IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No S199 of 2016

SOUTHERN HAN BREAKFAST POINT PTY LTD (IN LIQUIDATION)
Appellant

LEWENCE CONSTRUCTION PTY LTD
First Respondent

IAN HILLMAN
Second Respondent

AUSTRALIAN SOLUTIONS CENTRE
Third Respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I – PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II – ISSUES

2. The ultimate issue presented by this appeal is whether the payment claim made by the First Respondent (**Respondent**) on 4 December 2014 (**Impugned Payment Claim**) for work performed to 27 October 2014 was a valid payment claim for the purposes of s 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**).

3. That ultimate issue turns on the following subsidiary questions:

   (a) the s 13(1) question: whether the NSW Court of Appeal erred in holding that the existence of a "*reference date*" to "*support*" a payment claim is not an essential precondition for the making of a valid payment claim under s 13(1) of the Act;

   (b) the construction questions: if the Court of Appeal so erred, whether a "*reference date*" had relevantly arisen:

      (i) on the assumption that the Appellant validly took work out of the Respondent's hands (**Take Out**) on 27 October 2014; and/or

      (ii) on the assumption that the Respondent validly terminated the relevant contract at law for the Appellant's repudiation (**Termination**) on 28 October 2014;

   (c) the s 13(5) question: whether the Impugned Payment Claim should be characterised as being "*in respect of*" the 8 October 2014 "*reference date*".

4. The s 22(1) question: The Appellant also seeks to raise a question concerning whether a "*reference date*" is an essential precondition to the making of a valid determination under s 22(1)(a) of the Act. That question was not raised before the primary judge or the NSW Court of Appeal. The Respondent contends that the s 22(1) question should not be permitted to be raised for the first time in this Court. If the question is to be entertained, it only logically arises if the Appellant's arguments on the "*s 13(1) question*" are rejected.

PART III – SECTION 78B NOTICES

5. The Respondent has considered whether any notices should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). It considers that no such notices are required.

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PART IV – FACTS

6. In general terms, paragraphs 29 to 52 of the Appellant's Submissions provide a fair summary of the key factual and procedural background to this appeal.

7. It should also be noted that, at trial, the Appellant made no attempt to prove that the Appellant's Take Out was valid (thus leaving open the possibility that the Respondent validly terminated the Contract for the Appellant's repudiation).[1] As a result, if the Appellant fails on "*the s 13(5) question*" (as it did at both levels below), the Appellant must succeed on "*the s 13(1) question*" **and both** of the "*construction questions*" in order to succeed in this appeal.

PART V – ARGUMENT

10 **The s 13(1) question (ground 2 of the appeal)**

Overview

8. The Appellant's argument on the s 13(1) question wrongly seeks to limit the plain words of the Act in a way which is inconsistent with the Act's terms, legislative history and objects.

9. Under s 13(1) of the Act, the right to serve a payment claim is not restricted to a person who "*is*" entitled to a progress payment under s 8. Rather, as amendments to the Act made in 2003 made clear,[2] a payment claim may validly be served by a person "*who claims to be*" entitled to a progress payment.

10. It follows that the NSW Court of Appeal was correct to hold that the existence of a "*reference date*" and the consequent entitlement to a progress payment under s 8(1) are not "*jurisdictional*
20 *precondition[s]*" to the service of a valid payment claim under s 13(1) of the Act.

11. Nothing in the text of the Act requires or permits a different conclusion.

12. In this regard, it is telling that the Appellant's Submissions make no attempt to reconcile its preferred construction with the actual text of s 13(1) of the Act. Instead, those submissions simply raise a series of contextual matters said to support a conclusion that the existence of a "*reference date*" should be regarded as a precondition to the service of a valid payment claim but without explaining how that result can be accommodated within the statutory text.

13. As this Court has repeatedly emphasised:

> '... the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in
30 its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.[3]

14. A consideration of the text of the Act confirms that the construction of s 13(1) of the Act which was unanimously adopted by the NSW Court of Appeal was the correct one. The correctness of that conclusion is confirmed by considering the Act's history and objects.

The statutory text

15. Subsection 13(1) of the Act provides as follows:

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

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[1] See Ball J at [41] (AB 345); Ward JA at [25] (AB 379).

[2] *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW) (which commenced on 3 March 2003).

[3] *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at 519 [39] quoting *Alcan (NT) Alumina v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]. See also at *Commissioner of Taxation v Unit Trend Services* (2013) 250 CLR 523 at 539 [47]; *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22]; *Alphapharm v H Lundbeck* (2014) 254 CLR 247 at 287 [121].

16. Thus, in order to serve a valid payment claim under s 13(1) of the Act, a person must:

(a) be "*[a] person referred to in section 8(1)*";

(b) be a person who "*is*" or "*claims to be*" "*entitled to a progress payment*"; and

(c) serve a payment claim on a person who, under "*the construction contract concerned*", "*is or may be liable to make the payment*" claimed.

17. There is no dispute that:

(a) the Respondent was a person who "*claimed to be*" entitled to a progress payment;

(b) the contract between the parties (**Contract**) was a "*construction contract*" to which the Act applied;

(c) the Impugned Payment Claim was served on the Appellant (being the person who, under the "*construction contract*" between the parties, "*is or may be*" liable to pay the claimed progress payment).

18. As a result, the validity or otherwise of the Impugned Payment Claim under s 13(1) of the Act turns on whether the Respondent was "*[a] person referred to in section 8(1)*" at the time of service of the Impugned Payment Claim.

19. That directs attention to s 8(1) of the Act. That subsection provides as follows:

> 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 the contract,
>
> is entitled to a progress payment.

20. The primary judge and the Court of Appeal differed as to what was required in order to be "*[a] person referred to in section 8(1)*".

21. The primary judge held that that phrase only applied to a person who:

> satisfies all the requirements of s 8(1) – that is, a person who has undertaken to carry out construction work under a construction contract (or supply related goods and services) **in respect of which a reference date has arisen**.[4]

22. The Court of Appeal correctly held that this conclusion was erroneous.

23. Instead, that Court held that the words "*a person referred to in s 8(1)*" in s 13(1) refer "*in their ordinary meaning simply to a person falling within either s 8(1)(a) or s 8(1)(b)*"[5]. This was held to be so for a number of reasons including:

(a) because "*[l]inguistically, the opening words of s 8(1) ("[o]n and from each reference date") do not purport to identify a person*";[6] and

(b) because the words "*or who claims to be entitled to a progress payment*" in s 13(1) make "*clear*" "*that the existence of a dispute as to the entitlement [to a progress payment] does not preclude the making of a valid payment claim*".[7]

24. The Appellant's Submissions do not directly address why it is said that this aspect of the Court of Appeal's reasoning is wrong. Indeed, the Appellant's Submissions do not directly grapple with the critical issue on which the decisions of both the primary judge and the Court of Appeal turned – the meaning of the phrase "*[a] person referred to in s 8(1)*" in s 13(1) of the Act.

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[4] Ball J at [30] (AB 342) (emphasis added).

[5] Ward JA at [61] (AB 61). See also Emmett JA at [119] (AB 402); Sackville AJA at [132] (AB 405).

[6] Ward JA at [61] (AB 61). See also Emmett JA at [119] (AB 402).

[7] Ward JA at [61] (AB 388). See also Emmett JA at [120] (AB 403); Sackville AJA at [132]-[133] (AB 405-406).

