

**CONSTRUCTION
AND ADJUDICATION
IN HONG KONG**



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- (4) Any contract for the prefabrication, in Singapore, of components intended for construction work to be carried out on a construction site outside Singapore, where any one of the parties to the contract is not:
- (a) a body corporate incorporated under any written law in Singapore;
 - (b) a limited partnership registered under the Limited Partnerships Act 2008 (2020 Rev Ed) (Singapore); or
 - (c) a person carrying on a business that is registered under the Business Names Registration Act 2014 (2020 Rev Ed) (Singapore) (section 4(2)(d)); and
- (5) Such other contract or class of other contracts as may be prescribed (section 4(2)(e)).

[2-212] Insofar as the two aspects of the excluded contracts under section 4(2)(a) of the Singapore Act are concerned:

- (1) Section 2 of the Residential Property Act 1976 (Singapore) defines a 'residential property' to include:
 - (a) any vacant land upon which no building or other structure exists or any land upon which exists any building or other structure which is constructed or used contrary to any written law;
 - (b) any house, building or other premises or any part thereof which is permitted to be used pursuant to the Planning Act 1998 (2020 Rev Ed) (Singapore) or any other written law as a dwelling house¹⁷² or which is lawfully so used;
 - (c) any land zoned for residential purposes in the Master Plan; and
 - (d) such other land or building, in whatever manner zoned in the Master Plan, as the Minister may, by

¹⁷² 'Dwelling house' is further defined under s 2 of the Residential Property Act 1976 (Singapore) to include 'any building or tenement, or any part thereof, which is used, constructed or adapted for use for human habitation'. This is to be distinguished from a 'flat', which is defined to be 'a horizontal stratum of any building or part thereof, whether such stratum is on one or more levels or is partially or wholly below the surface of the ground, which is used or intended to be used as a complete and separate unit for the purpose of habitation or business or for any other purpose, and which may be comprised in a "lot", or in part of any "subdivided building" not shown in a registered "strata title plan" (the last 3 expressions within quotation marks having the meanings given by the Land Titles (Strata) Act 1967)'.

notification in the Gazette, declare to be residential property for the purposes of the Residential Property Act 1976 (Singapore),

but does not include:

- (a) any land, whether or not vacant, which is zoned for industrial or commercial purposes or both such purposes in the Master Plan or which is permitted to be used pursuant to the Planning Act 1998 (Singapore) or any other written law solely for industrial or commercial purposes or both such purposes;
- (b) any house, building or other premises, or any part thereof, which is permitted to be used pursuant to the Planning Act 1998 (Singapore) or any other written law solely for industrial or commercial purposes or both such purposes or which is lawfully so used;
- (c) any hotel registered under the provisions of the Hotels Act 1954 (2020 Rev Ed) (Singapore); and
- (d) such other land or building, in whatever manner zoned in the Master Plan, as the Minister may, by notification in the Gazette, declare to be industrial, commercial or non-residential property for the purposes of the Residential Property Act 1976 (Singapore).

- (2) Section 4(d) of the Building Control Act 1989 (Singapore) provides that the legislation does not apply to building works that are prescribed in the building regulations to be insignificant building works. The First Schedule of the Building Control Regulations 2003 (Singapore) specifies insignificant building works for the purpose of the Building Control Act 1989 (Singapore) and includes the following:

- (a) replacement or changing of windows and doors;
- (b) replacement or reinstatement of a safety barrier integrated with a window in a residential building that is carried out in accordance with the standardised design;
- (c) replacement of existing floor and wall finishes;
- (d) replacement or changing of any false ceiling with lightweight material;

- (e) erection of any single storey lean-to extension with roof covering of tiles, or of any lighter material, in any bungalow, semi-detached, terrace or linked house;
- (f) all air-conditioning works.

