granting leave to appeal in part and dismissing the appeal:

(1) The power to grant a stay in s 135 of the *Civil Procedure Act 2005* (NSW) is subject to other provisions of that Act and must be exercised judicially. The touchstone is what the interests of justice require in the circumstances of a particular case. The factors that may be taken into account are not otherwise confined: [1] (Bell CJ), [45]-[55] (McHugh JA), [174] (Griffiths AJA).

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24; *New South Wales Bar Association v Stevens* (2003) 52 ATR 602; [2003] NSWCA 95; *In the matter of Webuildem Pty Limited* [2012] NSWSC 708; *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685, considered.

(2) Where a stay is sought of a s 25 judgment, the statutory context in which the judgment comes into existence is often dispositive. That context includes the two policies of the Act identified in *A-Civil*: (i) to maintain the flow of money to the contractor, and (ii) as an interim measure, to place the risk of insolvency on the principal. However, these policies neither extinguish the court's power to grant a stay nor absolutely confine its exercise: [1] (Bell CJ), [60]-[74], [139]-[140] (McHugh JA), [174] (Griffiths AJA).

A-Civil Aust Pty Ltd v Ceerose Pty Ltd [2023] NSWCA 144; *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 118; *Brodyn Pty Ltd t/as*

Time Cost and Quality v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4; *Martinus Rail Pty Ltd v Qube RE Services (No. 2)* [2025] NSWCA 49; *Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australia Pty Ltd (No 3)* [2007] NSWSC 459; *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390; [2008] QCA 397; *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2018] NSWCA 33, considered.

(3) *A-Civil*, and the cases to which it referred were distinguishable. The facts here were singular. Mr McMenemy was seeking in the Other proceedings to have the Deed (on which the adjudication was based) declared void or unenforceable; the adjudicator had not considered those arguments; and Mr McMenemy was a consumer, not a commercial party: [1] (Bell CJ), [75]-[103], [141]-[142], [154]-[155] (McHugh JA), [174] (Griffiths AJA).

A-Civil Aust Pty Ltd v Ceerose Pty Ltd [2023] NSWCA 144, distinguished.

(4) The power to grant a stay of a s 25 judgment is not limited to cases where there would otherwise be irreparable harm rendering the party's rights nugatory, and consideration of the apparent strength of the principal's claim in the other proceeding is also not limited to such cases. It was open to the primary judge to take into account the view that he had formed on the material before him that Mr McMenemy had a strong prima facie case in the Other proceedings: [1] (Bell CJ), [104]-[122], [166]-[167] (McHugh JA), [174] (Griffiths AJA).

Bitannia Pty Ltd v Parkline Constructions Pty Ltd (2006) 67 NSWLR 9; [2006] NSWCA 238; *Hakea Holdings Pty Ltd v Denham Constructions Pty Ltd*; *BaptistCare NSW & ACT v Denham Constructions Pty Ltd* [2016] NSWSC 1120; *A-Civil Aust Pty Ltd v Ceerose Pty Ltd* [2023] NSWCA 144; *Martinus Rail Pty Ltd v Qube RE Services (No. 2)* [2025] NSWCA 49; *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2018] NSWCA 33; *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390; [2008] QCA 397, considered.

(5) It was open to the primary judge to point out that for the purposes of considering the balance of convenience, that the Builder was not relying on evidence of specific need for the money at that time. The absence of that evidence did not diminish the general force of the statutory policy to maintain the flow of money to the contractor; his Honour did not suggest otherwise: [1] (Bell CJ), [145]-[149] (McHugh JA), [174] (Griffiths AJA).

JUDGMENT

- 1 **BELL CJ:** I agree with McHugh JA.
- 2 **McHUGH JA:** The facts of this application for leave to appeal are singular. The application concerns a stay of execution granted by the primary judge, Waugh SC DCJ, of a money judgment in favour of the applicant (**the Builder**) arising by reason of the filing of an adjudication certificate pursuant to s 25 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**).
- 3 It is common ground that a s 25 judgment does not finally determine the parties' rights. The primary judge stayed the judgment pending determination of the parties' rights in proceedings commenced in the District Court of New South Wales by the respondent, Mr Nicholas McMenemy, and his wife, Ms Emily Webster, against the Builder (**the Other proceedings**). Those proceedings raise claims including for unconscionable conduct, duress and undue influence, and under the *Contracts Review Act 1980* (NSW).
- 4 Some of the applicant's proposed Grounds of appeal raise questions of principle, or at least of importance beyond this case. Leave to appeal should be granted with respect to those Grounds, but the appeal should be dismissed.

The dispute

- 5 The respondent, Mr McMenemy, is a homeowner, who contracted with the Builder to renovate the family home in Mosman he co-owned with Ms Webster.
- 6 The contract price was \$1,124,817.39, including GST. The contract was entered on or about 4 January 2023, using the Master Builders Association of NSW standard form Residential Building Contract, BC4, October 2021 (**the Contract**). It was common ground that the work undertaken was "residential building work" as defined in the *Home Building Act 1989* (NSW), Sch 1, s 2. Clause 14 of the Contract made detailed provision for variations, including that if the Builder agreed to undertake a variation, the variation was to be detailed in writing and signed by Mr McMenemy and the Builder (par (d)(i)), and requiring the Builder to notify Mr McMenemy in writing of the value of the variation within a reasonable time of receiving instructions to execute a variation (par (e)).

- 7 On Mr McMenemy's case, the parties agreed that Mr McMenemy and Ms Webster would source and supply certain materials that were within the contracted works for the home, including fixtures and fittings. The Builder was then to reimburse Mr McMenemy and Ms Webster for amounts they had paid to third parties for those materials.
- 8 Renovations commenced in late 2022 or early 2023. Mr McMenemy and his family planned to move back into their home on 22 September 2023. On 7 September 2023, Mr McMenemy sent an email to Mr Joel Black, who was the principal of the Builder, and to Mr Dane Melcum, who was the site supervisor employed by the Builder, which said as follows:

"Joel, Dane

Just wanted to let you know that the date when we need to move in is firm and set at 21st and 22nd September - and there is no slack to push that back.

I know you will both be as concerned as I am, about the tiler and the tightness of joinery install, and the flow on effects of stone and final plumbing fit off, but I wanted to let you know that we need to push to be in for that date as we have no further runway thereafter.

I recognise that we may not be entirely buttoned up outside, but we do need to get the interior elements complete and in a position so that we can inhabit the house.

Happy to discuss as I know we are all juggling a lot here

Nick"

- 9 That email plainly contemplated that the works would not be completed by 22 September 2023. It should be noted that cl 23(d) of the Contract provided: "The **Owner** is not entitled to take possession of the works nor receive the keys and/or any certificates until payment to the **Builder** of all monies payable under this Contract has been made." There is no suggestion that the parties' prior communications identified that as an impediment to what Mr McMenemy was proposing in his 7 September email.

The events of 22 September 2023

- 10 It is not the Court's function on an application for a stay of execution to make findings as to matters contested in an aid of which the stay is sought. Nevertheless, as will be seen, the strength of the party's case may be significant, and some primary facts, such as the sending or contents of documents, may not be disputed.

- 11 At 9:05 am on 22 September 2023, that is, the morning on which Mr McMenemy and his family were to move back into their home, Mr Melcum sent a text message to Mr McMenemy as follows:
- “Morning Nick
- Just wanted to check you have spoken to Joel about his email. I have a few trades here this morning tidying up a few things and just wanted to make sure everything is all good.”
- 12 At 9:12 am, Mr Black forwarded to Mr McMenemy an email which Mr Black had sent at 6:56 pm on 20 September 2023. The 20 September email had been sent to a different email address used by Mr McMenemy. Mr McMenemy gave evidence by affidavit that he had been unaware of that email before receiving Mr Melcum’s text message on 22 September. That is not improbable, given (a) the importance of the contents of the 20 September email; (b) the fact that Mr McMenemy did not respond to it; and (c) the fact that Mr Black forwarded a copy of it seven minutes after Mr McMenemy received Mr Melcum’s text message (which occurred in the disputed circumstances referred to below).
- 13 Mr McMenemy’s account is that at about 9:10 am on 22 September he called Mr Melcum, who told him to call Mr Black; and that he then called Mr Black, who said to him words to the effect, “I’ve sent you some documents that need to be sorted before you can move in”.
- 14 Mr Black and Mr Melcum made affidavits on the stay application in which each said, in identical words, “I deny all the verbal statements attributed to me by McMenemy and Webster in their respective affidavits.” Neither gave any account of what was in fact said in any conversation. In addition, Mr Black’s affidavit stated, “I reiterate that what I said in my verifying affidavit dated 5 August 2024 in District Court Proceedings No. 2024/00250069 remains true.” That was a reference to the defence filed on behalf of the Builder and Mr Black in the Other proceedings. It might be noted that paragraph 33 of the statement of claim in those proceedings pleaded and particularised the events and communications of 22 September 2023 over some nine pages. The defence made a bare denial of those allegations, which denial literally extends to the sending of the emails referred to below. But it was made clear in argument that the Builder does not dispute the sending of the written communications.

- 15 In any event, whatever was said, it is likely that there was some communication between Mr McMenemy on the one hand, and Mr Black and/or Mr Melcum on the other, after the text message at 9:05 am on 22 September which prompted Mr Black to forward his 20 September email at 9:12 am.
- 16 Among other things, the 20 September email forwarded at 9:12 am on 22 September 2023 attached a draft deed of variation which included the following.
- (1) Recital B stated that the contract value including variations was \$1,401,747.82 including GST.
 - (2) Recital C stated that the Owners had requested early possession on 22 September 2023 in circumstances where an amount of \$456,604.73 of the Contract remained unpaid.
 - (3) By cl 3.1, the Contract was amended as set out in Annexure A. The proposed amendments included the following matters.
 - (a) The parties agreed “to the following contract reconciliation of the Builder’s final rights and entitlements to payment under the Contract”, including that the contract price was adjusted to \$1,401,747.82; that the amount paid by Mr McMenemy to date was \$945,143.09; that an unpaid balance \$456,604.73 was to be paid as to \$174,817.39 prior to possession, and as to \$281,787.34 within 60 days of the date of the deed of variation.
 - (b) Mr McMenemy agreed that practical completion had been reached. (That may be contrasted with cl 22(f) of the Contract, which contemplated that practical completion would not be deemed to occur if Mr McMenemy took possession with the Builder’s consent in writing.)
 - (c) The Builder was entitled to interest on the outstanding balance at 15% per annum. (Which was the same as the rate in Sch 2, item 4(e) of the Contract; see cl 23(c).)
 - (d) Mr McMenemy charged in favour of the Builder “all right, title, estate and interest [of the Owners] in any real or personal property wherever situated” as security for their obligations under the deed of variation. (That may be contrasted with cl 31 of the Contract, which created a charge only upon the making of an order or judgment.)
- 17 By email at 10:09 am on 22 September 2023, Mr McMenemy responded to Mr Black. Mr McMenemy stated, among other things, “I am unable to verify the content of Recital B”, that is, the revised contract price of \$1.4 million. He said “It appears to be aligned with my recollection but I am unable to access

paperwork to appropriately confirm matters given I am in the midst of moving.”