25. Be that as it may, the Court of Appeal's approach on this issue was correct and should be affirmed by this Court.

26. There are two classes of "*person[s] referred to in section 8(1)*" (all of whom may conveniently be described as "**Construction Contractors**"):

(a) persons who have "*undertaken to carry out construction work*" under a "*construction contract*"; and

(b) persons who have "*undertaken to supply related goods and services*" under a "*construction contract*".

27. Provided that a person falls within one or both of those classes and is or claims to be entitled to a progress payment under a "*construction contract*", that person may serve a valid payment claim under s 13(1) of the Act.

28. If it were otherwise, the words "*or who claims to be*" in s 13(1) would be redundant – a payment claim could only be validly served by a person who "*is*" entitled to a progress payment under s 8 of the Act. On this approach, notwithstanding the text of s 13(1), "*claim[ing] to be*" entitled to a payment claim would not be sufficient to engage the statutory regime for making and adjudicating on claims for progress payments.

29. The correct view (which, as discussed below, is confirmed by the Act's legislative history and objects) is that the phrase "*[a] person referred to in section 8(1)*", the phrase "*or who claims to be*" and the phrase "*may be liable*" in s 13(1) confirm that a payment claim may validly be made under Part 2 of the Act by any Construction Contractor who "*claims to be*" entitled to a progress payment. Any dispute as to whether the claimant actually is entitled to a progress payment can be resolved through the provisions of Part 3 of the Act which permit the "*adjudication*" of payment claims. The NSW Court of Appeal was correct to conclude accordingly.

Legislative history

30. The correctness of the Court of Appeal's approach to s 13(1) is fortified by considering the legislative history of that subsection.

31. When the Act first commenced in 2000, s 13(1) read as follows (emphasis added):

> A person who **is** entitled to a progress payment under a construction contract (the ***claimant***) may serve a payment claim on the person who under the contract **is** liable to make the payment.

32. That wording was amended to its present form as part of the review that was required to be undertaken by s 38(1) of the Act. In order to facilitate that review, the relevant Minister released a discussion paper in September 2002 entitled "*Options for Enhancing the Building and Construction Industry Security of Payment Act 1999*" (**Discussion Paper**)[8].

33. That Discussion Paper suggested the following "*Proposed Action*":

> Clarify under s 13 that a payment claim may be made by a person referred to in s.8 (**ie. a person who has undertaken to carry out construction work or who has supplied related goods or services**) claiming to be entitled to a progress payment under the construction contract or the Act.[9]

34. That "*Proposed Action*" was taken by the NSW Parliament by way of the *Building and Construction Industry Security of Payment Amendment Act 2002* (NSW) (**2002 Amendment Act**).[10] The 2002 Amendment Act amended s 13(1) of the Act to read as follows (underlining added to denote the new words and punctuation added by the 2002 Amendment Act):

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[8] See Discussion Paper at 1.

[9] Discussion Paper at 7, "*issue no. 8*" (emphasis added).

[10] Discussion Paper at 7, "*issue no. 8*".

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

35. The context in which these amendments to s 13(1) of the Act were made confirm that the primary judge was wrong to conclude that the phrase "*[a] person referred to in section 8(1)*" refers to a person "*who has undertaken to carry out construction work under a construction contract (or supply related goods and services)* ***in respect of which a reference date has arisen***".[11]

36. Rather, as the Discussion Paper makes clear (and as the Court of Appeal correctly accepted), the reference in s 13(1) to "*[a] person referred to in section 8(1)*" was intended to be a reference to (to quote the Discussion Paper) "*a person who has undertaken to carry out construction work or who has supplied related goods or services*"[12] or, in other words, a Construction Contractor.

37. According to the discussion which accompanied the "*Proposed Action*" quoted above, there were two reasons (or "*aspect[s]*") which supported taking the "*Proposed Action*".

38. The first "*aspect*" was that:

> it has been argued that a payment claim under the Act can only be made if there is an entitlement at that time to a progress payment under the contract. Where there is no such entitlement, the argument is the claim cannot be validly made under the Act, and there is therefore no need to serve a payment schedule in response.[13]

39. It may be (as suggested by the Appellant at [74]) that this "*aspect*" was a reference to an argument that had not been the subject of judicial decision as at the date of the Discussion Paper to the effect that a claimant could only serve a payment claim under s 13 of the Act if, at the time of serving the payment claim, the claimant was entitled to a progress payment under the construction contract. That argument was ultimately (correctly) rejected in *Beckhaus Civil v Brewarrina Shire Council* [2002] NSWSC 960 at [52]-[64] but not until after the Discussion Paper was released.[14]

40. Whether or not the Appellant's speculation as to the source of the first "*aspect*" of the "*Proposed Action*" is correct, there was another "*aspect*" which the Discussion Paper identified as independently justifying the "*Proposed Action*". That "*second aspect*":

> is the question of whether, if there is no entitlement to an amount (either **under the Act** or the contract), a claim can be made. Is the entitlement to make a claim dependent upon the existence of an entitlement to a progress claim of some amount, no matter how small? For example, if because work is defective, there is no amount due to the claimant, can the claimant make a valid payment claim? **Just as a claimant can validly institute legal proceedings claiming a payment, even though it may ultimately be proven that the claim was not justified, so too a claimant should be able to make a valid payment claim under the Act even though it may ultimately be proven that no payment is due**. If a valid claim could only be made if an amount was due, then the purpose of adjudication would be defeated. An adjudicator would have no jurisdiction unless an amount was due.

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[11] Ball J at [30] (emphasis added) (AB 342-343). In fairness to the primary judge, his Honour was not directed to the Discussion Paper in argument.

[12] Note that the second reading speech for the Bill which became the 2002 Amendment Act stated that the amendments to the Act proposed by the Bill were "*foreshadowed*" in the Discussion Paper: see New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2002 at 6541.

[13] Discussion Paper at 18 (emphasis original).

[14] The decision in *Beckhaus Civil Pty Ltd v Brewarrina Shire Council* [2002] NSWSC 960 was appealed. However, that appeal did not involve any challenge to Macready AJ's reasoning at [52]-[64]: see *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576 at 579 [8]; *Walter Construction Group v CPL* [2003] NSWSC 266 at [52]-[53].

> ... The intention is that **provided a payment claim states it is made under the Act** (s 13(2)), **it will, for the purposes of the Act, be regarded as a proper claim for a progress payment and must be responded to by way of a payment schedule**. ...
>
> It is appropriate that this matter be clarified in the Act.[15]

41. It is clear from this passage that the author of the Discussion Paper was cognisant of the potential distinction between a claimant having an entitlement to a progress payment "*under the Act*" (that is, under s 8) and having such an entitlement "*under ... the contract*" (that is, an entitlement to an amount "*calculated in accordance with the terms of the construction contract*" under s 9). It is apparent that the intention of the "*Proposed Action*" referred to above was to "*clarif[y]*" that an absence of an entitlement "*under the ... contract*" **or** "*under the Act*" would not preclude a payment claim from being a "*proper claim for a progress payment*" which "*must be responded to by way of a payment schedule*".

42. In other words, the intention of the "*action*" proposed by the Discussion Paper in relation to s 13(1) was to ensure that a payment claim would be treated as being analogous to a statement of claim filed so as to institute legal proceedings. As the Discussion Paper correctly observes, "*a claimant can validly institute legal proceedings, even though it may ultimately be proven that the claim was not justified*".[16] Similarly, a payment claim may be served under the Act so as to commence the statutory "*procedure for recovering progress payments*"[17] even though it may ultimately be proven that that claim is not justified (for example, because the claimant does not have any entitlement to any progress payment under s 8 of the Act or because the claimant has no entitlement to any amount "*calculated in accordance with the terms of the construction contract*" under s 9.

