

Court of Appeal
Supreme Court
New South Wales

Case Name: Claire Rewais and Osama Rewais t/as McVitty Grove v
BPB Earthmoving Pty Ltd

Medium Neutral Citation: [2025] NSWCA 103

Hearing Date(s): 3 March 2025

Decision Date: 16 May 2025

Before: Leeming JA at [1];
Mitchelmore JA at [28];
McHugh JA at [166]

Decision: (1) The appeal is dismissed.
(2) The cross-appeal is dismissed.
(3) The appellants are to pay the respondent's costs
of the appeal and the cross-appeal.

Catchwords: BUILDING AND CONSTRUCTION — adjudication
under the Building and Construction Industry Security of
Payment Act 1999 (NSW) — service of underlying
payment claim and notice of intention to apply for
adjudication — jurisdictional error — where primary
judge found adjudication application filed prematurely
— whether adjudicator lacked jurisdiction to hear and
determine payment claim

BUILDING AND CONSTRUCTION — service —
service under s 31(1)(d) of the Building and
Construction Industry Security of Payment Act 1999
(NSW) — whether email address “specified” for service
of payment claim and notice of intention to apply for
adjudication

BUILDING AND CONSTRUCTION — adjudication —
Home Building Act 1989 (NSW) — where statutory
requirements for licence and insurance contravened —

whether ss 10 or 94 of Home Building Act prevent enforcement of adjudication under the Building and Construction Industry Security of Payment Act 1999 (NSW)

Legislation Cited:

Better Regulation Legislation Amendment (Miscellaneous) Act 2024 (NSW), s 2, Sch 1 item [1.2]
Building and Construction Industry Security of Payment Act 1999 (NSW), ss 3, 4, 7, 8, 11, 13, 14, 15, 17, 22, 31, 32, 32A
Electronic Transactions Act 2000 (NSW), ss 5, 8, 13A
Electronic Transactions Legislation Amendment (Government Transactions) Act 2017 (NSW)
Home Building Act 1989 (NSW), ss 4, 10, 92, 94

Cases Cited:

All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd [2017] NSWCA 289
Anderson v Canaccord Genuity Financial Ltd (2023) 113 NSWLR 151; [2023] NSWCA 294
Bauen Constructions Pty Ltd v Sky General Services Pty Ltd [2012] NSWSC 1123
BCFK Holdings Pty Ltd v Rork Projects Pty Ltd [2022] NSWSC 1706
BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd (2022) 108 NSWLR 350; [2022] NSWCA 82
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190
Coshott v Ludwig (1997) 8 BPR 15,519 at 15,521; (1997) NSW ConvR 55-810
Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58
Demex Pty Ltd v John Holland Pty Ltd (2022) 12 QR 438; [2022] QSC 259
Downer EDI Works Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd (2011) 80 NSWLR 202; [2011] NSWCA 78
Environment Protection Authority v Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq) (2014) 86 NSWLR 499; [2014] NSWCA 149
Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd [2006] NSWCA 259; 23 BCL 292

Icon Co (NSW) Pty Ltd v Australia Avenue
Developments Pty Ltd [2018] NSWCA 339
Kirk v Industrial Court of New South Wales (2010) 239
CLR 531; [2010] HCA 1
Martinus Rail Pty Ltd v Qube RE Services (No.2) Pty
Ltd [2025] NSWCA 49
Massoud v Nationwide News Pty Ltd; Massoud v Fox
Sports Australia Pty Ltd (2022) 109 NSWLR 468; [2022]
NSWCA 150
Probuild Constructions (Aust) Pty Ltd v Shade Systems
Pty Ltd (2018) 264 CLR 1; [2018] HCA 4
Project Blue Sky Inc v Australian Broadcasting
Authority (1998) 194 CLR 355; [1998] HCA 28
Southern Han Breakfast Point Pty Ltd (in liq) v Lewence
Construction Pty Ltd (2016) 260 CLR 340; [2016] HCA
52
Tickner v Chapman (1995) 57 FCR 451

Texts Cited: Herzfeld and Prince, Interpretation (3rd ed, 2024,
Thompson Reuters)

Category: Principal judgment

Parties: Claire Rewais & Osama Rewais t/as McVitty Grove
(Appellants)
BPB Earthmoving Pty Ltd (First Respondent)
Christopher Larcos (Second Respondent)

Representation: Counsel:
D Weinberger and D Emmerig (Appellants)
D Negro and M Keene (First Respondent)

Solicitors:
Agility Legal (Appellants)
Stacks Law Firm (First Respondent)
Moray & Agnew (Second Respondent)

File Number(s): 2024/00402944

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Supreme Court of New South Wales

Jurisdiction: Equity – Technology and Construction List

Citation: [2024] NSWSC 1271
Date of Decision: 10 October 2024
Before: McGrath J
File Number(s): 2024/00260669

[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]

Ms Claire Rewais and Dr Osama Rewais (“Rewaises”) engaged BPB Earthmoving Pty Ltd (“BPB”) to perform earthworks on their property in Woodlands, NSW (“Property”). No written contract was executed.

When requesting a quotation for the works, Dr Rewais sent a text message to the director of BPB containing an email address. At various points throughout the engagement, Dr Rewais occasionally used the email address to communicate with BPB and most invoices issued by BPB were sent to that email address. The invoices, which included account details for BPB, stated that they were made for the purposes of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (“*Security of Payment Act*”). In October 2023, the Rewaises made four bank transfers to the account BPB included in its emailed invoices, totalling \$80,000.

In February 2024, the parties fell into dispute in relation to further payments for works carried out at the Property, with the parties communicating their respective positions by email. On 24 April 2024, BPB sent Dr Rewais an email withdrawing all unpaid invoices and reissuing them as a single invoice with a statement to the effect that it was a payment claim for the purposes of the *Security of Payment Act*. On 22 May 2024, BPB’s solicitors sent a letter by post

and by email to the Rewaises giving notice of BPB's intention to apply for adjudication of the payment claim, as required under s 17(2) of the *Security of Payment Act*.

On 11 June 2024, BPB's solicitors sent an email to the Rewaises' solicitors attaching copies of the emails previously sent to the Rewaises. The Rewaises were not aware of the emails containing the payment claim and s 17(2) notice before the solicitors drew them to their attention.

On 13 June 2024, BPB lodged an application for adjudication under s 17(1)(b) of the *Security of Payment Act*. The adjudicator received submissions from both BPB and the Rewaises as to his jurisdiction to make a determination. The adjudicator issued a determination on 7 July 2024 in which he decided that the payment claim had been served on 24 April 2024 and the s 17(2) notice had been served on 22 May 2024. The adjudicator found that the Rewaises were required to make a progress payment in the amount sought by BPB in the payment claim.

The Rewaises commenced proceedings in the Supreme Court seeking a declaration that the determination was void for jurisdictional error. They also sought an order preventing enforcement of the determination on the basis that BPB had not satisfied requirements for residential building work under ss 4 and 92 of the *Home Building Act 1989* (NSW), as it did not hold a licence under that Act in relation to the work done at the Property and it did not have a contract of insurance with respect to that work.

The primary judge held that the payment claim and s 17(2) notice were served when Dr Rewais became aware of them on 11 June 2024 and that the adjudication determination was premature. Nonetheless, his Honour rejected the Rewaises' contention that this meant that the adjudicator lacked jurisdiction to determine the claim. The primary judge also concluded that the *Home Building Act* was not a bar to enforcement of the adjudicator's determination.

The Rewaises raised two principal issues on appeal: (1) whether the adjudicator had jurisdiction to hear and determine BPB's adjudication application despite the prematurity of the application; and (2) whether ss 10 and/or 94 of the *Home Building Act* rendered the determination unenforceable.

On a notice of contention, BPB took issue with the primary judge's findings as to service. It also contended that the *Security of Payment Act* impliedly repealed ss 10 and 94 of the *Home Building Act* to the extent that the latter precluded enforcement of adjudication determinations. By way of cross-appeal, BPB also contended that the residential building work could be carved out from its claim in accordance with s 32A of the *Security of Payment Act*.

The Court (Mitchelmore JA, Leeming JA and McHugh JA agreeing) held, dismissing the appeal:

Appeal issue 1: effect of premature application on jurisdiction of adjudicator

(1) *Per Mitchelmore JA and Leeming JA (McHugh JA agreeing):* On the findings the primary judge made regarding service, it necessarily followed that the adjudicator did not have jurisdiction and the Determination was void:

[101 [Ref197093257](#)] (Mitchelmore JA), [9 [Ref198037091](#)] (Leeming JA), [166 [Ref198128998](#)] (McHugh JA).

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190; *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4; *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340; [2016] HCA 52; *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289; *Craig v South Australia* (1995) 184 CLR 163; [1995] HCA 58; *Martinus Rail Pty Ltd v Qube RE Services (No.2) Pty Ltd* [2025] NSWCA 49; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 applied.

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

Appeal issue 2: whether the Determination was made unenforceable by ss 4 and 92 of the Home Building Act

(2) *Per Mitchelmore JA and Leeming JA (McHugh JA agreeing):* The adjudication process, and the enforcement of an adjudication determination, are not barred by ss 10 or 94 of the *Home Building Act*: [163 [Ref197093392](#)] (Mitchelmore JA); [26 [Ref198037016](#)] (Leeming JA), [166 [Ref198128998](#)] (McHugh JA).

Environment Protection Authority v Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq) (2014) 86 NSWLR 499; [2014] NSWCA 149, applied.

Contention issue 1: whether the payment claim and s 17(2) notice were served prior to 11 June 2024

(3) *Per Leeming JA and McHugh JA*: The words “of that kind” in s 31(1)(d) refer to the class of documents that have been “specified” by the person which may be only a subset of the broader class of documents to which s 31(1) refers: [15 [Ref198032548](#)]-[16 [Ref198032556](#)] (Leeming JA), [167 [Ref198032776](#)]-[168 [Ref198032786](#)] (McHugh JA). A person specifies an email address for service of a class of documents by words or conduct expressly or impliedly indicating the person’s consent to the use of the email address for service of that class of document: [170 [Ref198032868](#)] (McHugh JA, Leeming JA agreeing).

(4) *Per Mitchelmore JA*: Section 31(1)(d) permits a person to specify an email address for service of all documents authorised or required to be served, or for service of particular documents authorised or required to be served. The question in a given case will be whether a document has been served by email to an email address specified for service of a document of that kind. To construe s 31(1)(d) as limited to express specification would be inconsistent with the broader purposes of the Act; specification can also take place impliedly or by conduct: [137 [Ref198031867](#)]-[138 [Ref198031998](#)].

Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd [2006] NSWCA 259; 23 BCL 292; *Demex Pty Ltd v John Holland Pty Ltd* (2022) 12 QR 438; [2022] QSC 259; *BCFK Holdings Pty Ltd v Rork Projects Pty Ltd* [2022] NSWSC 1706; *Downer EDI Works Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd* (2011) 80 NSWLR 202; [2011] NSWCA 78; *Tickner v Chapman* (1995) 57 FCR 451; *Coshott v Ludwig* (1997) 8 BPR 15,519 at 15,521; (1997) NSW ConvR 55-810, applied.

(5) The Rewaises impliedly specified the email address for documents including the payment claim and the s 17(2) notice through their use of that email address in communications involving, inter alia, invoices expressed to be payment claims under the *Security of Payment Act*: [139 [Ref197349666](#)] (Mitchelmore JA), [24 [Ref198033546](#)]-[25 [Ref198033555](#)] (Leeming JA), [172 [Ref198033496](#)] (McHugh JA).

(6) Section 13A of the *Electronic Transactions Act* applies with the effect that the email need not have been opened or read by the addressee to have been

served: [142 [Ref198037999](#)] (Mitchelmore JA, Leeming and McHugh JJA agreeing).

Bauen Constructions Pty Ltd v Sky General Services Pty Ltd [2012] NSWSC 1123, applied.

Contention issue 2 and cross appeal

(7) *Per Mitchelmore JA and Leeming JA (McHugh JA agreeing)*: Given the Court's findings on the other issues, it is not necessary to consider the remaining issues: [143], [145] (Mitchelmore JA); [27] (Leeming JA), [166] (McHugh JA).

Massoud v Nationwide News Pty Ltd; Massoud v Fox Sports Australia Pty Ltd (2022) 109 NSWLR 468; [2022] NSWCA 150; *Anderson v Canaccord Genuity Financial Ltd* (2023) 113 NSWLR 151; [2023] NSWCA 294, considered.

JUDGMENT

- 1 **LEEMING JA:** I agree with the orders proposed by Mitchelmore JA, and with her Honour's reasons. I also agree with McHugh JA's judgment. What follows presupposes familiarity with the background and issues arising on the appeal, cross-appeal and notice of contention.
- 2 First, it is important to bear steadily in mind that this litigation concerns only the validity of an adjudicator's determination in favour of BPB in the amount of \$277,007.16. The *Building and Construction Industry Security of Payment Act 1999* (NSW) (*Security of Payment Act*) entitles BPB to enforce that certificate as if it were a judgment, but subject to the vital exception that it is without prejudice to the parties' rights under the contract: s 32. Nothing that the adjudicator found, or the Supreme Court determines by way of judicial review, or this Court determines on further appeal, can resolve the underlying contractual dispute between the parties.
- 3 Secondly, the limitations upon the extent to which judicial review is available reflect the fact that the regime merely establishes a prompt interim resolution of payment disputes, without prejudice to the parties' rights at law. Review is limited to jurisdictional error; mere error of law on the face of the record is insufficient: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4.

- 4 Thirdly, an adjudicator is unquestionably authorised to determine and apply his or her view of conflicting submissions as to the construction of the contract. Errors of contractual construction will not of themselves amount to jurisdictional error: *Probuild Constructions* at [79]-[80]; *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 at [16]; *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd* [2025] NSWCA 49 at [144].
- 5 Fourthly, an adjudicator is also unquestionably authorised to determine and apply his or her view as to a dispute concerning service of a payment claim. But the adjudicator's determination of whether a payment claim has been served is vitally different from his or her determination of a question of contractual construction. The service by the claimant on the respondent of a payment claim was the second of five "basic and essential requirements of the Act" identified by Hodgson JA in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [53]. In *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340; [2016] HCA 52 at [44], the High Court confirmed that:

service of a payment claim under s 13(1) of the Act is an essential precondition to taking subsequent steps in the procedure set out in Pt 3 of the Act. There is accordingly no dispute that, unless a payment claim answering that description is served, there can be no adjudication application and hence no adjudication within the jurisdiction conferred by s 22 of the Act. That shared understanding of the relationship between s 13(1) and s 22 is undoubtedly correct.