He suggested various amendments including the following.

- (1) The amount “payable on occupation” “needs to be \$155K ... + an amount that both parties accept is payment upon review (see Point 5 below)”. However, Mr McMenemy also proposed that the \$155k would be “payable on practical completion and the owner confirms that such payment will be authorised for release of payment within 7 days of occupation”.
 - (2) Point 5 stated that both parties accepted that there had been variations to the scope of the Contract, and that the parties agreed to review all invoices and variations within 30 days; to enter a deed of variation which would “confirm the value of any outstanding amounts payable to Black Label Developments”; and that upon execution of that deed of variation, the Builder’s proposed amended cl 23(b) (which provided that Mr McMenemy would have 60 days to pay the unpaid balance) would be applicable.
 - (3) The charge, to which there was no objection in principle, should be re-drafted.
 - (4) The interest rate should be 12%.
- 18 The effect of Mr McMenemy’s proposed amendments was to reject the Builder’s proposed “contract reconciliation of the Builder’s final rights and entitlements to payment”, including the Builder’s figures for the adjusted contract price and the outstanding unpaid balance. Instead, Mr McMenemy was proposing a 30-day process of reviewing all invoices and variations before agreement could be reached. Mr McMenemy’s 10:09 am email nevertheless concluded with the words, “I will call to discuss — this is even handed in the main, my commentary is meant to just make sure there is no ambiguity or nothing really missed.”
- 19 Mr McMenemy deposes that shortly after he sent the email, he received a telephone call from Mr Black at about 10:30 am in which they spoke words to the following effect. Mr McMenemy says that he asked, “How can I sign the deed when I’m moving today?” and that he then said:
- “The only basis on which I could sign any paperwork is if both parties agree to sit down, review the invoices Black Label have incurred, and mutually agree on any monies to be paid, but also for Black Label to finish off the work they have committed to actually do”.
- 20 He says that Mr Black responded:

“If you don’t sign the deed, you will be destitute and I’ll change the locks. I will print out a copy and come over and you will sign it with Dane standing there. Until you sign the deed you cannot take possession of the property”.

- 21 Mr Black’s general denial referred to above of “all the verbal statements attributed to me” means that at least Mr Black’s side of that conversation was disputed. There was no separate denial of Mr McMenemy’s side of the conversation, but that is caught by Mr Black’s denial of par 33 of the statement of claim, which recounts that conversation at subpar 33(n). Although Mr Black did not give his own account of what was said, there is no doubt that he and Mr McMenemy had a conversation of some kind, in light of the email that Mr Black sent Mr McMenemy at 1:40 pm. The body of that email said as follows:

“Please find attached the revised deed as per our discussions.

The wording of the charging clause has been drafted applicable to remedies under the relevant property law.

Could you please execute and send back to me.

Noting that moving into the house is not permitted until this deed has been executed.”

- 22 At 1:41 pm, Mr McMenemy received a text message (apparently from Mr Black, although Mr McMenemy deposed that it was from Mr Melcum) which stated:

“Revised deed sent over. Please execute and send back so we can allow you to move in”.

- 23 Mr McMenemy deposes that when he arrived with his family at their home at about 2:00 pm, Mr Melcum handed him a copy of the deed of variation and a pen, and said words to the effect: “I know this is wrong, but you’ve got to sign this or you won’t be moving in. Joel does this”. Those words were disputed by way of Mr Melcum’s general denial of “all the verbal statements attributed to me”.

- 24 Mr McMenemy says as follows:

“Under this extreme pressure, of not being allowed to move back home, I was forced to execute the Deed of Variation, which was witnessed by Emily. Otherwise, we had no place to go, given we had planned to move back home that day (as Joel Black, Dane Melcum, and the [Builder] knew), and all of our goods were in removals vehicles waiting outside our family home.”

- 25 Mr McMenemy says that he did not have the benefit of legal advice.

- 26 The following matters may be noted about the executed deed of variation (the **Deed**).
- (1) Recital B continued to state that the contract value including variations was \$1,401,747.82 including GST.
 - (2) Recital C continued to state that the Owners had requested early possession on 22 September 2023 in circumstances where an amount of \$456,604.73 of the Contract remained unpaid.
 - (3) By the amendments in Annexure A, the parties continued to agree “to the following contract reconciliation of the Builder’s final rights and entitlements to payment under the Contract”, including that the contract price was adjusted to \$1,401,747.82, that the amount paid by Mr McMenemy to date was \$945,143.09, and that the unpaid balance was \$456,604.73. However, that balance was now to be paid as follows:
 - (a) \$155,000 was to be paid by 29 September 2023 (substantially as requested by Mr McMenemy);
 - (b) \$150,000 was to be paid within 90 days;
 - (c) the parties were “to negotiate the balance of \$151,604.73 in good faith within 30 days of possession and document any agreement in writing with both parties’ signature.” However, in the event that that negotiation failed, the effect of the Deed was that, at least on the Builder’s case, Mr McMenemy remained liable for the whole unpaid balance of \$456,604.73. (That was the position the Builder adopted in advancing the claim it submitted to adjudication, as will be seen.)
 - (4) Mr McMenemy continued to agree that practical completion had been reached.
 - (5) The Builder was entitled to interest on the outstanding balance at 12% per annum, as requested by Mr McMenemy.
 - (6) Mr McMenemy continued to charge in favour of the Builder “all right, title, estate and interest [of the Owners] in any real or personal property wherever situated” as security for their obligations under the Deed.
- 27 As will be seen, the primary judge formed the view that Mr McMenemy had a strong prima facie case that the Builder had engaged in at least unconscionable conduct with respect to the execution of the Deed. The following might be observed about the evidence that was before the primary judge with respect to the events of 22 September 2023, insofar as it provided a basis on which to form such a view.
- (1) It was not disputed that the Builder was aware that Mr McMenemy, Ms Webster and their family needed to move in on 22 September 2023 and were committed to doing so. The Builder had known that for at least

two weeks. But there is no evidence of any suggestion prior to, at the earliest, 6:56 pm on the evening of 20 September 2023, that the Builder was going to insist on its rights under cl 23(d) of the Contract to withhold possession until payment of all outstanding monies. Nor is there any suggestion before then that the Builder would require, as a condition of permitting Mr McMenemy and Ms Webster to move in on 22 September, that Mr McMenemy execute a deed of variation. Junior Counsel for the applicant acknowledged at the hearing in this Court that 20 September was the earliest date at which terms along the lines of what was proposed in the draft deed were raised with Mr McMenemy and Ms Webster: Tcpt, 14 April 2025, 43.41. On Mr McMenemy's account, which is not improbable for the reasons given above, (a) he had not been aware of the 20 September email until the morning of the 22nd, and (b) Mr Black must have known that when he insisted on execution prior to giving possession on the 22nd. But it would make little difference if the email had been received on the evening of the 20th in any event. Mr McMenemy had expressly said in his email of 7 September 2023 that he had "no further runway" to move in after the 22nd.

- (2) On its face, the Deed bound Mr McMenemy to the Builder's "reconciliation of the Builder's final rights and entitlements to payment under the Contract", including agreement as to a revised contract price, as to the amounts paid to date, and as to the outstanding balance. Mr McMenemy also agreed that practical completion had occurred and agreed to grant a charge in favour of the Builder to secure its entitlements under the amended contract.
 - (3) Whether or not Mr Black and Mr Melcum spoke the words attributed to them of which Mr McMenemy gave evidence, there is no doubt on the written record that the Builder's position was as stated in the email at 1:40 pm: "moving into the house *is not permitted* until this deed has been executed", and in the text message a minute later: "Please execute and send back so we can *allow you to move in*".
 - (4) As the primary judge said, "the builder has chosen not to contest the facts by putting on affidavits in reply setting out a different account of what happened"; instead, Mr Black and Mr Melcum "have merely denied the conversations." The Builder was not required to give a positive account of the conversations or to explain the written communications. But in the absence of explanation or any positive account, (a) the contemporaneous written communications were left to speak for themselves, and (b) the texts and emails lent considerable support to Mr McMenemy's account of the discussions on 22 September 2023.
- 28 It fell to the primary judge to form a view, to the extent he could on the material before him, about the strength of Mr McMenemy's case. Even putting to one side the disputed conversations, the documentary evidence provided a strong basis to infer that the Builder engaged in unconscionable conduct which was a cause of Mr McMenemy's entry into the Deed.

The adjudication and judgment debt

- 29 It appears to be common ground that Mr McMenemy and Ms Webster paid the Builder the sum of \$144,817.40 on or about 10 October 2023. When that figure is subtracted from the “Unpaid Balance” of \$456,604.73 identified in the Deed, the balance of the Builder’s claim was \$311,787.33.
- 30 On or about 26 March 2024, the Builder served on Mr McMenemy a payment claim (described as a “Final Progress Claim”) for \$311,787.33, pursuant to the Act. This payment claim identified the total value of the work completed as \$1,274,316.20 excluding GST, which corresponds with the figure of \$1,401,747.82 including GST in the Deed. On or about 10 April 2024, Mr McMenemy submitted a payment schedule responding to the claim.
- 31 The claim was subject to adjudication under the Act. On 21 May 2024, the adjudicator made a determination that \$264,575.99 including GST was payable to the Builder. The adjudicator’s determination was not in evidence, and the basis on which the adjudicator reduced the claimed figure of \$311,787.33 to \$264,575.99 is not explained. However, some of the adjudicator’s conclusions were extracted in the affidavit material. In the reasons for the determination, the adjudicator stated, “Having considered the terms of the Deed and that it has been executed by both parties, I consider the Deed forms part of the Contract between the parties ...”. As to the circumstances in which the Deed was executed, the adjudicator said: “In respect of the reasons provided by the Respondent, for example, duress and unconscionability, these are not the type of matters that I can make a determination on.”
- 32 The Builder filed an adjudication certificate in the District Court which, by reason of s 25(1) of the Act, resulted in judgment in favour of the Builder against Mr McMenemy in the sum of \$283,956.93 on 31 May 2024. (The difference between the judgment sum and the adjudicated figure ten days earlier was not explained.)
- 33 The Builder then took a number of steps to enforce the judgment on 7 June 2024. These included serving an examination notice; obtaining a garnishee order, which resulted in \$25,060.47 being paid from Mr McMenemy’s bank account to the Builder; and obtaining a writ for levy of property. According

to Mr McMenemy, on 20 June 2024 this resulted in a visit to Mr McMenemy and Ms Webster at their home by the Sheriff, who stated that the next step to satisfy the judgment debt would be the sale of the house at auction.

The Other proceedings

- 34 On 8 July 2024, Mr McMenemy and Ms Webster commenced the Other proceedings in the District Court against the Builder, Mr Black and Mr Melcum. These were referred to during the hearing as the “section 32 proceedings”, by reason of s 32 of the Act which provides as follows.

