IN THE SUPREME COURT OF NEW SOUTH WALES, COURT OF APPEAL

No 85250 of 2025

BETTAR HOLDINGS PTY LTD t/as Hunt Collaborative
Appellant

RWC BROOKVALE INVESTMENTS PTY LTD atf Brookvale Development Trust
Respondent

APPELLANT'S ANNOTATED WRITTEN SUBMISSIONS

A. Introduction and overview

1. The Appellant (**Hunt**) appeals orders made by the District Court (Cole DCJ) dismissing its claim to recover the statutory debt that it says the Respondent (**RWC**) became liable to pay under s 14(4) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**) and awarding costs.

2. The primary judge erroneously held that no liability to pay had arisen.

3. In so holding, her Honour erred in failing to find that a "*construction contract*" existed between the parties (grounds 1 to 4), erred in failing to find that Hunt had relevantly served a **Payment Claim** complying with s 13(2)(a) of the Act that identified the construction work to which the claim related (grounds 5 and 6) and erred in failing to find that the Payment Claim was served on RWC (ground 7). In the premises, her Honour should have held that RWC became liable to pay the amount claimed in the Payment Claim and given judgment accordingly (ground 8).

4. The primary judge also erred in the exercise of her Honour's discretion to order that costs below be assessed on an indemnity basis (ground 9). In this regard, her Honour erred in principle by treating Hunt's case as doomed to fail because it failed on her Honour's (with respect, erroneous) view of the facts and law. Whatever might be said about Hunt's case below, it was not doomed to fail in a sense relevant to the exercise of the court discretion as to the basis on which costs should be assessed. Costs should follow the event both in this Court and below.

B. Background

5. The Act is well-known to this Court.

6. It is intended to provide what the High Court has described as "*a speedy and effective means of ensuring cash flow to builders and trade subcontracts form the parties with whom they contract*".[1]

[1] *Probuild v Shade Systems* (2018) 264 CLR 1 at 18 [43] quoting *RJ Neller* [2009] 1 Qd R 390 (QCA) at 400-401 [39].

7. The way the SOP Act does that is to confer upon a person who, under a construction contract, has undertaken to carry out construction work (or supply related goods and services) a statutory right to receive progress payments.[2] Such a person who is or who claims to be entitled to such a progress payment is empowered to serve a "*payment claim*" on the person who, under the construction contract concerned, is or may be liable to make the payment.[3]

8. A person on whom a payment claim is served may reply to a payment claim by providing a "*payment schedule*" to the claimant.[4] If a respondent to a payment claim does not do that within 10 business days after the payment claim is served (or such earlier time required by the relevant construction contract), the respondent becomes liable to pay the amount claimed in the payment claim (**claimed amount**) on the due date set by the SOP Act.[5] Pursuant to s 15(2)(a)(i) of the SOP Act, such a liability may be recovered, as a debt due to the claimant, in any court of competent jurisdiction.[6]

9. It can thus be seen that the SOP Act imposes what the High Court has described as a "*brutally fast*"[7] system of deadlines.

10. While this may lead to "*potentially harsh outcome[s]*"[8], that potential harshness is tempered by the fact that outcomes under the SOP Act only have an "*interim*"[9] or "*pro tem*"[10] operation. A person who – whether deliberately or through inadvertence – has failed to provide a payment schedule in response to a payment claim within the statutory timeframe must pay the amount claimed but may recover that amount if it establishes through ordinary civil proceedings that the claimant was not entitled to the amount claimed under the relevant construction contract or otherwise at all.[11]

11. In other words, a respondent who does not serve a payment schedule on time must "*pay now*" but may nevertheless "*fight later*".[12]

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[2] *Building and Construction Industry Security of Payment Act 1999* (NSW) s 8(1).

[3] *Building and Construction Industry Security of Payment Act 1999* (NSW) s 13(1).

[4] *Building and Construction Industry Security of Payment Act 1999* (NSW) s 14(1).

[5] *Building and Construction Industry Security of Payment Act 1999* (NSW) s 14(4).

[6] *Building and Construction Industry Security of Payment Act 1999* (NSW) s 15(2)(a)(i).

[7] *Probuild v Shade Systems* (2018) 264 CLR 1 at 18 [40] quoting Aronson et al, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017) 1070 [18.200].

[8] *Karam v HCA* (2022) 13 QR 84 (QSC) at [45] citing *Civil Contractors v Galaxy Developments* (2021) 7 QR 34 (QCA).

[9] See, *Probuild v Shade Systems* (2018) 264 CLR 1 at 16 [39].

[10] See, *Style Timber Floor v Krivosudsky* (2019) 100 NSWLR 133 (NSWCA) at 139 [25].

[11] See *Building and Construction Industry Security of Payment Act 1999* (NSW) s 31.

[12] *Martinus Rail v Qube RE Services* [2025] NSWCA 49 at [8].

12. Pursuant to s 15(4)(a) of the SOP Act, a court of competent jurisdiction may not give judgment under s 15(2)(a)(i) unless it is satisfied that the defendant has become liable to pay a claimed amount as a consequence of having failed to provide a payment schedule within the time allowed by the SOP Act (ie, 10 business days or such earlier time as the parties have agreed). Thus, to succeed, a plaintiff who sues under s 15(2)(a)(i) of the SOP Act must demonstrate:

    (a) that it is a person who, under a construction contract, has undertaken to carry out construction work (or supply related goods and services);

    (b) that it served a payment claim on the person who, under the construction conduct concerned, was said to be liable to make the payment; and

    (c) that the defendant failed to provide a payment schedule to the plaintiff within the time allowed by s 14(4) of the SOP Act.

13. Such a plaintiff must also demonstrate that there is an "*unpaid portion*" of the relevant claimed amount as that is the amount that the plaintiff is entitled to recover under s 15(2)(a)(i).