- 6 The primary judge very properly recognised this. On that basis, his Honour reviewed the finding of fact that there had been valid service, concluding that the adjudicator had erred on this point and that in fact BPB's payment claim had only been served on 11 June 2024, only two days before it made its adjudication application, rather than on 24 April 2024 as BPB had contended and as the adjudicator had found. His Honour was entitled and obliged to redetermine whether and when the payment claim had been served, because service went to the adjudicator's jurisdiction and was an aspect of the appellants' challenge to the certificate.
- 7 However, having found that service was effected in June rather than April, the primary judge fell into error when concluding that the adjudicator's error fell into "the separate category identified by Hodgson JA in *Brodyn* of compliance with

the more detailed requirements of the *Security of Payment Act*”: at [165]-[169]. On the finding made by his Honour, the payment claim was not served until 11 June 2024, only two days before the adjudication application was made. But a basic integer of the regime established under the Act is the entitlement of the respondent to provide a payment schedule within 10 business days after the payment claim is served (assuming the construction contract is silent as to time). If a respondent fails to do so, then s 14(4) provides that the respondent becomes liable to pay the claimed amount on the due date. On the findings of the primary judge, the precondition in s 14(4) was not satisfied and the liability to pay the claimed amount created by that subsection was not imposed. Further, the entitlement to make an adjudication application, in a case where no payment schedule has been provided, requires the respondent not to have paid the amount on the due date: s 17(1)(b), and in that circumstance, it is also necessary for the claimant to serve written notice of an intention to apply for adjudication, and for the respondent to be given a further 5 days to provide a payment schedule: s 17(2). An adjudication application “cannot be made” if s 17(2) is not complied with.

- 8 On the premise on which the findings of the primary judge proceeded, namely, that the payment claim was only served on 11 June 2024, there was no liability created by s 14(4), no entitlement to make an adjudication application because neither s 17(1)(b) nor s 17(2) was satisfied, and the prohibition in s 17(2) that an adjudication application “cannot be made” was engaged. The appellants were, on his Honour’s findings, denied of substantially the whole of the time period they had under s 14(4) to provide a payment schedule, and were wholly denied of the opportunity to provide a payment schedule conferred by s 17(2). None of this fell within “the more detailed requirements” identified by Hodgson JA in *Brodyn*. As Mitchelmore JA explains, *Chase Oyster Bay Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190 – to which the attention of the primary judge was not drawn – stands in the way of any other conclusion.
- 9 In short, if the primary judge were correct to find that the payment claim was not served until 11 June 2024, the adjudicator was mistakenly exercising jurisdiction when he had none. That was jurisdictional error: *Craig v South*

Australia (1995) 184 CLR 163 at 177; [1995] HCA 58. The adjudicator's reasoning, based as it was on what the primary judge had held to be an erroneous finding as to the time of service, could not be relied on to avoid the determination being affected by jurisdictional error.

- 10 Fifthly, I agree for the reasons given by Mitchelmore JA that the appellants had specified Dr Rewais' email address for service of payment claims under s 13 and any notice under s 17(2) of the *Security of Payment Act*, and that the finding by the primary judge to the contrary must be set aside. However, I would prefer to elaborate on aspects of s 31(1)(d), which is a provision which had only relatively recently been introduced.
- 11 As her Honour notes, the emails attaching payment claims sent to that address resulted in prompt payment (see for example those of 7 and 8 December 2023 summarised at [57 [Ref197346746](#)]-[58 [Ref197863228](#)]) and that address was also used for queries and explanations concerning invoices. Evidently Dr Rewais' email address had been provided to BPB and was used by the parties for the purpose of making and responding to payment claims.
- 12 It is convenient to reproduce s 31(1) in the form it took at relevant times:

31 Service of documents

(1) Any document that by or under this Act is authorised or required to be served on a person may be served on the person—

- (a) by delivering it to the person personally, or
- (b) by lodging it during normal office hours at the person's ordinary place of business, or
- (c) by sending it by post addressed to the person's ordinary place of business, or
- (d) by email to an email address specified by the person for the service of documents of that kind, or
- (d1) by any other method authorised by the regulations for the service of documents of that kind, or
- (e) in the case of service by a party to a construction contract on another party to the construction contract—in the manner that may be provided under the construction contract.

- 13 As Mitchelmore JA explains, the authorisation in s 31(1)(d) of service "by email to an email address specified by the person for the service of documents of that kind" was effected as part of reforms applicable to 39 statutes in a wide

range of areas. Schedule 1 of the *Electronic Transactions Legislation Amendment (Government Transactions) Act 2017* (NSW), which lists them in alphabetical order, commences with the *Adoption Act 2000* (NSW), the *Agriculture Tenancies Act 1990* (NSW) and the *Architects Act 2003* (NSW). That Act made reference to “service of *notices* of that kind”, but the *Building and Construction Industry Security of Payment Amendment Act 2018* thereafter replaced “notices” by “documents” which is the form the section took at the relevant time.

- 14 The provisions relating to service of documents by email introduced by the *Electronic Transactions Legislation Amendment (Government Transactions) Act 2017* operate in a wide range of areas. That operation may be affected by the particular legislation into which the new provision has been inserted.
- 15 The *Security of Payment Act* itself provides an example of how context may affect meaning. Section 31(1) is to be read as a whole. Paragraphs (a), (b) and (c) of s 31(1) are unqualified, and therefore apply to “any” document that by or under this Act is authorised or required to be served on a person. In contrast, paragraphs (d) and (d1) are qualified by the concluding words “documents of that kind”. One syntactical reading of those paragraphs is that once an email address has been specified, or once a method in the regulations has been complied with, then *any* document that by or under the *Security of Payment Act* that is authorised or required to be served may be served by email or by the method in the regulations. However, I do not think that is the correct reading of either paragraph. That reading in fact gives no work for “documents of that kind” to do, because its effect is to extend the operation of the paragraph to the entire class of documents to which s 31 applies, in the same way that unqualified paragraphs (a), (b) and (c) apply, and courts should “strive” to give meaning to every word: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [71]. Further, it is to be borne in mind that paragraph (d) is facultative, and there is thus nothing in the purpose which would prevent parties from agreeing that *some but not all* documents required to be served may be served by email. Another way of making this point is that there is nothing in the purpose of the new way by which service may be effected to support an all-or-nothing approach, whereby

either all or no documents may be served by email, as opposed to some but not others.

- 16 Those contextual matters shed light on what I regard is the correct parsing of paragraph (d). The words “of that kind” must, as a matter of ordinary grammar, refer to some antecedent class of documents. That is the force of “that”, which is an extraordinarily complex English word, and in the present context operates as a demonstrative pronoun and must refer to something. The words “of that kind” do not refer to the whole of the class of documents identified in the opening words of the subsection. Instead, they refer to the class of documents which have been “specified” by the person, without which the paragraph can have no operation.
- 17 The foregoing is confirmed by paragraph (d1). The regulations may provide that *all* documents may be served in a particular method. However, the regulations may also provide that *a more limited class* of documents may be served by a particular method. If the latter, then “documents of that kind” will refer to that more limited class of documents for which the regulations make provision.
- 18 Some examples may illustrate the point. It is open to the parties to a construction contract to agree that “Any document that by or under this Act is authorised or required to be served on the contractor may be served by email to [address]”. But it is also open to the parties to a construction contract to agree that “Any payment claim under s 13 of the Act may be served by email to [address] but service by email is not effective for other documents required to be served under the Act”. In the latter case, the “documents of that kind” to which s 31(1)(d) applies would only be payment claims under s 13.
- 19 Those examples are cases of express agreement. But it must also be the case that a person can “specify” an email address which will engage s 31(1)(d) impliedly or by conduct. To take a hypothetical example, assume there has been no express agreement as to service of payment claims by email, and that the first, second, third and fourth payment claims are sent to a principal’s email address, and are promptly paid without complaint, there would be a sound basis to conclude that the principal has specified that email address at least for

the purposes of service of payment claims. The result would be that if the principal then turned around and said that it had not been served with the fifth payment claim when it was sent to the same email address, it would readily be concluded that s 31(1)(d) applied.

- 20 In any case where a person is taken to have specified an email address impliedly or by conduct, there may be difficulty in identifying the class of documents which the person has specified to which s 31(1)(d) applies. (Of course, there may also be the same difficulty if the person has specified an email address expressly.) But mere difficulty in operation should not of itself defeat the operation of the provision.
- 21 What emerges from the above is that, if and when a person “specifies” an email address for service, then that person will be doing more than merely nominating a particular email address. The address may be, and often will be, nominated *for a purpose*. In that way, the person may also, expressly or impliedly, be identifying the class of documents for which service to that email address will be effective. That class of documents is the antecedent of “documents of that kind” in s 31(1)(d).
- 22 The *Electronic Transactions Legislation Amendment (Government Transactions) Act 2017* being facultative, there is no reason to prevent persons availing themselves of the facility to serve by email in respect of a limited class of documents.
- 23 It will be apparent from the above that the meaning of the new statutory language “by email to an email address specified by the person for the service of documents of that kind” in s 31(1)(d) is informed by its context, and in particular the balance of the subsection. It follows that the reasoning in the preceding paragraphs will not necessarily apply where the same words have been inserted into the potentially very different contexts in the other 38 Acts.
- 24 Turning to the facts of this case, the evidence did not establish any particular occasion on which the appellants expressly agreed that documents required to be served under the *Security of Payment Act* could be served by email. However, the evidence does establish that payment claims were in fact sent by email, and were in fact paid, promptly and without any complaint as to the

mode of service. Questions were also asked and answers given by email. I would conclude that payment claims fell within the class of documents “of that kind” to which s 31(1)(d) applied.

25 Further, the notice under s 17(2) is sufficiently similar in nature to a payment claim that I would likewise conclude that it too is a document to which s 31(1)(d) applies. Both are documents which refer to claimed indebtedness under the construction contract, which create legal rights under the *Security of Payment Act* calculated by non-payment after a small number of days after service. Another way of putting this is that the conclusion that by their course of conduct the appellants are taken to have specified email for the service of payment claims, but with a limitation that such service is not effective for any notice under s 17(2) in the event that there is no response to the payment claim, is one that would be quite artificial.

26 Sixthly, I agree with Mitchelmore JA that the primary judge was correct to conclude that ss 10 and 94 of the *Home Building Act 1989* (NSW) did not assist the appellants, despite BPB not being licensed or insured under that Act, and upon the assumption, favourable to the appellants, that some or all of the work was residential building work. Without detracting from her Honour’s reasons, the steps leading to that conclusion may be summarised as follows:

- (1) In the form those provisions took at the relevant time, s 10 and s 94(1)(a) provided that the contractor “is not entitled to damages, or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract”. Neither limb is contravened.
 - (a) Taking steps under the *Security of Payment Act*, including enforcing the deemed judgment created by lodging a certificate, is not contrary to the first limb which speaks of “not entitled to damages”; the legislation confers no entitlement to damages.
 - (b) The ambit of “any other remedy in respect of a breach of the contract” in the second limb is determined by the words “in respect of”, and that relational term while potentially broad is unquestionably contextual: see *Environment Protection Authority v Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq)* (2014) 86 NSWLR 499; [2014] NSWCA 149 at [60]. However, the adjudicator’s determination does not determine whether or not there has been a breach of contract, and does not in any way alter the damages that are recoverable pursuant to any breach of contract that may be found (save for allowance being made for

any amounts paid). Moreover, it is difficult to regard the interim rights created by the statutory regime as answering the description of a “remedy” in respect of breach. It follows that the second limb is not contravened.

- (2) Further, s 94(1)(b) provides that a person “is not entitled to recover money in respect of that work under any other right of action (including a quantum meruit)”. This paragraph, and in particular the words “under any other right of action”, does not stand alone but instead is to be read with s 94(1)(a) which refers to damages or other remedies in respect of a breach of contract. It is clear that both s 94(1)(a) and (b) are directed to causes of action. The statutory language of “right of action” does not without considerable straining extend to the new rights created by the *Security of Payment Act*, which are generated without any determination by a court, which do not give rise to any entitlement to money other than an interim entitlement which does not undermine the party’s contractual and quasi-contractual entitlements to damages, and which do not give rise to any cause of action estoppel.

27 Finally, the foregoing does not come close to exhausting the points advanced in this appeal. The notice of appeal contained 10 grounds, the cross-appeal contained 7 grounds and the notice of contention contained 8 grounds. So far as I can see, every possible permutation of outcomes was agitated one way or the other. The parties’ enthusiasm to agitate issues does not oblige this Court to resolve any of the multiplicity of non-dispositive grounds: cf *Massoud v Nationwide News Pty Ltd*; *Massoud v Fox Sports Australia Pty Ltd* (2022) 109 NSWLR 468; [2022] NSWCA 150 at [36]-[40] and [276]-[278] and *Anderson v Canaccord Genuity Financial Ltd* (2023) 113 NSWLR 151; [2023] NSWCA 294 at [420]. Nor does it favour any departure from the usual rule as to the exercise of the discretion as to costs. Moreover, the fact that there will be (unless the dispute is otherwise resolved) a determination after a final hearing of the underlying contractual dispute favours a narrow approach to non-essential issues being taken at this stage. That is because there has hitherto been no discovery or service of evidence or cross-examination, and there is the possibility that anything said by this Court in the different context of claimed jurisdictional error by the adjudicator may introduce needless complication into the final resolution of the issues in the contractual dispute.

28 **MITCHELMORE JA:** The appeal, notice of contention and cross-appeal in this matter concern an adjudication determination (Determination) under the *Building and Construction Industry Security of Payment Act 1999* (NSW)

(*Security of Payment Act*). The subject of the adjudication was a payment claim that the first respondent, BPB Earthmoving Pty Ltd (BPB) made under s 13 of the *Security of Payment Act* in relation to work it performed for the appellants, Mrs Claire Rewais and Dr Osama Rewais trading as McVitty Grove, at their property in Woodlands, NSW (Property).