32 Effect of Part on civil proceedings

- (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract—
 - (a) may have under the contract, or
 - (b) may have under Part 2 in respect of the contract, or
 - (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
 - (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).
 - (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—
 - (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
 - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.
- 35 Section 34 prohibits contracting out of the Act. Section 32 is within Pt 3, which also includes s 25. By s 4(1), “**construction contract** means 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.” Pt 2 (ss 8 to 12A) concerns the rights to progress payments.
- 36 Among the claims made in the Other proceedings, Mr McMenemy and Ms Webster allege that they overpaid the Builder and seek restitution and damages. They allege incomplete or defective work, failure to certify the work, failure to supply or install items and failure to reimburse Mr McMenemy and Ms Webster for materials they supplied. Those are claims about rights which

clearly enough fall within ss 32(1)(a) and (2) as arising under the contract or “arrangement”.

- 37 However, it should be noted that s 32 assumes the existence of a construction contract (or at least an arrangement under which the builder undertakes to do work), and is concerned in terms with rights arising under the contract or arrangement. In this respect, the statement of claim in the Other proceedings makes certain claims which do not readily fit within s 32. That is because those claims are directed to establishing that the Deed was void or should be declared unenforceable. Those claims thus attack the premise from which the adjudication proceeded, that “the Deed forms part of the Contract between the parties”. Mr McMenemy and Ms Webster allege that when Mr McMenemy executed the Deed, he did so under duress and undue influence and by reason of the Builder’s misleading or deceptive and unconscionable conduct (either at general law or under statute).
- 38 As to unconscionable conduct, the statement of claim expressly relies on ss 21 and 22 of the Australian Consumer Law, *Competition and Consumer Act 2010* (Cth), Sch 2 (**ACL**). By s 22(1), the court may have regard to the following matters for the purpose of determining whether a person has contravened s 21, which prohibits unconscionable conduct in connection with the supply of goods and services: “(a) the relative strengths of the bargaining positions of the supplier and the customer”; “(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier”; “(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services”. Particulars of such matters are subscribed to par 123 of the statement of claim.
- 39 The relief Mr McMenemy and Ms Webster claim includes declarations that the Deed is void or unenforceable, including pursuant to the ACL and the *Contracts Review Act*. (Mr McMenemy and Ms Webster also seek an order that

the s 25 judgment be stayed or set aside, the basis for which was not explored in argument.)

- 40 The Builder cross-claims, seeking the sum of \$311,787.33 (less the amount of \$25,060.48 paid under the garnishee order) including GST. The Builder claims that the parties agreed to variations totalling \$251,755 plus GST, bringing the total value of the works performed to \$1,274,316.26 plus GST (which corresponds with the GST-inclusive figure in the Deed).

The application for a stay

- 41 On 2 September 2024, Mr McMenemy filed a notice of motion in the District Court seeking orders that the judgment and orders made in this proceeding (i.e., the judgment arising upon filing of the adjudication certificate) be stayed pending resolution of the Other proceedings. The notice of motion did not identify the power invoked.
- 42 On 18 October 2024 the primary judge granted the stay sought, on condition that Mr McMenemy pay into court the judgment sum (apparently together with accrued interest) less the amount recovered already by the Builder under the garnishee order, being \$258,974.46.
- 43 The discretionary matters his Honour took into account will be addressed below.
- 44 The Builder's argument at the hearing of the application for leave to appeal was not structured by reference to the draft grounds of appeal. Indeed, some aspects of the argument are capable of being connected to the draft grounds of appeal only remotely, if at all. In the circumstances, it is convenient to begin with some general considerations arising out of the matters argued.

The District Court's general power to stay execution

- 45 The primary judge referred to the powers conferred on the District Court by ss 67 and 135 of the *Civil Procedure Act 2005* (NSW).
- (1) Section 67 provides: "Subject to rules of court, the court may at any time and from time to time, by order, stay any proceedings before it, either permanently or until a specified day."
 - (2) Section 135(1) provides: "The court may, by order, give directions with respect to the enforcement of its judgments and orders." By subs (2)(b)

and (c), the court may make orders prohibiting the Sheriff from taking any further action on a writ or prohibiting any other person from taking any further action to enforce a judgment or order of the court.

- 46 It is not in dispute that at least the power in s 135 extends to staying the execution of a judgment of the District Court. The judgment that arose upon the filing of the adjudication certificate was such a judgment.
- 47 Section 135 confers discretionary power in unconfined terms. However, the power is subject to other provisions of the *Civil Procedure Act*. Thus, by s 56(1), the “overriding purpose of this Act ... is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.” By s 56(2), “The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act ... and when it interprets any provision of this Act ...”. By s 58(1)(a), in deciding whether to make any order or direction for the management of proceedings, including “(ii) any order granting an adjournment or stay of proceedings,” “the court must seek to act in accordance with the dictates of justice.” Other express provisions may also be relevant to the exercise of the power to stay execution of a judgment or order, for example s 59 (elimination of delay) and s 60 (proportionality of costs). It also follows from the subject-matter of the power and the repository upon which it is conferred that the power is to be exercised judicially.
- 48 Subject to those matters, in light of the otherwise unconfined terms in which the power to stay execution is conferred, the factors that may be taken into account in the exercise of the power are similarly unconfined, except insofar as there may be found in the subject-matter, scope and purpose of the statute conferring the power, some implied limitation: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 40 per Mason J.
- 49 As Spigelman CJ said in *New South Wales Bar Association v Stevens* (2003) 52 ATR 602; [2003] NSWCA 95 at [83] (Meagher and Sheller JJA agreeing): “The overriding principle to apply when determining an application for a stay is to ask what the interests of justice require.” At [84], his Honour quoted *Ex parte Farren; Re Austin* (1960) 77 WN(NSW) 743 at 744 per Macfarlan J: “the power extends to whatever may be necessary to prevent any injustice occurring with respect to matters which come within its cognizance”.

- 50 The factors that may be taken into account in exercise of the power to stay execution pursuant to s 135 are not otherwise confined. That is to say, beyond the matters referred to above, the subject-matter, scope and purpose of the *Civil Procedure Act* do not prohibit or require the consideration of any particular factor. The touchstone is the dictates of justice in the particular case. As Black J said in *In the matter of Webuildem Pty Limited* [2012] NSWSC 708 at [13]:

“... The Court’s power to grant a stay under s 135 of the *Civil Procedure Act* is exercisable where the interests of justice so demand; the person seeking a stay must satisfy the Court that the requirements of justice require one; and the Court has a wide discretion whether to grant a stay and whether terms should be imposed on the grant of such a stay: *Joskovitz v Bonnick* [1964] VR 654 at 656; *Tringali v Stewardson Stubbs & Collett Pty Ltd* [1966] 1 NSWLR 354 at 360-361; *Victorian Securities Corporation Ltd v Icehot Pty Ltd (recs and mgrs apptd)* [2010] NSWSC 1413 at [9].”

- 51 Thus it was said in the well-known passage in *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 694E, in the analogous but not identical context of a stay of execution of a judgment pending appeal:

“In our opinion it is not necessary for the grant of a stay that special or exceptional circumstances should be made out. It is sufficient that the applicant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour.”

- 52 The matters bearing on the consideration of what justice demands, and so on the discretion to grant a stay of execution, will vary depending on the nature and circumstances of the case. For example, in *Stevens*, in the context of an appeal against a decision by the Bar Council to cancel the respondent’s practising certificate, Spigelman CJ held at [108] that the exercise of the Court’s power to stay must give significant weight to the protection of the public.

- 53 Cases arising in a particular area will often involve at least some considerations similar to those in other cases in that area, and in such cases the weight to be given in the exercise of the discretion to a given factor may also be similar. But the weight to be given to any particular factor may vary substantially, depending on the nature or circumstances of the case. Generally speaking, and subject to the well-established principles by which discretionary decisions may be reviewed on appeal, the weight to be given to relevant

factors is a matter for the judge exercising the discretion: *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 at [138].

- 54 Where a stay of execution of a judgment or order is sought pending the determination of another proceeding, a conventional approach to the exercise of the discretion is to determine whether the party has shown a prima facie case with respect to the other proceeding, and then to address the balance of convenience or, as it is sometimes called, the balance of risks. That exercise turns on the particular circumstances of the case, for the reasons given above.
- 55 A stay of execution may also be granted on conditions as appropriate having regard to the justice of the case. These might include, for example, payment of the judgment debt into court, or an undertaking to prosecute the other proceeding with expedition.

A-Civil Aust Pty Ltd v Ceerose Pty Ltd

- 56 The Act itself does not make specific provision with respect to the availability or otherwise of a stay of execution of the judgment that arises pursuant to s 25(1) of the Act by reason of filing an adjudication certificate. However, that section provides: "An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is *enforceable accordingly*." (Emphasis supplied.) Those words make clear that the judgment is subject to the court's ordinary powers with respect to the enforcement of judgments and orders, including the general power to stay execution.
- 57 As noted above, the matters bearing on an assessment of the dictates of justice, and so on the discretion to grant a stay of execution, depend on the nature and circumstances of the case. The statutory context in which a s 25 judgment comes into existence is highly material to assessing the dictates of justice in the exercise of that power, and often dispositive in the exercise of discretion.
- 58 However, the Builder went further, making a submission that would appear to confine the power itself. The Builder relied heavily on the following statement in *A-Civil Aust Pty Ltd v Ceerose Pty Ltd* [2023] NSWCA 144 at [21]:

“Where money is paid into Court under s 25(4) at the commencement of a case seeking to set aside a determination for jurisdictional error, the court has power to stay the payment out of money to the claimant under the determination pending resolution of the respondent’s judicial review proceedings. There is also power to grant an injunction or stay pending final resolution of contractual proceedings contemplated by s 32. However, in both cases the power must be exercised in accordance with the policy of the Security of Payment Act. In both cases a stay or interlocutory injunction will impinge on the two statutory policies, namely, (i) to maintain the flow of money to the subcontractor, and (ii) as an interim measure, to place the risk of insolvency on the principal.”

- 59 Given the emphasis the Builder placed on that passage and others in *A-Civil*, several observations should be made about them.

The Act does not confine the power to stay execution

- 60 First, the Builder particularly relied on the words, “the power *must* be exercised *in accordance with* the policy of the Security of Payment Act”. The Builder submits that the court is prohibited from “imping[ing]” upon the policies of the Act when exercising its discretion to grant a stay of execution, save in cases of fraud or egregious conduct. The near-absolute character of that proposition should be rejected. To the extent that a stay of execution of a s 25 judgment will impinge upon the policy of the Act, that is a matter to be given proper weight in the exercise of the discretion. That consideration will often be determinative in the circumstances of a particular case. But it is not universally prohibitive.
- 61 To the extent that the Builder’s submission is that the court lacks power to grant any stay of execution that would “impinge” on either of the two identified policies, it should be rejected. To the extent that the submission is that the court retains power to grant a stay, but is not permitted to exercise it (i.e., is bound in law to exercise its discretion to refuse a stay) whenever the stay would impinge upon the two identified policies, it would appear to amount to the same thing; in any event, it should be rejected.
- 62 As noted above, s 25(1) makes clear that the judgment is subject to the same powers of the court as any other judgment. That being so, the words “must be exercised in accordance with” in *A-Civil* refer to the need to consider and give proper weight to those policies in assessing the dictates of justice for the

purposes of exercising the discretion to grant a stay of execution of a s 25 judgment.

