# SUPREME COURT OF VICTORIA
## COURT OF APPEAL

S EAPCI 2023 0110

J.G. KING PROJECT MANAGEMENT PTY LTD (ACN 095 695 079) — Applicant

v

HUNTERS GREEN RETIREMENT LIVING PTY LTD (ACN 107 006 520) — First Respondent

and

SUSAN LEECH — Second Respondent

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| **JUDGES:** | NIALL, KENNEDY and MACAULAY JJA |
| **WHERE HELD:** | Melbourne |
| **DATE OF HEARING:** | 1 August 2024 |
| **DATE OF JUDGMENT:** | 12 December 2024 |
| **MEDIUM NEUTRAL CITATION:** | [2024] VSCA 310 |
| **JUDGMENT APPEALED FROM:** | [2023] VSC 536 (Attiwill J) |

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BUILDING AND CONSTRUCTION – Notice of contention – Where final payment claims for amounts allegedly owing under building contracts – Where amounts claimed equivalent to the remaining monies retained by the principal as security – Whether the payment claims were payment claims for the purpose of the *Building and Construction Industry Security of Payment Act 2002* ('Act') – Payment claims were made under a construction contract – Alternatively, payment claims were for 'construction work' for the purposes of the Act – Payment claims were valid payment claims for the purposes of the Act – No error by the judge.

BUILDING AND CONSTRUCTION – Whether contracts made 'express provision' for calculation of a claim for final payment under the Act – Whether, upon proper construction of contracts, unpaid amounts were due and payable under the Act absent a final certificate – Payment claims, as adjusted by adjudicator, were due and payable under the Act – Alternatively, s 48 of the Act would void contractual clauses if inconsistent with entitlement under the Act – Leave to appeal granted – Appeal allowed.

*Building and Construction Industry Security of Payment Act 2002*, ss 9, 10, 12, 23, 48.

*Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421; *Fifty Property Investments Pty Ltd v O'Mara* [2006] NSWSC 428; *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349; *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027; *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19; *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399; *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119; *Saville v Hallmarc Construction Pty Ltd* [2015] VSCA 318; *S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* [2020] QSC 307; *EHome Construction Pty Ltd v GCB Constructions Pty Ltd* [2020] QSC 291; *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106; *Cool Logic Pty Ltd v Citi-Con (Vic) Pty Ltd* [2020] VCC 1261; *Whitehorse Box Hill Pty Ltd v Alliance CG Pty Ltd* [2022] VSC 22; *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd as Trustee for the CGM Unit Trust* [2020] VSC 637, considered; *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* [2024] NSWCA 162; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, applied. *Punton's Shoes Pty Ltd v Citi-Con (Vic) Pty Ltd* [2020] VSC 514, not followed; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248, discussed.

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**Counsel**

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| Applicant: | Mr ND Hopkins KC with Mr AR Morrison |
| First Respondent: | Mr RG Craig KC with Mr BG Mason |

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| Applicant: | Champions Lawyers |
| First Respondent: | Minter Ellison |

NIALL JA:

1 I have had the benefit of reading in draft form the reasons for judgment of Kennedy JA and Macaulay JA. In my opinion, leave to appeal should be granted, the appeal should be allowed and the proceeding for judicial review against the adjudication determinations should be dismissed. The comprehensive account of the facts, contracts, legislative provisions and arguments found in the other judgments relieves me of the burden of rehearsing those matters and enables me to state my conclusions briefly.

***Statement of the issues***

2 The proceeding in the Trial Division was an application for judicial review of two adjudication determinations made under s 23 of the *Building and Construction Industry Security of Payment Act 2002* (the 'Act'). The determinations related to the construction of Stages 12 and 13 of a retirement village in Cranbourne East ('contracts'). In summary, the adjudicator (the second respondent) held that the first respondent developer ('principal') was liable to pay to the applicant ('builder') an amount equal to the payments retained by it under the contracts less an adjustment in relation to certain of the claimed items.

3 The adjudicator reasoned as follows:

(a) The progress claims were for construction work, being the contract sum ($4,766,750.10 (including GST) for Stage 12 and $6,546,185.76 (including GST) for Stage 13) less amounts received.

(b) There was, in any event, no prohibition on claiming retention moneys in a claim under the Act.

(c) The principal was not entitled to withhold retention moneys under the Act.

(d) Clause 37.4 of the contracts provided a reference date for the claims, being within 28 days after the expiry of the last defects liability period and the satisfaction of the builder's obligations under the contracts, which the adjudicator understood to mean the completion of the works in accordance with the plans and specifications.

(e) The contracts did not expressly provide for the calculation of the amount of the entitlement and the adjudicator therefore applied ss 10(1)(b) and 11(1)(b) of the Act.

(f) The adjudicator made some minor adjustments to the claims on the merits and otherwise upheld the claims.

(g) The adjudicator held that the contracts did not provide a date for payment and therefore applied s 12(1)(b) of the Act, with the consequence that the adjudicated amounts were payable 10 business days after the claims were served (being 2 September 2022).

4 The judge upheld a challenge to the adjudication determinations. There were four grounds of review:

(a) The claims were not in respect of construction work because they were claims for the return of security.

(b) No reference date arose in relation to the claims.

(c) The claims did not sufficiently identify the construction work and so did not constitute valid payment claims.

(d) The adjudicator erred in holding that the contracts did not provide for the calculation of the entitlement and wrongly held that the principal was not permitted to withhold the retention moneys.[1]

5 The judge held that the claims were valid claims with adequate detail and were for unpaid construction work.[2] The judge further held that the contracts set out how the amount of the progress claims was to be calculated, holding that cl 37.4 of the contracts provided the means of calculating an entitlement under the Act.[3] The judge held that, applying cl 37.4, the adjudicator was required to determine the moneys due and payable between the builder and the principal excluding any 'excluded amounts'.[4] Given that, so the judge found, the final progress claims were not due and payable until 14 days after the final certificates were issued or any earlier recourse to them by the principal, which had not occurred, and therefore no money was payable.[5]

6 Thus the judge held that the release of security mechanism in cl 5.4 had to be satisfied before the entitlement to the final progress payments arose, and the adjudication determinations were quashed.[6]

7 In this Court, there are four main issues, the first of which is raised by a notice of contention:

(a) Were the final progress claims for the return of retention moneys held by the principal as security, and, if so, did this take them outside the scope of a valid progress claim under the Act?

(b) Did the contracts expressly provide for the calculation of progress payments so as to render s 10(1)(a) of the Act applicable?

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1 *Hunters Green Retirement Living Pty Ltd v J.G. King Project Management Pty Ltd* [2023] VSC 536, [33] ('Reasons').
2 Ibid [82].
3 Ibid [198].
4 Ibid [206].
5 Ibid [207].
6 Ibid [209]–[218], [233].

(c) Did, as the judge found, cls 5.4 and 37.4 of the contracts permit the principal to withhold the balance of retention moneys until the issue by the superintendent (the principal)[7] of a final certificate under cl 37.4?

(d) If cls 5.4 and 37.4 had the effect found by the judge, were they invalid or inoperative by operation of s 48 of the Act?

8 I would answer question (c) in the negative and therefore grant leave to appeal and allow the appeal.

***The scheme in overview***

9 This matter concerns a claim for a progress payment under the Act. That the claim is a final progress claim adds a degree of detail that it will be necessary to address. The entitlement to which the claim is made is statutory. It does not involve an action in contract. It follows that the existence and nature of any entitlement to payment must be found in the terms of the Act.

10 In order for a claim to be made under the Act, there must be a construction contract. The existence of such a contract is a statutory precondition for the making of a claim for a progress payment under the Act.[8] It is not in dispute that there existed a construction contract between the parties.

11 Where it can, the Act uses the terms of the construction contract as a point of reference for the purpose of determining the timing and calculation of the statutory entitlement. So, for example, s 10(1) provides that, where the contract provides for the matter, the amount of a progress payment to which a person is entitled in respect of a construction contract is the amount calculated in accordance with the terms of the contract. And, if the contract makes no such express provision, s 10(2) explains how the entitlement is to be calculated. Similarly, s 9 provides that the entitlement is to be calculated by reference to a date ('the reference date') which is determined by or in accordance with the contract.

12 This extensive cross-referencing makes it easy to err by treating a claim for a progress payment as fundamentally one that gives effect to what the parties have agreed. That would be a mistake, at least for the reason that it is apt to incorporate contractual restrictions and limitations on the payment of a progress claim that are not recognised by, or that are qualified by, the Act. It would also be a mistake to treat the statutory entitlement as being affected by how the parties have acted or conducted themselves, especially where their conduct represents a departure from the terms of the contract, subject perhaps to the possibility of waiver or estoppel.[9] In applying the Act, one must

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7 In accordance with the definition of 'Superintendent' in cl 1 and item 5 of Part A to the contracts.

8 *Brodyn Pty Ltd (t/as Time Cost & Quality) v Davenport* (2004) 61 NSWLR 421, 440 [53(1)] (Hodgson JA, Mason P agreeing at 423 [1], Giles JA agreeing at 423 [2]); [2004] NSWCA 394; *Fifty Property Investments Pty Ltd v O'Mara* [2006] NSWSC 428, [17] (Brereton J); *Olbourne v Excell Building Corp Pty Ltd* [2009] NSWSC 349, [19]–[21] (Rein J).

9 *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, [58] (Palmer J).

guard against a natural predisposition to give overarching primacy to what the parties have agreed.

13 Notwithstanding that the Act has primacy, because of the cross-referencing it is convenient to start by outlining how the contracts provide for progress payments.

*Progress payments under the contracts*

14 Clause 37.1 provides that the builder shall give the superintendent a claim for a progress payment at certain intervals,[10] in a format reasonably required by the superintendent, which includes details of the value of the work done and other amounts owing to the builder, and which allows for deductions for any liquidated damages owing under cl 34.7. The superintendent is then required to issue a certificate ('progress certificate') that evidences the opinion of the superintendent as to the amount due pursuant to the claim and includes reasons for any difference between that amount and the claim as well as a further certificate evidencing an assessment of retention moneys and moneys due from the contractor to the principal. These certificates then lead to the builder issuing a tax invoice and payment by the principal. The principal is permitted to pay less that the invoiced amount if it exceeds the amount stated in the progress certificate and is also entitled to offset any amounts owing to it, before payment.

15 The contracts provide for the timing of the making of a claim, being the 25th day of each month for 'WUC'[11] done to the last day of that month during WUC, practical completion and the final payment claim. The contracts state that these dates are a 'reference date' for the purposes of the Act.[12]

16 Clause 37.4 deals with a 'final payment claim'. That clause provides:

> **37.4 Final payment claim and certificate**
>
> Within 28 days after the expiry of the last *defects liability period* and the satisfaction of all of the *Contractor's* obligations under the *Contract*, the *Contractor* shall give the *Superintendent* a written *final payment claim* endorsed 'Final Payment Claim' being a progress claim together with all other claims whatsoever in connection with the subject matter of the *Contract*. The *Contractor* must provide an executed *deed of release* before making the *final payment claim*.
>
> Within 10 business days after the receipt of a valid *payment claim*, the *Superintendent* shall issue to both the *Contractor* and the *Principal* a *final*

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10 In accordance with item 33, which provides for instalments as work is being carried out, at practical completion and at the time for making the final payment.

11 'WUC' is defined to mean 'the *work* which the *Contractor* is or may be required to carry out and complete under the *Contract* and includes *variations*, *included matters*, remedial *work*, *construction plant* and *temporary works* …' (cl 1).

12 Although the contracts refer to the time prescribed in cl 37.2, the judge found that this was clearly intended to be a reference to cl 37.1: Reasons, [143].

*certificate* evidencing the moneys finally due and payable between the *Contractor* and the *Principal* on any account whatsoever in connection with the subject matter of the *Contract*.

Those moneys certified as due and payable shall be paid by the *Principal* or the *Contractor*, as the case may be, within 5 business days after the *Superintendent* issues the final certificate.

The *final certificate* shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the *Contract* except for:

(a) fraud or dishonesty relating to *WUC* or any part thereof or to any matter dealt with in the *final certificate*;

(b) any *defect* or omission in *the Works* or any part thereof which was not apparent at the end of the last *defects liability period*, or which would not have been disclosed upon reasonable inspection at the time of the issue of *the final certificate*;

(c) any accidental or erroneous inclusion or exclusion of any work or figures in any computation or an arithmetical error in any computation;

(d) unresolved issues the subject of any notice of dispute by the *Principal* pursuant to clause 42, served before the 7th day after the issue of the final certificate; and

(e) third party claims brought against the *Principal* thereafter for damage, injury or death.

*Security under the contracts*

17 Against the possibility that, at some point, the builder will be liable to the principal in relation to its performance of the contracts, the builder is required to provide security to the principal.

18 The contracts provide that the security can take one or more of a variety of forms being 'cash, retention moneys, bonds, an interest bearing deposit in a bank, an approved undertaking or some other form approved by the party having the benefit of the security'. On execution, the parties to the contracts chose to use retention moneys as the form of security. Some matters of note include that:

(a) security is provided by the builder to secure its potential non-performance of the contracts, and the builder is under a contractual obligation to provide the security in the form and amount agreed;

(b) the security chosen allows the principal to retain an amount of money that is payable to the builder for work under the contracts; and

(c) the contracts provide for the release of or recourse to the security at the completion of the contracts and subject to the provision of final sign off, including a release.

19 Clause 5.4 provides for the 'reduction and release' of security and is in the following terms:

> **5.4 Reduction and release**
>
> Upon the issue of the *certificate of practical completion* and compliance by the *Contractor* with subclause 34.6A a party's entitlement to *security* (other than in *Item* 14(e)) shall be reduced by the percentage or amount in *Item* 14(f) or 15(d) as applicable, and the reduction shall be released and returned within 14 days to the other party.
>
> The *Principal's* entitlement to *security* in *Item* 14(e) shall cease 14 days after incorporation into *the Works* of the plant and materials for which that *security* was provided.
>
> A party's entitlement otherwise to *security* shall cease 14 days after *final certificate*.
>
> Upon a party's entitlement to *security* ceasing, that party shall release and return forthwith the *security* to the other party.

*The nature of retention moneys under the contracts*

20 The relationship *under the contracts* between progress payments and retention moneys is not entirely clear. It seems plain that cl 37.1 contemplates that the progress claim will be gross of any retention amount. The claim is to include details of the 'value of WUC done' rather than a net figure, and it also refers to details of other moneys then due to the builder and a deduction for liquidated damages. There is no mention of retention moneys in the list of what may be included in the claim in cl 37.1. Further, the amount of the retention moneys is 10 per cent of each progress certificate, rather than a percentage of the claim. The superintendent is to include a certificate that assesses the retention moneys calculated by reference to the progress certificate. That certificate may, but need not, form part of a progress certificate.

21 The builder describes retained moneys as 'already earned, though not yet payable'.[13] It identifies a distinction between an amount which is 'due and payable', in the sense that it is presently payable, and an amount that is merely 'due' but not payable until some future date. It says that the Act countenances a similar distinction, permitting a claim for a sum that is 'due' (s 14(2)(d)) as compared to one that will become 'due and payable' (s 12(1)) on a later date.

22 What is clear is that the funds that are retained as security by the principal come from moneys that are otherwise payable to the builder in respect of work carried out by it under the contracts. The security is an amount retained from a progress payment that

[13] Citing *Re Tout and Finch Ltd* [1954] 1 All ER 127, 135 (Wynn-Parry J).

is withheld after the amount owing to the builder has been calculated under the contracts.

23 The builder did not dispute that, as the contracts were performed, the principal was entitled to retain an amount, being 10 per cent of each progress certificate. The contracts do not regulate what, if anything, the principal is to do with the funds it retains pending release or recourse.

24 In *Punton's Shoes Pty Ltd v Citi-Con (Vic) Pty Ltd*, Digby J considered that retained moneys under a retention clause formed a separate fund that presumably neither party was immediately entitled to use as its own.[14] Interesting questions might arise as to how the contracts, including as supplemented or complemented by equity, might treat the retained funds in the hands of the principal. Such questions may be informed by the conduct of the parties and the extent to which they adhered to the contractual terms but, as has been noted, the Act operates to create a statutory entitlement including by reference to the terms of the construction contract rather than the conduct of the parties. However, the extent to which those questions arise depends on the operation of the Act, to which I now turn.

***Payment claims under the Act***

25 A person who has undertaken to carry out construction work or to supply related goods and services under the contract is entitled under s 9(1) to a progress payment under the Act. The amount of the entitlement is calculated under s 10, and, where the contract expressly provides, it is the amount calculated in accordance with the terms of the contract. The reference to calculation or valuation 'in accordance with the terms of the contract' is a reference 'to the contractual mechanism for determination of that which is to be calculated or valued, not to the person who, under the contract, is to make that calculation or valuation'.[15]

26 Section 12(1)(a) provides that a progress payment under a construction contract becomes due and payable on the day on which the payment becomes due and payable in accordance with the terms of the contract. If the contract does not expressly provide for a date, the amount becomes due and payable 10 days after the payment claim is made.[16]

***The notice of contention***

27 The principal seeks to uphold the judge's order on the basis that the payment claims were for retention moneys and that the Act does not allow a claim for such funds to be made. As the notice of contention raises a jurisdictional issue, it is convenient to deal with it at the threshold.

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14 [2020] VSC 514, [109]–[110].

15 *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027, [38] (McDougall J).

16 Act, s 12(1)(b).

28 The notice of contention is concerned with whether the final claims were ones that were capable of being made so as to enliven the Act, not with the merits of the claims. It is convenient to start with the form of the claims made and their proper legal character.

***The claims in this case***

29 The claims the subject of the proceeding are on their face final claims.

30 Given the parties' arguments and the reasons of the adjudicator, it is necessary also to refer to the earlier claims.

*The first claim in respect of Stage 12*

31 At the time of the first claim in respect of Stage 12,[17] the builder had undertaken work on 21 lots and the common area. According to its invoice, which was accompanied by detailed spreadsheets, it had completed work to the value of $79,953.52, not including GST. The amount of the invoice, including GST, was $87,149.32.[18] However, allowing for retention (of 10 per cent of the value of the work, being $7,995.36), the amount said to be due on the invoice was $79,153.96. The invoice was paid by the principal and, as a result, it withheld $7,995.36 by way of security.[19]

32 It seems plain that the builder claimed that the value of the work done to that point, calculated under the contract, was $79,953.52, not including GST. The judge held that, for the purposes of the Act, the builder claimed less than the invoiced amount.[20]

33 The invoice stated that it was a payment claim made under the Act. For the purpose of s 14(2)(d) of the Act, the invoice indicated the amount of the progress payment that the builder claimed to be due. Although the contract prescribed a process by which a progress claim would be made, including having the superintendent issue a progress certificate, these procedures were not in fact adopted.[21]

34 Subsequent claims were in similar form and were paid.

35 On 28 June 2019, practical completion was certified by the superintendent for work on Stages 12 and 13.[22] The certificate of practical completion provided for the builder to provide an invoice for the return of 50 per cent of the retention moneys in relation to:

(a) Stage 12 in the sum of $115,948.66 (inclusive of GST); and

(b) Stage 13 in the sum of $176,055.67 (inclusive of GST).[23]

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17 A similar process was adopted in relation to Stage 13.
18 Reasons, [14].
19 Ibid [17]–[18].
20 Ibid [17(a)].
21 Ibid [16]–[17].
22 Ibid [20].

36 On about 3 July 2019, the builder issued invoices for 'Retention Billed' in the amount of $115,948.66 (inclusive of GST) for Stage 12 and $176,055.67 (inclusive of GST) for Stage 13. The invoices for Stages 12 and 13 were accompanied by schedules that stated that they were payment claims under the Act. The principal paid these invoices.[24]

*The final claims*

37 On 19 August 2022, the builder sent to the principal:

(a) a document titled 'Final Payment Claim' for Stage 12 that stated that the 'Current Contract Claim' was $115,948.66 (inclusive of GST) and was a claim under the Act and a deed of release that stated the 'Amount Claimed' was $115,948.66 ('Stage 12 Payment Claim'); and

(b) a document titled 'Final Payment Claim' for Stage 13 that stated that the 'Current Contract Claim' was $176,055.64 (inclusive of GST) and was a claim under the Act and a deed of release that stated the 'Amount Claimed' was $176,055.64 ('Stage 13 Payment Claim').[25]

38 The claims included a schedule, headed 'Final Payment Claim'. The table in that schedule stated that each item of work was 100 per cent complete. It provided a cumulative value and a total value of the completed works and the total amount previously paid for the works. It set out the 'current contract claim', being the difference between the total amount of the value of the completed works less the total amount previously paid. It stated that:

(a) the current contract claim in the Stage 12 Payment Claim was $115,948.66 (inclusive of GST); and

(b) the current contract claim in the State 13 Payment Claim was $176,055.64 (inclusive of GST).

***Decision on notice of contention***

39 The principal submits, by way of its notice of contention, that the final payment claims were not for construction work. The parties' arguments as to the notice of contention, as well as the proposed grounds of appeal, are set out in the reasons of the other members of the Court.

40 There are two answers to the contention.

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23 Ibid.
24 Ibid [21].
25 Ibid [22].

41 In my opinion, the final payment claims were for construction work. The amounts were for construction work that had been undertaken by the builder and in respect of which amounts were said to be owing and unpaid. The fact that the amounts remained unpaid and had been held by the principal as security does not preclude the claims from being claims for construction work.