43. The practical consequence of this is that, "*provided a payment claim states it is made under the Act*",[18] that payment claim is valid and "*must be responded to by way of a payment schedule*"[19] (so as to avoid a consequence analogous to a default judgment[20]).

44. This outcome is consistent with the statutory purpose of requiring a "*statutory early warning to claimants that the respondent does not propose to pay their claim in full*"[21]. That purpose is defeated if recipients of payment claims can fail or refuse to give an "*early warning*" that it does not propose to pay a claimant's claim in full and later argue:

    (a) in debt proceedings (see s 15(2)(a)(i));

    (b) in proceedings to prevent the enforcement of an adjudication determination (see s 15(2)(a)(ii)); and/or

    (c) in response to any decision by the Construction Contractor to suspend work in purported exercise of the power conferred by ss 15(2)(b) and 27,

    that a payment claim was void (and therefore could not support an action in debt, an adjudication determination or a right to suspend) because the claimant had no entitlement to a progress payment under s 8(1) of the Act.

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[15] Discussion Paper at 18-19 (emphasis added).

[16] Discussion Paper at 19.

[17] See the heading to Part 3 of the Act (which forms part of the Act: see *Interpretation Act 1987* (NSW) s 35 (1)(a)).

[18] And provided that it is served by a Construction Contractor on its counterparty and is not served in breach of the prohibitions in ss 13(4) and (5). The requirement to state that it is under the Act has since been removed.

[19] Discussion Paper at 19.

[20] See s 15 of the Act.

[21] New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 September 1999 (second reading speech for bill which became original Act) at 105.

Objects

45. A further reason for affirming the NSW Court of Appeal's approach is because that approach tends to promote the objects underlying the Act.[22]

46. As Keane JA observed in relation to the Queensland counterpart to the Act, "*security of payments*" legislation has the object of providing "*a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract*".[23]

47. That object is sought to be achieved through the Act's approach of conferring Construction Contractors with a statutory right to obtain a "*prompt **interim** decision on a disputed payment*"[24] from an adjudicator "*without undue formality or resort to the law*".[25] Such decisions are "*interim*" in the sense that they are "*without prejudice to the common law rights of both parties*"[26] and may be revisited *de* novo in ordinary court or arbitral proceedings.[27]

48. In this way, the Act is often described as creating a regime requiring respondents to payment claims to "*pay now, argue later*"[28].

49. The construction of s 13(1) of the Act advanced by the Appellant would tend to defeat the "*speed[ ] and effective[ness]*" of the "*pay now, argue later*" regime sought to be created by the Act.

50. The present matter provides a case in point.

51. The Respondent made its application for adjudication on 17 February 2015.[29] That application was determined by the Adjudicator within six weeks.[30] More than eighteen months and many tens of thousands of dollars in legal costs later, the parties are still debating whether the "*interim decision*" of the Adjudicator was legally effective. Regardless of who succeeds in that debate, the question of who is finally entitled to retain the amounts awarded by the Adjudicator will remain unresolved. This result is far from consistent with the legislative object of providing a "*speedy and effective means of ensuring cash flow*" through "*prompt interim decisions*" made "*without undue formality or resort to the law*".

52. In the present case, the factual matters that the primary judge was called upon to decide[31] were relatively confined and were able to be tried within one hearing day. This was because the Appellant did not seek to prove that the Take Out was valid. Instead, it assumed the burden of proving that the Respondent had no entitlement to a progress payment on the assumption that the Take Out was valid and on the assumption that the Respondent terminated the Contract for the Appellant's repudiation.[32]

53. However, had the Appellant's representatives made a different forensic decision before the primary judge and instead sought to prove that the Take Out was valid, the course of the trial would have been very different. On that approach, it would have been necessary for the Appellant to prove (inter alia):

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[22] See *Interpretation Act 1987* (NSW) s 33.

[23] *RJ Neller v Ainsworth* [2009] 1 Qd R 390 at 389-390 [39].

[24] New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 September 1999 at 107 (emphasis added).

[25] *Coordinated Construction Co Pty Ltd v Climatech* (2005) 21 BCL 364 (NSWCA) at [45].

[26] *Falgat Constructions Pty Ltd v Equity Australia Corporation* (2005) 62 NSWLR 385 (NSWCA) at 389 [22].

[27] See Act s 32.

[28] *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [96] and quoted on multiple occasions subsequently.

[29] Ward JA at [17] (AB 377).

[30] Ward JA at [18] (AB 377).

[31] On his Honour's (with respect erroneous), view that a payment claim must be "*supported*" by a reference date in order to be valid: see Ball J at [41] (AB 345).

[32] See Ward JA at [25] (AB 379).

(a) that the Respondent had committed a substantial breach of contract by substantially departing from a construction program without reasonable cause or the Superintendent's approval;[33]

(b) that, in response to the purported notice to show cause, the Respondent failed to show reasonable cause in writing why the Appellant should not exercise a right referred to in subclause 39.4 of the Contract;[34] and

(c) that the Appellant reasonably exercised any right it had to take work out of the hands of the Respondent.[35]

54. A trial on those issues would have taken at least a number of days and may have taken a number of weeks. Again, this is not something which would be consistent with the "*speedy and effective means of ensuring cash flow*" by way of "*prompt interim decisions*" made "*without undue formality or resort to the law*".

55. A final example should put beyond doubt the question of whether acceptance of the Appellant's construction of s 13(1) would be destructive of the objects of the Act.

56. The 2002 Amendment Act "*confirm[ed]*" that "*milestone payments*" are "*covered*" by the Act.[36] A "*milestone payment*" is earned on the occurrence of an identified event.[37] For example, parties to a construction contract might agree that a "*milestone payment*" equal to 10% of the total contract price may be claimed and is payable when each 10% of the work has been completed.

57. On the Appellant's approach to s 13(1) of the Act, an adjudicator's determination under a contract of that nature would <u>always</u> be susceptible to challenge by an unsuccessful respondent. This is because (on the Appellant's approach to s 13(1)) it would always be open to an unsuccessful respondent to seek to prove before a court that, despite the adjudicator's determination, the contractor had only completed (say) 9% of the work under the construction contract with the result that the entitlement to a progress payment under s 8(1) had not arisen and that the "*jurisdictional precondition for the service of a valid payment claim*" was not satisfied. Again, this result would tend to defeat the legislative object of enabling Construction Contractors to obtain cash flow through "*prompt interim decisions*" made "*without undue formality or resort to the law*".

<u>The nine contextual matters raised by the Appellant</u>

58. At paragraphs 57 to 78 of its submissions, the Appellant raises nine contextual "*reasons*" said to support a conclusion that the existence of a "*reference date*" (and thus an entitlement to a progress claim under s 8(1) of the Act) is a "*jurisdictional precondition for the service of a valid payment claim*".

59. None of these reasons (whether considered separately or cumulatively) support a conclusion other than that advanced above and unanimously accepted by the NSW Court of Appeal.

60. As to the **<u>first</u>** of the Appellant's reasons, the Appellant is correct to say that Parliament must have intended <u>some</u> matters to be jurisdictional. However, that bare statement does not advance the analysis.

