

**SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY  
COURT OF APPEAL**

<b>Case Title:</b>	<b>Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd</b>
<b>Citation:</b>	<b>[2019] ACTCA 15</b>
<b>Hearing Date:</b>	10 May 2019
<b>Decision Date:</b>	28 May 2019
<b>Before:</b>	Murrell CJ, Mossop and Loukas-Karlsson JJ
<b>Decision:</b>	The appeal is dismissed with costs
<b>Catchwords:</b>	<b>APPEAL</b> – BUILDING AND CONSTRUCTION – Adjudication of progress payment claim under <i>Building and Construction Industry (Security of Payment) Act 2009</i> (ACT) – whether payment claim served within period required by s 15(4)(b) – some work within 12 month period, some outside – whether fact that work within 12 month period was work done under relevant construction contract was a jurisdictional fact or whether claim that the work had been done under the construction contract sufficient to enliven adjudicator’s jurisdiction – whether primary judge erred in not determining the terms of a construction contract – operation of s 15(4) of the <i>Building and Construction Industry (Security of Payment) Act 2009</i> (ACT)
<b>Legislation Cited:</b>	<i>Building and Construction Industry Security of Payment Act 1999</i> (NSW), ss 13, 13(5), 17(2)(a) <i>Building and Construction Industry (Security of Payment) Act 2009</i> (ACT), ss 10, 10(1), 11, 12, 15, 15(1), 15(4), 15(4)(a), 15(4)(b), 15(5), 16, 19(2), 24, 38, 43, Pt 3, Pt 4
<b>Cases Cited:</b>	<i>Ampcontrol SWG Pty Ltd v Gujarat NRE Wonga Pty Ltd</i> [2013] NSWSC 707 <i>Brodyn Pty Ltd v Davenport</i> [2004] NSWCA 394; 61 NSWLR 421 <i>Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd</i> [2018] ACTSC 282 <i>Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd</i> [2010] NSWCA 190; 78 NSWLR 393 <i>Energetech Australia Pty Ltd v Sides Engineering Pty Ltd</i> [2005] NSWSC 801 <i>Estate Property Holdings Pty Ltd v Barclay Mowlem Construction Ltd</i> [2004] NSWCA 393; 61 NSWLR 575 <i>Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd</i> [2005] NSWSC 705 <i>Pines Living Pty Ltd v John O’Brien &amp; Walton Construction Pty Ltd</i> [2013] ACTSC 156 <i>Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd</i> [2017] NSWCA 151; 95 NSWLR 82 <i>Project Blue Sky Inc v Australian Broadcasting Authority</i> [1998] HCA 28; 194 CLR 355 <i>Southern Han Breakfast Point Pty Ltd (In liq) v Lewence</i>

*Construction Pty Ltd* [2016] HCA 52; 260 CLR 340  
*The Trustees of the Roman Catholic Church for the Diocese of Lismore v T F Woollam and Son* [2012] NSWSC 1559  
*Winyu Pty Ltd v King* [2015] ACTSC 387

**Parties:** Canberra Drilling Rigs Pty Ltd (Appellant)  
Haides Pty Ltd (First Respondent)  
Max Tonkin (Second Respondent)

**Representation:** **Counsel**  
D Weinberger (Appellant)  
B Katekar and D Robens (First Respondent)  
No appearance (Second Respondent)

**Solicitors**  
Chamberlains Law Firm (Appellant)  
WMG Legal (First Respondent)  
Adjudicate Today (Second Respondent)

**File Number:** ACTCA 63 of 2018

**Decision under appeal:** Court/Tribunal: Supreme Court of the ACT  
Before: McWilliam AsJ  
Date of Decision: 12 October 2018  
Case Title: Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd  
Citation: [2018] ACTSC 282

## THE COURT:

### Introduction

1. The appellant (Canberra Drilling) was engaged by Core Building Group (Core) to carry out piling and anchoring works in relation to a multi-storey residential development in Gungahlin. Canberra Drilling then sub-contracted the respondent (Haides) to carry out some of that work. Haides undertook piling and anchoring work in April and May 2016. A little over a year later, on 31 May 2017 and 1 June 2017, Haides at the request of Core, returned to the site and carried out some further work involving the “de-stressing” of the anchors that had been installed (the 2017 work).
2. A payment claim under the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) (SOP Act) had been made in 2016 and had been partially paid. Subsequently, in June 2017, Haides gave Canberra Drilling a second payment claim under the SOP Act claiming payment for the 2017 work as well as for work carried out more than 12 months earlier. The amount claimed for the 2017 work was \$12,680.25. The total that the payment claim sought was \$287,068.75. A third payment claim claiming the same amount as the second payment claim was made in September

2017. Canberra Drilling did not pay this third claim. Nor did it serve a payment schedule pursuant to s 16 of the SOP Act.