- 63 That the policies of the Act will generally be matters of great weight in the exercise of the court's discretion to grant a stay, but neither extinguish the court's power to do so nor absolutely confine its exercise, is consistent with the approach described in ***TFM Epping Land Pty Ltd v Decon Australia Pty Ltd*** [2020] NSWCA 118. This Court emphasised the "basal purpose of the Act ... to create a speedy determination *pro tem* to ensure that progress claims are dealt with and paid promptly": at [78]. The Court went on to say the following at [87]:

"None of the foregoing detracts from the principles applied by the primary judge that permit a stay of execution to be granted, no differently from the fact that a stay of execution may in an appropriate case be granted in respect of any other judgment. We respectfully agree with N Adams J, in a sentence immediately preceding a passage from her judgment in *Bellerive Homes Pty Ltd v FW Projects Pty Ltd* [[2018] NSWSC 1435] reproduced in the Developers' written submissions:

'A stay will generally be less readily available in relation to judgments entered following an adjudication under the SOP Act than in relation to appeals arising from curial proceedings.'

- 64 That passage was quoted with approval, as part of a longer extract from *TFM Epping Land*, at [28] of *A-Civil*. The quotation was introduced by the words, "The caution which the power to grant interlocutory relief should properly attract was recently emphasised by this Court in *TFM Epping Land*". The language of "caution" is directed to the proper approach to the exercise of the power, rather than suggesting that there is a limitation on the power itself. To similar effect was the conclusion expressed at the end of that part of the reasons in *A-Civil*, at [31]:

"These matters lend weight to the conclusion that there is a *heavy burden* on a party who seeks injunctive relief or a stay pending the outcome of proceedings contemplated by s 32 on the basis that a payment may become unrecoverable due to the possible or even likely insolvency of the payee at a later date. *Considerable caution* should attend the grant of such an injunction or a stay, as to do so *may detract* from the primary purpose of the Act."

(Emphasis supplied.)

- 65 That the policies of the Act do not extinguish or absolutely confine the exercise of the court's power to grant a stay of execution, but instead affect the application of the general principles concerning the exercise of the power in

particular cases to which those policies are relevant, is consistent with the two sentences of *A-Civil* at [22] that immediately follow the paragraph on which the Builder relies:

“The *application* of the *general principles* governing the grant of interlocutory relief, including determining whether there is a serious question to be tried and where the balance of convenience lies, will be constrained by the need to give effect to these statutory policies. Further, the principles will require *separate application in each case*. For example ...”

(Emphasis supplied.)

- 66 That approach is consistent with authority in this Court now going back two decades. It was said in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [85] per Hodgson JA (Mason P and Giles JA agreeing) that a court in which judgment for recovery of money had been given under s 25 of the Act could stay execution of the judgment, but that “the policy of the Act that progress payments be made would be a discretionary factor weighing against such relief.” It is clear from the potential “discretionary factors in favour of a stay of execution” in that case which Hodgson JA canvassed at [86] that the general principles governing the discretion remained applicable. It was in that context that his Honour acknowledged at [87] that the intention of the legislature that progress payments be made with a minimum of delay and court involvement “could militate strongly against the granting of such a stay.”
- 67 That conclusion is not inconsistent with *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4. It was held in *Probuild* that the Act “has the effect that the Supreme Court does not have jurisdiction enabling it to quash an adjudicator’s determination for error of law on the face of the record”: at [53] per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ. At [52], their Honours noted that “[t]his understanding of the scheme of the [Act] accords with the earlier decision of the Court of Appeal ... in *Brodyn Pty Ltd v Davenport*”. Their Honours pointed out that the Act had twice been amended since *Brodyn* and that no amendment had been made to alter the effect of the decision.

The two policies

68 In the passage in *A-Civil* at [21] quoted above, the Court identified two statutory policies: “(i) to maintain the flow of money to the [contractor], and (ii) as an interim measure, to place the risk of insolvency on the principal.”

69 The first policy concerns the mischief to which the Act was directed, namely, that developers and head contractors were withholding cashflow from their contractors and subcontractors. It is often said that cashflow is the lifeblood of the construction industry. As the Minister, Mr lemma, said in the Second Reading Speech for the Act in its original form:

“With regard to the background to this bill I remind the House that on 15 February the Premier announced the Government’s intention to stamp out the un-Australian practice of not paying contractors for work they undertake on construction. It is all too frequently the case that small subcontractors, such as bricklayers, carpenters, electricians and plumbers, do not get paid for their work. Many of them cannot survive financially when that occurs, with severe consequences to themselves and their families.

The Government is determined to rid the construction industry of such totally unacceptable practices. ...”

(New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 8 September 1999 at 103.)

70 Any stay of execution of a s 25 judgment will “impinge” upon the statutory policy of maintaining the flow of money to the contractor. Yet there is no doubt that execution of such a judgment may be stayed. It is uncontroversial that giving proper weight to the first policy in the exercise of the discretion requires the court to be cautious about granting a stay. But, whereas the policy of the Act of maintaining the flow of money to the contractor applies generally, the balance of convenience is concerned with the circumstances of the particular case. To adapt Spigelman CJ’s language at [114] of *Stevens*, a general policy (such as maintaining the flow of money to the contractor) on the one hand, and the particular matters going to the risk of prejudice to the principal on the other, “are not measurable on the same scale, although they are both entitled to weight”. The existence of the first policy does not, for example, authorise the court to assume in the balance of convenience that the contractor will not survive if the adjudicated payment is withheld or delayed.

71 The second policy plays a somewhat more direct role in the balance of convenience. For the purposes of determining whether to grant a stay of

execution of a s 25 judgment, the dictates of justice are to be assessed on the basis that the policy of the very Act that resulted in the judgment is to assign the risk of insolvency, on an interim basis, to the principal. That consideration will diminish, and may practically eliminate, the weight to be given in the exercise of the discretion in any given case to the risk of the contractor's insolvency. Thus it has been said that "a mere risk of insolvency is ordinarily insufficient to justify a stay", as is a "significant doubt" about the ability to meet a future judgment or award: **Martinus Rail Pty Ltd v Qube RE Services (No. 2)** [2025] NSWCA 49 at [300], [303] per Payne JA (Gleeson JA and Griffiths AJA agreeing).

- 72 It should also be noted that, in any event, not every stay of execution will impinge upon the second policy as formulated in *A-Civil*. The word "interim" acknowledges that in at least some cases it would not be inconsistent with the policy of the Act to grant a stay. An example is "where the failure to do so would have the practical effect of making permanent that which, clearly enough, the legislature intended to be only interim": **Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australia Pty Ltd (No 3)** [2007] NSWSC 459: at [75] per McDougall J, quoted with approval in *TFM Epping Land* at [72]. To grant a stay on the ground of actual or imminent insolvency would not be inconsistent with the policy of the Act. Thus it was recognised in *A-Civil* at [26] that "[w]here it is certain that the principal will suffer irreparable prejudice, it would generally be a proper exercise of the Court's discretion to grant a stay."
- 73 A similar point may be made about the formulation used in *Martinus* at [303] per Payne JA (Gleeson JA and Griffiths AJA agreeing): "The statutory policy of the SOP Act is that a contractor has a right to immediate cash flow, to be used in the ordinary course of business, despite the risk that a future award (or judgment) may not be satisfied." The reference to the ordinary course of business acknowledges that it would not be inconsistent with the policy of the Act to grant a stay on the ground that there was a risk (but not the certainty) of dissipation of assets other than in the ordinary course of business. Nor would it be inconsistent with the policy of the Act to grant a stay where there was evidence that the persons in control of the contractor had a history of

“phoenixing” companies so as to avoid meeting their liabilities in the ordinary course of business (as in **Greenwood Futures v DSD Builders (No 2)** [2018] NSWSC 1471 at [13]-[15], [17], [21] per McDougall J).

- 74 When considering the role of statutory policy in determining the dictates of justice, it should be remembered that the Act contains no statutory command as to the proper approach to granting a stay. Statements identifying and giving effect to the statutory policy in the exercise of the discretion to stay a s 25 judgment will be made at some level of abstraction. The resulting formulations of the policy should not be treated as though they were themselves statutory commands directed to the exercise of the power to stay execution.

The significance of the statutory policies is predicated on several assumptions

- 75 A related point is that statements about the exercise of a general judicial discretion must be approached with a consciousness of the context in which the statements were made. Courts are not legislatures. Judgments are not statutes. Judicial power is exercised in the context of particular disputes. Statements in judgments will often, and perhaps usually, involve unstated assumptions which were uncontroversial in the circumstances of the particular case. Often the same assumptions may safely be made in other cases in the same area. But not always.
- 76 That being so, a further matter to be noted about the statement on which the Builder relies at [21] of *A-Civil* concerns assumptions that stand behind the significance given to the two statutory policies in the exercise of the discretion to grant a stay of execution.

The assumption that the work was done pursuant to a contract or arrangement

- 77 By s 3(1), the object of the Act is “to ensure that any person who undertakes to carry out construction work ... *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” (emphasis supplied). That is the root of the first of the two policies identified in *A-Civil*. But the words “under a construction contract” are important. As noted above, by s 4(1), “**construction contract**” means 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.”

- 78 The existence of such a contract or arrangement is central to the operation of the Act. It is the foundational assumption upon which the policies of the Act are erected. By s 7(1), subject to that section, the Act “applies to any construction contract, whether written or oral”. By s 8(1), “A person who, under a construction contract, has undertaken to carry out construction work or to supply related goods and services is entitled to receive a progress payment.” (Section 3(2) makes clear that there is a statutory entitlement to progress payments, whether or not the contract provides for progress payments.) By s 9, the amount of the progress payment is to be either the amount “calculated in accordance with the terms of the contract” or (if the contract makes no provision) the amount calculated on the basis of the value of the work carried out “under the contract”. By s 10(1), the work is to be valued in accordance with the terms of the contract or (if the contract makes no provision) having regard to the contract price, the contract rates, any variation agreed by the parties to the contract, and the estimated costs of rectifying any defect. By s 11(1), subject to that section and any other law, a progress payment is payable in accordance with the applicable terms of the contract. By s 13(1), a payment claim under the Act is to be served upon the person who, under the construction contract, is or may be liable to make the payment. By s 22(2)(b), in determining an adjudication application, the adjudicator is to consider “the provisions of the construction contract from which the application arose”.
- 79 It follows that, to the extent that the policy of the Act is “to maintain the flow of money to the subcontractor” or contractor, that policy proceeds from the premise, which permeates the Act, that the work for which a payment claim is submitted was done under a contract (or at least an “arrangement” under which the builder “undertakes” to do the work). So much was acknowledged in *Probuild* where it was said that “[t]he statutory entitlement is predicated upon the existence of a construction contract”: at [38].
- 80 That may be a matter of some significance to the exercise of the discretion to grant a stay in the present case. Here, Mr McMenemy’s case is that the Deed

is void, or at least that it should be declared unenforceable. If Mr McMenemy is right, the premise from which the policy of the Act proceeds does not apply. There is no suggestion that, if the Deed were void or otherwise unenforceable as a contract, its terms represented the “arrangement under which [the Builder] under[took] to carry out construction work”.