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[33] See cl 39.2 of the Contract (AB 67); purported notice to show cause dated 10 October 2014 (AB 107).

[34] See cl 39.4 of the Contract (AB 68); response to purported notice to show cause dated 20 October 2014 (AB 112).

[35] See *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 257C-263D, 279C-280F. It seems that it is uncontroversial between the parties that the power in cl 39.4 of the Contract must be exercised reasonably: see the Appellant's purported notice to show caused dated 27 October 2014 (AB 118.41).

[36] See New South Wales, *Report of the Review of the Building and Construction Industry Security of Payment Act 1999*, Parliamentary Paper No 17 of 2002 at 12.

[37] See definition of "*progress payment*" in s 4 of the Act.

61. Whether or not a particular matter is jurisdictional is a question of statutory construction. The analysis above confirms that a "*reference date*" and a consequent entitlement to a progress payment under s 8(1) are not jurisdictional in the sense of being preconditions to the service of a valid payment claim under s 13(1).

62. The analysis above also confirms (by reference to the statutory text rather than through recourse to vague assertions of Parliamentary intent) why the Appellant is correct to say that it is "*uncontroversial*" that the existence of a construction contract is a precondition to the service of a valid payment claim. As observed above, the preconditions to the service of a valid payment claim under s 13(1) include that the claimant is "*[a] person referred to in section 8(1)*". In order to be such a person, one must be a person who has "*undertaken to carry out construction work*" or "*supply related goods and services*" under a "*construction contract*". This obviously requires there to actually be a construction contract.[38]

63. As to the **second** of the Appellant's reasons, the Appellant is correct to say that "*there is good reason for some matters to be jurisdictional*" (emphasis added). However, again, that bare statement does not advance the resolution of the issues in this appeal. Contrary to the Appellant's Submissions, it is no part of the Respondent's argument (or, for that matter, the reasoning of the NSW Court of Appeal) that Parliament intended it to be for adjudicators to determine all of what the Appellant describes as the "*statutory integers*". For example, the Respondent accepts that an adjudicator's jurisdiction cannot validly be invoked by a person who is not a Construction Contractor.

64. As to the **third** matter raised by the Appellant, the Appellant is wrong to submit (again, without an analysis of the statutory text) that Parliament has sought to draw a bright line between "*entitlement*" and the "*amount*" of such entitlement and made the former jurisdictional and the latter non-jurisdictional.

65. Determining questions of entitlement constitutes a substantial part of the statutory function of adjudicators. For example, as part of their role in determining whether a claimant has any entitlement to a progress payment as "*calculated in accordance with the terms of the [construction] contract*"[39], adjudicators must inevitably determine questions of entitlement such as whether the "*terms of the [construction] contract*" entitle a claimant to be paid the amount claimed. This requires adjudicators to construe the "*terms of the [construction] contract*" and will regularly require adjudicators to "*determine complex legal issues quickly*".[40]

66. For example, one of the most fertile areas for disputes before adjudicators pertains to whether, on the proper construction of the construction contract, particular work amounts to "*variation*" work for which the Construction Contractor is entitled to additional payment.[41] As was observed in *SSC Plenty v Construction Engineering* [2015] VSC 631 at [44], disputes of this kind "*regularly arise in construction disputes and are often attended with considerable complexity*".

67. The scope for disputation before adjudicators on this issue is to such an extent that the Victorian counterpart to the Act has been amended to limit the circumstances in which a claimant is able to make payment claims which include claims in relation to (inter alia) alleged variations.[42] No equivalent limitation exists in the NSW Act.

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[38] Further, it is necessary for there to be a "*construction contract*" before a claimant can satisfy the requirement in s 13(1) to serve the payment claim "*on the person who, under the construction contract concerned, is or may be liable to make the payment*".

[39] Section 9 of the Act.

[40] *John Holland Pty Ltd v TAC Pacific Pty Ltd* [2010] 1 Qd R 302 at 323 [66].

[41] See, eg, cll 36.1-36.4 of the Contract (AB 63-64).

[42] *Building and Construction Industry Security of Payment Act 2002* (Vic) ss 10A, 10B, 14(3)(b); see also *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* (2011) 27 BCL 244 at [120].

68. The **fourth** of the Appellant's reasons misunderstands the structure of the Act and, in particular, the different roles that Part 2 and Part 3 play in the scheme of the Act.

69. Part 2 of the Act (in which s 8 is to be found) establishes statutory "*rights to progress payments*"; Part 3 (in which s 13 is to be found) creates a "*procedure for recovering*" progress payments to which a Construction Contractor claims to be entitled under Part 2.

70. Once the different roles of Part 2 and Part 3 of the Act are appreciated, it is unsurprising that the provisions of Part 2 (and not just s 8) are expressed in what the Appellant describes as "*objective*" language. Those provisions relevantly identify the (objective) circumstances in which the statutory entitlement to a progress payment arises (s 8), the amount of that entitlement (s 9), how construction work is to be valued (s 10) and when progress payments are payable (s 11). They say nothing, however, about how a statutory progress payment may validly be claimed[43] or how disputes regarding a claimed entitlement are to be resolved. That is the province of Part 3.

71. In this way, the fact that Part 2 of the Act speaks in objective language when describing Construction Contractors' "*[r]ights to progress payments*" provides no assistance in determining the circumstances in which the "*[p]rocedure for recovering progress payments*" in Part 3 can validly be invoked.

72. In particular, the fact that s 8 uses objective language does not support the Appellant's submission that the matters referred to in s 8 are always matters for the determination of a court rather than an adjudicator. If it were otherwise, it would presumably follow that all of the matters in Part 2 (all of which are expressed in objective language) were jurisdictional matters. This would mean that all findings of adjudicators would always be susceptible to challenge on an application for judicial review.

73. The Appellant is also wrong to submit (as part of its fourth reason) that the question of whether there is a "*reference date*" turns on matters which courts rather than adjudicators are "*apt to determine*".

74. Unless a contract makes an express provision with respect to the matter, "*reference date[s]*" for the purposes of the Act occur on the last day of each calendar month.[44] There is no reason to think that courts are particularly "*apt to determine*" what the last day of a calendar month is.

75. Where there are dates which can be "*determined by or in accordance with the terms of the contract as the date[s] on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the [construction] contract*", those are the "*reference date[s]*" for the purposes of the Act.[45]

76. There is no reason to think that courts are peculiarly "*apt to determine*" "*reference date[s]*" which are to be ascertained in this fashion. It is very common for construction contracts to permit or require claims for progress payments to be made monthly on a particular day of the month. For example, the Australian Standard General Conditions of Contract AS 4000-1997 (**AS 4000-1997**) which were adopted by the parties in the present case, contemplates that the parties might agree that progress claims can be made on a particular day of each month.[46] There is no reason to think that "*courts are typically apt to determine*" whether such a day has occurred.

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[43] Except to the extent that ss 8(1)(a) and (b) are incorporated into s 13(1) by reference.

[44] Pursuant to s 21 of the *Interpretation Act 1987* (NSW) "*named month*" essentially means calendar month (that is, January, February, March etc.).

[45] See s 8(2) of the Act.

[46] See cl 37.1 (AB 64) and item 28 of Part A of the Annexure to the Contract (AB 81.15).

77. Another common approach is for parties to agree that progress payments may be made once a particular stage of the works (or "*milestone*") has been achieved. This, for example, is the alternative approach contemplated by AS 4000-1997.[47] Again, there is no reason to conclude that "*courts are typically apt to determine*" whether "*reference dates*" ascertained in this fashion have occurred. If anything, the progress of construction works is a matter that an adjudicator (who may well be a construction industry expert) may be "*typically apt to determine*".