3. The third payment claim was subject of an application for adjudication under the SOP Act. On 2 November 2017, the adjudicator made a decision that Canberra Drilling was required to pay Haides \$284,057.50 plus interest and costs. The amount was not paid and an adjudication certificate was filed in the Supreme Court with the result that judgment was entered for \$292,528.21 on 13 December 2017.
4. Canberra Drilling then brought proceedings in the Supreme Court challenging the validity of the adjudication decision. Canberra Drilling contended that, for a number of different reasons, the adjudicator had fallen into jurisdictional error. The primary judge rejected each of the contentions put forward and as a result the application was dismissed: *Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd* [2018] ACTSC 282.
5. Although the grounds of appeal are more extensive, as articulated in its submissions the central contention of Canberra Drilling was that s 15(4) of the SOP Act has the effect that whether the claimed work was performed under the construction contract was a jurisdictional fact and the primary judge erred in failing to determine that jurisdictional fact. As a consequence, Canberra Drilling contended that the primary judge erred in failing to determine whether, under the contract, Haides was entitled to payment for the 2017 work and in holding that the decision in *Estate Property Holdings v Barclay Mowlem Construction Ltd* [2004] NSWCA 393; 61 NSWLR 575 meant that the claim was made within the time permitted by s 15(4) of the SOP Act.
6. Canberra Drilling contended that findings should have been made on these issues and that this court should make such findings or remit the proceedings so that findings can be made.

### Statutory provisions

7. The SOP Act is based upon, and largely similar to, the *Building and Construction Industry Security of Payment Act 1999* (NSW) (NSW Act). The background to, and scheme of, the SOP Act is described in *Pines Living Pty Ltd v John O'Brien & Walton Construction Pty Ltd* [2013] ACTSC 156 at [17]-[25] and in the primary judge's decision at [29]-[42].
8. The most relevant provisions of the SOP Act are as follows:

#### **Part 3 Rights to progress payments**

##### **10 Right to progress payments**

- (1) On and from each reference date under a construction contract, a person is entitled to a payment (a **progress payment**) if the person has undertaken, under the contract, to—
  - (a) carry out construction work; or
  - (b) supply related goods and services.

...

##### **11 Amount of progress payment**

The amount of a progress payment to which a person is entitled in relation to a construction contract is—

- (a) the amount worked out under the contract; or

- (b) if the contract does not provide for an amount, the amount worked out on the basis of the value of—
  - (i) construction work carried out or undertaken to be carried out by the person under the contract; or
  - (ii) related goods and services supplied or undertaken to be supplied by the person under the contract.

## 12 Valuation of construction work and related goods and services

- (1) Construction work carried out or undertaken to be carried out under a construction contract must be—
  - (a) valued under the contract; or
  - (b) if the contract does not provide for valuation—valued having regard to each of the following:
    - (i) the contract price for the work;
    - (ii) any other rates or prices set out in the contract;
    - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a stated amount;
    - (iv) if any of the work is defective, the estimated cost of rectifying the defect.

...

## Part 4 Procedure for recovering progress payment

### Division 4.1 Payment claim and payment schedule

#### 15 Payment claim

- (1) A person who is or who claims to be entitled to a progress payment under section 10 (1) (the **claimant**) may give a claim (a **payment claim**) to the person who, under the construction contract concerned, is or may be liable to make the payment (the **respondent**).

*Note 1* If a form is approved under s 47 for a payment claim, the form must be used.

*Note 2* For how documents may be served, see the Legislation Act, pt 19.5.

- (2) A payment claim must—
  - (a) identify the construction work or related goods and services to which the progress payment relates; and
  - (b) state the amount of the progress payment that the claimant claims is payable (the **claimed amount**); and
  - (c) state that it is made under this Act.
- (3) The claimed amount may include any amount—
  - (a) that the respondent is liable to pay the claimant under section 29 (3); or
  - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) A payment claim may be given only before the later of—
  - (a) the end of the period worked out under the construction contract; and
  - (b) the end of the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

- (5) A claimant must not give more than 1 payment claim for each reference date under the construction contract.
- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

