SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2020 0095

YUANDA VIC PTY LTD (ACN 166 473 089) Applicant

v

FAÇADE DESIGNS INTERNATIONAL PTY LTD (ACN 099 706 859) Respondent

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JUDGES:	McLEISH, NIALL and SIFRIS JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	20 November 2020
DATE OF JUDGMENT:	5 March 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 44
JUDGMENT APPEALED FROM:	[2020] VSC 570 (Riordan J)

BUILDING CONTRACTS – *Building and Construction Industry Security of Payment Act 2002* – Payment claim indicating claimed amount – Principal liable to pay claimed amount after failure to provide payment schedule – Application to court by claimant to recover claimed amount – Court required not to give judgment for claimant unless satisfied claimed amount does not include any excluded amount – Whether court must be satisfied on face of claim or may look more widely – Whether excluded amount may be deducted from claimed amount and judgment given for balance – Whether excluded amount can be severed from claimed amount – *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183, *John Beever (Aust) Pty Ltd v Roads Corporation* [2018] VSC 635, considered – *Building and Construction Industry Security of Payment Act 2002* ss 4, 14(2)(d), 15(4), 16(2), 16(4).

BUILDING CONTRACTS – Whether claimed amount included non-permitted variations – *Building and Construction Industry Security of Payment Act 2002* s 10B(2).

BUILDING CONTRACTS – Whether claimed amount included items based on alleged fraudulent settlement agreement – Whether claims individually substantiated – Relevance of alleged fraudulent settlement agreement – Whether 'fraud unravels everything'.

STATUTORY INTERPRETATION – Consequences of non-compliance with statutory requirement not to include 'excluded amount' in 'claimed amount' – *Building and Construction Industry Security of Payment Act 2002* evinces policies of preventing recovery of excluded amounts and encouraging adjudication to resolve disputes – Court role limited to enforcement of statutory liability – Enforcement unavailable where 'claimed amount' non-compliant.

WORDS AND PHRASES – 'claimed amount' – 'excluded amount'.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr R Fenwick Elliot with Ms L Mills	Fusion Legal
For the Respondent	Mr M Roberts QC with Ms C Symons	Piper Alderman

1 We have had the benefit of reading in draft form the reasons of Sifris JA. However, we have come to a different view as to proposed ground 2, which leads us to decide that the appeal should be allowed. We gratefully adopt his outline of the issues in the appeal, including the reasons of the primary judge and the submissions of the parties.

2 In the reasons that follow we explain why we would uphold proposed ground 2. We also give our own reasons for rejecting proposed ground 1, given that these two grounds are related.

Proposed ground 2

3 The first and second proposed grounds of appeal raise for consideration the proper construction of s 16(4)(a)(ii) of the *Building and Construction Industry Security of Payment Act 2002* ('the Act'). It is convenient to set out the terms of s 16(4)(a):

> (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—
>
> (a) judgment in favour of the claimant is not to be given unless the court is satisfied—
>
> (i) of the existence of the circumstances referred to in subsection (1); and
>
> (ii) that the claimed amount does not include any excluded amount; …

4 Section 16(2)(a) enables the claimant to elect between two alternative courses if a respondent becomes liable to pay a claimed amount under s 15(4) as a consequence of having failed to provide a payment schedule and then fails to pay the claimed amount on or before the due date. Those alternative courses are, first, to recover the unpaid portion of the claimed amount as a debt due to the claimant in a court of competent jurisdiction (s 16(2)(a)(i)), and secondly, to make an adjudication application in relation to the payment claim: s 16(2)(a)(ii).

5 The first option, enforcing the debt, relies on s 15(4) of the Act, which provides that, if a payment claim is served and the respondent does not provide a payment schedule within the time required, the respondent 'becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates'. In other words, court action under s 16(2)(a)(i) involves identifying and enforcing a statutory liability.

6 The statutory liability in question is a liability to pay 'the claimed amount'. That is a defined term. Section 4 provides that:

> ***claimed amount*** means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 14.

7 Section 14 sets out the requirements for a payment claim. Relevantly for present purposes, it provides:

> (2) A payment claim—
>
> …
>
> (c) must identify the construction work or related goods or services to which the progress payment relates;
>
> (d) must indicate the amount of the progress payment that the claimant claims to be due (the ***claimed amount***); and
>
> ...
>
> (3) The claimed amount—
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> …
>
> (b) must not include any excluded amount.

8 The words 'as referred to in section 14' in the definition of 'claimed amount' in s 4 indicate that that expression does not simply mean an amount of a progress payment claimed to be due. Otherwise the words referring to s 14 would have no work to do. When one goes to s 14 to identify what that work may be, it becomes plain that the reference is to s 14(2)(d), where the bold and italicised defined term 'claimed amount' is repeated.

9 Section 14(2)(d) does two things that the definition in s 4 does not. First, it makes it clear that it is the claimant who claims that a claimed amount is due. Section 4 is silent as to this point, but it is obvious in any event. This cannot be the real work of the reference to s 14.

10 Secondly, and significantly, s 14(2)(d) requires that the amount of the progress payment that the claimant claims to be due must be indicated in the payment claim. The amount so indicated is then described as the 'claimed amount'.

11 It is not clear whether the primary judge was taken to the definition of 'claimed amount' in s 4, but he did not refer to it. Its terms are important because, as already noted, it reveals that the claimed amount is not just the amount claimed, but the amount claimed 'as referred to in s 14'. If s 14(2)(d) were to be read as defining the claimed amount as 'the amount of the progress payment that the claimant claims to be due', the reference in s 4 to s 14 would add nothing.

12 Of course, the principles of statutory interpretation only presume that words in a statute have some operation. They do not prohibit the adoption of a construction that acknowledges that words are otiose; such a construction should, however, be avoided if possible.[1] The preceding textual examination is therefore only the start of the process of construction.

13 Turning then to the context of s 16(4)(a)(ii), several points may be observed. First, as already noted, the Court's task under the provision is to decide whether a statutory liability exists and, if so, whether it is to be enforced. The statute defines the nature and extent of any liability. Nothing in s 16(4)(a) suggests that the Court may identify or enforce any liability other than that created under s 15(4). Section 16(4)(b) expressly precludes the raising of any contractual defence or cross-claim.

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1 See, eg, *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship ('Malaysian Declaration Case')* (2011) 244 CLR 144, 192 [97] (Gummow, Hayne, Crennan and Bell JJ).

14 Secondly, and in contrast to the role of the Court, an adjudication (being the second option available to a claimant when no payment schedule is provided and the claimed amount remains unpaid) is an avenue for revisiting the nature and extent of statutory liability. So, if the claimant proceeds to adjudication under s 18(1)(b), the adjudicator is to determine the 'adjudicated amount', being the amount of the progress payment, if any, to be paid by the respondent to the claimant: ss 4, 23(1)(a). The adjudicator in doing so must not take into account any part of the claimed amount that is an excluded amount: s 23(2A)(a). The amount determined by the adjudicator then becomes a statutory liability of the respondent: s 28M (subject to the possibility of an adjudication review, which may be put to one side). This necessarily displaces the liability formerly created by s 15(4).

15 Thirdly, it is noteworthy that s 23(2A)(a) is in very different terms to s 16(4)(a)(ii), in that it refers to the adjudicator not 'tak[ing] into account … an excluded amount', rather than the claimed amount 'not includ[ing] any excluded amount'. Only s 23(2A) uses language directly requiring the decision-maker to put excluded amounts out of account.

16 Fourthly, if an adjudication amount is not paid, an adjudication certificate may be provided, giving the person in question the right to recover the unpaid portion of the amount payable as a debt due to that person: s 28R. The Court is required to be satisfied that the amount payable has not been paid, but the other person cannot challenge the adjudication determination, except in one limited respect if subsequently seeking to have the Court's judgment set aside: s 28R(5)(a)(iii) and (6).

17 Taken together, these provisions suggest that the Court has a limited role, confined to identifying and enforcing statutory liabilities as debts. The task of adjudication is larger. Where it takes place, excluded liabilities are expressly required to be deducted and a new statutory liability for the adjudicated amount is substituted. Again, the Court's role is confined to ordering payment of that amount

to the extent it is unpaid.

18 Two relevant and connected policies are evident in the relevant provisions of the Act. First, where there are substantive issues in dispute about the contents of a payment claim, the proper course is to pursue adjudication. Section 3 sets out the object of the Act, namely to ensure that any person who (relevantly) undertakes to carry out construction work 'is entitled to receive, and is able to recover, progress payments' in relation to that work, by means of granting a statutory entitlement to that payment': s 3(1) and (2). By s 3(3), the means by which the Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

> (a) the making of a payment claim by the person claiming payment; and
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> (b) the provision of a payment schedule by the person by whom the payment is payable; and
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> (c) the referral of any disputed claim to an adjudicator for determination; and
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> (d) the payment of the amount of the progress payment determined by the adjudicator; and
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> (e) the recovery of the progress payment in the event of a failure to pay.

19 The Act therefore exhibits a clear policy that disputes regarding liability for payment are dealt with by adjudication, with the Court's function being to order recovery of unpaid amounts.

20 Secondly, the Act is at pains to prevent the recovery of excluded amounts. Despite anything in the construction contract, an excluded amount 'must not be taken into account in calculating the amount of a progress payment to which a person is entitled': s 10(3), 10B(1). In the course of providing for the service of payment claims and defining their content, s 14 states that the claimed amount 'must not include any excluded amount': s 14(3)(b). Section 15(3)(c) requires a payment schedule to identify any amount the respondent alleges is an excluded amount. As already mentioned, an adjudicator must not take into account any part of the

claimed amount that is an excluded amount: s 23(2A)(a). An adjudication determination is void to the extent it takes account of an excluded amount: s 23(2B)(b). Review of an adjudication determination is available on the sole ground that the adjudicator included an excluded amount, or wrongly determined that an amount was an excluded amount: ss 28B(3), 28C(2).

21 A tolerably clear statutory scheme emerges, by which, if there is a dispute about the extent to which excluded amounts are being claimed, that is a matter for adjudication. If there is no dispute, a claimant may proceed straight to court seeking recovery. At that point, the Court 'is not to' give judgment in favour of the claimant unless it is satisfied that the claimed amount does not include 'any' excluded amount. Consistently with the policy of the Act to prevent recovery of excluded amounts and the role of the Court in enforcing a liability determined by the statute, the natural meaning of those words is that, if the claimed amount includes any excluded amount, it is not to give judgment.

22 Notably, in providing for the statutory liability on failure to provide a payment schedule, s 15(4) does not carve out any excluded amount. The liability is for the claimed amount, and nothing less. This is consistent with a construction of s 16(4)(a)(ii) which precludes enforcement of such a liability where it includes any excluded amount. In such a case, the liability has arisen in contravention of the various prohibitions against the use of excluded amounts in calculating progress payments and in payment claims: ss 10(3), 10B(1), 14(3)(b). It stands to reason that the Act would not permit enforcement of the liability in these circumstances but would treat the matter as one that ought to have been adjudicated.

23 If one were to give 'claimed amount' an ambulatory operation, so that the Court acting under s 16(4) could give judgment for a lesser amount on the basis that the claimant (by the time of the enforcement proceedings) no longer seeks recovery of excluded amounts included in the payment claim, that would open the way for the Court to range more widely than identifying whether there is a statutory liability

to enforce. It would be determining the claimed amount, albeit by reference to abandoned excluded amounts. That would permit the Court to be used, rather than the quicker and more informal processes contemplated by the Act, for the adjudication of potentially complex factual disputes. It would take the Court beyond the role of enforcing recovery of a statutory liability.

24 Such a result would sit uncomfortably with the Act's clear policy of encouraging resort to adjudication for dispute resolution. In light of that policy, resort to the Court under s 16(2)(a)(i) should be seen as an option intended to be used only in a clear case. A claimant who chooses not to proceed to adjudication takes the risk that the criteria in s 16(4)(a) might not be met. Interpreting sub-paragraph (ii), in accordance with its natural meaning, as prohibiting judgment if any excluded amount has been claimed, is consistent with that understanding of the legislative scheme.

25 This construction also encourages a claimant to comply with the various prohibitions against including excluded amounts in a progress payment or payment claim, by denying direct judicial enforcement absent prior adjudication in all such cases.[2] The contrary construction, favoured by the primary judge, opens the way for a claimant to include excluded amounts in a payment claim and then to abandon any amounts identified as excluded amounts after a trial of the issue in court. That approach does nothing to encourage compliance with the Act's policy that excluded amounts not be claimed as part of the scheme.

26 The result of this construction is not that a payment claim containing an excluded amount is invalid. Such a claim is valid and may give rise to a liability under s 15(4) if a payment schedule is not provided in time. The adjudication path then offers a means of recovering the claimed amount, less any excluded amounts identified by the adjudicator. If the direct judicial enforcement path is taken in such a case, it will fail, but nothing prevents the claimant from including the same work

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[2] See [22] above.

(less any excluded amounts) in a fresh payment claim.

27 For the above reasons, the 'claimed amount' in s 16(4)(a)(ii) is the amount claimed in the payment claim, and if that amount includes any excluded amount the Court is precluded from giving judgment in favour of the claimant. Accordingly, we would uphold ground 2.

Notice of contention — severance

28 The respondent contends, by way of notice of contention, that even if ground 2 succeeds, the decision of the primary judge as to the proper treatment of excluded amounts should be upheld in reliance on what is described as the 'doctrine of severance'. It was contended that, even if the above construction were correct, the doctrine permitted any amount of the claimed amount that was an excluded amount to be 'severed from the claimed amount' so that s 16(4)(a)(ii) is satisfied.

29 The first basis for this contention was an argument that the word 'excluded' meant 'shut out from consideration' and that, consistently with this meaning, the definition of 'excluded amounts' invited a process whereby such amounts were shut out from consideration. This result was said to be supported by the objects of the Act and a claimant's right or entitlement to a progress payment, together with the provisions requiring an adjudicator not to take account of excluded amounts.

30 In our opinion, this argument fails at the threshold. In truth, it does not accept the construction of s 16(4)(a)(ii) identified above but suggests reasons for favouring the alternative construction. Those reasons should not be accepted. The critical issue is not what is meant by 'excluded' but what s 16(4)(a)(ii) means by 'does not include'. As already mentioned, it is noteworthy that the provisions governing adjudication use different language, requiring the adjudicator not to 'take into account' any excluded amount: s 23(2A)(a). This difference serves to demonstrate that the contention is misconceived.