- 29 BPB sent the payment claim to Dr Rewais by email dated 24 April 2024, using an email address that Dr Rewais had provided at an early stage of the dealings between the parties. On 22 May 2024, BPB sent a notice under s 17 of the *Security of Payment Act*, by email to the same email address and by registered post to the address of the Property, informing the Rewaises of its intention to apply for an adjudication under the Act. It was not in dispute on the appeal that the Rewaises did not become aware of the payment claim or the notice of intention to apply for an adjudication until 11 June 2024.
- 30 On 13 June 2024, BPB applied for adjudication of the payment claim under the *Security of Payment Act*. The second respondent, Christopher Larcos, was the appointed adjudicator (he filed a submitting appearance on the appeal). On 7 July 2024, the adjudicator published the Determination in which he determined that the adjudicated amount of \$277,007.16 was payable to BPB.
- 31 The Rewaises commenced proceedings in the court below seeking, as their primary relief, a declaration that the Determination was void and an order quashing it. In support of this relief, they contended that service of the payment claim did not occur until they became aware of it on 11 June 2024. The primary judge, McGrath J, found that both the payment claim and the notice were served on 11 June 2024, and that the adjudication application was premature: at [145], [150]. However, his Honour rejected the Rewaises' contention that it must follow from those findings that the adjudication application was invalid and that the adjudicator lacked jurisdiction to determine it. Instead, his Honour concluded that the Determination was not void for want of jurisdiction: at [169].
- 32 In the alternative to their primary relief, the Rewaises sought an order restraining BPB from enforcing the Determination on the basis of the operation of provisions of the *Home Building Act 1989* (NSW), which applied because the

agreement between BPB and the appellants involved at least some residential building work within the meaning of that Act. The primary judge found that BPB had contravened ss 4 and 92 of the *Home Building Act*, which respectively required BPB to be licensed and insured with respect to work performed under that Act. Nonetheless, his Honour concluded that BPB was not precluded from enforcing the Determination because the statutory remedy under the *Security of Payment Act* was not properly characterised as falling within the scope of ss 10 or 94 of the *Home Building Act*: at [218]-[220].

- 33 The focus of the Rewaises' appeal was the primary judge's conclusion that the Determination was not void. BPB defended the primary judge's conclusion on the basis of his Honour's findings that the payment claim and notice of adjudication were served on 11 June 2024. However, BPB also relied on a notice of contention by which it challenged those findings as to service. Specifically, BPB contended that his Honour should have found that service of the payment claim occurred on 24 April 2024, relying in the alternative upon s 31(1)(d) and (e) of the *Security of Payment Act* and ss 8 and 13A of the *Electronic Transactions Act 2000* (NSW). BPB also contended that its notice of intention to apply for adjudication was served on 22 May 2024, relying on those same provisions; or, alternatively, on 24 May 2024, relying on s 31(1)(c) of the *Security of Payment Act*, which permits service at a person's ordinary place of business.
- 34 The Rewaises also challenged the correctness of the primary judge's conclusions regarding the *Home Building Act*, accepting that if they succeeded on their principal grounds of appeal it was not necessary for the Court to resolve that challenge. On its notice of contention, BPB submitted that his Honour should not have embarked upon consideration of the *Home Building Act* at all, on the basis that the provisions of the *Security of Payment Act* impliedly repealed the provisions of the *Home Building Act* to the extent of any contrariety.
- 35 BPB accepted that its cross-appeal only arose for resolution if the Court decided that ss 10 and/or 94 of the *Home Building Act* rendered the Determination unenforceable. In that event, BPB contended that the

Determination was only unenforceable in so far as the payment claim related to residential building work, relying on s 32A of the *Security of Payment Act*. The parties agreed that the value of works the subject of the payment claim and which were of that character was \$54,779.08.

- 36 Given that BPB sought to defend the Rewaises' challenge to the primary judge's conclusion that the Determination was not void for want of jurisdiction on the basis of his Honour's findings about service, I will first address the grounds of appeal that concern that challenge. Resolution of BPB's challenge to the primary judge's findings regarding service is finely balanced and involves a detailed examination of the factual background.
- 37 On the basis of the primary judge's finding that the payment claim was served on 11 June 2024, and the finding that the notice under s 17 was served on the same date, the adjudication application was invalid and there was no jurisdiction to determine it. His Honour was wrong to reach the contrary conclusion. However, his Honour's findings as to service were also wrong. It follows that his Honour's conclusion that the Determination was not void was correct.
- 38 The primary judge was correct to conclude that the provisions of the *Home Building Act* on which the Rewaises relied did not render the Determination unenforceable. It follows that the appeal should be dismissed and that it is not necessary to determine the cross-appeal.

Background to the proceedings

- 39 The Rewaises became the registered proprietors of the Property on 17 December 2020. They use the Property, which has an area of 103 acres, as their family home: at [8]. In addition to the residential dwelling, there is a separate building on the Property which was used as a "cellar door" and a café before the Rewaises purchased it (café building), as well as a disused vineyard and a grove of olive trees extending across 22 acres: at [7].
- 40 In April 2021, the Rewaises registered the business name "McVitty Grove Café", which they changed in November 2021 to "McVitty Grove": at [10]. A liquor licence which was attached to the Property at the time of purchase was transferred to Mrs Rewais. Mrs Rewais gave evidence that she and her

husband maintained the liquor licence because it was a valuable asset even though they were not contemplating serving liquor commercially.

- 41 Between July 2021 and June 2022, the Rewaises generated income of \$5,785 from the sale of olive oil produced on the Property. Mrs Rewais gave evidence that this activity was a hobby and that the costs of production outweighed the income: at [11]. In February 2023, Dr Rewais, who is a medical doctor, obtained development approval to construct consulting rooms at the Property: at [12]. In April 2024, the Rewaises sold 11 head of cattle which had been kept on the Property, deriving \$11,000 from this sale: at [13].

Works at the Property and invoicing of the works

- 42 In February 2023, the Rewaises were introduced to Mr Beau Braeckmans, the sole director of BPB, by John Arnot of Oxley Landscapes: at [16]. Around 6 March 2024, Mr Braeckmans, Mr Arnot, and the Rewaises met at the Property. The primary judge found that on or about that date, BPB and the Rewaises entered into an oral agreement pursuant to which BPB would carry out earthworks at the Property as requested by the Rewaises from time to time, which his Honour defined as the “Contract”: at [17]. His Honour stated at [17]:

“As part of the Contract, it was initially agreed that BPB would perform earthworks around the existing café building in which a proposed doctor’s surgery was to be constructed on the bottom floor, involving fixing up the carpark and the pathway from the carpark down to the proposed doctor’s surgery, the removal of trees and tidying up the batter (the incline). The works to be completed under the Contract expanded throughout 2023 and early 2024 through further oral requests made by the Rewaises to Mr Braeckmans and remain the subject of dispute between the parties.”

- 43 On 14 March 2023, Mr Braeckmans prepared a costs estimate for the works initially agreed to be completed at the Property, which Mr Braeckmans provided to Mr Arnot by email: at [18]. The estimate described the scope of the works as including: levelling out the carpark, stripping topsoil and removing trees, sealing sandstone, removing trees near the café building, battering ledges, boxing out for the concrete pathway, and building an accessible pathway, with the estimated cost of \$82,646 excluding GST: at [18]. A few days later, Mr Arnot told Mr Braeckmans that the Rewaises wanted to go ahead with the estimate for the work and asked when he could start: at [19].

- 44 On 9 May 2023, BPB commenced works at the Property: at [20]. Over time, the scope of work expanded, which the primary judge described in some detail. Without repeating that summary, it is sufficient to note some aspects of it.
- 45 In June 2023, Mr Braeckmans, Mr Arnot, and the Rewaises met again at the Property to agree to further works, including mulching embankments and filling a gully. On 22 June 2023, Mr Arnot informed Mr Braeckmans that the Rewaises had abandoned the plan to construct a doctor's surgery. Instead, they intended to renovate the area and open it as a function centre, including by constructing a sandstone amphitheatre near the café building. The primary judge accepted the evidence of Mrs Rewais and Dr Rewais that they intended to use this area for their children's weddings and did not intend to use it commercially: at [25].
- 46 At about 8:30am on 26 June 2023, being the day that BPB commenced work on the amphitheatre and continued other works, Dr Rewais sent a text message to Mr Braeckmans asking whether he had an "indication of costing": at [29]. Dr Rewais sent a further text message in the same chain which said only: "srewais@gmail.com". Dr Rewais gave evidence that while he did have this email address, he did not open all emails that came through this address and he did not regularly check it.
- 47 That same evening and the following morning, Dr Rewais sent text messages following up his request for costings with Mr Braeckmans: at [31]-[32]. On 30 June 2023, Mr Arnot advised Mr Braeckmans that Dr Rewais was chasing the costs estimate for the amphitheatre works as well as work on the retaining wall at the residence and on the road leading to the residence: at [33]. On 1 July 2023, Mr Braeckmans sent a text message to Dr Rewais containing a photograph of a handwritten document setting out costs for each of those works, totalling \$319,500: at [34]-[36].

Claim 1 invoice

- 48 The primary judge observed the following at [44]:
- "Prior to August 2023, BPB had not issued any invoices to the Rewaises for works completed. The Contract did not expressly provide for an invoicing or payment process and Dr Rewais said that he and Mr Braeckmans never discussed a specific method of communication to be used between them

(including for the issuing of invoices). If not in person, communications between Dr Rewais and Mr and Mrs Braeckmans occurred by a mix of text messages and emails.”

- 49 On 11 August 2023, Mrs Braeckmans sent an email to “srewais@gmail.com”, which said:

“Hi Sam

Please find your invoice and docket summary attached for works completed at [the Property] to date. Thank you.

Kind regards

Paula Braeckmans”

- 50 The email attached a tax invoice of the same date on BPB letterhead, which was addressed to “McVitty Grove” (Claim 1 invoice). The Claim 1 invoice contained a text box that described the work as “[e]xcavation and landscape works carried out on site” between 9 May 2023 and 24 July 2023 “as per attached spreadsheet” at a cost of \$86,840 (excl GST). At the bottom of the invoice was a text box that contained the payment terms (30 days), the balance due (\$95,524 incl GST), BPB’s bank account details, and the Australian Business Number for McVitty Grove.

- 51 In between the two text boxes on the invoice was the following statement (italics and bold in original):

“Please note: Overdue payments will incur a late payment fee. Please pay by the due date. This claim has been made under the Building and Construction Industry Security of Payment Act.”

This statement appeared in the same place on each of the invoices that BPB issued for the works at the Property.

- 52 On 14 September 2023, Mrs Braeckmans sent two further emails to the “srewais@gmail.com” address. In the first email, again addressed to “Sam”, Mrs Braeckmans referred to attaching “the breakdown of works and amended invoice showing the items listed separately”, along with the dockets. According to her evidence, she amended the invoice following a conversation with Mr Braeckmans on or about that date in which he said words to the effect of:

“Sam doesn’t understand the latest invoice, John [Arnot] has asked me if we can reissue it with a breakdown of the work showing the items separately listed so he can see what work is covered by the estimate and what was out of scope and what was for the sandstone amphitheatre.”

- 53 The amended Claim 1 invoice that Mrs Braeckmans prepared was itemised by reference to work “completed prior to the estimate”, work completed “outside the scope of the estimated works” and “[e]stimated work completed”. The formal parts of the invoice (including the statement I have extracted at [50 [Ref195518139](#)] above) and the amount due were the same as in the original invoice.

Invoice for sandstone

- 54 In the second of the emails she sent to “srewais@gmail.com” on 14 September 2023, Mrs Braeckmans attached an invoice “for 100 x Sandstone Blocks” (the sandstone invoice). This invoice, dated 14 September 2023, was for \$38,500 (including GST) for the “[s]upply and cartage of 100 x 2M A Grade Sandstone Blocks”. The sandstone invoice was in the same form as the amended Claim 1 invoice.
- 55 On 16 October 2023, Mrs Braeckmans emailed an MYOB statement of account to Dr Rewais at the “srewais@gmail.com” address, to which she added to the email subject the word “Overdue”: at [50]. On each of 17, 18, 19 and 20 October 2023, the Rewaises made a funds transfer to the bank account that BPB nominated in its invoices, totalling \$80,000. Dr Rewais accepted in cross-examination that he obtained the bank account details from an invoice that Mrs Braeckmans had sent. Mrs Braeckmans applied the payments to the amended Claim 1 invoice, leaving \$15,524 outstanding: at [53].

Claim 2 invoice

- 56 BPB continued work at the Property throughout this period. On 14 November 2023, Dr Rewais sent Mr Braeckmans a text message which said: “Just checking Where we are at with quotes, work etc”. Mr Braeckmans responded by text message later that day: “Still working on it”: at [56].
- 57 On 7 December 2023, Mrs Braeckmans sent an email to “srewais@gmail.com”, addressed to “Sam” and attaching an invoice “for the progress payment for the retaining wall near the house”. The tax invoice was dated 30 November 2023 and was for the amount of \$44,000 (incl GST) (Claim 2 invoice). The “Terms” were “COD”.

- 58 BPB's bank account records showed a transfer of \$20,000 from the Rewaises on 7 December 2023, and a further transfer of \$24,000 on 8 December 2023: at [59]. By email from "srewais@gmail.com" dated 8 December 2023, Dr Rewais replied to Mrs Braeckmans' email of 7 December 2023, advising her that "[t]his one is completely paid for", which she acknowledged by reply email.
- 59 Later on 8 December 2023, Dr Rewais sent another email from "srewais@gmail.com" to Mrs Braeckmans' email address with the subject "Café deck". The email attached drawings of the deck that Dr Rewais wanted to construct off the café building, which he had asked Mr Braeckmans if BPB could assist with. Mr Braeckmans had indicated that BPB could assist but requested drawings: at [61]-[62].

Query about the sandstone invoice

- 60 On 22 December 2023 at 11:57am, an MYOB statement of account was sent by email to "srewais@gmail.com". At 3:50pm the same day, Dr Rewais sent a reply email to Mrs Braeckmans, stating that he was not sure he understood "the amount of \$38,500 in the statement". In a reply email sent at 7:14pm, Mrs Braeckmans said, "That is the invoice for the sandstone blocks", and reattached the sandstone invoice. By further reply sent at 8:23pm, Dr Rewais wrote:

"Hi Paula
therapy sandstone was part of the quote . I sent you the text .
Cheers
Sam"

As the primary judge noted at [65], the text Dr Rewais was referring to was a photo of the 1 July scope of works document that he sent to Mrs Braeckmans.

- 61 Dr Rewais was cross-examined about the emails that he exchanged with Mrs Braeckmans in December 2023 as follows:

"Q. You were sending these emails to Paula [Mrs Braeckmans] in December 2023 because you were content for written communicat[ions] relating to BPB's invoices to be sent by email?