The assumption that there has been an interim assessment of the principal’s answer to the claim

81 Another assumption standing behind the significance given to the policies of the Act when determining the dictates of justice for the purposes of the discretion to grant a stay of execution in cases involving s 25 judgments is that the adjudication itself has given interim consideration, however rough and ready, to the merits of the principal’s answer to the progress claim.

82 In *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390; [2008] QCA 397, Keane JA said at [42] (Fraser JA and Fryberg J agreeing):

“While addressing considerations relevant to the exercise of the discretion to order a stay, one may also mention the consideration that the adjudication of Neller’s claim resulted in a favourable outcome for Neller. While this adjudication is provisional, and, indeed, may ultimately be held to be devoid of legal effect, *it is not irrelevant that an independent and expert arbiter has assessed the merits* of the building dispute between the parties and concluded that the merits of that dispute lie very much in Neller’s favour. *This is a consideration* which tends to lessen the weight to be accorded to the concern that Ainsworth might be deprived of the fruits of ultimate vindication by the refusal of a stay.”

(Emphasis supplied.)

83 McDougall J had made a similar point in *Veolia* at [74], in a passage this Court quoted in *TFM Epping Land* at [72]. McDougall J emphasised that an adjudication under the Act involved:

“*an examination*, admittedly of an abbreviated and sometimes rough and ready way, of the *competing claims*. ... [T]he legislature has said that *disputes* as to progress payments are to be *determined* in the first instance through the mechanism provided in the [Act]. That mechanism allows *an examination* not only of the payment claim but also of the payment schedule, in which (one might expect) the respondent ordinarily would set out *all reasons* why, it says, the claimant is not entitled to be paid.”

(Emphasis supplied.)

- 84 The assumption that there has been an interim consideration of the merits is wrapped up in the formulation of the second of the policies identified in *A-Civil*: “(ii) as an *interim* measure, to place the risk of insolvency on the principal”.
- 85 Here, part of the answer to the progress claim given in the principal’s payment schedule and adjudication response involved matters that the adjudicator considered beyond the scope of the adjudicator’s function to determine: see 31 above [Ref198542585](#). The correctness of that conclusion was not in issue on the appeal. But it follows that there has been no interim determination of the merits of those particular aspects of the principal’s answer to the payment claim. Again, that may be a matter of significance to the exercise of the discretion to grant a stay of execution, especially where the Court is satisfied that there is a strong *prima facie* case in respect of those matters.

The assumption that the principal is a commercial party

- 86 A further assumption standing behind the significance given to the policies of the Act when considering the dictates of justice for the purposes of the discretion to grant a stay of execution in cases involving s 25 judgments has been that the construction contract was between commercial parties.
- 87 Section 7(2)(b) of the Act as originally conceived provided:
- (2) This Act does not apply to:
 - ...
 - (b) a construction contract for the carrying out of residential building work (within the meaning of the *Home Building Act 1989*) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in, or
 - ...
- 88 The exemption from the application of the Act was clearly enough directed to ensuring that ordinary homeowners — consumers — were not exposed to the various risks which the security of payment regime imposed on principals. In any event that was the exemption’s effect. Those risks included not only the risk that the contractor might not be able to meet any successful s 32 judgment, but also the tight timetables for responding to a claim.
- 89 The exemption remained in the Act until 21 October 2019, the effective date on which s 7(2)(b) was repealed. However, the exemption was continued by

regulation. Section 7(5) provides: “This Act does not apply to any construction contract, or class of construction contracts, prescribed by the regulations for the purposes of this section.” Regulation 3A of the Building and Construction Industry Security of Payment Regulation 2008 (NSW), which also came into force on 21 October 2019, provided: “For the purposes of section 7(5) of the Act, owner occupier construction contracts are prescribed as a class of construction contracts to which the Act does not apply.” Section 4 of the Act also introduced a new definition of “**owner occupier construction contract**” as meaning “a construction contract for the carrying out of residential building work within the meaning of the *Home Building Act 1989* on such part of any premises as the party for whom the work is carried out resides or proposes to reside in.”

- 90 Substantially the same exemption was carried over as reg 4 of the Building and Construction Industry Security of Payment Regulation 2020 (NSW). But on 1 March 2021, reg 4 was repealed. The exemption ceased to exist.
- 91 That occurred following the December 2017 Review of Security of Payment Laws conducted for the Australian Government’s Department of Jobs and Small Business by J Murray AM. The Murray Review noted that the legislative regimes in New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory did not enable builders who carry out construction work in the residential sector to make a statutory payment claim against an owner-occupier, even though subcontractors who carry out work on the same project make such claims against the builder: Australian Government Department of Jobs and Small Business, *Review of Security of Payment Laws: Building Trust and Harmony* (December 2017) at 124. The Murray Review also noted that some governments had been reluctant to extend the operation of the security of payment legislation to enable claims to be made against “mum-and-dad” owner-occupiers. The Murray Review stated that a majority of “stakeholders” (which appear largely to have been industry associations, adjudicators and representatives of government) supported the extension of the adjudication system, although the responses from State and Territory regulators and officials had been mixed: at 124-125.

- 92 The author of the Murray Review expressed agreement with the position advanced by the Housing Industry Association and a majority of the Master Builders Associations that the scheme should be extended to construction contracts for residential owner-occupiers (at 125), which became Recommendation 12. The reason given was as follows (at 125-126):

“... residential builders (other than in Tasmania) are placed in an invidious position. There seems something inherently incongruous as to how a legislative scheme that has been designed to improve the payment practices within the industry will only permit one group of contractors to avail themselves of the benefits of the legislation, and yet on the same building project, another type of contractor would be deliberately shut out from the process. True, the relationship between a residential builder and a ‘mum-and-dad’ owner-occupier is of a different nature to that of a builder and subcontractor, but the fact remains that residential builders face similar cash flow issues to subcontractors when they do not receive prompt payment for building work carried out.

I accept that additional consumer protection safeguards will need to be built into the legislative scheme whenever a house builder makes a payment claim on a ‘mum and dad’ owner-occupier. ...”

- 93 The statement that “additional consumer protection safeguards [would] need to be built into the legislative scheme” was significant. It acknowledged a difference of kind: “the relationship between a residential builder and a ‘mum-and-dad’ owner-occupier is of a different nature to that of a builder and subcontractor”.
- 94 Recommendation 13 was to the effect that a payment claim served on an owner-occupier should include information as to how to reply to the claim and the time period within which to do so: at 126. However, provisions giving effect to Recommendation 13 were not included in the New South Wales legislation that extended the operation of the scheme to residential owner-occupiers. Nor was any other consumer protection mechanism introduced. The secondary materials relating to the New South Wales legislative history do not explain why that was so.
- 95 One final point should be noted about the scheme of the Act in this respect. The definition of “**owner occupier construction contract**” continues to have work to do. Since 21 October 2019, s 11(1C) has provided that a progress payment to be made under an “exempt residential construction contract” becomes due and payable on a different timetable from payments due under

other contracts. That timetable is potentially more favourable to the principal to the extent that the contract so provides (although the default period of 10 days is less favourable than the default periods of 20 and 15 days for other types of contracts). That provision remains in the Act, and the s 4 definition of an “**exempt residential construction contract**” continues to refer to an “owner occupier construction contract”. Thus, although consumer residential construction contracts are no longer “exempt” from the security of payment regime, they are nevertheless distinguished from other contracts.

- 96 It is not necessary to determine whether, in light of the amendments to the Act and the repeal of the relevant regulation, the Act should be taken to have the same operation with respect to the expanded universe of construction contracts to which it has applied since 2021 as it had before that date. The direct operation of the Act itself is not the question. The question is the significance of the policy of the Act when determining whether to stay execution of a judgment in light of the dictates of justice in the circumstances of the particular case.
- 97 For more than two decades, the cases in this State concerning the discretion to grant a stay of execution of a s 25 judgment were decided in the context of a security of payment regime which excluded consumer residential construction contracts. Instead, the regime was directed to contracts between, for example, developers and their builders, or between head contractors and their subcontractors. That was a commercial context.
- 98 Statements about the significance for the discretion of the statutory policy — in particular, the policy assigning the risk of insolvency to the principal — were made in that context. Thus, as Keane JA said in *Neller*, addressing the cognate provisions of the relevant Queensland legislation:

“[29] ... The evident concern of the legislature in excluding contracts between builders and *resident owners* from the scope of the BCIP Act is to ensure that *the ultimate consumers* of the goods and services provided by the building and construction industry should not be subject to a regime which, among other things, *imposes certain financial risks* upon building owners who are participants in that industry to the advantage of the builders who contract with them.

...

“[40] The BCIP Act proceeds on the assumption that the interruption of a builder’s cash flow may cause the financial failure of the builder before the rights and wrongs of claim and counterclaim between builder and owner can be finally determined by the courts. On that assumption, the BCIP Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder’s financial failure, and inability to repay, could be expected to eventuate. Accordingly, the risk that a builder might not be able to refund moneys ultimately found to be due to a *non-residential owner* after a successful action by the owner must, I think, be regarded as a risk which, as a *matter of policy in the commercial context in which the BCIP Act applies*, the legislature has, prima facie at least, assigned to the owner.”

(Emphasis supplied.)

- 99 Paragraph 40 of *Neller* was cited with approval in *Probuild* at [51], fn 79, as authority for the central proposition contained in the second of the policies identified in *A-Civil*, namely, that “[t]he risk that the party placed at an advantage by an underpayment or overpayment may later become incapable of meeting such an order is a risk that is assigned to the other party”.
- 100 At times, the commercial context in which the Act operated was expressly adverted to, as in *Neller*. Another example is ***Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd*** [2018] NSWCA 33. Immediately following the High Court’s decision in *Probuild*, the respondent in that unsuccessful appeal, Shade Systems, applied to have monies paid out of court that had earlier been paid in as a condition of the grant of a stay. The application came before Payne JA sitting as the referrals judge in this Court. After careful consideration at [26] of the aspects of the High Court’s decision relevant to the discretion his Honour was called upon to exercise, and after extensive reference at [27] to *Neller*, Payne JA concluded at [33]:
- “*Neller*, in the passage approved by the plurality in the High Court in this case, however, makes clear that the risk that Shade Systems might not be able to refund moneys ultimately found to be due to Probuild must be regarded as a risk which, as a matter of policy *in the commercial context* in which the *Security for Payments Act* applies, the legislature has, prima facie at least, assigned to Probuild.”
- (Emphasis supplied; see also at [36] referring again to “the commercial context” in which the Act applied.)
- 101 When the Act operates in that commercial context, the interests engaged are largely those of commercial parties who have contracted with one another in pursuit of commercial objectives. The risk of, for example, a counter-party’s insolvency is readily seen as a commercial risk. Given the nature of the

interests engaged, it is not difficult to see why the dictates of justice as between commercial parties might not require that judgment be stayed in order to protect one of them from exposure to a commercial risk which the policy of the statute allocates to it.