42 It may be accepted that there are two different ways to characterise the earlier payment claims. On the one hand, they might be seen as claiming the full value of the work done but allowing the principal, with the agreement of the builder, to retain an amount as security. On the other, it might be said that the claims were only for the amount then payable under the invoice, which would leave the balance of work unclaimed. In my opinion, the better view is that, consistent with s 14(2)(d) of the Act, the claims specified the amount claimed as being the amount due on the invoice, representing the value of the work less the retained amount. In other words, the balance of the work, the value of which equates to the retention, was not the subject of the earlier claims and was first claimed in the final progress claims.

43 With great respect to the view taken by Macaulay JA, it does not matter for present purposes whether the building work had already been claimed pursuant to earlier progress claims. In my view, even if it had been claimed, it was not paid to the builder and s 14(9) of the Act permitted the builder to include in a subsequent payment claim an amount that has been the subject of a previous claim but which had not been paid.

44 In my opinion, it does not matter that the money the subject of the claims could also be characterised as money held by the principal as security. Even if it was held for that purpose, it did not lose its character as money owing for construction work done. It may be accepted that a claim for the release of other forms of security may not involve a claim for payment for construction work. So, for example, if the builder had provided a bank guarantee in the sum of 10 per cent of the contract price to be held as security, a claim for its release would not be a claim to be paid for construction work. That is a very different situation to a claim based on money withheld by the principal that was otherwise payable for work done.

45 Secondly, and in any event, s 10 of the Act couches the entitlement as being one 'in respect of a construction contract'. As a result, a party to a construction contract can make a claim in respect of amounts owing under the contract. Those amounts do not have to be for construction work. *EnerMech*[26] so holds, I am unable to distinguish it and, out of comity,[27] it should be followed.

***Ground 1***

46 I agree with Kennedy JA on ground 1.

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26 *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* [2024] NSWCA 162, [59]ff (Basten JA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]).

27 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); [2007] HCA 22.

***Ground 2***

47 Relevantly, the interplay between ss 9, 10 and 12 of the Act and the construction contracts yields the following result.

48 Section 9 of the Act gave the builder an entitlement to progress payments. Those payments were to be calculated in accordance with the contracts. The facility by which the principal was contractually entitled to retain funds to be used for the purpose of security did not affect how the entitlement was to be calculated under s 10, which is based on the value of the work. The purpose of the calculation is to ascribe, using the terms of the contracts, a value to the work, which then informs the statutory entitlement. That is to say, the contracts set out the value of the work or allow it to be calculated. For the purpose of the contracts and therefore s 10, the ability to retain funds affected neither the value of the work nor the calculation of the statutory entitlement.

49 The point can be illustrated by a simple example. Assume that the builder completes a section of work and makes a payment claim in respect of it. The contracts say how much the builder is entitled to charge for that work, that is, they allow the value of the work to be identified. The fact that part of the funds owing in respect of that work may be retained by the principal does not affect the value of the work for the purpose of s 10. To be clear, the value of the work is not reduced by the amount retained.

50 Seen in this way, s 9 confers the entitlement and s 10 allows that entitlement to be valued. It might seem surprising that the Act gives the builder an entitlement to be paid an amount that it has agreed should be held by the principal as security. However, once it is recognised that the Act confers a statutory entitlement that prioritises cash flow over other considerations and that the contracts provide the means for its calculation based on the value of the work, no incongruity exists.

51 Importantly, the Act also deals with when the statutory entitlement is to be paid. The answer to that question is found in s 12. Section 12 is concerned with when amounts become due and payable. It provides that a progress payment under a construction contract becomes due and payable on the date on which the payment becomes due and payable in accordance with the terms of the contract or, where the contract makes no express provision, 10 business days after a payment claim is made.

52 In addition to s 12, there are a number of indications that the Act is concerned with the timing by which progress claims are to be paid. Thus, s 14(2)(d) requires that the claim set out the amount of the progress payment that the claimant claims to be due. Where there is a dispute that leads to adjudication, the adjudicator is to determine the amount of the progress payment (if any) to be paid and the date on which that amount became or becomes payable.[28] The reference to a date on which the adjudicated amount 'becomes payable' suggests that the adjudicated amount might fall due on a future date.

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[28] Act, s 23(1)(a), (b).

53 The possibility that, in relation to a progress claim, a construction contract allows the principal to retain some or all of the progress payment as security until some later date or circumstance gives rise to an important question of construction in respect of s 12. As I have already endeavoured to explain, a statutory progress payment reflects the value of the work done and the statutory entitlement is not reduced by the amount of any retention that the contracts require. On the other hand, it does not automatically follow that the amount of the retention moneys is immediately due and payable. Subject to the possible operation of s 48(1) of the Act, which prevents a contract from modifying or restricting the operation of the Act, a contract can determine when a progress payment, or part thereof, falls due and payable.

54 Here, the contracts allow for the issuing of a progress claim at specific intervals and allow the builder to issue a claim in respect of WUC performed up to the relevant interval. They allow for further progress claims at practical completion and at the time of the final payment claim. They also allow the principal to retain funds as security, and, as the builder accepted, the retained amounts were due but not yet payable at the time of the earlier progress claims.

55 The position with respect to the final payment claims raises other issues. The question becomes whether amounts earlier retained were due and payable immediately pursuant to the final payment claims or whether the amounts claimed were only due and payable after the issue of a final certificate. In turn, that involves consideration of cls 37.4 and 5.4 of the contracts.

56 The relationship between a final claim under the Act and cl 37.4 of the contracts is a difficult one.

57 It is important to observe that the Act allows for the making of a final payment claim for construction work carried out under a construction contract.[29] Subject to s 14(7), which deals with amounts that remain unpaid, once a final payment claim is served, no further payment claim can be served under the Act in respect of the construction contract to which the payment claim relates.[30] It is tolerably clear that the purpose of the final payment claim is to give the builder the opportunity to claim, by way of a statutory entitlement, for all the work done under the construction contract. That is not the same thing as a final accounting of all the contractual entitlements going between the parties, a point that is revealed by the fact that a statutory claim, including a final claim, cannot include excluded amounts.[31]

58 On receipt, and subject to strict time limits, the principal has an opportunity to contest the claim by way of a payment schedule[32] but, in calculating the amount owing, excluded amounts, which include, for example, time-related costs,[33] must not be taken into account and the overall process is designed to be summary in nature and

29 Ibid s 14(1), (5).
30 Ibid s 14(6).
31 Ibid s 14(3)(b).
32 Ibid s 15.
33 Ibid s 10B.

undertaken without prejudice to the underlying contractual position. The potential divergence between a statutory claim and a contractual entitlement remains even in relation to a final payment claim under the Act.

59 As was the case with the earlier progress claims, s 10 of the Act provided the means of valuing or calculating the amount of the statutory entitlement: the answer to ground 1 of the application for leave to appeal remains apposite. Turning then to cl 37.4, it says that the final payment claim under the contract includes a progress claim together with all other claims whatsoever in connection with the subject matter of the contract. Further, the process contemplated by the clause involves a bringing to account of all the claims and counterclaims under the contract with a view to reaching a binding determination of the contractual position by means of a certificate that provides conclusive evidence of accord and satisfaction and the discharge of each party's obligations. In my opinion, cl 37.4 goes beyond that which is contemplated by a final progress claim under the Act.

60 The potential disjunction between a final progress payment under the Act and a final payment claim under the contracts means that the statutory claim may precede compliance with the contractual terms. That might lead to the possibility that, where the form of security chosen by the parties is retention moneys, the principal might be obliged to satisfy the statutory claim and pay over funds that had been held as security. I do not see that as involving a payment of security to the builder. Rather, it is a reflection that the sum held has two different characters. It was both the subject of a statutory claim for a progress payment and held as security. The contractual obligation to maintain security would remain unless and until it is the subject of recourse or released as permitted by cl 5.4, but that obligation does not stand in the way of a final claim to a progress payment under the Act.

61 It was not in dispute that cl 37.4 provides for the making of a final progress claim and that it supplied a reference date for the purpose of s 9 of the Act. Appling cl 37.4, the adjudicator's task was to assess the amount owing in respect of the claims, which I have held were claims for construction work, having regard to the permissible material under the Act. In my view, the adjudicator performed that task and arrived at the amounts owing pursuant to the statutory claims. The contractual requirement that there be a final certificate before moneys are payable and the further restriction in cl 5.4 on the release of security did not bear on the value of the entitlement. The adjudicator was correct to so hold.

62 In my respectful opinion, the judge conflated the statutory entitlement that was to be calculated in accordance with the contracts and the separate question of when the statutory entitlement becomes due and payable. The former is determined by applying s 10 of the Act and the latter by applying s 12. The judge calculated the final progress payments in accordance with cl 37.4 by asking when the moneys were due and payable under the contracts.[34] The question when they were due under the contracts was relevant to s 12 but not to s 10.

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34 Reasons, [207], [209].

63 The question remains as to when the statutory entitlement was payable. The answer lies in s 12 of the Act.

64 The adjudicator held that cl 37.4 did not expressly provide for when the final progress claim was made. I agree. As already observed, cl 37.4 is concerned with a different issue, namely the final adjustment of all contractual entitlements, in respect of which the clause imposed some procedural requirements that were apt to yield a final and conclusive resolution of the contractual position. It does not expressly deal with when the final statutory claim is payable. It follows that the final claims, as adjusted by the adjudicator, were payable 10 days after service of the claims.[35]

***Ground 3***

65 If cl 37.4 requires that the amount owing by way of statutory entitlement be withheld until all of the contractual payments have been assessed and certified by the superintendent, then it would be inconsistent with the scheme of the Act and unenforceable to that extent by reason of s 48 of the Act. Consequently, if I were wrong as to ground 2, then I would uphold ground 3.

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35 Act, s 12(1)(b).

66 To require that a final claim under the Act can only be payable once the contractual obligations, including for example with respect to excluded amounts, are resolved; a release forthcoming; and a certificate issued would entail restricting the operation of the Act in a significant way and fall foul of s 48 of the Act.[36]

***Conclusion***

67 It follows that the judge erred in holding that the final payment claims were not payable until the final certificates were provided and cls 37.4 and 5.4 were satisfied. There was no error in the adjudication determinations that held that the claims were due and payable.

KENNEDY JA:

***PART A: BACKGROUND***

68 On 13 August 2018, the applicant (the 'builder') entered into two contracts with the first respondent developer (the 'principal') to construct stages 12 and 13 of a retirement village in Cranbourne East (the 'contracts').

69 Over the course of the contracts, the builder progressively issued progress claims in respect of the amount of value of the construction works completed. Each claim also contained a statement that it constituted a payment claim under the *Building and Construction Industry Security of Payment Act 2002* (the 'Act'). In each case the builder claimed lesser amounts than the total amounts invoiced by deducting amounts for 'retention moneys' under the contracts. This meant that the parties did not follow the detailed process identified in the contracts in respect of the making of progress claims. Nevertheless, the principal paid the amounts claimed up until the making of the (final) payment claims, described below.[37]

70 On 28 June 2019, practical completion was certified by the superintendent (the principal[38]). On 3 July 2019, the builder invoiced for 'retention billed' in the amount of 50 per cent of the retention moneys. The principal paid these amounts and also paid further invoices for works in July.[39]

71 On 19 August 2022, the builder served two documents on the principal:

(a) a document titled 'Final Payment Claim' for stage 12 that stated that the 'Current Contract Claim' was $115,948.66 (inclusive of GST) and was a claim under the Act together with a deed of release that stated the 'Amount Claimed' was $115,948.66; and

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36 *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2008] NSWSC 399, [22]–[23] (McDougall J).

37 *Hunters Green Retirement Living Pty Ltd v J.G. King Project Management Pty Ltd* [2023] VSC 536, [12]–[17] ('Reasons').

38 Clause 1 (definition of 'Superintendent') and Item 5 of Part A to the contracts.

39 Reasons, [20]–[21].

(b) a document titled 'Final Payment Claim' for stage 13 that stated that the 'Current Contract Claim' was $176,055.64 (inclusive of GST) and was a claim under the Act together with a deed of release that stated the 'Amount Claimed' was $176,055.64;

(collectively, the 'payment claims').

72 The payment claims each contain a schedule that, inter alia:

(a) states that it is a 'Final Payment Claim';

(b) lists about 30 items of contract works (including 'piling', 'frame', roofing', 'painting', 'robes', and 'floor coverings') as being 100 per cent complete and gives a contract value for each item;

(c) provides a cumulative value and a total value of the completed works;

(d) provides a total amount previously paid for the works;

(e) provides a 'current contract claim', being the difference between the total amount of the value of the completed works less the total amount previously paid; and

(f) provides a 'current variation claim', being the difference between the total amount of the value of the completed variations less the total amount previously paid. In each payment claim this is $0.00.

73 The amounts stated in the payment claims are equivalent to the amounts of the remaining 50 per cent of the retention moneys under the contracts.[40] However, the amounts also constitute the remaining amount of the contract price (some 2.5%) due for the works performed under each contract, which had not been paid.

74 There was no evidence before the judge that a 'final certificate' had been issued under cl 37.4 in respect of either of the contracts.

75 On 2 September 2022, the principal issued $NIL payment schedules in response to the payment claims, and disputed their validity.

76 On about 14 September 2022, the builder lodged adjudication applications under s 18 of the Act in respect of the payment claims with the Resolution Institute.

77 On 13 October 2022, the adjudicator Susan Leech (second respondent),[41] made two adjudication determinations under the Act ('determinations'). She concluded that the amount due was $114,932.07 (including GST) in relation to stage 12, and $176,055.54 (including GST) in relation to stage 13.

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40 Ibid [25].

41 The second respondent filed a notice of intention not to respond or contest the application for leave to appeal.

78 The adjudicator first found that she had jurisdiction to determine the applications. She found, inter alia, that, on the face of the payment claims, they were 'for construction work'. She also found that there was a 'reference date' which occurred on 19 August 2022.

79 The adjudicator then turned to calculating the amount of each progress payment that was due under the terms of the Act. She observed that she was required to calculate the amount of the progress payments by applying the express terms if available (citing s 10(1)(a) and (b) of the Act). However, she was not satisfied that such terms were available. In particular, she considered that the operation of the superintendent's opinion was contrary to an express term. She stated:

> In my view, … s 11(1)(b) of the Act has been the relevant provision to assess all of the progress payments under the contract to date. I am not satisfied that the withholding for retentions fits any of the categories of s 11(1)(b)(i), (ii), (iii) or (iv). Consequently, I am not satisfied that the [principal] has been entitled to withhold retentions at anytime from the point of the view of the Act. For this reason also, I find that the payment claim is not a claim for the return of retentions. From the point of the view of the Act, it appears to be a claim for work for which the [principal] has only made part payments for in the past.

80 The adjudicator proceeded to value the progress payment in each case by reference to the principal's reasons for withholding payment on account of alleged defects. After making minor adjustments for defective works in respect of stage 12, the adjudicator determined the amounts due in each case. She further found that the contracts did not expressly provide for the due date for payment for the purpose of s 12 of the Act. She thereby applied s 12(1)(b) and found that the due date for payment was 2 September 2022, being 10 business days after the payment claims were served.

81 The principal subsequently commenced proceedings in the Trial Division seeking judicial review of the two determinations on the basis of eight grounds. Relevantly:

(a) two of the grounds (grounds 1 and 5) related to the principal's notice of contention and alleged jurisdictional error. Those grounds concerned whether the payments claims engaged the Act's processes;

(b) two other grounds (grounds 4 and 8) related to the builder's application for leave to appeal and alleged non-jurisdictional error of law on the face of the record. They concerned whether the adjudicator incorrectly calculated the progress claim entitlements.

82 On 6 October 2023, the judge upheld grounds 4 and 8 and ordered, amongst other things, that the two determinations be quashed and that the moneys previously paid (into court) be returned to the principal.[42] In essence, the judge considered that the

[42] The judge accepted that he had jurisdiction to review a security payment adjudication determination for non-jurisdictional error of law on the face of the record in circumstances where judgment has not been entered pursuant to s 28R of the Act. The parties made joint submissions to this effect, with

amounts the subject of the payment claims were not properly payable under the contracts until 14 days after the issue of a final certificate.

83 In making this decision the judge found that he had jurisdiction in that, contrary to the principal's submission, the payment claims were for 'construction work' for the purposes of the Act. His reasons for quashing the determinations were then threefold: first, he found that the contracts did make express provision for the calculation of the progress payments to which the builder was entitled under the Act;[43] second, he considered that, upon a proper construction of the contracts, the unpaid amounts were not, at the reference date under the Act, payable to the builder absent a final certificate;[44] and third, he found that cl 5.4 was not void pursuant to s 48(1) of the Act (as the builder had contended).[45]

84 The builder now seeks leave to appeal in relation to each of these three critical aspects of the judge's decision on the following three (alternative) proposed grounds of appeal:

1. Whether the contracts made 'express provision' for calculation of a claim for final payment

   1.1 The judge erred in law in finding in the Judgment at [198]–[205] that clause 37.4, on its proper construction, made express provision (within the meaning of [s] 10(1)(b) of the Act) for how the amount of any final payment was to calculated.

   1.2 The judge ought to have found that:

   (a) the contracts made no 'express provision' within the meaning of [s] 10(1)(b) of the Act (or s 11(1)(b) of the Act) for how the amount of any final payment was to be calculated or valued; and

   (b) the valuation of any final payment was to take place in accordance with the default mechanism set out in ss 11(1)(b) and 11(2)(b) of the Act.

   1.3 If the judge had so found, then the identified ground to quash the determinations for non-jurisdictional error of law would not have arisen.

2. Whether the proper construction of clauses 5.4 and 37.4 required the final certificate to withhold the balance of retention moneys

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which the judge agreed: Reasons, [174]–[176]. This was because of the operation of s 85(1) and 85(5)(a)–(c) of the *Constitution Act 1975*.

43 Reasons, [198]–[205].

44 Ibid [206]–[218].

45 Ibid [219]–[220].

2.1 The judge erred in law in finding in the Judgment at [206]–[218] that clauses 5.4 and 37.4, on their proper construction, required the adjudicator to deduct a sum from the assessment of the claim for final payment to account for the final tranche of retention money as the time for release of that sum had not arisen at the relevant reference date.

2.2 The judge ought to have found that clauses 5.4 and 37.4, on their proper construction, did not require the adjudicator to deduct a sum from the assessment of the claim for final payment to account for the final tranche of retention money, but rather that such amount was properly recoverable in the [builder's] claim for final payment.

2.3 If the judge had so found, then the identified ground to quash the determinations for non-jurisdictional error of law would not have arisen.

3. Whether the proper construction of clauses 5.4 and 37.4 offended s 48(1) of the Act

3.1 The judge erred in law:

(a) in finding in the Judgment at [219] that the relevant part of clause 5.4 was not void pursuant to s 48(2) of the Act; and

(b) in failing to address the [builder's] alternative arguments with respect to the effect of s 48(2) of the Act, namely that the contracts were void to the extent they required the Adjudicator to adopt the Superintendent's certificate in place of her own assessment as to whether retention was due ([builder's] outline of submissions at [60]–[61], annotated list of issues at [14]).

3.2 If clauses 5.4 and 37.4, on their proper construction, applied to a claim under the Act and required the adjudicator to withhold a sum from the assessment of the claim for final payment to account for retention money in circumstances where the superintendent had not issued the final certificate, then the judge ought to have found that:

(a) those provisions offended s 48(2) of the Act insofar as they:

(i) required the adjudicator to rely on the issue of a final certificate by the superintendent in assessing whether the final tranche of cash retention was due to be included in the assessment of the claim for final payment;

(ii) deferred the [builder's] entitlement to recover

the final tranche of retention money until after:

(A) the final payment claim under the Act had been made;

(B) that entitlement had been released or discharged by the mechanisms set out in clause 37.4 and the deed of release which was to accompany the final claim; and

(iii) prevented the final tranche of cash retention from ever being claimed in a payment claim under the Act; and

(b) to the extent the provisions offended s 48(2) of the Act, they were void and ought to be severed from the contracts.

3.3 If the judge had so found, then the identified ground to quash the determinations for non-jurisdictional error of law would not have arisen.

85 By notice of contention, the principal, in turn, alleges that the judgment should be affirmed on the basis of the following ground:

1. The [builder's] claims for progress payments, which were solely in respect of the release of retention moneys, were not claims for progress payments in respect of 'construction work' or 'related goods and services'. In fact:

(a) The [builder's] claims for progress payments at issue were solely in respect of the release of retention moneys in the [principal's] possession.

(b) The judge incorrectly held at [112]-[113] that these claims were claims for progress payments in respect of 'construction work' within the meaning of s 5 of the Act.

(c) Consequently, the judge was incorrect to find that the [builder's] claims for progress payments at issue may be the subject of a payment claim served pursuant to s 14 of the Act.

(d) The judge should instead have found that the [builder's] claims for progress payments at issue were not in respect of 'construction work', and therefore did not constitute payment claims for the purposes of the Act, such that the first and fifth grounds of judicial review in the [principal's] originating process should have been allowed.

86 It is first necessary to set out the relevant contractual terms and statutory provisions. I will then turn to a consideration of the notice of contention (prior to the application for leave to appeal) given that it raises a question of jurisdiction.

## *PART B: THE CONTRACTS*

87 The contract documents constituted a formal instrument of agreement, amended general conditions of contract (designated as AS4902-2000), as well as annexures (item 16A of Part A). The contracts in respect of each stage are identical, save for details specific to the separate stages of construction.