[2-213] With regards to the excluded contracts under section 4(2)(b) of the Singapore Act, 'employee' is defined under section 2 of the Employment Act 1968 (Singapore) as a person who has entered into or works under a contract of service with an employer and includes a workman, and any officer or employee of the Government included in a category, class or description of such officers or employees declared by the President to be employees for the purposes of the Employment Act 1968 (Singapore) or any provision thereof, but does not include any of the following:

- (1) any seafarer;
- (2) any domestic worker; and
- (3) any person belonging to any other class of persons whom the Minister may, by notification in the Gazette, declare not to be employees for the purposes of the Employment Act 1968 (Singapore).

[2-214] While section 4(2)(c) of the Singapore Act excludes its application to any terminated contract that contains provisions permitting the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract, it does not have the effect of overriding the fundamental prohibition under the Singapore Act against 'pay when paid' clauses.¹⁷³

[2-215] In *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd*,¹⁷⁴ the High Court deals with the following question:

Does the Act go so far as to render "pay when paid" provisions in a construction contract unenforceable notwithstanding the termination of the contract? In particular, where a term in a construction contract purports to suspend payments upon termination of the contract, and makes the contractor's liability to pay any further sum owing to its sub-contractor contingent or

¹⁷³ See also **Heading 3.7** of this chapter for 'pay when paid' clauses.

¹⁷⁴ *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862.

conditional on the operation of some other contract or agreement, does s 4(2)(c) of the Act apply so as to render the entire Act inapplicable to the contract; or, would s 9 of the Act apply so as to render such a clause in the terminated contract unenforceable and of no effect? In short, what (if any) is the interplay between ss 4(2)(c) and 9 of the Act?

[2-216] In this regard, the High Court held that:

(1) Section 4(2)(c) of the Singapore Act should be construed in context, having regard to the entire piece of legislation, not in isolation. In doing so, the court should strive to achieve a harmonious construction of provisions within the same statute, particularly where that construction would promote the purpose of the legislation and thereby, give effect to the intention of Parliament. As such, section 4(2)(c) of the Singapore Act should be construed in light of the other provisions of the Singapore Act such as section 9.

(2) While section 4 of the Singapore Act sets out the parameters for when it does or does not apply, it should not be interpreted or given primacy over other provisions in the Singapore Act. In particular, section 4(2)(c) does not take primacy over section 9 of the Singapore Act.

(3) The *raison d'être* of the statutory framework was to ensure that sub-contractors are not left at the mercy of main contractors: (a) withholding payments for reasons unrelated to the subcontractors' performance; and (b) making such payments contingent on performance of some other contract.

(4) When section 4(2)(c) of the Singapore Act is construed to determine if the Singapore Act applies to a particular terminated construction contract, any termination and suspension of payment provisions in that contract are to be given effect only if they do not fall foul of section 9 of the Singapore Act.

(5) In support of the above conclusion, the High Court further noted that both sections 9(1) and 9(2) of the Singapore Act refer to a 'pay when paid provision' in a 'contract'. The term 'contract' is, in turn, defined in section 2 of the Singapore Act as 'a construction

contract or a supply contract, and includes a construction contract ... that has been terminated'. Thus, it is clear that Parliament intended for section 9 of the Act on the effect of 'pay when paid' provisions to also apply to a terminated construction contract.

3.6 Claim for loss and expense

[2-217] Prior to the Building and Construction Industry Security of Payment (Amendment) Act 2018 (Singapore) (the 'Amendment Act'), there was some uncertainty as to whether, under the Singapore Act, a claimant is entitled to claim in an adjudication for 'loss and expense' or prolongation costs arising from an extension of time.

[2-218] The Amendment Act confirmed that claims for prolongation costs and loss and expense do fall within the scope of the statutory regime under the Singapore Act, but it also substantially limited the scope for these claims. In particular, the amended section 17(3) of the Singapore Act provides that:

In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss or expense that is not supported by —

- (a) any document showing agreement between the claimant and the respondent on the quantum of that part of the payment claim or the payment response; or
- (b) any certificate or other document that is required to be issued under the contract.