14. The primary judge held that her Honour was not satisfied as to the first two elements summarised in paragraph 12 above (it was common ground below that RWC did not provide a payment schedule within 10 business days of the time that Hunt contended it had served a payment claim under the SOP Act). Specifically, her Honour held:

    (a) that her Honour was not satisfied that Hunt had proven that it had concluded a "*construction contract*";

    (b) that the claim that Hunt contended was a payment claim under the SOP Act was not such a payment claim because (according to her Honour) it did not "*patent[ly]*" "*identify in a reasonable way the particular work in respect of which the claim [was] made*";

    (c) that that claim had not been served on RWC (as opposed to its "*development manager*").

15. Hunt challenges each of those essential holdings. In each case, that challenge is advanced on more than one alternative basis. In the result, to succeed on its appeal against the primary judge's order dismissing its claim under s 15(2)(a)(i) of the SOP Act, Hunt must establish one of grounds 1 to 4 (construction contract), one of grounds 5 and 6 (payment claim) and one or other of the alternative contentions concerning forming part of ground 7 (service). The brackets of grounds just summarised are dealt with seriatim below (Parts C to E respectively) followed by a brief section dealing with the consequences of error relevantly being found in relation to the primary judge's principal holdings (Part F) and a further section concerning Hunt's separate challenge to the primary judge's costs order (Part G).

C. Grounds 1 to 4: The primary judge should have held that a "*construction contract*" had been concluded between Hunt and Respondent

Introduction to grounds 1 to 4

16. The SOP Act defines the concept of a "*construction contract*" broadly.

17. Specifically, a construction contract is defined by s 4 of the SOP Act to mean:

> 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.

18. Hunt contends that the correct conclusion to be drawn from the facts proven below is that the parties concluded a contract sometimes referred to as falling within the fourth class of case additional to the three mentioned in *Masters v Cameron* (1954) 91 CLR 353 – an immediately binding contract made in contemplation of a further contract being entered into in substitution for the first contract containing, by consent, additional terms (ground 1).

19. There are other routes to the same result:

    (a) conventional estoppel: that the parties proceeded upon a common assumption as to their legal relationship the consequence of which is that RWC is estopped from denying the existence of a "*contract or other arrangement*" between it and Hunt (ground 2);

    (b) promissory estoppel: that RWC is estopped from denying the existence of a "*contract or other arrangement*" by reason of a promissory estoppel of the kind held to exist in *Walton Stores v Maher* (1988) 164 CLR 387 (ground 3);

    (c) "*other arrangement*": the parties concluded an "*other arrangement*" falling within the scope of that phrase in s 4 of the SOP Act (ground 4).

20. Those alternative routes would only arise for consideration if this Court were to dismiss ground 1 of the appeal.

Ground 1: The primary judge should have held that a contract was concluded

21. In *Baulkham Hills Private Hospital v G R Securities* (1986) 40 NSWLR 622 at 628, McLelland J said the following:

> There is in reality a fourth class of case additional to the three mentioned in *Masters v Cameron*, as recognised by Knox CJ, Rich J and Dixon J, in ***Sinclair, Scott & Co*** *v Naughton* (1929) 43 CLR 310 at 317 namely, "…one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms.

22. Hunt contends that it concluded a contact of that kind with RWC by about 27 October 2023 and that the primary judge erred in failing to hold otherwise.

23. In essence, the parties concluded what is sometimes referred to as an "*early works contract*" in contemplation that that contract would be in due course be substituted with a broader and more formal contract.

24. The most important piece of evidence in this regard is an email sent by Mr James Webb, a "*Senior Development Manager*" of "*Hannas*" to Mr Nicholas Bettar (the General Manager of Hunt) at 2:47pm on 27 October 2023 (copied to Mr Danny Hanna and Mr Steven Ogden both of "*Hannas*").[13] That email (**the 2:47pm Email**) relevantly read as follows:

> Hi Nick,
>
> Thanks for the chat earlier, as discussed it is Hannas [sic] intention to send Hunt Co. a letter of intent early next week which includes the commercial agreement between both parties and a draft contract to be used under the CM [contract management] agreement.
>
> Hannas agree to the commercial conditions noted in your attached letter of offer. It is Hannas [sic] intention, once a draft CM contract is agreed between both parties, to execute a contract between Hannas and Hunt Co. for the Brookvale project.
>
> I will also speak with E-Lab and EI on the fee for the structural and fire engineer with the intention of having them engaged by Monday 30th October.
>
> I believe the above should provide enough assurance for you to discuss the project with you [sic] team and push forward.
>
> Have a good weekend. [emphasis added]

25. Two features of that email are worthy of particular note.

26. First, by its second paragraph, the email positively indicates "*agree[ment]*" to the "*commercial conditions*" noted in a "*letter of offer*" sent to Mr Webb by Mr Bettar earlier that day (11:43am) (**Letter of Offer**).[14] The Letter of Offer referred to many "*meetings*" and "*discussions*" as well as to a phone call earlier that morning and set out what Mr Bettar said was his understanding of "*fundamentals*" that had been "*agreed*". The covering email to the Letter of Offer[15] sought a "*letter of intent*" or "*written confirmation*" the same day so that Mr Bettar could "*gear up correctly for Monday start*".

27. The second feature of the 2:47pm Email worthy of particular note is the text of the penultimate paragraph. In that paragraph, Mr Webb indicated that he believed that his email should provide enough "*assurance*" for Mr Bettar to "*push forward*". In context, the "*assurance*" that Mr Webb was offering is reasonably to be understood as conveying a promise that Mr Bettar's company, Hunt, would be paid in accordance with the agreed

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[13] Plaintiff's Court Book (**CB**) below at 285-286 (1 Blue 104I-105D).

[14] CB 283-284 (1 Blue 100L-101O).

[15] CB 281 (1 Blue 98L).