31 Resort to the doctrine of severance does not salvage the argument. It applies

where part of an instrument is invalid and, in limited circumstances, the remainder may be preserved by severing that part.[3] The respondent does not identify an instrument to which the doctrine might apply. It cannot be the Act itself, because no question of its validity arises. Nor can it be the payment claim. That is not simply because treating the claimed amount as something less than that which is indicated in the payment claim would fly in the face of the construction of 'claimed amount' which has been identified above. It is also because a payment claim which contains an excluded amount within the claimed amount is still a valid payment claim. That is evident from the requirement that the respondent's payment schedule identify alleged excluded amounts,[4] and the obligations on the Court and an adjudicator in respect of excluded amounts. If the payment claim were simply invalid, these provisions would have no foundation upon which to operate. Since no question of validity of the payment claim arises, severance is not an issue.

32 It is necessary to refer to three decisions relied upon by the respondent in support of the contrary conclusion. First, in *Gantley Pty Ltd v Phoenix International Group Pty Ltd*,[5] Vickery J undertook an analysis of the common law doctrine of severance in the context of a challenge to the validity of a payment claim. It is important to note that the Act did not then include amendments made in 2006 which introduced the concept of 'excluded amounts'. As a result, there was no equivalent of s 16(4)(a)(ii) or s 23(2A). The question was whether the fact that a payment claim contained items that did not sufficiently identify the work in question as required by s 14(3)(c) rendered the whole payment claim invalid.

33 *Gantley* therefore involved a case of alleged invalidity where the question of severance squarely arose. In that context, Vickery J held that the Act did not operate to exclude the common law doctrine of severance.[6] It is plain that this conclusion is

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3 See *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, [96]–[111] (Vickery J) ('*Gantley*'), and the cases there cited.

4 See s 15(2)(c).

5 [2010] VSC 106, [96]–[111].

6 Ibid [115].

of no assistance in the present case. Apart from the legislative provisions being fundamentally different in critical respects, the present case does not involve a question of validity of the payment claim.

34 Next, in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd*,[7] Vickery J noted that, while the Act enables a respondent to a payment claim to identify excluded amounts, it does not provide for a respondent who identifies an excluded amount to avoid payment of the whole claimed amount.[8] That is plainly so, but the point does not shed light on the availability of severance, or the construction of s 16(4)(a)(ii) which is only one means of recovering the claimed amount. In any event, this case involved an adjudication and, as Vickery J explained earlier in his reasons, s 23(2B) of the Act makes it clear that an adjudicator's determination is void to the extent that it takes an excluded amount into account, which constitutes a 'statutory scheme of severance' in that context.[9] Vickery J referred to the observations about severance in *Gantley*, but held that the Act did not make invalid a payment claim that includes an excluded amount.[10] Again, this made resort to the doctrine unnecessary, and inappropriate.

35 Finally, in *John Beever (Aust) Pty Ltd v Roads Corporation*,[11] Digby J stated that s 16(4)(a)(ii) 'precludes the Court from giving judgment for the claimant in respect of' any excluded amount.[12] However, this was merely a paraphrase of the section. Later references in the judgment rather suggest that the inclusion of an excluded amount means that the amount claimed cannot be recovered, by reason of s 16(4)(a)(ii).[13] Digby J was in any event not purporting to decide the current question. Nor did he need to decide the question of severance in the context of the

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7 [2011] VSC 183.

8 Ibid [71].

9 Ibid [63]–[64].

10 Ibid [65]–[69].

11 [2018] VSC 635.

12 Ibid [44].

13 Ibid [164], [166].

matter before him, which was a claim for summary judgment.

36 In short, none of these authorities supports the respondent's reliance on the doctrine of severance, and its contention in that respect should be rejected.

37 The result is that the appeal must succeed and the other proposed grounds need not be considered. However, it is desirable to say something about proposed ground 1 in particular, because it is informed also by the preceding discussion.

Proposed ground 1

38 As the reasons of Sifris JA make clear, the primary judge adopted a construction of s 16(4)(a)(ii) by which the Court is required to be satisfied that the claimed amount does not include any excluded amount 'on the face of the payment claim'.[14] The parties are in agreement that the 'face' of the payment claim includes the documents supporting the payment claim, which can be taken to mean documents referred to in the payment claim or served with it. The question under proposed ground 1 is whether the Court may have resort to other material.

39 Two points are clear at the outset. The first is that, consistently with the preceding analysis, a construction that confines the role of the Court and encourages disputes to be resolved through adjudication better advances the objects and policy of the Act. That of course does not, without more, justify a particular construction unless it is first anchored in the statutory text. Secondly, s 16(4)(b)(ii) expressly prohibits the respondent from raising a defence in relation to matters arising under the construction contract. That provision may have a wide operation, but it is not necessary to decide its scope here.[15] The question is whether the language of s 16(4)(a)(ii) supports a further limitation on the material that may be advanced before the Court, being material which, although admissible by the rules of evidence, is excluded from the Court's statutory task.

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14 Reasons [59].

15 See *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93, [20] (Basten JA, Meagher JA agreeing at [77]), [95] (Emmett AJA); Reasons [55(g)], [56].

40 The textual issue concerns the meaning of 'does not include'. On one reading, the claimed amount is simply a number and the question whether it 'includes' any excluded amount is one of fact, to be determined by reference to any admissible evidence (so long as the respondent does not thereby raise a defence contrary to s 16(4)(b)(ii)). Alternatively, the 'claimed amount' is an amount indicated in a payment claim and the question what it 'includes' therefore looks to the payment claim for the answer.

41 In our opinion, the competing interpretations are resolved by resort in the first place to the definition of 'claimed amount' in s 4. Again, that amount is an amount 'as referred to in s 14', which as has been seen, means the amount indicated as the claimed amount in the payment claim. Section 14(3)(b) states that the claimed amount 'must not include any excluded amount'. It is this stipulation as to which the Court must be satisfied under s 16(4)(a)(ii). When one turns to the definition of 'excluded amounts' in s 10B (cross-referenced in s 4), they are amounts 'that must not be taken into account in calculating the amount of a progress payment'.

42 Reading these provisions together, a payment claim 'includes an excluded amount' if such an amount has been taken into account in calculating the claimed amount indicated in the payment claim. That is significant, because the payment claim must also identify the construction work or related goods or services to which the payment claim relates: s 14(2)(c). That means that the manner in which the payment claim is calculated will be apparent in the payment claim. It will be possible to see from the payment claim what amounts have been taken into account in calculating the claimed amount, and the work, goods or services, to which they are referable.

43 Accordingly, the payment claim itself will have 'included' those amounts and provided an explanation for their inclusion. There is a subtle difference between this and saying that the claimant has 'included' the amounts. That is because, if it is said that the claimant has 'included' the amounts, the inquiry into whether an excluded

amount has been included would logically examine the factual basis relied on by the claimant. In contrast, where it is the payment claim that 'includes' an amount, the equivalent inquiry might logically confine itself to the material disclosed in the payment claim.

44 The textual considerations therefore suffice to show that the meaning of 'must not include any excluded amount' is open to more than one interpretation. In those circumstances, the interpretation which best accords with the policy of the Act should be preferred. In our opinion, that is the more limited construction on which the primary judge relied. The enforcement process is not intended to be an inquiry into the merits of the claim. That is obvious from the prohibition on the respondent advancing a cross-claim or raising a defence. It is also apparent more generally from the 'pay now, argue later' scheme of the Act as a whole and, within that scheme, the provision for adjudication (and adjudication review) in respect of disputed excluded amounts. An interpretation which gives the Court a limited role is to be encouraged as consistent with the Act's preference for adjudication to resolve disputes about the contents of a payment claim.

45 To the extent that this construction might be thought unfairly to disadvantage a respondent, it must be remembered that the respondent has the opportunity, in providing a payment schedule, to identify any amounts alleged to be excluded amounts (and it is obliged to do so if a payment schedule is provided). That claim may be based on any material at all, meaning that the respondent can travel well beyond the face of the payment claim. A respondent who has failed to do so can hardly be heard to complain that it is unfair, if a claimant then seeks recovery through the Court, that the Court need only be satisfied as to the excluded amount question on the face of the payment claim and documents to which it refers or which were served with it.

46 For these reasons, we would grant leave to appeal on proposed ground 1 but do not uphold that ground.

Proposed ground 3

47 Proposed ground 3 takes issue with specific amounts for site shutdowns which are said to be excluded amounts. It serves no purpose if the appeal succeeds on ground 2, as in our view it should. However, we agree with Sifris JA that leave should be granted, and we would reject the ground for the reasons he gives.

Proposed grounds 4 and 5

48 Proposed grounds 4 and 5 depend on the applicant first succeeding on ground 1. These proposed grounds too serve no purpose if the appeal succeeds on ground 2. Again, however, we agree that leave should be granted, and would reject these grounds, for the reasons given by Sifris JA.

Conclusion

49 We would grant leave to appeal, allow the appeal and set aside the orders of the primary judge. In their place, we would order that the claim be dismissed.

SIFRIS JA:

Introduction

50 This application for leave to appeal raises important issues in relation to the application of the *Building and Construction Industry Security of Payment Act 2002* ('the Act'). The Act provides a pay now and argue later scheme, designed to ensure that those who engage in construction work or who supply goods and services under a construction contract, receive and recover progress payments in a timely and cost effective manner. This case exposes the danger that parties may argue now and if required pay later.

51 On 16 September 2020, a judge of the Trial Division of the Court entered judgment in favour of the respondent, Façade Designs International Pty Ltd ('Façade') against the applicant, Yuanda Vic Pty Ltd ('Yuanda') in the sum of

$3,357,664.67 plus interest in the sum of $296,210.42 pursuant to s 16(2) of the Act. On 15 September 2020, the judge delivered reasons for judgment.[16]

52 Yuanda seeks leave to appeal from part of the decision.

Relevant factual and procedural background

53 By a Supply and Installation Agreement dated 13 April 2018 ('the Contract'), Façade agreed to carry out the installation of façade elements manufactured and supplied by Yuanda as part of the construction of commercial and residential towers at 447 Collins Street, Melbourne, Victoria, known as 'the Arch on Collins' ('the Project') for the Contract price of $14.5 million.

54 From September 2018 until the Contract was terminated in November 2019, Façade performed construction works and supplied services under the Contract.

55 On 30 September 2019, Façade purported to provide a payment claim under s 14 of the Act for a total amount of $4,584,820.68 (inclusive of GST) ('the Payment Claim'). This is the start of the process under the Act. A payment claim is required to indicate, as it did, the progress payment that the claimant claims to be due. This amount is defined as the 'claimed amount'. This definition is important and is central to proposed appeal ground 2. In short, Yuanda contends that judgment can only be entered for this 'fixed' amount, as claimed. An important aspect of a claimed amount is that it must not include an 'excluded amount' as defined. It is common ground that the claimed amount indicated on the Payment Claim included interest, which is an excluded amount. Whether interest could simply be excluded and judgment given for a lower amount than the claimed amount is part of proposed appeal ground 2.

56 The Payment Claim comprised several individual claimed items and amounts with tax invoices and supporting documents. The claim for interest (invoice 1162)

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16 *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 520 ('Judgment' or 'Reasons').

was on its face an excluded amount. However, Yuanda contends that the Payment Claim included other excluded amounts comprising non permitted variations (proposed ground 3) and amounts based on an alleged fraudulent settlement agreement (proposed grounds 4 and 5). These matters are referred to in more detail below.

57 On 2 October 2019, Yuanda paid Façade the amount of $1,115,455 (inclusive of GST) reducing the amount claimed to $3,469,365.58.

58 Yuanda did not provide a payment schedule to Façade within 10 business days of receiving the Payment Claim, as permitted by s 15 of the Act. A payment schedule is intended to constitute the response to the payment claim by a respondent. However, a respondent is not obliged to respond or indicate which parts of the claim are accepted and which parts are rejected, including whether a claim includes an excluded amount. The consequences of not responding are dealt with next.

59 Accordingly, pursuant to s 15(4) of the Act, Yuanda, having elected not to provide a payment schedule, became liable to pay Façade the claimed amount on 30 October 2019, being the due date for the progress payment to which the Payment Claim related.

60 Yuanda failed to pay the claimed amount and Façade, after conceding some reductions, sought judgment pursuant to s 16(2)(a)(i) of the Act. This section enables a claimant to recover the unpaid portion of the claimed amount as a debt due in any court.[17]

61 However, under s 16(4)(a) the court must be satisfied that the respondent is liable to pay the claimed amount and that the claimed amount does not include an excluded amount. All of the proposed grounds of appeal are directed to this requirement. Yuanda contends that the judge ought not to have been satisfied that

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17 Section 16(2)(a)(ii) provides for adjudication as an alternative to court proceedings.

the claimed amount did not include an excluded amount. Rather, Yuanda contends that the judge should, after proper inquiry (proposed ground 1), have found that in addition to the claim for interest, the claims for non-permitted variations (proposed ground 3) and the claims based on the alleged fraudulent settlement agreement (proposed grounds 4 and 5) should have been found to be excluded amounts. Based on these suggested findings the Court could not be satisfied, as required, and accordingly the proceeding should have been dismissed, there being no ability on the part of the Court to simply reduce the Payment Claim or the claimed amount by the excluded amounts (proposed ground 2).

62 Yuanda also contended before the judge, more generally, that the Payment Claim was invalid because it did not sufficiently identify the construction work or related goods and services to which the progress payment related within the meaning of s 14(2)(c) of the Act, and as a consequence it was not liable to pay the amount under s 15(4) of the Act ('the Adequacy of the Payment Claim').

63 In relation to the Adequacy of Payment Claim, the judge rejected the contention and held that the validity of a payment claim is to be assessed by reference to the face of the claim and any supporting documents and that the claim 'need only provide sufficient detail to enable the respondent to identify the subject matter of the claim, not to make its own assessment of the amount payable.'[18] The judge held that the Payment Claim did provide sufficient detail. Although there is no appeal against this finding, the approach of the judge to the assessment of claims, more generally, remains relevant to the assessment of those claims that Yuanda contends included excluded claims. In other words, what level of inquiry is to be undertaken in order for the Court to be satisfied that no excluded amount has been claimed. Yuanda contends that in relation to excluded amounts a greater level of scrutiny is required in order for the Court to be satisfied prior to entering judgment under s 16(4)(a).

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18 Reasons [38].

64 In relation to the suggested excluded claims, the judge held, as noted, that an assessment based on the face of the claim and supporting documents was sufficient. The judge also held that, if following such assessment, or by admission, an excluded amount was included in the Payment Claim, judgment could still be given for a lesser amount, that is, an amount different to the claimed amount.