88 Clause 2.1 provided that the '*Contractor* shall carry out and complete *WUC* in accordance with the *Contract*, the *Principal's* disclosed policies and procedures and *directions* authorised by the *Contract*.'[46] 'WUC' was in turn defined to mean 'the *work* which the *Contractor* is or may be required to carry out and complete under the *Contract* and includes *variations*, *included matters,* remedial *work*, *construction plant* and *temporary works* …' (cl 1).

89 Clause 2.1 also relevantly provided that the Principal was to pay the *Contractor* 'the lump sum' 'adjusted by any additions or deduction made pursuant to the *Contract*' in a case where the principal accepted a lump sum, rather than rates. In this case, the lump sum (or 'contract sum') in the case of stage 13 was '$6,406,597.96 (including GST)' and in the case of stage 12, it was '$4,637,944.41 (inclusive of GST)' (item 1A of Part A).

90 Both cls 37 and 5 are central to the dispute between the parties.

91 Clauses 37.1 and 37.2 of the contracts provided:

> **37 Payment**
>
> **37.1 Progress claims**
>
> The Contract shall give the *Superintendent* claims for payment (*'progress claims'*) progressively in accordance with *Item* 33 while *WUC* is being carried out, at *practical* completion and at the time for making the *final payment*.
>
> An early *progress claim* shall be deemed to have been made on the date for making that claim.
>
> Each *progress claim* shall be given in writing to the *Superintendent* and be in a format the *Superintendent* reasonably requires and shall include details of the value of *WUC* done and details of other moneys then due to the *Contractor* pursuant to provisions of the *Contract* and must include a deduction for any *liquidated damages* for which the *Contractor* is liable in accordance with clause 34.7.
>
> **37.2 Certificates**
>
> The *Superintendent* shall, within 10 *Business Days* after receiving such

[46] The contracts have significant amendments that are tracked which make them difficult to read. In this judgment, where provisions from the contracts are set out, the original tracking has not been included.

a progress claim, issue to the *Principal* and the *Contractor*:

(a) a progress certificate evidencing the *Superintendent's* opinion of the moneys due from the *Principal* to the *Contractor* pursuant to the progress claim and reasons for any difference (*'progress certificate'*); and

(b) a certificate evidencing the *Superintendent*'s assessment of retention moneys and moneys due from the *Contractor* to the *Principal* pursuant to the *Contract*. This certificate may be separate to, or form part of, a *progress certificate*.

If the Contractor does not make a progress claim in accordance with *Item* 33, the Superintendent may issue the *progress certificate* with details of the calculations and shall issue the certificate in paragraph (b).

Notwithstanding any other term of this *Contract*, the *Principal* is not obliged to make any payment until the *Superintendent* receives a *progress claim* that complies with this subclause 37.2.

The *Superintendent* shall, within 10 *Business Days* of receiving a *progress claim* that complies with this subclause 37.2, issue to the *Principal* and the *Contractor* a progress certificate in final form (*'progress certificate'*).

The *Contractor* shall, within 10 *business days* of receiving a *progress certificate*, issue the Superintendent with a tax invoice which must be in the amount of the *progress certificate*

If the tax invoice submitted by the *Contractor* is in an amount greater than the amount permitted by this subclause 37.2, the *Principal* shall not be required to pay the *Contractor* an amount in excess of the amount of the tax invoice permitted by this subclause 37.2.

The *Principal* shall within the time indicated in *Item* 33A after the Superintendent receives a progress claim and tax invoice that comply with this subclause 37.2, pay to the *Contractor* the balance of the tax invoice after setting off such of the certificate in paragraph 37.2(b) as the *Principal* elects to set off. If that setting off produces a negative balance, the *Contractor* shall pay that balance to the *Principal* within the time indicated in *Item* 33A of receiving written notice thereof.

Neither a *progress certificate* nor a payment of moneys shall be an admission of liability or evidence that the subject *WUC* has been carried out satisfactorily. Payment other than *final payment* shall be payment on account only.

92 Item 33(a) of Part A provided that the times for submission of progress claims pursuant to cl 37.1 of the contracts is the 25th day of each month for '*WUC*' done to the last day of that month during WUC, practical completion and at the time for making the final payment claim.

93 The *Contractor* further agreed that 'the time prescribed in clause 37.2 for the *Superintendent* to receive a *progress claim* is the "reference date" within the meaning

and for the purposes of the [Act]' (cl 37.7(a)). The judge found that this was clearly intended to be a reference to cl 37.1.[47]

94 Clause 37.4 then specifically dealt with a 'final payment claim' and provided:

> **37.4 Final payment claim and certificate**
>
> Within 28 days after the expiry of the last *defects liability period* and the satisfaction of all of the *Contractor's* obligations under the *Contract*, the *Contractor* shall give the *Superintendent* a written *final payment claim* endorsed 'Final Payment Claim' being a progress claim together with all other claims whatsoever in connection with the subject matter of the *Contract*. The *Contractor* must provide an executed *deed of release* before making the *final payment claim*.
>
> Within 10 *business* days after the receipt of a valid *payment claim*, the *Superintendent* shall issue to both the *Contractor* and the *Principal* a *final certificate* evidencing the moneys finally due and payable between the *Contractor* and the *Principal* on any account whatsoever in connection with the subject matter of the *Contract*.
>
> Those moneys certified as due and payable shall be paid by the *Principal* or the *Contractor*, as the case may be, within 5 business days after the *Superintendent* issues the *final certificate*.
>
> The *final certificate* shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the *Contract* except for:
>
> (a) fraud or dishonesty relating to *WUC* or any part thereof or to any matter dealt with in the *final certificate*;
>
> (b) any *defect* or omission in *the Works* or any part thereof which was not apparent at the end of the last *defects liability period*, or which would not have been disclosed upon reasonable inspection at the time of the issue of *the final certificate*;
>
> (c) any accidental or erroneous inclusion or exclusion of any work or figures in any computation or an arithmetical error in any computation;
>
> (d) unresolved issues the subject of any notice of dispute by the *Principal* pursuant to clause 42, served before the 7th day after the issue of the final certificate; and
>
> (e) third party claims brought against the *Principal* thereafter for damage, injury or death.
>
> …
>
> **37.6 Other moneys due**

[47] Reasons, [143].

> The *Principal* may deduct from moneys otherwise due to the *Contractor*
>
> (a) any debt or other moneys due from the *Contractor* to the *Principal*; and
>
> (b) any good faith claim to money which the *Principal* may have against the *Contractor* whether for damages (including liquidated damages), under an indemnity or otherwise relating to the *Works* or the *WUC*,
>
> whether under the Contract or otherwise at law.

95 A draft deed of release, as provided for in cl 37.4, was also contained in an annexure to each contract at Part F. The draft contained a number of warranties given by the 'Contractor', which included that 'the Contractor ha[d] fully complied with all of its obligations under the [contract]' (cl 2.1(a)) and that the works were 'completed' (cl 2.1(b)). Further that:

> (c) the Contractor has given notice to the Principal or the Superintendent of all claims which it has against the Principal which are connected with or arise out of the Works Contract or the carrying out of the Works executed by the Contractor under the Works Contract; and
>
> (d) the Contractor is not aware of any claim by any person which is connected with or arises out of the Works Contract or the carrying out of the Works executed by the Contractor under the Works Contract of which it has not given notice to the Principal or the Superintendent.

96 Clause 4 of the draft deed of release also provided for the terms of the release:

> **4. Release**
>
> 4.1 The total money due under or in any way connected with or arising out of the Works Contract or the carrying out of the Works executed by the Contractor under the Works Contract (including any moneys which might be due to the Contractor from the Principal by way of damages for negligence, breach of contract or other obligation) is the Amount Claimed.
>
> 4.2 Upon payment by the Principal to the Contractor of the Amount Claimed, the Contractor hereby releases and indemnifies the Principal, the Superintendent, or any employee, agent, servant or other contractor to the Principal or the Superintendent, from and against all claims which the Contractor, but for the execution of this Deed, may have had.
>
> …

97 The 'Amount Claimed' was defined to mean the amount referred to as such on the face of the deed (cl 1.1(a)).

98 Clause 5 of the contracts concerned security. The word 'security' was defined broadly in cl 1 to include cash, retention moneys, bonds, an interest bearing deposit in a bank, an approved undertaking, or some other form approved by the party having the benefit of the security.

99 Clause 5.1 required that '*Security* shall be provided in accordance with *Item* 14 or 15.' Those items provided that only the builder was to provide security. Further that:

(a) security was to take the form of 'retention moneys' or two unconditional bank guarantees each for 2.5 per cent of the total *contract sum* (item 14(a) of Part A);

(b) security was to a maximum percentage of 5 per cent of the *contract sum* (item 14(b) of Part A); and

(c) if the security was provided in the form of retention moneys then it was to be 10 per cent of each progress certificate (item 14(c) of Part A).

100 Clause 5.2 made provision for recourse to the security as follows:

> **5.2 Recourse**
>
> *Security* shall be subject to recourse by a party (including by being converted into cash *security* that does not consist of cash, by a party who remains unpaid after the time for payment, including:
>
> (a) any debt or other moneys due from the *Contractor* to the *Principal*; and
>
> (b) any good faith claim to money which the *Principal* may have against the *Contractor* whether for damages (including liquidated damages), under an indemnity or otherwise relating to the *Works* or the *WUC*.
>
> The *Contractor* shall not take any steps, including seeking an injunction or other order of any court, to prevent the *Principal* from calling upon or the issuer from paying under the *security* or to prevent the *Principal* from enjoying the benefit of the *security*. If the *Principal* calls upon the *security* and it is subsequently determined that the *Principal* was not entitled to do so then the *Principal's* sole liability to the *Contractor* shall be to return or reinstate the *security*.

101 Clause 5.3 made provision for a party to substitute a different form of security.

102 Clause 5.4 further provided for the 'reduction and release' of security as follows:

> **5.4 Reduction and release**
>
> Upon the issue of the *certificate of practical completion* and compliance by the *Contractor* with subclause 34.6A a party's entitlement to *security* (other than in *Item* 14(e)) shall be reduced by the percentage or amount in *Item* 14(f) or 15(d) as applicable, and the reduction shall be released and returned within 14 days to the other party.

> The *Principal's* entitlement to *security* in *Item* 14(e) shall cease 14 days after incorporation into *the Works* of the plant and materials for which that *security* was provided.
>
> A party's entitlement otherwise to *security* shall cease 14 days after *final certificate*.
>
> Upon a party's entitlement to *security* ceasing, that party shall release and return forthwith the *security* to the other party.

103 Item 14(f) of Part A was applicable and relevantly provided that the security was reduced by 50 per cent upon the certificate of practical completion.

## *PART C: STATUTORY FRAMEWORK*

104 The main purpose of the Act is 'to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts' (s 1).

105 The object of the Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services 'under a construction contract' is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services' (s 3(1)).

106 The means by which the Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with the Act (s 3(2)). The means by which the Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

(a) the making of a payment claim by the person claiming payment;

(b) the provision of a payment schedule by the respondent to a payment claim;

(c) the referral of any disputed claim to an adjudicator for determination;

(d) the payment of the amount of the progress payment determined by the adjudicator; and

(e) the recovery of the progress payment in the event of a failure to pay (s 3(2)).

107 The Act does not limit any other entitlement that a claimant may have under a construction contract, or any other remedy that a claimant may have for recovering that other entitlement (s 3(4)).

108 In *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* ('*SSC Plenty Road Appeal Decision*'),[48] Santamaria, Beach and McLeish JJA endorsed the

[48] [2016] VSCA 119.

following statement of Warren CJ and Tate JA (with whom Kaye JA agreed) in *Saville v Hallmarc Construction Pty Ltd*[49] regarding the operation of the New South Wales *Building and Construction Industry Security of Payment Act 1999* (NSW) (the '*NSW Act*') which also applied to the (Victorian) Act:

> (1) [the Act] operates in a 'rough and ready' way to preserve the cash flow to a builder notwithstanding that the builder might ultimately be required to refund the money received and yet have an inability to repay;
>
> (2) it imposes a mandatory regime regardless of the parties' contract with extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses;
>
> (3) at each stage of the regime for enforcement of the statutory right to progress payments, it lays down clear specifications of time and other requirements to be observed, rendering it not difficult to understand 'that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation';
>
> (4) as adjudication determinations are capable of being filed as a judgment for debt in a court of competent jurisdiction, a respondent to a payment claim should not be at risk of suffering a judgment where a temporal limitation has not been complied with by the claimant;
>
> (5) a claimant has alternative remedies; 'even if the door to adjudication is closed, the door to judgment remains open'.[50]

109 Subject to particular exemptions which do not apply, the Act applies to any construction contract, whether written or oral, or partly written and partly oral (s 7). '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 (s 4 (definition of 'construction contract')).

110 Part 2 of the Act concerns rights to progress payments. Section 9(1) of the Act provides for a statutory right to a progress payment:

> (1) On and from each reference date under a construction contract, a person—
>
> (a) who has undertaken to carry out construction work under the contract; or
>
> (b) who has undertaken to supply related goods and services under

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49 [2015] VSCA 318.

50 *SSC Plenty Road Appeal Decision* [2016] VSCA 119, [51], quoting *Saville v Hallmarc Construction Pty Ltd* [2015] VSCA 318, [80] (Warren CJ and Tate JA, Kaye JA agreeing at [147]) (citations omitted). See also *Saville v Hallmarc Construction Pty Ltd* [2015] VSCA 318, [81] (Warren CJ and Tate JA, Kaye JA agreeing at [147]).

the contract—

is entitled to a progress payment under this Act, calculated by reference to that date.

111 The term 'progress payment' is defined as a payment to which a person is entitled under s 9 of the Act (s 4 (definition of 'progress payment')). It includes, amongst other things:

(a) the final payment for—

(i) construction work carried out under a construction contract; or

(ii) related goods and services supplied under the contract; …

112 Section 9(2)(a) of the Act provides for the meaning of 'reference date' where the contract makes express provision with respect to the matter as being:

(a) a date determined by or in accordance with the terms of the contract as—

(i) the date on which a claim for a progress payment may be made; or

(ii) a date by reference to which the amount of a progress payment is to be calculated—

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; …

113 The adjudicator considered that the reference date in this case was prescribed by cl 37.4, being 'within 28 days after the expiry of the last defects liability period and the satisfaction of all of the Contractor's obligations under the contract'. The adjudicator found that this occurred on the day that the builder delivered the deed of release.

114 Section 10 provides for the calculation of a progress payment under s 9 of the Act, as follows:

(1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of—

(i) construction work carried out or undertaken to be carried out by the person under the contract; or

(ii) related goods and services supplied or undertaken to be supplied by the person under the contract—

as the case requires.

(2) Despite subsection (1) and anything to the contrary in the construction contract, a claimable variation[51] may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

(3) Despite subsection (1) and anything to the contrary in the construction contract, an excluded amount[52] must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

115 Section 11 provides for the valuation of construction work and related goods and services. Insofar as it concerns construction work it provides:

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued—

(a) in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, having regard to—

(i) the contract price for the work; and

(ii) any other rates or prices set out in the contract; and

(iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

116 Section 12(1) of the Act provides that a progress payment under a construction contract becomes due and payable on the date on which the payment becomes due and payable in accordance with the terms of the contract, or if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

117 Part 3 of the Act sets out the procedure for recovering progress payments. Section 14 of the Act provides for payment claims. Sections 14(1) and (2) of the Act provide:

(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on

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51 'Claimable variation' is defined and set out in s 10A of the Act.

52 The term 'excluded amount' is defined in s 10B of the Act, and includes, amongst other things, any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract (s 10B(2)(c)).

the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim—

(a) must be in the relevant prescribed form (if any); and

(b) must contain the prescribed information (if any); and

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

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

(e) must state that it is made under this Act.[53]

118 A payment claim in respect of a final progress payment may be served only within the period determined in accordance with the terms of the construction contract, or within 3 months of the relevant reference date if no such period applies (s 14(5)). A claimant cannot serve more than one final payment claim (s 14(6)), unless the amount has not been paid (s 14(7)).

119 A person on whom a payment claim is served may reply to the claim by providing a payment schedule to the claimant (s 15(1)). The matters that must be included in a payment schedule are set out in s 15(2).

120 Various consequences may flow depending on the content of any payment schedule. Relevantly, subject to strict time limits, a claimant may apply for adjudication of a payment claim if the respondent provides a payment schedule, but the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim (s 18(1)(a)(i)).

121 Pursuant to s 23(1), an adjudicator is to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant, the date on which that amount becomes payable, and the rate of interest payable on that amount. In making that determination the adjudicator must consider the matters set out in s 23(2) and only those matters. If an adjudicator determines that a respondent is required to pay an adjudicated amount the respondent is required to pay that amount under s 28M or s 28N. Section 28R of the Act relevantly provides that if an authorised nominating authority has provided an adjudication certificate to a person under s 28Q, the person may recover as a debt due to that person, the unpaid portion of the amount payable under ss 28M or 28N.

122 Section 47(1) provides, inter alia, that nothing in Part 3 affects any right that a party to a construction contract may have under the contract; or under Part 2; or in respect of anything done or omitted to be done under the contract.

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[53] Emphasis in original.

123 Section 48(1) provides that the provisions of the Act have effect despite any provision to the contrary in any contract. Section 48(2) provides:

> (2) A provision of any agreement, whether in writing or not—
>
> (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or
>
> (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act—
>
> is void.

## *PART D: NOTICE OF CONTENTION*

### *(1) Judge's reasons*

124 As already noted, the judge concluded that the payment claims were for 'construction work' for the purposes of the Act.[54] In forming this conclusion he relied on a finding made earlier in his reasons[55] that the payment claims were 'claims for the unpaid amounts for the construction work retained by [the principal] as security in the form of retention moneys under the Contracts.'[56]

125 In the earlier passages cited he found that first, the payment claims claimed the unpaid amounts for construction work and were each stated to be a 'Final Payment Claim'. Given the way the parties invoiced he did not accept that the payment claims reversed a set off, nor that the builder 'separately provided' the retention money to the principal.[57] Secondly, he considered there to be a direct and obvious relationship between the unpaid amounts for construction work and amounts held as security.[58] He stated:

> The Payment Claims claim 100% of the construction contract sum less amounts paid. As observed by Henry J in *Vannella Pty Ltd v TFM Epping Land Pty Ltd* (***Vannella***),[59] where a party claims 100% of the construction contract sum, it must include retention moneys.[60]

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54 Reasons, [111]. Grounds 1 and 5 of the originating motion alleged that the adjudicator committed jurisdictional error when concluding that the payment claims were 'in respect of construction work' within the meaning of s 5 of the Act and therefore constituted a 'payment claim' for the purposes of s 14(1) of the Act.

55 Reasons, [82]–[91].

56 Ibid [90], [112].

57 Ibid [83]–[84].

58 Ibid [86].

59 *Vannella Pty Limited atf Capitalist Family Trust v TFM Epping Land Pty Ltd; Decon Australia Pty Limited v TFM Epping Land Pty Ltd; Vannella Pty Limited v TFM Epping Land Pty Ltd* [2019] NSWSC 1379.

60 Reasons, [88].

126 However, he also did not accept the builder's submission that the payment claims were 'balancing claims'. He considered that the absence of the term, 'retention moneys', did not alter the character of the amounts claimed.[61]

127 The judge ultimately concluded that, upon a proper construction of the Act, a payment claim under the Act for 'unpaid amounts for construction work retained by a respondent as security in the form of retention moneys under a contract', is a payment claim for 'construction work' for the purposes of the Act. He relied on the following:

(a) there is a direct and obvious nexus between retention moneys and unpaid amounts for construction works;

(b) retention moneys are not 'excluded amounts' in s 10B of the Act;

(c) it is not relevant that 'retention moneys' are not listed in ss 5 or 6 of the Act. This is because those sections are limited to defining the actual 'construction work' and 'related goods and services'. Those sections do not identify what may be claimed in a payment claim;

(d) this construction facilitates the main purpose of the Act. This is because such a construction provides for entitlements to final payments for persons who carry out construction work. This construction also facilitates the object of the Act. This is because such a construction ensures that any person who undertakes to carry out construction work under a construction contract is entitled to receive, and is able to recover, a progress payment in relation to the carrying out of that work. The calculation and/or valuation of the progress payment is governed by ss 10 and 11 of the Act and, as a result of ss 10(1)(a) and 11(1)(a) and (b) of the Act, is to be calculated and/or valued in accordance with the terms of the contract if the contract makes express provision with respect to these matters. The actual calculation of a payment claim under the Act that is for, or includes, unpaid amounts for construction work retained by a respondent as security in the form of retention moneys under a contract may be a nil amount;

(e) a payment claim for unpaid amounts for construction work retained by a respondent as security in the form of retention moneys under a contract, may readily identify the construction work for the purposes of s 14(2)(c) of the Act;

(f) a payment claim under the Act for unpaid amounts for construction work retained by a respondent as security in the form of retention moneys under a contract, may readily identify the amount a claimant claims to be due for the purposes of s 14(2)(d) of the Act. Section 14(2)(d) of the Act provides that a payment claim 'must indicate the amount of the progress payment that the claimant claims to be due' (emphasis added).[62]

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61 Ibid [90].