- 102 The position is more complex once the assumption that the principal is a commercial party is abandoned. As the Murray Review recognised, where the principals are consumers who have engaged a contractor to undertake residential construction work on their home, the relationship between the parties is of a different nature from that between builder and subcontractor. While the sophistication and bargaining power of a developer or head contractor may usually be expected to be at least the equal of those of their contractors or sub-contractors, the same is not necessarily true of the sophistication or bargaining power of the principal under a consumer residential construction contract.
- 103 The interests engaged where the principal is a consumer are also broader and different in kind from those involving commercial parties, such that the significance of the statutory policies may be different when considering the demands of justice in a particular case. For consumers of residential building services, the prospect that the contractor might take their money pursuant to an unfavourable adjudication of an excessive payment claim and then be unable to meet a s 32 judgment is not a mere commercial risk to be factored into the structure and conduct of a commercial relationship with another business. The fact that the subject-matter of the contract is their home may also complicate matters. Execution of a s 25 judgment may have catastrophic consequences. For example, where the principal is unable to meet a s 25 judgment debt, it might well be relevant to the dictates of justice and to the force to be given to the statutory policy of immediate cashflow that the Sheriff is threatening to sell the principal's home. That might particularly be so if the principal has a strong s 32 case.

The nature of the jurisdiction to grant a stay

- 104 Another matter arising out of the Builder's reliance on *A-Civil* for the submission that "the power must be exercised in accordance with the policy of

the [Act]” concerns the nature of the jurisdiction to grant a stay of execution.

The Builder made a submission by reference to the following statements in

Martinus at [303] per Payne JA (Gleeson JA and Griffiths AJA agreeing):

“The relevant jurisdiction engaged is the interlocutory power of the Court to prevent frustration of a future award (or judgment). The statutory policy of the SOP Act is that a contractor has a right to immediate cash flow, to be used in the ordinary course of business, despite the risk that a future award (or judgment) may not be satisfied. ... Once the nature of the jurisdiction invoked is properly identified, and the policy of the SOP Act clearly understood, it is clear that a ‘significant doubt’ about the ability to meet an award in the future is insufficient to award a stay.”

- 105 The submission was to the effect that the only situation in which it is permissible to exercise the power to grant a stay is to prevent frustration of a future award or judgment, that is, where there would otherwise be irreparable harm rendering a party’s rights nugatory.
- 106 That submission should be rejected. For the reasons given above, the power to grant a stay of execution is exercisable for the purpose of avoiding injustice in the particular case. It is not confined by the sole purpose of preventing frustration of a future judgment or order.
- 107 What Payne JA said in *Martinus* at [303] is to be read in context. His Honour held at [300] that there had been no *House v The King* ([1936] HCA 40; (1936) 55 CLR 499) error in the primary judge’s refusal of a stay. His Honour went on to explain why, even if a *House v The King* error had been established and he were called on to re-exercise the discretion, he would have refused a stay: at [301]. Payne JA’s statement at [303] of *Martinus* about the nature of the jurisdiction invoked was made in that context. It was directed to the particular argument advanced in support of the stay in that case. On the facts, his Honour concluded that in light of the policy of the Act, Qube had failed to show a “basis for concluding that there is a *sufficient risk* that Qube will be unable to recover from *Martinus* any amounts ordered to be paid as restitution following a final award”: at [302]; emphasis supplied. His Honour found that a “significant doubt” about *Martinus*’ ability to repay was “insufficient”: at [302], [303]. That was not a statement that the power to grant a stay of execution was only exercisable in order to prevent frustration of a future judgment or order, or

that the power was only engaged where there would otherwise be irreparable prejudice.

- 108 Drawing on the language in which the nature of the jurisdiction invoked in *Martinus* was described at [303], the Builder drew an analogy between the power to grant a stay of execution and the power underpinning freezing orders. For the reasons already given, the power to grant a stay of execution of a s 25 judgment is not confined by the purpose of preventing frustration of a future judgment or order in s 32 proceedings. However, to the extent that, in a particular case, the reasons in favour of a stay of execution may be analogous to those invoked when the Court makes a freezing order, it should be noted that a freezing order has a dramatic effect on what is otherwise the present right of the person against whom it is made to dispose of their property as they see fit. The personal freedom to do so is a fundamental policy of the common law. A freezing order undoubtedly “impinges” on that policy. But the fact that a freezing order interferes with the person’s present rights is a consideration going to weight in the exercise of the discretion, not to power. The same is true of the fact that a stay interferes with the contractor’s present right to be paid as a s 25 judgment creditor.

Strength of the case

- 109 Related to the Builder’s submission that a stay may be granted only in cases where there would otherwise be irreparable harm rendering the party’s rights nugatory was another strand of the Builder’s argument. This was to the effect that the strength of a principal’s case in any s 32 proceedings arises for consideration only where it is first shown that the principal will suffer irreparable prejudice (e.g., because of the contractor’s insolvency) if it succeeds in the s 32 proceedings. That submission should also be rejected.
- 110 An applicant seeking a stay of execution of any judgment pending the outcome of some other proceeding generally needs to show a prima facie case. Here, the Builder accepted that Mr McMenemy had made out a prima facie case: Tcpt, 14 April 2025, 43.9-10. However, Senior Counsel for Mr McMenemy conceded that where the judgment the subject of the application for a stay is a

s 25 judgment, the applicant will generally be required to show a “strong prima facie case”. Mr Robertson SC said (Tcpt, 14 April 2025, 56.42):

“We do accept, however, that in the absence of a strong prima facie case, it will ordinarily be very difficult to obtain a stay of this kind. Why? Because of the reason the [sic] fell from the Chief Justice. The stay will necessarily impinge on one of the statutory policies. So, in the face of that you need a pretty good reason to obtain a stay.”

- 111 The language of a “strong prima facie case” was traced to another decision of Hodgson JA, *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9; [2006] NSWCA 238 at [5], where his Honour referred to the discussion of the power to grant a stay in *Brodyn*.
- 112 In the present case, one reason for closely considering the strength of the claim in the Other proceedings is that, unusually, there had only been a partial examination of Mr McMenemy’s answer to the payment claim in the adjudication itself: see 31 above [Ref198546773](#). More generally, another reason why the strength of the principal’s claim may be significant in the discretion is that, whatever the nature of the prejudice the principal asserts, the extent of any prejudice may be in part a function of the strength of its claim in the other proceedings.
- 113 Paragraph [26] of *A-Civil*, on which the Builder relies, is consistent with the second of those reasons. As noted above, it was acknowledged at [26] that it would generally be proper to grant a stay where it is “certain that the principal will suffer irreparable prejudice”. It was then said that “the extent or certainty of the risk of prejudice must be closely examined in each case and will depend in part on the merit of the principal’s claim under the contract.” That was a statement that the strength of the principal’s case in any s 32 proceedings is to be taken into account in assessing the risk of prejudice. It was not a statement that the strength of the principal’s case is relevant only where it is first shown that the principal will suffer irreparable prejudice if that case succeeds.
- 114 Contrary to the approach for which the Builder contends, in *Neller*, Keane JA began his analysis at [19] with consideration of the party’s prospects. That analysis ran through to [36], where his Honour concluded: “I do not consider that the principal substantive argument ... can be said to enjoy such strong prospects of success as to displace the consideration that the evident intention

of the BCIP Act [is] that an adjudication should have effect unless and until an inconsistent decision is made by a court of competent jurisdiction.” It was only after that point that his Honour went on to consider the risk of the contractor’s insolvency.

115 In *Hakea Holdings Pty Ltd v Denham Constructions Pty Ltd; BaptistCare NSW & ACT v Denham Constructions Pty Ltd* [2016] NSWSC 1120 at [6], Ball J similarly identified the strength of the applicant’s claim as one of the “factors that the court will take into account in balancing the competing policies”. In the dispositive section of his Honour’s reasons at [61]-[62], the fact that “BaptistCare and Hakea both have strong cases that they do not owe the amounts that are the subject of the adjudication determinations under their respective contracts” was the first reason his Honour gave for deciding “to continue the orders preventing Denham from enforcing the adjudication determination and judgment it has obtained.”

116 Payne JA considered *Hakea* when deciding the application to have monies paid out of court in *Shade Systems*: at [28]-[30]. Notably, his Honour did not disagree with Ball J’s statement in *Hakea* that the strength of the applicant’s claim was a relevant factor. To the contrary, his Honour proceeded on the basis that the strength of the claim was a factor, but one that he considered was neutral on the material before him: at [29].

117 In the result, the strength of a principal’s claim in any s 32 proceedings may well be a significant matter in the exercise of the discretion to grant a stay of execution of a s 25 judgment, whether or not it is first shown that the principal will suffer irreparable prejudice if that case succeeds.

118 The Builder also submitted that the mere existence of a strong prima facie case would be insufficient, without more, to justify a stay of execution of a s 25 judgment. Those submissions were not tied to any draft ground of appeal. This is in any event not the case in which to address those submissions. As will be seen below, the primary judge’s decision was based on a range of matters.

The risk of insolvency

119 A final strand of the Builder’s argument based on *A-Civil* and *Martinus* is that, at least where there is concern that the contractor may not be able to meet a

final judgment, the power to stay execution may only be exercised in cases of actual (or perhaps imminent) insolvency. As noted above, actual insolvency would be a reason for granting a stay that was not inconsistent with the Act. But that is not the only situation in which the power to stay execution of a s 25 judgment may be properly exercised. Instead, the exercise of the discretion requires the court to consider and weigh all relevant factors.

- 120 Indeed, in *Martinus* itself, where the primary judge had refused a stay, Payne JA said the following at [300] in explaining that there had been no *House v The King* error:

“His Honour correctly identified the relevant legal principles and appreciated that a balancing exercise was called for. In that balancing exercise, it was permissible to consider whether final rights would be frustrated, as his Honour did. The primary judge *did not find that a stay was available only when insolvency has been demonstrated*. It is clear that a mere risk of insolvency is ordinarily insufficient to justify a stay. No *House v The King* error was shown.”

(Emphasis supplied.)

- 121 It should also be noted that the risk, short of certainty, that the contractor will be unable to meet a judgment in s 32 proceedings may be a factor joined with others in the exercise of the discretion. So much is clear from the decision in *Neller* where, immediately after the paragraph cited in *Probuild*, Keane JA said at [41]:

“The *mere existence* of the very kind of risk on which the provisions of the BCIP Act in favour of the builder are predicated would not ordinarily be sufficient of itself to justify a stay of an execution warrant based on the registration of a certificate of adjudication. There may, of course, be other circumstances, which, *together with this risk*, justify the staying of a warrant of execution based on the registration of an adjudication certificate. For example, the builder may have engaged in *tactics calculated to delay* the ultimate determination of the rights and liabilities of the parties so as unfairly to increase the owner’s exposure to the risk of the builder’s insolvency. Or the builder may have *restructured its financial affairs* after the making of the building contract so as to increase the risk to the owner of the possible inability of the builder to meet its liabilities to the owner when they are ultimately declared by the courts. In this case there are no such circumstances.”