65 The originating motion was filed on 12 November 2019. The trial commenced on 13 May 2020 and extended over 8 days. The parties filed a total of 15 affidavits. The judge made the following observations regarding the conduct of the proceeding:[19]

> As a result of the approach taken to the issues in this proceeding, its determination resulted in:
>
> (a) extensive discovery;
>
> (b) detailed schedules of issues;
>
> (c) the filing of fifteen affidavits;
>
> (d) a court book consisting of 3,260 pages;
>
> (e) cross-examination of witnesses over five days;
>
> (f) written submissions in excess of 350 pages;
>
> (g) a book of authorities in excess of 1,500 pages;
>
> (h) a total of eight hearing days; and
>
> (i) a delay of nearly nine months from filing to completion of the hearing.
>
> Such delays and the substantial associated costs are an anathema to the scheme of the Act. If permitted to continue it will have the effect of discouraging contractors from exercising their rights to apply for judgment for fear of being caught in the Court's procedures. The Court should strive to adopt appropriate procedures to allow contractors to exercise their rights in a summary, expedient and cost-effective manner.

The issues on appeal

66 The first proposed ground of appeal contends that in order to be satisfied that the Payment Claim does not include an excluded amount, the Court is required to

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19 Ibid [71]–[72].

determine this as an objective fact and if necessary this assessment is required to go beyond the face of the claim and require a little 'digging'.[20]

67 The second proposed ground of appeal contends that judgment can only be given for the claimed amount and that if an excluded amount (whether obvious on the face of the claim or apparent after some digging) is included in the claimed amount judgment cannot be given, and the proceeding must be dismissed.

68 The third proposed ground of appeal contends that a number of claims were for non-claimable variations and therefore excluded amounts, with the consequence contended for by ground 2.

69 The fourth and fifth proposed grounds of appeal effectively contend that a number of the claims were based on the alleged fraudulent settlement agreement and were not only excluded claims but infected the entire Payment Claim on the basis that 'fraud unravels everything', with the consequence that the proceeding should have been dismissed.

70 The precise proposed grounds of appeal are set out below.

71 Façade has filed a Notice of Contention claiming that to the extent that a claimed amount includes an excluded amount, the excluded amount can be severed from the claimed amount in order to satisfy the requirements of s 16(4)(a)(ii) of the Act (Contention ground 1).

72 Façade also contends that to the extent that 'the trial judge was required to take a more expansive view of the circumstances of and context behind the payment claim for the purpose of determining whether the claim items specifically challenged by the applicant in these appeal proceedings, most notably claim 1129 (based on the alleged fraudulent settlement agreement) included an excluded amount, then an application of this approach would not assist the applicant' (Contention ground 2). In support of Contention ground 2, Façade refers to a series of emails and

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[20] The word 'digging' was used by the applicant's counsel.

correspondence in support of and comprising evidence of 'the objective context and circumstances' which provide justification for the relevant claims.

73 I will first set out the relevant provisions of the Act, then refer to some of the authorities. I will then deal with the approach and reasons of the judge and then after setting out the proposed grounds of appeal, I will deal with each ground.

Relevant provisions of the Act

74 The Act came into operation on 31 January 2003 and was subsequently amended in 2006 by the *Building and Construction Industry Security of Payment (Amendment) Act 2006* (the 'Amending Act').

75 Section 1 of the Act provides that '[t]he main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts'.

76 Section 3 sets out the object of the Act as follows:

> (1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
>
> (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.
>
> (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves—
>
> (a) the making of a payment claim by the person claiming payment; and
>
> (b) the provision of a payment schedule by the person by whom the payment is payable; and
>
> (c) the referral of any disputed claim to an adjudicator for determination; and
>
> (d) the payment of the amount of the progress payment determined by the adjudicator; and
>
> (e) the recovery of the progress payment in the event of a failure

to pay.

(4) It is intended that this Act does not limit—

(a) any other entitlement that a claimant may have under a construction contract; or

(b) any other remedy that a claimant may have for recovering that other entitlement.

77 Section 9(1) establishes the right to progress payments 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 under this Act, calculated by reference to that date.

78 Section 14 sets out the requirements with respect to payment claims as follows:

(1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim—

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

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

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

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

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

(3) The claimed amount—

(a) may include any amount that the respondent is liable to pay the claimant under section 29(4);

(b) must not include any excluded amount.

Note

Section 10(3) provides that a progress payment must not include an excluded amount.

(4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within —

(a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or

(b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment—

whichever is the later.

79 Section 15 provides for the serving of a payment schedule in reply to a payment claim and the consequences of failing to do so as follows:

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule—

(a) must identify the payment claim to which it relates; and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***); and

(c) must identify any amount of the claim that the respondent alleges is an excluded amount; and

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

(e) must contain the prescribed information (if any).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If—

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

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

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

(ii) within 10 business days after the payment claim is served;

whichever time expires earlier—

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

80 Section 16 establishes the rights of a claimant arising from a respondent's failure to provide a payment schedule or failure to pay the claimed amount as follows:

(1) This section applies if the respondent—

(a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant—

(a) may—
(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
(ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention—
(i) to suspend carrying out construction work under the construction contract; or

(ii) to suspend supplying related goods and services under the construction contract.

…

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

(a) judgment in favour of the claimant is not to be given unless the court is satisfied—

(i) of the existence of the circumstances referred to in subsection (1); and

(ii) that the claimed amount does not include any excluded amount; and

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

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

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

81 Section 10B defines excluded amounts as follows:

(1) This section sets out the classes of amounts (***excluded amounts***) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.

(2) The excluded amounts are—

(a) any amount that relates to a variation of the construction contract that is not a claimable variation;

(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to—

(i) latent conditions; and

(ii) time-related costs; and

(iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

(d) any amount in relation to a claim arising at law other than under the construction contract;

(e) any amount of a class prescribed by the regulations as an excluded amount.

82 Section 10A defines claimable variations as follows:

(1) This section sets out the classes of variation to a construction contract (the ***claimable variations***) that may be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

(2) The first class of variation is a variation where the parties to the construction contract agree—

(a) that work has been carried out or goods and services have been supplied; and

(b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and

(c) that the doing of the work or the supply of the goods and services constitutes a variation to the contract; and

(d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and

(e) as to the value of that amount or the method of valuing that amount; and

(f) as to the time for payment of that amount.

(3) The second class of variation is a variation where—

(a) the work has been carried out or the goods and services have been supplied under the construction contract; and

(b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

(c) the parties to the construction contract do not agree as to one or more of the following—

(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;

(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

(iii) the value of the amount payable in respect of the work or the goods and services;

(iv) the method of valuing the amount payable in respect of the work or the goods and services;

(v) the time for payment of the amount payable in respect of the work or the goods and services; and

(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into—

(i) is $5 000 000 or less; or

(ii) exceeds $5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)).

(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if

any reference to '$5 000 000' were a reference to '$150 000'.

83 Section 4 of the Act defines a claimed amount as:

> *claimed amount* means an amount of a progress payment claimed to be due for construction work carried out, or for related goods and services supplied, as referred to in section 14

84 Related goods and services are relevantly defined in s 6(1)(b)(i) of the Act as:

> (1) In this Act, related goods and services, in relation to construction work, means any of the following —
>
> …
>
> (b) services of the following kind—
>
> (i) the provision of labour to carry out construction work;

The authorities

85 Although the authorities are not in dispute, it is useful to set out the approach taken to the interpretation of the Act and cognate legislation in other States.

86 The responsible Minister in introducing the bill stated in the second reading speech:

> The main purpose of this bill is to provide for an entitlement to progress payments for persons who carry out building and construction work or who supply related goods and services under construction contracts. This bill represents a major initiative by the government to remove inequitable practices in the building and construction industry whereby small contractors are not paid on time, or at all, for their work.
>
> ... quick adjudication of disputes is provided for with an obligation to pay or provide security of payment.

87 In *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*, Beech J described the purpose of the like Western Australian legislation in the following terms:

> In construing the Act it is to be borne in mind that the object of the scheme created by the Act is, as described in the explanatory memorandum and the Second Reading Speech, to 'keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted disputes'. [21]

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21 [2009] WASC 19, [122].

88 In *Amflo Constructions Pty Ltd v Jefferies,* Campbell J made observations to similar effect about the NSW Act, regarding provisions which are mirrored in the Victorian Act, saying:

> A fundamental feature of the legislation is that, apart from the fact that parties to a construction contract cannot contract out of the rights given by the legislation ... nothing ... affects any of the rights that parties to a construction contract have ... The concern of the Act is with maintaining the cash flow of claimants, by enabling them to recover quickly amounts which the adjudication process says they are entitled to. It is possible for the person who pays the amount of money which an adjudication has found due to seek to reclaim that money, in court proceedings which decide what the ultimate legal rights of the parties are. An evident purpose of the Act is that, if there is to be such litigation, it will start from a position where the claimant has been paid the amount which the adjudication process has decided should be paid. [Specific references to the sections of the NSW Act omitted][22]

89 In *Grocon Constructors v Planit Cocciardi Joint Venture [*No2*],* Vickery J observed

> The Building and Construction Industry Security of Payment Act 2002 was introduced in Victoria to allow for the rapid determination of progress claims under construction contracts or sub-contracts, and contracts for the supply of goods or services in the building industry. The process was designed to ensure cash flow to businesses in the building industry, without parties get tied up in lengthy and expensive litigation or arbitration. It was intended to establish a process for the fast recovery of progress payments payable under a construction contract. This was to be achieved by a novel procedure which provided for the rapid adjudication of payment disputes at a low cost to the parties. The amendments introduced into the Act which operate from 31 March 2007 reinforce the scheme by creating, inter alia, a fast track system for enforcing payment in the courts through an expedited process for the entry of judgment founded on a certificate evidencing the adjudication determination and an affidavit of non-payment.[23]

90 From this brief analysis, it may readily be accepted, as has been observed in a number of authorities that the Act places the claimant in a privileged position in the sense that it acquires rights that go beyond its contractual rights.[24]

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22 [2003] NSWSC 856 at [25] and [27].

23 [2009] VSC 426, [33]–[34].

24 *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248; *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42 at 50; *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106.

Judge's reasons

91 In relation to the nature of the hearing the judge said:[25]

> An application for judgment under s 16 of the Act is intended to be summary in nature. However that does not mean that the principles relevant to applications for summary judgment under s 61 of the *Civil Procedure Act 2010* (Vic) or ord 22 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) apply. Before entering judgment the Court does not need to be satisfied that the respondent has no real prospect of success. Rather, the Court should finally determine on the evidence, whether it is satisfied of the matters referred to in s 16(4)(a) of the Act according to the principles referred to in paragraphs 40 to 41 and 54 to 59 below. Any enquiry into whether the respondent has arguable cross-claims or defences would be contrary to s 16(4)(b).

92 In relation to the Adequacy of the Payment Claim, the judge summarised the relevant principles of statutory construction, which were not in dispute, and held, by reference to the authorities, that evidence of surrounding circumstances was not admissible in determining the validity of a payment claim. At paragraph 36 of his reasons, the judge said:[26]

> In my opinion, in determining whether a payment claim complies with s 14(2)(c) of the Act, the Court should not have regard to extrinsic evidence of surrounding circumstances for the following reasons:
>
> (a) Compliance with s 14(2)(c) of the Act is assessed on an objective basis. Evidence of conversations between parties or the subjective ability of parties to understand a payment claim should not be permitted.
>
> (b) The proposition that the validity of payment claims under s 14 of the Act should be determined by reference to the face of the payment claim is supported by the weight of authority, including the following:
>
> (i) In *Jemzone Pty Ltd v Trytan Pty Ltd*, Austin J held that the claimant was obliged to ensure that the payment claim complied 'on its face' with s 13(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the NSW Act'), being the equivalent of s 14(2) of the Act. He observed that extraneous circumstances and previous communications should not be considered, stating:

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25 Reasons [14] (footnotes omitted).

26 Footnotes omitted.

> [T]he payment claim must on its face contain all the ingredients required by the Act. While the court should not take an unduly strict approach to the construction of the claim, it ought not to cure defects in the claim document by reference to extraneous circumstances or previous communications.

(ii) In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*, Hodgson JA said that a payment claim would not be a nullity unless its failure to comply with s 13(2) of the NSW Act was 'patent on its face'. His Honour held that the test of validity was whether the payment claim '*purports* in a reasonable way to identify the particular work in respect of which the claim is made'.

(iii) Ipp JA agreed with the reasons of Hodgson JA and formulated the test of validity as being whether the payment claim 'is made in good faith and *purports* to comply with s 13(2) of the [NSW] Act'.

(iv) In *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd*, the New South Wales Court of Appeal held that, for the purposes of the New South Wales equivalent of s 16 of the Act, the question of whether a claim was made for a variation under the NSW Act was resolved by reference to the face of the claim.

In my opinion, the admission of extrinsic evidence of surrounding circumstances would be inconsistent with the assessment of compliance on the basis of the purport of the payment claim document.

(c) To the extent that guidance can be gained by reference to another area of the law which requires an objective assessment, the exclusion of extrinsic evidence of surrounding circumstances is consistent with the 'true rule' as applied by Mason J in objectively interpreting contracts. The principal reasons for excluding evidence of surrounding circumstances under the true rule are as follows:

(i) Admission of such evidence would undermine the Court's ability to avoid 'difficult, time-consuming, expensive and problematic' consideration of extraneous material.

(ii) The parties should be held to their written words, which appear plain on their face.

(d) Similar considerations are particularly applicable to interpreting the requirements of a payment claim under the Act for the following reasons:

(i) If, as in this case, the validity of a payment claim under the Act could be challenged by reference to extrinsic

evidence of surrounding circumstances, it could cause long delays and very substantial costs to be incurred in making claims under the Act. It is not consistent with the purpose of the Act for the assessment of whether a payment claim successfully identified the construction work for which payment is claimed, to be undertaken 'in hindsight', or 'after a full investigation of all the facts and circumstances'.

(ii) The admission of evidence of dealings and communications between parties to a project, which may extend over years, on the basis of relevance to an extended view of 'context' or otherwise, 'would drive a horse and cart (or perhaps a B-double) through the legislative scheme'.

As Vickery J explained in Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd:

> The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality. The *Building and Construction Industry Security of Payment Act 1999* (NSW) has led to a spate of litigation in its relatively short life. If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.

(e) If the Court applies an objective test to assessing the validity of a payment claim and its supporting documents, such documents should be readily available for the Court's assessment. Accordingly, determination of whether a payment claim has satisfied the requirement of s 14(2)(c) should be relatively straightforward. As was observed by Leeming JA in *Style Timber Floor Pty Ltd v Krivosudsky*:

> Whether or not a document is a payment schedule must be something which is capable of ascertainment readily, and (at least ordinarily) without the assistance of a lawyer.