62 Ibid [113].

128 The judge observed that there have been a number of decisions in which judges have recognised the 'direct and obvious nexus' between retention moneys and construction work and have also recognised that a payment claim for retention money may be made under the Act (or the equivalent legislation in other jurisdictions).[63] He acknowledged that Digby J had expressed a contrary view in *Punton's Shoes Pty Ltd v Citi-Con (Vic) Pty Ltd* ('*Punton's Shoes*')[64] and *Watpac Constructions Pty Ltd v Collins & Graham Mechanical Pty Ltd as Trustee for the CGM Unit Trust* ('*Watpac*'),[65] but gave reasons for disagreeing with those views.[66]

129 The judge concluded:

> The absence of a contractual entitlement of [the builder] to make a claim for the retention money as part of its claim for a final payment under clause 37.4 of the Contracts does not mean that the Payment Claims are not for construction work. The absence of such a contractual entitlement does not alter the nature of the Payment Claims as claims for the unpaid amount for construction work retained by [the principal] as security in the form of retention moneys under the Contracts. In *Punton's Shoes* and *Watpac*, Digby J expressed a contrary view.[67] For the reasons I have just given, I do not agree, with respect, with Digby J on this matter. The absence of such contractual entitlement is relevant, in the present case, to the calculation of the payment claim under the Act. I address that issue later in this judgment.[68]

### *(2) Principal's submissions*

130 The principal submitted that the contracts contained discrete arrangements in relation to the treatment of retention moneys which operated alongside the payment arrangements.

131 It submitted that the 'direct and obvious nexus' between retention moneys and unpaid amounts for construction works relied on by the judge was not sustainable:

(a) First, the builder's entitlement to have retention moneys released was a completely different entitlement to the entitlement to receive payment for construction work and had a 'different character'.[69]

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63 Being *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106; *The Cat Protection Society of Victoria v Arvio Pty Ltd* [2018] VSC 757; *Cool Logic Pty Ltd v Citi-Con (Vic) Pty Ltd* [2020] VCC 1261; *Whitehorse Box Hill Pty Ltd v Alliance CG Pty Ltd* [2022] VSC 22; *EHome Construction Pty Ltd v GCB Constructions Pty Ltd* [2020] QSC 291; *S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* [2020] QSC 307: Reasons, [114]–[123].

64 [2020] VSC 514.

65 [2020] VSC 637.

66 Reasons, [134]. The judge also disagreed with Burchell JR, who followed the decisions of Digby J, in *Foursquare Construction Management Pty Ltd v Chevron Corporation Pty Ltd* [2020] VCC 1928: see Reasons, [131]–[134].

67 *Punton's Shoes* [2020] VSC 514, [110], [112] (Digby J).

68 Reasons, [134] (citations in original).

69 Citing *Punton's Shoes* [2020] VSC 514, [109]–[111] (Digby J); *Watpac* [2020] VSC 637, [180], [186]–[191] (Digby J).

(b) Second, conflating the entitlements disregarded the underlying basis by which the principal was entitled to hold the retention moneys, which involved a set off which reduced the builder's liability to pay the principal another amount. The legal character of a set off recognises that it is equivalent to actual payment on each side.[70] If not, then the builder stands to be paid twice in respect of the same construction work. However, in oral submissions, the principal did not pursue the submission that there was a formal setting off. Rather, counsel for the principal conceded that, in some circumstances, retention moneys may be properly characterised as a 'deduction', but that ultimately 'nothing meaningful turns on this debate'.

(c) Third, the fact that retention moneys were not 'excluded amounts' is not significant given that the calculation is premised on the claimant having an entitlement to a progress payment under the Act.

(d) Finally, the judge's analysis was not consistent with the statutory purpose since, if the Act covers retention moneys, then principals will be encouraged to avoid the consequence by seeking other forms of security which will need to be provided in full at the outset of the builder's work.

132 In oral submissions counsel submitted that the only kind of work that can be the subject of a claim under the Act is construction work or related goods and services. This was evident from s 11 (which identifies that it is those two categories which must be valued) as well as s 10(1)(b), and the definition of a progress payment.

133 In oral submissions counsel sought to also distinguish the recent decision of the NSW Court of Appeal, *EnerMech v Acciona Infrastructure Projects Australia Pty Ltd* ('*EnerMech*')[71] — which the builder relied upon. He highlighted that the decision arose in a different context where review for non-jurisdictional error was not available. Further, that there were a number of sections of the (Victorian) Act which were not addressed — highlighting ss 1 and 3.

### *(3) Builder's submissions*

134 The builder reiterated a submission (rejected by the judge) that the payment claims were best viewed as 'balancing claims,' rather than claims for retention. However, it maintained that they were claims for payment of construction work either way.

135 The builder submitted that it is the nature of a claim for final payment that it will seek payment for the whole contract sum less amounts paid to date. The claims were for the full sum due under each contract less payments made to date. The definition of contract sum is straightforward at Item 1A of Part A of each contract. The contract does not provide for the contract sum to alter (i.e to change to 95 per cent of

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70 Citing *Federal Commissioner of Taxation v Steeves Agnew & Co (Vic) Pty Ltd* (1951) 82 CLR 408, 420–1 (Dixon J); [1951] HCA 26.

71 [2024] NSWCA 162.

$4,637,944.41 in the case of the stage 12 contract) upon the withholding of retention moneys.

136 The builder highlighted that the general nature of retention money was money already earned but not yet payable. In this light, a claim for retention money is a claim seeking payment for construction work already performed, but not yet paid for.[72]

137 It did not detract from the analysis that retention money was not expressly mentioned in ss 5 and 6 since these provisions referred to physical aspects of the work rather than payment mechanisms. The ability to claim retention money is no different from the ability to claim profit, rise and fall or demobilisation expenses (i.e. from other valuation 'mechanisms').

138 The builder also rejected the suggestion that the 'set off' provided in cl 37.2 altered the analysis. First, it was inconsistent with the general concept that retention is a sum due but not yet payable (the word 'retention' implies it is a sum retained by the principal). Second, the taking of retention did not involve a cross-liability. Third, it would effectively allow a respondent to rely on an offsetting claim for liquidated damages to resist a payment claim under the Act giving it a benefit excluded by s 10B of the Act. Finally in this case there was no evidence of a set off or 'discrete fund' in any event; rather there was a straightforward underpayment which the builder sought to rectify in its final balancing claim. In oral submissions counsel accepted the characterisation that there was a 'de facto deduction'.

139 Counsel also placed significant reliance on the decision in *EnerMech*. He submitted that this case supported that there was no requirement in the legislation for there to be a claim 'for construction work' at all. The requirements was only that there be work under the contract. This court ought follow that case pursuant to the principles in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* ('*Farah Constructions*'),[73] which provide that intermediate appellate courts should not depart from decisions in intermediate appellate courts in another jurisdiction unless they are convinced that those decisions are 'plainly wrong'.[74]

140 In oral submissions counsel also suggested that the payment claims may not be claims for retention at all, but simply a shortfall in claims. Further, that the judge was correct to find that the differences in the Acts of other jurisdictions did not affect the analysis (referring in particular to *S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* ('*SHA*')[75] and *EHome Construction Pty Ltd v GCB Constructions Pty Ltd* ('*EHome*')).[76]

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72 Citing *EHome Construction Pty Ltd v GCB Constructions Pty Ltd* [2020] QSC 291, 6 (Bond J); *Cool Logic Pty Ltd v Citi-Con (Vic) Pty Ltd* [2020] VCC 1261, [88]–[90] (Judge Woodward).

73 (2007) 230 CLR 89; [2007] HCA 22.

74 Ibid 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

75 [2020] QSC 307.

76 [2020] QSC 291.

### *(4) Consideration*

#### *(a) Case law*

141 In *EnerMech*, the appellant builder issued a progress payment claim for just over $10 million. The respondents served a payment schedule indicating that there was no amount owing or payable. An adjudicator subsequently found in favour of the appellant and the respondents challenged the adjudicator's determination on the following basis:

> On the [respondents'] 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 [respondents] as a result of having recourse to certain security provided by the [appellant] and a claim for certain other amounts that were not on account of construction work or for related goods or services.[77]

142 The primary judge upheld the respondents' challenge.

143 In the NSW Court of Appeal the builder advanced two grounds of review: ground 1 alleged that the judge erred in finding that a 'payment claim' must be a claim for payment 'for construction work' within the meaning of the *NSW Act*; ground 2 alleged that the payment claim was not a claim 'for construction work'.

144 The NSW Court of Appeal (Basten AJA, Meagher JA and Griffiths AJA agreeing) upheld ground 1 and allowed the appeal. In so saying the court said:

> [W]hatever 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, fulfilment of that entitlement is a matter to be determined by the adjudicator, subject to limited rights of review for jurisdictional error.[78]

145 The court observed that the *NSW Act* did not purport to limit the amount or nature of a payment to which a party was entitled under a construction contract. Further, there was a risk of compartmentalising payments according to their character, regardless of the terms of a contract, so that a party might contend that some fell within the concept of a progress payment for which a claim could be made and some did not.[79]

146 The court observed that neither the primary judge, nor the respondents, identified any provision in the *NSW Act* which required a payment claim to be made 'for construction work'. This was not determinative however. Grammatically a payment

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77 *EnerMech* [2024] NSWCA 162, [4] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]).

78 Ibid [8] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]).

79 Ibid [16] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]).

claim is not 'for construction work', it is a claim for money owing on account of construction work (or related goods or services).[80] The judgment continued:

> The point arises most relevantly for present purposes in the definition of 'progress payment', set out at [15] above. The definition gives a primary 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.[81]

147 The court concluded that, in the light of the objects, structure and spare language of the legislation, there was little scope for implying unstated conditions as essential to the validity of a payment claim.[82] The court also returned to the danger of alternative characterisations, stating:

> 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.[83]

148 Accordingly, the finding that the claim was invalid was rejected. Ground 2 also did not arise as there was no 'rule' to the effect that a payment claim may only be made 'for construction work.' In any event, the adjudicator's understanding was not able to be challenged.[84]

149 Two features are worthy of note.

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80 Ibid [59]–[60] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]).
81 Ibid [61] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]).
82 Ibid [74] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]).
83 Ibid [75] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]). And see also ibid [16] where Basten AJA (Meagher JA and Griffiths AJA agreeing) also suggested that there is a risk of compartmentalising payments according to their 'character'.
84 Ibid [76]–[82] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]). In NSW, review for an error of law on the face of the record is not available: ibid, [79].

150 First, although the principal highlighted that *EnerMech* was solely concerned with a review based on jurisdictional error, grounds 1 and 5 of the originating motion — the subject of the notice of contention in this case — in fact alleged jurisdictional error.

151 Second, as also properly highlighted, there are a number of features of the *NSW Act* which are different. This included s 13(3)(b) which expressly provided that a claim may be made in respect of an amount that is held under the construction contract by the respondent and that the claimant claims is due for release. Nevertheless:

(a) there was in fact no specific claim for release of the security, nor for repayment of the security in *EnerMech* although the fact that a payment claim may be made for such an amount was seen as generally 'relevant';[85] and

(b) there were other provisions that expressly used the expression 'for construction work', namely in s 13(5) and (6), which do not appear in the equivalent provision in the (Victorian) Act, s 14.

152 Before turning to the decision of Digby in *Punton's Shoes*, there are a number of other decisions which generally support the principle that a payment claim may be made under the Act, even if it may also be characterised as a claim for the return of retention moneys.

153 Thus, in the decision of *EHome*,[86] Bond J considered a challenge to a payment claim on the basis that it incorporated an amount of a claim for retention money that had been deducted from the value of previous claims. The judge cited the definition of a 'payment claim' in s 68 of the Queensland *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (the '*Qld Act*') and stated:

> The only reason suggested to justify the conclusion that it would not fall within that definition was that it claimed, in effect, return of retention monies because of the way that it calculated the claim. The notion is that it is not a claim 'for' construction work. That argument seems to me to be flawed. The claim expressed in the way that it was, as I have already described, was a claim for payment for construction work. Retention amounts were amounts that had been deducted from the value of construction work already completed. So a claim expressed as this one was simply cannot be characterised as other than a payment claim within the meaning of this Act.[87]

154 In the decision of *SHA* (which also concerned the *Qld Act*), a contractor forwarded final payment claims after the relevant contracts had been terminated. The adjudicator found that, because a reference date arose under the *Qld Act* (under s 67(2)) when the contract was terminated, the contractor was entitled to seek a final payment claim and to include all money 'due and payable under the contract', which included the amount

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85 Ibid [20] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]). And see also further reference to s 13(3)(b) at ibid [68].

86 [2020] QSC 291.

87 Ibid 6.

of the cash retentions.[88] Bond J dismissed an application to set the adjudicator's determinations aside on the basis of jurisdictional error. In so doing he summarised the reasoning of the adjudicator as follows:

> He reasoned that once Niclin had established a right to make a final payment claim, the provisions of the Act were such that the final payment claim could be calculated in such a way that permitted an effective recovery of retentions (or, using his words, having completed the works and defects, Niclin was 'entitled to include the release of the cash retention in the amount [Niclin] says is payable'). That was so because of the nature of a final payment claim, and of cash retentions (which represent a withholding of payment from the value of work which has already been completed).[89]

155 Bond J considered that a proper construction of the *Qld Act* permitted that approach.[90] He observed that the contract did not provide for the calculation of a final payment claim calculated from the date of termination. Accordingly the amount of the progress payment was to be calculated under the *Qld Act*.[91] He also considered the form of the payment claim and stated:

> In the present case, Niclin presented its payment claim in a way which demonstrated that, insofar as its claim sought return of retentions, that was because its payment claim was based on the value of all work done including variations less previous payments, and that value necessitated payment of retentions which had previously been withheld from the valuation of work done.[92]

156 The builder also placed emphasis on some further statements of Bond J (which were also relevant to proposed ground 3 of the application for leave to appeal):

> SHA's first argument before me wrongly seeks to advance the proposition that a payment claim under the Act cannot advance a money claim unless it can demonstrate that the entirety of the amount claimed has actually accrued due under the contract. But that proposition cannot be made good. Most sophisticated construction contracts are structured such that progress payments do not accrue due unless and until a certifier has certified an amount for payment. The existence of such a certificate is a condition precedent to the amount becoming due and payable under the contract. Absent that certificate, the claimant is not entitled to be paid under the contract. But the Act creates an entitlement to a progress payment valued in a particular way, and regardless of whether the contractual certificate has been obtained. The fact that progress payments are to be valued 'having regard to … contract price', and that the definition of that term refers to the amount the party is 'entitled to be paid under the contract', is not to be construed as a mechanism by which contractual conditions precedent to entitlement stymie the right to a progress

88 *SHA* [2020] QSC 307, [63].
89 Ibid [66].
90 Ibid [67].
91 Ibid [72].
92 Ibid [73].

payment which the Act provides.

> A similar proposition applies in relation to the final payment claim, which the Act authorises to be made when a contract has been terminated, and even though the fact of the termination means that there can never be a final payment claim advanced pursuant to the contract. In the present case, it does not matter that the amount which represents the retentions withheld under the contract cannot be said to be an amount which has yet accrued due and payable under the contract. The contractor has a statutory entitlement to a final payment claim, calculated under s 71(b) and valued under s 72(1)(b). If the adjudicator values that claim in accordance with the provisions of the Act, the effect of that valuation may well be to enable the claimant to be paid an amount of money which includes the value of cash retentions withheld from work already done (and even though under the contract there was no accrued right to the return of cash retentions), but that seems to me to be made permissible by the terms of the Act.[93]

157 In seeking to challenge this decision, the principal highlighted two matters:

(a) first, that the *Qld Act* expressly permits an entitlement to seek retentions;[94] and

(b) second, that the contract in that case did not provide for the calculation of a final payment claim as alleged here.

158 Although undoubtedly relevant, neither of these matters appear to form any critical part of the relevant reasoning in *SHA*. There have also been a number of decisions consistent with *SHA*, which include *Gantley Pty Ltd v Phoenix International Group Pty Ltd* ('*Gantley*'),[95] *Cool Logic Pty Ltd v Citi-Con (Vic) Pty Ltd* ('*Cool Logic*'),[96] and *Whitehorse Box Hill Pty Ltd v Alliance CG Pty Ltd*.[97]

159 However, as already indicated, the principal placed significant reliance on the reasoning of Digby J in *Punton's Shoes* and *Watpac*.

160 In *Punton's Shoes*, the payment claim was issued in respect of 50 per cent of the retention moneys after practical completion, but made no claim in respect of the balance of the works.[98] The adjudicator determined in favour of the contractor, despite concluding that there was no contractual procedure for the claimant to request the return of the retention funds.[99] However, Digby J quashed this determination.

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93 Ibid [74]–[75].

94 Referring to s 68(2)(b) of the *Qld Act* which provides:

> (2) The amount claimed in the payment claim may include an amount that—
> …
> (b) is held under the construction contract by the respondent and that the claimant claims is due for release.

95 [2010] VSC 106, [187] (Vickery J).

96 [2020] VCC 1261, [88] (Judge Woodward).

97 [2022] VSC 22, [72]–[74] (Stynes J).

98 *Punton's Shoes* [2020] VSC 514, [4] (Digby J).

99 Ibid [69(d)].

161 In so doing, Digby J considered that it was clear on the natural meaning of the language of the statute that a potential claimant's entitlement to a progress payment and to serve a payment claim was 'in respect of construction work and related goods and services undertaken under the relevant construction contract.'[100]

162 The judge pointed to contractual provisions similar to those applicable in this case which made provision for the progressive deduction of retention funds and certification. The judge stated:

> By this agreed contractual mechanism a discrete fund in the nature of retention moneys was established and accumulated to ensure due and proper performance of the Contract by the Contractor.
>
> Under the scheme of the Contract the retention moneys progressively deducted formed a separate and distinct security fund to ensure performance by the Contractor. *The separate and distinct character of the contractual security fund* created by the deduction of retention moneys is apparent from the terms and operation of cls 5.1, 5.2, 5.5, 5.6 and 42.8 of the Contract which establish the purpose of that security fund, the contractual mechanism for its accumulation and reduction and the bases upon which recourse may be had to that security fund by the Principal. The Contract makes no provision for a claim in respect of, or for payment to the Contractor in relation to the security fund. Accordingly, any implied right or entitlement there may be in the Contractor to return of a portion of retention moneys is different in character and distinct from either a claim under the Contract for the value of work carried out or an entitlement under the SoP Act for the value of construction work carried out and related goods and services.
>
> In distinction to a payment claim entitlement, the Contract does provide a mechanism to adjust the parties' entitlements in relation to moneys deducted by way of retention. Any sum held by way of retention is taken into account in the Final certification process under cl 42.6 of the Contract and thereby accounted for in the amount ultimately payable as between the Contractor and the Principal on the final reconciliation of each parties entitlements under the Contract. The retention deduction, reduction, recourse and security related provisions of the Contract do not contemplate or accommodate payment claims by the Contractor for contract work undertaken or related goods and services supplied.
>
> For the above reasons, and in particular because the Contract, including the progress payment provisions in cl 42.1 of the Contract make no provision for the return or payment of retention moneys, any implied entitlement to return of retention moneys upon the issue of the Certificate of Practical Completion under the Contract, or adjustment under cl 42.6, is not in the nature of a progress payment entitlement in relation to work carried out by the Contractor in the performance of the Contract.
>
> Neither, for the same above reasons, is the first defendant's September

100 Ibid [90].

> 2019 Payment Claim under the Contract for return or payment of half retention moneys in the nature of a payment claim under the SoP Act for construction work or related goods and services undertaken and provided under the Contract. This is so irrespective of whether the first defendant was able to establish a valid reference date, and any implied or other foundation for its claim to be paid half the deducted retention moneys.[101]

163 In *Watpac*, Digby J considered, inter alia, an application for summary judgment on a cross-claim by a defendant who had made payment claims under two separate contracts under the Act. The payment claims sought the remaining 50 per cent of the retention moneys under those contracts, but did not concern a final payment claim. Digby J held that, assuming that the first defendant's payment claims for the release and return of the security came within the Act (which they did not), no reference date arose.[102] However, he also considered that the claims did not come within the scope of the Act because the claims were not claims 'in relation to construction work or related supply of goods and services undertaken under the Contracts'. In so finding he cited his decision in *Punton's Shoes*.[103]

*(b) Analysis*

164 It is convenient to deal with two of the matters raised by the principal at the outset.

165 First, there is the case of *Punton's Shoes*. It may be observed that this case was concerned with a claim for return of retention funds following practical completion, rather than at the final payment stage, although it is true that the judge appears to reject the statutory entitlement generally. Such rejection is apparently based on a view that a claim for retention is 'different in character' from a claim for the value of construction work.

166 However, the judge's characterisation is, respectfully, apt to distract. Thus, in making this finding, the judge appeared to rely on his factual determination that a 'discrete fund' was created by the agreed contractual mechanism in *Punton's Shoes*. There is in fact no such 'separate and distinct fund' created in this case given that the parties effectively ignored the relevant contractual provisions and the builder simply claimed less than the full invoiced value. More importantly, I agree with the statements in *EnerMech* to the effect that alternative characterisations of a claim provide an uncertain basis for implying some condition of validity. This is illustrated by the present case where it is equally valid to characterise the amounts the subject of the payment claims as being due for outstanding work performed under the contracts in circumstances where they have been deducted from the value of construction work actually completed under those contracts.

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101 Ibid [109]–[113] (citations omitted, emphasis added).

102 *Watpac* [2020] VSC 637, [171].

103 Ibid [180], citing *Punton's Shoes* [2020] VSC 514, [75]–[85], [94]–[114] (Digby J). And note that, as the judge observed, the decision of Digby J was also followed by Burchell JR in *Foursquare Construction Management Pty Ltd v Chevron Corporation Pty Ltd* [2020] VCC 1928.

