

Court of Appeal
Supreme Court
New South Wales

Case Name: EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd

Medium Neutral Citation: [2024] NSWCA 162

Hearing Date(s): 6 May 2024

Date of Orders: 10 July 2024

Decision Date: 10 July 2024

Before: Meagher JA at [1];
Basten AJA at [2];
Griffiths AJA at [89]

Decision: (1) Allow the appeal from the judgment in the Equity Division given on 14 December 2023.

(2) Set aside orders 1, 2 and 5 entered on 15 December 2023 and in their place order that:

(a) the amended summons dated 24 October 2023 be dismissed;

(b) the plaintiffs pay the costs of the first defendant of the summons;

(c) the first defendant pay the plaintiffs' costs of the cross-summons.

(3) Order that the first to third respondents pay the appellant an amount of \$10,160,109.77, together with interest at 9.1% per annum from 7 July 2023 to the date of payment.

(4) Order that the first to third respondents pay the appellant's costs in this Court.

Catchwords: BUILDING AND CONSTRUCTION – payment claim –

validity – claim for payment due under construction contract – whether claim must be “for construction work” – purpose of claim to recover an amount obtained by respondents through recourse to bank guarantees provided by claimant – defence asserted in payment schedule – whether issue to be determined by adjudicator or Court

Legislation Cited:

Building and Construction Industry Security of Payment Act 1999 (NSW), ss 3, 4, 7, 8, 9, 10, 12, 13, 14, 15, 16, 20, 22, 25, 27, 34
Supreme Court Act 1970 (NSW), s 69

Cases Cited:

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor (2004) 61 NSWLR 421; [2004] NSWCA 394
BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd (2022) 108 NSWLR 350; [2022] NSWCA 82
Ceerose Pty Ltd v A-Civil Aust Pty Ltd (2023) 112 NSWLR 225; [2023] NSWCA 215
Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190
Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385; [2005] NSWCA 228
Grocon (Belgrave St) Developer Pty Ltd v Construction Profile Pty Ltd [2020] NSWSC 409
Illawarra Retirement Trust v Denham Constructions Pty Ltd [2015] NSWSC 823
Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) 64 NSWLR 462; [2005] NSWCA 409
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4
Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd (2004) 20 BCL 276; [2004] NSWSC 116
Sopov v Kane Constructions Pty Ltd (No 2) (2009) 24 VR 510; [2009] VSCA 141
Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd (2016) 260 CLR 340; [2016] HCA 52
Witron Australia Pty Ltd v Turnkey Innovative Engineering Pty Ltd [2023] NSWCA 305

Category: Principal judgment

Parties: EnerMech Pty Ltd (Appellant)
Acciona Infrastructure Projects Australia Pty Ltd (First Respondent)
Samsung C&T Corporation (Second Respondent)
Bouygues Construction Australia Pty Ltd (Third Respondent)
Rosemarie Risgalla (Fourth Respondent)

Representation: Counsel:
M Christie SC / D Hume (Appellant)
S Robertson SC / M Keene (First to Third Respondents)

Solicitors:
Vincent CCL Pty Ltd t/as Vincent Young (Appellant)
Clyde & Co Australia (First to Third Respondents)

File Number(s): 2023/465352

Decision under appeal:

Court or Tribunal: Supreme Court

Jurisdiction: Equity – Technology and Construction List

Citation: [2023] NSWSC 1565

Date of Decision: 14 December 2023

Before: Stevenson J

File Number(s): 2023/245026

[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]

On 3 June 2020, the appellant, EnerMech Pty Ltd, entered into a Major Works Subcontract with Acciona Infrastructure Projects Australia Pty Ltd, Samsung C&T Corporation and Bouygues Construction Australia Pty Ltd (the respondents) to supply electrical works for part of the WestConnex project. On 8 June 2023, the appellant issued a progress payment claim (PC 29) to the respondents for just over \$10 million.

The respondents served a payment schedule indicating that (subject to minor variations) there was no amount owing or payable. On 7 July 2023 the appellant made an application for adjudication, pursuant to Pt 3, Div 2 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (Security of Payment Act). The respondents provided a response to this application one week later. On 25 July 2023, the adjudicator found in favour of the appellant. The adjudicator's determination was reissued on 3 August 2023 after a slip rule application making a minor correction.

The respondents commenced proceedings in the Equity Division, Technology and Construction List, to have the determination quashed and the appellant enjoined from requesting an adjudication certificate or taking any other steps to enforce the determination. It alleged that the payment claim was invalid because it was not a claim for payment for construction work, but rather sought to recover an amount of \$9,230,157.40 obtained by the respondents in exercise of a contractual entitlement to have recourse to security (being bank guarantees) provided by the appellant.

On 14 December 2023, the primary judge, Stevenson J, upheld the respondents' claim and made orders in their favour. On 13 February 2023, the appellant filed a notice of appeal: the issues for determination on appeal were whether:

- (i) a payment claim may be made only "for construction work", and
- (ii) the Court had jurisdiction to make determine that question.

The Court (Basten AJA, Meagher JA and Griffiths AJA agreeing) allowing the appeal, held:

As to (i)

1 A payment claim must be for an amount of money; the claim must assert that an amount is payable for work done, goods supplied, or services rendered, under a construction contract. The definition of “progress payment” requires that there be a “construction contract” and that there be consideration or amounts payable under it: [9], [61].

2 When considering the objects, structure and spare language of the Security of Payment Act, as well as the judicial analysis since its inception, there is little scope for implying unstated conditions as essential to the validity of a payment claim or a payment schedule: [9], [73]. The claim stated that the claimant was owed an amount for construction work undertaken under the construction contract: it was therefore a valid payment claim: [76]. The statutory limitations on actions for enforcement and judicial review are also resistant to the implication of unexpressed conditions going to the validity of the claim: [79].

Brodyn Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394; *BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd* (2022) 108 NSWLR 350; [2022] NSWCA 82 applied.

As to (ii)

3 It is the role of the adjudicator to determine the proper construction of the contract, identification of the work already completed and whether payment has already been made for work completed for the purposes of ascertaining whether there is an amount payable under a payment claim: [62], [79].

4 The effect of s 25(4)(a)(ii) of the Security of Payment Act is that an adjudicator’s understanding of a construction contract, even if legally erroneous, is not able to be challenged on a claim to enforce an adjudication certificate. Further, it cannot be challenged on judicial review for an error of law on the face of the record: [79].

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

5 In these circumstances, it was inappropriate to address the appellant’s challenge to the primary judge’s finding that PC 29 “was not, or did not comprise, a claim for construction work”: [82].