93 In dealing with the standard for compliance under s 14(2)(c) by a claimant the judge said at paragraph 38:[27]

> The undemanding standard for compliance with s 14(2)(c) is demonstrated by the following principles:
>
> (a) A payment claim is only required to be bona fide and reasonably purport to identify the particular work in respect of

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27 Footnotes omitted.

which the claim is made.

(b) A payment claim is only a claim. It is unlike a payment schedule, which is intended to identify the scope of the dispute, and articulate the respondent's case to be determined by the adjudicator.

(c) A payment claim is not required to be as precise or as particularised as a pleading. It need only provide sufficient detail to enable the respondent to identify the subject matter of the claim, not to make its own assessment of the amount payable.

(d) Evidence of what officers did in response to a payment claim is unhelpful and whether they were able to understand the payment claim in fact is not relevant, because 'the focus must remain on the objective circumstances, not the subjective intentions or perceptions of one of the parties'.

(e) The fact that there may be typographical omissions or other errors does not invalidate a payment claim. As was said by the Full Federal Court in *Pyneboard Pty Ltd v Trade Practices Commission:*

> [T]he mere fact that parsing and analysis in the artificial atmosphere of the courtroom can lead to the identification of a number of latent ambiguities will not invalidate what, as a matter of commonsense, is reasonably clear.

(f) To interpret the identification requirement under s 14(2)(c) as imposing a more exacting standard would encourage challenges to the validity of purported payment claims in the courts. The words of s 14(2)(c) do not mandate such an approach. I consider that a more exacting standard would not accord with the legislative intention. As Hodgson JA observed in *Nepean Engineering*, it cannot be consistent with the scheme of the Act for it to be construed as promoting:

> [A] respondent [to] avoid the effect of the Act by not serving a payment schedule, and defending the [s 16] proceedings by raising a question as to identification, which could be as to just one of many items in a claim and could be such as to depend upon a very detailed examination of all the circumstances of the contract.

94 The judge then dealt with the position where a respondent is unable to identify the work to which the claim relates. The remedy in such a case is to resort to the adjudication process set out in the Act. A respondent would be entitled to serve a payment schedule refusing to make payment on the basis that it cannot identify the work. The dispute would then be dealt with by an adjudicator. This is not an issue in this application.

95 The judge then identified the relevant principles for determining the validity of a payment claim and said:[28]

> On the basis of the above analysis, I would state the relevant principles as follows:
>
> (a) A payment claim is construed objectively. A payment claim will comply with s 14(2)(c) if a reasonable building practitioner in the position of the recipient would have understood the payment claim to be bona fide and to purport in a reasonable way to identify the particular work in respect of which the claim is made.
>
> (b) The payment claim will include documentation expressly or impliedly referred to on the face of the payment claim. Documentation will be impliedly incorporated by reference if a reasonable building practitioner in the position of the recipient would have understood the payment claim to refer to such supporting documentation. By way of example:
>
> (i) In this case, the Payment Claim included a claim for $20,475 relating to Invoice 1109. It referenced Invoice 1109, but contrary to the notation in the Payment Claim, the invoice and supporting documents were not issued with the Payment Claim. However, a reasonable building practitioner in the position of the recipient would have understood that the Payment Claim related to Invoice 1109 and its supporting documents, which had been sent to the respondent by email on 4 June 2019.
>
> (ii) In *John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd*, a payment claim sent to the respondent on 11 August 2014 identified the construction work as follows:
>
> > Project No: 20,139 PE705 - DIP Plant Mechanical Package 03
> > Order No / Contract: 50030556
> > …
> > Description:
> > Progress Claim 6 (MAY 2014).
>
> A reasonable building practitioner in the position of the recipient would have understood that the payment claim related to the 'May 2014' claim and its supporting documents, which had been sent to the respondent by email on 3 June 2014.

The objective approach requires reference to the context, being the

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[28] Reasons [40]–[41] (footnotes omitted).

construction contract and the entire payment claim, together with documentation expressly or impliedly referred to in the payment claim. This process of reference to the context is '[o]rdinarily … possible by reference to the [construction] contract alone', together with the abovementioned documentation. The plurality in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* said 'ordinarily' because:

> [S]ometimes, recourse to events, circumstances and things external to the contract is necessary [for the purpose of facilitating] … an understanding 'of the genesis of the transaction, the background, the context and the market in which the parties are operating'.

However, for the reasons expressed in paragraph 36(d) above, the courts should be wary to ensure that the exception allowing for evidence of context is not used as a Trojan horse to admit extrinsic evidence of surrounding circumstances, including prior dealings and the subjective intentions or understanding of parties, which is irrelevant.

96 Finally the judge concluded that if a part of the Payment Claim fails to identify the construction work, the entire claim is not invalid and the Payment Claim will be adjusted accordingly.

97 The judge's conclusions is set out in paragraphs 43–45 as follows:[29]

In this case, the Payment Claim served by Façade was detailed. It attached and referred to extensive supporting documentation. In my opinion, for the reasons stated above and in Appendix 2, a reasonable building practitioner in the position of Yuanda would have understood the Payment Claim to be bona fide and to purport in a reasonable way to identify the particular work in respect of which the claim was made. Accordingly, I consider that the Payment Claim was a valid claim under s 14 of the Act.

Yuanda contended that many of the individual Claim Items comprising the Payment Claim failed to sufficiently identify the construction work or related goods and services to which the progress payments related. In my opinion, for the reasons expressed above, the validity of the Payment Claim is to be considered in its totality.

In case I am in error, I have set out my reasons for rejecting Yuanda's submissions with respect to each of the disputed Claim Items in Appendix 2 to these reasons. In summary, Yuanda's contentions of insufficient identification were principally made on one of the following grounds, which I reject for the reasons set out below:

(a) The Claim Item was not a claim for construction work under the Act, but was rather a claim for:

(i) idle time;

(ii) acceleration of works; and/or

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[29] Footnotes omitted.

(iii) compensation arising from the inability to access the site.

In my opinion, the relevant invoices and supporting documentation provided in respect of each such Claim Item sufficiently identified the services (being the provision of labour) which Façade claimed related to construction work. If Yuanda had wanted to contend that the claimed work was not construction work or related goods and services, it should have done so in a payment schedule.

(b) The Claim Item was a claim for construction work:

(i) referred to in the Settlement Agreement which was back-dated and invalid;

(ii) with insufficient details of how the claimed amount was calculated; and/or

(iii) that had not been properly authorised.

In my opinion, the relevant invoices and supporting documentation provided in respect of each such Claim Item sufficiently identified the construction work claimed. A payment claim does not need to include sufficient particulars to disclose the calculation of the claimed amount. The validity of supporting documentation is a matter for determination by an adjudicator after service of a payment schedule, not for the Court under s 16 of the Act.

(c) Mr Nguon, a project manager employed by Yuanda, gave evidence that he was unable to comprehend the construction work referred to in particular Claim Items and that insufficient details were provided as to how the claim was calculated. Façade contested this evidence on the basis that Yuanda had filed a payment schedule out of time, which demonstrated that it did comprehend the construction work to which the Payment Claim related.

In my opinion, none of this evidence is relevant to an inquiry into compliance with s 14(2)(c) because evidence of the subjective opinions and knowledge of the parties' employees is not admissible for the purpose of the objective inquiry into the validity of a payment claim.

(d) The Payment Claim included insufficient particulars of the request or direction from Yuanda to enable identification of the claims.

With respect to each of the Claim Items in the Variations Table, I have found that the Payment Claim and supporting documentation expressly or inferentially claimed that the relevant work was requested or directed by Yuanda or a person acting on its behalf. Yuanda's contention that, on full investigation of the facts and circumstances, it was unable to identify the construction work claimed because:

(i) the work claimed was not the work so requested or directed; or

(ii) the claim included both work within the scope of the Contract and additional work beyond the scope, which could not be

differentiated,

is not relevant for the purpose of assessing compliance with s 14(2)(c). On the face of the invoices and supporting documentation, the claims were for work requested or directed by Yuanda. Any challenge to that claim should have been made in a payment schedule.

(e) The evidence established that the Payment Claim included some incorrect references to site instructions and other documents alleged to contain or refer to a direction or instruction by Yuanda.

Such errors do not invalidate a payment claim and an inquiry into whether a payment claim includes such errors is not relevant to the question of compliance with s 14(2)(c). For similar reasons, the fact that Façade acknowledged that there was some double counting between various Claim Items was not relevant because the Payment Claim, on its face, complied with s 14(2)(c).

98 In relation to claims which allegedly contained an excluded amount the judge held that in determining whether any part of a claim included an excluded amount it was sufficient to examine the face of the Payment Claim including any supporting documents. It was not a requirement to conduct a full investigation of the facts and circumstances. The judge's reasons are set out in paragraph 55 as follow:[30]

In my opinion, the former construction should be preferred for the following reasons:

(a) As set out above, the Act provides a detailed mechanism that:

(i) prohibits claimants claiming for excluded amounts;

(ii) requires respondents to identify any amount it alleges is an excluded amount; and

(iii) directs adjudicators and review adjudicators not to take into account any part of a claimed amount that is an excluded amount and makes any determination void to the extent that it does so.

(b) This scheme is detailed and it is inconsistent with the legislative intention to:

(i) permit avoidance of the scheme;

(ii) substitute an investigative role on the courts; and

(iii) advantage respondents who do not provide a payment schedule.

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30 Footnotes omitted.

(c) It would be strange indeed if, by failing to provide a payment schedule, the respondent could avoid:

(i) the need to identify any excluded amount to an adjudicator; and

(ii) the balance of the scheme adopted by the Act with respect to an adjudicator not taking into account excluded amounts,

but rather argue, as a knock out point before the Court, that it should not be satisfied that 'the claimed amount does not include an excluded amount'. As was observed by Hodgson JA in *Nepean Engineering*, such a construction would result in 'a very detailed examination of all the circumstances of the contract' and be 'wholly inconsistent with the scheme of the Act'.

(d) As it is accepted that the inclusion of an excluded amount does not invalidate a payment claim for the purposes of the adjudication scheme under the Act, it is not consistent with the object of the Act for such an inclusion to effectively invalidate a payment claim for the purposes of s 16. As Hodgson JA said in *Nepean Engineering:*

> If a payment claim which thus purports to identify the work in respect of which the claim is made is sufficient to support a valid determination … it would in my opinion be wholly inconsistent with the scheme of the Act if it was not also sufficient to support a cause of action under s 15 of the [NSW Act] in a case where no payment schedule is served.

(e) There are textual differences in the respective roles to be undertaken by the Court and the adjudicator under the Act, being:

(i) under s 23, the adjudicator is required to determine an adjudication application by considering the matters referred to in sub-s (2) and not taking into account any part of the claimed amount that is an excluded amount under sub-s (2A); and

(ii) under s 16, the Court is not required to give consideration to specified matters or to make a determination.

The task imposed on the Court is different to the task imposed on the adjudicator, which is consistent with the fact that the Act requires the Court to be satisfied that there is no *claim* for an excluded amount.

(f) Courts investigating and determining final claims would be inconsistent with the purpose of the Act. The Act is specifically not intended to determine the final rights of the contracting parties, and must be construed in that context. Applying the latter construction would result in a final determination of contractual liability issues with all the associated delay and expense, which the Act is intended to avoid. Such a final determination after a full hearing on the merits may well give rise to an issue estoppel on aspects of contractual liability, which would be inconsistent with s 47 of the Act.

(g) Permitting the respondent to lead evidence to establish that a claimed

amount was an excluded amount, for example because it was not a claimable variation, would permit it to raise a defence in relation to matters arising under the construction contract, which is not permitted under s 16(4)(b)(ii). As Basten JA observed in *Epping Land*:

> It is possible that the amounts claimed for variations did not properly arise under the contract because, for example, relevant procedural steps had not been followed. However, to pursue that issue would involve raising a defence in relation to matters arising under the construction contract, a course prohibited by s 15(4) of the *Security of Payment Act*.
>
> Had the principals wished to challenge the claim on that basis, they could have done so by way of a payment schedule provided pursuant to s 14, indicating the claimed items intended to be paid and the reason for non-payment of any item not accepted. Such an issue would then have been addressed by the adjudicator appointed to determine any dispute thus arising. However, that course was not taken.

To similar effect Emmett AJA said:

> The scheme of the Payment Act contemplates that disputes be determined by an adjudicator. The Principal failed to take advantage of the procedure afforded to it. Contractual defences are not intended to be raised at this stage of adjudication.

I am mindful of the fact that their Honours were considering the NSW Act which does not include s 16(4)(a)(ii). However I consider the construction which permits the subsection to be read consistently with the prohibition on raising a defence, as construed under the NSW Act, is to be preferred.

99 In referring to the Act, the judge said:[31]

The Act as amended, adopted the following scheme with respect to excluded amounts:

(a) Under s 10(3), an excluded amount must not be taken into account in calculating the amount of a progress payment.

(b) Under s 14(3)(b), the amount of the progress payment the claimant claims to be due must not include any excluded amount.

(c) Under s 15(2)(c), a payment schedule must identify any amount of the claim that the respondent alleges is an excluded amount.

(d) Under s 21(2)(ca), an adjudication response must identify any amount of the payment claim that the respondent alleges is an excluded amount.

(e) Under s 23(2A), an adjudicator must not take into account any part of the claimed amount that is an excluded amount in determining an

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[31] Reasons [53].

adjudication application, and under sub-s (2B), the determination is void to the extent that it is based on an excluded amount.

(f) Under s 28B, a respondent may apply for the review of an adjudication determination only:

(i) on the ground that the adjudicated amount included an excluded amount; and

(ii) if the respondent has identified that amount as an excluded amount in the payment schedule or the adjudication response.

(g) Under s 28C, a claimant can only apply for the review of an adjudication determination on the ground that an amount was wrongfully determined to be an excluded amount.

(h) Under s 28I(3), a review adjudicator must not take into account any excluded amount in determining an adjudication review application, and under sub-s (4) the determination is void to the extent that it is based on an excluded amount.

(i) Under s 28M, the respondent is required to pay an adjudicated amount (subject to the provisions with respect to applications for review in ss 28B and 28N).

(j) Under s 28N, a respondent is required to pay an amount under a review determination.

(k) Under s 28O, if the respondent fails to pay any part of an adjudicated amount in accordance with s 28M or s 28N, the claimant may request an adjudication certificate.

(l) Under s 28R, a party may recover the amount of an adjudication certificate as a debt in any court of competent jurisdiction.