"*commercial conditions*" and could therefore safely "*push forward*" with the "*project*" (that is, Hunt acting as a construction manager in relation to a **Project** in Brookvale).

28. While it is true that the 2:47pm Email contemplated that further steps would be taken including the provision of something called a "*letter of intent*", that does not mean that no contract was concluded on 27 October 2023. Objectively considered, the 2:47pm Email communicated an agreement immediately to be bound by an obligation to pay Hunt for its work on the Project in accordance with the "*agree[d]*" "*commercial conditions*" albeit in circumstances where both parties expected that a more formal contractual documentation would be executed in due course.

29. That understanding of the communications culminating in the 2:47pm Email is consistent with what occurred in the weeks immediately following. [16] As the primary judge found:[17]

> It is clear from the evidence … that Hannas knew that Hunt was working on the Brookvale project and performing the kind of tasks a construction manager performs, such as engaging subcontractors. Officers of Hannas requested officers of Hunt to undertake various tasks.

30. For example:

    (a) on 31 October 2023, Mr Webb gave "*approval*" to commence with "*EI for Structural Design and E-Lab for Fire Services*" in response to a detailed advice given by Mr Bettar the previous day as to whether those consultants should be engaged;[18]

    (b) on 8 November 2023, Mr Webb advised Mr Bettar by email that there was "*nothing stopping [his] team progressing the design*" for the Project;[19]

    (c) several design meetings occurred in November 2023 at which Mr Bettar, Mr Webb and others were in attendance at which Hunt was allocated various tasks;[20]

    (d) on 11 December 2023, Mr Hanna invited Mr Bettar to submit a claim "*to cover [Hunt's] reasonable costs*".[21]

31. This evidence supports a conclusion that a contract had been concluded by 27 October 2023.

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[16] Post-contractual conduct is admissible as to whether a contract was formed: see, eg, *Brambles v Bathurst CC* (2001) 53 NSWLR 153 at 163-164 [25] citing, inter alia, *Howard Smith v Varawa* (1907) 5 CLR 68 at 77.

[17] *Bettar Holdings v RWC Brookvale* [2025] NSWDC 11 (**J**) at [67] (Red 34K-N).

[18] CB 290-291 (1 Blue 11-112B; 1 Blue 109-110).

[19] CB 480 (1 Blue 171K-L).

[20] See CB 959ff, items 3.2.3, 4.1.3, 4.2.1, 4.2.6 and 4.2.7 (2 Blue 613U-615J); CB 973, items 5.3.5, 5.3.8, 5.3.9, 7.2.1 and 8.2.1 (2 Blue 642T-643V)..

[21] Affidavit of Danny Hanna sworn 22 July 2024 at [22] (CB 64) (1 Blue 30I-J).

32. A plausible alternative characterisation of the communications between the parties is difficult to articulate. RWC's case seems to be Hunt was performing voluntary work for it for several weeks in the forlorn hope of eventually concluding a contract with it. That is not realistic objective assessment of what occurred.

33. By the 2:47pm Email and by his and his "*Hannas*" colleagues other conduct, Mr Webb conducted himself in such a way as permitted Hunt (and, more important, a reasonable person in the position of Hunt) reasonably to infer the existence of a contract.[22] It follows that a contract relevantly came into existence by about 27 October 2023.

34. The primary judge did not agree.

35. After referring to the evidence summarised above and certain other evidence including that concerned with negotiations of the terms of written contractual documentation, the primary judge said the following:[23]

> The formation of a contract requires "the existence of agreement (consensus on terms)" (see JW Carter *Contract Law in Australia* 8th Edition 2023 at [3-01]. It is clear from the events set out above that agreement did not transpire between Hannas and Hunt. Some terms of a potential future contract were agreed, but negotiations were always subject to a comprehensive agreement being arrived at and recorded in a written and executed contract. This has never occurred. A complete set of agreed terms was never arrived at between Hannas and Hunt.

36. The point that the primary judge was making by the last three paragraphs of the passage just quoted are correct but that does not mean that it is "*clear*" (or correct) that agreement did not "*transpire*". While it is tolerably clear that, on 27 October 2023, it was intended by both parties that a written contract would be executed, that does not mean that the "*assurance*" given by 2:47pm Email was meaningless in law. Rather, the question is whether the "*agree[ment]*" communicated by Mr Webb's email (objectively considered) constituted an assent immediately to be bound by the "*commercial conditions*" that had been agreed or whether the intention of the parties objectively considered was not to make a concluded bargain at all, unless and until they executed a formal contract.

37. The former is the correct characterisation of what occurred. The 2:47pm Email did not just communicate an "*agree[ment]*". It provided an "*assurance*". The use of the word "*assurance*" is inconsistent with reading of the 2:47pm Email as communicating only a tentative non-binding "*agreement*" as to particular terms subject to later negotiation.

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[22] See, eg, *Cornish v Abington* (1859) 4 H&N 549 at 556; 157 ER 956 at 959 per Pollock CB.

[23] J at [64] (Red 33B-J). The primary judge makes a similar point at [71] (Red 35M-V).

38. Objectively considered, Hunt was being "*assur[ed]*" that if it started work on the following Monday as it proposed (and did) it would be paid. A contract thereby came into existence. The primary judge erred in failing to so hold.

39. Although it is not entirely clear from the primary judge's reasons, Hunt appears to have lost below on the "*construction contract*" question for another reason – the primary judge appears not to have been satisfied that any contract that relevantly existed was entered into with RWC. In this regard, the primary judge observed (at [64]) that:

> The only relevant negotiation of a contract occurred between officers/employees of Hunt and officers/employees of Hanna. There has been no suggestion that there was any attempt to negotiate a contract directly with RWC.