JUDGMENT

- 1 **MEAGHER JA:** I agree with the reasons of Basten AJA and the orders he proposes.
- 2 **BASTEN AJA:** By an agreement dated 3 June 2020 the appellant, EnerMech Pty Ltd entered into a Major Works Subcontract (subcontract) with the first–third respondents (who were engaged in a joint venture known as “ASBJV”) to undertake electrical works on the M4-M5 Link main tunnel which was part of the WestConnex project. The subcontract had a completion date of 31 May 2022, which appears to have been extended. On 8 June 2023, the appellant served a progress payment claim No 29 (PC 29) on the respondents. The amount of the claim was a little over \$10 million.
- 3 The respondents served a payment schedule indicating that, with minor variations, no amount was owing or payable. In accordance with the provisions of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (Security of Payment Act) on 7 July 2023 the appellant submitted PC 29 for adjudication. On 14 July 2023, the respondents provided an adjudication response and on 25 July 2023 an adjudicator gave a determination in favour of the appellant. The determination was reissued on 3 August 2023, after correction was sought on a slip rule application.
- 4 A day before the amendment to the determination, the respondents had commenced proceedings in the Equity Division, Technology and Construction List, seeking orders quashing the determination and permanently restraining the appellant (the first defendant below) from requesting an adjudication certificate or otherwise taking steps to enforce the determination. The nature of the dispute was succinctly identified in the respondents’ (plaintiffs below) amended Technology and Construction List statement in the following terms:

“On the plaintiffs’ case, the purported payment claim was invalid because it was not a claim for payment on account of construction work or for related goods or services but rather was, in substance, a claim for a credit of \$9,230,157.40 in relation to amounts obtained by the plaintiffs as a result of having recourse to certain security provided by the first defendant and a claim for certain other amounts that were not on account of construction work or for related goods or services.”

- 5 On 14 December 2023 the primary judge, Stevenson J, delivered judgment upholding the respondents' challenge to the validity of the determination.¹ By orders made on 15 December 2023, the adjudication determination was quashed and the appellant was permanently restrained in the terms referred to above.
- 6 On 13 February 2024, the appellant filed a notice of appeal seeking to have the judgment set aside. The appellant alleged error on the part of the primary judge in holding:
 - (1) that a "payment claim" must be a claim for payment "for construction work", within the meaning of the Security of Payment Act, and
 - (2) PC 29 was not a claim "for construction work".
- 7 The premise underlying the challenge to the first finding was twofold: first, that the Security of Payment Act did not prescribe, as an essential condition of the validity of a payment claim, that it be "for construction work"; secondly, if there were such a condition, it was a matter to be determined by the adjudicator and not by the Court. (The adjudicator had in fact determined the issue favourably to the appellant, and there was no challenge to her determination of that issue.) The challenge to the second finding was that, if there were a jurisdictional condition to be determined by the Court, the primary judge wrongly held it was not satisfied in this case.
- 8 For the reasons explained below, whatever the meaning of the phrase "for construction work", it was not an essential element of a progress payment claim that it be so characterised. While a payment claim must assert an entitlement to payment for work done under a construction contract, fulfillment of that entitlement is a matter to be determined by the adjudicator, subject to limited rights of review for jurisdictional error. Accordingly, the appeal should be allowed and the decision of the primary judge set aside. As compliance with such a condition is not a matter for the Court, this Court should not consider whether PC 29 complied. If the Court did so and came to a different answer to that given by the adjudicator, it would in effect be reviewing the decision of the

¹ Acciona Infrastructure Projects Australia Pty Ltd v EnerMech Pty Ltd [2023] NSWSC 1565 ("Acciona").

adjudicator for non-jurisdictional error of law, an exercise which is not permitted under the Security of Payment Act² and, in any event, was not sought.

Essential requirements of a payment claim

- 9 The point of departure in considering the essential preconditions to a valid payment claim under the Security of Payment Act must be the terms of the Act itself. However, in the 24 years since the Act commenced (on 26 March 2000) there has been considerable judicial analysis, both of the specific issue as to the nature of a payment claim, and as to principles governing the construction of the Security of Payment Act. It will be necessary to address the cases in due course. However, it is convenient to note at the outset that for some 20 years, since *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*,³ this Court has been restrained in implying essential preconditions to the engagement of statutory powers, which would invite judicial intervention. Thus, in *BSA Advanced Property Solutions (Fire) Pty Ltd v Ventia Australia Pty Ltd*⁴ a five-judge bench observed:

“35 There are undoubtedly limits to the characteristics of a valid payment claim. It is commonly accepted that s 13(2) identifies such limits by use of the obligatory ‘must’. However, conscious of the objects of the legislative scheme, the courts have been cautious in identifying these as ‘basic requirements’,^[5] precise compliance with which is a precondition to the exercise by the adjudicator of his or her function.^[6] Spigelman CJ observed in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*:^[7] ‘As Hodgson JA recognised in *Brodyn*, the purpose of the legislative scheme is best served by restricting the scope of intervention by the courts’.”

(The respondents accepted that s 13(2) did not create jurisdictional requirements:⁸ see also *Ceeroose Pty Ltd v A-Civil Aust Pty Ltd*⁹ in relation to s 22(2).)

² *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 (“Probuild Constructions”).

³ (2004) 61 NSWLR 421; [2004] NSWCA 394 (“Brodyn”).

⁴ (2022) 108 NSWLR 350; [2022] NSWCA 82 (“BSA”).

⁵ *Brodyn* at [55].

⁶ See, for example, *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409 at [24]-[26] (Hodgson JA).

⁷ (2010) 78 NSWLR 393; [2010] NSWCA 190 at [55].

⁸ CA Tcpt, 6 May 2024, p 32(30).

⁹ (2023) 112 NSWLR 225; [2023] NSWCA 215 at [31] (Payne JA).

- 10 Part 1 of the Security of Payment Act (Preliminary) contains a statement of the object of the Act (s 3), together with definitions. Part 2 confers a right to progress payments in the following terms:

8 Right to progress payments

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.

- 11 Section 8 was amended in 2002 and again in 2018, but at all times relevant for present purposes (other than with respect to earlier cases) it was in the current form.
- 12 Section 9 states that the “amount of a progress payment to which a person is entitled in respect of a construction contract is to be ... the amount calculated in accordance with the terms of the contract”. If the contract does not so provide, the amount is to be calculated “on the basis of the value of construction work carried out ... by the person ... under the contract”: s 9(b). Section 10 elaborates on the process of valuation.
- 13 Part 3 is titled “Procedure for recovering progress payments”. Part 3, Div 1 is titled “Payment claims and payment schedules” and commences with s 13, which is central to the issues in the present case, and relevantly reads as follows:¹⁰

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.

...

(2) A payment claim—

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

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

(c) must state that it is made under this Act.

(3) The claimed amount may include any amount—

¹⁰ The omitted subsections are (1A)-(1C) (relating to the time for service) and (7)-(9) and a note (relating to head contractors).

- (a) that the respondent is liable to pay the claimant under section 27(2A), or
 - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) A payment claim may be served only within—
- (a) the period determined by or in accordance with the terms of the construction contract, or
 - (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),
- whichever is the later.
- (5) Except as otherwise provided for in the construction contract, a claimant may only serve one payment claim in any particular named month for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) in that month.
- (6) Subsection (5) does not prevent the claimant from—
- (a) serving a single payment claim in respect of more than one progress payment, or
 - (b) including in a payment claim an amount that has been the subject of a previous claim, or
 - (c) serving a payment claim in a particular named month for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) in a previous named month.

14 Counsel for the respondents sought to identify three elements in s 13(1).¹¹ The first was the identification of the claimant as a person referred to in s 8, namely a person who has undertaken to carry out construction work under a construction contract. There was no dispute that the appellant satisfied that requirement. The second element was a requirement that the claimant be a person “who is or claims to be entitled to a progress payment”. Where the person has served what appears to be a claim for payment under a construction contract, the respondents submitted there was a separate issue as to whether what was claimed amounted to a “progress payment”, as opposed to a claim for damages for breach of a contract or for an account of payments made. That was an important element in the respondents’ case because they sought to characterise the claim as one for an account of

¹¹ CA Tcpt, p 29(13).

payments made between the parties. The third element identified what the claimant is entitled to do, namely serve a payment claim on the person who is or who may be liable to make the payment.