(m) Under s 28R(5), a person who seeks to set aside a judgment cannot challenge an adjudication determination or a review determination, except under sub-s (6) on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.

100 The judge's conclusion on the excluded amounts is set out in paragraphs 60–62 as follows:[32]

> The Payment Claim relating to Invoice 1162 was, on its face, a claim for interest under the Act and therefore an excluded amount within the meaning of s 10B(2)(d), a matter ultimately conceded by Façade.
>
> Except for Invoice 1162, for the reasons set out in Appendix 2, I have rejected Yuanda's submissions that the Payment Claim included claims for excluded amounts. I have found that on the face of the Payment Claim, including

[32] Footnotes omitted.

the supporting documentation, each of the Claim Items in the Variations Table were expressly or inferentially claimed on the basis that the relevant work was carried out in accordance with a request or direction or the agreement of Yuanda or a person acting on its behalf.

In summary, Yuanda's contentions that the Payment Claim included claims for excluded amounts were principally made on one of the following grounds, which I reject for the reasons set out below:

(a) On full investigation of the facts and circumstances, in fact:

(i) the request or direction was not made by Yuanda or a person acting on its behalf; and

(ii) the work carried out was in excess of that requested or directed.

In my opinion, whatever a court might determine after a full investigation of the facts and circumstances is not relevant for the purposes of determining whether a claim is, on its face, a claim for an excluded amount.

(b) Façade was not entitled to the variations claimed in the Payment Claim because:

(i) the Contract provided that its rights could be no greater than Yuanda's rights under its contracts with Multiplex; and

(ii) it did not comply with the procedures for variations under the Contract.

Although such contentions may be properly raised as a defence to Façade's claim on adjudication following the submission of a payment schedule (subject to the provision in s 13 of the Act that 'pay when paid provisions' are of no effect), they are not relevant to whether a claim is, on its face, a claim for an excluded amount.

(c) The evidence established that some Claim Items in the Payment Claim included incorrect references to site instructions and other documents alleged to contain or refer to a direction or instruction by Yuanda.

In my opinion, the fact that a full investigation of the facts and circumstances may demonstrate that all or part of the construction work was not authorised by a written request or direction, is not relevant for the purpose of determining whether a claim is, on its face, a claim for an excluded amount.

101 Finally the judge concluded that the inclusion of an excluded amount in a payment claim does not prevent the Court from giving judgment for the appropriate amount under s 16. The judge said as follows:[33]

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[33] Reasons [66]–[68] (footnotes omitted).

66 In my opinion, the second constructional choice presented by s 16(4)(a)(ii) is whether 'the claimed amount' is:

(a) the claimed amount in the payment claim when served; or

(b) the claimed amount at the time entry of judgment is sought.

67 In my opinion, the latter is to be preferred as an interpretation that promotes the legislative purpose for the following reasons:

(a) Although s 14(3)(b) prohibits the inclusion of an excluded amount in a payment claim, the inclusion of an excluded amount does not invalidate the payment claim. This is evident from the fact that the Act provides for the respondent to identify excluded amounts in a payment schedule and for the adjudicator not to take such amounts into account in making a determination. Such provisions would be futile if the inclusion of an excluded amount was to render a payment claim invalid. There is no logic in construing the Act so that the inclusion of an excluded amount invalidates a payment claim for the purposes of judgment under s 16, but not for adjudication under s 23.

(b) On the construction contended for by Yuanda, unlike an adjudication where only the excluded amount is rejected, s 16(4) would prohibit judgment for the whole of the claimed amount if it included 'any excluded amount'. On this construction, the respondent would be advantaged by failing to file a payment schedule and not participating in the mechanism under the Act. In my opinion, such a construction does not promote the object of the Act. As Vickery J observed in *Seabay Properties* Pty *Ltd v Galvin Construction* Pty *Ltd:*

> Although the respondent in the payment schedule may deduct from the payment claim any sum in respect of a claimed' excluded amount', nowhere in the Act is there any express statutory relief given to a respondent to avoid payment of the amount of the payment claim as a whole, because part of the claim comprises an 'excluded amount'. If such an outcome was to be implied into the Act, unintended consequences could arise which, in some cases, could work to undermine its central purpose. For example, if the position were otherwise, and if a relatively modest sum comprising an alleged 'excluded amount' was claimed in a payment claim, the respondent could, with impunity, avoid liability to make any payment at all to a claimant on the payment claim. If this was to occur, the claimant would be denied the benefits of the Act in respect of the large portion of his claim which, absent the relatively small 'excluded amount', he would otherwise have been entitled to. In my opinion, the Act was not intended to operate in this way.

The 'unintended consequences' referred to by Vickery J were presumably that a respondent could identify an excluded

amount in a payment claim, no matter how small, and then avoid any liability by refusing to provide a payment schedule. In my opinion, this would be an absurd result and could not have been intended by the legislature.

(c) The text of s 16(4)(a)(ii) is in the present tense ('*does* not include'). If the legislative intent was that the claimed amount was fixed from the time it was served under s 14, this would have been more clearly expressed by the use of the past tense (for example, '*did* not include').[34]

(d) On Yuanda's interpretation, the payment claim could not be amended after it was served. Accordingly, a claimant in Façade's position could not reduce the claimed amount for any reason, such as the identification of double payments. Such inflexibility would do nothing to promote the object of the Act.

(e) The Act demonstrates that claims for excluded amounts should not be allowed. This object is achieved by the Court not entering judgment until the claimed amount is reduced by the sum of any excluded amount.

68 If it was necessary, I would consider that the doctrine of severance should apply to permit severance of any excluded amount from the amount claimed before judgment is entered for the balance. As was observed by Vickery J in *Seabay Properties:*

> [N]ow here in the Act is there any express statutory relief given to a respondent to avoid payment of the amount of the payment claim as a whole, because put of the claim comprises an 'excluded amount'.

Proposed grounds of appeal

102 The proposed grounds of appeal are as follows:

1. The trial judge erred in finding at [55] that the question of whether a claim amount includes an excluded amount for the purpose of section 16(4)(a)(ii) of the *Building and Construction Industry Security of Payment Act 2020* (the **Act**) should be determined, not as an objective fact, but on the face of payment claim. In so erring, the Trial Judge:

   (a) failed to give effect to the unambiguous terms of the Act;

   (b) instead construed section 16(4)(a)(ii) in way such as deprive it of its intended effect and contrary to the legislative intent; and

   (c) failed to have regard to the objective approach taken in *John Beever v Roads Corporation* [2018] VSC 635.

2. The trial judge erred in finding at [66] that the 'claimed amount'

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[34] Original emphasis.

referred to in section 16(4)(a)(ii) means, not the amount claimed in the payment claim, but the amount claimed at the time entry of judgment is sought. In doing so, the trial judge:

(a) failed to pay any regard to sections 4 and 14 of the Act, whereby the 'claimed amount' is defined to mean the amount claimed in the payment claim; and

(b) failed to distinguished between the opportunity for severance in circumstances where a payment claim is the subject of an adjudication, and the separate pathway provided for by section 16(4)(a)(ii) of the Act.

3. The trial judge erred in failing to have any regard to the definition of 'variation' in section 4 of the Act as a change in the scope of the construction work to be carried out or the related goods and services to be supplied, under the contract. Had his Honour done so, the Court would have been bound to find:

(a) that those elements of the payment claim that were not for any change in the scope of the construction work, but were for compensation for loss of time or damage suffered by reason of site shutdowns, were not claims for variation within the meaning of Act (regardless of whether they are claims for variation within the meaning of the contract),

(b) accordingly that such claims were claims for excluded amounts, both as a matter of objective fact and as appears from the face of the payment claim.

4. In relation to those parts of the payment claim based upon the alleged settlement agreement, the trial judge erred in finding that it was not relevant that evidence had been given at the trial that the settlement agreement was invalid or illegitimate. Had his Honour taken the evidence into account, he would have been bound to conclude:

(a) that the alleged settlement agreement was an invalidity;

(b) a reasonable practitioner in the position of Yuanda with the background knowledge of past dealings between the parties would not have understood the payment claim to be bona fide.

5. Further, by failing to take that evidence into account, the trial judge failed to consider whether that evidence was such as to vitiate the plaintiff's claim or to use the Act to facilitate a fraud.

103 The notice of contention is in the following terms:

1. The trial judge should have found that on an application of the doctrine of severance, any amount in the claim amount that was determined to be an excluded amount (within the meaning of s 10B of the *Building and Construction Industry security of Payment Act 2002* (Vic)(the Act) could be severed from the claimed amount so that the condition in s 16(4)(a)(ii) of the Act was satisfied.

2. In relation to claim item 1129, the trial judge should have found:

   a. Including by reference to evidence of the objective context and circumstances in which claim item 1129 was prepared, that the Settlement Agreement was not obtained in circumstances involving fraud or deception;

   b. Including by reference to evidence of the objective context and circumstances in which claim item 1129 was prepared, that there was clear evidence that the applicant requested or directed the live edge work that was the subject of claim item 1129 so that, even without recourse to the Settlement Agreement, claim item 1129 was capable of constituting a second class variation for the purpose of s. 10A(3) of the Act;

   c. Applying an 'on the face of the payment claim' assessment and without recourse to the Settlement Agreement, that there was other evidence, including the internal purchase order document generated by the applicant (Reasons, [103(b)]) that was capable of supporting a finding, for the purpose of s. 10A(3) of the Act, that the work performed the goods and services described in invoice 1129 had been carried out and were the subject of a request or direction by the applicant.

Proposed ground 1 — Is the face of the payment claim sufficient when dealing with alleged excluded amounts

Yuanda's submissions

104 Yuanda submits that judgment may not be given if the claimed amount includes any excluded amount and that this is a 'single binary fact'. It submits that it is a 'condition precedent to judgment' that no part of the claimed amount comprises an excluded amount. This is the basis of proposed ground 2.

105 However, Yuanda submits that whether or not an excluded amount has been included 'is a question of fact upon which the court might or might not be satisfied one way or the other'. This was the plain and natural meaning of s 16(4)(a)(ii) and there was no requirement that there should be a full investigation of the facts and circumstances.

106 Yuanda submits that the judge erred in finding that the determination is to be made on the face of the payment claim rather than as an objective fact. In assessing this objective fact, although there was no requirement for a full investigation of the

facts and circumstances, some 'digging' may be required in order to obtain the necessary satisfaction. Otherwise, the face of the payment claim approach would in practice give rise to an absurdity because a claimant is unlikely 'to characterise any part of its claim as a claim for an excluded amount'.

107 Finally, Yuanda submits that there was a claim for an excluded amount because 'on the face of the payment claim there was indeed a claim for an excluded amount, namely the interest claim.' As a consequence the Court could not be satisfied and no judgment was able to be given, the condition precedent having failed. This is the subject of proposed ground 2.

Façade's submissions

108 Façade submits that the plain and natural meaning of the section does 'not disclose, or in any way limit, how the state of satisfaction is to be achieved' and the judge did not depart from the plain and natural meaning of the section.

109 Façade submits that having properly considered the legislative history of the statutory scheme and the mischief to which the provisions were directed, the judge was correct to approach the assessment as to whether a payment claim included an excluded amount, on the basis of the face of the payment claim and supporting documents, as the legislation did not intend for the courts to have an investigative role. This, it contends, was supported by the fact that the purpose of the legislation was not to determine the final rights of the parties, but rather to have the payment claim dealt with in a quick and summary way that did not contemplate a full and costly investigation. This was further supported by precluding a respondent from raising any defence arising under the construction contract.

110 Façade submits that the judge correctly had regard to the detailed provisions of the statutory scheme and its objectives, machinery and framework. Although the Act prohibits claimants from claiming excluded amounts it also requires, as found by the judge, respondents to identify any amount it alleges is an excluded amount.

111 Noting that both parties agreed that a full investigation was not required, Façade queried what other assessment applied if not the face of the payment claim and supporting documents, as undertaken by the judge. The answer, given in oral submissions, is that some digging may be required by the judge in order to obtain the necessary level of satisfaction.

Analysis

112 The parties agree that in order to assess whether a payment claim includes an excluded amount a full investigation of the facts and circumstances is not required. What then is required?

113 After setting out the statutory scheme relating to excluded amounts (at [53]) the judge held that in relation to the requirement to be satisfied that the 'claimed amount does not include any excluded amount' it was sufficient to examine and assess the face of the payment claim, including the supporting documents and that a full investigation of the facts and circumstances or any further digging was inconsistent with the purpose of the Act. The reasons and the authorities relied on by the judge are referred to earlier.

114 However, the gravamen of Yuanda's submission is that notwithstanding the above, where excluded amounts are specifically raised by a respondent, at the court hearing, the judge, in order to be satisfied as to the objective position, may have to do some digging which it was suggested was a level of inquiry far less than a full investigation. As pertains to this case the judge did both and was accordingly satisfied.

115 There is much force in Façade's submission, accepted by the judge and supported by the authorities that an assessment based on the face of the claim and any supporting documentation is sufficient in order to be satisfied and that further digging is not required. Of course further digging and a complete investigation may be required or undertaken at a later stage and is specifically not precluded.

However, this is not required in order to achieve the necessary satisfaction under the summary procedure contemplated by s 16(4)(a)(ii) of the Act.

116 It is of the first importance to note that the Act is not intended to determine the final rights of the contracting parties.[35] Rather, it sets out a summary procedure to enable those who undertake construction work to recover progress payments for that work, without a full investigation and assessment of the validity of the claim. Section 3(3) of the Act, which sets out the objects of the Act, is referred to above.

117 A review of the procedure by reference to the Act and the authorities establishes that if the payment claim, the start of the procedure, is in proper form and complies with s 14, it is to be assessed in the first instance by reference to the description appearing on the face of the payment claim. Any evidence of the substance of the claim may be taken into account but it is not necessary to go behind the claim and engage in the suggested digging exercise or conduct a full investigation of the claim.

118 The procedure provides a remedy for a person served with a payment claim that contends that an amount has been incorrectly included. Section 15 enables such party to provide a payment schedule in the prescribed form identifying 'any amount of the claim that the respondents alleges is an excluded amount'. Any disputed claim is then referred to an adjudication for determination.

119 Failure to respond to a payment claim within the required time has consequences for the party served with the payment claim, called the respondent. Under s 15(4) of the Act, the 'respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relations'. Further consequences are set out in s 16 of the Act. Pursuant to s 16(2)(a)(i) of the Act the claimant is entitled to recover the claimed amount as a debt due in any court of competent jurisdiction. In such court proceedings that court must be satisfied 'that the claimed amount does not included any excluded amount'

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35 *Building and Construction Industry Security of Payment Act 2002* s 47.