(Emphasis supplied.)

- 122 The Builder itself acknowledged that where the evidence disclosed a history of egregious conduct, such as “phoenixing” companies (as in *Greenwood Futures*), that would be a relevant consideration in the exercise of the discretion to grant a stay of execution: Tcpt, 14 April 2025, 6.50-7.16; 80.50-

81.2. Yet, to stay execution on that basis would still infringe, at least, the cashflow policy of the Act.

The primary judge's exercise of discretion

- 123 The primary judge was well aware of the policies of the Act, and referred to them at a number of points in the context of quoting from leading judgments, including *TFM Epping Land*. For example, at J[72]-[73], his Honour plainly accepted the Builder's submissions as to the existence of the two policies (at J[72]: "The policy of the Act is to ensure the builder is paid promptly and requires or allows the parties to argue about it later"; at J[73]: "the policy of the Act to allocate risk to the owner rather than the builder ... I accept that that is definitely a policy of the Act"). His Honour also referred to leading decisions both about the policies of the Act and about the proper approach to the grant of a stay, including extensive quotation from and discussion of *TFM Epping Land*: at J[55]-[64].
- 124 The primary judge nevertheless granted the stay, in what he described as "the peculiar circumstances of this case": at J[107]. His Honour did so on the material before him, and noting at several points (e.g., at J[11]) that he was not making final findings. The principal elements in the reasoning were as follows.
- (1) At J[55], the primary judge noted that it was common ground that the Court needed to be satisfied that Mr McMenemy had "a strong prima facie case" in the Other proceedings, "particularly the relief to have the deed set aside." His Honour discussed the strength of the case at a number of points, including at J[65], J[67], J[70] ("the strongest position for the owner ... may lie in unconscionable conduct or relief under the *Contracts Review Act*"), J[95] ("serious prospect that the deed is void or voidable"), J[100], J[102] ("a strong prima facie case ... sharp, very sharp practice") and J[106].
 - (2) The primary judge took into account in the exercise of his discretion that the principal was an owner of residential property: at J[78]-[79]. As his Honour pointed out, over several pages, the fact that the Act applied in this case was the result of changes to the legislative regime that culminated in the abolition of the exemption from the Act of owner occupied residential building work on 1 March 2021: at J[84]. His Honour distinguished the discretionary calculation involving the policy of the Act in a commercial context from the calculation in the context of the case before him: at J[88].
 - (3) Mr McMenemy had offered to pay the outstanding amount of the s 25 judgment into court, and his Honour made the order granting a stay

conditional on that happening. His Honour acknowledged that making the Builder “wait for his money if he is proven right” “may not sit neatly with the purpose and policy of the legislation”, but nevertheless considered Mr McMenemy’s offer to pay money into court “a very significant consideration”: at J[94], J[96].

- (4) At J[97]-[99] the primary judge referred to submissions made on behalf of Mr McMenemy to the effect that “there is a real risk that the owner may not see that money again if he succeeds in the other proceedings”. His Honour said that those submissions “carry some weight on discretionary considerations”: at J[99]. His Honour particularly focused on two issues. First, the submission that the Builder had been “unable or unwilling to pay moneys it owes [Mr McMenemy and Ms Webster] in relation to the works, despite several promises to pay” (being a reference “to the arrangement or understanding about Mr McMenemy and Ms Webster providing materials which were included in the contract price, and the arrangement was to reimburse them for paying for those materials”): at J[97]. His Honour referred to the “risk that [Mr McMenemy] will not be able to recover the money in light of the peculiar facts of this case that the builder already owes this money under the arrangement”: at J[98]. The second submission was directed to “the very concerning issues raised in the affidavit” about “the way in which the deed of variation came to be executed” (at J[97]) and “the way in which the builder conducted itself in obtaining the deed of variation” (at J[98]). This was clearly referring to what his Honour was satisfied was a strong *prima facie* case of sharp practice (at J[102]) and wrongful conduct (at J[106]).
- (5) It was common ground that the adjudicator could not determine the issues as to duress, unconscionable conduct and/or undue influence. Yet the adjudication led under the Act to the creation of a judgment debt where there was “a serious prospect that the deed is void or voidable and not enforceable by the builder”: at J[95]. His Honour said that that consequence “does not sit comfortably with the policy of the Act as it has been articulated by the Courts to date.” His Honour appears to have been contrasting that situation with the one described in *TFM Epping Land* at [72] (a paragraph to which the primary judge had referred at J[58]). There, as discussed above, this Court endorsed a passage in *Veolia* in which McDougall J referred to the fact that an adjudication involved an examination, even if rough and ready, of the competing claims, including the principal’s arguments as to why the builder was not entitled to be paid. The primary judge had also referred at J[86] to *Neller* at [40]-[41]. As noted above, in *Neller* at [42] Keane JA had said that it was not irrelevant to the exercise of the discretion to stay that an independent and expert arbiter had assessed the merits of the dispute.
- (6) While the Builder relied heavily on the general policy considerations under the Act, including “the underlying purpose to ensure that cashflow flows through the industry and to builders”, the Builder had nevertheless made no submission nor put on any evidence to suggest that cashflow of the sum in question was particularly needed at that time: at J[103].

- (7) Finally, the primary judge pointed out that the premise of adjudication under the Act and of the policies which it serves — the existence of a contract — was under serious challenge in the particular case, given his conclusion that there was a strong *prima facie* case in relation to the enforceability of the Deed. As his Honour said at J[105]-[106]:

“... No doubt, the general policy of the Act occurs in situations where contracts are negotiated and acted upon, and then whilst there may be arguments about the meaning of the contract or the obligations under the contract, the contract nevertheless provides the bedrock for the arrangements between the parties, and with the Act in the background, provides for the cashflow that is needed and required.

However, all of that is thrown out the window, in my view, if the parties have not agreed in the sense of entering into a legally enforceable agreement or one that can be or should be set aside. It strikes me that it is beyond the policy considerations or relevance of the policy considerations of the Act for the Court to stand by and allow for the possibility, in my view, a seriously *prima facie* case possibility, that the contract upon which the builder sues, being the deed of variation which varied the original contract, has been obtained by wrongful conduct. This, in my view, is a very serious and heavy consideration.”

- 125 This combination of circumstances is rather different from those in the leading cases upon which the Builder relies. Of particular note are the discretionary factors to which his Honour referred at J[97]-[99], concerning a history of non-payment and sharp practice. Those matters are akin to the considerations that might justify a freezing order in order to prevent frustration of a future judgment. The draft grounds of appeal did not challenge those parts of the judgment.

Applicable standard of review

- 126 There are three hurdles the Builder must clear in order to succeed in this Court.
- 127 First, the primary judge’s decision to grant a stay of execution was discretionary. The Builder needs to show a *House v The King* error.
- 128 Secondly, the primary judge’s decision was interlocutory. The Builder needs leave to appeal. “Leave applications in this Court attract a general obligation on the applicant for leave to establish that there is an issue of principle, a question of public importance or a reasonably clear injustice going beyond something that is merely arguable”: *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48 at [6].

129 Thirdly, the primary judge's decision did not determine substantive rights. It concerned a matter of practice and procedure. This Court has long recognised the need to exercise particular caution in reviewing such decisions. That is especially so where, as here, the amount at issue risks being overtaken by the legal costs, given the scope of the litigation. The body of the statement of claim in the Other proceedings is some 75 pages in length. Sir Frederick Jordan's familiar statement in *In the matter of the Will of F B Gilbert (dec)* (1946) 46 SR (NSW) 318 at 323 bears repeating:

"... I am of opinion that ...there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal."

130 The case is in a category "in respect of which appellate courts have been directed to exercise particular caution in reviewing": *PPK Willoughby* at [3].

The proposed grounds of appeal

131 The applicant was given leave to amend his draft notice of appeal at the hearing.

Proposed Ground 1

132 Ground 1 is as follows:

"By reason of the errors stated in grounds (2)-(5), the primary judge erred in the exercise of his discretion by granting a stay of the judgment obtained by the applicant pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act')."

133 This Ground expresses a conclusion which, in terms, depends on the success of Grounds 2 to 5. It was not separately argued, and its fate is tied to those other Grounds.

134 Leave to appeal should not be granted in respect of Ground 1.

Proposed Ground 2

135 Ground 2 is as follows:

“By reason of grounds (3) and (4), the primary judge erred in law by failing to exercise the power to grant a stay in accordance with the policy of the Act, as required, namely:

- (i) to maintain the flow of money to the contractor, and
- (ii) as an interim measure, to place the risk of insolvency on the principal.”

- 136 As noted above, the primary judge’s decision was a discretionary one, reviewable in accordance with the principles in *House v The King*. To the extent that this Ground refers to Grounds 3 and 4, which do attempt to formulate *House v The King* errors, it adds nothing to them.
- 137 However, Ground 2 goes on to the effect that the primary judge “erred in law” because he was “required” “to exercise the power to grant a stay in accordance with the policy of the Act”.
- 138 To the extent that the words “exercise ... in accordance with” convey that the primary judge committed a *House v The King* error by failing to have regard to the policies of the Act, it must be rejected. His Honour plainly gave close consideration to those policies.
- 139 However, it was made clear at the hearing that the Builder’s proposition is instead the much stronger one discussed above: that there is a rule of law to the effect that the court can never (absent fraud or equally heinous conduct) grant a stay if it will impinge upon the two identified policies of the Act. If the Ground is to be understood in that way, it must be rejected for the reasons given above. The court does not lack power to grant a stay of execution merely because the stay would impinge on those policies. Nor is the court bound in law to exercise its discretion to refuse a stay if it would have that effect.
- 140 Senior Counsel for the Builder, invoking *A-Civil* at [21], submitted that “this Court has expressly stated that the discretion must be exercised in accordance with the policies of the Act”: Tcpt, 14 April 2025, 6.4-5. There are two basic difficulties with this submission. First, as explained above, the words on which the Builder relies should not be read as stating a rule of law in the way the Builder insists. Instead, those words emphasise the materiality of the statutory policies in the exercise of the discretion.
- 141 Secondly, the submission falls into the error identified earlier in these reasons. There are at least three unstated assumptions at work in the passage from A-

Civil. The first assumption, upon which the progress payment regime in the Act is based, is that the work for which the progress claim is made has been carried out pursuant to a contract or arrangement between the principal and the contractor. The second assumption is that the adjudication itself has given interim consideration, however rough and ready, to the merits of the principal's answer to the progress claim. The third assumption is that the issue is to be decided in the context of a contract between commercial parties, not involving consumers of residential building services.

- 142 In the present case, the second and third assumptions do not apply, and the first assumption will be destroyed if Mr McMenemy's unconscionability case succeeds (the primary judge being satisfied that there was a strong *prima facie* case in that respect).
- 143 To the extent that this proposed Ground propounds a rule of law to the effect that the court can never grant a stay if it will impinge upon the two statutory policies, it raises a question of principle. To that extent, leave to appeal should be granted. But the Ground must fail and the appeal should be dismissed.