- 15 The first element requires reference to the definition of “construction contract”; the second element turns on the meaning of “progress payment”. The respective definitions in s 4 are in the following terms:

4 Definitions

(1) In this Act—

...

construction contract means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.

...

progress payment means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement)—

(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or

(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or

(c) a payment that is based on an event or date (known in the building and construction industry as a “milestone payment”).

- 16 Two points are immediately apparent from these provisions: first, the Security of Payment Act does not purport to limit the amount or nature of a payment to which a party is entitled under a construction contract; secondly, there is a risk in compartmentalising payments according to their character, regardless of the terms of the contract, so as to contend that some fall within the concept of a progress payment for which a claim may be made, and some do not. It will be necessary to return to this point in considering the terms of the subcontract.
- 17 This approach is consistent with the following reasoning in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd*:¹²

¹² (2016) 260 CLR 340; [2016] HCA 52 (Kiefel, Bell, Gageler, Keane and Gordon JJ).

“59 Within Pt 2 an important distinction is drawn between a progress payment to which a person is entitled and the amount of the progress payment to which that person is entitled. Cast in the present tense, s 8(1) makes clear that a person who meets the description of a person who has undertaken to carry out construction work or supply related goods and services under a construction contract is immediately by force of that provision ‘entitled to a progress payment’ on and from each reference date under the construction contract. Cast in the future tense, in contrast, s 9 makes clear that the amount of a progress payment to which the person is so entitled is not fixed by force of that section but ‘is to be’ ascertained in the manner prescribed by that section, and quantifies the amount of the progress payment to which a person is entitled by force of s 8(1). ...

60 That distinction drawn in Pt 2, between a present entitlement to a progress payment and the future ascertainment of the amount of the progress payment to which that present entitlement relates, explains the two-part description in s 13(1) of a person who is able to make a payment claim so as to trigger the procedure for recovery set out in Pt 3. The first part of the description – ‘[a] person referred to in section 8(1)’ – refers to a person whom s 8(1) makes ‘entitled to a progress payment’. The second part of the description – ‘who is or who claims to be entitled to a progress payment’ – neither contradicts nor qualifies the first part of the description. The second part of the description rather recognises, consistently with s 9, that the amount of the progress payment to which that person is entitled might ultimately be ascertained, according to the procedure set out in Pt 3, to be less than the amount that the person claims to be due and might even be ascertained according to that procedure to be nothing.”

- 18 In its original form, s 8 provided for payment claims to be made “on and from each reference date”. The term “reference date” has been removed, but the concept remains, namely that 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”, unless the contract expressly permitted a claim to be served from an earlier date.¹³
- 19 Section 13(2) provides, in obligatory terms, three matters which a payment claim must contain. However, the respondents accepted that the use of the imperative did not necessarily indicate an essential precondition to validity, and did not do so in s 13(2).¹⁴ These are factors of which an adjudicator will need to be satisfied in the case of an adjudication. (In most cases, these matters will not be in issue.)
- 20 Section 13(3) identifies two amounts which may be included in a payment claim, the first being a payment under s 27(2A). Section 27(1) permits a

¹³ Security of Payment Act, s 13(1A) and (1B).

¹⁴ See fn 8 above.

claimant to suspend work under a construction contract (after giving notice to do so for non-payment of an amount payable which has fallen due and not been paid); s 27(2A) permits a claim for loss or expenses incurred as a result of suspending work. The second claimable amount is one withheld under the terms of the construction contract by the respondent, which the claimant says is due for release. For example, the subcontract provided for the appellant to provide security (cl 5.2), for release of the security (cl 5.8), and further that where the contractor has wrongfully had recourse to the security, the subcontractor's sole remedy is "repayment of the security" (cl 5.5(b), (c)). There was no claim for release of the security, nor for repayment of the security, in the present case, but the fact that a payment claim may be made for such an amount is relevant in determining what it may mean to require that a payment claim must be "for construction work".

- 21 In form, PC 29 set out all amounts which had been claimed under previous payment claims, together with a record of payments made, for the purpose of identifying the amount payable. That formulation was not challenged, and may be justified either by reference to s 13 (5) and (6) read together, or by reference to the terms of the subcontract.
- 22 Section 14 provides that a party served with a payment claim may in response provide a payment schedule indicating the amount of the payment (if any) proposed to be made. Failure to provide a payment schedule within the prescribed time (10 business days after service of the payment claim) will render a respondent liable to pay the claimed amount.
- 23 Section 14 recognises that non-payment may be justified under a construction contract where a respondent is permitted to withhold payment. In that case, the payment schedule is required to indicate "the respondent's reasons for withholding payment": s 14(3).
- 24 The Security of Payment Act then provides for two circumstances in which a respondent may default. The first is where no payment schedule is provided pursuant to s 14 (see s 15); the other is where a payment schedule indicates that while part of the payment claim is payable another part is not payable, but the admitted part is not paid (s 16). In each case, the claimant is permitted to

recover the unpaid amount as a debt in a court of competent jurisdiction. There are limits on the defences which a respondent can raise in such proceedings, as provided, for example, in s 15(4):

15 Consequences of not paying claimant where no payment schedule

...

(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled—

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract.

25 Part 3, Div 2, provides for the adjudication of disputes which arise where a payment claim has been made and a payment schedule provided indicating a scheduled amount less than the amount claimed.

26 The deadlines are extremely tight: for serving a payment schedule (10 business days), for making an adjudication application (in the usual case, 10 business days after the payment schedule is received), for lodging an adjudication response to the adjudication application (generally, 5 business days after receiving the application) and for determination of the application (10 business days after notifying the parties of acceptance of the application, unless further time is agreed). Importantly, the respondent “cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule”: s 20(2B).

The “construction contract”

27 Before identifying the steps taken in the present case by reference to the payment claim and payment schedule, it is convenient to identify relevant aspects of the subcontract, pursuant to which the construction work was undertaken. In doing so, the factual matters indicating the relevance of the clause will be noted. (In the subcontract, the appellant was the “Subcontractor”

and the respondents the “Contractor”.) Clauses 5 and 42 were of central importance.

- 28 Clause 5 of the subcontract required that the appellant provide security within 10 days after the date of the subcontract or the commencement of any work under the subcontract: cl 5.2, 5.4. The amount of the security was fixed at 10% of the subcontract sum.¹⁵ Clause 5.5 read as follows:

5.5 Recourse to Security

- (a) The Contractor may have recourse to the security provided in accordance with this clause 5 where the Contractor:
 - (i) has become entitled to exercise a right under this Subcontract in respect of the security;
 - (ii) claims reimbursement of any monies paid to or to be paid to others under or in connection with this Subcontract; or
 - (iii) to the extent to which the Contractor has or may have a bona fide Claim against the Subcontractor under, arising out [of] or in any way in connection with this Subcontract.
 - (b) The Subcontractor will have no claim against the Contractor for any loss that the Subcontractor may suffer (including consequential economic loss) occasioned by such conversion.
 - (c) The Subcontractor’s sole remedy arising from recourse to security which is later found to be a wrongful conversion is repayment of the security.
- 29 Clause 5.8(b) provided that upon the subcontractor complying with cl 42.12, the contractor must release security pursuant to cl 42.8(d).
- 30 Clause 42 (Payment) commenced with cl 42.1 providing for “Payment Claims, Payment Schedules and Payment”. The entitlement to payment under a payment claim was said to be subject to provision of security, obtaining insurance and payment of secondary subcontractors and employees. In other respects, cl 42.1 mirrored the Security of Payment Act. However, given the reliance placed on it by counsel for the appellant it is convenient to set out the following provisions (emphasis added):

42.1 Payment Claims, Payment Schedules and Payment

- (a) Subject to:
 - (i) the provisions of this Subcontract; and

¹⁵ Major Works Subcontract, Annexure Pt A, p 125.