(s16(4)(A)(ii) of the Act). Excluded amounts is defined in s 10B of the Act.

120 The structure, intent and purpose of the Act and the procedure for payment and objections to payment in relation to excluded amounts are predicated on a relatively quick summary procedure for allocation of risk pending any final determination. A full investigation of alleged excluded amount or the suggested digging exercise are entirely contrary to the intended purpose. Rather, it is up to the respondent to identify, in the manner provided for, the excluded amount and set in train the adjudication process. If the respondent fails to do so, it is not open to the respondent to later contest and request a full investigation or digging exercise (a suggested lesser review) in relation to an alleged excluded amount that it should have raised earlier, particularly in circumstances where the enquiry is not directed to a final determination of the rights of the parties, but rather what interim accommodation is appropriate and indeed required based on a face of the claim consideration.

121 I have had regard to the whole of the judge's reasons on this issue and are unable to identify any error. I would grant leave to appeal but not uphold the ground.

Proposed appeal ground 2 — Contention ground 1 — what if the claimed amount includes an excluded amount — can judgment be given for a lesser amount — can the excluded amount be severed

Judge's reasons

122 The judge held that judgment could be given for an amount less than the claimed amount in the Payment Claim and that the words 'claimed amount' as referred to in s 16(4)(a)(ii) referred to the amount claimed at the time of judgment.[36] Accordingly, it was permissible to reduce the claimed amount by any identified excluded amount (or any other amount such as arithmetical error or double counting

[36] Reasons [52].

or payment) and enter judgment for the reduced amount.

Yuanda's submissions

123 Yuanda submits that the pathway provided by s 16(4)(a)(ii), being a summary and short cut procedure, requires the amount claimed, as referred to in that section, to be the same amount that was claimed in the Payment Claim, and that no adjustment or severance is possible other than payments made in reduction of the amount claimed.

124 By reference to ss 4 and 14 of the Act, Yuanda submits that judgment may not be given in an amount other than the amount stated in the Payment Claim, and that in this respect the judge erred in giving judgment in a lesser amount, that is an amount that excluded interest being an excluded amount. As an excluded amount was included, judgment could not be entered for any amount. This it was submitted followed from the 'unambiguous terms of the definition in the Act' which was consistent.

125 Yuanda submits that the Reasons given by the judge, in holding that judgment could be entered for a lesser amount are misplaced. Paragraph 7 of Yuanda's written case is in the following terms:[37]

> Further, each of the reasons given by the trial judge for his finding at [67] is misplaced:
>
> a. a finding that a court is not satisfied under section 16(4)(a)(ii) does not invalidate a payment claim. This is not to the point;
>
> b. a respondent is never advantaged by failing to serve a payment schedule in time. In those circumstances, the claimant can commence an adjudication, in which case the respondent is precluded from filing an adjudication response;
>
> c. the fact of what is the 'claimed amount' is permanent, such that either the present tense or the past tense is equally aposite [sic];
>
> d. the question of double payments is accommodated by section 16(2)(a)(i) whereby the amount recoverable is not 'the claimed amount' but 'the unpaid portion of the claimed amount'. And if the

[37] Footnotes omitted.

claimant chooses to go to adjudication, it may in its adjudication application make any submission it chooses as to what the adjudicator should determine and the Adjudicator may determine the amount of the progress payment to be paid (being the adjudicated amount).

e. the object of the Act is best achieved by applying its terms, and closing off the shortcut of an application for a court judgment under section 16 in circumstances where the claimant has included excluded amounts in its payment claim. The scheme of the Act is that, where a payment claim does or may contain an excluded amount, the appropriate mechanism is adjudication, in which the adjudicator may determine whether there are any and what excluded amounts in the claimed amount, and take those out of account. The Act provides an excluded amount must not be taken into account in calculating the amount of a progress payment, determining this amount is a task for an arbitrator only.

126 Finally, Yuanda submits that severance of the excluded amount is not possible and contradicts the clear words of s 16(4)(a)(ii). It submits that the correct approach is not severance but reference to an adjudicator.

Façade's submissions

127 Façade submits that the judge was correct in his constructional choice and that claimed amount under s 16(4)(a)(ii) is the amount claimed at the time of judgment. The amount claimed in the Payment Claim is the amount that the claimant claims to be due as a progress payment. It represents a high starting point and can be reduced.

128 Façade submits that Yuanda's construction of s 4 as forever fixing the amount is erroneous, as the definition simply clarifies what the claim must relate to. The references in s 4 to s 14 does not fix the amount so that it is unable to be reduced. If a claim was reduced it was still 'an amount that was relevantly identified in a Payment Claim and claimed to be due for construction work carried out, or for related goods and services supplied' thereby falling within ss 4 and 14.

129 Façade submits that 'the flexible quality of the ultimate value of the claimed amount is reinforced throughout the scheme of the Act.' Reference is made to adjudication claims. Further, the statutory debt comprehended by s 16(4)(a)(ii)

contemplates 'that by the time that recovery action is pursued, the claimed amount might have undergone a diminution in value, such that what is sought to be recovered is the unpaid amount of the original claimed amount.'

130 In rejecting the argument that the short cut mechanism operates so as to preclude judgment for a lesser amount if an excluded amount is included, Façade submits:[38]

> 12.1 the purpose of the Act, which is to ensure that any person who undertakes to carry out construction work or to supply related goods and services under a construction contract is entitled to receive, *and is able to recover*, progress payments in relation to the carrying out of construction work or the supply of related goods and services;
>
> 12.2 the fact that the Act does not distinguish between the alternative pathways available to a claimant where no payment schedule has been provided being adjudication of a payment claim under section 16(2)(a)(ii) and proceedings under section 16(2)(a)(i) for recovery of the unpaid portion of the claimed amount as a statutory debt. Indeed, the Act identifies the s. 16(2)(a)(i) 'path-way' as the *only* mechanism for the *recovery* of the claimed amount and reserves this option for the precise circumstance where a respondent has failed to provide a payment schedule. Where the Act does not seek to differentiate between the two options provided by section 16(2)(a) where a payment schedule is not provided, and given adjudication proceedings are subject to much more immediate temporal and other restrictions a claimant should be entitled to choose to proceed directly to recovery and, beyond the natural limits recognised by the statutory scheme (removal of excluded amounts), should not be penalised for doing so;
>
> 12.3 the fact that the Act does not make the absence of an excluded amount from the claimed amount a condition-precedent to application under s. 16(2)(a)(i) but instead a condition-precedent to the Court giving judgment in favour of the claimant where the claimed amount *does not include* [at, and by the time that judgment is sought and given, rather than historically] any excluded amount.

Analysis

131 Having considered the text, context and purpose of the Act,[39] I am of the

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38 Footnotes omitted. Original emphasis.

39 *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 (McHugh, Gummow, Kirby and Hayne JJ); *Minister for Home Affairs v DMA18 as litigation guardian for DLZ18* [2020] HCA 43 at [43].

opinion that the judge was correct in holding that judgment was able to be entered for a lesser sum than the claimed amount stated in the Payment Claim, in circumstances where the judge was satisfied that the judgment did not include an excluded amount.

132 The all or nothing approach, advanced by Yuanda, so far as the text is concerned, relies exclusively on the definition of claimed amount. It is this amount, claimed in the Payment Claim (s 14), that constitutes and comprises the debt (s 15(4) and s 16(2)(a)(i)) for the purposes of judgment (s16(4)(a)). There is indeed a consistent link — by definition — between the Payment Claim, the debt and the judgment.

133 Although 'claimed amount' is a useful definition and basis to identify the amount of the claim as it progressively goes through the various stages, from the making of the claim to the (optional) payment schedule, and to the debt itself which forms the basis of the judgment, there is nothing to indicate that at the time of judgment, claimed amount, although usefully defined, is not capable of referring to the amount claimed and actually owing at the time of judgment. The judge considered and was satisfied that the claimed amount at the time of judgment was indeed the claimed amount reduced by the excluded claim and being the amount actually owing.

134 The rival interpretation, to the effect that it is only the statutory debt that can be enforced and nothing less, with respect, may lead to absurd and entirely unintended consequences as this case demonstrates in relation to the obvious claim for interest, that was not objected to. The procedure is not intended to be inflexible or punish a claimant for putting in an excluded claim any more than a claim that is affected by bad arithmetic or double counting or errors de minimis, which all have the effect of adjusting the claimed amount and the debt. The claim is not invalid. Indeed there are no stated consequences for doing so. There is nothing in the text to indicate that the Court is unable to consider the proper debt due — by excluding the excluded amount — and like the position of an adjudicator giving judgment

accordingly. To this extent, at the time of judgment the claimed amount, as defined, is only of historical and procedural relevance. It does not, by a definition, in the face of a different reality, foreclose on the ability of the Court to grant judgment for a reduced or adjusted amount being the proper debt due, such debt having been established to the satisfaction of the judge. The critical issue is that the amount claimed at judgment must not include any excluded amount

135 Although there is nothing specific in the text to suggest that judgment can be given for any amount less than, or any amount other than the debt created under s(15)(4) of the Act, there is also nothing specific in the text to suggest that judgment cannot be given for a claimed amount that is adjusted and is less than the claimed amount as defined.

136 Consequently, the fact that the amount may be fixed, by virtue of the definitions, says nothing about the further step or possibility of judgment being given for a lesser sum. As noted earlier the Act does not address this situation. It is silent. Section 16(4)(a) relevantly says and does no more than that judgment is not to be given for the 'debt due' being the 'claimed amount' (the amount that is fixed throughout) if it includes an excluded amount. The fact that judgment for the claimed amount cannot be given says nothing about whether judgment in a lesser amount can be given. The Act does not say that judgment can only be given for the claimed amount. Of course, judgment for the claimed amount is the usual course and is the expectation and assumption of the parties because the payment claim should not include an excluded amount and there is no responsive payment schedule. Consequently in the usual course the debt will not change other than any payment in reduction, which is contemplated.

137 The lesser or adjusted amount, is in such circumstances, qualitatively no less an amount or debt that is due and payable and it does not suffer from the same vice. It represents part of the claimed amount that is not subject to any challenge and in respect of which the judge is satisfied. There is nothing textual to suggest that such recovery is not permitted other than that there is no specific section enabling this to

be done. The fact that judgment is not to be given for a claimed amount if it includes an excluded amount is not a sufficient indicator that no other judgment is available in respect of an otherwise established debt.

138 As the text is silent as to whether judgment can be given for a lesser sum a construction that is reasonably open and that promotes the purpose of the Act, and is not inconsistent with the text is to be preferred.[40]

139 This construction accommodates Yuanda's contention that as a defined term claimed amount does not change and is fixed. As noted it is only this fixed amount that is not susceptible to judgment (if it includes an excluded amount) but not any other properly adjusted amount.

140 Consequently, although the issue of construction is not free from difficulty, I respectfully disagree with the construction advanced by the majority. It is not compelled by either the text or context of the Act. In my opinion, the more flexible approach accorded to an adjudicator is not a sufficient indicator of a commensurate restriction and inflexibility on the part of the Court particularly in the circumstances of this case and in particular the inclusion of an obviously excluded amount, known by Yuanda and not responded to.[41] Why should so simple a case — where nothing is disputed — go to an adjudicator?

141 Although the text is specific and clear, so far as it goes, I am of the opinion that, properly construed, it is not exhaustive or conclusive so as to preclude at the very least obvious adjustments that have the effect of reducing the claimed amount.

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40 *Interpretation of Legislation Act 1984* s 35(a); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 390 at [26] (French CJ and Hayne JJ); *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297, 321 (Mason and Wilson JJ).

41 The failure to respond, by a payment schedule, referred to and emphasised many times in this judgment, is not without significance, so far as any later contest is concerned, in circumstances where the claimant elects to go to court under s 16(2)(a). (See Reasons at [66] – [68]). The better course is to serve a payment schedule. (See *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liq)* [2005] NSWCA 409, albeit in a different context.)

142 The text says that judgment should not be given for the claimed amount, the statutory debt, if it includes an excluded amount. So be it. The critical question however is whether judgment can only be given for the statutory debt which is underpinned by the claimed amount and if the claimed amount includes an excluded amount that is the end of the matter and no judgment can be given. Any judgment for a different sum, and in particular a lesser sum would not be for the statutory or judgment debt or the claimed amount, but for a different amount. I do not consider that this should have any bearing on the court enforcement alternative or that such process is so constrained so as to not permit any variation or adjustment of the claimed amount or statutory debt particularly where it is so obvious, and not objected to in a payment schedule. In such a case and because of such adjustment the court would not be giving judgment for the claimed amount or the statutory debt because it is not the correct debt. However, surely it can still give judgment in favour of the claimant for a lesser sum, a reduced and accurate judgment debt. It is clear that judgment is able to be given for an amount different to the amount claimed or statutory judgment in certain circumstances, such as arithmetical errors or double counting. There is no reason why this should not include an amount that is obviously an excluded amount. Such a recalculation or adjustment is necessary, permissible and entirely in tune with the aim and purpose of the Act. The notion of a fixed judgment debt with no leeway or ability to adjust the debt in obvious and uncontested circumstances is contrary to the aim and purpose of the Act.

143 Accordingly, it is not necessary or desirable, in my view, to consider the application of the contended and contentious doctrine of severance and I do not propose to do so. Although such consideration is best left for another day, I consider that the better view is that the doctrine of severance does not apply for the reasons given by the majority.

144 For the reasons given, I would grant leave to appeal but not uphold the ground.

Proposed appeal ground 3 — did the claimed amount include non-permitted variations which are excluded amounts?

Yuanda's submissions

145 Yuanda submits that in addition to the claim for interest, Façade has included in the Payment Claim other excluded amounts, namely claims in respect of site shutdowns. There is no dispute, that on the particular days that are included in the Progress Claim, the site was shutdown. Yuanda submits that these claims are evident on the face of the Payment Claim[42] but are incorrectly referred to as variations, a characterisation that it contends was erroneously accepted by the judge.

146 Yuanda submits that the claims, as acknowledged by Façade, do not directly relate to construction work done under the Contract. Accordingly, it submits that as there was no change in scope of the construction work to be carried out, the amounts are not claimable variations and are therefore excluded by s 10B(2)(a) of the Act. Further, site shutdowns do not involve any change in the scope of the construction work and are time related costs specifically excluded under s 10B(2)(b)(ii) of the Act.

Façade's submissions

147 Façade submits that the claims are claimable variations under s 10A of the Act and therefore not excluded amounts under ss 10B(2)(a) or 10B(2)(b) of the Act. Façade submits that the claims fall under either the first class of variation or the second class of variation referred to in s 10A of the Act.