A. I responded to these emails after being prompted to do so. Not through email.

HIS HONOUR:

Q. Could you answer the question that you were asked?

A. Okay, well I was – I responded to these emails after being prompted to respond to the emails through conversation.

Q. Is the answer to the question that you weren't content or you were content?

A. Can you rephrase what you mean by that, content?

NEGGO: Is your Honour content for me to --

HIS HONOUR: It's your question.

NEGGO:

Q. You were prepared to proceed on a basis by which communications relating to invoices could occur by email?

A. I responded via email."

- 62 Later in cross-examination, Dr Rewais volunteered that every payment he was asked about was prompted "by either a conversation or a text message". That led to the following exchange:

"Q. 'Every payment', did you say?

A. Yeah, every payment that you brought up – 7 December, 8 December, conversation about the sandstone blocks on 22 December – was prompted by either a conversation with Beau [Braeckmans] or John Arnot.

Q. That's not right is it? Can I tell you why?

A. Please.

Q. You received invoice 1614 on 7 December --

A. Correct.

Q. --and made a payment towards it on the same day.

A. Correct. You are correct, and I had a conversation with Beau that day in front of the house, and he said, 'Could you please pay for that?' And I continued the conversation and said, 'I'll look at it today. Could you please quote me for the work in front of the house?' And Beau said, 'Yes, I'll have it by the weekend', and John Arnot was present at that conversation. So I made payment on the 7th, and the 8th, and I know Paula had broken her ankle and as her GP I messaged her just to say, 'Look, payment has been made', and she said – in a couple of days she said, 'Thank you', just courtesy, yeah."

Claim 3 and 4 invoices

- 63 On about 31 December 2023, Mrs Braeckmans prepared two further invoices addressed to McVitty Grove. The first of those invoices, both of which were dated 31 December 2023, was for \$26,716.98 (including GST) for "[e]arthworks completed outside of scope" between 25 July 2023 and 7 November 2023 (Claim 3 invoice). The second invoice was for \$59,312.55 (including GST) for "[e]arthworks completed for sandstone wall" between 5 December 2023 and

31 December 2023 (Claim 4 invoice). On Mr Braeckmans' instruction, Mrs Braeckmans did not email these invoices to Dr Rewais because Mr Braeckmans wanted to discuss them with the Rewaises in the new year: at [66].

Meeting to discuss the invoices

64 On 2 February 2024, Mr Arnot, Mr Braeckmans, and the Rewaises met to discuss the payment of BPB's invoices: at [68]. On that occasion, Mr Braeckmans provided to the Rewaises a folder that contained hard copies of all of the invoices that BPB had issued between August and December 2023 (the amended Claim 1 invoice, the sandstone invoice, and the Claim 2, 3 and 4 invoices), together with a spreadsheet that identified, for each, what work the invoices related to, including if it was "outside of scope", what payment had been received, the outstanding amount, and any "savings".

65 Dr Rewais gave evidence that this was the first time he had seen any of the invoices. As the primary judge said at [68], "that evidence cannot be right because Dr Rewais conceded in cross-examination that he had obtained the BPB bank account details from the invoices which he had already received by email from Mrs Braeckmans and paid". Although his Honour referred, in the context of payment, to the amended Claim 1 invoice, the sandstone invoice and the Claim 2 invoice, according to BPB's spreadsheet part of the Claim 1 invoice remained outstanding and the sandstone invoice had not been paid (noting that Dr Rewais had queried it in December 2023).

Claim 5 invoice

66 On 6 February 2024, Mr Braeckmans sent an email to Dr Rewais at "srewais@gmail.com", in which he referred to attaching an invoice for work completed in January 2024 and a statement showing the outstanding balance, and asked for advice as to "when we can expect payment of the outstanding amounts". The attached invoice, marked "Claim 5", was for a total amount of \$33,280.72 (incl GST) for "[e]arthworks completed for Sandstone Wall" (Claim 5 invoice): at [69]. On 8 February 2024, a corresponding MYOB statement of account was sent to Dr Rewais by email: at [70].

Dispute about payment of invoices

- 67 On 12 February 2024, BPB ceased work on the Property and Mrs Braeckmans sent a text message to Dr Rewais which said, "Can you please advise asap when we can expect any payment on the overdue invoices from Aug – Dec last year? Thankyou". In his reply of the same day, Dr Rewais said that he was in the process of working through the invoices and would respond the following day: at [71]-[73]. On 13 February 2024, Mr Braeckmans and Dr Rewais exchanged text messages on the same subject. On 14 February 2024, BPB removed its equipment from the Property: at [72].
- 68 Also on 14 February 2024, at 7:03am, Dr Rewais sent an email (from "srewais@gmail.com") to Mrs Braeckmans' email address: at [75]. Relevantly for present purposes, Dr Rewais addressed aspects of each of the Claim 1, Claim 2, Claim 3 and Claim 4 invoices and the sandstone invoice, along with the more recent Claim 5 invoice that had been sent by email. On 18 February 2024, Mr Braeckmans provided his response by email to "srewais@gmail.com", attaching a word document that set out Dr Rewais' email and interposed Mr Braeckmans' response at various points: at [78]-[80]. On 20 February 2024, Mr Braeckmans sent a further email to Dr Rewais, asking for a response to his email of 18 February 2022 by close of business on 21 February 2024, which he followed up with a text message: at [81]-[82]. On 22 February 2024 at 6:51am, Dr Rewais replied by email: at [83]. The content of this exchange between the Rewaises and BPB is not relevant. What is relevant is the fact that the exchange took place by email between Dr Rewais and BPB, with Dr Rewais using the email address "srewais@gmail.com".

A credit adjustment

- 69 On 23 February 2024 at 8:43am, Mrs Braeckmans sent an email to Dr Rewais attaching a credit adjustment for an amount that BPB had included in the Claim 3 invoice but which had previously been charged directly by Mr Arnot (the credit adjustment): at [84]. The credit adjustment was in the same form as all of the other invoices that BPB had issued but was for a negative amount. Dr Rewais acknowledged receipt by reply email at 9:56am.

Claim 6 invoice

- 70 On 2 March 2024, Mrs Braeckmans sent a further email to Dr Rewais attaching an invoice “for work completed in February”: at [85]. The work described in this invoice, dated 29 February 2024, was “[e]arthworks completed on Sandstone Wall”, and was for a total amount of \$34,352.45 (incl GST) (Claim 6 invoice). At around the same time on 2 March 2024, Mrs Braeckmans emailed a further invoice “for the remainder of sandstone blocks delivered to site”, totalling \$7,315 (incl GST) (the further sandstone invoice).

The payment claim dated 24 April 2024

- 71 There was no issue in the present case that the Contract was a “construction contract” as defined in s 4 of the *Security of Payment Act* and that the Act applied: see s 7(1). The object of the *Security of Payment Act*, as set out in s 3(1), “is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services”. As s 3(2) explains, the Act achieves this object “by granting a statutory entitlement to such a payment”. Section 8(1) provides:

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.

- 72 The means by which a person who is entitled to a progress payment is able to recover it is set out in Part 3 of the Act, the key steps in which are summarised in s 3(3) as involving:
- (a) the making of a payment claim by the person claiming payment, and
 - (b) the provision of a payment schedule by the person by whom the payment is payable, and
 - (c) the referral of any disputed claim to an adjudicator for determination, and
 - (d) the payment of the progress payment so determined.

- 73 As to the first step, s 13 of the *Security of Payment Act* relevantly provides:

13 Payment claims

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

(1A) A payment claim may be served on and from the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and on and from the last day of each subsequent named month.

(1B) However, if the construction contract concerned makes provision for an earlier date for the serving of a payment claim in any particular named month, the claim may be served on and from that date instead of on and from the last day of that month.

(1C) In the case of a construction contract that has been terminated, a payment claim may be served on and from the date of termination.

...

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

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

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

whichever is the later. ...

74 Section 31 of the *Security of Payment Act* provides generally for service of documents under the Act and provides:

31 Service of Documents

(1) Any document that by or under this Act is authorised or required to be served on a person may be served on the person—

(a) by delivering it to the person personally, or

(b) by lodging it during normal office hours at the person's ordinary place of business, or

(c) by sending it by post addressed to the person's ordinary place of business, or

(d) by email to an email address specified by the person for the service of documents of that kind, or

(d1) by any other method authorised by the regulations for the service of documents of that kind, or

(e) in the case of service by a party to a construction contract on another party to the construction contract—in the manner that may be provided under the construction contract.

(2) Service of a document that is sent to a person's ordinary place of business, as referred to in subsection (1)(c), is taken to have been effected when the document is received at that place.

(3) The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of documents.

(4) In this section—

document includes written notice or determination.

serve includes give, send or otherwise provide.

- 75 Section 14(1) of the *Security of Payment Act* provides that the person “on whom a payment claim is served” may respond by providing a payment schedule which, pursuant to s 14(2), must identify the payment claim to which it relates and the amount of the payment (if any) that the respondent proposes to make. Section 14(4) provides:

(4) If—

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent does not provide a payment schedule to the claimant—

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served, whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

- 76 The term “due date” in relation to a progress payment is defined in s 4 of the *Security of Payment Act* to mean “the due date for the progress payment, as referred to in section 11”. Section 11(1A) relevantly provides that a progress payment to be made by a principal to a head contractor under a construction contract “becomes due and payable on”:

(a) the date occurring 15 business days after a payment claim is made under Part 3 in relation to the payment, except to the extent paragraph (b) applies, or

(b) an earlier date as provided in accordance with the terms of the contract.

- 77 On 24 April 2024, Mr Braeckmans sent four emails to the email address “srewais@gmail.com” which, together with the various attachments, constituted BPB’s payment claim under s 13 of the *Security of Payment Act*. The first email was sent at 9:22am with the subject “INV00001676 from BPB Earthmoving Pty Ltd – Email 1 of 4”. That email stated:

“Att: Sam Rewais & Claire Rewais - McVitty Grove

BPB Earthmoving Pty Ltd has withdrawn the following invoices issued to McVitty Grove: INV 1593, INV 1597, INV 1614, INV 1620, INV 1621, INV 1624, INV 1630, INV 1634, and INV 1635. Please find **attached** INV 1676 issued for works completed at [the Property] together with a supporting

statement required pursuant to the *Building and Construction Security of Payment Act 1999 (NSW)* and all work dockets and supplier invoices.

6 attachments.

Kind regards

Beau Braeckmans”

- 78 The various invoices which the covering email described as having been withdrawn corresponded to the Claim 1 invoice, the sandstone invoice, the Claim 2, 3, 4 and 5 invoices, the credit adjustment, the Claim 6 Invoice and the further sandstone invoice. The invoice attached to the first email, numbered 1676 and dated 24 April 2024, contained a detailed description of the work done, the total value of the work and materials, the payments made in relation to the amended Claim 1 and Claim 2 invoices, and the outstanding balance of \$277,007.16 including GST. It stated that it was a claim under the *Security of Payment Act*. Consistently with s 11(1A) of the Act, the “Terms” part of the invoice stated: “Payment is due 15 business days from the date of this invoice”. Also attached to the first email were other documents containing the information referred to in s 13(2). The three further emails each attached pdf documents comprising dockets for a particular date range.
- 79 The Rewaises did not provide a payment schedule in response to BPB’s payment claim until 18 June 2024, on the basis that the payment claim was not served until it was brought to Dr Rewais’ attention on 11 June 2024.

The adjudication application and Determination

- 80 Section 17 of the *Security of Payment Act* provides for a claimant to apply for adjudication of a payment claim. Subsections (1) and (2) provide:
- (1) A claimant may apply for adjudication of a payment claim (an adjudication application) if—
 - (a) the respondent provides a payment schedule under Division 1 but—
 - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or
 - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless—

(a) the claimant has served written notice on the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

81 Section 22 of the *Security of Payment Act* addresses determination of an adjudication application by an adjudicator, whose eligibility and appointment is addressed in ss 18 and 19. Pursuant to s 22(1), an adjudicator is to determine the amount of the progress payment that the respondent is to pay to the claimant, and the date on which any such amount is to be paid, along with the rate of interest payable. In determining that application, s 22(2) provides that the adjudicator “is to consider the following matters only”:

(a) the provisions of this Act,

(b) the provisions of the construction contract from which the application arose,

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

82 On 22 May 2024, BPB's solicitors sent a letter addressed to Claire Rewais and Dr Osama Rewais t/as McVitty Grove, the purpose of which was to give notice of BPB's intention to apply for adjudication of the payment claim, as required by s 17(2) of the *Security of Payment Act*: at [90], [94]. I will refer to this letter below as the “s 17(2) notice”. The primary judge accepted that the s 17(2) notice was sent by email to “srewais@gmail.com”, and by express post to the Property: at [91]. Australia Post records that were in evidence showed that it was delivered to the Property on 24 May 2024.

- 83 The s 17(2) notice referred to the payment claim, the failure to provide a payment schedule within the time allowed by s 14, the failure to pay the whole of the claimed amount by the due date, and BPB's election to apply for adjudication of the payment claim. Consistently with s 17(2)(b), the letter gave the appellants five business days in which to serve a payment schedule or pay the payment claim in full.
- 84 On 11 June 2024, BPB's solicitors sent an email to the Rewaises' then legal representatives. Dr Rewais was blind-copied into this email. The email contained a link to a OneDrive folder containing copies of the four emails comprising the payment claim and a copy of the s 17(2) notice. Upon receiving the email, Dr Rewais' solicitor made a phone call to Dr Rewais, at which time Dr Rewais became aware of the email that had been sent to him: at [95]. The primary judge accepted Dr Rewais' evidence that he had not opened or otherwise been aware of the payment claim or the s 17(2) notice before this time. Dr Rewais subsequently checked his mailbox at the Property for the s 17(2) notice and did not find it: at [96]-[97].
- 85 On 13 June 2024, BPB lodged an adjudication application under s 17(1)(b) of the *Security of Payment Act* and sent it by email to the Rewaises' legal representatives at that time, who accepted service on their behalf: at [98].
- 86 On 18 June 2024, the Rewaises provided BPB with a payment schedule under s 14 of the *Security of Payment Act*. In the payment schedule, the Rewaises submitted that they did not owe BPB anything, that the adjudication application was invalid, and that the adjudicator did not have jurisdiction to determine the application: at [99].
- 87 Both parties were given an opportunity to make submissions to the adjudicator in relation to his jurisdiction to make the Determination and did so.
- 88 On 7 July 2024, the adjudicator published the Determination: at [100]. The adjudicator considered that Dr Rewais' provision of the "srewais@gmail.com" email address on 26 June 2023, in addition to the subsequent use of that address for similar purposes, amounted to specification for the purposes of s 31(1)(d) of the *Security of Payment Act*: Determination [56], [65]. It followed that the payment claim and the s 17(2) notice were respectively served on

24 April 2024 and 22 May 2024, and that service was not a barrier to his jurisdiction.

- 89 The adjudicator also found, albeit not on the basis of any party's submissions, that the email address may have been specified through an implied variation of the Contract: Determination [69]. He also found, contrary to the Rewaises' submissions, that they became aware of the payment claim and s 17(2) notice on 24 April 2024 and 22 May 2024 respectively: Determination [72].