(ii) the Subcontractor complying with clauses 5, 21.1(a), and 43, the Subcontractor is entitled to make a claim for payment (each a 'payment claim') on:

(iii) each relevant Reference Date; and

(iv) the Final Payment Claim Reference Date.

(b) An early payment claim will be deemed to have been submitted on the date the Subcontractor was entitled under this Subcontract to submit it.

(c) The payment claims must be delivered to the Contractor's Representative supported by:

(i) particulars of the payment claimed by the Subcontractor in sufficient detail to enable the Contractor's Representative to determine (without needing to refer to any other documentation or information) the amounts then payable by the Contractor to the Subcontractor under this Subcontract;

(ii) any documentation, certification or information as the Contractor's Representative may from time to time require the Subcontractor to set out or attach;

...

(iv) evidence of the amount due to the Subcontractor and other information as required by the Contractor;

....

(d) Without limiting the requirements set out in the Subcontract, payment claims must include the value of work carried out by the Subcontractor in the performance of this Subcontract to that time together with all amounts then due to the Subcontractor arising out of or in connection with this Subcontract or for any alleged breach thereof.

(e) Within 10 Business Days of receipt of a payment claim, the Contractor's Representative must issue to the Contractor and to the Subcontractor a payment schedule identifying the payment claim to which it relates, stating the payment, which, in the opinion of the Contractor's Representative, is to be made by the Contractor to the Subcontractor or by the Subcontractor to the Contractor.

(f) Where the amount in the payment schedule is less than the amount of the payment claim, the Contractor's Representative must indicate in the payment schedule why the scheduled amount is less and, if it is less because payment is being withheld for any reason, the reasons for withholding payment.

(g) The Contractor's Representative must allow in any payment schedule issued pursuant to clause 42.1(e) including any Final Payment Schedule issued pursuant to clause 42.8(a), *amounts paid under this Subcontract and amounts otherwise due from the Contractor to the Subcontractor and/or due from the Subcontractor to the Contractor arising out of or in connection with this Subcontract including but not limited to any amount due or to be credited under any other provisions of this Subcontract.*

(h) By the Due Date for Payment, the Contractor must pay to the Subcontractor or the Subcontractor must pay to the Contractor (as the case may be) an amount not less than the amount shown in the payment schedule as due to the Subcontractor or to the Contractor. A payment made pursuant to this clause 42.1(h) *is on account only* and will not prejudice the right of either party to dispute under clause 47 whether the amount so paid is the amount properly due and payable under this Subcontract. If, as a result of a determination (whether under clause 47 or as otherwise agreed), the amount determined to be properly due and payable is different to the amounts paid pursuant to this clause 42.1(h), the Contractor or Subcontractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

(i) *Payment of monies* will not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but *will be a payment on account only*, except as provided by clause 42.8(e).

...

- 31 PC 29 did not purport to be a "Final Payment Claim", however, it may be noted that provision for such a claim was made in cl 42.7:

42.7 Final Payment Claim

(a) On or before the Final Payment Claim Reference Date, the Subcontractor must lodge with the Contractor's Representative a final payment claim and endorse it 'Final Payment Claim'.

(b) Subject to the provisions of clause 42.12,¹⁶ the Subcontractor must include in the Final Payment Claim all monies which the Subcontractor considers to be due from the Contractor under or arising out of this Subcontract.

(c) Failure to submit a Final Payment Claim, or include a Claim in the Final Payment Claim, by the Final Payment Claim Reference Date bars the Subcontractor from making a Final Payment Claim or bringing any Claim on any basis whatsoever (whether under contract, statute or in negligence or otherwise) arising out of, or in connection with the Work Under this Subcontract.

- 32 The term "Claim" was defined in cl 2.1 in the following terms:

Claim includes any claim, action, demand or proceeding for payment of money (including damages) or for an extension of time:

(a) under, arising out of, or in any way in connection with, this Subcontract....

- 33 Clause 42.8 dealt with a "Final Payment Schedule"; subject to a number of preconditions, par (d) stated that "within 45 days after the Due Date for Payment, the Contractor must release to the Subcontractor any security then

¹⁶ Clause 42.12 provided for the provision of a Deed of Release as a condition precedent to payment of a payment claim or release of security after the issue of a Certificate of Substantial Completion.

held by the Contractor". The term "Due Date for Payment" was defined in cl 2.1 to mean "thirty (30) Business Days after a claim for payment is made by the Subcontractor".

- 34 Further, cl 42.8(e) provided that, subject to specified conditions, and exceptions for fraud and mistake,

"... the Final Payment Schedule will be evidence in any proceedings of whatsoever nature and whether under this Subcontract or otherwise between the parties arising out of this Subcontract, that the Works have been completed in accordance with the terms of this Subcontract and that any necessary effect has been given to all the terms of this Subcontract which require additions or deductions to be made pursuant to this Subcontract ...".

- 35 The significance of cll 42.7 and 42.8 is that they bring within the scheme of the Security of Payment Act the resolution (subject to specified exceptions and conditions) of all entitlements to payment under the subcontract. Clause 42.1(d) required that a payment claim include the value of work carried to that time, "together with all amounts then due to the Subcontractor arising out of or in connection with this Subcontract or for any alleged breach thereof". Clause 42.1(g) required that a payment schedule must allow for all payments made or due, both by and to each party under the subcontract: that requirement was consistent with the description of payments in accordance with a payment schedule being "on account only" and not determining "whether the amount so paid is the amount properly due and payable under this Subcontract". Similarly the requirement that a payment schedule include "amounts paid under this Subcontract and amounts otherwise due from the Contractor to the Subcontractor ... including but not limited to any amount due or to be credited under any other provisions of this Subcontract", may be broad enough to include amounts withheld by way of security, where the amount has been appropriated or "converted" to the use of the contractor.

- 36 The contractual basis for the recourse by the respondents to the security was partly cl 5.5 (set out at [28] above) and partly cl 42.11 which read as follows:

42.11 Recourse of Unpaid Monies

Where, within the time provided by this Subcontract, the Subcontractor fails to pay the Contractor an amount due and payable under this Subcontract, the Contractor may have recourse to the security under this Subcontract and any deficiency remaining may be recovered by the Contractor as a debt due and payable.