[2-219] In this regard, it was held by the Court of Appeal in *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd*¹⁷⁵ that the amendment was intended to exclude 'complex claims':

As the Minister of State for National Development, Mr Zaqy Mohamad ("the Minister of State"), explained at the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (Bill No 38/2018) (Singapore Parliamentary Debates, Office Report (2 October 2018) vol 94 ("2018 Parliamentary Debates")), s 17(2A) was intended to exclude "complex claims" involving "complicated prolongation costs, damages, losses or expenses". Such claims unduly lengthened the adjudication process and '[went] beyond the

175 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 at para 45.

original scope of the [SOPA], which [was] intended to cover claims for work done or goods and services supplied'.

[2-220] Section 17(3) of the Singapore Act prescribes that the circumstances under which a claim is entitled to claim for damage, loss and expense, ie, the amount must either be certified under the relevant contract or have been agreed by the parties. In other words, in the absence of such certificate or agreement, even if the evidence shows a strong case for the claimant's entitlement to such damage, loss or expense, the adjudicator would still have no power to deal with such claim.

3.7 Prohibition against 'pay when paid' provisions

[2-221] Section 9 of the Singapore Act provides that a pay when paid provision of a contract is unenforceable and has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or for goods or services supplied or undertaken to be supplied, under the contract. A 'pay when paid provision' is defined under section 9 of the Singapore Act as:

- (1) that makes the liability of one party (the first party) to pay money owing to another party (the second party) contingent or conditional on payment to the first party by a further party (the third party) of the whole or any part of that money;
- (2) that makes the due date for payment of money owing by the first party to the second party contingent or conditional on the date on which payment of the whole or any part of that money is made to the first party by the third party;
- (3) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or conditional on the operation of any other contract or agreement; or
- (4) that is of such kind as may be prescribed.

3.8 Prohibition against contracting out of the Singapore Act

[2-222] Section 36 of the Singapore Act provides that:

- (1) The provisions of the Singapore Act have effect despite any provision to the contrary in any contract or agreement.

- (2) The following provisions in any contract or agreement (whether in writing or not) are void:
- (a) a provision under which the operation of the Singapore Act or any part of the Singapore Act is, or is purported to be, excluded, modified, restricted or in any way prejudiced, or that has the effect of excluding, modifying, restricting or prejudicing the operation of the Singapore Act or any part of the Singapore Act; and
 - (b) a provision that may reasonably be construed as an attempt to deter a person from taking action under the Singapore Act.
- (3) The Minister may, for the purpose of subsection 36(2)(a), prescribe the type of provisions in any contract or agreement, or any class thereof, which are deemed to have the effect of excluding, modifying, restricting or prejudicing the operation of the Singapore Act or any part of the Singapore Act.
- (4) Except as provided in subsection 36(1), nothing in the Singapore Act limits or otherwise affects the operation of any other law in relation to any right, title, interest, privilege, obligation or liability of a person arising under or by virtue of a contract or an agreement.

[2-223] Therefore, not only will a term that expressly provides that the Singapore Act does not apply be void, but a term that otherwise prejudices the operation of the Singapore Act may also be void pursuant to section 36 of the Singapore Act.

[2-224] A term of a contract which is prohibited under section 36(2) of the Singapore Act is void without any qualification, such as 'for the purposes of this Act'. This seems to suggest that if a provision is avoided by operation of section 36(2) of the Singapore Act, it is void for all purposes.

[2-225] However, it has also been argued that the effect of avoidance under the Singapore Act should not extend beyond the statutory remit. In particular, it has been suggested that the idea that the effect of the Singapore Act is to create a statutory regime which exists side by side with a contractual regime may properly suggest that these prohibitions are only intended to operate within the province of matters in respect of which the statutory track is invoked. On this

view, unless there are clear terms which take the prohibitions of the offending contractual terms beyond the statutory remit, respect for party autonomy must preserve the consideration of the operation of these contractual terms in the final hearing.¹⁷⁶

4. SIMILARITIES AND DIFFERENCES BETWEEN THE UK ACT, NSW ACT AND THE SINGAPORE ACT

[2-226] From the brief review of the UK, NSW and Singapore regimes above, there are clear similarities between them. The primary object and purpose of all the regimes is to solve or reduce the cash flow problems existing in the construction industry. By adopting adjudication as the dispute resolution means, the parties to a dispute can obtain a quick and interim result. Such a result will, subject to limited grounds, be recognised and enforced in courts. If any party to the dispute is unsatisfied with the adjudication result, they can still resort to arbitration or litigation to seek a final determination.