78. It is true that, in a small class of cases, a contestable question of contractual construction may need to be resolved in order to ascertain what dates "*determined by or in accordance with the terms of the contract*" are "*reference dates*". However, contrary to paragraph 63 of the Appellant's Submissions, that unusual class of cases does not provide "*a significant factor in assessing whether Parliament intended [reference dates] to be jurisdictional*". As observed above, a significant part of an adjudicator's role is to construe construction contracts for the purposes of determining whether a claimant is entitled to the amount claimed. The scheme of the Act does not support an assertion that questions of contractual construction are generally intended to be jurisdictional matters rather than matters for an adjudicator to decide.

79. As for the Appellant's **fifth** reason, the Appellant is wrong to seek to draw a bright line distinction between the nature of the inquiry required by s 8 and of the Act and that required by s 9.

80. Pursuant to s 9(a) of the Act, "*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*". Plainly, it is necessary for a construction contract to be construed before a calculation "*in accordance with the terms of the contract*" can be performed.

81. Contrary to the Appellant's submissions, it is not correct to say that "*in practice*" determining the amount of a progress payment "*in accordance with the terms of [a] contract*" is "*essentially*" "*a question of calculation and of valuation*". Rather, in practice (as discussed above), disputes before adjudicators regularly turn on questions of law such as whether the claimant is entitled to the amount claimed on the proper construction of the contract.

82. It may also be observed that there is an incongruity between the Appellant's fourth and fifth reasons. As part of its fourth reason, the Appellant submits that the question of whether a "*reference date*" exists is likely to be jurisdictional because "*reference dates*" are "*determined by or in accordance with the terms of the contract*" (or, if the contract makes no express provision with respect to the matter, by applying a statutory test).

83. However, as part of its fifth reason, the Appellant acknowledges (correctly) that the "*amount of a progress payment*" is not a jurisdictional matter even though that question is determined "*in accordance with the terms of the contract*" (or, if the contract makes no express provision with respect to the matter, by applying a statutory test). The Appellant provides no explanation as to how it could be the case that adjudicators have jurisdiction to determine one matter "*in accordance with the terms of the contract*" but no jurisdiction to determine another matter "*by or in accordance with the terms of the contract*".

84. Contrary to the **sixth** and **seventh** reasons advanced by the Appellant, s 22(1) of the Act provides no support for the Appellant's construction of s 13(1) of the Act. The gravamen of the Appellant's argument on this issue is that – because adjudicators are directed by s 22(1) to determine the "*amount*" to be paid by the respondent to the claimant – there is an implied "*denial of power in adjudicators to determine whether there is an entitlement to a progress payment in the first place*"[48].

85. There are at least two major flaws in this argument.

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[47] See item 28(a) of Part A of the Annexure to the Contract (AB 81.19).

[48] AS at [67].

86. First, an adjudicator's jurisdiction to determine the amount of the progress payment "*to be paid by the respondent to the claimant*" must sensibly carry with it the jurisdiction to determine that the respondent is required to pay the amount so determined (and that the claimant has a corresponding entitlement to be paid). If it were otherwise, despite the terms of s 22(1)(a) of the Act, an adjudicator would not actually have jurisdiction to determine the amount "*to be paid by the respondent to the claimant*". Rather, he or she would only have jurisdiction to determine the proper quantum of the claim for a progress payment made by the claimant (but not whether that amount is "*to be paid by the respondent to the claimant*"). As well as being inconsistent with the text of s 22(1)(a), such a result would also be inconsistent with s 23(2) of the Act which contemplates that an adjudicator might "*determine[] that a respondent is required to pay an adjudicated amount*" and imposes a statutory obligation on the respondent to pay any such amount.

87. Secondly, the Appellant's argument does not properly accommodate the parenthetical words "*(if any)*" in s 22(1) of the Act. Those words confirm that – as well as having jurisdiction to determine that a particular "*adjudicated amount*" is "*to be paid by the respondent to the claimant*" – adjudicators also have jurisdiction to determine that there is not "*any*" amount to be so paid. In other words, adjudicators have jurisdiction to determine whether or not a claimant has an entitlement to have "*any*" amount paid to it.

88. The Appellant's **eighth** reason misunderstands the respective fields of operation of s 13(1), on the one hand, and s 13(5) on the other.

89. Subsection 13(5) prohibits "*more than one payment claim*" being served "*in respect of*" each "*reference date*".

90. In light of that prohibition, a person who was dissatisfied with an adjudication of a particular payment claim could not validly "*serve a new payment claim which is objectively in respect of the same reference date as the initial determination [scil – payment claim]*".[49] Such a purported payment claim would be void on the grounds that it was served in breach of s 13(5) of the Act. That result would ensue whether or not the purported payment claim was *prima facie* valid under s 13(1).

91. The Appellant is also wrong to say (as part of its eighth reason) that the approach advanced by the Respondent and accepted by the Court of Appeal "*give[s] rise to a risk of inconsistent determinations between adjudicators*". That submission overlooks authority which holds that an adjudication determination can create an issue estoppel which binds the parties in subsequent adjudications.[50] Once it is appreciated that issue estoppels of this kind can arise, the Appellant's assertion of the risk of "*inconsistent determinations between adjudicators*" falls away.

92. The Appellant's **ninth** and final reason advanced in support of its case on s 13(1) is disposed of by paragraphs 30 to 44 above. Those paragraphs confirm that the Court of Appeal's approach to s 13(1) of the Act is consistent with the legislative history and purpose of that subsection.

93. As the Appellant submits at paragraph 77, Ward JA's comment that s 13(1) was amended to overcome the contrary effect of the decision in *Brewarrina Shire Council v Beckhaus* (2003) 56 NSWLR 576 must be incorrect including because the Act which made that amendment commenced before the cited decision had been handed down. However, that mistake (which appears to have its source in a submission made by the present Appellant)[51] does not undermine the remainder of Ward JA's reasoning and, in any event, was not a matter relied upon by the other two judges who accepted that s 13(1) should be construed in the manner contended for by the present Respondent.

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[49] cf AS at [70].

[50] See, in particular, *Dualcorp v Remo Constructions* (2009) 74 NSWLR 190 at 205 [68], 208 [76].

[51] See "*First Respondent's Annotated Written Submissions*" dated 22 June 2015 at [63].

Conclusion

94. The NSW Court of Appeal's construction of s 13(1) of the Act is correct. Ground 2 of this appeal should be dismissed.

The s 22(1) question

95. As well as repeating and expanding on the argument that it put at both levels below based on the asserted invalidity of the Impugned Payment Claim under ss 13(1) and 13(5) of the Act, the Appellant now seeks to raise a new argument (designated its "*first*" argument) to the effect that – even if a "*reference date*" under s 8 of the Act is not a jurisdictional precondition for the service of a valid payment claim under s 13(1) of the Act – it is nevertheless "*an essential precondition to the making of a valid determination under s 22(1)*".[52]

96. This argument was not raised before the primary judge or the Court of Appeal (indeed, the present Appellant's written submissions before the Court of Appeal did not even mention s 22(1) of the Act[53]). The new argument should not be permitted to be raised for the first time in this Court. Arguably, the Appellant's new argument falls beyond the limited grant of special leave ordered on 28 July 2016 which, relevantly, permitted an appeal on the ground that the Court of Appeal "*erred in concluding that the existence of a reference date* ***to support a payment claim*** *... is not a jurisdictional fact*"[54]. In any event, to adapt what Keane J recently said in at *Paciocco v Australia and New Zealand Banking Corporation* (2016) 90 ALJR 835 at [240], the NSW Court of Appeal "*cannot be said to have erred in failing to accept an argument not put to it*".