40. That may be so but is not to the point.

41. RWC's only witness below was Mr Hanna.[24] Mr Hanna deposed that he is the Chief Executive Officer of the development manager authorised by RWC to manage the Project on RWC's behalf, **Hannas Contracting Services** Pty Ltd.[25] He also swore an affidavit verifying RWC's defence below in which he deposed that he was authorised to make that affidavit on behalf of RWC.[26] His evidence below confirmed that he specifically invited Hunt to make the Payment Claim that Hunt ultimately made[27] and RWC's defence implicitly conceded that Mr Hanna was authorised to receive Payment Claims on behalf of RWC.[28]

42. In light of that evidence, applying the approach to the weighing of evidence usually associated with *Blatch v Archer* (1774) 1 Cowp 64; 98 ER 969 and in the absence of any evidence being advanced by RWC as to any limits on, or absence of, authority on the part of Hannas Contracting Services to enter into contracts on behalf of RWC as part of its management function, the primary judge should have concluded that Hannas Contracting was authorised by RWC to conclude contracts on its behalf in connection with the Project including a contract with Hunt on or about 27 October 2023.

43. Such a finding would not be outside of the pleadings (cf J at [70]). Hunt's pleadings pleaded the critical communications including the 2:47pm Email and made clear its case was Messrs Webb, Hanna and Ogden were representatives of "*the Defendant*" (ie, RWC).[29]

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[24] See T18.3-6 (Black 49C-E). The other affidavits referred in J [4] (Red 20F-I) were served but not read.

[25] CB 61 (1 Blue 27G-I).

[26] CB 16 *Red 16K).

[27] Affidavit of Danny Hanna sworn 22 July 2024 at [22] (CB 64) (1 Blue 30I-J).

[28] Amended Defence filed 14 June 2024 at [8B] (Red 14K-L), conceding that the Payment Claim was received on 15 January 2025: the day that Mr Hanna said that the Payment Claim came to his actual notice.

[29] See, in particular, Amended Statement of Claim filed 29 May 2024 at [7] (Red 4M-P).

<u>Ground 2:</u> In the alternative, the Court should find that the primary judge erred in failing to find that RWC was estopped from denying that a contract had relevantly been concluded by reason of a conventional estoppel

44. An alternative route to the same conclusion is to hold that RWC is estopped from denying the existence of a contract by reason of the doctrine of conventional estoppel.

45. Such an estoppel may arise where parties have adopted a conventional basis for their transaction whether or not that it consistent with the true state of affairs.[30]

46. As this Court explained in *Ryledar v Euphoric* (2007) 69 NSWLR 603[31], it is necessary to establish the following matters in order to found a conventional estoppel:

> (a) the plaintiff has adopted an assumption as to the terms of its legal relationship with the defendant;
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> (b) the defendant has adopted the same assumption;
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> (c) both parties have conducted their relationship on the basis of that mutual assumption;
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> (d) each party knew or intended that the other act on that basis; and
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> (e) departure from the assumption will occasion detriment to the plaintiff.

47. All of those elements are satisfied in the present case.[32]

48. The first three elements and that part of the fourth element relevant to RWC are confirmed by the primary judge's finding that:[33]

> Hannas knew that Hunt was working on the Brookvale project and performing the kind of tasks a construction manager performs, such as engaging subcontractors. Officers of Hannas requested officers of Hunt to undertake various tasks.

49. From that finding it should be further found (if ground 2 is reached):

    (a) That Hunt assumed that it was a party to a contract under which it was the construction manager in relation to the Project. The Court would infer that Hunt would not have worked on the Project and "*perform[ed] the kind of tasks a construction manager performs*" unless it understood that it was the construction manager for the Project under a contract under which it would be entitled to be paid for its work (particularly in circumstances where correspondence on and before 27 October 2023 is consistent with Hunt not being prepared to perform substantive work in the absence of an assurance of a promise to pay).

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[30] See, eg, *Grundt v Great Boulder* (1937) 59 CLR 641 at 676-7.

[31] Referring to *Moratic v Gordon* (2007) Aust Contract Reports 90-255 per Brereton J.

[32] Except the last one if ground 1 is upheld. But if ground 1 is upheld, ground 2 will not be reached.

[33] J at [67] (Red 34K-N).

(b) That RWC proceeded on a like assumption. It should be inferred from the fact that officers of Hannas (the company that was authorised by RWC to manage the Project on RWC's behalf) "*requested officers of Hunt to undertake various tasks*" that it considered that it had a contractual power to make those requests.

(c) That the performance of "*the kind of tasks a construction manager performs*" including on the request of RWC amounted to the parties conducting their relationship on the basis of a mutual assumption that Hunt had a contractual duty to perform those tasks and that RWC had a contractual power to request that they be performed.

(d) That RWC knew that Hunt was acting on the basis that it was a party to a contract of the relevant kind. That inference should be drawn from the fact that (on the primary judge's findings) Hannas (and therefore RWC) knew that Hunt was "*working on the Brookvale project and performing the kind of tasks a construction manager performs*".

50. This Court should also find (if ground 2 is reached) that:

(a) Hunt intended that RWC act on the basis that there was a contract of a relevant kind between the RWC and Hunt. That finding should be made as a corollary of the proposed findings that Hunt assumed that it was a party to a contract with RWC and that it performed work on an assumption that, if it did so, it would be entitled to be paid.

(b) That departure from the common assumption would occasion detriment to Hunt. Specifically, it would defeat the claim made below in the absence of this Court being satisfied of an alternative basis for concluding that there was a "*construction contract*" between RWC and Hunt.

51. For those reasons, ground 2 should be upheld if ground 1 is not.

<u>Ground 3:</u> In the alternative, the Court should find that RWC is estopped from denying the existence of a contract or other arrangement

52. A yet further route to concluding that there was a "*construction contract*" between RWC and Hunt is through the doctrine of promissory estoppel.