[2-227] To entrench a party's rights under the legislation, the UK Act, NSW Act and the Singapore Act all include provisions that:

- (1) prevent the parties from contracting out of the Act;
- (2) prohibit the notorious 'pay when paid' provisions; and
- (3) give the receiving party the right to suspend work.

[2-228] There are also differences among the regimes. Without carrying out a detailed comparison among the three regimes, two main distinctions are highlighted below.

[2-229] The first distinction is that while the scope of the UK Act extends to any dispute to a construction contract and either party to the construction contract may refer their dispute to adjudication, the scope of the NSW Act and the Singapore Act is limited to payment claims and only the downstream party is entitled to make a payment claim against the upstream party. In this regard, the Ordinance is more akin to the NSW Act and Singapore Act than the UK Act.

[2-230] The second distinction is that the UK Act, the NSW Act and the Singapore Act contain different timetables for the adjudication

¹⁷⁶ Chow Kok Fong, *Security of Payments and Construction Adjudication* (3rd edn, LexisNexis 2022) at para 4.74.

process. In the absence of agreement between the parties, the general adjudication periods from initiation to determination are:

- (1) 28 days (from the referral of the dispute) under the UK Act;¹⁷⁷
- (2) 15 business days¹⁷⁸ under the NSW Act;¹⁷⁹ and
- (3) 21 days¹⁸⁰ under the Singapore Act.¹⁸¹

[2-231] In this regard, as will be seen below, the Ordinance provides a more generous timetable.¹⁸²

177 Housing Grants, Construction and Regeneration Act 1996 (UK), s 108(2)(c).

178 Excluding Saturday, Sunday, public holiday as well as 27, 28, 29, 30 and 31 December (see the Building and Construction Industry Security of Payment Act 1999 (NSW), s 4).

179 Assuming the adjudication application is lodged on day 0 and the adjudication response lodged five business days later, the determination should be made within ten business days after the adjudication response. See Building and Construction Industry Security of Payment Act 1999 (NSW), ss 20(1), 21(3)(a).

180 Excluding public holiday as defined under the Holidays Act 1998 (2020 Rev Ed) (Singapore) (see the Building and Construction Industry Security of Payment Act 2004 (Singapore), s 2).

181 Assuming the adjudication application is lodged on day 0 and the adjudication response lodged on day seven, the determination should be made within day 21. See the Building and Construction Industry Security of Payment Act 2004 (Singapore), ss 15(1), 16(1) and 17(1).

182 See **Chapter 7**.

CHAPTER 3

SCOPE OF APPLICATION

[3-1] Similar to the Housing Grants, Construction and Regeneration Act 1996 (UK) (the 'UK Act'), Building and Construction Industry Security of Payment Act 1999 (NSW) (the 'NSW Act') and Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) (Singapore) (the 'Singapore Act'), a fundamental requirement for the application of the Construction Industry Security of Payment Ordinance (Cap 652) (the 'Ordinance') is the existence of a construction contract. The text below will examine the meaning of a construction contract under the Ordinance in more detail. In particular, it will discuss:

- (1) the meaning of a construction contract under the Ordinance;¹
- (2) the division between public contracts (and their subcontracts) and main private contracts (and their subcontracts);² and
- (3) the exempted situations.³

[3-2] As explained in **Chapter 1**, the Development Bureau has published various model adjudication documents since the Ordinance was gazetted. One of the documents, namely DEVB's Model Practice Note on Jurisdiction of Adjudicators, contains various examples on the meaning of a construction contract. Where appropriate, the document will be referred to below.