The primary judge's findings on service of the payment claim and s 17(2) notice

- 90 The hearing before the primary judge proceeded on the basis that it was for his Honour to determine the date of service of the payment claim and the s 17(2) notice. In the outline of submissions filed before the hearing, the Rewaises characterised the primary issues for determination as follows:

- a. First, whether the First Defendant's payment claim under s 13 of the SOPA ... was served on the Plaintiffs prior to making an adjudication application, and therefore whether the adjudicator had jurisdiction to determine the adjudication application; and
- b. Second, irrespective of the first issue, whether the First Defendant is entitled to enforce the Adjudication Determination in circumstances where the First Defendant was subject to a prohibition against enforcement under ss 10 and 94 of the *Home Building Act 1989* (NSW)...

- 91 In relation to the first issue, the Rewaises described service of a payment claim under s 13(1) as an essential precondition to taking the subsequent steps in Part 3 of the *Security of Payment Act*, including making an adjudication application. In circumstances where the payment claim was not served until Dr Rewais became aware of it on 11 June 2024, the Rewaises submitted that the adjudication process was commenced prematurely and, as a result, the adjudicator did not have jurisdiction to make the Determination under s 22 of the *Security of Payment Act*.

- 92 The submissions that the Rewaises advanced regarding service of the payment claim were consistent with Hodgson JA's identification in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 ("*Brodyn*") (at [53]) of a number of "basic and essential" requirements of the *Security of Payment Act*, failure to satisfy which would result in a purported determination that was "not in truth ... an adjudicator's

determination within the meaning of the Act” (at [52]). Hodgson JA identified those basic and essential requirements as including (at [53]):

- “1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (s 7 and s 8).
2. The service by the claimant on the respondent of a payment claim (s 13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s 17).
4. The reference of the application to an eligible adjudicator, who accepts the application (s 18 and s 19).
5. The determination by the adjudicator of this application (s 19(2) and s 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).”

93 BPB did not make any submissions against the proposition that service of the payment claim was a jurisdictional precondition for the court to determine. Its evidence and submissions were directed at establishing the correctness, as a matter of fact, of the adjudicator’s findings about service of the payment claim and the s 17(2) notice. As I will explain below, BPB advanced different submissions on the appeal, although not in a manner that caused the Rewaises any relevant prejudice.

94 Starting with service of the payment claim, BPB submitted that it served it by email in accordance with s 31(1)(d) of the *Security of Payment Act*. The primary judge concluded that BPB had not proved that the payment claim was served in accordance with that provision: at [140]. His Honour accepted the Rewaises’ submission that Dr Rewais provided his email address to Mr Braeckmans only for the purpose of receiving the quote (see [46 [Ref195682856](#)] above). This did not, in his Honour’s view, amount to Dr Rewais having specified his email address “for the service of documents of that kind”, namely, of the kind under the *Security of Payment Act*: [142].

95 BPB also relied on the *Electronic Transactions Act* to prove service of the payment claim by email. Relevantly, s 8 of the *Electronic Transactions Act* provides:

8 Writing

(1) If, under a law of this jurisdiction, a person is required to give information in writing, that requirement is taken to have been met if the person gives the information by means of an electronic communication, where—

- (a) at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference, and
- (b) the person to whom the information is required to be given consents to the information being given by means of an electronic communication.

(2) If, under a law of this jurisdiction, a person is permitted to give information in writing, the person may give the information by means of an electronic communication, where—

- (a) at the time the information was given, it was reasonable to expect that the information would be readily accessible so as to be useable for subsequent reference, and
- (b) the person to whom the information is permitted to be given consents to the information being given by means of an electronic communication.

(3) ...

(4) This section applies to a requirement or permission to give information, whether the expression **give**, **send** or **serve**, or any other expression, is used.

(5) For the purposes of this section, **giving information** includes, but is not limited to, the following—

- (a) making an application,
- (b) making or lodging a claim,
- (c) giving, sending or serving a notification,
- (d) lodging a return,
- (e) making a request,
- (f) making a declaration,
- (g) lodging or issuing a certificate,
- (h) making, varying or cancelling an election,
- (i) lodging an objection,
- (j) giving a statement of reasons.

96 Section 5 of the *Electronic Transactions Act* defines “consent” to include “consent that can reasonably be inferred from the conduct of the person concerned, but does not include consent given subject to conditions unless the conditions are complied with”. Section 13A of the *Electronic Transactions Act* deals with the time of receipt of communications sent electronically and relevantly provides:

13A Time of receipt

(1) For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication—

(a) the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee, or

(b) the time of receipt of the electronic communication at another electronic address of the addressee is the time when both—

(i) the electronic communication has become capable of being retrieved by the addressee at that address, and

(ii) the addressee has become aware that the electronic communication has been sent to that address.

(2) For the purposes of subsection (1), unless otherwise agreed between the originator and the addressee of the electronic communication, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address. ...

97 The primary judge concluded that the *Electronic Transactions Act* did not apply and that the adjudicator was wrong to rely on it, stating at [144]:

“Section 8 of that Act ... governs the *form* of communications by permitting information required or permitted to be given in writing to be sent electronically to a consenting person. Section 13A merely deems the time of receipt of communications sent electronically. Neither of these sections affect the requirements for service of a payment claim under s 31 of the *Security of Payment Act* and do not bear on the question of whether the Rewaises were made aware of the payment claim. Further, I do not consider that s 8 of the *Electronic Transactions Act* is engaged in the present case as the Rewaises did not consent to the information in the form of a payment claim being given by means of electronic communication.”

(Emphasis in original.)

98 Consistently with the decision of this Court in *Falgaat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259; 23 BCL 292 at [58] (“*Falgaat*”), the primary judge accepted that BPB could prove service of the payment claim by serving documents by one of the methods in s 31(1) of the *Security of Payment Act* or by bringing it to the actual attention of the Rewaises: at [120]. His Honour accepted the Rewaises’ submission that the payment claim was not brought to their attention before Dr Rewais saw the document on 11 June 2024: at [143]. Having rejected BPB’s submissions as to service under s 31, it followed that 11 June 2024 was the date of service of the payment claim.

- 99 Although the primary judge considered it unnecessary to consider the time of service for the s 17(2) notice given his findings about service of the payment claim, his Honour also concluded that it was not served until Dr Rewais had actual notice of it on 11 June 2024. His Honour rejected BPB's submission that the s 17(2) notice was served by email pursuant to s 31(1)(d) of the *Security of Payment Act*, for the same reasons as applied to service of the payment claim: at [147]. His Honour also rejected BPB's additional reliance on service of the s 17(2) notice by post pursuant to s 31(1)(c) of the *Security of Payment Act*. His Honour concluded that the Property was not the Rewaises' "ordinary place of business". His Honour considered that the Property was principally used as the family home; olive oil production and cattle sales were merely undertaken as a hobby; the café building and amphitheatre were intended to be used only for family events; and plans to operate health consulting rooms from the Property were abandoned before 2024: at [148].

Validity of the Determination

- 100 The first seven grounds of the Rewaises appeal were directed to the primary judge's conclusion that the Determination was not void. Although formulated in various ways, the focus of the Rewaises' complaint was that his Honour made the findings about service of the payment claim and s 17(2) notice for which they contended, from which it should have followed that the Determination was void. His Honour reached the contrary conclusion, they submitted, by a path of reasoning that was contrary to the decision in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190 ("*Chase Oyster Bar*"), as confirmed and reinforced in *Icon Co (NSW) Pty Ltd v Australia Avenue Developments Pty Ltd* [2018] NSWCA 339 ("*Icon*").
- 101 On the findings the primary judge made regarding service it necessarily followed that the adjudicator did not have jurisdiction and the Determination was void. In reaching that conclusion, I note that having regard to the manner in which the case was argued the primary judge's attention was not drawn to *Chase Oyster Bar* or to *Icon*. His Honour was referred to *Brodyn*, but for the limited purpose of what Hodgson JA said about the proper construction of s 10 of the *Home Building Act*.

- 102 It is necessary to say something more about the scope of judicial review under the *Security of Payment Act*. I have set out above the object in s 3(1) and the means by which the Act seeks to achieve that object, including, in particular, the statutory process for recovery of payment claims in Part 3. In *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 (“*Probuild*”) at [38], the High Court described the statutory regime as “predicated upon the existence of a construction contract” but with the entitlement to and enforcement of payments under the regime standing apart from the parties’ rights under the contract. The procedure for which Part 3 provides is “designed to operate quickly” so as to ensure the prompt resolution of payment disputes: at [40]. However, determinations and payments made under the Act do not affect any civil proceedings arising under the contract, save for the possibility that allowance must be given for payments made: see s 32(2) and (3). Although the *Security of Payment Act* does not speak of “interim” entitlements and payments, the High Court considered that label aptly reflected “how the statutory entitlement interacts with any underlying contractual liability”: at [39].
- 103 The nature of the regime led Spigelman CJ to observe in *Chase Oyster Bar* at [55] that the purpose of the Act was “best served by restricting the scope of intervention by the courts”, which has been quoted with approval in subsequent cases including *BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd* (2022) 108 NSWLR 350; [2022] NSWCA 82 at [35] and, more recently, *Martinus Rail Pty Ltd v Qube RE Services (No.2) Pty Ltd* [2025] NSWCA 49 at [57]. In *Probuild*, the High Court confirmed that judicial review of an adjudicator’s determination under the *Security of Payment Act* is limited to jurisdictional error and does not extend to non-jurisdictional errors of law on the face of the record.
- 104 Nonetheless, as Hodgson JA explained in *Brodyn*, “for a document purporting to be an adjudicator’s determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination”: at [52]. As I have set out above, the requirements that his Honour identified as meeting that description included “the service of a payment claim”. In *Southern Han Breakfast Point Pty Ltd (in*

liq) v Lewence Construction Pty Ltd (2016) 260 CLR 340; [2016] HCA 52 at [44], the High Court endorsed as “undoubtedly correct” the shared understanding of the parties in that case that s 13(1) of the Act was “an essential precondition to taking subsequent steps in the procedure set out in Part 3 of the Act”, in the sense that “unless a payment claim answering that description is served, there can be no adjudication application and hence no adjudication within the jurisdiction conferred by s 22 of the Act”.

- 105 In the present case, the primary judge extracted Hodgson JA’s reasons in *Brodyn* at [53] and acknowledged the consequences of non-compliance with the basic and essential requirements of the Act, including by reference to what the High Court said in *Southern Han* about service of a payment claim: at [158]. The primary judge then found that “[i]n a general sense, it appears that all the ‘essential requirements’ for an adjudicator’s determination under the *Security of Payment Act* have been complied with”: at [164]. His Honour made specific reference to “condition two” (service of a payment claim) being satisfied on the basis that the payment claim was served on the Rewaises on 11 June 2024: at [164].
- 106 In *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289 at [35], in describing the High Court’s reasoning in *Southern Han* at [44] as “plainly correct” even though it was not argued, Leeming and Payne JJA noted that “[a] series of important consequences follow upon the service of a payment claim, many of which are measured, directly or indirectly, by the number of business days following service of a payment claim”. Those statutory consequences include the making of an adjudication application under s 17 of the *Security of Payment Act*, which Hodgson JA identified in *Brodyn* at [53] as another of the basic and essential elements of the Act.
- 107 Relevantly for present purposes, pursuant to s 17(1)(b) a claimant may apply for adjudication of a payment claim if the respondent both fails to provide a payment schedule and fails to pay the whole or any part of the claimed amount “by the due date for payment”. Section 17(2) bears repeating:
- (2) An adjudication application to which subsection (1)(b) applies cannot be made unless—

(a) the claimant has served written notice on the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

108 The 20-business day period within which the notice to which s 17(2)(a) refers must be served commences “immediately following the due date for payment”. As I noted at [76 [Ref196233239](#)] above, that phrase is defined by reference to s 11, the provisions of which identify when a progress payment becomes due and payable by reference to when a payment claim “is made”, returning one to service and s 31 of the *Security for Payment Act*. In the present case, on the primary judge's finding that the payment claim was served on 11 June 2024, the progress payment the subject of that payment claim did not become due and payable under s 11(1A) until the date occurring 15 business days after that date. It followed that when BPB served the s 17(2) notice, which his Honour found also occurred on 11 June 2024, the time for its service had not yet commenced to run.

109 The primary judge accepted that, on his findings as to service, the filing of the adjudication application on 13 June 2024 was premature: at [165]-[166]. Nonetheless, his Honour concluded that the Determination was not void “simply because [the adjudicator's] decision as to the timing of service and whether the adjudication application was made in time was erroneous”: at [169]. In support of that proposition, his Honour cited the reasons of Hodgson JA in *Brodyn* at [55]. At [54] of *Brodyn*, Hodgson JA observed that the provisions of the *Security of Payment Act* that contained the basic and essential requirements also contained “more detailed requirements”, examples of which included, in s 17, “the time when an adjudication application can be made and as to its contents”. His Honour then said at [55]:

“In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with these more detailed requirements was essential to the existence of a determination: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the

legislation and reasonably capable of reference to this power (cf *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598) and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether the more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.”

110 The primary judge, who set out this passage and in doing so bolded the last sentence (at [156]), described the present case as falling into what he described as this “separate category”: at [165]. His Honour appears to have placed particular reliance on the last sentence in [55] of *Brodyn*, emphasising the following matters in support of the Determination not being void:

- (1) The issue of the timing of BPB’s filing of the adjudication application was squarely raised before the adjudicator, with both parties making submissions about the timing of service of the payment claim and the s 17(2) notice and the adjudicator’s jurisdiction: at [167].
- (2) The adjudicator’s reasons on jurisdiction ran to five pages and addressed the application of s 31 of the *Security of Payment Act* and the *Electronic Transactions Act* and the time at which the Rewaises became aware of the payment claim and s 17(2) notice: at [168].
- (3) The adjudicator demonstrated “a bona fide attempt to exercise his power to make a Determination”: at [170].