The payment claim (PC 29)

- 37 PC 29 issued on 8 June 2023 included a variation claim in an amount of \$15,372.67 and a claim for payment of an amount of \$69,906.26 resulting from a slip rule amendment to a previous adjudication determination, together with interest thereon in an amount of \$3,240.49. Otherwise, the payment claim listed in a series of schedules all the works which had been undertaken under the contract, and variations to it. However, the column of each schedule headed "value claimed this period" was left blank. As explained in a coversheet, the current claims totalled \$106,941,444.09 and the previous determinations totalled \$106,922,872.42, being a difference of \$18,611.67. That last amount constituted the variation, together with interest, referred to above. The claim further identified the amount certified and paid to date as \$97,622,808.76. That was said to leave a net amount outstanding of \$9,318,675.33, which, together with GST, gave a total amount of \$10,250,542.86, from which the amount paid under the slip rule was deducted, leaving a net balance to be paid by the respondents of \$10,180,582.60.
- 38 Schedule 5 to PC 29, headed "Previous Payments", included the amounts paid under each of the previous payment claims, from which a deduction of \$9,230,157.40 was made, leaving the figure outstanding as the total paid to date – \$97,622,808.76 – which accorded with the figure in the cover/summary sheet.
- 39 On 23 June 2023, the respondents sent a covering letter, attaching a payment schedule, alleging that the payment claim was not valid because "it is not a claim for a progress payment (that is, a claim for payment for construction work (or related goods and services) in respect of which it is said that the claimant has an entitlement to payment under the Act)". The letter continued:
- "To the extent that the Payment Claim is determined to be a valid payment claim under the Act, the contractor responds to the specific claims set out in the Payment Claim."
- 40 With respect to the slip rule amendment and interest (totalling \$73,146.72), the respondents did not deny that the amount was unpaid, but stated that it was not properly included within a payment claim and should have been sought in accordance with "the enforcement provisions of the Act". Nevertheless, the

amount was paid on 23 June 2023 (that is, the date of the payment schedule). (In fact, the amount of the amendment was not included in PC 29, but the interest was so included.) With respect to the amount covered by the variation (identified as \$15,371.18), the respondents stated in the letter accompanying the payment schedule that there had been no compliance with the requirements of the subcontract in relation to variations, but continued:

“Without prejudice to this position, and strictly on a no admissions/no concessions basis, and [as] a gesture of good will, the Contractor has paid the Subcontractor \$15,371.18 ... on 23 June 2023.”

- 41 That left the amount of \$9,230,157.40 to be addressed. The respondents noted that there was no explanation of the deduction from payments made but inferred that, as the amount was that to which they had had recourse under the bank guarantees, it was a reference to that recourse. The letter continued:

“14 The amount of \$9,230,157.40 deducted by the Subcontractor from the paid to date amount is not a deduction made by the Contractor, but correlates to the Contractor’s recourse to the bank guarantees and is neither for construction work nor the supply of related goods or services as required under section 13(2)(a) of the Act. Accordingly, the Act is not engaged and an adjudicator does not have jurisdiction to determine the Subcontractor’s claim for a deduction to the paid to date amount.

15 Pursuant to clause 5.5(a)(iii) of the Subcontract, *The Contractor may have recourse to the security provided in accordance with this clause 5 where the Contractor to the extent to which the Contractor has or may have a bona fide Claim against the Subcontractor under, arising out [of] or in any way in connection with this Subcontract.* The Contractor notes that it has bona fide claims against the Subcontractor (including liquidated damages) well in excess of \$9,230,157.40. Accordingly, the Contractor’s right to have recourse to the bank guarantees arises from this clause 5.5(a)(iii) of the Subcontract. The Subcontractor’s attempt to recover the amount of \$9,230,157.40 falls outside the remit of the Act.

16 The Contractor further notes that the Subcontractor has not written to the Contractor disputing its entitlement to call on the bank guarantees nor has it taken any steps to apply to a Court of competent jurisdiction to restrain the Contractor from using the proceeds of the bank guarantee demand.

17 Accordingly, under the Act, the Subcontractor is not permitted to recover this amount within the Payment Claim and for reasons stated above, the Contractor has scheduled the amount of \$0.00 for these claims.”

- 42 As a footnote to the last submission, there was a reference to *Grocon (Belgrave St) Developer Pty Ltd v Construction Profile Pty Ltd* [2020] NSWSC 409, a judgment of Ball J, relied upon by the primary judge, to which reference will be made below.

- 43 The issue before the primary judge, and now before this Court, is whether, for the reasons stated in the payment schedule, PC 29 was not a valid payment claim under the Security of Payment Act.

Judgment below

- 44 On 9 November 2023, Ball J identified five questions which he directed be determined separately from any other questions in the proceedings. Apart from costs, there do not appear to have been any other questions arising in the proceedings: however, the matter was complicated at that stage by the existence of the appellant's cross-claim which gave rise to separate questions 2, 3 and 4. Those questions were resolved against the appellant, which has not appealed from the dismissal of its cross-claim. Question 5 assumed that there might be a discretionary issue as to the grant of relief if the respondents were otherwise successful. Putting that to one side, the question addressed by the primary judge, and the subject of the appeal, was whether the adjudication determination dated 25 July 2023 was "affected by jurisdictional error and thus liable to be quashed".
- 45 That statement of the issue reflected the proposition, confirmed in *Probuild Constructions*,¹⁷ that a determination by an adjudicator under the Security of Payment Act may only be set aside by this Court in its supervisory jurisdiction under s 69 of the *Supreme Court Act 1970* (NSW) for jurisdictional error.
- 46 Further, the statutory scheme which was accepted by the High Court as inconsistent with any broader form of review is also consistent with a restrained approach to the construction of the Act in identifying matters which may constitute essential preconditions to the exercise of the adjudicator's function. In the present case, the question of construction arises only with respect to the validity of PC 29 in the context provided by the contract.
- 47 Both parties approached the question as one of characterising the nature of the claim. Unsurprisingly, and as appears from the description of the payment claim and the content of the payment schedule, they characterised it in different ways. The two grounds of appeal assumed that the question turned

¹⁷ See fn 2 above.

upon whether the claim was for payment of an amount “for construction work” undertaken by the appellant.

- 48 The primary judge noted that the respondents’ case, as set out in the respondents’ written submissions before him, was:

“66 ...

‘... in substance, [PC 29] includes a claim for the payment to EnerMech of the amount obtained by [the respondents] from HSBC by making the Demands. That is plainly not a claim for or on account of “construction work” or “related goods and services”. It is thus not a claim that can be made by way of a payment claim under s 13(1) of the Act.’”

The reference to “Demands” was to directions given by the respondents to HSBC to pay to the respondents the amount held by the bank as security.

- 49 The judge then considered the terms of s 13(1), the definition of “progress payment”, the terms of ss 8 and 9 and concluded:

“71 Although the definition of ‘progress payment’ in s 4 of the Act gives, as examples, a final payment ‘for construction work’, or a single or one-off payment ‘for carrying out construction work’, the Act does not provide, in terms, that a payment claim must be ‘for’ construction work.

72 However, the High Court has held that:

‘The repeated references in s 8, and in the extended definition of progress payment, to payment “for” work carried out or to be carried out (or goods and services supplied or to be supplied) “under” a construction contract nevertheless point to an important limitation that is implicit in the overall design of the Act, and that has been so from the time of its original enactment. That limitation is that the Act is concerned to provide a statutory mechanism for securing payment of an amount claimed to be payable in partial or total discharge of an obligation to pay for work (or for goods and services supplied) imposed by the contractual force of a construction contract. The Act is not concerned to provide security for payment of an amount claimed by way of damages for breach of a construction contract. Nor is the Act concerned to provide security for payment of an amount which, according to prevailing authority,¹⁸ might be claimed as an alternative to damages by way of restitution for work carried out (or goods and services supplied) in the event of the construction contract terminating on acceptance of repudiation.’¹⁹”

¹⁸ Sopov v Kane Constructions Pty Ltd (No 2) (2009) 24 VR 510; [2009] VSCA 141 at [9]–[12] (Maxwell P, Kellam JA and Whelan AJA) (original footnote).

¹⁹ Southern Han at [66] (original footnote).