1. EXISTENCE OF A CONSTRUCTION CONTRACT

[3-3] Pursuant to section 2 of the Ordinance, a construction contract:

- 1 See **Heading 1** of this chapter.
- 2 See **Heading 2** to **Heading 3** of this chapter.
- 3 See **Heading 4** of this chapter.

- (a) means a legally enforceable agreement under which—
- (i) a party agrees to carry out construction work for another party; or
 - (ii) a party agrees to supply related goods and services for construction work to another party; but
- (b) does not include a development contract under which the whole consideration payable is calculated otherwise than by reference to the value of the construction work or the related goods and services.

[3-4] Consequently, a construction contract comprises three main elements:

- (1) there must be a 'legally enforceable agreement';
- (2) there must be 'construction work' or 'related goods and services'; and
- (3) the contract must not be a 'development contract'.

[3-5] As it has been repeatedly held in various cases, the existence of a construction contract is a 'jurisdiction fact'.⁴ A proper finding on it is, therefore, of crucial importance. In this connection, an adjudicator's finding on it is open to review by the court, and the adjudicator's determination may be set aside by the court if the finding is erroneous.

1.1 Meaning of 'legally enforceable agreement'

[3-6] Under the Ordinance, a construction contract can be written or oral, or partly written and partly oral.⁵ In this regard, the Ordinance is more similar to the UK Act⁶ and the NSW Act,⁷ and is wider than the Singapore Act (which requires a construction contract to be made in writing).⁸

4 See Chapter 9, Heading 2.4.2(a)(ii).

5 Construction Industry Security of Payment Ordinance (Cap 652), ss 7(2)(a) and 8(2)(a).

6 See Chapter 2, Heading 1.2.

7 Building and Construction Industry Security of Payment Act 1999 (NSW), s 7(1).

8 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) (Singapore), s 4(1).

[3-7] Like the UK Act,⁹ the NSW Act¹⁰ and the Singapore Act,¹¹ a construction contract under the Ordinance can be governed by local or foreign law.¹²

[3-8] The explicit requirement for a legally enforceable agreement is noteworthy, as there is no such requirement under the NSW Act. According to section 4 of the NSW Act, a 'construction contract' means 'a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party'.

[3-9] In *Okaroo Pty Ltd v Vos Construction & Joinery Pty Ltd*,¹³ there was a direct payment arrangement between the employer and the nominated sub-contractor. Nicholas J held that such arrangement was sufficient to satisfy section 4 of the NSW Act.¹⁴ His Honour at paragraph 55 rejected Okaroo's submission that a construction contract within the meaning of the Act must be a contract or other arrangement under which liability to pay for the construction work is legally enforceable.¹⁵

[3-10] In *Machkevitch v Andrew Building Constructions*,¹⁶ there was a construction contract between the builder and the proprietor. The question was whether there was a construction contract between the builder and the plaintiff which was a principal of the proprietor. The builder's case was that the plaintiff, Mr Machkevitch, had given an oral undertaking to ensure that the builder was paid if the

9 Housing Grants, Construction and Regeneration Act 1996 (UK), s 104(7).

10 Building and Construction Industry Security of Payment Act 1999 (NSW), s 7(1).

11 Building and Construction Industry Security of Payment Act 2004 (Singapore), s 4(1).

12 Construction Industry Security of Payment Ordinance, ss 7(2)(a) and 8(2)(a).

13 *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45.

14 See *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45 at paras 38–55.

15 This is applied by *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd* [2013] NSWSC 363 at para 22, per McDougall J; *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 at para 21, per McDougall J; *Cromer Excavations Pty Ltd v Cruz Concreting Services Pty Ltd* [2011] NSWSC 51 at para 19, per Davies J; *Levadetes Pty Ltd v Iberian Artisans Pty Ltd* [2009] NSWSC 641 at para 49, per McDougall J. cf *Lendlease Engineering Pty Ltd v Timecon Pty Ltd* [2019] NSWSC 685 at para 87, per Ball J; *Vis Constructions Ltd v Cockburn* [2006] QSC 416 at para 51, per Jones J.