53. The 2:47pm Email is properly understood as conveying with it an "*assurance*" or promise by RWC that Hunt would be paid for its work on the Project whether or not the contemplated written contract was ultimately finalised and executed. The Court should infer that that assurance was relied upon in Hunt performing the work that it subsequently performed given that it is tolerably clear from the cover email to the Letter of Offer and surrounding communications that Bettar was not prepared to start substantive work (or "*gear up*" to "*start*" work) in the absence of a promise to be paid.

54. Hunt would suffer detriment if RWC were able to resile from its assurance (promise) in that would defeat the claim made below in the absence of this Court being satisfied of an alternative basis for concluding that there was a "*construction contract*" between RWC and Hunt.

55. In those circumstances, the Court should find that RWC is estopped from denying the existence of a contract between it and Hunt applying the notion of promissory estoppel approved by Mason CJ, Wilson, Brennan and Deane JJ in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

Ground 4: In the alternative, the Court should find the existence of an "*other arrangement*"

56. The final alternative route that Hunt advances for concluding that there was relevantly a "*construction contract*" between it and RWC is a finding that there was relevantly an "*other arrangement*" within the meaning of that phrase in the definition of "*construction contract*" in s 4 of the SOP Act.

57. In *BSA v Ventia* (2022) 108 NSWLR 350 at 360 [36], a five-member bench of this Court said the following about the definition of "*construction contract*" in s 4 of the SOP Act:

> The expansive definition of construction contract, to include both a contract and some other arrangement, directs attention to the carrying out of the work, for reward, rather than the legal characteristics of the source of the obligation to carry out the work and the source of the liability of the respondent to make a payment.

58. The weight of first-instance authority supports the view that that "*expansive definition*" includes "*arrangements*" that are not legally enforceable in ordinary civil proceedings:

    (a) in *Okaroo v Vos* [2005] NSWSC 45 at [42], Nicholas J rejected a submission that the term "*arrangement*" in the definition of "*construction contract*" should be understood to mean an agreement which is "*tantamount to a contract enforceable at law*";

    (b) in ***Machkevitch*** *v Andrew Building* [2012] NSWSC 546, McDougall J concluded that the "*engagement, or agreement (not legally enforceable)*" proven in that case constituted a "*construction contract*";

    (c) in *IWD v Level Orange* [2012] NSWSC 1439 at [25], Stevenson J proceeded on the basis that that the concept of an "*arrangement*" encompasses transactions or relationships which are not legally enforceable (although found that there was "*probably*" a legally binding contract in the case before his Honour);

    (d) in *Justar v Chase* [2020] ACTSC 231 at [52], Mossop J accepted (based on the decision in *Mackevitch*) that an arrangement that falls short of an enforceable contract may be a "*construction contract*" for the purposes of the ACT equivalent of the SOP Act;

(e) in ***Crown Green Square*** *v TfNSW* [2021] NSWSC 1557 at [165], Henry J held that an "*arrangement*" for the purposes of the SOP Act "*need not be legally enforceable in the sense that it must give rise to legally binding obligations on the parties*".

59. A different view was taken by Ball J (as his Honour then was) in *Lendlease Engineering v Timecon* [2019] NSWSC 685. While his Honour accepted that that different view was not consistent with a number of first instance authorities, his Honour reasoned that, in light of s 32 of the SOP Act (which preserves parties' rights under their construction contracts), it would make:

> no sense to interpret the SOP Act as creating a right to a progress claim when the claimant has no underlying right to be paid any amount at any time by the person against who the claim is made for the work the claimant has undertaken to perform. Under s 32, any payment resulting from the adjudication of such a claim would have to be returned.

60. It is respectfully submitted that the weight of first instance authority is to be preferred to the contrary view expressed by Ball J. With respect, Ball J's approach wrongly puts a gloss on the word "*arrangement*" that is not required from the SOP Act's terms, subject matter or purpose.

61. This Court has said that the purpose of the SOP Act "*is best served by restricting the scope of intervention of the courts*".[34] That is best done adopting a more "*expansive*" interpretation of the word "*arrangement*" that does treat that word as being implicitly limited by a criterion not appearing in the statutory text.

62. On that approach, there is a reduced scope for a party dissatisfied with an adjudication determination to argue that that determination is not binding and therefore need not be complied with due to the absence of a "*construction contract*". An argument that there was no contractual or other obligation to make the payment would instead be required to be advanced and resolved through ordinary private law proceedings, as s 32 contemplates.

63. It is respectfully submitted that the correct approach to the concept of an "*arrangement*" for the purposes of the SOP Act is that proposed by Henry J in *Crown Green Square* at [170].

64. On that approach, there is a "*construction contract*" so long as there is a:

> concluded state of affairs between two or more parties involving some element of reciprocity or acceptance of mutual rights and obligations relating to payment or price for the works (which may or may not be legally binding obligations) under which one party undertakes to carry out construction work for another party to the arrangement.

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[34] *BSA v Ventia* (2022) 108 NSWLR 350 at 360 [35] quoting *Chase Oyster Bar v Hamo Industries* (2010) 78 NSWLR 393 at 407 [55] which in turn refers to *Brodyn v Davenport* (2004) 61 NSWLR 421.

65. On that basis, RWC and Hunt are parties to an "*arrangement*" and therefore a "*construction contract*" even if they are not parties to a legally binding contract or estopped from denying the existence of such a contract. The exchange between RWC and Hunt culminating in the 2:47pm Email amounted to a concluded state of affairs in which Hunt undertook to carry out construction work and RWC gave an "*assurance*" that that work would be paid for in accordance with agreed "*commercial conditions*". That is sufficient to constitute an "*arrangement*" and therefore "*construction contract*". This Court should so hold if ground 4 is reached.

D. Grounds 5 & 6: The primary judge should have held that the Payment Claim complied with s 13(2)(a)

66. Subsection 13(2) of the SOP Act relevantly provides that:

> A payment claim—
>
> (a) must identify the construction work (or related goods and services) to which the progress payment relates.