111 As I noted above, it was not in dispute before the primary judge that the issue of service of the payment claim and s 17(2) notice were matters for his Honour to determine as essential preconditions to the adjudicator’s jurisdiction. BPB did not submit that the adjudicator’s findings about service were not reviewable save for jurisdictional error. That BPB did not advance that argument in relation to service of the payment claim under s 13 of the Act reflected the long-standing characterisation of that matter as an essential precondition to an adjudicator having jurisdiction to make a determination, as confirmed in *Southern Han*. That it did not do so in relation to the s 17(2) notice reflected the decision of this Court, subsequent to *Brodyn*, in *Chase Oyster Bar*.

112 In the words of McDougall J at [125] of *Chase Oyster Bar*, one of the issues in that case was whether s 17(2)(a) of the *Security of Payment Act* establishes “a condition that must be satisfied before an adjudicator has jurisdiction to determine an application to which s 17(1)(b) applies”; and whether an adjudicator’s decision as to satisfaction of that condition bound the Court. In articulating the first issue at [36] of *Chase Oyster Bar*, Spigelman CJ also answered the second:

“The issue to be determined is whether the adjudicator had jurisdiction to determine an ‘application’ which had been made without compliance with the mandatory (in a negative sense) terminology of s 17(2). The issue is not, contrary to some of the submissions made, whether the adjudicator had jurisdiction to determine that s 17(2)(a) had been complied with. That section is not addressed to the adjudicator and is not a matter which he is directed to ‘determine’ within s 22(1) of the *Security of Payment Act*. It may be that it is a matter which he must ‘consider’ as one of the ‘provisions of the Act’ within s 22(2)(a). However, that section confers no power to determine the issue.”

113 Spigelman CJ concluded that compliance with s 17(2) of the *Security of Payment Act* was an essential precondition to an adjudicator’s jurisdiction: see [41]-[53]. McDougall J also concluded that in circumstances to which s 17(1)(b) applied, the requirement in s 17(2)(a) “is a condition of the right to make an adjudication application, and satisfaction of that condition is an element of the jurisdiction of the adjudicator” at [222]. Basten JA agreed at [96], describing the language of the provision as “intractable” and stating that “neither the structure nor the purpose of the Act suggests a different conclusion”.

114 Basten JA also concluded that the *Security of Payment Act* did not give the adjudicator the power conclusively to determine the validity of the adjudication application: at [101] (McDougall J agreed at [238]). Although in a practical sense there was “much to recommend the view that the adjudicator is able to determine whether the application complies with provisions such as s 17(2)(a)”, his Honour identified three factors that supported the contrary view:

“[99] ... First, s 22(1), identifying that which the adjudicator is to determine, makes no reference to the validity of the adjudication application. Secondly, s 22(2) limits the matters which the adjudicator is entitled to consider to the Act, the provisions of the construction contract, the payment claim, the payment schedule, submissions in support of either and the results of any inspection. In a provision which renders the consideration of any other material impermissible, the absence of any reference to the circumstances in which the adjudication application was made is highly significant.

[100] Thirdly, the descriptions of the matters to which payment claims and payments schedules must relate and hence (at least implicitly) the matters to which the submissions in support can properly refer, do not expressly identify any aspect of the circumstances in which the adjudication application was made.”

- 115 One of the questions that was referred to the Court in *Chase Oyster Bar* was whether, in light of the High Court’s decision in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1 (“*Kirk*”), the decision in *Brodyn*, and in particular what Hodgson JA said at [54]–[55], should not be followed or was incorrectly decided. Spigelman CJ observed at [25] that in so far as Hodgson JA referred to the more detailed requirements of s 17 those remarks were obiter. Spigelman CJ further observed at [26] that in so far as Hodgson JA said in [55] of *Brodyn* that Parliament “did not intend that exact compliance with all the more detailed requirements was essential”, that statement “may leave open the possibility that *some* of the ‘detailed requirements’ *could* be found to be ‘essential’” (emphasis in original). McDougall J agreed with Spigelman CJ’s observations in [25] and [26], noting also that he did not think that the conclusion he reached as to the proper construction of s 17(2)(a) was necessarily inconsistent with Hodgson JA’s reasoning in *Brodyn*: at [229]. Basten JA also observed that his Honour may not have decided the matters identified in the question in such broad terms as was there assumed: at [106].
- 116 In *Icon* at [10]–[11], Basten JA cited *Chase Oyster Bar* as authority for the proposition that the engagement of s 17(2)(a) of the *Security of Payment Act* depends upon the existence of an identified state of affairs, as opposed to a provision that depended upon a state of satisfaction of the decision-maker as to that state of affairs. His Honour explained the distinction between those two categories as follows (footnotes omitted):

“[13] It is a fundamental principle that the engagement of a statutory power may depend either upon the existence of an identified state of affairs, or a state of satisfaction of the decision-maker as to an identified state of affairs. In the first category, the actual state of affairs, being the criterion of engagement of the power, is described as a ‘jurisdictional fact’, meaning that the lawful exercise of the power may ultimately depend upon a finding of a court exercising judicial review as to whether or not the required state of affairs existed. The second category is sometimes also said to involve a jurisdictional fact, but only in the sense that the relevant fact is an opinion formed by the

decision-maker; in that case a reviewing court can only be concerned with the existence and lawful formation of the opinion.

[14] There are aspects of the Security of Payment Act which fall into each category. The first category includes the service of a payment claim within the period specified by s 17(2)(a) of the Act. In most cases that matter is readily determined and little inconvenience is generally caused by identifying it as an essential precondition to the exercise of the relevant powers.

[15] The Security of Payment Act does not refer to the opinion or satisfaction of the adjudicator. Nevertheless, there being no right of appeal, the adjudicator's findings with respect to matters of fact, within jurisdiction, will be unreviewable. Further, there being no review for errors of law on the face of the record, the adjudicator's determination of legal issues will also be unreviewable."

- 117 As counsel for the Rewaises submitted on the appeal, his Honour's reference in [14] to service of a payment claim within the period specified by s 17(2)(a) was likely intended to refer to a notice of intention to apply for adjudication. Nonetheless, for reasons I have already given service of the payment claim does bear on the calculation of the period to which s 17(2)(a) refers.
- 118 On the appeal, BPB contended that an adjudicator's decision as to the statutory and contractual mechanisms for service in a particular case fell within the second category of jurisdictional fact to which Basten JA referred in *Icon*, which was reviewable only for jurisdictional error as to the existence or lawful formation of the adjudicator's state of satisfaction. The starting point for this argument was the terms of s 22 of the *Security of Payment Act*. I have set out above the identification, in s 22(2), of the limited matters that the adjudicator is to consider in determining an application, which include the provisions of the Act, the provisions of the construction contract, the payment claim and any payment schedule and submissions that have been duly made. BPB submitted that a finding of an adjudicator that involved consideration of those requirements, for example s 31 of the Act as to service, or the contractual provisions as to service, was a matter within jurisdiction and was unreviewable absent a vitiating factor.
- 119 Acknowledging the difficulty of reconciling that submission with the Court's construction of s 17(2) in *Chase Oyster Bar*, BPB accepted that that decision was authority for the proposition that service of a notice under s 17(2) within the 20-business day period stipulated in s 17(2)(a) was a "first category" jurisdictional fact. However, BPB submitted that it did not follow that a court

would review the findings of an adjudicator as to the contractual and statutory mechanisms for service. Counsel for BPB explained the argument by reference to the present case as follows:

“In this case, the documents were served by email within the period, and since service by email was pursuant to the contractual and statutory mechanisms which the adjudicator found, no issue arises for judicial review.

Or to put it another way, the Court won't look at the issue of the first category jurisdictional fact without taking into account what the adjudicator has decided as to the mechanisms of service referable to the provisions of the contract and the provisions of the Act.”

- 120 The Court's decision in *Chase Oyster Bar* as to the proper construction of s 17(2)(a) cannot be read so narrowly. True it is, as BPB submitted, that there was no issue in that case involving construction of the parties' contract, and the focus was the calculation of the 20-business day period in s 17(2)(a). However, the submission that *Chase Oyster Bar* concluded only that calculation of that period was a “first category” jurisdictional fact does not engage with the reasoning by which the Court arrived at that conclusion. On BPB's submission, a court's answer to that question would depend upon findings that an adjudicator made, even if the court formed the view that those findings were wrong. That BPB's submission entailed a bifurcation of the relevant inquiry in that way told against its acceptance.
- 121 Another telling answer to it lies in the Court's rejection, in *Chase Oyster Bar*, of an argument that the respondent advanced in support of s 17(2)(a) not being a first category jurisdictional fact. The argument sought to draw an analogy with cases that found that determination of whether submissions had been “duly made” for the purposes of s 22(2)(d) was a matter for the adjudicator and not the court. In rejecting the analogy as inapposite, McDougall J observed at [220] that whether or not a submission is “duly made” depended on “an assessment of the issues raised by a payment claim and payment schedule, and a value judgment as to whether a particular submission falls within the ambit of the payment claim or payment schedule, properly understood”. That assessment was one in which “expert evaluation, and an understanding of the way in which the parties have dealt with each other, will be of assistance”. His Honour did not consider that the question raised by s 17(2)(a) would be similarly assisted by expert evaluation, stating:

“By contrast, *the fixing of a due date for payment of a progress payment is a mechanical process carried out in accordance with the relevant provisions of the contract or the Security of Payment Act (s 11(1))*. The task of counting 20 business days *from that due date* requires no more than a calendar and, perhaps, a pencil, used with an appreciation of the definition of ‘business day’ in s 4.”

(Emphasis added.)

122 The Attorney General for NSW intervened in support of the respondent in *Chase Oyster Bar* and advanced a similar submission, relying on the fact that while the 20 business day period to which s 17(2)(a) referred could be easily ascertained, the commencement date of that period was not always as clear. Spigelman CJ rejected this argument as being “of little weight in view of the express stipulation in s 11(1) [now s 11(1A)] that a progress payment becomes due and payable on the date specified in the contract or if none is specified, 10 days [now 15 days] after the payment claim is made”: at [51]. There may be cases, of which the present is one, in which questions of service are not as mechanical as Spigelman CJ and McDougall J envisaged, which Basten JA implicitly acknowledged in *Icon* at [14] when he described service as readily determined “in most cases”. However, the members of the Court in *Chase Oyster Bar* were cognisant of that possibility and nonetheless construed s 17(2)(a) as a first category jurisdictional fact.

123 The finding of the primary judge that the payment claim was not served until 11 June 2024 necessitated a finding that the notice purportedly given under s 17(2)(a) did not comply with that provision. It followed that the adjudicator did not have jurisdiction to determine the adjudication application and the Determination was void for want of jurisdiction. His Honour was wrong to conclude to the contrary.

124 It is thus necessary to turn to BPB’s notice of contention and its challenge to the primary judge’s findings on service.

BPB’s challenge to the primary judge’s findings on service

125 BPB’s grounds of contention were many and varied, but their focus was the primary judge’s finding that the payment claim and the s 17(2) notice were served on 11 June 2024. BPB submitted that his Honour should have found that the payment claim was served by email on 24 April 2024, and the s 17(2)

notice was served by email on 22 May 2024, relying in the alternative on s 31(1)(d) and s 31(1)(e) of the *Security of Payment Act* and s 8(2)(a) and s 8(2)(b) of the *Electronic Transactions Act*. Alternatively, in relation to the s 17(2) notice, BPB submitted that his Honour should have found that it was served by post on 24 May 2024, relying on s 31(1)(c) of the *Security of Payment Act*.

- 126 BPB's submissions on these issues relied on what it described as the informal dealings between the parties. BPB submitted that even though the Contract did not provide for an invoicing or payment process, it would have been self-evident to the parties that documentation such as invoices would likely come into existence. BPB relied on Dr Rewais' provision of the email address "srewais@gmail.com" by text on 26 June 2023, and the numerous emails that were exchanged between BPB and Dr Rewais using that address in the period between 11 August 2023 and 24 April 2024. Some of those emails related to works at the Property, and a number attached invoices and statements of account, with some of the invoices paid promptly. Dr Rewais' evidence in cross-examination, that he was prepared and content to receive communications by email, was confirmatory of what the documentary record otherwise revealed. The fact that he was, on his evidence, prompted orally by the Braeckmans to check his emails in relation to invoices does not relevantly alter the use of the email address as a means of communication with respect to the works and claims for payment with respect to them. Neither Dr Rewais nor Mrs Rewais informed the Braeckmans at any stage that progress claims should not be sent by email or should be sent in some other way.
- 127 BPB submitted that having regard to what the circumstances disclosed about the parties' dealings, the court should not be unduly exacting as to satisfaction of the requirements of the legislative provisions on which it relied, in particular the requirement, in s 31(1)(d) of the *Security of Payment Act*, for an email address to be "specified by the person for the service of documents of that kind". In this context, BPB submitted that the fact that Dr Rewais' immediate purpose in providing the email address was unrelated to the *Security of Payment Act* should not have been dispositive of whether service could be effected in accordance with s 31(1)(d), as the primary judge found that it was.