97. Further, the present case is not an appropriate vehicle through which to consider the circumstances in which an adjudicator's finding as to the existence of a reference date (as part of making a determination under s 22(1)) may be challenged in judicial review proceedings.

98. The Respondent accepts that there are at least some circumstances in which an adjudicator's finding as to the existence of a reference date may be challenged by way of judicial review proceedings. For example, such a finding may be challenged if it results in a legally unreasonable determination in the sense discussed in *Minister for Immigration v Li* (2013) 249 CLR 332 or that if the finding was made in circumstances amounting to a breach of the rules of procedural fairness.[55] A finding that a reference date has accrued is arguably also capable of challenge by way of an application for an order in the nature of certiorari if it is infected by an error of law on the face of the record.[56] Whether or not there are broader grounds for challenging an adjudicator's determination as to the existence of a reference date was not explored at either level below. This Court is not the place for exploring such issues for the first time.

99. If (despite the above), the Appellant's new argument based on s 22(1) is entertained, it should be rejected.

100. Although that argument is designated in its submissions to be the Appellant's "*first*" argument, it only logically arises if this Court affirms the Court of Appeal's approach to s 13(1) of the Act (thereby rejecting what the Appellant calls its "*second*" argument). The consequence of such a conclusion would be that a claim for a progress payment that is served by a person "*who claims to be entitled to a progress payment*" will be a valid payment claim for the purposes of s 13(1) of the Act even if it is not "*supported*" by a "*reference date*".

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[52] See AS at [4].

[53] See "*First Respondent's Annotated Written Submissions*" dated 22 June 2015.

[54] See paragraph 3 of order made on 28 July 2016 (AB 417) and notice of appeal filed 10 August 2016 at [2] (AB 419).

[55] See eg, *Musico v Davenport* [2003] NSWSC 977 at [107]-[108].

[56] See *Supreme Court Act 1970* (NSW) s 69; *Probuild v Shade Systems* [2016] NSWSC 770 at [74].

101. Such a payment claim:

(a) must be responded to by a payment schedule in order to prevent a statutory debt from arising in the amount of the claim;[57]

(b) could support the claimant exercising a statutory power to suspend work if the payment claim is not responded to;[58] and

(c) may be the subject of a valid application for adjudication which, if made, would be validly referred to an adjudicator for determination.[59]

102. Yet, on the Appellant's approach to s 22(1), such a payment claim (although validly referred to an adjudicator for adjudication) could never actually be adjudicated by him or her.

10 103. The absurdity of that outcome reveals the error in the Appellant's argument. It could not sensibly have been the NSW Parliament's intention that a valid payment claim could validly be referred to an adjudicator for determination but not validly determined by him or her.

104. The Appellant's submissions to the contrary should be rejected if entertained.

The construction questions (ground 3 of the appeal; ground 1 of the notice of contention)

Introduction

105. If the Appellant succeeds on ground 2 of its appeal, it will be necessary to consider what is described in subparagraph 3(b) above as the "*construction questions*" – namely whether a "*reference date*" had relevantly arisen:

(a) on the assumption that, on 27 October 2014, the Appellant took the whole of the work
20 out if the Respondent's hands by a valid exercise of the power in cl 39.4(a) of the Contract (**Take Out Construction Question**); and

(b) on the assumption that, on 28 October 2014, the Respondent validly terminated the Contract for the Appellant's repudiation (**Termination Construction Question**).

106. Having regard to the way in which the Appellant conducted its case at trial (and, in particular, the fact that it did not seek to prove that the Take Out was valid[60]), the Appellant must succeed on ground 2 and on both of these Construction Questions in order to succeed in this appeal (or, alternatively, succeed on ground 4 of the appeal).

The Take Out Construction Question (paragraph 1(a) of the Notice of Contention)

107. On 27 October 2014, the Appellant took the whole of the work remaining to be completed
30 under the Contract out of the Respondent's hands purportedly pursuant to cl 39.4 of the Contract.[61]

108. Justice Ward (with whom Sackville AJA agreed)[62] held that, had it been necessary to determine the issue, her Honour would have held that (on the assumption that the Take Out by the Appellant was valid) no "*reference date*" would have arisen to support the Impugned

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[57] See ss 14 and 15(1) of the Act.

[58] See ss 15(2)(b), 27 of the Act.

[59] See ss 17 and 19 of the Act.

[60] See Ward JA at [25] (AB 379).

[61] Ward JA at [13] (AB 376); Contract cl 39.4 (AB 68).

[62] Ward JA at [92] (AB 396); Sackville AJA at [152] (AB 411). Emmett JA did not decide the Take Out Construction Question: Emmett JA at [122] (AB 403).

Payment Claim (made on 4 December 2014 for work up to the Take Out on 27 October 2014).[63] Her Honour erred in reaching this conclusion.

109. Subsection 8(2) of the Act relevantly defines "*reference date*" in the following terms:

> In this section[64], ***reference date***, in relation to a construction contract, means:
>
> (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or
>
> (b) if the contract makes no express provision with respect to the matter – the last day in the named month[65] in which the construction work was first carried out (or the related goods and serves were first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

110. The Contract (and, in particular, cl 37.1 thereof)[66] makes express provision with respect to the matter of the dates on which progress payments may be made (that is, the 8th day of each month for work under the Contract done to the 7th day of the month).[67]

111. The Contract does not expressly provide that the accrual of "*reference dates*" ceases on a valid Take Out under cl 39.4(a) of the Contract. The Take Out Construction Question therefore turns on whether the Contract impliedly has this operation.

112. Clause 39.4 of the Contract provides that (emphasis added):

> If the Contractor fails to show reasonable cause by the stated date and time [in a notice to show cause given under cl 39.2], the Principal may by written notice to the Contractor:
>
> a) take out of the Contractor's hands the whole **or part** of the work remaining to be completed and **suspend payment** until **it** becomes due and payable pursuant to subclause 39.6 ...[68]

113. In turn, subclause 39.6 relevantly provides that:

> When work taken out of the Contractor's hands has been completed, the Superintendent shall assess the **cost thereby incurred** and shall certify as moneys due and payable accordingly the difference between the costs (showing the calculations therefor) and **the amount which would otherwise have been paid to the Contractor if the work had been completed by the Contractor**. ...[69]

114. Thus, the regime contemplated by cll 39.4(a) and 39.6 is that – in certain circumstances – the Principal (that is, the present Appellant) can take the whole or part of the work remaining to be completed out of the contractor's hands, complete the work itself (whether personally or by another contractor) and then charge the Contractor (that is, the present Respondent) for any additional cost to it in doing so.

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[63] Ward JA at [15].

[64] Although the definition of "*reference date*" in s 8(2) of the Act is expressed to only apply "*[i]n this section*", the definition should be applied to the term wherever used in the Act: see *Draybi One v Norms Carpentry Joinery* [2013] NSWSC 1676 at [19].

[65] That is, calendar month: see *Interpretation Act 1987* (NSW) s 21.

[66] AB 64.