167 Next, insofar as the principal sought to distinguish the decision in *SHA* on the basis that the contract in that case did not make provision for the calculation of the claim (as compared to this case) this was also unhelpful. Although an adjudicator may be called upon to value construction work carried out in accordance with the terms of the contract under s 11, this does not assist in determining whether the payment claims themselves properly constituted payment claims for the purposes of the Act (as challenged by the notice of contention).

168 For reasons expressed below, I consider that they did constitute valid payment claims, having regard to the relevant provisions in the (Victorian) Act.

169 As highlighted already, although the *NSW Act* included s 13(3)(b) (which expressly provided that a claim may be made in respect of an amount that is held under the construction contract), the claim made in *EnerMech* was not a claim for return of security under that provision, and the critical analysis rather focused on the general requirements for a valid payment claim. The general purpose and objects contained in ss 1 and 3 of the (Victorian) Act are also not prescriptive of the entitlement to make a payment claim.

170 Turning then to the critical provision, s 14 provides that 'a person referred to in section 9(1)' who is, or claims to be, entitled to a progress payment may serve a payment claim on the person who '*under the construction contract*' is or may be liable to make the payment. Section 14 otherwise repeatedly refers to what can be done 'in respect of the construction contract' or 'under the construction contract' and contains no reference at all to the phrases, 'in respect of construction work', or 'for construction work'.[104]

171 Turning next to s 9, it provides that, on each reference date, a relevant person is entitled to a progress payment calculated by reference to that date. The relevant person is someone who has undertaken to carry out construction work '*under the contract*'.[105]

172 Finally, a progress payment is defined in s 1 as a payment to which a person is 'entitled under section 9' (i.e. someone who has undertaken to carry out construction work 'under the contract'). Although the more specific reference to a 'final payment, in the definition of 'progress payment', makes reference to a payment 'for' construction work, that work is work carried out '*under*' the contract and, as highlighted in *EnerMech*, is 'illustrative and not restrictive' of the general concept of a 'progress payment.'[106]

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104 The judge used the expression 'for construction work' rather than 'in respect of construction work', although the parties used these terms interchangeably.

105 The judge highlighted that the grounds of judicial review do not contain any reference to 'related goods and services' within the meaning of s 6 of the Act, and that the principal confirmed that the grounds of judicial review were limited to 'construction work': Reasons, [33(a)] n 66.

106 *EnerMech* [2024] NSWCA 162, [61] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]).

173 I am therefore of the view that the reasoning in *EnerMech* is applicable, and is certainly not 'plainly wrong',[107] notwithstanding some differences in the legislation. Although a payment claim must assert an entitlement to payment for work done under a construction contract, it is not required to be made 'in respect of construction work' or 'for construction work' in order to be a valid payment claim.

174 An examination of the payment claims in this case indicates they readily meet the requirements in the Act since each clearly asserts an entitlement to payment for work done under a construction contract. They each detail the works undertaken and identify the total contract price, less amounts previously paid, to arrive at a 'current contract claim' which is payable.

175 In the alternative, however, I am also of the view that the payment claims can be readily characterised as being 'for construction work' as the judge found, and consistent with the preponderance of authority summarised above. Put simply, the payment claims each constituted a claim for payments owed for construction work performed under the construction contract, less amounts which had already been paid. Even if the quantum of each claim was equivalent to the value of moneys retained, they are also properly characterised as payment claims 'for construction work' made under the Act.

176 For these reasons, the judge was correct to reject the claim that the adjudicator had made a jurisdictional error and the notice of contention must thereby be refused.

## *PART E: APPLICATION FOR LEAVE TO APPEAL*

### *(1) Proposed ground 1 — Whether the contracts made 'express provision' for calculation of a claim for final payment*

#### *(a) Judge's reasons*

177 The judge held that cl 37.4 of the contracts makes express provision for the calculation of the progress payments to which the builder is entitled under the Act. He did not accept the builder's submission that cl 37.4 is only 'referable to contractual entitlements' and the 'contractual stream of payment',[108] and relied on four key matters:

(a) First, he accepted that the contracts do not 'expressly state' that cl 37.4 makes provision for the calculation of a progress payment under the Act, but considered that it was unnecessary for a provision to make express reference to the Act.[109]

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107 *Farah Constructions* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); [2007] HCA 22.

108 Reasons, [198].

109 Ibid [199].

(b) Second, he noted that cl 37.4 concerns a final payment claim, and that the present case concerns a statutory right to a 'progress payment' under the Act which is a 'final payment'.[110]

(c) Third, he recorded that cl 37.4 provides for the superintendent to issue a final certificate 'evidencing the moneys finally due and payable between the Contractor [the builder] and the Principal … on any account whatsoever in connection with the subject matter of the [Contracts]'. He considered that '[t]his provides for the calculation of the final payment under the Act. The reference to the superintendent does not mean that cl 37.4 does not provide for a calculation within the meaning of section 10(1)(a) of the Act. An adjudicator is required to undertake their own calculation.'[111]

(d) Fourth, in his Honour's view, cl 37.2 of the contracts was not relevant to a final payment claim. Rather, cl 37.4 provided for a separate and distinct process for a final payment claim.[112]

178 The judge also rejected various submissions of the builder including that it was relevant that cl 37.4 required the builder to give a final payment claim to the superintendent;[113] that a calculation in accordance with the terms of a contract under s 10(1)(a) is limited to a calculation of the 'value of the construction work';[114] and that that the decision of the Queensland Court of Appeal in *Gambaro Pty Ltd as Trustee for the Gambaro Holdings Trust v Rohrig (Qld) Pty Ltd*[115] was of assistance.[116]

*(b) Builder's submissions*

179 The builder submitted that s 10(1)(a) of the Act means 'calculated on the criteria established by the contract', rather than the adoption of a contractual mechanism.[117] Further, that it will only be engaged where the contract provides an answer to the particular problem.

180 It submitted that cl 37.4 does not fulfil this function. Rather, the judge (at paragraph [201] of the Reasons) relied on an outcome (i.e. the figure in the final certificate) which did not provide guidance on the relevant criteria, or calculations for arriving at the figure that balances the parties' competing claims. It was further well established

110 Ibid [200].
111 Ibid [201], referring to ibid, [193]–[195].
112 Ibid [202].
113 Ibid [203].
114 Ibid [204].
115 [2015] QCA 288.
116 Reasons, [205].
117 Citing *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521, 542 [35] (Hodgson JA, Mason P agreeing at 523 [1], Giles JA agreeing at 523 [2]); [2004] NSWCA 395; applied in *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* [2007] NSWCA 19, [38] (Hodgson JA, Beazley JA agreeing at [1]); and *SSC Plenty Road Appeal Decision* [2016] VSCA 119, [83] (Santamaria, Beach and McLeish JJA).

that certificate provision clauses such as these are irrelevant to the task that the adjudicator must undertake.[118]

181 The builder submitted that cases in which it has been found that a contract makes express provision for a calculation or valuation typically involve a contract which contain detailed criteria about the relevant calculation.[119] The builder submitted that a submission that similar clauses made express provision for the purposes of s 11(1)(a) was rejected at first instance in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* ('*SSC Plenty Road First Instance Decision*').[120]

182 The builder submitted that cl 37.4 is silent as to the mechanics of the final claim calculation and is directed to the superintendent's role in issuing the final certificate. Further, the judge did not explain in a positive way how cl 37.4 makes 'express provision' for the calculation of any amount pursuant to s 10(1)(a).

183 In oral submissions counsel highlighted that the first paragraph of cl 37.4 simply provides for the making of a claim, while the second paragraph provides for the issue of a final certificate. The paragraphs do not provide for any calculation.

*(c) Principal's submissions*

184 The principal submitted that the builder's submissions disregard that the process established in cl 37.4 follows the arrangements in cl 37.2 for determining the amount of every progress payment up to practical completion, as well as the provisions of the contract for determining other discrete amounts payable between the parties.

185 Insofar as it concerned a progress payment, cl 37.1 provided that those claims were to capture '*WUC* done to the last day of that month during *WUC*, *practical completion* and at the time for making the *final payment claim*'.

186 In oral submissions counsel emphasised the inter-relationship between cls 37.1 and 37.4 and submitted that cls 37.1, 37.2 and 37.4 provide a clear basis for calculating a progress claim, being the value of the work done to a particular point in time less contractually available deductions. This was further confirmed by cl 2.1 which provided for the total contract sum to be paid, adjusted by additions or deductions made pursuant to the contract. He also submitted that the principal's ability to elect not to set off the full amount of the retention did not undermine this position, because it did not affect the builder's lawful entitlement.

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118 Citing *Abacus v Davenport* [2003] NSWSC 1027, [34]–[40] (McDougall J); *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941, [86]–[95] (Hammerschlag J); *SHA* [2020] QSC 307, [74]–[76] (Bond J).

119 Citing, by way of example, *PPK Willoughby v Eighty Eight Construction* [2014] NSWSC 760, [15], [68] (McDougall J); *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521, 534–6 [18]–[19], 542 [35] (Hodgson JA, Mason P agreeing at 523 [1], Giles JA agreeing at 523 [2]); [2004] NSWCA 395; *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* (2018) 54 VR 721, 751–3 [110]–[120] (Riordan J); [2018] VSC 14; *Punton's Shoes* [2020] VSC 514, [102]–[103], [112] (Digby J).

120 [2015] VSC 631, [117] (Vickery J).

*(d) Consideration*

187 Section 10(1)(a) provides that the amount of a progress payment is to be 'the amount *calculated* in accordance with the terms of the contract' where the contract makes provision for that matter.

188 The builder was correct to suggest that a certificate cannot supply the 'calculation' for the purposes of s 10(1)(a). Thus, in *SSC Plenty Road First Instance Decision*, cl 37.1 provided that the parties agreed that the percentages of the contract sum and amounts payable were to be 'as certified by the Superintendent'. In those circumstances, Vickery J considered that the contract made no express provision with respect to valuing progress claims under s 11(1)(a), stating:

> An invitation for an adjudicator to merely adopt a superintendent's certificate, without more, is not a contractual provision of the kind contemplated by s 11(1)(a) of the Act. It does not provide *any means or basis upon which an adjudicator may independently undertake the valuation exercise,* but rather delegates that task *ex post facto* to the contractually appointed superintendent. Such an exercise is not countenanced by the sub-section.[121]

189 On appeal the parties agreed that the contract made no express provision in respect of the valuation of contract work; the issue was rather whether it was open to the adjudicator to determine a price that was different from that certified.[122] In the course of finding that the adjudicator was not bound to adopt the amount certified, this Court helpfully summarised a number of cases which assist in the construction of s 10(1)(a), including *Abacus v Davenport* ('*Abacus*'),[123] *Transgrid v Siemens Ltd* ('*Transgrid*')[124] and *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* ('*John Holland*').[125]

190 Thus, in *Abacus*, an owner contended that, where there was a contractual mechanism that provided for an architect to certify the amount of a progress claim, the only entitlement of the builder was to the progress claim so certified. McDougall J rejected that argument, stating:

> [A] reference to calculation or valuation 'in accordance with the terms of the contract' is a reference to the contractual mechanism for determination of that which is to be calculated or valued, *not to the person who, under the contract, is to make that calculation or valuation*. In the present case, it means that Mr Davenport was bound to calculate the progress payment in accordance with cl 10.02 of the contract. It does not mean that Mr Davenport was bound by the architect's earlier performance (or attempted or purported performance)

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121 *SSC Plenty Road First Instance Decision* [2015] VSC 631, [115] (emphasis altered).

122 *SSC Plenty Road Appeal Decision* [2016] VSCA 119, [7], [71] (Santamaria, Beach and McLeish JJA).

123 [2003] NSWSC 1027.

124 (2004) 61 NSWLR 521; [2004] NSWCA 395.

125 [2007] NSWCA 19.

of that task.[126]

191 In *Transgrid*, the NSW Court of Appeal expressed provisional agreement with McDougall J.[127]

192 Then in *John Holland*, Hodgson JA (with whom Beazley JA agreed) said:

> I note that in *Transgrid* …, I expressed the view (obiter) to the effect that 'calculated in accordance with the terms of the contract' meant calculated *on the criteria established by the contract*, and did not mean reached according to mechanisms provided by the contract; and I adhere to that view as being more in accord with the use of the word 'calculated' and with the prohibition in s 34 of the [NSW] Act on contracting out of the effect of the [NSW] Act. On the other view, contractual provisions denying progress payments for construction work otherwise than as certified by a superintendent or in accordance with review procedure provided by the contract could in my opinion have the effect of restricting the operation of the Act, and thus be made void by s 34.[128]

193 I accept that 'calculated in accordance with the terms of the contract' means calculated 'on the criteria established by the contract'. I further accept, as the judge did, that the adjudicator must undertake their own calculation. However, the contract must provide some objective basis upon which an adjudicator may 'independently' engage in that exercise.

194 Turning then to the terms of the contracts, while cl 37.4 makes specific provision for the making of a final payment claim, it cannot be read in isolation. In particular, cl 37.4 provides that a final payment claim is to be constituted by a 'progress claim' as well as 'all other claims whatsoever' in connection with the contract. While the latter will be referable to applicable terms in the contracts, the former 'progress claim' is specifically referable to cl 37.1 which expressly includes 'the final payment' as a 'progress claim'. I therefore consider that cl 37.1 does have relevance to the payment claims in this case.

195 Turning then to cl 37.1, it makes provision for progress claims to be made:

(a) 'in accordance with *Item* 33' in respect of '*WUC* done to the last day of that month, practical completion, and at the time for making the final payment claim' (item 33(a) of Part A);

(b) for each progress claim to include details of the 'value of *WUC* done' as well as 'other moneys then due' under the contract and deductions for any liquidated damages; and

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126 *Abacus* [2003] NSWSC 1027, [38] (emphasis added).

127 *Transgrid* (2004) 61 NSWLR 521, 542 [35] (Hodgson JA, Mason P agreeing at 523 [1], Giles JA agreeing at 523 [2]); [2004] NSWCA 395.

128 *John Holland* [2007] NSWCA 19, [38] (Hodgson JA, Beazley JA agreeing at [1]) (citations omitted, emphasis added).

(c) in a context where '*WUC*' is defined by reference to the work the builder is required to carry out 'under the *Contract*' including '*variations*' and 'remedial *work*'; and

(d) where each contract gives a total 'contract price' for the work adjusted by any relevant additions or deductions under cl 2.1.

196 Each contract hence makes provision for the valuation of work done as at a specified date, having regard to variations and rectifications, and in the context of a specified contract price. The matters identified above are in fact substantially similar to the relevant matters specified in the Act under s 11(1)(b) (applicable where the contract makes no relevant provision).

197 In all the circumstances, each contract thereby provides for objective criteria so that an adjudicator might independently make a calculation of the amount of a final payment claim to which the builder was entitled.

198 Finally, although cl 37.2 makes provision for certification, the superintendent's opinion of what is 'due' is to be given 'pursuant to the progress claim' (i.e. on the basis of the criteria provided in cl 37.1). The fact that a principal might elect not to set off the retention moneys and other money 'due' also does not detract from the analysis. Rather, the contract provides clearly defined criteria for the value of retention moneys to be deducted (under cl 5 and item 14 of Part A) over the course of the contract, such as to identify the amount of the progress payment to which the builder was 'entitled'.

199 I therefore consider that the judge was correct to find that the contract makes express provision for the calculation of the amount of the final progress claim for the purposes of s 10(1)(a).

### *(2) Proposed ground 2 — Whether the proper construction of cls 5.4 and 37.4 required the final certificate to withhold the balance of retention moneys*

#### *(a) Judge's reasons*

200 The judge considered that the unpaid amounts for construction work retained by the principal as security in the form of retention moneys under the contracts formed a 'separate and distinct fund' constituting the 'security' under the contracts.[129] He cited *Punton's Shoes*[130] for this proposition. He considered that, pursuant to cls 5 and 37.4 of the contracts, the final 50 per cent of the retention moneys were not due to be released and returned to the builder until 14 days after the final certificates were issued, subject to any earlier recourse to them by the principal.[131]

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129 Reasons, [207], [217(e)].
130 [2020] VSC 514, [110] (Digby J).
131 Reasons, [207].

201 In his view, this conclusion was clear from the text, context and purpose of the contracts.[132]

202 The judge made reference to the provisions of cl 5. He observed that cl 5.4 relevantly provides that '[a] party's entitlement otherwise to *security* shall cease 14 days after *final certificate*'.[133] He considered it to be clear from the text of cl 5.4, that the reference to 'otherwise' is a reference to a party's entitlement to security ceasing 'otherwise' than in the two circumstances provided for in the two immediately preceding paragraphs of cl 5.4.[134]

203 He further rejected the builder's suggestion that cl 5.4 is a 'long stop' provision. He considered that *Tomkins Commercial and Industrial Builders Pty Ltd v Majella Towers One Pty Ltd* ('*Tomkins*')[135] (which was relied upon by the builder) did not assist the builder as it did not concern retention moneys, but a bank guarantee. Moreover, like *Tomkins*, he considered that it was the issue of the final certificate that triggers the release and return of the retention moneys within 14 days pursuant to cl 5.4, subject to any prior recourse to them by the principal pursuant to cl 5.2.[136]

204 The judge noted the builder's submission that it is implicit in cl 37.4 that the builder is entitled to the return of the security as part of the final payment process. The builder referred to the need for the builder to include all claims whatsoever in connection with the subject matter of the contracts in its final payment claim and the need for the builder to execute a deed of release. Further, that the final certificate is conclusive evidence of the 'accord and satisfaction' and 'in discharge' of each party's obligations in connection with the subject matter of the contracts (except for some exceptions in cl 37.4(a)–(e)).[137] The judge considered that the 'accord and satisfaction' referred to in cl 37.4 is an agreement between the parties, in place of the parties' causes of action on their claims, in the following terms as expressly provided in cls 5 and 37.4 of the contracts:

> (a) the Superintendent is to determine the moneys finally due and payable under the Contracts and issue a final certificate evidencing those monies;
>
> (b) the moneys certified as due and payable are to be paid by [the builder] or [the principal] as the case may be within 5 business days after the issue of the final certificate, except in the case of the matters in sub-clause 37.4(a)–(e);
>
> (c) the issue of the final certificate triggers the release and return of the security within 14 days pursuant to clause 5.4;

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132 Ibid [208].
133 Emphasis added by the judge.
134 Reasons, [209].
135 [2017] QSC 202, [95]–[105] (Brown J).
136 Reasons, [210].
137 Ibid [211].

(d) a party may have recourse to the security within 14 days of the final certificate pursuant to clause 5.2 if that party remains unpaid after the time for the final payment (i.e. after 5 business days from the date of issue of the final certificate).[138]

205 In his view, this process applies with respect to all forms of security provided for in the contracts, including retention moneys or bank guarantee.[139]

206 The judge considered that this construction of cls 5 and 37.4 accords with the purpose of the contracts to 'finally determine the monies due and payable by the parties except in the case of the matters in cl 37.4(a)–(e) and to trigger the date for the release and return of the security upon the issue of a final certificate'. He noted that the purpose of the contracts is not to obtain a return and release of the security as part of the payment to be made within 5 business days of the final certificate, but that this is expressly provided for by cl 5.4. In his view, this construction was consistent with the purpose of cl 5 to provide for a recourse by a party to the security if it remains unpaid after the time for the payment, including after the time for final payment.[140]

207 The judge agreed with a submission of the builder that it was required to include within its final payment claim 'all claims for payment due to it'. However, for reasons he had already explained, he considered that the builder did not have an entitlement to make a claim for the retention money as part of its claim for a final payment under cl 37.4 of the contracts.[141]

208 Finally, he did not accept the builder's submission that it would be 'anomalous and entirely inconsistent' with the primary purpose of the Act if, in a claim for a final payment expressly contemplated by the Act, a claimant was not permitted to recover a substantial part of the contract price for the work. In particular he reasoned:

…

(d) [the builder's] claims concern the unpaid amounts for the construction work retained by [the principal] as security in the form of retention moneys under the Contracts. For the reasons I have already given, it was not a claim only for the unpaid amounts for the construction work;

(e) the unpaid amounts for the construction work retained by [the principal] as security in the form of retention moneys under the Contracts formed a separate and distinct fund constituting the 'security' under the Contracts;

(f) upon a proper construction of clauses 5.4 and 37.4 of the Contracts, the unpaid amounts for the construction work retained by [the principal] as security in the form of retention moneys under the Contracts were not, at the reference date under the Act, payable to [the builder];

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138 Ibid [212].
139 Ibid [213].
140 Ibid [214]–[215].
141 Ibid [216].

(g) upon a proper construction of clauses 5.4 and 37.4 of the Contracts, the unpaid amounts for the construction work retained by [the principal] as security in the form of retention moneys under the Contracts are payable to [the builder] 14 days after the issue of final certificates. This is subject to any recourse to the security by [the principal] pursuant to clause 5.2 as a result of [the builder] not paying any amount stated in the final certificate as being due and payable to [the principal];

(h) as a result, the amount of the progress payments under 10(1) of the Act to which [the builder] was entitled in respect of the Contracts was a nil amount calculated in accordance with the Contracts.[142]

*(b) Builder's submissions*

209 The builder advanced three main submissions.

210 First, it submitted that the amounts claimed were properly claimed as part of a final payment claim under cl 37.4, highlighting that cl 37.4 intended the builder to include 'all other claims whatsoever' in connection with the subject matter of the contracts. It also placed emphasis on the provision of the executed deed of release. Clauses 4.2 and 4.3 of that release had the effect of releasing the principal from liability for any amount not included in the 'Amount Claimed', which was broadly defined. Clause 37.4 also required the superintendent to issue a final certificate evidencing the moneys due and payable 'on any account whatsoever in connection with the subject matter of the Contract'. That certificate was also 'conclusive evidence of accord and satisfaction' (save for the exceptions in sub-paras (a)–(e)).