67. The primary judge held that Hunt's payment claim did not meet that basic requirement. Her Honour erred in so holding.

68. The Payment Claim[35] is in a conventional form. It identified the persons who Hunt claimed provided services for the benefit of RWC, the amount of services they were claimed to have performed (measured in days or weeks) and the daily or weekly rate Hunt claimed to be entitled to be paid.[36] That is enough to satisfy s 13(2)(a) of the SOP Act.

69. The ACT Court of Appeal recently held accordingly in relation to the Australian Capital Territory counterpart to of s 13(2)(a) of the SOP Act in *WNA Construction Pty Ltd v Canberra Building and Maintenance Pty Ltd* [2025] ACTCA 17 (decided after the primary judge's decision).

70. In that case, it was argued that a payment claim was invalid because it did not satisfy the ACT equivalent of s 13(2)(a) of the SOP Act. That argument was rejected. The Court held that, while aspects of the invoices annexed to the payment claim there considered varied in detail:

> even the most sparse of the invoices … specified the hours worked and the hourly rate for the claim. In our view, the appeal judge correctly held that the payment claim was sufficient to satisfy the minimal requirements of the *Security of Payment Act*.

71. This Court should make a similar finding and find that the primary judge erred in finding to the contrary.

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[35] CB 1165-116 (2 Blue 793-794).

[36] The Payment Claim also included a claim for profit and overheads referred to as a P&O charge.

72. Again, a guiding consideration in interpretation should be this Court's adage the purpose of the SOP Act "*is best served by restricting the scope of intervention of the courts*". [37] That consideration supports interpreting s 13(2)(a) as only imposing "*minimal requirements*" on a would-be claimants and otherwise leaving it respondents to dispute and adjudicators to determine the quality of a claimant's articulation and proof of the work, goods or services. As Hodgson JA explained in ***Nepean*** *Engineering v Total Process Services* (2005) 64 NSWLR 462 at 477 [48]:

> if a respondent is unable to identify some of the work in respect of which a payment claim is made, it can in the payment schedule say it does not propose to make any payment in respect of that work because it cannot identify the work … If an adjudicator then determined that the work was not identified in the payment claim, presumably he or she would not award any payment in respect of that work;

73. In finding to the contrary, the primary judge quoted Hodgson JA's reasons in *Nepean* at length but, with respect, appears to have misunderstood them and, in any event, misapplied the test for validity that Hodgson JA proposed. [38]

74. The primary judge identified (in a summary way at [84]) four reasons for concluding that the Payment Claim did not comply with the SOP Act in is therefore void:

    (a) that the payment claim *"patent[ly]*" failed to "*identify in a reasonable way the particular work in respect of which the claim was made*";

    (b) that "*[t]he information an adjudicator would require to make a determination under s 22 of the Act is not provided in the claim*";

    (c) that the Payment Claim did not "*identif[y]*" the "*relevant construction contract*" beyond reference to "*our various agreements and documentation between both parties*"; and

    (d) that the information provided in the Payment Claim was not "*sufficient to enable an adjudicator to determine the value of services supplied because the services have not been identified*".

75. The second and fourth of those reasons are directly inconsistent with Hodgson JA's reasons in *Nepean*. The gist of Hodgson JA's reasons (as confirmed, in particular, by the passage quoted at paragraph 72 above, which the primary judge did not refer to) was that – so long as there is no "*patent*" failure to comply with s 13(2)(a) – any inability of a putative respondent or adjudicator to understand with precision what work or services is said to have been performed or provided is not a matter going to the validity of the payment claim.

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[37] *BSA v Ventia* (2022) 108 NSWLR 350 at 360 [35] quoting *Chase Oyster Bar v Hamo Industries* (2010) 78 NSWLR 393 at 407 [55] which in turn refers to *Brodyn v Davenport* (2004) 61 NSWLR 421.

[38] The test for validity proposed by Hodgson JA has since been treated by this Court as the appliable one: see, most recently, *Manarti v Universal Property Group* [2025] NSWCA 135 at [40]-[48].

76. Rather, it is a matter that would entitle a respondent to serve a payment schedule disputing the amount claimed and entitle an adjudicator to refuse to award payment in relation to the particular work in issue.

77. As for the first reason summarised in paragraph 74 above, that reason wrongly conflates two different aspects of Hodgson JA's reasons in *Nepean*. At paragraph 36 of his Honour's reasons in that case, Hodgson JA opined that "*I do not think a payment claim can be treated as a nullity for failure to comply with s 13(2)(a) of the Act, unless the failure is patent on its face*". While his Honour went onto say that "*this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made*", that does not mean that Hodgson JA was saying that a payment claim is invalid unless it "*purports in a reasonable way to identify the particular work in respect of which the claim is made*" as the primary judge appears to have thought.

78. Rather, the ultimate question on Hodgson JA's reasons is whether there was a failure to comply with s 13(2)(a) of the SOP Act that is "*patent on its face*". There will no such failure "*merely because it can be seen, after a full investigation of all the facts and circumstances*" that the payment claim failed "*to successfully identify all the construction work for which payment is claimed*".[39]

79. The Payment Claim plainly satisfies that test as properly understood. On its face, it identified the services that were claimed to have been provided and identified the amount claimed on account of those services. On Hodgson JA's approach, it is unnecessary for a claimant to go further in order to serve a valid payment claim. If the level of detail provided proves insufficient for a respondent or adjudicator to understand the claim, those are matters to be dealt with in a payment schedule or adjudication determination. They are not matters for determination by a Court.