16 *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546.

proprietor did not pay it. McDougall J found at paragraphs 27–28, 51, that the oral undertaking amounted to an engagement, or agreement (not legally enforceable), under which Mr Machkevitch assured the builder that he had sufficient personal resources to pay it if the proprietor did not, he would do so; and that the builder accepted and acted on this assurance by executing the building contract and the bonus deed. Therefore, it amounted to an ‘arrangement’ for the purposes of the definition of ‘construction contract’ under the NSW Act.¹⁷

[3-11] In contrast, in *Grave v Blazevic Holdings Pty Ltd*,¹⁸ the respondent obtained a default judgment against the applicant. Subsequently, the applicant sought to set aside the default judgment on the ground that he was not, but his service company was, a party to the construction contract under which the respondent had carried out the relevant work. The primary judge refused the application. On appeal, the New South Wales Court of Appeal held that under section 13 of the NSW Act, the person on whom the progress claim may be served is someone who, under the construction contract concerned, is or may be liable to make the payment. The words ‘is or may be liable’ may be capable of referring, for example, to primary or secondary liability (the latter, for example, as guarantor). They may be capable of encompassing disputes as to quantification; and disputes as to whether, on the proper construction of the contract and the Security of Payment Act, any payment is due at all. However, whatever is the nature and amount of the liability sought to be enforced, it must be a liability ‘under the construction contract concerned’. If the proposed recipient of the payment claim is not a party to or liable under the construction contract, then it falls outside that statutory description.¹⁹ As a result, it was held at paragraph 37

¹⁷ This is applied by *Crown Green Square Pty Ltd v Transport for NSW* [2021] NSWSC 1557 at para 165, per Henry J. cf *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd* [2013] NSWSC 363 at paras 28–29, per McDougall J.

¹⁸ *Grave v Blazevic Holdings Pty Ltd* (2010) 79 NSWLR 132, [2010] NSWCA 324.

¹⁹ See *Grave v Blazevic Holdings Pty Ltd* (2010) 79 NSWLR 132, [2010] NSWCA 324 at para 26, per McDougall J.

that the applicant had an arguable defence and the default judgment was set aside.²⁰

[3-12] Furthermore, in *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd*,²¹ Class Electrical applied to Go Electrical for the supply of goods and equipment on credit. Go Electrical agreed to supply on that basis. Their credit agreement was reduced in writing. Thereafter, from time to time Class Electrical would request Go Electrical to supply goods or equipment, and from time to time Go Electrical would accede to those requests and deliver accordingly. The requests for delivery were constituted by purchase orders given by Class Electrical to Go Electrical. The deliveries were accompanied by and evidenced in invoices for the goods delivered. Go Electrical claimed that Class Electrical was indebted to it in an amount exceeding \$1.8 million for the supply and delivery of electrical fittings and appliances. Go Electrical sought to utilise the NSW Act to enforce its claim. Ultimately, the claim was referred to an adjudicator for determination. He found in favour of Go Electrical and made a determination accordingly. The issue in the case was whether the credit agreement itself was a construction contract, and therefore the payment claim and adjudication determination were related to one construction contract (instead of a multiplicity of contracts between the parties).

[3-13] McDougall J held at paragraphs 34–35 that in the statutory context, a person undertakes to carry out construction work, or to supply related goods and services, for or to another if the first person agrees, or accepts an obligation, or promises, to do that work or supply those goods and services. The agreement or acceptance or promise need not be one having legal effect, so that there may not be a contract as the law understands that term. Nonetheless, the undertaking must be one under a contract or other arrangement.

[3-14] In that case, although the credit agreement recognised that there might be contracts of sale made between Class Electrical as purchaser and Go Electrical as vendor, there was nothing in the agreement that sets out any of the usual indicia of a supply contract. All of those matters were left for later agreement if Class

²⁰ This is considered in *Johnston v Lianda Constructions Pty Ltd* [2014] NSWSC 1178 at para 39, per Associate Justice Harrison; *Nigro v EVS Group Pty Ltd* [2012] NSWSC 1545 at paras 37, 61–62, per Hislop J.