148 Façade submits that claimable variations do not only refer to the change in the scope of the construction work but includes 'the related goods and services to be supplied' under the Contract. The relevant claims, it was contended, relate to the provision of labour to carry out construction work for the period of each shutdown. This was relevantly a change in the scope of the services to be supplied.

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42 The claims comprise claim 1099 for $88,252.50, claim 1109 for $20,475, claim 1120 for $35,070 and parts of claim 1140 for $68,527.50.

149 Façade submits that each claim falls within the definition of 'second class claimable variation' because:

(a) there was evidence that Façade's claim related to the supply of goods and services (labour) under the Contract to carry out construction work on the day of the relevant site shutdown;

(b) there was evidence that the supply of labour was responsive to a request or direction from the applicant for the supply of goods and services (in the form of labour); and

(c) there was otherwise a lack of consensus between the parties as to one or more of the matters identified in s 10A(c)(i)-(v) of the Act.

150 The judge accepted Façade's characterisation in assessing each of the claims.[43]

Analysis

151 Invoice 1099 in the sum of $88,252.50 (excl GST) is dated 11 April 2019. The accompanying email refers to the 'March Variation'. The description on the invoice is 'Site Evacuation and Shut Down'. Attached to the invoice is a schedule setting out the number of men required to work for the number of hours requested and the rate per hour. The description of work column on the schedule says ' Site Evacuation for safety matter (April 2, 3 & 4 2019)'. The total amount is $88,252.50. In addition, Façade provided Yuanda (Rith Ngoen ('Nguon'), a Project Manager at Yuanda) with a document called Site Record No. 0422 detailing the number of men available to work the various hours requested over the period 2-4 April 2019. The document is signed by Ngoen and it appears that the amount was claimed from Multiplex Constructions Pty Ltd ('Multiplex').

152 The other invoices, 1109, 1120 and 1140 and accompanying documentation is in the same form.

153 The judge held that invoice 1099 was a claimable variation and said:[44]

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43 Reasons [85]–[86], [92], [96], [125]–[126].

In my opinion, a reasonable building practitioner in the position of Yuanda, on receiving the Payment Claim, would have understood that this Claim Item:

(a) related to Invoice 1099 and its supporting documentation, which had been provided to Yuanda by email on 11 April 2019; and

(b) was for a variation, arising from a direction to evacuate the site on 2, 3 and 4 April 2019,

for the following reasons:

(a) the invoice and supporting documentation made it plain that the claim was for services within the meaning of s 6 of the Act, being the provision of labour to carry out construction work; and

(b) the submission that the labour services provided by Façade were idle time was a matter that would have properly been the subject of an assertion in a payment schedule.

I am satisfied that, on its face, the Payment Claim relating to Invoice 1099 does not include a claim for an excluded amount for the following reasons:

(a) The Payment Claim included this item under the heading 'Variations', which referred to variations under the Contract. There was no submission that a reasonable building practitioner would have considered the claim to be other than a claimable variation because of s 10A(4) of the Act or otherwise.

(b) The email attaching Invoice 1099 referred to it as being for a variation.

(c) A payment claim is not a pleading and it is not necessary for it to particularise the agreement, request or direction on which the variation is based. A reasonable recipient would have inferred that the site evacuation was claimed to be in accordance with a direction.

(d) If Yuanda wished to contend that there was no agreement, request or direction or, more particularly, that it did not give any such request or direction, it could properly have raised that assertion in a payment schedule.

154 I agree with the judge's analysis and conclusion.

155 The emails attaching the various claims and the face of the claims referred to variations. The variations were claimable variations under s 10A of the Act.

156 The requirements of s 10A(3) dealing with second class claimable variations have all been met as submitted. Services, being the provision of labour, were

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[44] Ibid [85]–[86].

supplied or made available under the Contract (s 10B(3)(a)). Further, Yuanda requested or directed the supply of services (s 10A(3)(b)). Finally, the parties to the Contract do not agree that the supply of services constitutes a variation to the contract (s 10A(3)(c)).

157 Having concluded that the variations in respect of site shutdowns were claimable variations under the second class of variation and therefore not excluded amounts, it is not necessary to consider whether the variations fall within the first class of variation under s 10(A)(2) of the Act.

158 For the reasons given I would grant leave to appeal but not uphold the ground.

Proposed appeal grounds 4 and 5 — Contention ground 2 — the alleged fraudulent settlement agreement

159 It is convenient to deal with these grounds together.

Judge's reasons

160 The first reference to the settlement agreement is in appendix 2 where the judge, adopting a 'belts and braces approach', assesses each invoice. The reason for appendix 2 is dealt with by the judge at paragraphs [44]–[45] in the following terms:[45]

> Yuanda contended that many of the individual Claim Items comprising the Payment Claim failed to sufficiently identify the construction work or related goods and services to which the progress payments related. In my opinion, for the reasons expressed above, the validity of the Payment Claim is to be considered in its totality.
>
> In case I am in error, I have set out my reasons for rejecting Yuanda's submissions with respect to each of the disputed Claim Items in Appendix 2 to these reasons. In summary, Yuanda's contentions of insufficient identification were principally made on one of the following grounds, which I reject for the reasons set out below:
>
> (a) The Claim Item was not a claim for construction work under the Act,

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45 Ibid [44]–[45]. Although there is only one reference to the settlement agreement, it is desirable to set out the judge's approach and reasoning in relation to the invoices.

but was rather a claim for:

(i) idle time;

(ii) acceleration of works; and/or

(iii) compensation arising from the inability to access the site.

In my opinion, the relevant invoices and supporting documentation provided in respect of each such Claim Item sufficiently identified the services (being the provision of labour) which Façade claimed related to construction work. If Yuanda had wanted to contend that the claimed work was not construction work or related goods and services, it should have done so in a payment schedule.

(b) The Claim Item was a claim for construction work:

(i) **referred to in the Settlement Agreement which was back-dated and invalid**;[46]

(ii) with insufficient details of how the claimed amount was calculated; and/or

(iii) that had not been properly authorised.

In my opinion, the relevant invoices and supporting documentation provided in respect of each such Claim Item sufficiently identified the construction work claimed. A payment claim does not need to include sufficient particulars to disclose the calculation of the claimed amount. The validity of supporting documentation is a matter for determination by an adjudicator after service of a payment schedule, not for the Court under s 16 of the Act.

(c) Mr Nguon, a project manager employed by Yuanda, gave evidence that he was unable to comprehend the construction work referred to in particular Claim Items and that insufficient details were provided as to how the claim was calculated. Façade contested this evidence on the basis that Yuanda had filed a payment schedule out of time, which demonstrated that it did comprehend the construction work to which the Payment Claim related.

In my opinion, none of this evidence is relevant to an inquiry into compliance with s 14(2)(c) because evidence of the subjective opinions and knowledge of the parties' employees is not admissible for the purpose of the objective inquiry into the validity of a payment claim.

(d) The Payment Claim included insufficient particulars of the request or direction from Yuanda to enable identification of the claims.

With respect to each of the Claim Items in the Variations Table, I have found that the Payment Claim and supporting documentation expressly or inferentially claimed that the relevant work was requested or directed by Yuanda or a person acting on its behalf.

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[46] Emphasis added.

Yuanda's contention that, on full investigation of the facts and circumstances, it was unable to identify the construction work claimed because:

(i) the work claimed was not the work so requested or directed; or

(ii) the claim included both work within the scope of the Contract and additional work beyond the scope, which could not be differentiated,

is not relevant for the purpose of assessing compliance with s 14(2)(c). On the face of the invoices and supporting documentation, the claims were for work requested or directed by Yuanda. Any challenge to that claim should have been made in a payment schedule.

(e) The evidence established that the Payment Claim included some incorrect references to site instructions and other documents alleged to contain or refer to a direction or instruction by Yuanda.

Such errors do not invalidate a payment claim and an inquiry into whether a payment claim includes such errors is not relevant to the question of compliance with s 14(2)(c). For similar reasons, the fact that Façade acknowledged that there was some double counting between various Claim Items was not relevant because the Payment Claim, on its face, complied with s 14(2)(c).

161 In assessing invoice 1129 in the sum of $724,260.76, the judge referred to the content of the invoice and other supporting documents as set out below. At paragraph 103(d), the judge referred, for the second time, to the settlement agreement including the recitals and Schedule 1. The judge then referred to Yuanda's submissions which were in the following terms:[47]

Yuanda further submitted that this Claim Item was for an excluded amount for the following reasons:

(a) There was no request or direction from Yuanda prior to the works being carried out and the Order/Variation Requisition postdated the start of the works.

(b) The Settlement Agreement was not valid or binding and, even if it were binding, it could not constitute a first class variation under s 10A(2) of the Act because no time for payment of the amount was specified.

(c) The work did not involve a change in the scope of the works. The change was only as to methodology.

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47 Reasons [105].

162 The judge rejected Yuanda's submissions and said[48]

> I reject Yuanda's submission that the Payment Claim relating to Invoice 1129 did not sufficiently identify the relevant construction work or related goods and services. In my opinion, a reasonable building practitioner in the position of Yuanda would have understood from the Payment Claim that the work referred to in Invoice 1129 related to the supporting documents, being:
>
> (a) the claimed variations in Yuanda Order/Variation Requisition 22072019, signed by the Project Manager and Construction Manager of Yuanda; and
>
> (b) the purported Settlement Agreement which expressed the work as being a variation to the Contract,
>
> from which the recipient could have identified the construction work or related goods and services to which the progress payment related.
>
> For the same reasons, I am satisfied that the Payment Claim with respect to Invoice 1129 did not include a claim for any excluded amount. This Claim Item is a claim for construction work or related goods and services based on variations which, as is apparent from the face of the supporting documents, were requested, directed or agreed by Yuanda, and are therefore claimable variations.
>
> If Yuanda had wanted the claims to be investigated for the purpose of determining whether:
>
> (a) the construction work or related goods and services to which the Payment Claim related were not claimable variations;
>
> (b) the work the subject of the invoice had not been completed at the time of the Payment Claim; or
>
> (c) the Settlement Agreement was invalid;
>
> it could have made such assertions in a payment schedule.
>
> There was an extensive amount of examination and cross-examination with respect to the validity of the Settlement Agreement. In my opinion, this was not relevant for the purpose of objectively determining whether the Payment Claim sufficiently identified the construction work or related goods and services, or whether on its face, the Payment Claim included a claim for an excluded amount.

163 The settlement agreement was not referred to again and no findings were made by the judge despite cross examination and final submissions (on a narrower basis as referred to below) relating to the validity of the settlement agreement. There is no ground of appeal specifically directed to the failure of the judge to make such a

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[48] Ibid [106]–[109].

finding. Rather the ground is framed on the basis that the evidence 'that the settlement agreement was invalid or illegitimate' should have been taken into account by the judge. The judge held, as referred to above, that it was not necessary to take the evidence into account.

Yuanda's submissions

164 Yuanda submits that 'much of the claim' was based on a settlement agreement which was 'invalid and indeed fraudulent, having been signed without authority and falsely backdated with the view of obtaining earlier payment'.

165 Yuanda submits that the judge should not have approached the matter on the face of the Payment Claim but should have upheld the principle that 'fraud unravels everything' and struck out or dismissed the claim.

Façade's submissions

166 Façade submits that Yuanda adopted a much narrower approach to the settlement agreement and the critical issues at trial, contending that the settlement agreement could not be used as evidence of claim 1129 as constituting a first class claimable variation, that is an agreed variation. It did not submit that the alleged fraudulent settlement agreement infected the validity of the entire Payment Claim so as to render it invalid.

167 Façade submits that the judge was correct in considering the face of claim 1129 and supporting documentation and concluding that it sufficiently identified the construction work and related goods and services to which the claim related.

168 Façade submits that the approach of the judge was correct, that is not to go beyond or behind the face of the claim and deal with what is (now) contended to be a fraud case, particularly in circumstances where no payment schedule was provided and the matter was not fully articulated and argued below other than on the narrow basis referred to.

169 In ground 2 of its notice of contention, Façade submits that in any event, if the judge was required to consider the fraud allegations and go beyond the face of the claim, this would not assist Yuanda. It was contented that the evidence as a whole established that the settlement agreement was not 'obtained in circumstances involving fraud and deception' and it clearly demonstrated that Yuanda 'had requested or directed the live edge work that was the subject of claim 1129 so that, even without the settlement agreement, claim 1129 was capable of being characterised as a second class variation. The evidence referred to by Façade is referred to below.

Analysis

170 In my opinion, it is necessary to consider the settlement agreement in the context in which it was raised and dealt with at trial. It was used, together with other documents, to support claim 1129, which was regular and supportable on its face, as found by the judge and there was no need to go further and make any findings in relation to fraud or forgery. This was not a case about fraud or forgery which is required to be properly and precisely pleaded and considered. It was not raised in a payment schedule, and was not squarely or adequately raised at trial. Nevertheless, having been raised, essentially as an evidentiary matter, the judge was required to be satisfied that the claim did not include an excluded amount. Adopting the approach and level of inquiry that he found appropriate and desirable in the circumstances, with which I agree, the judge was so satisfied. I do not consider that the judge was required to go further.

171 In any event, as contended by Façade, the evidence establishes that the critical matters the subject of the settlement agreement and comprising claim 1129 were in any event, and apart from the settlement agreement, claimable variations by Façade and therefore not excluded amounts. It is necessary to refer to the evidence.

172 On 9 April 2019, Walter Bond ('Bond') the Construction Manager of Yuanda gave notice to Multiplex that Yuanda considered that 'the works now being carried

out on live edges to be a variation of the contract' ('the Notice'). The works were being carried out by Façade. Importantly, the Notice contained the following:

> A cost breakdown of the costs incurred to date due to non productivity as a result of changes to the installation methodology by Multiplex as attached…Ongoing additional costs will be added as and when they become know.

The Notice was copied to Nguon and David Rees ('Rees'), the Commercial Manager of Yuanda. The costs breakdown referred to the work done and services provided by Façade.

173 A variation submission was attached to the Notice. The total variation price claimed was $1,228,145.36, all referrable to work and services performed by Façade. The variation description is in the following terms:

> Extra over Cost for non productivity, due to changes in Installation program and installation methodology. As per contract, all works were to be done behind screens and not below screens (Live edge works).