211 Second, it relied on the general nature of retention money as money already earned but not yet payable.[143] This is also reflected in the Act which permits a claim for a sum which is 'due' (s 14(2)(d)), but which may be 'due and payable' on a later date (s 12(1)). It submitted that the retention money was relevantly due to the builder, although cl 37.2 granted a temporary basis upon which it was not 'due and payable'. Further, insofar as a claim for a final payment was concerned, the judge found that cl 37.4 provided a separate and distinct process. This made provision for the builder to claim withheld retention and for the principal to pay it. The money properly belonged to the builder and the circumstances permitting its continued retention no longer applied.

212 In oral submissions counsel also rejected the suggestion that retention moneys could be legally 'set off' as only moneys due can be set off.[144] Retention moneys do not

142 Ibid [217].

143 Citing *Re Tout and Finch Ltd* [1954] 1 All ER 127, 135 (Wynn-Parry J); *Ballast Wiltshier Plc (formerly Ballast Nedham Construction Ltd) v Thomas Barnes & Sons* [1998] EWHC (TCC) 306, [26] (Judge Bowsher QC); *PC Harrington Contractors Ltd v Tyroddy Construction Ltd* [2011] EWHC (TCC) 813, [24] (Akenhead J).

144 Citing *Federal Commissioner of Taxation v Steeves Agnew & Co (Vic) Pty Ltd* (1951) 82 CLR 408, 420–1 (Dixon J); [1951] HCA 26.

involve the incurring of a liability; just that moneys are put aside. The appropriate characterisation was therefore that retention moneys are treated as a deduction.

213 Third, the builder reiterated its submission (rejected by the judge) that cl 5.4 operated as a 'long stop or catch-all provision' and that the primary mechanism for recovering the final tranche of retention was by the final claim. It highlighted that, if the judge's construction was correct, then the superintendent's final certificate would always provide for, at most, only 97.5 per cent of the contract sum. Where security was retention money there would be no way for the builder to recover the final tranche of retention funds where it had warranted that it had no other claims and provided a release. Clause 5.4 should therefore govern the release of security other than retention money. It also provides a return date if a party serves a notice of dispute (as in *Tomkins*). The builder placed reliance also on some observations in *Badge Constructions (SA) Pty Ltd v Rule Chambers Pty Ltd* ('*Badge Constructions*')[145] to the effect that a final certificate would appear to pick up all moneys 'including securities' that may have been lodged.[146]

214 In oral submission counsel emphasised that a final payment claim of 100 per cent ought be made — not 97.5 per cent as the judge found. In so doing he highlighted the finality and comprehensiveness of the language of cl 37.4 which was intended to cover 'everything' and 'to tie up the contract in a bow' and 'everyone moves on'. The deed of release not only included cl 4, but also included reference to 'all' obligations; 'all' claims; that the Works have been 'completed'; and that there was an indemnity and release from and against 'all' claims. He also highlighted that the final certificate would evidence an accord and satisfaction and a discharge of each party's obligations. He submitted that the full and complete release was not designed to address the situation presented on the judge's construction.

215 In reply submissions counsel emphasised that:

(a) even apart from the release, the certificate operated as a discharge of each party's obligations in connection with the subject matter of the contract. Thus, the matters set out by the judge at paragraph [212] of the Reasons would not occur because there would be a final certificate valued at only 97.5 per cent and the builder would be forever deprived of 2.5 per cent of the value of the works;

(b) the 14 day period (specified in cl 5.4) would not be necessary with cash retentions as the principal would already have access to the funds. Clause 5.4 however could still have work to do where security took a different form such as a bank guarantee where a period of time was needed to make a claim, or where there was a situation such as existed in the case of *Tomkins*; and

(c) the builder was entitled to claim for 100 per cent as a final payment claim and the certificate provision could not stand in the way of this entitlement given it was a 'mechanics provision' as explained in a number of the authorities.

145 (2007) 99 SASR 502; [2007] SASC 417.
146 Ibid 523 [67] (Gray J, David J agreeing at 534 [130]).

*(c) Principal's submissions*

216 The principal submitted that the builder misconceived the interaction between cls 5.4 and 37.4 in two respects.

217 First, it submitted that the retention money was not 'properly belonging to the builder' or relevantly 'due' to the builder. Rather by reason of cls 5.1 and 37.2 the principal was entitled to hold those moneys, and not return them, until after the final certificate was issued under cl 5.4.

218 Second, the builder sought to treat retention moneys differently to other security though there was no basis for this different treatment on a correct construction of the contracts. In particular, the principal highlighted that the contractual arrangements for having recourse to the security and releasing it were identical and nothing in the text demonstrated otherwise. Further cl 5.4 did not differentiate between the type of security provided.

219 It submitted that the builder's construction challenges the commercial viability of retention moneys and encourages principals to avoid its consequences by insisting on other forms of security which might place a greater burden on a contractor's cash flow. It also highlighted that the security would still be recoverable as damages for breach, or as a debt.

220 Insofar as the deed of release was concerned, the principal's position was that this would not prevent recovery for a number of reasons. These included that first, given that cl 4 only operated in respect of amounts 'due' to the builder, retention funds would not be covered as they are not 'due' until 14 days after the final certificate under cl 5.4. Second, the release only operated upon payment of the 'amount claimed' (which would not include retention funds). Third, the principal could also not rely upon the deed to oust the builder's entitlement based on the principles in *Grant v John Grant & Sons Pty Ltd*.[147]

221 Counsel also submitted that cl 37.4 did not provide for a complete accord and satisfaction, but contained a number of exceptions, including for defects not apparent at the end of the last defects liability period (in cl 37.4(b)).

222 In oral submission the principal emphasised that cls 5 and 37.4 could be read together. A proper reading of cls 5.1 and 5.4 was that the principal had an enforceable entitlement to security for the period right up until 14 days after the date of the final certificate. Thus, cl 37.4 made provision for the builder to have 5 days to pay an amount (if it was liable under a final certificate) and then, gave the principal a further window to have recourse to the security (given cl 5.2 only allowed recourse after the due date for payment). Hence the retention fund should not be released until after provision of the final certificate. The fact that it was open to the builder to substitute the form of security at any time (cl 5.3) was also said to be inconsistent with the

147 (1954) 91 CLR 112, 129–130 (Dixon CJ, Fullagar, Kitto and Taylor JJ); [1954] HCA 23.

suggestion that there was any accrued right to recover retention moneys at any earlier stage.

*(d) Consideration*

223 There were two features of the judge's reasons which formed a critical basis for his conclusion that the unpaid amounts for construction work retained were not part of the amounts to which the builder was entitled under the Act. First, that they 'formed a separate and distinct fund'. Second, that the builder did not have an entitlement to make a claim 'for the retention money' as part of its claim for a final payment, pending the final certificate.[148]

224 However, for the following reasons, I consider that the builder was entitled to both claim, and receive, the amounts of the payment claims, as adjusted by the adjudicator, under the Act.

225 First, the judge appears to have based his conclusions on the reasoning of Digby J in *Punton's Shoes*. For reasons already given, I do not find this reasoning to be of assistance. Although the moneys sought might be characterised as retention funds, they still constituted amounts outstanding under a construction contract, the subject of a valid payment claim under the Act.

226 Next, although there is an intersection between the Act and each contract in relation to the valuation of an amount of a progress payment, this is in a limited way. More particularly, s 10(1)(a) provides that the amount of a progress payment be 'calculated' in accordance with the contract. As explained above,[149] the task of calculating the work undertaken under the contract is based on the criteria established in the contract, rather than the mechanisms provided in the contract for the making of that calculation and/or the person who is to make that calculation. The absence of a certificate does not prevent the adjudicator from undertaking the calculation.

227 The adjudicator also found that the contracts made no express provision as to when the amounts were due. She considered that s 12(1)(b) filled the relevant contractual lacuna, such that the due date for payment was 10 business days after the date of each claim. Such a finding was not the subject of challenge and may be accepted. Although the contracts provided for various milestones as part of the certification process for assessing all contractual claims, they did not make specific provision for the due date for the final progress claim where no such process was undertaken.

228 Save for one matter, dealt with below, it was not suggested that there was some other obstacle to the making of the payment claims under s 14 of the Act in circumstances where the judge held that the claims were valid claims, with adequate detail.

229 However, as indicated already, the judge found that the builder did not have an entitlement to make the payment claims under cl 37.4, by reference to cl 5.4. The

148 Reasons, [216].
149 See above [187]–[193].

parties hence focused on whether cl 5.4 operated to prevent the making of the payment claims, given that they might also be characterised as claims for amounts held for security. The question which arose was whether the moneys could be claimed prior to the effluxion of 14 days after the provision of a final certificate.

230 The short answer to this question is found in another finding made by the judge to the effect that there was a reference date under the Act. The judge also recorded that the principal did not dispute that the payment claims were made 'within 28 days after the expiry of the last defects liability period and the satisfaction of all of [the builder's] obligations' under cl 37.4 of the contracts,[150] as found by the adjudicator. It thereby followed that the builder was entitled to make the claim for the progress payment in each case, even if it might also include a claim for amounts previously held as retention.

231 As the builder was entitled to make the payment claims, which were due and payable under the Act, it is unnecessary to go further. However, if it was necessary to decide, I also consider that, having regard to the text, context and purpose of each contract,[151] cl 5.4 would not prevent the builder from making a claim for a progress payment as part of, and at the time of, the making of the 'Final Payment Claim' under cl 37.4 of each contract.

232 First, such a conclusion is consistent with general principles. Thus in *Protectavale Pty Ltd v K2K Pty Ltd*,[152] Finkelstein J said:

> A final payment claim may be defined as a 'final balancing of account between the contracting parties' (*Jemzone* (2002) 42 ACSR at 49) or 'simply the last of the payment claims' (*Southern Region Pty Ltd v State of Victoria (No 3)* [2001] VSC 436 at [32]). In substance it is a claim for a payment which, when made, will discharge the principal from further obligations to pay money under the construction contract.[153]

233 Second, there is the language of cl 37.4. This includes words such as 'Final', and 'all other claims whatsoever'. The 'final' certificate was also to evidence 'the moneys finally due and payable … on any account whatsoever in connection with the subject matter of the *Contract*'. This all underscores the evident purpose of the clause that there be a final reckoning of any claims, including the final 'progress claim'.

234 Despite such clear language, the principal's construction would mean that the superintendent's final certificate would ultimately provide for, at most, 97.5 per cent of the value of the contract sum.

235 Finally, the terms of the draft release, and the accord and satisfaction referred to in cl 37.4, strongly support this conclusion. Even allowing for some potential arguments

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150 Reasons, [142].

151 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, [46]–[48].

152 [2008] FCA 1248.

153 Ibid [17]. See also *Gantley* [2010] VSC 106, [233] (Vickery J).

about their coverage, the various references highlighted by the builder signify an end point.

236 Turning next to cl 5.4, if read in isolation, it is possible to read cl 5.4 as meaning that *any* security is to be returned 14 days after final certificate, where the two circumstances provided in the two immediately preceding paragraphs of cl 5.4 are inapplicable. However, even if read in isolation, the language does not purport to be exhaustive. More particularly, the fact that there is an ultimate 'end point' to the entitlement to security (of 14 days after final certificate) does not exclude the possibility that an entitlement might have ceased earlier under another provision.

237 It is also not appropriate to read a provision in isolation. The existence of an earlier termination of the entitlement to security is confirmed when cl 5.4 is read with the plain words of cl 37.4. As explained already, the clear language of that provision is that the builder is entitled to include a progress payment in respect of works completed as part of the 'Final Payment Claim' made. Where security has been taken by way of retention moneys, this will therefore include a claim to those moneys which have already been earned under the contract.[154] This can still leave cl 5.4 to have some application. In particular, if the security is held in a different form, such as a bank guarantee, then the relevant 14 day period specified in cl 5.4 will apply.

238 The valuation of such a progress claim may then give rise to different considerations, when considering a claim under the Act, as opposed to a contractual claim. For example, excluded amounts under s 10B, including liquidated damages claims, will not be taken into account in calculating the amount of a progress payment due under the Act.

239 However, it is unnecessary to consider these issues further, where there was no suggestion that any claim had been made on the moneys for liquidated damages, or otherwise. The payment claims rather involved relatively straightforward progress claims for remaining unpaid construction works. Given that the statutory conditions were met, I consider that the builder was entitled to the amount of each payment claim under the Act as calculated, and adjusted, by the adjudicator. Further, that the judge erred in quashing the determinations of the adjudicator.

### *(3) Proposed ground 3 — whether cls 5.4 and 37.4 offended s 48(1) of the Act*

240 For the reasons already given, I consider that there was a statutory entitlement to the amounts found by the adjudicator under the Act, even absent certification (as identified in cl 37.4, and referred to in cl 5.4). The making of a claim under the Act turns on different criteria, which do not depend on certification having occurred.

241 However, insofar as this is incorrect and cl 5.4 and 37.4 would operate to prevent the amounts from being paid absent certification, then those provisions would be void

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154 *Re Tout and Finch Ltd* [1954] 1 All ER 127, 135 (Wynn-Parry J).

under s 48. This is consistent with the clear legislative purpose to prioritise a builder's entitlement to be put in funds for the full value of construction works.

242 The judge dealt with this matter briefly, stating:

> I refer to the matters I have addressed earlier in this judgment, including the operation of the accord and satisfaction provided for in clause 37.4. As a result, in my view, clause 5 is not void pursuant to s 48 of the Act. The Adjudicator was required to calculate the moneys due and payable between [the builder] and [the principal] as at the reference date, excluding any 'excluded amounts' under s 10B of the Act. As at the reference date, the unpaid amounts for the construction work retained by [the principal] as security in the form of retention moneys were not due and payable.
>
> As a result, [the builder] was entitled to nothing (i.e. a nil amount) for its payment claims under the Act as at the 'reference date'.[155]

243 As highlighted by the builder, there were really two aspects of certification which have been the subject of judicial consideration. First, as the judge recognised,[156] it has been held that an adjudicator is not bound by the calculation performed by a superintendent in reaching and certifying an amount due and payable between the parties.[157] This proposition did not appear to be contested. However, second, the builder submitted that there was authority that the obtaining of a certificate cannot be a precondition to an entitlement to payment under the Act.

244 It was really the second aspect relied upon in this case and, as authority for this proposition, the builder relied on two cases: *Trysams* and *SHA*.

245 In *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* ('*Trysams*'),[158] an adjudicator had determined that the builder should receive an amount which included the retention fund. In so doing the adjudicator rejected a submission that the retention money could not be released absent a final certificate.[159] The adjudicator's reasons included a statement that the contractual provisions relied upon sought to limit the operation of the *NSW Act* and thus fell foul of s 34(2)(a).[160] That determination was challenged on the basis that the adjudicator had denied the principal natural justice.

246 McDougall J rejected the suggestion that there had been a breach of natural justice, based on materiality,[161] but went on to state:

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155 Reasons, [219]–[220].

156 Ibid [201].

157 And see, for example: *Abacus* [2003] NSWSC 1027, [38] (McDougall J); *Trysams* [2008] NSWSC 399, [65] (McDougall J); *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941, [93] ( Hammerschlag J).

158 [2008] NSWSC 399.

159 Ibid [22]–[23].

160 Section 34(2)(a) provided that a provision of any agreement (whether in writing or not) under which the operation of the Act is, or is purported to be, excluded, modified or restricted (or that has that effect), is void.

161 *Trysams* [2008] NSWSC 399, [58].

> I do not think that the adjudicator's conclusion, that the contractual provisions on which Trysams relied were void by operation of s 34, is necessarily (or at all) inconsistent with the reasoning of the Court of Appeal in *John Holland*. On the contrary: if the contractual provisions had the effect of denying Club's entitlement to the retention fund, simply because no final certificate or special certificate had been issued, it might well be correct to say that those provisions restricted, or had the effect of restricting, the operation of the Act in relation to a final payment claim that included a claim for the retention sum. Clearly, the legislature intended that adjudicators should have power to determine such claims. Equally clearly, adjudicators deciding such claims are not to be bound by the decision (or absence of decision) of a superintendent to issue (or not to issue) a final or special certificate. In this respect, I refer not only to the decision of Hammerschlag J in *Trysams* but also to my decision in *Abacus v Davenport* [2003] NSWSC 1027 at [34] to [40]. (I note that Hammerschlag J in *Trysams* at [93] referred to and relied upon my decision.)[162]

247 The remarks of Bond J in *SHA* cited already are to similar effect.[163] In particular, he considered that the *Qld Act* creates an entitlement to a progress payment valued in a particular way, and 'regardless of whether the contractual certificate has been obtained'.[164]

248 The principal raised a number of submissions in relation to the above analysis.

249 First, it sought to distinguish *SHA* and *Trysams*. In particular it highlighted that the equivalent *Qld Act* and *NSW Act* (which the decisions in *SHA* and *Trysams* concerned, respectively) contained an express provision which allowed a payment claim to include an amount held as retention.[165] By contrast, there is no express provision in the (Victorian) Act which could be said to be modified or restricted by the contracts. It also reiterated a submission that, in *SHA*, the contract did not provide for the calculation of a final payment claim, such that the calculation mechanisms under the Act were invoked.

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162 Ibid [65].
163 See above [156].
164 *SHA* [2020] QSC 307, [74].
165 *Qld Act*, s 68(2)(b); *NSW Act*, s 13(3)(b).

250 However, given that I have determined that the builder was entitled to claim the funds by way of a valid payment claim made under the Act, the fact that the right might be specifically expressed takes the matter no further. The second point also fails to grapple with the fact that the Act provides for a remedy, even where the calculation of the quantum is determined by reference to the contract.

251 Second, the principal submitted that the amount calculated in accordance with the contract should include such deductions as the contract requires. But this also did not assist it in respect of proposed ground 3. As explained above, it is possible that different amounts will be due under the contract, as opposed to the Act. Proposed ground 3, however, concerns the different issue as to whether part of the amount due under the Act should be excluded solely because of the absence of a certificate.

252 Finally, the principal contended that the structure of the Act did not provide that a claim could be brought for every single dollar earned under the contract. This may be accepted. In particular, by reason of the absence of a reference date, an amount may not be recoverable under the Act.[166] However, in this case, it was accepted that a reference date arose and that the criteria for the making of a payment claim under s 14 were otherwise met.

253 The statements made in *Trysams* and *SHA* are otherwise a logical extension of the well-established principle that a certificate cannot bind an adjudicator. Insofar as the provisions of the contract did have the effect of denying the builder's entitlement to the remaining 2.5 per cent of the contract sum due for construction work because no final certificate had been issued, then in my view, they would restrict the operation of the Act in relation to the making of a final payment claim. More particularly, they would restrict or modify the provisions dealing with the entitlement to make, and receive, the final payments, including ss 9, 10, and 14 of the Act.

254 Accordingly, if it was necessary to find, I consider that proposed ground 3 would be sustained.

## *PART F: CONCLUSION*

255 Leave to appeal will be granted, and the appeal will be allowed. An order will be made to set aside the judge's orders and an order will be made in lieu that the proceeding be dismissed.

MACAULAY JA:

## *Introduction and background*

256 In my view the key question in this appeal is whether the Act denies to principals the right to retain security that is financed by deductions from money that, in turn, is

166 See, eg, *Southern Han* (2016) 260 CLR 340; [2016] HCA 52.

earned by a contractor by carrying out construction work or supplying related goods and services under a construction contract. Unlike cognate legislation in other states of Australia, the Act does not expressly recognise the entitlement of a contractor to make a statutory payment claim for money held by a principal under a construction contract, for security or otherwise, that the contractor claims is due for release. For reasons that will become apparent, I do not consider that the Act should be construed as denying such an entitlement. In my view, however, the right of a principal to deduct payments for security, and withhold the accumulated amounts of that security until the contract says it is to be released to the contractor, survives and does not conflict with the operation of the Act.

257 The effect of that view is that the judge was correct to quash the adjudicator's determination that Hunters Green should pay the amounts set out in the adjudicator's two determinations issued on 13 October 2022.

258 I have had the considerable benefit of reading in draft the reasons of Niall JA and Kennedy JA. Although I ultimately reach a different position to their Honours in relation to the disposition of the appeal, our difference lies principally in the analysis. Therefore, and with gratitude, I propose to adopt Kennedy JA's description of the factual background,[167] contractual provisions, statutory framework, decision of the trial judge and submissions put by the parties. I will only add to or restate certain aspects of those matters for convenience or emphasis.

*Statutory regime*

259 As has been noted, the main purpose of the Act is to 'provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts' (s 1).

260 Although the Act refers to 'claimants' and 'respondents' — being those who make and respond to claims for progress payments under a construction contract — for convenience I will refer to them as the 'builder' and the 'principal', respectively. Further, even though the Act refers to claims for both 'construction work' and 'goods and services', for simplicity I will generally refer only to claims for 'construction work', since the relevant claims in this proceeding only concern construction work.