[67] See Item 28 of Part A of the Annexure to the Contract (AB 81.17).

[68] AB 68.

[69] AB 68.

115. As Ward JA correctly held,[70] the Take Out Construction Question largely turns on the meaning of the word "*it*" in the phrase "*suspend payment until it becomes due and payable pursuant to subclause 39.6*".[71]

116. If the word "*it*" was referring to all future payments on any account whatsoever, it may have been arguable that the suspension of all payments carried with it an implied suspension of the right to make any further progress payments. However, that is not what the word "*it*" is referring to. Rather, the word "*it*" in cl 39.4(a) is referring to the amount (if any) which "*becomes due and payable pursuant to subclause 39.6*".

117. Clause 39.6 requires a calculation to be made of the "*difference*" between:

10 (a) the "*cost thereby incurred*" (that is, the costs incurred by taking work out of the Contractor's hands and completing that work itself); and

(b) the "*amount which would otherwise have been paid to the Contractor if the work* [that is, the work which was taken out of the Contractor's hands] *had been completed by the Contractor*".

118. Clause 39.6 has nothing to say about work that has not been taken out of the Contractor's hands such as work that has already been performed as at the date of the take out or incomplete work that the Principal decided not to take out of the Contractor's hands. That being so, the word "*it*" in cl 39.4 should not be understood as referring to and suspending payment (or, by implication, the right to make a claim for payment) in relation to work that has not been taken out of the Contractor's hands.

20 119. The correctness of this approach is confirmed by considering the result which would ensue in the event that the Principal takes only part of the work remaining to be completed out of the Contractor's hands (as is specifically authorised by cl 39.4(a) of the Contract). For example, if (which is denied) the power under cl 39.4(a) to take work out of the Contractor's hands was enlivened on the facts of the present case, it would have been open to the Appellant to decide not to take all of the work remaining to be completed out of the Contractor's hands but instead to take only part of that work out of the Contractor's hands. In this way, the Principal could have (for example) taken out of the Contractor's hands the obligation to install the doorknobs in each apartment but otherwise decided to keep the Contractor's construction obligations intact.

30 120. On the Appellant's (and Ward JA's) approach, if the Principal had proceeded in this fashion, the Contractor would be obliged to complete the whole of the remaining work under the Contract (other than the doorknobs) without any ability to claim or receive cash flow by way of progress payments until the Principal or another contractor installs the doorknobs (which, for practical reasons, obviously could not occur until much of the Contractor's other construction obligations had been fulfilled such those relating to the construction of floors, walls, ceilings, doorframes and doors).

121. This could not have been the intention of the contracting parties.

122. The correct view of cl 39.4(a) is that it does not impliedly exclude the Contractor's right to make a claim for a progress payment in relation to work which was not taken out of the
40 Contractor's hands. On the facts of the present case, this means that it was open to the Contractor to make a claim for a progress payment on and from 8 November 2014 in relation to work performed up to the date of the Take Out (27 October 2014). Justice Ward erred in opining to the contrary.

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[70] Ward JA at [86] (AB 394).

[71] Ward JA at [86] (AB 394).

The Termination Construction Question (ground 3 of the appeal; ground 1(b) of the notice of contention)

123. As noted above, the trial before the primary judge was conducted on the basis that, if the Take Out was not a valid exercise of power, it constituted a repudiation of the Contract which the Respondent validly "*accepted*" by terminating the Contract at law on 28 October 2015.[72]

124. On the assumption that the Contract was terminated in this fashion, a question arises as to whether termination by the Respondent for the Appellant's repudiation had the effect of preventing the accrual of any further "*date[s] determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made*" for the purposes of s 8(2)(a) of the Act.

125. This is not necessarily a pure question of contractual construction. Rather, given that s 8(2)(a) of the Act refers to dates determined by or "*in accordance with the terms of the contract*" (rather than dates determined "*by*" or "*under*" the contract) it is possible that there is a "*date*" determined "*in accordance with the terms of the contract as a date on which a claim for a progress payment may be made*" on and from which a Construction Contractor may be entitled to a progress payment under the Act even though that date might not be a date on which a Construction Contractor might make a claim for a progress payment under the construction contract.

126. There is a line of authority which takes a similar view in relation to the words "*in accordance with the terms of the contract*" in s 9(a) of the Act.[73] That paragraph provides that "*[t]he amount of the progress payment to which a person is entitled*" is "*the amount calculated in accordance with the terms of the contract*".

127. The identified line of authority holds that "*calculated in accordance with the terms of the contract*" in s 9 means "*calculated on the criteria established by the contract*" rather than "*reached according to mechanisms provided by the contract*".[74] As a result, the outcome "*in accordance with the terms of the contract*" will not necessarily be the same as the outcome under the contract.

128. For example, as Hodgson JA explained in *Plaza West v Simon's Earthworks* [2008] NSWCA 279 at [54], "*contractors are not deprived of entitlement to payment under the Act because a [contractual] condition precedent, such as the obtaining of a superintendent's certificate, has not been satisfied*".

129. Once the above is appreciated, it becomes clear that Ward JA did not make the error ascribed to her Honour by paragraph 85 and 89 of the Appellant's Submissions. Her Honour's approach was not to make an "*assumption that the Act gave an entitlement to reference dates*". Rather, her Honour's approach was to (as s 8(2) of the Act commands) look to the "*terms of the contract*" to see if there was a date which could be "*determined by or in accordance with*" those terms as a "*date on which a claim for a progress payment may be made*".

130. Her Honour correctly held[75] that, under the terms of the Contract (and, in particular, cl 37.1 thereof), a reference date arises on the 8th day of each month for work done under the contract up to the 7th day of that month. Her Honour then considered[76] whether there was a contractual provision which "*preclude[d]*" further dates arising after termination for the Appellant's repudiation.

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[72] See Ball J at [41] (AB 345); Ward JA at [25] (AB 379).

[73] See *Abacus Funds Management v Davenport* [2003] NSWSC 1027 at [38]; *Leighton Contractors v Campbelltown Catholic Club* [2003] NSWSC 1103 at [73]; *Transgrid v Walter Construction* [2004] NSWSC 21 at [53]; *John Holland v Roads and Traffic Authority* (2007) 23 BCL 205 (NSWCA) at [38], [77]; *Hervey Bay v Civil Mining* (2010) 26 BCL 130 (QSC) at [24]; *NSW Land and Housing v Clarendon Homes* [2012] NSWSC 333 at [17].

[74] See *John Holland v Roads and Traffic Authority* (2007) 23 BCL 205 (NSWCA) at [38].

[75] Ward JA at [82] (AB 393).

[76] Ward JA at [82] (AB 393).

131. Contrary to the Appellant's Submissions, by using the word "*preclude*", her Honour was not "*discern[ing] some statutory right existing independently of the Contract, and then [asking] whether the Contract precluded that right*". Rather, her Honour was observing that in circumstances where one of the "*terms of the contract*" (cl 37.1[77]) expressly provided that "*reference dates*" arise on the 8th day of each month, it was necessary to consider whether some other term of the contract provided an exception to (or "*preclu[sion]*" of) that position. Her Honour correctly held that there was no such term.

132. An alternative route to the same ultimate conclusion[78] is available by treating the Termination Construction Question as a pure question of contractual construction. On that approach, the Termination Construction Question reduces to a question of whether the contracting parties intended that – if the Contract was terminated by the Respondent for the Appellant's repudiation – the Respondent would thereby be precluded from making a claim for a progress payment in relation to work performed up to the date of termination.