- 50 What was to be implied from those two passages in the reasons of the primary judge was a finding that unless the Court was satisfied that the payment claim was a claim “for” work carried out under the construction contract, PC 29 was invalid. That can be inferred because the judge then set about answering the question, “Was Payment Claim 29 a claim for construction work?” From there on the judge addressed that question: as will be explained below, that was an impermissible step. The reasoning need not be addressed in detail.
- 51 The appellant contended that it had never claimed a payment by way of damages or restitution, or on any other basis which might possibly have fallen within the reasoning in *Southern Han*, but only for construction work undertaken pursuant to the construction contract. When the respondents called on the security, the appellant was effectively deprived of part of the benefits obtained by it under the subcontract which had been paid on a contingent basis pursuant to the terms of the subcontract and in accordance with the Security of Payment Act, and recorded, in accordance with the terms of cl 42.1(h) and (i), by way of a running account. Although the appellant could not then say of which particular amounts it had been deprived, it could say that the balance of the account was less than the amount of its entitlements for construction work undertaken and carried out, and could therefore be the subject of a payment claim. This analysis was not accepted.
- 52 After referring to further submissions by the parties, the judge stated:
- “78 EnerMech did not claim the payment of \$10,180,582.60 because it had performed the construction work set out in the nine items, save for \$18,611.67, but because of an asserted entitlement to claim as a credit, in the calculation of the amount to which it was entitled: an amount equal to the Security Amount.”
- 53 The primary judge stated that that was not an end to the matter, noting the appellant’s contention that the effect of certain clauses in the subcontract was that “the cash position between the two parties during the pendency of the works” was in the nature of a “running account”: at [79]. The judge accepted that the submission required reference to the terms of cl 42, which have been set out above. The judge considered those matters and concluded:
- “101 Thus, the amount of any Security recovered by Acciona following a call under cl 42.11 would not be received by it ‘on account only’ but rather as an amount ‘due and payable’. I cannot see how, in those circumstances, it could

be said that recovery by Acciona of the amount of the Security could somehow result in EnerMech being given a credit for the construction work it had performed or having the effect of reducing the amount payable by Acciona to EnerMech for that construction work.”

- 54 However, the central issue for present purposes is not whether the reasoning of the primary judge was correct, but whether he was correct to undertake that exercise himself, rather than leave the question of the amounts, if any, to which the appellant was entitled for determination by the adjudicator having regard to the “jurisdictional” issue raised squarely by the payment schedule.
- 55 Nevertheless, it was in this context that the primary judge considered and followed the reasoning of Ball J in *Grocon*:

“17 *Grocon*’s claim is simple. It says that, insofar as Payment Claim No 033 claims amounts paid under the guarantees, the claim is not one for construction work or related goods or services undertaken to be carried out or supplied under a construction contract. Consequently, it is not one that can be the subject of an adjudication under the Act.

18 CP advances three answers to that claim. First, it says that the question whether the claim is a claim for construction work or related goods or services is a question that can be determined by the adjudicator. Second, it says that, in any event, Payment Claim No 33 is a claim for construction work. That is because the payment claim includes the value of the whole of the work undertaken less the amount it has been paid.”

(The third answer alleged that the contractual provision for recovery of amounts under a guarantee was inconsistent with the Act and void: this was the subject of the appellant’s cross-claim and was rejected both in *Grocon* and by the primary judge.)

- 56 In accepting that the issue was jurisdictional, Ball J relied on the reasoning in *Southern Han* at [66].²⁰ He did not refer to a different view adopted by Darke J in *Illawarra Retirement Trust v Denham Constructions Pty Ltd*,²¹ accepting that the inclusion in the claim of an amount taken by the respondent under a guarantee was “merely an item that forms part of the actual monetary position between the plaintiff and the defendant which may be taken into account in the [adjudicator’s] determination of the amount (if any) that should be paid to the defendant in respect of its claim”.

²⁰ *Grocon* at [19]-[20].

²¹ [2015] NSWSC 823 at [32]-[33].

57 When the primary judge came to consider these judgments, he distinguished that of Darke J on the basis that the present argument had not been raised, but also preferred the reasoning of Ball J.²²

Ground 1 – must a payment claim be “for construction work”?

58 Ground 1 was in the following terms:

“The primary judge:

(a) erred in holding ... that a payment claim was not a ‘payment claim’ for the purposes of the [Security of Payment Act] if the payment claim did not, or did not comprise, in substance a claim for ‘construction work’; and

(b) ought to have held that:

(i) there is no rule that a payment claim be, or comprise, a claim for ‘construction work’;

(ii) alternatively, if there is such a rule, compliance with the rule is a matter for the determination of the adjudicator and is not a matter of jurisdictional fact for determination by the Court.”

59 Neither the primary judge, nor the respondents in this Court, identified any provision in the Security of Payment Act which required a payment claim to be made “for construction work”. As the primary judge acknowledged at [71] (set out at [49] above), having had regard to the definition of progress payment, “the Act does not provide, in terms, that a payment claim must be ‘for’ construction work”. The respondents did not take issue with that proposition.

60 However, that linguistic feature is not determinative. Grammatically, a payment claim is not “for construction work”; it is a claim for money owing on account of construction work (or related goods or services). Thus, while s 13(5) and (6) use the phrase “for construction work” in relation to a payment claim served in a particular month, it is part of a shorthand phrase, namely “for construction work carried out or undertaken to be carried out (or for related goods and services supplied or undertaken to be supplied) in that month”. To similar effect, the term is used in relation to “money owing” or “consideration payable”: s 12(2); s 7(2); and in relation to the “claimed amount”: s 4(1).

61 The point arises most relevantly for present purposes in the definition of “progress payment”, set out at [15] above. The definition gives a primary

²² Acciona at [108] and [116].

meaning, namely “a payment to which a person is entitled under section 8”, and a secondary meaning, by way of inclusions, each of the three matters identified being illustrative and not restrictive. As a matter of construction, there is no doubt that a payment claim must be for an amount of money, and the claim must assert that the amount is for work done, goods supplied or services rendered, under a construction contract. Those three categories of items are expansive and cover the range of primary obligations which are likely to form the basis of a right to payment under a construction contract. The two critical elements are that there be a “construction contract” and that there be consideration or amounts payable under it.

- 62 Whether an amount is in fact payable will depend on the proper construction of the contract, identification of the work which has been carried out and a determination as to whether that work has already been paid for. These are matters to be determined by an adjudicator in the case of a dispute; they are not preconditions to the validity of a claim. If the entitlement is claimed to arise “under” a construction contract, as required by s 13(1) of the Act, the soundness of a claim denied in the payment schedule is for the adjudicator. Use of the word “for” to describe the required relationship between the amount and the basis of liability to pay is not a reason to substitute that word for the language of the statute, let alone to create a novel precondition to engagement.
- 63 The passage in *Southern Han* at [66], set out above, does not contradict that approach. *Southern Han* did not purport to create an implied condition of the validity of a payment claim. It would, to say the least, be surprising if the High Court had sought to impose an implied constraint on the operation of the Act, without identifying the basis upon which it did so. The passage relied upon from *Southern Han* did not purport to undertake that task.
- 64 *Southern Han* addressed three concepts, namely (i) the terms of the construction contract, (ii) the terms of the Security of Payment Act and (iii) relief available under the general law. It is uncontroversial that a progress payment cannot claim amounts which might be recoverable under the general law by way of damages, restitution, or by way of an account. The distinction drawn by

the High Court was between such remedies and “payment ‘for’ work carried out or to be carried out ... ‘under’ a construction contract”. The first sentence of the passage relied upon does not, it may be noted, use the term “for construction work”. The “important limitation” identified in the following sentence, being the matter with which the Security of Payment Act was “concerned”, was to secure payment “of an amount claimed to be payable in ... discharge of an obligation to pay for work ... imposed by the contractual force of a construction contract”. This refers, in the clearest possible terms, to the contractual basis of the obligation. (The contract must qualify as a “construction contract”, but there was no suggestion that the subcontract did not so qualify.)