261 Without repeating its features in detail, broadly, the Act provides the following regime:

(a) A builder under a construction contract is entitled to a statutory 'progress payment', including a 'final payment', on and from a 'reference date' (s 9);

(b) The amount of the statutory progress payment is either the amount calculated in accordance with the terms of the contract or the amount calculated on the basis

167 For reasons explained below, I may disagree with Kennedy JA's statement in [69] that the builder claimed 'lesser amounts than the total amounts invoiced by deducting amounts for "retention moneys" under the contracts'.

of the value of the construction work carried out or goods and services supplied (s 10);

(c) The expression 'construction work' is defined to include, amongst other things, construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming part of land (s 5);

(d) The procedure for obtaining the statutory progress payment amount (found in pt 3 of the Act) is for the builder to serve on the principal a 'payment claim' which, amongst other things, must identify the construction work to which the progress payment relates and indicate the amount claimed to be due (s 14);

(e) If the principal disputes the payment claim, and provided there is a timely notification of dispute by the principal (by filing a 'payment schedule' (s 15)), the builder may make an 'adjudication application' (s 18) to have an adjudicator appointed (s 20);

(f) The adjudicator is to make an 'adjudicator's determination' of the 'adjudicated amount' (s 23), which is the amount of any progress payment to be paid by the principal to the builder on a particular date at a particular rate of interest; and

(g) Subject to statutory rights to review — and any surviving right to judicial review — the principal must pay the 'adjudicated amount' to the builder by the specified date (s 28M).

262 In the present proceeding, JG King — the builder — sought to engage the processes of the Act by referring to an adjudicator its disputed payment claims for progress payments in respect of Stages 12 and 13. In each case, the claim was for a final payment. The amount that JG King sought in relation to Stage 12 was $115,948.66 and the adjudicator determined the 'adjudicated amount' to be $114,932.07. JG King sought a progress payment in relation to Stage 13 of $176,055.67 and the adjudicator determined the adjudicated amount to be precisely that sum. In respect of each Stage, Hunters Green — the principal — had alleged that it was owed sums for defective or incomplete works. The adjudicator allowed a small amount of Hunters Green's claim in respect of Stage 12. That allowance accounts for the difference between JG King's claim and the adjudicated amount. No allowance was made by the adjudicator in relation to Hunters Green's claim for Stage 13.

*Result in the Trial Division*

263 Hunters Green sought judicial review of the adjudicator's determinations in respect of both Stage 12 and Stage 13. As they did before this Court, in the Trial Division both parties agreed that the Court had jurisdiction to judicially review the adjudicator's determination on the basis that no judgment had been entered for the adjudicated amounts pursuant to s 28R of the Act. Because no such judgment had been entered, the parties jointly submitted that this Court's jurisdiction to conduct a judicial review of the adjudicator's determination had not been ousted by ss 28R and 51 of the Act. This Court has proceeded on that basis.

264 The judge determined eight issues raised before him. He found for JG King on issues 1, 2, 3, 5, 6 and 7 but for Hunters Green on issues 4 and 8. The latter two issues were determinative of the outcome, with the result that the judge quashed the adjudicator's determinations. Accordingly, by its three proposed grounds of appeal, JG King sought to appeal the judge's findings in respect of issues 4 and 8. In addition, Hunters Green filed a notice of contention challenging the judge's findings regarding issues 1 and 5, as an alternative means of supporting the correctness of the result given by the judge.

*Issues on appeal*

265 The notice of contention focuses on an argument as to whether the adjudicator had jurisdiction to make any determination at all (the 'jurisdictional issue'). JG King's three grounds of appeal proceed from the assumption (and as held by the judge) that the adjudicator did have jurisdiction. Essentially, grounds 1 and 2 challenge the judge's findings as to the correctness or otherwise of the adjudicator's treatment of provisions of the construction contract made between the parties. Ground 3, separately, rehearses an argument put to the judge, but dismissed by him, that, in any event, s 48 of the Act makes void the provisions of the contract that Hunters Green relied upon.

266 For convenience, I will address the notice of contention and JG King's grounds of appeal in the same order as Kennedy JA — that is, I will set out my analysis and conclusions on the jurisdictional issue, then on each of appeal grounds 1–3. There is good reason to adopt this sequence. The issues considered in relation to the jurisdictional issue overlap with and inform the issues considered in relation to the grounds of appeal, especially grounds 2 and 3.

267 As to the notice of contention, I ultimately agree with Kennedy JA that this Court should follow the decision of the New South Wales Court of Appeal in *EnerMech* and hold that the adjudicator had jurisdiction to make an adjudication determination. However, as I have reached this conclusion with some hesitation, I set out my own reasons on this issue below.

268 Having determined that the adjudicator had jurisdiction to determine any amount payable under the payment claims for Stages 12 and 13, I also agree with Kennedy JA's conclusion in respect of JG King's ground 1 and with her reasons for it.[168] That is to say, I agree that the judge was correct to find that the contract made express provision for the calculation of the amount of the final progress claim for the purposes of s 10(1)(a) of the Act. That means that JG King's argument that the adjudicator was required to adopt the method provided by s 11 of the Act to calculate the amounts due under the progress claims cannot be sustained.

269 The further question then — on which my view differs from that of Kennedy JA, and on which the outcome of this appeal turns — is whether the proper construction of cls 5.4 and 37.4 of the contract required the adjudicator to issue a final certificate that

168 Above, [199].

withheld the balance of retention monies (ground 2). If, applying cls 5.4 and 37.4 of the contracts, the adjudicator ought to have provided a determination that withheld the balance of retention monies, it will be necessary to determine whether those clauses offend s 48(1) of the Act (ground 3).

270 Before setting out my analysis and conclusions in respect of these issues, it is useful to briefly recap the key provisions of the construction contract, and to set out the operation of the payment claim arrangements in fact adopted by the parties. The key provisions of the construction contract are set out in detail by Kennedy JA (see above [87]–[103]). I will not replicate that summary in great depth. However, for convenience, I wish to revisit the critical aspects of the contract and the payment claims which bear upon the issues on appeal, and my analysis of those issues. In doing so, it is sufficient to confine the description of the contract provisions, and of the invoices and payments made under the contract, to those that relate to Stage 12. Although dollar amounts differ, the relevant contractual provisions and the regime for payment claims for Stage 13 are essentially the same.

*Construction contract*

271 The contract sum for Stage 12 construction works, inclusive of GST, was $4,637,944.41. The intervals for making progress claims pursuant to cl 37.1 of the contract were stipulated as the 25th day of each month during the works under the contract, on the date of practical completion and at the time for making the final payment claim. Although the printed form of the contract allowed for provision to be made for both 'Contractor's Security' and 'Principal's Security', as completed, the contract only made provision for contractor's security. Contractor's security was to take the form of either 'Retention Monies' or 'Unconditional Bank Guarantees'. In either case, the amount was to be 5 per cent of the contract sum until practical completion, at which time the security was to reduce to 2.5 per cent.

272 Clause 5 of the contract set out in some detail the terms governing the provision and use of the security. The relevant parts of cl 5 have been extracted by Kennedy JA (see above [98]–[102]). Clause 37 of the contract set out in some detail the method for making progress claims and how those claims were to be assessed and paid. The relevant parts of cl 37 have also been extracted by Kennedy JA (see above [91]).

273 Clause 1, headed 'Interpretation and construction of Contract', defined 'security' to mean any one of six forms of security. In addition to retention moneys or bank guarantees, security could, among other things, also take the form of cash or an interest bearing deposit in a bank. At any time, the party providing retention moneys or cash security could substitute another form of security (as defined): cl 5.3.

*Invoices and payments*

274 In this section I deal with the invoices and payments in some detail. I do so for several reasons. First and foremost, I do so to demonstrate and emphasise that, by the time JG King made its 'final' payment claims in August 2022, it had already claimed payment from Hunters Green for the entire value of all the construction works carried

out under the contract. I reject JG King's submission that it had only claimed for 97.5 per cent of the construction works. Secondly, and relatedly, at the hearing of the application, there seemed to be a degree of uncertainty about what percentage of construction works was claimed in each progress payment claim, and what percentage had been claimed by the time of and in the final claim. Some of that confusion may be attributable to the fact that the amount of GST and the rate of deduction for retention were both 10 per cent.

275 Although the scheme provided by cl 37 of the contract for making, assessing and paying progress claims included a determination by the 'superintendent' (as defined in the contract), in practice the parties bypassed that mechanism. Instead, for each progress claim, Hunters Green simply paid the invoices rendered to it by JG King up until the final claim made on 19 August 2022. In each case, the progress claims made by JG King adopted a consistent format. JG King raised an invoice supported by detailed workings set out in a spreadsheet. For example, JG King issued the **first invoice** concerning Stage 12 on 11 October 2018. It was in the following terms:

| **Contract Summary (Ex GST)** | |
|---|---|
| Original contract amount | 4,216,313.10 |
| Approved variations | 0.00 |
| Revised contract amount | 4,216,313.10 |
| Value of Works Completed | 79,953.52 |
| Less Value of Previous Claims | 0.00 |
| Less Retention Held | 7,995.36 |
| This Claim Invoice | 79,953.52 |
| Balance to Contract Completion | 4,136,359.58 |
| Percentage Billed | 1.90% |
| GST | 7,195.80 |
| Retention Held | 7,995.36 |
| Amount due this Invoice | 79,153.96 |
| **Invoiced to Date Inc GST** | **87,149.32** |
| **Received to Date Inc** | **0.00** |

| | |
|---|---|
| **GST** | |
| **Balance Owed Inc GST** | **87,149.32** |

276 A number of things should be noted about the form of this invoice. First, most (but not all) of the figures are *exclusive* of GST. Some are expressed to be *inclusive* of GST but one line — 'Amount due this Invoice' — in fact includes GST but is not marked that way. This observation may seem unimportant, but unless noticed it might cause some confusion about the value of *construction work* that was claimed by the invoice compared with the amount of money claimed as *due* and payable. Showing the figures both on a GST exclusive and GST inclusive basis, the key lines in this invoice may be depicted as follows:

| Item | GST exclusive | GST inclusive |
|---|---|---|
| Value of works completed | 79,953.52 | 87,948.87 |
| This Claim invoice | 79,953.52 | 87,948.97 |
| Retention held | (7,995.36) | (8,794.90) |
| Amount due this invoice | 71,958.16 | 79,153.96 |

277 It can be seen from this table that the first invoice for Stage 12 claimed the full value of the construction works then completed. However, the amount of money then 'due', as shown by the invoice, was the sum left after the agreed deduction of 10 per cent for retention (as explained in the next paragraph). The second payment claim confirms that the value of construction work claimed by the first invoice was the entire value for work carried out at the date of that invoice. Consistently with the first invoice, the second payment claim records the 'Value of Previous Claims', expressed as GST inclusive, as $87,948.87.

278 Secondly, the form of the first invoice refers in two places to 'retention held'. It can be seen that in each case the retention is an amount equivalent to 10 per cent of the value of the construction work claimed by the invoice. Although the contract only permitted overall retention of 5 per cent of the contract sum, the retention was front-loaded in the early stages of the contract and then it cut out once the 5 per cent overall level had been reached. Thirdly, the form of invoice stated the original contract amount and added approved variations to arrive at a 'revised contract amount'. In the case of the first invoice, no variations had yet been approved. Variations were subsequently approved and reflected in revised contract amounts in later invoices.

279 In his Reasons, the judge set out a table of invoices issued for Stage 12 for the period prior to practical completion:[169]

[169] Reasons, [12].

| Date | 'This Claim Invoice' | 'Retention Held' (from this claim) | 'Amount due this invoice' | 'Less Retention Held' (to date) | 'Balance Owed Inc GST' |
|---|---|---|---|---|---|
| 11 October 2018 | $79,953.52 | $7,995.36 | $79,153.96 | $7,995.36 | $87,149.32 |
| 11 October 2018 | $160,766.06 | $16,076.61 | $159,158.38 | $24,071.97 | $262,384.31 |
| 12 November 2018 | $332,555.06 | $33,255.55 | $329,229.50 | $57,327.52 | $386,557.02 |
| 11 December 2018 | $565,122.64 | $56,512.27 | $559,471.41 | $113,839.79 | $673,311.20 |
| 24 January 2019 | $777,299.47 | $77,729.95 | $769,526.47 | $191,569.74 | $961,096.21 |
| 4 February 2019 | $731,343.03 | $19,246.08 | $783,306.67 | $210,815.82 | $1,763,648.96 |
| 4 March 2019 | $715,871.85 | None specified | $787,459.04 | $210,815.82 | $1,781,581.53 |
| 29 March 2019 | $555,375.90 | None specified | $610,913.52 | $210,815.82 | $1,609,188.38 |
| 3 May 2019 | $279,249.95 | None specified | $307,174.98 | $210,815.82 | $1,128,904.32 |
| 31 May 2019 | $91,504.72 | None specified | $100,655.20 | $210,815.82 | $618,646.00 |

280 As seen in this table — particularly by reference to the first line against 11 October 2018 (the date of the first invoice) —the column headings reflect some of the line items in the form of invoice.

281 As at the date of JG King's last invoice depicted in this table — that is, 31 May 2019 — the balance owed (inclusive of GST) was $618,646.00. More significantly for present purposes, the 31 May 2019 invoice stated (GST inclusive):

(a) Value of works completed — $4,717,946.42;

(b) Value of previous claims — $4,617,291.23; and

(c) Percentage billed — 99.87%.[170]

282 However, that was not the last invoice JG King issued before it made its final payment claim on 19 August 2022. Two other invoices were issued in July 2019.

283 On 3 July 2019, JG King invoiced Hunters Green for one half of the amount of retention held, namely $115,948.66 (inclusive of GST). The GST exclusive amount was $105,407.95. As noted above, once practical completion was reached Hunters Green was only entitled to retain 50 per cent of the contractor's security. The 3 July invoice was issued for half the retention sum to effect that reduction, and that sum was paid to JG King.

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[170] The invoice appeared to contain an error: the amount in (b) is 97.87% of the amount in (a).

284 Five days later, on 8 July 2019, JG King sent Hunters Green a further invoice. In the version of that invoice set out below, I have included an additional column to show the GST inclusive amount, set against the GST exclusive amount as shown in the original invoice.

| **Contract (Ex GST)** | **Summary** | **(Inc GST)** |
|---|---|---|
| Original contract amount | 4,216,313.10 | 4,637,944.41 |
| Approved variations | 117,096.08 | 128,805.69 |
| Revised contract amount | 4,333,409.18 | 4,766,750.10 |
| Value of Works Completed | 4,333,409.18 | 4,766,750.10 |
| Less Value of Previous Claims | 4,289,042.20 | 4,717,946.42 |
| Less Retention Held | 105,407.87 | 115,948.66 |
| This Claim Invoice | 44,366.98 | 48,803.68 |
| Balance to Contract Completion | 0.00 | |
| Percentage Billed | 100% | |
| GST | 4,436.69 | |
| Amount due this Invoice | 48,803.67 | |
| **Invoiced to Date Inc GST** | **4,756,209.49** | |
| **Received to Date Inc GST** | **4,486,049.13** | |
| **Balance Owed Inc GST** | **270,160.36** | |

285 As seen in this invoice, on 8 July 2019 the total value of all construction work for Stage 12, being the original contract sum and all approved variations, was $4,766,750.10 (GST inclusive). This sum represented an increase of $48,803.68 on the value of completed works (GST inclusive) as shown in the 31 May 2019 invoice. The 8 July 2019 invoice records that, with the amount claimed in that invoice, 100 per cent of the value of construction work had been billed and no more billing was anticipated to 'contract completion'. No further construction works were undertaken after 8 July 2019. According to the face of the invoice, the payment of the $48,803.68 to JG King would complete payment of the full value of all construction works for which it had made a progress claim. Hunters Green paid that sum soon after the

invoice was issued.[171] Along with (and despite) payment of this amount, the invoice records that $115,948.66 (GST inclusive) was retained as security.

286 Three years later, on 19 August 2022, JG King sent Hunters Green its 'final payment claim' for Stage 12. It is that claim that is the subject of this proceeding. It was not in the form of previous invoices but took the form of a spreadsheet similar to those that had accompanied previous invoices. It is unnecessary to set out the detail of that document. It is sufficient to describe its key elements and set out a short table depicting the final figures claimed.

287 The spreadsheet was in two parts. The first part set out the items of work making up the original contract sum, showing that they were all 100 per cent complete. In total, those items added up to $4,216,313.10 (excluding GST), or $4,637,944.41 (including GST). At the foot of this table were the following three lines:

| | **GST exclusive** | **GST inclusive** |
|---|---|---|
| Total Cumulative $ exc GST | $4,216,313.10 | $4,637,944.41 |
| Less Previously Paid $ exc GST | $4,110,905.23 | $4,521,995.75 |
| Current Contract Claim $ exc GST | $105,407.87 | $115,948.66 |

288 Beneath that table was a further table that spelt out details of the variations claimed and the variation payments made. Again, all of the items were said to be 100 per cent complete. The total (GST exclusive) amount was $117,096.08, with the GST inclusive amount being $128,805.69. That is the same amount shown for variations in the 8 July 2019 invoice. After deducting previous variations paid, no claim was made for any outstanding variations.

289 Unlike the previous invoices, to arrive at the amount claimed therein, the August 2022 payment claim did not add the approved variations to the original contract sum and compare that total with the total of all previous *claims*. Instead, it compared all amounts previously *paid* (other than for variations) with the original contract sum and showed a difference of $115,948.66 (GST inclusive). Variations, recorded separately, were treated as having been fully paid. In the result, a total claim including variations was made for $115,948.66 (GST inclusive). No reference was made to a retention sum.

290 Had the August 2022 claim been set out in the same format as the 8 July 2019 invoice (and all previous invoices), it would show, in the GST inclusive column, precisely the same details as appear in the first four lines of the 8 July 2019 invoice — that is, the amounts in respect of the 'Original contract amount', 'Approved variations', 'Revised contract amount' and 'Value of Works Completed'. However, the fifth line — that is, 'Less Value of the Previous Claims' — would show the amount as $4,766,750.10

171 Reasons, [21]

because it would, of course, take into account the $48,803.68 claimed in the 8 July 2019 invoice and subsequently paid.

291 To repeat, by making its claim for $48,803.68 on 8 July 2019, JG King brought its total claim for Stage 12 to $4,766,750.10; that is, as a consequence of that invoice, JG King had claimed the entire sum for all construction works (the original contract sum plus all approved variations) that it performed for Stage 12. It also follows that, if prepared in the same way that previous invoices had been prepared, the August 2022 claim would have shown that, by that date, the entire sum claimable for construction works for Stage 12 had previously been claimed. The 'Amount due this Invoice' would be nil.

292 Precisely the same analysis can be performed in relation to Stage 13. The conclusion is the same.

***Did the adjudicator have jurisdiction to make an adjudication determination?***

293 As the High Court stated in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd*,[172] unless a claim answering the description of a 'payment claim' in the Act is served by a claimant upon a respondent — thereby initiating the steps for the recovery of progress payments set out in pt 3 of the Act — there can be no adjudication application and, hence, no adjudication within the jurisdiction conferred by the Act. Although these statements were made in relation to the *Building and Construction Industry Security Payment Act 1999* (NSW), they are equally applicable to the Victorian Act.

294 In *Southern Han* the debate concerned the feature of a payment claim that requires it to be tied to a 'reference date'. In the present case, the feature of a payment claim that is in question is whether the payment claims must be, and if so were, 'for construction work'. The alternative view — said to deny the claims made by JG King in August 2022 the character of being a 'payment claim' under the Act — is that the payment claims were for retention amounts and not for construction work.

*Adjudicator's decision*

295 The adjudicator held that the payment claims made by JG King in August 2022 for Stages 12 and 13 were claims 'for construction work'. The adjudicator went further and held that the Act did not permit Hunters Green to withhold retention amounts at any time during the contracts. Her conclusion is best represented in the following paragraph:

> Accordingly, I find that the payment claim was for construction work on its face in contrast [to] the payment claims of *Punton's Shoes* and *Foursquare*. I find that the wider case law is supportive of the view that amounts that may relate to retentions can be claimed in a payment claim.

172 (2016) 260 CLR 340, 356 [44], (Kiefel, Bell, Gageler, Keane and Gordon JJ); [2016] HCA 52 ('*Southern Han*').

> Furthermore, in the case of the current payment claim, I found that [Hunters Green] was not entitled to withhold retentions under the Act at any time during the contract. In the absence of express provisions in the Act, I am not satisfied that an uncertain basis of withholding can apply to invalidate the payment claim. In the absence of any other submissions to the contrary from [Hunters Green], I conclude that the content of the payment claim was valid.

*Judge's decision*

296 The judge recorded the parties' agreement in submissions made before him that,

> upon a proper construction of the Act, a claim for a progress payment must be in relation to 'construction work' or 'related goods and services', within the meaning of the Act, to constitute a 'payment claim' for the purposes of s 14(1) of the Act'.[173]

297 The judge agreed with the parties' analysis because, as he put it, amongst other things 'a payment claim under the Act must identify the construction work or related goods and services to which the progress payment relates'.[174] The judge referred specifically to s 14(2)(c).

298 In substance, Hunters Green submitted that the two payment claims made in August 2022 were not for construction work but, instead, were for the return of retention monies which had lost their character as monies due for construction work. JG King argued that the money the subject of the payment claims had never lost the character of being monies due for construction work. These essential arguments were advanced by each party in numerous different ways.

299 For the purpose of the jurisdiction argument, the judge upheld JG King's arguments and concluded that the payment claims were 'for "construction work" within the meaning of the Act'.[175] The judge analysed arguments put to him about how previous authorities resolved whether the Act's mechanisms accommodated a claim for the return of retention money. JG King submitted that the preponderance of authority recognised that a payment claim under the Act could be made in respect of retention money. It submitted that it was of no consequence that, unlike Acts in other States and Territories,[176] the Victorian Act did not expressly state that a payment claim may include a claim for money held by a respondent for security. Hunters Green disagreed with JG King's analysis of the authorities. As a means of distinguishing decisions in

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173 Reasons, [92]. It is important to note that the argument before the judge took place, and the judge's decision was given, before the decision in *EnerMech* referred to below at [304].