80. If this Court comes to a different view and considers that Hodgson JA's reasoning requires an assessment of the quality of a claimant's articulation of construction work or related goods and services as opposed to merely whether the face of a payment claim identifies construction work or related goods or services claimed to have been performed (with the quality of the articulation a matter to be, if appropriate, objected to in a payment schedule and dealt with in an adjudication determination), it is respectfully submitted that Hodgson JA's reasoning should be revisited by this Court. The extent of the obligation in s 13(2)(a) of the SOP Act is to "*identify*" the construction work or related goods and services) to which the progress payment relates. In context, that means that the claimant must "*identify*" the construction work (or related goods or services) that the claimant claims to have

[39] *Nepean Engineering v Total Process Services* (2005) 64 NSWLR 462 at 474 [34].

been performed or provided. It would be to place a gloss on the statutory language inconsistent with the approach of generally restricting the scope of intervention of the courts to require, as a condition of validity of a payment claim, the "*identif[ication]*" to satisfy any particular standard. So long as a payment claim may be characterised as "*identifying*" the "*construction work (or related goods and services) to which the progress payment relates*", it should be regarded as complying with s 13(2)(a) of the SOP Act. Any dispute about the quality of that identification is a matter to be raised in a payment schedule and dealt with by an adjudicator.

81. As for the final reason identified by the primary judge for concluding that the Payment Claim was not a valid payment claim (insufficient identification of construction contract), that reason has no foothold in the SOP Act or in any authority.

82. While payment claims may only be validly served by a party to a construction contract, nothing in the SOP Act requires a payment claim to identify with precision (or at all) the particular construction contract that entitles the claimant to make such a claim. The primary judge's approach to the contrary amounted to the imposition of an additional precondition to the validity of a payment claim that has finds no support in text, context or authority. Her Honour erred in imposing such a precondition.

83. In this way, the primary judge erred in finding that the Payment Claim was invalid for failing to comply with s 13(2)(a) of the SOP Act. Ground 5 or 6 should be upheld.

E. <u>Ground 7:</u> The primary judge should have held that the Payment Claim was served by email on 21 December 2023 or by post on 5 January 2024

84. Finally, the primary judge erred in holding (in a single paragraph of reasoning: J [89]) that the Payment Claim was not served on RWC.

85. The primary judge appears to have accepted that the Payment Claim was received by what her Honour described as "*individual recipients*" (that is, officers or employees of Hannas Contracting Services) but does not appear to have accepted that that receipt amounted to service on RWC. In other words, the basis for the primary judge's refusal to find that the Payment Claim was served appears to be, in effect, in the nature of a want of agency point.

86. The essence of that point (including the related pleading point that the primary judge refers to in her Honour's reasons) has been dealt in paragraphs 41 to 43 above. In short, it was proven on the evidence below that Hannas Contracting Services was the development manager authorised by RWC for the Project and the Court would not infer that that authority was relevantly limited, particularly in circumstances where RWC implicitly conceded below that Mr Hanna was authorised to receive payment claims on behalf of RWC.

87. In those circumstances, the Court would conclude that the primary judge erred in her Honour's conclusion that the Payment Claim was not served on RWC and instead find that the Payment Claim was served on RWC by email on or about 21 December 2023 or, in the alternative, was served by post with such service taken to have been effective on or about 5 January 2024.

88. Pursuant to s 31(1)(d) of the SOP Act, a payment claim may be served "*by email to an email address specified by the person for the service of documents of that kind*". For the purposes of that paragraph, a person "*specifie[s]*" an email address where he, she or it: [40]

> expressly or impliedly indicat[es] the person's consent to the use of the email address for service of that class of document.

89. Such consent was implicitly provided by a course of dealing between Mr Hanna and Mr Webb on the one hand and Mr Bettar on the other in which communications associated with the Project were performed by email. Those communications include the making and response to a payment claim that was not made under the SOP Act.[41]

90. In that context, when Mr Hanna said "*I am happy for you to submit a claim to cover your reasonable costs*" he was implicitly saying that such a claim could be submitted to him by email.[42] That is enough to constitute "*specifi[cation]*" for the purposes of s 31(1)(d) of the SOP Act.

91. If that be accepted, s 13A(1) of the *Electronic Transactions Act 2000* (NSW) (**ETA**) operated to cause the email by which Hunt dispatched its Payment Claim (**Payment Claim Email**)[43] to be taken to have been received for the purposes of the Act when the email "*bec[a]me[ ] capable of being retrieved by the addressee at an electronic address designated by the addressee*". If the Court accepts that Mr Hanna's email address should be regarded as "*specified*" for the purposes of s 31(1)(d) of the Act, it should also accept, by parity of reasoning, that it was "*designated*" for the purposes of s 13A of the ETA.

92. The Court should find that the Payment Claim Email became capable of being retrieved at Mr Hanna's email address at about 2:40pm on 21 December 2023 as follows:

    (a) pursuant to s 161(1)(d) of the *Evidence Act 1995* (NSW) (**EA**), an electronic communication is presumed (subject to presently irrelevant exceptions) to have been

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[40] *Claire Rewais and Osama Rewais t/as McVitty Grove v BPB Earthmoving Pty Ltd* [2025] NSWCA 103 at [170].

[41] See CB 1155-1156 (2 Blue 777-778), 1159-1160 (2 Blue 787-788).

[42] Affidavit of Danny Hanna sworn 22 July 2024 at [22] (CB 64) (1 Blue 30I-J).

[43] CB 1161 (2 Blue 790).

received at the destination to which it appears from the document to have been sent;

(b) pursuant to s 161(1)(e) of the EA, an electronic communication is presumed to have been received at the destination to which it appears from the document to have been sent if it appears from the document that the sending of the communication concluded at a particular time;

(c) pursuant to s 13A(2) of the ETA, it is to be assumed for the purposes of s 13A(1) of the ETA that an electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address;

(d) it appears from the Payment Claim Email that it was sent to Messrs Webb and Hanna;

(e) it appears that the sending of that communication concluded at about 2:40pm on 21 December 2023;

(f) in the premises and in circumstances where no evidence was led sufficient to raise doubt about any of the presumptions summarised in subparagraphs (a) to (c) above, the Court should find that the Payment Claim Email was capable of being retrieved, received and served at about 2:30pm on 21 December 2023.