174 The variation submission had already been sent to Multiplex before the Notice was sent. On 27 March 2019. Bond sent an email to Multiplex enclosing the variation submissions. The email is in the follow terms:

> As discussed today, we are seeking acceleration/compensation costs for all works relating to live edges and out of sequence works (Façade Installation). This mainly related to the East Tower, levels 3 to 6 and 12 to 20 and level 4 of the West Tower.
>
> This project was not priced to work on live edges (with the exception of loading bay/Ali-Mak areas), it was based on MPX contractual obligation of a 6 day cycle and working behind screens. Attached is a diagram showing he process and resources required to do this.
>
> Due to structural delays beyond our control, we have been forced to perform works out of sequence and on live edges, this in turn has caused significant installation delays and costs to the program.
>
> Please find attached over and above costs assessments for level 12–20 based on out of sequence and live edge works already completed on level 3 to 6 of the East Tower for which there was only (pprox..) 35% installation efficient rate.
>
> Please review and provide direction to proceed.

The email was copied to Nguon and Rees.

175 On 9 April 2019, Bond sent a copy of the Notice to Tony Callipari of Façade. In the email Bond stated that 'if they don't respond to this then we can go legal on it. Make sure to keep daily records of site issues an [sic] panel count level zones etc'.

176 Even before the Notice and on 5 April 2019, Callipari had notified Yuanda (Bond, Nguon and Dennis Yuliadinata) of various delays (2 April 2019, 3 April 2019 and 4 April 2019) 'that has restricted [Façade] to continue with contract work'. Compensation was sought in respect of 60 workers, scheduled to work on those days.

177 On 27 May 2019, Façade sent a tax invoice to Yuanda claiming an amount of $569,408.40 including GST. The description of the claim was in the following terms:

Non productivity Claim (First Claim as per schedule/TOTAL CLAIM $1,107,413.96 + GST)	$441,000.00
Plant Equipment, Static Lines, Height Awareness Training	$76,644.00

The basis of the claim was the same as the claim made by Yuanda to Multiplex in the Notice.

178 The schedule referred to in the tax invoice identified the sum of $441,000 as owing out of the total of $1,107,413.96. The description at the top of the schedule is in the following terms:

> Residential Tower – Variation costing for breach of contract and/or change to scope of work introducing revised installation methodology and loss of productivity.

179 On 18 June 2019, Rees sent an email to Zhijun Liu, the Chief Executive Officer of Yuanda and James Chi, in-house lawyer at Yuanda. Bond was copied to the email. Although internal, the email deals with and suggests an approach to Multiplex. Relevantly, it includes the following:

> We have a strong case for both claiming Overtime and loss of productivity from MPX. To date have not had any formal recognition or agreement from MPX on the loss of productivity, their current offer of $400k is derisory and does not reflect the cost currently incurred by FDI.

…

> Our position should be that if MPX fail to reimburse the LoP and O/T then we would have no other option but to repudiate the contract on the grounds of access dates and not working behind screens.
>
> We and our installer are currently significant costs in Lop and O/T that needs to be addressed. We should therefore also insist on an on account payment for cost incurred to date.

Later that day Bond sent a copy of the email to Callipari.

180 On 18 June, Callipari sent an email to Nguon of Yuanda, requesting a variation and adjustment to the contract price, in the following terms:

> Please be aware that FDI has provided additional labour to fulfil Yuanda recovery programme as per agreement on the 19.4.19. Until such time that Yuanda issues the Supplier a clause 8 variation confirming as adjustment to the Contract Price against the amounts claimed, FDI will not provide extra/over labour in addition to labour already provided. (refer to the Supplier's Notice of Variation Ref No. 003 East Tower Residential)

Bond was copied to the email.

181 On 21 June, Bond sent an email to Callipari and Nguon in the following terms:

> As per yesterdays [sic] discussion Yuanda acknowledge FDI's claim to compensation for Non-productive work. Currently this variation is a moving target, so we cannot finalize the variation till the project is completed.
>
> Moving forward, please ensure that we you resourse accordingly to achieve all the committed goals MPX have requested. I need to make this project a success for all parties concerned, so that relationships are keep and that we would together in the future.

Liu, Rees, Chi and Robbie Wei, all of Yuanda were copied to the email.

182 If the variation was finalised, as referred to in the email, the variations would be a first class variation under s 10(A)(2) of the Act The request to 'resource accordingly', in my view constitutes a second class variation under s 10(A)(3) of the Act and therefore site time loss is a claimable variation and not an excluded amount.

183 On 21 June, Rees sent an email to Bond, Nguon and Callipari in the following terms:

> Please be assured I am and have been looking into this as a matter of priority, I have requested additional detailed particulars from FDI on Tuesday, which I believe Rith is organizing. The current situation is not helping either of us at the moment as I do need the detailed backup, once I have these, I can review.

> The issues as I see it are:
>
> 1) Non Productive over time, and
> 2) Loss of Productivity
>
> Both these issue [sic] will need be summarized per floor/level and subsequently crossed referenced back to last issued programme/schedule from MPX, this would need to include All hours burned on each floor/level to identify that exact Loss of Productivity.

Liu, Sam Cui, Chi and Wei, all of Yuanda were copied in to the email.

184 Later that day, Callipari sent an email to Rees, Bond and Nguon in the following terms:

> I understand that you have to sort out costs but you have not yet issued necessary clause 8 variation instructions which confirm the scope of the variation and confirm that FDI will be reimbursed the cost incurred in carrying out the variation.
>
> Since the type of variations being requested cannot be priced the clause 8 variation should confirm the methodology of how variation will be valued and what records FDI is to provide to Yuanda.
>
> As a matter of urgency FDI need this variations.

Liu, Cui, Chi and Wei, all of Yuanda were copied to the email.

185 On 24 June 2019, Piper Alderman acting on behalf of Façade sent a letter to Rees. The letter refers to previous correspondence and Façade's request that Yuanda issue variation notices concerning 'changes to work methods, costs and delay imposed on our client by their requirements'. After acknowledging Yuanda's recognition of Façade's claims 'to compensate for non productive work' the letter continues:

> To be clear, while your acknowledgement is welcomed, our client contends that the scope of the changes to the WUC under the Subcontract it has been forced has resulted in our client incurring costs and losses beyond the non-productive overtime and loss of productivity costs foreshadowed in your email.
>
> By way of summary of our client's previous correspondence, the changes to the works and works methods and compounding acts of prevention that have been imposed on our client (and which our client contends constitute variations under clause 8 of the Subcontract) include the following:
>
> 1. requirement to install from a live edge as occurred for levels 2-6 and 12-24 of the East Tower and level 4 of the West Tower
>
> 2. incomplete handovers of levels and insufficient crane time for loading

and back-loading for the East Tower;

3. back-propping not being cleared from lower levels;

4. lack of any drop-zones until February 2019 and then, once implemented, continual changes to the drop-zones;

5. the lack of a program for screen installation (such a program would facilitate efficient installation of façade);

6. out of sequence works to levels 2-6 & 12-24 of the East Tower and level 4 of the West Tower;

7. exclusion of nose cone on level 4 of the Commercial Tower (due to non-compliant screen design); and

8. change to the mast climber installation (now requiring panels to travel from the ground floor, or designated launching levels).

Further, our client maintains that the costs and losses arising from the changes and acts of prevention listed above extend, in addition to non-productive overtime and loss of productivity, to additional overtime costs, costs to accelerate WUC using new additional labour, additional training costs, as well as the costs of additional machinery (cranes, walkie-stackers, forklifts, jib arms etc) and equipment (static lines, drop bolts, anchor points, tool lanyards etc).

Enclosed for your information is a spreadsheet prepared by our client setting out each of the variations it has been, or may be, required to carry out and the different categories of costs it has incurred, will continue to incur or may incur in performing those variations.

186 On 28 June, Bond sent an email to Callipari in the following terms:

In reference to Piper Alderman correspondence DF: 416128 dated 24 June 2019 & Aconex reference correspondence GCOR-ODOlOD

Yuanda acknowledge that the items indicated as variations in the above reference correspondence are variations under clause 8 of the Yuanda/FDI subcontract 3017/500002 and we confirm work on these variations is to continue and Yuanda will value each variation in accordance with the FDI/Yuanda subcontract 3017/500002.

Furthermore the progress and valuation of each variation will be determined by FDI on a monthly basis and included in the monthly progress claims for valuation & payment by Yuanda in accordance with the sub contract terms.

The email was copied to Nguon.

187 This email is an important acknowledgment by Yuanda of the variations referred to in items 1–8 of the Piper Alderman letter dated 24 June 2019.

188 By letter dated 2 July 2019 addressed to Rees, Piper Alderman, after 'confirming Yuanda's acknowledgment that the variations to our client's works…constitutes variations…which…our client is able to be paid progressively', continued as follows:

> We are instructed that Yuanda has, without explanation, failed to pay our client's invoice 00001106 dated 27 May 2019 for $569,408.40 including GST (copy enclosed), being a payment claim for the cost of the Variation Works (in particular non-productive works and purchase of equipment for live-edge works) as at 27 May 2019 (**May Variation Costs**).
>
> While our client remains willing to provide any additional documentation reasonably required for the purpose of valuing the Variation Costs as an adjustment to the Contract Price under the Subcontract, it is of the view that payment of the invoiced amount (i.e. $569,408.40 including GST) should not be further delayed, given:
>
> 1. it is clear that the costs of the Variation Works will significantly exceed the invoiced amount, i.e. payment of the invoiced amount alone could never result in an overpayment to our client;
>
> 2. Yuanda has expressly acknowledged its obligation to make progressive payments of the Variation Costs;
>
> 3. our client has, as a convenience to Yuanda, held off claiming for the significant Variation Costs incurred in June 2019 pending completion of the relevant floors.

The letter enclosed the tax invoice of 27 May 2019 and the variation costing in the sum of $1,107,413.96.

189 On 17 July 2019 and in response to Yuanda's request that Multiplex review the compensation claim made by Façade, Multiplex advised that their offer would be increased to $480,000. In the letter Multiplex advised that 'the offer is fully inclusive of my acceleration costs incurred to date as a result of Façade not being installed behind screens'.

190 On 24 July, Rees sent an email to Bond and Nguon in the following terms:

> Now with my Commercial Manager Hat on!
>
> I've just had a brief chat with Liu.
>
> 1. We agree that $480k will be paid to FDI (not sure when)
>
> 2. The OR is to be amended for Inv 00001106 to reflect this amount.

3. FDI are to provide better detailed particulars of there [sic] claim, in line with claims/disputes custom and practise for a claim. This is not to be construed as a back to back payment.

4. We need to consider that any loss of productivity claim should be based on ACTUAL cost not contract Rates or EBA.

191 On 30 July, Bond sent an email to Callipari attaching an 'Order/Variation Requisition' in the sum of $1,435,400.34. The sum of $1,107,413.96 was included in the requisition. The requisition was signed by Bond, Rees and Nguon. In the email Bond stated 'for your records, David Rees has signed off the order request, you just need Liu signature!'

192 On 28 July 2019, Façade submitted invoice number 1129 in the sum of $796,686.84. The description on the tax invoice is:

Non Productivity Claims	$666,413.96
(second claim as per schedule)[49]	
Plant, equipment, static lines	$57,846.80

193 The order/variations requisition and the variations costing in the sum of $1,107,413.96 were attached to the tax invoice. The settlement agreement was also attached.

194 Part of the claim, in the sum of $480,000 ,was paid leaving the balance to be paid as agreed. Counsel for Yuanda properly conceded that the sum of $480,000 was paid on account. As the goods were supplied and services rendered the claim, at the very least constitutes a second class claimable variation. In my opinion, and notwithstanding the absence of 'Liu's signature', the claim also constitutes a first class variation. It was clearly agreed by the parties, as referred to in the correspondence, and apart from the settlement agreement. The variation requisition, authorising payment in the sum of $480,000 is dated 1 August, 2019. It was signed by Bond, Nguon, Harding and Rees, all holding senior positions within Yuanda. The absence of Liu's signature on the variation requisition is in my opinion irrelevant.

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[49] The first claim was in the sum of $441,000 (see paragraph [120] above). The second claim was for $666,413.96 giving a total of $1,107,413.96.

Liu was copied in to all relevant emails and there is no evidence of any relevant dissent on his behalf.

195 The settlement agreement is dated 10 July 2019. There is no dispute that it was backdated. It is signed by Bond on behalf of Yuanda and Callipari.

196 The settlement agreement does two things. First, it records the contract price adjustment in the sum of $1,107,413.96 and secondly it includes in Schedule 1 eleven categories of work that are claimable as separate variations.

197 Whatever the status of the settlement agreement I do not regard it as a bar to recovery of the amounts claimed under the summary procedure contemplated by s 16(4)(a) of the Act. The agreement does need to be considered in the context of the case and the nature of the proceedings. To repeat, this was not a case about fraud where matters have to be fully and precisely pleaded and particularised.

198 The settlement agreement was of very little evidential value and could be put to one side. It was not necessary to consider the agreement or any fraud because the claim on its face and supported by other documents was justified and established. The contract price adjustment was agreed in any event and without recourse to the settlement agreement. The variations were also substantially the same as those referred to in the Piper Alderman letter dated 2 July 2019, as properly conceded by counsel for Yuanda.

199 I do not consider that the judge erred in his approach to and consideration of claim 1129. The judge was not obliged to consider the settlement agreement in the manner contended (on appeal) by Yuanda. If I am wrong, my investigation of the underlying facts and circumstances reveals that the claim was entirely justified, as contended by Façade, without reference to the settlement agreement.

200 In the circumstances, it was unnecessary and undesirable to deal with the efficacy and validity of the settlement agreement 'on the run'. It was not pleaded, not part of a payment schedule, not precisely articulated and raised at trial only as an

evidentiary matter. However, most importantly, it was irrelevant to the claim which was otherwise supportable. This is not to say that the allegations are not serious and may be required to be dealt with in due course, with potentially drastic consequences, but not at this stage.

201 It follows that I do not consider it necessary or desirable to deal with Yuanda's contention that 'fraud unravels everything'. It was not raised and dealt with at trial and is not relevant to the proper assessment of claim 1129. In any event, the matter was not fully argued before the Court. No attempt was made to identify and articulate the elements of the fraud. Fraud and forgery were used loosely and interchangeably.[50] Further, it was not entirely clear what was to be unravelled and how. The determination of the progress claim, not being a final determination of the rights of the parties, is best left, and indeed must be left, for another day.

202 Accordingly, for the reasons given, I would grant leave to appeal on proposed grounds 4 and 5, but not uphold the grounds, and so far as may be necessary uphold Contention ground 2.

Disposition

203 As the proposed grounds of appeal were arguable, I would grant leave to appeal. However, for the reasons given I would dismiss the appeal.

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[50] A number of phrases were used to describe the settlement agreement; 'invalid and indeed fraudulent', 'invalid or illegitimate', 'not valid or binding', 'a forgery'.