174 Ibid, [92].

175 Ibid, [135].

176 Referring to: *Building and Construction Industry Security of Payment Act 1999* (NSW), s 13(3)(b); *Building Industry Fairness (Security of Payment) Act 2017* (QLD), s 68(2)(b); *Building and Construction Industry (Security of Payment) Act 2009* (ACT), s 15(3)(b); *Building and Construction Industry Security of Payment Act 2009* (TAS), s 17(3)(b); *Building and Construction Industry Security of Payment Act 2009* (SA), s 13(3)(b).

other States, it placed weight on the specific provisions in the legislation of those other States that enabled claims to be made for security money.

300 The judge acknowledged that the strongest authorities in favour of Hunters Green were the decisions of Digby J in *Punton's Shoes Pty Ltd v Citi-con (Vic) Pty Ltd*[177] and *Watpac Construction Pty Ltd v Collins & Graham Mechanical Pty Ltd*.[178] In *Punton's Shoes*, Digby J expressed the view that monies progressively deducted from payments for construction work to be held as security 'formed a separate and distinct security fund to ensure performance by the Contractor'.[179] Further, Digby J said that:

> any implied right or entitlement there may be in the Contractor to return of a portion of retention monies is different in character and distinct from either a claim under the Contract for the value of work carried out or an entitlement under the [Act] for the value of construction work carried out and related goods and services.[180]

301 The judge disagreed with Digby J's analysis. In his reasons, the judge in this case made various findings about the relationship between amounts due for construction work and the retention money. They may be summarised as follows:

- The payment claims in the present case are claims for unpaid amounts for the construction work retained by Hunters Green as security in the form of retention monies under the Contracts;[181]
- Hunters Green did not pay JG King the full amount for the construction work because amounts were deducted for retention monies;[182]
- The deduction for retention money cannot be analysed as a set-off of mutual liabilities such that Hunters Green can be treated as having paid for the construction work and received back from JG King money to be retained for security;[183]
- Therefore, the payment claims were not made 'solely to recover retention moneys';[184]
- There is a 'direct and obvious relationship' between the unpaid amounts for the construction work and the amounts held by Hunters Green as security in the form of retention monies;[185] and
- The payment claims claim 100 per cent of the construction contract sum less amounts paid.[186]

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177 [2020] VSC 514 ('*Punton's Shoes*').
178 [2020] VSC 637 ('*Watpac*').
179 *Punton's Shoes* [2020] VSC 514, [110] (Digby J).
180 Ibid.
181 Reasons, [82].
182 Ibid [83].
183 Ibid.
184 Ibid [84].
185 Ibid [86].
186 Ibid [88].

302 Having regard to these findings, his Honour reached his conclusion in favour of JG King's position, saying:

> I refer earlier in this judgment to the separate and distinct nature of the retention moneys as security. The Contracts make provision for the release and return of the final 50% of the retention moneys within 14 days of the issue of a final certificate upon a final payment claim under clause 37.4 of the Contracts. JG King had no contractual entitlement to the retention money as part of its entitlement to a final payment under clause 37.4 of the Contracts. I do not accept, however, … Hunters Green's submission that JG King's entitlement to receive the retention moneys is not an entitlement under the Act to receive payment for the value of construction work. This is because, as I have already said, there is a direct and obvious relationship between the unpaid amounts for the construction work and the amounts held by Hunters Green as security in the form of retention moneys under the Contracts.
>
> …
>
> In *Punton's Shoes* and *Watpac*, Digby J expressed a contrary view. For the reasons I have just given, I do not agree, with respect, with Digby J on this matter.[187]

303 For these reasons, the judge concluded that, for the purpose of analysing the jurisdiction of the adjudicator, the payment claims *were* for construction work within the meaning of the Act and thereby engaged the adjudication process under it. In short, he rejected the argument that the adjudicator had no jurisdiction to make an adjudication determination in relation to these payment claims.

*Submissions on appeal*

304 Between the date the judge delivered his Reasons and the hearing of the appeal, the New South Wales Court of Appeal delivered its decision in *EnerMech Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* ('*EnerMech*').[188] *EnerMech* is particularly relevant to the question of the jurisdiction of an adjudicator under the New South Wales equivalent of the Act. Each party's written submission was filed prior to the *EnerMech* decision, so it was addressed on oral submissions.

305 In its written submission, Hunters Green placed strong reliance on the provision in clause 5 of the contract for the payment of, recourse to, reduction and release of any security provided under the terms of the contract. According to Hunters Green:

(a) A contractor's entitlement to the 'release' of retention money is distinct from and not to be conflated with the contractor's entitlement to payment for construction work — they are different entitlements of a different character;

(b) The setting off of amounts due to the principal for retention money from payments due for construction work is the legal equivalent of each party paying

187 Ibid [134].
188 [2024] NSWCA 162.

its respective liability to the other (meaning that, in effect, with the payment of each progress payment with the deduction of retention monies for security, the principal is to be taken to have paid the entirety of the amount claimed for construction work at that point);

(c) Contrary to the view that treating a claim for retention monies as a claim for money for construction work will enhance cash flow to contractors, and thereby facilitate the purpose of the Act, instead, that analysis will mean that, in future, principals will insist upon payment of security up front by either cash deposits or bank guarantees. This outcome will be detrimental to contractors' cash flow.

306 In oral submissions, Hunters Green urged this Court to be wary about embracing the *EnerMech* decision due to what it submitted were differences between the Act and the equivalent New South Wales Act. As will be seen, the New South Wales Court of Appeal eschewed considering whether a payment claim was made 'for construction work' in deciding whether the claim conferred jurisdiction upon an adjudicator to make a determination. Instead, the Court focused on whether the payment claim was made 'under a construction contract'. Hunters Green continued to submit that this Court should analyse whether the payment claim is 'for construction work' and, finding that it is not, hold that the adjudicator lacked jurisdiction. In any event, it submitted that the judge was permitted to review the adjudicator's decision, even if jurisdiction had been validly conferred, and the judge's decision setting aside the adjudication determination should be upheld by rejecting grounds 1, 2 and 3.

307 It is convenient to turn directly to JG King's oral submissions made in reliance upon *EnerMech*.

308 *EnerMech* concerned a payment claim brought by the contractor for a progress payment of a little over $10 million. The principal disputed the claim by serving a payment schedule. An adjudicator gave a determination in favour of the contractor. A judge of the New South Wales Supreme Court quashed the determination on the basis that the claim was not a claim for payment on account of construction work or for related goods and services. Instead, it was, in substance, a claim for a credit of $9,230,157.40 in relation to amounts obtained by the principal by having recourse to security provided by the contractor under the contract.

309 The Court of Appeal allowed the contractor's appeal, and restored the adjudicator's determination. The Court did not find anything in the New South Wales Act that required a payment claim to be made 'for construction work'. Rather, it held that the two critical elements are that there be a 'construction contract' and that there be consideration or amounts payable under it. If those elements exist, the payment claim is amenable to the jurisdiction of the adjudicator. 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. The determination of these matters, the Court held, were not 'preconditions to the validity of a claim'.[189]

310 Moreover, the Court found that the reasoning of the adjudicator in upholding the contractor's claim on the basis that the claim was 'for construction work' was a matter for the adjudicator and not to be reviewed by the Court, even if legally erroneous.[190] That understanding was largely, if not wholly, driven by the Court's conclusion concerning the equivalent of s 28R(5) of the Act in a proceeding to enforce an adjudicator's certificate. In the present case, as noted, the parties agree that s 28R does not apply because no proceeding has been taken to enforce the adjudicator's certificate. For that reason, no argument is advanced by JG King that the Court is prevented from reviewing any error made by the adjudicator within jurisdiction (that is, for non-jurisdictional error).

311 JG King relied on *EnerMech* to submit that, here, its claim was plainly made 'under' the construction contracts. The payment claims set out the value of the construction works completed and the amount paid to date, and claimed the difference. For that reason, it submitted that the adjudicator had jurisdiction and, on this basis alone, the notice of contention must fail.

312 JG King continued to rely also on its written submissions to address the alternative argument that, to have validity, the claim must be 'for construction works'. It attacked the proposition that monies held on retention in some way lose their character as money payable for construction works. In the end, JG King argued that it does not really matter if the payment claims are construed as claims for the return of sums retained for retention or as 'balancing claims' at the final wash-up of the contract. Either way, it submitted, they are claims for payment for construction work. It submitted that the contract sum stipulated in the contract does not change or get reduced by the parties' agreement that the principal can retain a proportion of the money for construction work as a form of security.

313 JG King's line of reasoning (deployed both for the jurisdiction argument and on ground 2) was this: retention money is a form of security that temporarily delays payment otherwise due to the contractor. The money retained is 'already earned, though not yet payable'.[191] It remains the contractor's money and 'part of the purchase price'. In this light, JG King submitted, a claim for retention money is a claim seeking payment for construction work or related goods and services already performed but not yet paid for.

314 Although other States and Territories have specific provisions that expressly incorporate claims for the return of monies held for security into the concept of payment claims, JG King submitted that this was simply to clarify any ambiguity. Those provisions did not enlarge the scope of permissible claims that were covered by

189 *EnerMech* [2024] NSWCA 162, [59], [61]–[62] (Basten AJA, Meagher JA agreeing at [1], Griffiths AJA agreeing at [90]).

190 Ibid [79]–[82].

191 Referring to *Re Tout and Finch Ltd* [1954] 1 WLR 178, 187 (Wynn-Parry J).

the Act in any event. JG King criticised Hunters Green's analysis of set off, insisting, instead, that the retention was merely a temporary withholding of payment otherwise earned for the construction work.

*Consideration*

315 In my view, although with some hesitation, I think that this Court should follow the decision in *EnerMech* and hold that the adjudicator had jurisdiction to make an adjudication determination. That is because the 19 August 2022 payment claims were claims for amounts of money claimed to be due 'under' the construction contracts. Even if it may be correct to say that the amounts claimed were not amounts 'for construction work' — as I think is the case, for the reasons set out below in respect of ground 2 — such a finding does not deny jurisdiction to the adjudicator so long as the other two elements just mentioned are present. The gateway to jurisdiction as determined in *EnerMech* is relatively broad.

316 I reach this conclusion with some hesitation, because the Court in New South Wales appeared to consider it relevant to its construction of the New South Wales Act that that Act expressly recognised a claim for the release of security as the legitimate subject of a statutory payment claim.[192] This is not the case in the Victorian Act. Without that kind of provision, I think there is a respectable argument that, to be a valid payment claim under the Act, the claim must be for an amount for construction works or related goods and services. Nevertheless, the balance of the reasoning of the New South Wales Court would otherwise apply to the construction of the Act, and I am not persuaded that it is 'plainly wrong'[193] or distinguishable.

317 I would therefore reject Hunters Green's argument insofar as it seeks to impose a condition that a payment claim must claim money 'for construction works' in order to found the jurisdiction of the adjudicator. In doing so, however, I do not reject its argument — particularly germane to ground 2 — that JG King's entitlement to be paid progress payments, including a final payment, must relate to an entitlement to payment for carrying out construction work or supplying related goods and services under the contract. That therefore brings me to JG King's grounds of appeal.

***Did the proper construction of cls 5.4 and 37.4 require that the final certificate withheld the balance of retention monies?***

318 As already stated, I agree with Kennedy JA that ground 1 should be rejected. That is, I agree that the amount of any progress payment to which JG King was entitled in respect of the construction contracts could be valued in accordance with the terms of those contracts. That means that the adjudicator was bound to value the entitlement to a progress payment under the 19 August 2022 payment claims in accordance with the terms of the contracts and not in accordance with the method set out in s 11(1)(b) of

192 *EnerMech* [2024] NSWCA 162, [20] (Basten AJA).

193 *Farrah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); [2007] HCA 22.

the Act. That has the effect that the adjudicator was bound to take into account the contractual provisions relating to Hunters Green's entitlement to withhold security.

319 Therefore, the critical ground to determine in my view is ground 2. I will not repeat the arguments that have been fully summarised by Kennedy JA. It should be apparent that what I have already written so far bears upon my analysis of this ground.

320 Unlike Kennedy JA, I would reject JG King's contentions on ground 2 and uphold the judge's conclusion, largely for the reasons he expressed.

321 First, I would adopt Digby J's analysis in *Punton's Shoes* and *Watpac* that, once deducted from money payable for construction work, the retention moneys formed a discrete and separate fund that was of a different character from the money due for construction work which was its financial source.[194] A 'security' is of a different nature to a sum of money due for construction work. Of course, there is a connection between security in the form of retention moneys and the money earned by construction work, because it was by performing construction work and becoming entitled to payment for it that the contractor had the means of financing the provision of security.

322 It does not matter whether the money was 'deducted' or, in the language of cl 37.2, 'set off' from the payments due on account of the construction work completed. By agreement between the parties, instead of the principal paying over the full amount for construction work and, simultaneously, the contractor paying over an amount of money to the principal on account of security, the same result was achieved by a deduction being made from the first payment. Nor does it matter, in my view, that the money was not placed in some discrete fund, but only represented as additional cash available to the principal compared to what it would have held if the amount was not retained.[195]

323 That mechanism should not obscure the true nature and effect of what was achieved by the retention of the money. A security could take a number of forms. Obviously, the form most advantageous to a contractor from a cash-flow perspective is the one that permits the contractor to finance the security over the life of the contract by the accumulation of small amounts of money deducted from earnings. But whether the security is provided up-front by cash, a deposit in a bank account or a bank guarantee, or progressively by retention moneys, it has the same character. It is a financial resource against which the principal can have recourse, in the event that the contractor becomes liable to the principal, to satisfy that liability. To insist that, for the contractor's cash-flow benefit, the contractor is entitled to the statutory remedy to recover the security back as if it was due for construction work, is to overlook the nature of the retention money and the cash-flow benefit that by its nature it confers.

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194 See *Punton's Shoes* [2020] VSC 514, [109]–[113] (Digby J), extracted by Kennedy JA at [162] above.

195 For present purposes, it is unnecessary to decide what interests, legal or equitable, each party held in that fund during the currency of the contracts.

324 Pursuant to clauses 5.4 and 37.4 of the contracts, Hunters Green's entitlement to the retention money by way of security would cease 14 days after issue of the final certificate. Hunters Green would immediately become bound to release and return the balance of the security to JG King. But the amount to be returned to JG King is the 'release' of a 'security'; it is not a payment for construction work. The money ceased to have the character of money for construction work. JG King had already claimed and been paid for all of the construction work against which retention monies were deducted and, being so deducted, that money in the hands of Hunters Green assumed the character of a security. The contract fully dealt with the mechanism for any recourse to and release of that security, as security money. It did not purport to deal with the recourse to or release of that money as money for construction work.

325 JG King's argument that the retention money reflects monies 'earned but not yet payable' may be accepted. So too may Hunters Green's argument that the unreleased security remains, from JG King's point of view, a 'yet to be crystallised chose in action' for the release of the security pending and subject to the determination of Hunters Green's entitlement to have recourse to that security. Both characterisations are, in substance, the same thing. But, as at 19 August 2022, the retention monies remained intact as a security and were not 'payable' to JG King, nor had its chose in action for the release of that money (or the unused balance thereof) crystallised so as to be actionable.

326 Subject to the Act, the adjudicator was bound to consider the construction contracts from which the adjudication applications arose.[196] The contracts establish a distinct mechanism for dealing with security money, on the one hand, and money due for construction work (or related goods and services), on the other. In my opinion, the adjudicator was bound to apply cls 5.4 and 37.4 of the contracts. One outcome of applying those clauses to the payment claim was for the adjudicator to:

(a) determine that there was nil owing for construction work;

(b) determine the amount (if any) for which Hunters Green had any entitlement to have recourse to the security;

(c) determine that the final certificate must reflect that the balance of retention money in respect of each contract be withheld for 14 days after the date of the final certificate; and

(d) otherwise allow cls 5.4 and 37.4 to operate according to their terms.

327 In any event, the adjudicator was in error in treating the payment claims as claims for construction work then due and payable. I reject the submission made by JG King that the effect of Hunters Green's argument is that the most it could claim, and the superintendent's final certificate would always provide for, only 97.5 per cent of the contract sum. As I have endeavoured to show, as at 8 July 2019, JG King had claimed every cent for which it was entitled on account of carrying out construction work.

196 The Act, s 23(2)(b).

With Hunters Green's payment of $48,803.68 soon after 8 July 2019, and accounting for JG King's obligation to provide security by way of retention, JG King had been paid in full the money to which it was entitled on account of carrying out construction work. The adjudicator ought instead to have given full effect to the contractual provisions relating to the release of security.

328 The amounts determined by the adjudicator as being due and payable to JG King under the adjudication determination were not, in fact, then due and payable to JG King. The balance of security, in the form of the retained money, was not payable pursuant to an adjudication determination under the Act, but only by operation of cls 5.4 and 37.4 of the contract. If the adjudicator had jurisdiction to make an adjudication determination, she should at least have determined that the balance of retention monies was only due and payable to JG King 14 days after the issue of a final certificate. It was not payable immediately.

329 To the extent that there is any room to construe the terms of the draft release as being in conflict with cls 5.4 and 37.4 — which may be doubted — in my view the construction of the draft release must yield to the terms of the contract, not the other way round. Neither the accord and satisfaction provided in cl 37.4 nor the release can be construed as discharging the principal from its obligation to release the security (or balance thereof) 14 days after the date of the final certificate.

330 There is no merit in JG King's argument, put by way of reply in its oral submissions, that there is only a 'very small prejudice' to Hunters Green if it loses the benefit of that 14-day period for retaining the security. This is hardly a case for complaining about finely balanced periods of time. This case has been fought on a point of principle for reasons that have not been explained to the Court but, that being the case, it is to be decided on a point of principle and not pragmatism. In principle, the retained monies were not to be released until 14 days after the final certificate. The adjudicator was wrong to decide otherwise. In my opinion ground 2 must fail.

***Do cls 5.4 and 37.4 offend s 48(1) of the Act?***

331 That brings me to ground 3.

332 As must be apparent from what I have already said, in my view the concept of retention monies as a form of security survives the legislation. Unlike cognate legislation in other states and territories, the Act does not expressly include among the amounts that may be the subject of a payment claim amounts held under a construction contract by a principal, as security or otherwise, that a claimant claims is due for release.

333 In my view, on its proper construction, the Act does not confer an entitlement on a contractor to immediately claim back money deducted to be retained as security each time a progress claim is made as money due 'for construction work'. Interestingly, JG King did not argue that the Act had that effect. It accepted that the principal may retain that money because that is what the parties had agreed in the contracts. That is so. Equally, once all construction work has been completed and a final payment claim is made, a determination must be made for the amount due for construction work that

does not impinge upon the principal's entitlement to retain the security until such time as the contract says it must be released. Because that is also what the parties agreed in the contracts.

334 In other words, in the same way that retention monies may be deducted against each progress claim throughout the duration of the contract to be held as security, those accumulated monies remain outside of the scope of the contractor's entitlement to be paid for construction work at the point of the final payment claim.

335 JG King sought to differentiate the position at the point of a final payment claim by characterising the process then applicable as the working out of a 'balancing claim' — that is, working out the value of work done, taking into account appropriate adjustments and the amount already paid, and declaring the balance owed. It did not satisfactorily explain why the contractual provisions applicable to security, and the parties' respective entitlements to it, did not continue to apply at the final payment stage just as they had throughout the duration of the contract.

336 Even though it did not accept this proposition, the logical extension of JG King's argument is that the Act would cause the provision of security by way of retention money to be ineffective. As acknowledged by Bond J in *SHA Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd*,[197] and in the present case by the adjudicator, at every progress payment stage the Act would require the principal to pay the contractor for the full value of the completed construction work without any deduction for retention.

337 Section 47(1) of the Act provides that, subject to s 48, nothing in pt 3 of the Act affects the right that any party to a construction contract may have under the contract. Section 48(1) applies the provisions of the Act despite any provision to the contrary in any contract and sub-s (2) voids any contractual provision that purports to exclude, modify or restricts the operation of the Act, or has that effect.

338 There is no provision of these construction contracts, relating to security, that purports to exclude, modify or restrict the operation of the Act in permitting contractors to make and be paid for progress claims, whether throughout the works or at the final payment claim stage. Further, there is nothing about the contracts' provisions for security which contradicts or works against the purposes of the Act. Under the construction contracts the principal was entitled to maintain the security until 14 days after issue of a final certificate. As JG King seems to recognise, deductions were legitimately made against progress payments throughout the duration of the works under contract because that is what the parties had agreed would happen. Nothing changed at the point of final payment. The parties agreed that the security be retained until 14 days after final certificate. There is nothing inimical to the operation of the Act in permitting the principal to retain the benefit of that security through to the date on which the contract said the principal was entitled to it.

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197 [2020] QSC 307, [75] (Bond J).

339 In my opinion, s 47 preserves the principal's right to security financed by the retention of money payable for construction works. At least under provisions of the contracts the subject of this proceeding, s 47 also preserves the principal's right to hold that security until the terms of the contracts require that it be released.

340 For these reasons, I would reject ground 3.

***Conclusion***

341 In the result, I would grant leave to appeal but dismiss the appeal.

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