93. In the alternative, the Court would conclude that the Payment Claim was taken to have been effected by post on or about 5 January 2024.

94. Pursuant to s 31(1) of the SOP Act (emphasis added):

> Any document that by or under [the SOP Act] is authorised or required to be served on a person may be served on the person— […]
>
> (d) by sending it by post addressed to the person's ordinary place of business […]

95. Service of a document sent to a person's ordinary place of business by post "*is taken to have been effected when the document is received at that place*": see SOP Act s 31(2).

96. For the purposes of the SOP Act, service on a person may be effected upon his, her or its agent. Thus, "*the person*" referred to in s 31 for relevant purposes is Hannas Construction Services, the development manager authorised by RWC to manage the Project on RWC's and (for the reasons already addressed at paragraphs 41 to 43 above) agent of RWC for the purposes of receiving Payment Claims under the Act.

97. The evidence below proved that the Payment Claim was posted to Suite 26.02, Governor Phillip Tower, 1 Farrer Place, Sydney on 22 December 2023.[44] That address was the one appearing in the email signatures of Messrs Hannah, Webb and Ogden and,

[44] See the evidence summarised in the Plaintiff's Outline of Submissions below at [63] (Black 12S-13D).

the Court should infer, was an ordinary place of business of Hannas Construction Services.

98. Pursuant to s 160(1) of the EA (subject to a presently irrelevant exception):

> It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address … was received at that address on the seventh working day after having been posted.

99. Thus, in circumstances where no evidence was led below that raised doubt about the presumption in s 160(1), this Court would find that the Payment Claim was received at Suite 26.02, Governor Phillip Tower, 1 Farrer Place, Sydney on the seventh working day after having been posted (that is, 5 January 2024) and was therefore served on RWC on that date.

F. Ground 8: The primary judge should have held that RWC was liable to pay the Claimed Amount plus interest

100. It was common ground below that no payment schedule was given by RWC within 10 business days of 21 December 2023 or 5 January 2024 (RWC's case was that it, by Mr Ogden of Hannas Constructing Services, served a payment schedule on 25 January 2024).

101. It follows from that and from the above that RWC became liable to pay the Claimed Amount "*on the due date for the progress payment to which the payment claim relates*" referred to in s 11 of the SOP Act with interest accruing thereafter. The primary judge erred in finding to the contrary.

102. The appeal should be allowed and order 1 of the primary judge's orders made on 12 February 2025 set aside. In lieu thereof, the orders referred to in prayer 2 of Hunt's notice of appeal or orders to like effect should be made. RWC should also be ordered to pay Hunt's costs.

G. Ground 9: In the alternative, the primary judge's costs order should be set aside

103. In separate reasons delivered after her Honour's principal judgment, the primary judge held that Hunt should pay RWC's costs before the court below on an indemnity basis including because it was, in her Honour's view, "*doomed to fail*". Her Honour's conclusion that indemnity costs should be awarded was founded on her Honour's view that each of Hunt's principal contentions (that there was a construction conduct, that the Payment Claim complied with the Act and that the Payment Claim was served) should be rejected coupled with consideration of the existence of a pre-hearing $33,000 offer from RWC.

104. In light of that approach to reasoning, the primary judge's indemnity costs order will be undermined if this Court upholds any of grounds 1 to 8. That is so even if Hunt does not enjoy sufficient success on appeal to warrant the appeal otherwise being allowed.

105. In any event, the exercise of the primary judge's discretion miscarried because it involved acting on a wrong principle.

106. The primary judge appears to have considered that the proceedings were "*doomed to fail*" because, in her Honour's opinion, each of Hunt's principal contentions should be rejected. But that is not what "*doomed to fail*" means in the relevant sense. There is usually at least one loser in litigation and the fact that a judge considers that the loser should lose does not, without more, provide a basis for awarding indemnity costs.

107. Indemnity costs against a plaintiff on the basis that proceedings were doomed to fail are only justifiable on a correct approach to principle where "an *action has been commenced or continued in circumstances where the [plaintiff], properly advised, should have known the he had no chance of success*": *Fountain Selected Meats v International Produce Merchants* (1988) 81 ALR 397 (FCA) at 401. While the primary judge held that "*[i]t should have been clear to the plaintiffs prior to the filing of the statement of claim that a claim under the Act based on [the Payment Claim] could not succeed*", nowhere in her Honour's reasons did the primary judge explain why (or whether) her Honour considered the plaintiff's case not just to be liable be rejected in her Honour's opinion but so hopeless that it had no chance of success. Whatever might be said of Hunt's contentions below (or, for that matter, on appeal), they cannot fairly be described as hopeless. The Court would infer that the primary judge erred in principle (or alternatively reached an unreasonable or plainly unjust result) in (or by) reaching another result.

108. This Court should re-exercise the primary judge's discretion by ordering that costs of the proceedings in the District Court follow the event on the ordinary basis.

109. The justice of that result is unaffected by the $33,000 pre-hearing offer that RWC made below. That was, in substance, a demand to capitulate. In the absence of this Court finding that Hunt's case below was so weak as to make it unreasonable for the $33,000 offer to be accepted, this Court would not re-exercise the primary judge's discretion by ordering Hunt to pay RWC's costs on an indemnity basis. This Court would instead set aside the special costs order made by the primary judge on 28 March 2025 and (if the present appeal is otherwise to be dismissed) leave the primary judge's existing costs order intact.

H. Conclusion

110. For these reasons, the appeal should be allowed and orders to the effect of those set out in Hunt's notice of appeal made.

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