65 The distinction thus drawn in *Southern Han* was central to the reasoning of the Court. It occurred in the course of concluding that, in accordance with the Security of Payment Act as then in force, “the existence of a reference date under a construction contract within the meaning of s 8(1) is a precondition to the making of a valid payment claim under s 13(1)”: at [63]. The Court turned to the issue as to “how any such reference date is to be determined”. The Court then accepted that, at least by way of an amendment to s 8, the Security of Payment Act contemplated that “a claim for a progress payment might be made after the contract has expired”: at [65]. The entitlement of the subcontractor turned upon whether it was entitled to a payment in respect of work done under the contract at a time when the contract had been terminated and the work taken out of its hands.

66 Rejecting the possibility that the Security of Payment Act protected a claim for damages, the joint reasons in *Southern Han* continued:

“67 Explaining that limitation, Barrett J said in *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd*:²³

‘The clear message throughout the Act is ... that any “progress payment”, including one within para (a), (b) or (c) of the definition of “progress payment”, can only have that character if it is “for” work done or, where some element of advance payment has been agreed, “for” work undertaken to be done. The relevant concepts do not extend to damages for breach of contract, including damages for the loss of an opportunity to receive in full a contracted lump sum price. Compensation of that kind does not bear to actual work the relationship upon which the “progress payment” concept is founded.’

²³ (2004) 20 BCL 276; [2004] NSWSC 116 at [34].

68 Consistently with that explanation, while emphasising the characterisation of a contractual payment always to be one of substance as to which a mere contractual label cannot be conclusive, Hodgson JA referred in *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*²⁴ to a progress payment as an ‘amount that a construction contract requires to be paid as part of the total price of construction work’.”

67 Hodgson JA in *JM Hargreaves* asked whether a claim based on an extension of time could be made for “any amount that a construction contract requires to be paid as part of the total price of construction work”. Properly understood, the approval of these passages confirmed that the focus of consideration must be on payments due under the construction contract. (It is not necessary in this case to address the effect on this reasoning of the inclusion of “damages” in the definition of “Claim” in the subcontract.)

68 This approach is consistent with the language of s 13(1), which refers to a person claiming to be entitled to a progress payment serving a claim on a person who “under the construction contract concerned, is or may be liable to make the payment”. No doubt the meaning of the phrases “under the construction contract” and “for construction work” will often coincide, but the former phrase is used in s 13(1), and the latter phrase is not. Each phrase is a label and, as Hodgson JA noted in *JM Hargreaves*, labels cannot be determinative of the nature of the claim. Reference to a claim “for” construction work merely invokes a different label. Section 13(2)(a) refers to construction work “to which the progress payment relates”; s 13(3)(b) provides for payment of an amount held by the respondent which is claimed to be “due for release”. No different language need be invoked, nor should it be.

69 The scheme of the Security of Payment Act, as recognised in *Southern Han* and other cases, is to focus upon the construction contract, overlaid by a statutory entitlement to progress payments.

70 Further, pursuant to s 9, the amount of a progress payment to which a person is entitled “in respect of a construction contract” (not “for construction work”) is, in the first instance, to be calculated “in accordance with the terms of the contract”. Again, the emphasis is on the contract. However, if the contract makes no such express provision, a valuation exercise must be undertaken

²⁴ (2005) 63 NSWLR 385; [2005] NSWCA 228 at [41].

pursuant to s 10(1)(b). One of the matters to which regard may be had is, “if any of the work is defective, the estimated cost of rectifying the defect”: s 10(1)(b)(iv). Thus, whether or not the exercise is fully covered by the terms of the contract, a progress claim will involve a range of evaluative assessments, such as the degree to which the work has been completed, whether it complies with the terms of the contract and whether it is defective. All of these are matters which, if a dispute is raised in a payment schedule, will need to be determined by an adjudicator.

- 71 Consistently with this reasoning, in *BSA* this Court rejected a submission that an implication could be drawn from the statutory use of the term “reference date” in the singular, so that a payment claim could only be made with respect to one construction contract:

“36 Three matters make it inherently implausible that there is any strict and precise ‘one contract rule’. First, s 8(1) confers an entitlement to a progress payment in respect of construction work carried out under a contract. The object of the Act, as explained in s 3, is to ensure that persons carrying out such work (or supplying related goods and services) obtain regular payments on account, and subject to a final reckoning. The expansive definition of construction contract, to include both a contract and some other arrangement, directs attention to the carrying out of the work, for reward, rather than the legal characteristics of the source of the obligation to carry out the work and the source of the liability of the respondent to make a payment.

37 Secondly, the stated requirements for a valid payment claim do not include the identification of the source of the obligation to carry out the work or the source of the entitlement to payment. The Court has preferred not to read the Act as containing implied limitations, such as permitting the conditions of service of a payment claim to be qualified by the contract. ...

...

40 Thirdly, the phrase ‘the one contract rule’ conveys a degree of precision as to its meaning which quickly dissolves on consideration of its possible application. The fact that it appears to reflect the phrase ‘under a construction contract’, in ss 8 and 13, gives it a false sense of acceptability.”

- 72 Consistently with that approach, a payment schedule must identify why, if not the full amount, some part of the claim is being withheld “for any reason” and indicate “the respondent’s reasons for withholding payment”: s 14(3). Beyond those matters, and the requirement that the payment schedule be served within the permitted period, s 14 imposes no conditions on the validity of a payment schedule; if it is not served within time, it is ineffective.

- 73 The respondents sought to derive some assistance from the requirements for a valid payment schedule addressed in *Witron Australia Pty Ltd v Turnkey Innovative Engineering Pty Ltd*.²⁵ However, there is nothing in the reasoning in *Witron* which suggests an intention to depart from the approach adopted to the construction of the Security of Payment Act discussed in earlier cases.²⁶ As the identification of the three relevant criteria at [21] of *Witron* demonstrates, the definition of a payment schedule is quite different from that of a payment claim. Further, the Court construed the relevant statutory provisions having regard to the purpose and function served by a payment schedule, which may be contrasted with that of a payment claim.
- 74 Understanding the objects of the Security of Payment Act, its structure and its spare language, there is little scope for implying unstated conditions as essential to the validity of a payment claim or a payment schedule. The “important limitation that is implicit in the overall design of the Act” identified in *Southern Han* is not engaged with respect to the proposed criterion of the validity of a payment claim.
- 75 Finally, alternative characterisations of a claim provide an uncertain basis for identifying an implied condition of validity, even if it were thought there might be greater room for implying limitations on the operation of the statutory scheme than that described above. In its simplest form, the claim and the payment schedule might be characterised as follows: “the claimant states ‘I am owed \$x for construction work undertaken under the construction contract’; the respondent replies, ‘I have paid \$x in full and no further amount is owing’”. In such a circumstance, the correctness of the claim and the response would be matters for determination by an adjudicator: however, that characterisation is equally apt to cover the present circumstances and the alternative characterisation provided by the respondents.
- 76 The finding that the claim was invalid, and that the adjudication must be set aside for that reason, should be rejected.