133. That question should be answered in the negative.

134. The Contract contemplates that the Respondent will earn and be paid the Contract Sum progressively. That is made clear by, in particular, cl 37.1 of the Contract[79] which provides that the Contractor "*shall*" claim payment progressively on a monthly basis.

135. The Contract should not be construed in such a way as would deprive the Contractor of its right to progressive payment in the event that the Contract is terminated for the Principal's repudiation. To so construe the Contract would be to permit a party to take advantage of its own wrong.[80]

136. The correct view is that termination of the Contract by the Respondent for repudiation by the Appellant will not deprive the Contractor from making at least one further claim for a progress payment in relation to work performed up to the date of termination.[81] It follows that the Termination Construction Question should be resolved favourably to the Respondent.

The s 13(5) question (ground 4 of the appeal)

137. Ground 4 of the appeal can be quickly disposed of. By that ground, the Appellant contends that the Impugned Payment Claim contravened s 13(5) of the Act by being the second payment claim "*in respect of*" the 8 October 2016 "*reference date*". That argument was raised at both levels below but not accepted by any of the judges of the Court of Appeal or by the primary judge.

138. Subsection 13(5) of the Act provides as follows (emphasis added):

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[77] AB 64.

[78] See Notice of Contention filed 18 August 2016 at [1(b)] (AB 423.01).

[79] AB 64.

[80] See, eg, *Alghussein Establishment v Eton College* [1988] 1 WLR 587. It would be no answer to this submission to argue that, on the Appellant's approach, any cessation of a reference dates would be caused by the Respondent's decision to terminate rather than the Appellant's repudiation of the Contract. The correct approach is to regard any disadvantage arising from the termination of a contract at law as being caused by the repudiating party rather than the "*innocent*" party: see, by analogy, *The Solholt* [1983] 1 Lloyd's Rep 605 at 607.

[81] A similar view was arrived at in *Holdmark Developers v GJ Formwork* [2004] NSWSC 905 (***Holdmark***) at [23], [25], [26]. In *Brodyn v Davenport* (2004) 61 NSWLR 421 (***Brodyn***) at 443 [62]-[63], the *Holdmark* was disapproved insofar as it held that "*only one final payment claim*" could be made after a contract is terminated. *Brodyn* is not, however, inconsistent with the proposition from *Holdmark* that at least one "*reference date*" will ordinarily arise "*in accordance with the terms of the contract*" after the construction contract is terminated: see *Walton Construction v Corrosion Control Technology* [2012] 2 Qd R 90 at [47]-[48].

> A claimant cannot serve more than one payment claim **in respect of** each reference date under the construction contract.

139. Properly construed, s 13(5) prohibits what the Discussion Paper called "*Repeat Claims*"[82] and authorities on the Act have described as "*repetitive payment claims*".[83] According to the Discussion Paper, the 1999 Act included "*no limit on how many payment claims can be made under the Act for **any particular construction work***".[84] This had the result, according to the Discussion Paper that (emphasis added):

> A vexatious claimant may serve the **same** payment claim **repeatedly** over a period of time, with the hope that the respondent will eventually fail to serve a payment schedule.[85]

10 140. As the Appellant correctly submits (at [105]-[106]), s 13(5) calls for the characterisation of the payment claim said to have been served in breach of s 13(5) – if that payment claim can properly be characterised as being "*in respect of*" a reference date in respect of which there has already been a payment claim, the latter payment claim will be void.[86]

141. For reasons which are not clear, at trial, the Appellant did not tender the payment claim which was said to have been repeated by the Impugned Payment Claim.

142. The primary judge did, however, find (based on an admission by the Respondent) that a payment claim had been made in respect of the 8 October 2014 reference date.[87] The primary judge also observed that it was "*agreed that the [Impugned Payment Claim] related to work done by [the Respondent] up to 27 October 2014, when the work was taken out of its hands*"[88].

20 143. Those findings could not support a conclusion that the Impugned Payment Claim was a "*[r]epeat*" of the payment claim made in respect of the 8 October 2014 reference date or that the Impugned Payment Claim should be characterised as being "*in respect of*" 8 October 2014. The Court of Appeal was correct to so hold.

144. If anything, the "*scanty evidence*"[89] relied on by the Appellant before the primary judge (and, in particular, the evidence that the impugned Payment Claim "*related to work done by [the Respondent] up to 27 October 2014*") supported a conclusion that the Impugned Payment Claim was **not** "*in respect of*" 8 October 2014.

145. The Appellant's Submissions to the contrary (in particular, at [107]-[110]) appear to proceed on an unestablished premise – that s 13(5) of the Act deems payment claims to be "*in respect*
30 *of*" the "*most proximate*" reference date which has arose.[90] There is no basis for putting such a gloss on the statutory language of s 13(5).

146. Contrary to the Appellant's Submissions (at [110]), such a gloss is not necessary in order to avoid the scheme of the Act being defeated "*by simply including work done after a date which cannot validly be used [as a reference date]*". Properly analysed, the scheme of the Act could not be defeated in that way.

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[82] Discussion Paper at 7, "*issue no 12*".

[83] See, eg, *Kitchen Xchange v Formacon Building* [2014] NSWSC 1602 at [29]. See also *Dualcorp v Remo* (2009) 74 NSWLR 190 at 194 [14] per Allsop P.

[84] Discussion Paper at 21.

[85] Discussion Paper at 21.

[86] The First Respondent accepts that Sackville AJA was in error to the extent that his Honour suggested to the contrary (at [148]; AB 410) – the other two judges in the Court of Appeal did not make this error and Sackville AJA would have rejected the present Appellant's Submissions on this issue "*in any event*" (see Sackville AJA at [149]; AB 410).

[87] Ball J at [22] (AB 340).

[88] Ball J at [8] (AB 337).

[89] Sackville AJA at [151] (AB 411).

[90] See Sackville AJA at [149] (AB 410) making an observation to similar effect.

147. This is because a payment claim which "*simply includ[es] work done after a date which cannot validly be used [as a reference date]*" will fail because a claimant which makes such a claim will have no entitlement to a progress payment under s 8(1).

148. The correct view of s 13(5) is that it is directed to the mischief referred to in the Discussion Paper – "*repeat claims*" being made "*for any particular construction work*" in particular where that is done "*with the hope that the respondent will eventually fail to serve a payment schedule*".

149. The Impugned Payment Claim was not such a "*repeat claim*". The Appellant's argument to the contrary should be rejected. Ground 4 of the appeal should be dismissed.

Conclusion

10 150. The NSW Court of Appeal was correct to allow the appeal to that Court and to set aside the relief granted by the primary judge. The appeal to this Court should be dismissed with costs.

PART VI – ARGUMENT ON NOTICE OF CONTENTION

151. Paragraph 1 of the Respondent's notice of contention (**Notice**) is dealt with in paragraphs 107 to 122 and 132 to 136 above.

152. Paragraph 2 of the Notice does not arise. That paragraph anticipated[91] that the Appellant would make an argument to the effect of the first four lines of the paragraph 2 of the Notice. That argument not having been made, paragraph 2 of the Notice does not arise.

PART VII – TIME ESTIMATE

153. Approximately two hours will be required for the Respondent's oral argument.

20 22 September 2016

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[91] Based on the arguments advanced by the Appellant in support of its application for special leave to appeal. See Applicant's Summary of Argument filed 20 November 2015 at [19].