Proposed Ground 3

- 144 Ground 3 is as follows:

"The primary judge erred and acted upon a wrong principle in stating that the principles and the policy in (2)(i) only applied if the builder adduced evidence that the cashflow of the adjudicated amount was needed by the builder and took into account an irrelevant matter, being the absence of evidence that the Applicant needed cashflow."

- 145 This Ground misstates the primary judge's reasons. His Honour did not "stat[e] that the principles and the policy in (2)(i) [i.e., to maintain the flow of money to the contractor] only applied if the builder adduced evidence that the cashflow of the adjudicated amount was needed by the builder". Instead, in the paragraph of which the Builder complains, the primary judge said as follows: at J[103].

"I will then move to other discretionary considerations. I have already mentioned Mr McMenemy offers to pay the judgment sum into Court. The considerations mentioned by Black J in the case I quoted earlier come into play at this point about the general interests of justice. The builder leans heavily into the general considerations about the policy of the Act, and the underlying purpose to ensure that cashflow flows through the industry and to builders in his position, yet has made no submission or put on no evidence to suggest that the cashflow of the sum in question is particularly needed at this

time or will have any detrimental effect on the builder if it is not provided, as opposed to being set aside by payment into Court and paid at a later date once the parties rights have been fully determined.”

- 146 The words, “the general considerations about the policy of the Act, and the underlying purpose to ensure that cashflow flows,” refer back to the long discussion of statutory policy which commenced at J[55]. His Honour was in no way doubting that the policies existed, or that they were to be taken into account in the exercise of his discretion. His Honour was not saying that the policy was only relevant if there was also evidence of the need for cashflow.
- 147 His Honour was making a different point. He was saying that in considering the interests of justice in the particular case, and especially the delay that would be occasioned if the money were paid into court instead of to the Builder, he was taking into account that it was not suggested that the Builder had any particular need for the money at that time. The Builder says that that was an irrelevant consideration. As Mr McMenemy submitted, that must mean a prohibited consideration. There is no basis in the Act for implying any such prohibition.
- 148 Moreover, his Honour was addressing “discretionary considerations”, in particular, the balance of convenience or risks. That exercise turns on the particular circumstances of the case. In deciding whether or not to grant a stay, one matter of potential significance in the balance of convenience or risks would be the extent of any specific actual need the contractor might have had for the money at the time. By contrast, although the general statutory policy to maintain the flow of money to the contractor must be given proper weight, it cannot be translated into any particular level of practical need for cashflow which might then be put in the scales.
- 149 If the Builder had led evidence that it urgently required the money for some reason, that evidence could hardly have been irrelevant to the exercise of discretion. Payne JA’s decision as referrals judge in *Shade Systems* provides an example of the relevance of evidence of such need. One matter that his Honour took into account was “that the evidence persuades me that absent the progress payment ... there is a risk that Shade Systems will become insolvent”: at [37]. If evidence of that kind is not irrelevant, it must be open to the judge to note its absence. The absence of specific evidence does not

diminish the general force of the statutory policy; his Honour did not suggest otherwise. To that extent, the absence of evidence was neutral. But it was open to his Honour to point out that for the purposes of considering the balance of convenience, the Builder was not relying on evidence of specific need.

- 150 This proposed Ground does not raise an issue of principle, a question of public importance or a reasonably clear injustice. It also concerns a discretionary decision on a matter of practice and procedure. Leave to appeal should be refused.

Proposed Ground 4

- 151 Ground 4 is as follows:

“The primary judge erred and acted upon a wrong principle and took into account an irrelevant matter in concluding that the principle and the policies in (2)(i) and (2)(ii) relating to maintaining cash flow and the allocation of risk under the Act do not apply to contracts for residential building work or apply differently to such contracts.”

- 152 This Ground arises particularly out of J[88]:

“Clearly, there is a commercial context in that sort of situation, and the cases and second reading speeches referring to cashflow being the lifeblood of the industry and so on, and one can see readily why the bigger players in the industry should not be concerned about having to wait and argue later. But the calculation there is very different when it comes to ordinary people dealing with a builder in respect of the building or renovations to their own homes. It is not clear that the policy previously articulated in cases applies so readily in those circumstances. This is a factor, in my view, that goes to a consideration or heightened consideration of any discretionary factors if the Court does have the power to grant a stay, which I think it does. I therefore do not accept the builder’s submission that it is irrelevant that Mr McMenemy is the owner of residential property. In my view, it is a relevant consideration.”

- 153 The first question is what is meant by the word “apply” in proposed Ground 4. The primary judge did not suggest that the Act itself operates in any different way upon contracts for residential building work as opposed to commercial contracts. His Honour did not say that the principles or policies about cashflow and the allocation of risk under the Act “do not apply to contracts for residential building work” in that sense. Nor did he say that they “apply differently” to such contracts.
- 154 His Honour was making a different point, about the weight to be given to the statutory policies in the discretion to grant a stay of execution of a s 25 judgment, where the judgment arises out of a contract for residential building

work. So much is apparent from the words, “the calculation there is very different”. The calculation to which his Honour was referring was the discretionary calculation. The words, “not clear ... *applies* so readily” in the next sentence were directed to the weight to be given to the policy in that discretionary calculation. That is the point of the next sentence: “This is a factor, in my view, that goes to a consideration or heightened consideration of any discretionary factors ...”.

155 For the reasons explained above, that reasoning did not involve any error or “wrong principle”. Where a s 25 judgment arises out of a construction contract to which consumers are parties, the interests engaged are not confined to commercial interests. His Honour was not wrong to point out that the “calculation” is different “when it comes to ordinary people”. The fact that the principal was a consumer was capable of bearing on the significance or weight to be given to the two statutory policies when determining the dictates of justice in the particular case.

156 To the extent that proposed Ground 4 otherwise complains that the fact that this was a contract for residential building work was an “irrelevant matter”, again the Builder needs to establish that it was a prohibited consideration. Given the subject-matter, scope and purpose of the power, the Builder cannot do so.

157 However, to the extent that this proposed Ground asserts that his Honour erred by distinguishing contracts for residential building work from other contracts, it raises a question of principle or at least importance beyond this case. To that extent, leave to appeal should be granted. But the Ground must fail and the appeal should be dismissed.

Proposed Ground 5

158 Ground 5 is as follows:

“The primary judge erred and acted upon a wrong principle in finding that the Respondent had a strong prima facie case in District Court proceedings no. 2024/00250069.”

159 It is convenient to note at the outset a complaint that is not identified in this proposed Ground. The Builder’s complaint here is not that the question

whether the principal had a strong prima facie case was irrelevant. More particularly, notwithstanding the submissions discussed above, the complaint identified in this proposed Ground is not that it was only open to the primary judge to consider the strength of the case if his Honour was first satisfied that Mr McMenemy was facing irreparable prejudice. The Builder accepted at the hearing in this Court that the strength of Mr McMenemy's claim was relevant to the exercise of the discretion to stay execution and that it was "entirely appropriate for the primary judge to consider the underlying merits of the underlying claim": Tcpt, 14 April 2025, 26.16-20.

160 The complaint under this proposed Ground is instead that in light of the matters in dispute on the pleadings and the evidence, the primary judge should not have been satisfied that the principal had a strong prima facie case.

161 In the way in which this proposed Ground was advanced, it is not at all clear that it articulates a *House v The King* error. The "wrong principle" was said to be "imposing too low of a test for a strong prima facie case": Tcpt, 14 April 2025, 34.19-20.

162 By adopting the language of a "test", the Builder implies that there is a question of principle at issue. A test suggests that there are criteria to be applied, the result of which is binary: the principal's case is "strong" or it is not. But the strength of the party's case does not function in that manner in the exercise of the discretion to grant a stay of execution of a s 25 judgment. The strength of the case will lie somewhere along a spectrum. Some strong prima facie cases will be stronger than others. The stronger the case, the stronger the argument in favour of the stay of execution. The idea of a binary "test" does not engage with the nature of the function.

163 In any event, the Builder did not identify the correct "test", that is, the applicable criteria. That is unsurprising, given that the real complaint was one of degree ("too low"), not kind.

164 The gist of the Builder's argument was as follows:

"The issue of principle is that his Honour appears to have misunderstood what the proper test is when it comes to determining what a strong prima facie case looks like, because his Honour considered it seems that it was open to his Honour to find that there was a strong prima facie case, but given the

extent of the dispute on the pleadings and in the evidence, it simply isn't open to his Honour ..."

Tcpt, 14 April 2025, 34.29-32.

165 The Builder's submission amounted to this: that in light of the matters in dispute, it was open to the primary judge to conclude that Mr McMenemy had a prima facie case, but not a strong prima facie case. There are two basic difficulties with this argument.

166 First, it was a matter for the primary judge to form a view about the strength of the principal's claim (including, if his Honour so considered, the view that it was not possible to say more than that there was a prima facie case). The proposed Ground really amounts to a challenge to the primary judge's evaluative assessment of the strength of the case. That does not disclose a *House v The King* error.

167 The second difficulty is that many important matters were in fact not disputed: that the Builder had been aware for weeks that Mr McMenemy and Ms Webster had "no runway" after 22 September; that there had been no attempt to ventilate the issues that became the subject of the Deed before the evening of 20 September at the earliest; the contents of the draft and then the executed Deed; most importantly, the contents of the email at 1:40 pm and the text message at 1:41 pm on the afternoon of 22 September. It was open to the primary judge to form a view on that material that the case was strong.

168 Leave to appeal on this proposed Ground should be refused.

Proposed Ground 6

169 Ground 6 is as follows:

"The exercise of the discretion to grant a stay of a judgment arising from an adjudicator's determination under the Act must be exercised in accordance with the policy of the Act (as set out in (2) above) and had the primary judge exercised the discretion in accordance with the policy of the Act, namely:

- (i) to maintain the flow of money to the contractor, and
 - (ii) as an interim measure, to place the risk of insolvency on the principal,
- the primary judge would not have granted the stay."

170 The Builder made clear in its written submissions in reply that proposed Ground 6 was directed towards the re-exercise of the discretion by this Court, in the event that a *House v The King* error was established.

171 No such error having been shown, there is no occasion for this Court to re-exercise the discretion.

Conclusion and orders

172 Leave to appeal should be granted with respect to proposed Grounds 2 and 4, but the appeal should be dismissed. The application for leave to appeal should otherwise be refused. The Builder should pay Mr McMenemy's costs in this Court.

173 The orders I propose are:

- (1) Grant leave to appeal with respect to proposed Grounds 2 and 4 in the amended draft notice of appeal.
- (2) Direct the appellant to file a notice of appeal pursuant to the leave granted within seven days.
- (3) Dismiss the appeal.
- (4) Otherwise dismiss the summons for leave to appeal.
- (5) The appellant pay the respondent's costs in this Court.

174 **GRIFFITHS AJA:** I agree with the orders proposed by McHugh JA and with his Honour's reasons.

[Redacted signature]