²⁵ [2023] NSWCA 305 (Kirk JA, Leeming and Payne JJA agreeing).

²⁶ *Witron* at [23].

Other issues

77 The second way in which the appellant put its case was that, if there were such a “rule”, compliance was a matter for the adjudicator and not a matter of jurisdictional fact for determination by the Court. In the absence of such a “rule” that question does not directly arise. However, the underlying premise is that all questions arising from the construction of the contract and the provisions of the Security of Payment Act itself, as applied to the factual circumstances raised by the claim and the payment schedule, are matters for the adjudicator to determine. With few exceptions, it should be accepted that that is the object of the Security of Payment Act and the way it is expected to operate. That may be inferred from the terms of s 22, which provides in part:

22 Adjudicator’s determination

- (1) An adjudicator is to determine—
 - (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the **adjudicated amount**), and
 - (b) the date on which any such amount became or becomes payable, and
 - (c) the rate of interest payable on any such amount.
- (2) In determining an adjudication application, 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.

78 Further, the Act provides for an adjudication certificate to be filed as a judgment for a debt and to be enforceable accordingly: s 25(1). While a respondent can seek to have the judgment set aside, s 25(4) provides that the respondent:

- (a) is not, in those proceedings, entitled—
 - (i) to bring any cross-claim against the claimant, or
 - (ii) to raise any defence in relation to matters arising under the construction contract, or
 - (iii) to challenge the adjudicator's determination

79 The effect of s 25(4)(a)(ii) is to confirm that the adjudicator's understanding of the construction contract, even if legally erroneous, cannot be challenged on a claim to enforce an adjudication certificate; nor, without more, as held in *Probuild Constructions*, can it be so challenged on judicial review. These provisions, which are mirrored by restrictions on the respondents' defences in relation to claims where no payment schedule has been served, or where there has been a failure to pay the excess above the scheduled amount, underlay the conclusion that an adjudication certificate cannot be challenged for error of law on the face of the record. The same statutory scheme is resistant to the implication of unexpressed conditions going to the validity of the claim.

80 By way of observation, the reasoning of the adjudicator in upholding the payment claim was based on her understanding of the operation of the construction contract. Whether that understanding was correct or otherwise could not have been raised by the respondents in challenging the filing of the adjudication certificate. The Court should be cautious in implying an essential condition of validity of a payment claim in circumstances where the effect is to subvert the express preclusion on the power to resist the effect of an adjudication. The underlying basis for that observation is the function of the construction contract in determining whether a claim should succeed or not.

81 It follows that, whatever conditions on the entitlement of the claimant arose from the correct reading of the subcontract and the Security of Payment Act, as relied on in the payment schedule, they were properly matters for the adjudicator. To that extent, ground 1(b)(ii) should be upheld.

82 Ground 2 alleged error on the part of the primary judge in holding that PC 29 "was not, or did not comprise, a claim for construction work". That ground was premised on acceptance of the propositions that (i) a payment claim could only be made for payment for construction work, and (ii) whether the payment claim was so made was a matter to be determined by the Court. For the reasons

given above, that exercise was not a matter for the Court and it would be inappropriate for this Court to review that assessment. It is correct, however, as ground 2(b)(iii) asserted, that PC 29 was not invalid in the sense relied on by the respondents.

Orders

- 83 The orders in the Equity Division entered on 15 December 2023 quashed the adjudication determination (order 1); superfluously, restrained the appellant from acting on the determination (order 2), and ordered that the present appellant pay the respondents' costs, including the costs of the appellant's cross-claim. The appellant sought to have each of these orders set aside. It did not seek to set aside the order dismissing its cross-summons (order 3), nor seek an order that the moneys paid into Court by the respondents be paid out to it (order 4). The reason for not challenging order 4 was presumably that it had already been given effect; however, there was an issue as to what order should be made in its place.
- 84 The absence of challenge to order 3 (dismissing the cross-claim) has consequences for the appropriate order in relation to the costs in the Equity Division, namely whether the appellant should nevertheless pay the respondents' costs of its failed cross-claim.
- 85 With respect to the payment out, the appellant sought an order that the respondents pay it an amount of \$10,180,582.60 less \$20,472.83. (The balance is \$10,160,109.77.) The appellant also sought interest from 7 July 2023 to the date of payment at the rate of 9.1% per annum. The adjudication determination identified the adjudicated amount as \$10,180,582.60, indicating that the amount became payable on 7 July 2023; the accepted deduction was an amount which had been paid before the date of the adjudication determination, but after the date of the payment claim.
- 86 Section 25(4) of the Security of Payment Act requires the respondent to an adjudication determination seeking to have the resulting judgment set aside to pay the unpaid portion of the adjudicated amount into Court pending final determination of the proceedings. It is conventional to make such a payment

into Court as a condition of judicial review proceedings which seek to prevent the adjudication certificate being issued or filed.

87 The respondents agreed that if the decision of the primary judge were to be set aside the appellant would be entitled to act on the adjudication certificate and obtain the payment made into Court plus interest. Counsel for the respondents further agreed that the procedure might be satisfied by an order of the Court requiring the respondents to make the payment directly to the appellant. That course should be taken.

88 As to the costs of the proceedings in the Equity Division, the appellant's costs of the respondents' summons should be paid by those respondents. The cross-claim raised a separate matter as to whether cl 5.5(a)(iii) and 42.11 of the subcontract were invalid, because inconsistent with the terms of the Security of Payment Act and thus void pursuant to s 34 of the Act. Although it has been said that a respondent is entitled to raise such defences as it considers viable without being at risk of paying costs in respect of part of the proceedings if entirely successful on its first defence, where severable defences are raised by way of cross-claim that principle may not apply. Further, arguably it was only because the respondents sought to intervene to prevent the creation of a judgment debt that they were the plaintiffs in the Court below, whereas they might have sought to set aside a judgment debt once obtained by the appellant. In those circumstances, costs should follow the event and the appellant should pay the costs of its unsuccessful cross-claim. Otherwise, it should have its costs of the respondents' summons and in this Court.

89 Accordingly, the Court should make the following orders:

- (1) Allow the appeal from the judgment in the Equity Division given on 14 December 2023.
- (2) Set aside orders 1, 2 and 5 entered on 15 December 2023 and in their place order that:
 - (a) the amended summons dated 24 October 2023 be dismissed;
 - (b) the plaintiffs pay the costs of the first defendant of the summons;
 - (c) the first defendant pay the plaintiffs' costs of the cross-summons.

- (3) Order that the first to third respondents pay the appellant an amount of \$10,160,109.77, together with interest at 9.1% per annum from 7 July 2023 to the date of payment.
- (4) Order that the first to third respondents pay the appellant's costs in this Court.

90 **GRIFFITHS AJA:** I agree with Basten AJA.

Amendments

24 January 2025 - Par 18: "may be" inserted before "served"; deleted "under" replaced with "in".

Par 41: quote par 15, 1st line, capital C for contractor; inserted "[of]" in front of "or"; par 16, 1st line, capital C for contractor.

Par 64: replaced "for Payment Act" with "of Payment Act".

Par 67: replaced "for construction work" with "of construction work".

Par 73: deleted "identified" before "at [21]".

Par 74: inserted "that is implicit" before "in the overall design".