- 128 In *Falgat* at [58], Hodgson JA described s 31 of the *Security of Payment Act* as facultative. Section 31(1) prescribes a number of methods by which a person may serve a document that is authorised or required under the Act to be served on a person. Pursuant to s 31(3), the methods specified in s 31(1) are in addition to the provisions of any other law with respect to service, such as s 109X of the *Corporations Act 2001* (Cth) which his Honour referred to in *Falgat*. Further, if a document is actually received and comes to the attention of a person to be served or provided with the document, it does not matter whether or not the facultative regime has been complied with: *Falgat* at [58].
- 129 As Crowley J observed in *Demex Pty Ltd v John Holland Pty Ltd* (2022) 12 QR 438; [2022] QSC 259 (“*Demex*”) at [73], ss 31(1)(a) to (d) specify a particular type of act or conduct by which a party may serve a document, while ss 31(d1) and (e) permit other methods of service to be specified, respectively by regulation or by agreement between the parties in the contract. As his Honour further observed at [75], apart from delivering a document to the person to be served personally in s 31(1)(a), the other means of service provided by s 31 do not suggest that “any awareness is required on the part of the recipient party or any further act must be done by the recipient party, before service is complete”. Even service pursuant to s 31(1)(c), which is the only paragraph for which express provision is made as to when it takes effect, is complete “when the document is received at that place” s 31(2). In *Falgat* at [62], Hodgson JA expressed the view that the composite phrase, “received at that place”, indicated that “mail delivered to a registered office or place of business is received at that place when it is put into the mail box of that registered office or place of business, without the necessity of anyone actually seeing it”.
- 130 Attempts to construe s 31 in a restrictive way have generally been rejected. In *Demex*, which concerned service of a payment claim and payment schedule, Crowley J stated that were it otherwise, “the timeliness of receipt of progress payments could then be determined by the timing of action taken by the recipient” and the potential for undue delay would be obvious: at [72]. Such delay would be contrary to the facultative character of the section and the broader purpose and objectives of the *Security of Payment Act* to which I have referred above. As Stevenson J summarised in *BCFK Holdings Pty Ltd v Rork*

Projects Pty Ltd [2022] NSWSC 1706, the regime is “intended to provide a speedy way to resolve, on an interim basis, disputes concerning construction contracts” in a manner that, so far as possible, “avoids arid and technical disputes”: at [25]-[26].

131 It is also important to note, as Giles JA recognised in *Downer EDI Works Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd* (2011) 80 NSWLR 202; [2011] NSWCA 78 (“*Downer EDI*”) at [27], that s 31 is concerned with service of documents beyond service of payment claims and payment schedules, including (and grouping some of the provisions differently to Giles JA):

- (1) s 15(2)(b), s 16(2)(b), and s 24(1)(b), notice of intention to suspend performance;
- (2) s 17(2)(a), notification of intention to apply for adjudication;
- (3) s 19(1), notice by an adjudicator of acceptance of an adjudication application;
- (4) s 23(1)(a), an adjudicator’s determination;
- (5) s 26A(2), a payment withholding request on a principal contractor;
- (6) s 26A(5), notification of whether a person is a principal contractor;
- (7) s 26B(3)(c), a notice of claim under the *Contractors Debts Act 1997* (NSW);
- (8) s 26B(5), an adjudicator’s determination on a principal contractor; and
- (9) s 26D(3), notice to a principal contractor of withdrawal of an adjudication application.

132 The appeal in *Downer EDI* concerned the proper construction of s 31(1)(c) of the *Security of Payment Act* and service “at the person’s ordinary place of business”. The appellant contended that where a person had more than one ordinary place of business, s 31(1)(c) should be read down so as to refer to the place of business having the closest connection to the works the subject of the relevant construction contract: at [19]. In support of that contention, the appellant relied on the importance that the Act placed on compliance with time limitations, submitting that reading down s 31(1)(c) was necessary “so that a payment claim was received at a place where someone would have knowledge of the relevant works and could take action to provide a payment schedule”. It was said to be contrary to the intent of the Act “that there could be receipt at a

remote location which was otherwise the recipient's ordinary place of business": at [25]. In rejecting the argument, Giles JA stated at [30]:

"In my opinion, there is no warrant for confining the person's ordinary place of business to which the postal article is addressed to the place of business with the closest connection with the relevant works. Nothing in s 31(1)(c) so provides, or makes the ordinary place of business turn on whether the intended recipient of the notice has a site office for the relevant works, administers the works from one location, or administers the works from another location. The provision requires a location which satisfies the ordinary language of a place of business which is the person's ordinary place of business. The intrusion of a closest connection would bring greater uncertainty to what should be reasonably determinable. It is not to be expected that the person serving the notice should have to determine which of a number of places of business of the intended recipient is the one with the closest connection with the relevant works — a quite different test from one which is an ordinary place of business — at risk of failure in service if the determination is contestable."

- 133 At the time of the decisions in *Falgat* and *Downer EDI*, s 31 did not contain s 31(1)(d) in its current form (at that time, what is now s 31(1)(d1) was numbered s 31(1)(d)). However, what Giles JA and Hodgson JA respectively said about the character of s 31 applies with equal force to its construction.
- 134 The Rewaises emphasised the word "specified" and submitted that the paragraph requires precision, including with respect to the particular documents here in issue, namely a payment claim and a s 17(2) notice. It is the case, as Burchett J observed in *Tickner v Chapman* (1995) 57 FCR 451 at 480, that "[c]ourts which have considered the meaning of 'specify' in various contexts have treated it as a strong word", his Honour having referred to it in an earlier case as "a word that signifies precision". Nonetheless, and like all words, "specify" must take its colour from the context in which it appears: *Coshott v Ludwig* (1997) 8 BPR 15,519 at 15,521; (1997) NSW ConvR 55-810.
- 135 The circumstances in which s 31(1)(d) was enacted are of some significance in this respect. Section 31(1)(d) was inserted in its current form pursuant to the *Electronic Transactions Legislation Amendment (Government Transactions) Act 2017* (NSW). The main purpose of that Act, as described in the Second Reading Speech, was "to enable digital transactions between the Government and citizens, businesses or other organisations where they are not currently permitted or unclear": New South Wales Legislative Council, *Parliamentary*

Debates (Hansard), 24 May 2017 at 37. The relevant amendments were described in the Second Reading Speech as follows:

“A range of legislation currently requires that documents and notices be served ‘personally or by post’. Schedule 1 to the bill amends requirements for documents to be served only in this way, allowing for certain documents and notices to be sent electronically, for example by email, with the consent of the individual. Amendments to 39 Acts, and one regulation provides for electronic service delivery as another option in addition to serving documents personally or by post. The amendments are consistent with efforts across government to increase the channels of communication and service delivery available, such as amendments to the *Fines Act 1996* that allow the option of issuing electronic penalty notices. I note that the amendments will not affect requirements for serving documents in relation to court proceedings and are focused on government transactions. ...”

136 By Schedule 1 of the *Electronic Transactions Legislation Amendment (Government Transactions) Act*, a provision in identical terms to s 31(1)(d) was inserted into a series of Acts, either alone or with a provision in similar terms to s 31(1)(d1), or as part of broader amendments of a provision pertaining to service of documents. The amendment was intended to expand the means by which documents may be served. Although it is of course necessary to construe s 31(1)(d) in the context of the Act in which it appears, it is of some relevance to that task that its terms are not unique to this Act, and that the same language was inserted into this and other Acts with a view to facilitating electronic service.

137 Coming then to the terms of s 31(1)(d), what must be specified is an email address, which requires precision. That email address must be specified “by the person” who is to be given, sent or otherwise provided with the document (having regard to the definition of “serve” in s 31(4)). The “documents” to which s 31(1)(d) refers picks up the chapeau in s 31(1) and “[a]ny document that by or under this Act is authorised or required to be served on a person”, which would include payment claims and s 17(2) notices and the other documents that Giles JA identified in *Downer EDI*. In referring to an email address that is “specified ... for service of documents of that kind”, s 31(1)(d) permits a person to specify an email address for service of all documents authorised or required to be served under the Act, or for service of particular documents authorised or required to be served. The question in a given case will be whether a document has been served by email to an email address specified for service

of a document of that kind. The answer will depend on the circumstances, noting as Leeming JA has observed at [19 [Ref197864400](#)] above that specification can also take place impliedly or by conduct.

- 138 The Rewais submitted in writing in this respect that it could not be the case “that any party who is involved in a commercial transaction has, by communicating informally with the other party, consented to be formally served by any method of communication that the parties might ordinarily engage in”. The characterisation of service under the Act as a “formal” process is at odds with the range of documents to which s 31 applies and the definition of “serve” in s 31(4). To construe s 31(1)(d) as limited to express specification would be inconsistent with the broader purposes of the Act.
- 139 I have set out in some detail above the communications between the parties using the email address that Dr Rewais provided (see [49 [Ref196733409](#)] to [62 [Ref196733423](#)], [66 [Ref196733435](#)], and [68 [Ref196733446](#)]-[70 [Ref196733458](#)] above). It is the case that Dr Rewais provided that email address at an early stage of his dealings with BPB. However, he and BPB proceeded to communicate using that email address about works under the Contract and invoices for those works (which, as counsel for BPB emphasised in his oral submissions, were styled as payment claims under the Act). The email communications included queries being raised about invoices and, ultimately, disputes about those invoices. In my view, the evidence disclosed that Dr Rewais had specified the email address for service of documents of the kind that the *Security of Payment Act* requires or authorises to be served, so as to enable BPB to serve the payment claim and adjudication notice by sending them to that email address pursuant to s 31(1)(d).
- 140 The primary judge concluded at [142] and [147] that service by email to Dr Rewais’ email address was not available to BPB pursuant to s 31(1)(d) of the *Security of Payment Act* for the purposes of the payment claim and the s 17(2) notice because Dr Rewais had only provided that email address for the purpose of receiving a quote. It follows from what I have said above that I accept BPB’s submission that this was not dispositive of the issue and his Honour erred in finding that it was.

- 141 It is not necessary for me to consider BPB's alternative reliance on the provisions of the *Electronic Transactions Act* in terms of service. I would, however, take a different view to the primary judge on the question of whether BPB had given the "information" (being the payment claim and s 17(2) notice) to the Rewaises electronically with their "consent" for the purposes of s 8 of that Act, having regard to the definition of the latter term in s 5 and the course of conduct between the parties.
- 142 Section 13A of the *Electronic Transactions Act* remains relevant to BPB's capacity to prove service under the *Security of Payment Act*. The appellant in *Demex* relied on s 13A for that purpose in circumstances where the contract specified the email address. By contrast with the evidence on which the appellant in *Demex* relied (which was that both the sender and recipient put the email into evidence and their respective copies showed the same date and time), in the present case BPB's evidence included documents showing that the emails were capable of being retrieved by Dr Rewais on the date that they were sent. In *Bauen Constructions Pty Ltd v Sky General Services Pty Ltd* [2012] NSWSC 1123, Sackar J construed the words "capable of being retrieved" in *Electronic Transactions Act*, s 13A(1)(b), correctly in my view, to not require that the email have been opened or read by the addressee. Thus, as BPB submitted, service was effective irrespective of whether the Rewaises had actual notice or awareness of the email.
- 143 In the circumstances, it is not necessary to consider BPB's further ground on its notice of contention, that the s 17(2) notice was served on 24 May 2024 by post at the Rewaises' "ordinary place of business".
- 144 On the evidence in this case, BPB served the payment claim on 24 April 2024. The s 17(2) notice was served on 22 May 2024, within the 20-business day period for which s 17(2)(a) makes provision. The adjudication application was made on 13 June 2024 and complied with s 17(2)(b). The adjudicator had jurisdiction to determine the application.
- 145 In view of this conclusion, it is necessary to return to the Rewaises' appeal, and their contention that the primary judge erred in finding that ss 10 and 94 of the *Home Building Act* did not prohibit BPB from enforcing the Determination.

The application of ss 10 and 94 of the Home Building Act

146 As I noted above at [90 [Ref196412420](#)], the Rewaises submitted to the primary judge that even if the Determination was not void on its primary case, it was unenforceable on the basis of ss 10 and 94 of the *Home Building Act*. The primary judge found that the entire Property was a “dwelling” for the purposes of the *Home Building Act* and that the Contract was thus one to which the *Home Building Act* applied. However, his Honour concluded that ss 10 and 94 did not preclude BPB’s enforcement of the Determination under the *Security of Payment Act*.

147 The Rewaises took issue with this conclusion in grounds 8 to 10 of their appeal. BPB, on its cross-appeal, took issue with his Honour’s anterior finding that the Contract was for residential building work within the meaning of the *Home Building Act*. However, BPB accepted that it would only be necessary to address its challenge to this part of his Honour’s reasoning if the Court upheld the Rewaises’ grounds of appeal on this issue. The reasoning below thus proceeds in the first instance on the basis of the primary judge’s finding that the Contract was for residential building work to which the *Home Building Act* applies.

The primary judge’s construction of ss 10 and 94 of the Home Building Act

148 Section 4(1) of the *Home Building Act* prohibits a person from contracting to do any residential building work “except as or on behalf of an individual, partnership or corporation that is the holder of a contractor licence authorising its holder to contract to do that work”. Where s 4(1) defines the prohibition, s 10 addresses the civil enforcement consequences of non-compliance:

10 Enforceability of contracts and other rights

(1) A person who contracts to do any residential building work, or any specialist work, and who so contracts—

- (a) in contravention of section 4 (Unlicensed contracting), or
- (b) under a contract to which the requirements of section 7 apply that is not in writing or that does not have sufficient description of the work to which it relates (not being a contract entered into in the circumstances described in section 6(2)), or
- (c) in contravention of any other provision of this Act or the regulations that is prescribed for the purposes of this paragraph,

is not entitled to damages or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract, and the contract is unenforceable by the person who contracted to do the work. However, the person is liable for damages and subject to any other remedy in respect of a breach of the contract committed by the person.

(2), (3) (Repealed)

(4) This section does not affect the liability of the person for an offence against a provision of or made under this or any other Act.

149 The requirements under the *Home Building Act* with respect to insurance adopt a similar structure. Section 92 is an offence provision, prohibiting a person doing residential building work under a contract (s 92(1)), or demanding or receiving a payment under a contract for such work (s 92(2)), unless a contract of insurance that complies with the Act is in force in relation to that work and a certificate of insurance evidencing the contract of insurance has been provided to the other party to the contract. Section 94 provides:

94 Effect of failure to insure residential building work

(1) If a contract of insurance required by section 92 is not in force, in the name of the person who contracted to do the work, in relation to any residential building work done under a contract (the ***uninsured work***), the contractor who did the work—

(a) is not entitled to damages, or to enforce any other remedy in respect of a breach of the contract committed by any other party to the contract, in relation to that work, and

(b) is not entitled to recover money in respect of that work under any other right of action (including a quantum meruit).

(1A) Despite section 92(2) and subsection (1), if a court or tribunal considers it just and equitable, the contractor, despite the absence of the required contract of insurance, is entitled to recover money in respect of that work on a quantum meruit basis.

(1B) A contractor who applies to a court or tribunal for a remedy under this section, or who is awarded money under this section, is not guilty of an offence under section 92(2) by virtue only of that fact.

(1C) Without limiting the factors that a court or tribunal may consider in deciding what is just and equitable under subsection (1A)—

(a) in relation to any contract—the court or tribunal may have regard to the impact on the resale price of the property if no contract of insurance is provided, and

(b) in relation only to a contract entered into before 30 July 1999—the court or tribunal is not to be limited by the fact that the required contract of insurance was not obtained until after the date of the contract.