²¹ *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd* [2013] NSWSC 363.

Electrical should choose to order goods from Go Electrical and if Go Electrical should choose to supply them. In particular, the credit agreement did not contain anything to the effect that Go Electrical agreed, or accepted, or promised to supply goods from time to time. The question of supply was left at large. As a result, McDougall J concluded that the credit agreement was not a construction contract under the NSW Act.²²

[3-15] *Williams v Concreting Services Pty Ltd*²³ is another case illustrating how the courts have approached the question. In that case, Childcare Specialists Australia Pty Ltd (CSA) entered into a contract with the proprietor of the site at Ropes Crossing in Western Sydney. The plaintiff Mr Williams was the sole director of CSA. The first defendant Concreting Services Pty Ltd (Concreting) performed work at the site and was awarded \$242,903.42 for its work done against the plaintiff pursuant to a determination by an adjudicator. The issue in the case was whether any 'construction contract' in relation to the work done by Concreting was between Concreting and CSA, and not between Concreting and Mr Williams. Stevenson J held at paragraph 9 that the counterparty to the contract or arrangement in the case was CSA, not Mr Williams. Accordingly, the adjudicator had no jurisdiction under the NSW Act to make the determination, and the determination is void.

[3-16] Given the explicit requirement for a legally enforceable agreement under the Ordinance, the New South Wales cases should be considered with this important distinction in mind.

1.2 Meaning of 'construction work'

[3-17] The term 'construction work' is defined in section 3(1) of the Ordinance as:

- (a) the construction, installation or erection of a specified structure; or
- (b) the replacement, extension, renewal, alteration, repair, restoration, maintenance, dismantling or demolition of, or the addition to, an existing specified structure.

²² See *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd* [2013] NSWSC 363 at paras 36–39, per McDougall J.

²³ *Williams v Concreting Services Pty Ltd* [2013] NSWSC 366.

[3-18] Specified structures are set out in Schedule 2 of the Ordinance, which contains a wide range of building, structural and engineering works.

[3-19] The difference between section 3(1)(a) and section 3(1)(b) is that while section 3(1)(a) refers to the construction, installation and erection of a *new structure*, section 3(1)(b) refers to the repair or alteration works of an *existing structure*.²⁴

[3-20] Section 3(2) of the Ordinance further elaborates that any work mentioned in section 3(1) includes:

- (a) work that is carried out to an integral or ancillary part of a specified structure, including—
 - (i) making architectural features;
 - (ii) undertaking utilities and services installations;
 - (iii) landscaping; and
 - (iv) painting or decorating external or internal surfaces; and
- (b) work that is preparatory to, or for rendering complete, any work mentioned in that subsection, including—
 - (i) site clearance, site investigation, excavation, filling, tunnelling and boring;
 - (ii) provision of access roads and scaffolding;
 - (iii) construction and maintenance of site offices; and
 - (iv) site restoration.

[3-21] Section 3(3) of the Ordinance also explains that 'utilities and services installation' in section 3(2) includes 'any electrical and mechanical installation, building services installation, electronic installation, radio and broadcasting installation and telecommunication installation'.

[3-22] *Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd*,²⁵ a Queensland Supreme Court case, is instructive on the meaning of 'construction work'. In Queensland, pursuant to the Building and Construction Industry Payments Act 2004 (the '2004 Queensland Act'):

²⁴ DEVB Model Practice Note on Jurisdiction of Adjudicators available at https://www.devb.gov.hk/filemanager/en/content_2436/DEVB_model_practice_note_jurisdiction.pdf accessed 7 August 2025 at the Annex, Diagram 2.

²⁵ *Capricorn Quarries Pty Ltd v Inline Communication Construction Pty Ltd* [2013] 2 Qd R 1.