(2) However, the contractor remains liable for damages and subject to any other remedy in respect of any breach of the contract committed by the contractor.

(3) Residential building work that is uninsured work at the time the work is done ceases to be uninsured work for the purposes of this section if the required contract of insurance for the work is subsequently obtained.

(4) If a person commenced residential building work before 30 July 1999 and entered into a contract of insurance that complies with this Act in relation to that work after the contract for the residential building work was entered into, that contract of insurance is, for the purposes of this section or any previous version of this section, taken to have been in force in relation to the residential building work done under the contract for the residential building work whether that work was done before or after the contract of insurance was entered into.

150 BPB accepted that it was not licensed under the *Home Building Act*, and that it did not have a contract of insurance in place that complied with the requirements of s 92 of that Act: at [197]. The primary judge summarised the Rewaises' argument as to the effect of BPB's non-compliance with s 4 of the *Home Building Act* as follows at [194]:

"(1) Pursuant to s 10(1) of the HBA, BPB is not entitled to an award of damages or to enforce any other remedy in respect of a breach of the Contract and the Contract is unenforceable by BPB.

(2) The effect of this bar on enforcement is that BPB was not entitled to pursue adjudication pursuant to the *Security of Payment Act*. This is because the *Security of Payment Act* adjudication provisions are a means by which a residential building contract may be enforced.

(3) The court ought to construe the *Security of Payment Act* adjudication provisions as operating 'harmoniously' with the HBA as, if this were not the case, the protections provided for by the HBA would be rendered meaningless."

151 In concluding that s 10 of the *Home Building Act* did not preclude the enforceability of the Determination under the *Security of Payment Act*, the primary judge, correctly, considered himself bound by what Hodgson JA said about the section in *Brodyn*: at [216]. One of the arguments that the appellant advanced in that case was that because the respondent was not licensed under the *Home Building Act* the subcontract was illegal pursuant to s 4 of that Act, and was unenforceable pursuant to s 10: at [81]. In rejecting that argument, Hodgson JA stated at [82]:

"In my opinion, the civil consequences for an unlicensed contractor for its breach of s.4 are those set out in s.10, and not any wider deprivation of remedies. In my opinion this is confirmed by the different provisions of s.94, which explicitly precludes, in the event of breach of the insurance provisions, the obtaining of a quantum meruit unless a court considers it just and

equitable. In my opinion, the remedy given by the Act is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract: it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus it is not affected by s.10 of the HBA.”

- 152 In relation to s 94 of the *Home Building Act*, the Rewaises submitted that the different wording of that provision produced different consequences, which the primary judge summarised at [195]:

“(1) Section 10 contains a restriction on entitlement to damages and enforcement of ‘any other remedy in respect of a breach of contract.’ Section 94 contains the same restriction plus an additional restriction on recovering money ‘in respect of that work under any other right of action (including a quantum meruit)’.

(2) In *Brodyn*, Hodgson JA distinguished s 94 from his observations about s 10 and his Honour’s reasons have no wider application than s 10 ... *Brodyn* states that because an adjudicator’s determination is a ‘statutory remedy’ it is not ‘damages or any other remedy in respect of a breach of contract’ but does not state that an adjudicator’s determination is not a ‘right of action’ as captured by s 94. Section 94 should therefore be read as having a broader application than s 10 in terms of its effect of precluding the enforcement of building contracts.

(3) Although they note that s 94 preserves the court’s ability to grant quantum meruit if it considers it just and equitable, it submits that such an order is not sought and is not an issue in these proceedings.”

- 153 The primary judge accepted that s 94 adopted a broader prohibition in so far as s 94(1)(b) referred to “any other right of action”. Nonetheless, the remedy available to BPB under the *Security of Payment Act* did not, in his Honour’s opinion, fall within s 94 of the *Home Building Act* because it was “not equivalent to seeking damages or any other remedy in respect of a breach of contract”, nor was it “equivalent to seeking to recover money in respect of [residential building] work under any other right of action”: at [218]. The statutory entitlement to a progress payment was not a “right of action” within the meaning of s 94 as it was not a right to bring proceedings in a court of law: at [218]-[219]. His Honour found some support for this conclusion in s 22 of the *Security of Payment Act*, which sets out the matters to which an adjudicator is to have regard and does not include the provisions of any other Act, including the *Home Building Act*: at [220].

The appeal from his Honour's conclusions regarding ss 10 and 94 of the Home Building Act

154 On 20 August 2024, s 8(2) of the *Security of Payment Act* commenced. It was inserted pursuant to the *Better Regulation Legislation Amendment (Miscellaneous) Act 2024* (NSW) (s 2(b) and Sch 1 item [1.2]) and provides:

(2) A person is not entitled to a progress payment under subsection (1) if the construction contract—

(a) does not comply with the *Home Building Act 1989*, section 4, or

(b) involves construction work that is residential building work done in contravention of the *Home Building Act 1989*, section 92.

This subsection effectively renders reliance on ss 10 and 94 of the *Home Building Act* unnecessary. Nonetheless, as s 8(2) was not in force at the time that BPB served its payment claim it is necessary to consider the legislation as it applied at the time for the purposes of this appeal.

155 It should first be observed that s 10 and s 94(1)(a) of the *Home Building Act* both use the same formulation, “is not entitled to damages or to enforce any other remedy in respect of a breach of contract committed by any other party to the contract”. When this was raised with counsel for the Rewaises in the course of oral argument, counsel accepted that if Hodgson JA’s reasoning in *Brodyn* was correct with respect to the proper construction of s 10 of the *Home Building Act*, it would also apply to s 94(1)(a) of that Act.

156 The Rewaises submitted that changes to the regime under the *Security of Payment Act* since *Brodyn* was decided called for reconsideration of the correctness of what Hodgson JA said about s 10 of the *Home Building Act* (and, by implication, s 94(1)(a)). They relied in particular on the enactment of s 8(2) of the *Security of Payment Act*. Accepting that s 8(2) was not in force at the time the payment claim was served, the Rewaises relied on its enactment as confirming Parliament’s intention that the two statutory regimes are not independent and that the *Security of Payment Act* should not operate as a backdoor for an unlicensed or uninsured builder to circumvent the effect of s 10 or s 94.

157 Relying on subsequent amendments to construe an earlier version of a statute should be approached with caution, so as not to give retrospective effect to an

amendment in the absence of a provision directing as such: see Herzfeld and Prince, *Interpretation* (3rd ed, 2024) at [8.340] and the cases there cited. The enactment of an amendment could equally indicate a view on the part of the legislature that the legislation pre-amendment did not operate as intended. In the case of the amendment on which the Rewaises relied, the second reading speech to the *Better Regulation Legislation Amendment (Miscellaneous) Act*, pursuant to which s 8(2) was inserted, expressly described its purpose as plugging a loophole in the *Security of Payment Act*, to ensure that the right to receive a progress payment for building work is limited to lawful building work: New South Wales Legislative Council, *Parliamentary Debates* (Hansard), 20 June 2024 at 10.

- 158 Accordingly, to the extent that any weight can be placed on the amendment, it is at least consistent with, if not supportive of, Hodgson JA's reasons in *Brodyn*. As Hodgson JA there said, and has been said many times since about the regime in Part 3 of the *Security of Payment Act*, the remedy that is available under Part 3 is not of the nature of damages or any other remedy in respect of breach of contract, nor is it enforcement of the contract.
- 159 Turning then to s 94(1)(b) of the *Home Building Act*, and again considering this provision in the absence of the subsequent enactment of s 8(2), the Rewaises submitted that the mechanisms by which a claimant may enforce an entitlement to a progress payment under the *Security of Payment Act* entailed obtaining judgment in a court of competent jurisdiction, either on the basis of a failure of the respondent to provide a payment schedule and pay by the due date (s 15(2)) or on the basis of an adjudication certificate (s 25(1)). They submitted that this process of applying to and obtaining a judgment debt in a court of competent jurisdiction amounted to recovering money under "any other right of action" in s 94(1)(b).
- 160 Counsel for the Rewaises made the following submission orally as to the consequences if that were not the proper characterisation of the process under the *Security of Payment Act*:

"As is trite, this is an interim regime and final rights under the contract survive. If my submission on the construction we urge in relation to 94(1)(b) were wrong, it would mean my client would have to pay and then tomorrow would

be entitled to recover immediately save to the extent of any quantum meruit. The same submission can be made in relation to unlicensed contracting. It's an interim regime, if I can speak colloquially. We pay the money today; we recover it tomorrow pursuant to our final rights I think under s 32.

That's good reason as a matter of pragmatism why the Court should construe there (sic) provisions in the manner in which we urge. We pay today and we recover in a court of competent jurisdiction tomorrow."

161 There are two aspects of that submission which were at least double-edged and ultimately told against the position for which the Rewaises contended. The first was the acceptance, consistently with the language of ss 94(1A) to (1C), that notwithstanding the terms of s 94(1)(b) recovery remains available on a quantum meruit basis if the court considers it just and equitable. The fact that s 94(1)(b) does not impose an absolute prohibition on recovery tells against it being relied on in that way with respect to the interim regime in Part 3 of the *Security of Payment Act*.

162 The second aspect was the necessarily interim nature of the regime under Part 3 of the *Security of Payment Act*. As BPB emphasised, an adjudication under Part 3 of the *Security of Payment Act* does not finally determine the parties' respective rights. Still less does registration of a judgment debt under s 15 have that character. As BPB emphasised, both of those orders could be unwound by an order under s 32(3)(b). Contrary to the Rewaises' submissions, this is not a bizarre outcome and is in any event reflective of the regime in the *Security of Payment Act*.

163 It follows that the primary judge's conclusion in relation to ss 10 and 94 of the *Home Building Act* was correct and the Determination was not unenforceable by force of those provisions. It is thus unnecessary to consider the cross-appeal.

Conclusion

164 It follows for the reasons I have given above that, although I agree with the Rewaises that the primary judge's reasoning as to why the Determination was not void was wrong, his Honour's conclusion was nonetheless correct on the basis of BPB's grounds of contention about service. His Honour's conclusion regarding ss 10 and 94 of the *Home Building Act* was correct. It follows that the appeal should be dismissed. Given that the contingency on the basis of which

the cross-appeal was said to arise did not eventuate, it should also be dismissed.

165 The parties did not advance any particular submissions as to costs and there is no reason that the ordinary rule should not apply. Accordingly, I propose the following orders:

- (1) The appeal is dismissed.
- (2) The cross-appeal is dismissed.
- (3) The appellants are to pay the respondent's costs of the appeal and the cross-appeal.

166 **McHUGH JA:** I have had the considerable benefit of reading in draft Mitchelmore JA's careful and comprehensive reasons for judgment. I agree with the orders her Honour proposes, and, subject to what follows, with her Honour's reasons and with the additional reasons of Leeming JA.

167 For the purposes of s 31(1)(d) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**), the words "of that kind" refer to the class of documents for the service of which the email address has been "specified" by the person. It is convenient to refer to that class, as Leeming JA does, as the class of documents which have been specified by the person.

168 The person may specify an email address for service of a class of documents comprised of all documents authorised or required to be served under the Act, or of a class comprised of some subset of those documents. The person may identify the class of documents specified by excluding some types of documents from the class.

169 Since the words "of that kind" refer to the class of documents which the person specified, the question for the court is not to determine for itself whether a document the service of which is in issue is of the same "kind" as some other document that is within the class the person specified. The question is instead whether the document in issue is itself within the class the person specified. To illustrate: assume (a) that the person has expressly specified an email address for service of s 13(1) payment claims, but expressly excluded all other documents, and (b) that the document the service of which is in issue is a s 17(2) notice of intention to apply for adjudication of a payment claim. The

question for the court would not be whether the court itself considered the s 17(2) notice to be of the same kind as a s 13(1) payment claim. The question would be whether s 17(2) notices were themselves within the class of documents the person specified, and the answer, in that case, would be no.

- 170 For the purposes of s 31(1)(d), a person “specifie[s]” an email address for service of a class of documents by words or conduct expressly or impliedly indicating the person’s consent to the use of the email address for service of that class of document. Whether the person does so will depend on the circumstances.
- 171 Particularly where the question is whether the person’s conduct impliedly specified an email address for service of a class of documents, it should be borne in mind that the service of documents under the Act may have serious legal consequences. Service by email of some documents under the Act will start time running on tight statutory timetables that may lead to interim liabilities to make payment notwithstanding that, as this case demonstrates, the person served may be unaware that the document exists. Relatedly, it may also be significant that the Act applies to a spectrum of contracts and arrangements extending from major commercial projects involving Tier 1 contractors at one end to what might be termed consumer residential construction at the other. (The former exemption of “residential building work” from the application of the Act, originally contained in s 7(2)(b) and later continued in substance by regulation, was removed in 2021 when reg 4 of the Building and Construction Industry Security of Payment Regulation 2020 (NSW) was repealed.) Depending on the circumstances, it may be that a residential consumer’s conduct is less readily to be seen as impliedly specifying an email address for the service of statutory documents for the purposes of s 31(1)(d) than would similar conduct on the part of a commercial head contractor. Section 31(1)(b) and (c) draw a similar distinction: they permit service by lodgement at, or by post addressed to, “the person’s ordinary place of business”, not their ordinary place of residence.
- 172 In this case, Dr Rewais engaged in a course of conduct in which he responded to invoices sent by email that were, as Mitchelmore JA points out, expressly

identified as payment claims under the Act. Having regard to the other circumstances concerning use of the email address to which her Honour refers, Dr Rewais' conduct implied his consent to the use of (and thus specified) the email address for the service of a class of documents that included s 13(1) payment claims and other documents of a similar nature. In the circumstances of this case, I agree with Leeming JA that it would be artificial to conclude that Dr Rewais by his conduct had specified an email address for the service of a class of documents comprised of s 13(1) payment claims, but which excluded any notice under s 17(2) in the event that there was no response to a payment claim.

- 173 The same conclusion may not follow in other cases; whether it does will depend on the circumstances. Given the jurisdictional significance of service, contractors wishing to use a particular email address to serve documents engaging the Act's operation, and particularly its adjudication procedures, would be well advised first to obtain express confirmation from the principal that the email address may be used for service of documents authorised or required to be served by or under the Act.

Amendments

16 May 2025 - Removed error "distinguishedconsidered", replaced with "considered" in headnote.