### Primary judge's reasons

9. Before the primary judge one of the grounds of challenge to the adjudicator's decision was that the 2017 works were not works "under the contract" for the purposes of s 10(1) and hence the payment claim could not be adjudicated upon. On this point the primary judge's reasons (at [54]-[62]) may be summarised as follows:
  - (a) Any determination made on the basis of a payment claim that the claimant had not been entitled to make is void for lack of jurisdiction. Unless a payment claim is made answering the description in the Act, there can be no adjudication application and, hence, no adjudication: *Southern Han Breakfast Point Pty Ltd (In liq) v Lewence Construction Pty Ltd* [2016] HCA 52; 260 CLR 340 at [44].
  - (b) One of the basic and essential requirements for the existence of an adjudicator's determination is the existence of a construction contract between the claimant and a respondent to which the SOP Act applies: *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394; 61 NSWLR 421 at [53].
  - (c) The language of s 15(1) means that it is not necessary for the court to determine whether or not the work was actually performed under the contract. Rather, a person may make a claim, not only if the person "is entitled" to a progress payment, but also if that person "claims to be" entitled to a progress payment and the claim may be issued to the person who, under the construction contract concerned either "is liable" or "may be" liable to make the payment.
  - (d) Those words are intended to ensure that a person on whom the SOP Act confers an entitlement to a progress payment is able to make a valid payment claim even though it may ultimately be proved that no payment was due under the construction contract: *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151; 95 NSWLR 82 at [104].
  - (e) The words of s 15(1), combined with the broad definition of 'construction contract' and the express reservation of a party's rights to sue under s 38 of the SOP Act, have created a statutory regime which recognises that the existence of a contractual dispute does not prevent payment.
  - (f) The present circumstances are an example of such a contractual dispute. Canberra Drilling says that the work was not part of the contract it had with Haides, or if it was, it was included as part of the existing rates which the Canberra Drilling quoted to Core. It says that Haides was therefore not entitled to charge the extra amount claimed. Haides says the opposite. A claim under the SOP Act is not the forum to resolve those questions of construing the terms of the contract.
  - (g) It is sufficient for the purposes of enlivening the operation of the SOP Act that there was a construction contract between the two parties, that Haides claims

the work was done under it, and that it is at least arguable that the work was either expressly incorporated or necessarily part of the work to be performed under the contract.

- (h) If the position were otherwise, it would defeat the entire objective of the SOP Act, as parties would be attempting to prove the existence or otherwise of contractual terms, for the purpose of establishing whether work was done 'under the contract'.
10. A further ground of challenge before the primary judge was whether the third payment claim was for work done outside the 12 month period permitted by s 15(4) of the SOP Act. On this point the primary judge reasoned as follows:
- (a) *Estate Property Holdings* determined that it is sufficient for a valid payment claim to be served where only some work for which payment is claimed was undertaken in the 12 month period prior to the payment claim.
  - (b) The 2017 work was within the 12 month period.
  - (c) Canberra Drilling's argument was really that the 2017 work was not work "under the contract", leaving all of the work under the contract outside that period.
  - (d) Because her Honour had found that Haides was entitled to claim for that work because it was arguable that Canberra Drilling "may be liable" to make the payment, Canberra Drilling's contention must fail.

## **Submissions**

11. On appeal the submissions of Canberra Drilling focused upon the operation of s 15(4). That subsection defines the period during which a payment claim may be given. The relevant paragraph is s 15(4)(b). Canberra Drilling's contention was that the 2017 work was not work done under the relevant construction contract and as a consequence there was no construction work carried out in the period of 12 months prior to the date of the payment claim. As a consequence, the payment claim was made outside the period permitted by s 15(4) and the jurisdiction of the adjudicator was not properly enlivened.
12. The submissions put on behalf of Canberra Drilling emphasised the numerous references to "the construction contract" in ss 10-12 and 15 of the SOP Act. In particular, they emphasised that the right to payment attaches to a person who has undertaken "under the contract" to carry out construction work: s 10; and the entitlement is to the amount worked out "under the contract": s 11.
13. The submissions emphasised that the existence of a construction contract is a central requirement for an adjudicator's determination: *Brodyn* at [53]. Counsel for Canberra Drilling then submitted that "it follows that the court must determine whether the work was performed under the contract". In other words, the submission took *Brodyn* as authority not only for the proposition that there must be a "construction contract" but also that there would not, relevantly, be a "construction contract" if the work for which a claim was made was not "under" that contract. By this means the submission sought to characterise the dispute not as a dispute as to whether or not an amount was due under the contract for particular work, but rather as to whether or not there was any

contract to which it could be said that the 2017 work was done “under”. The contention may be refined to the following question: does s 15(4) mean that the jurisdiction of the adjudicator is contingent upon the construction work to which the claim relates being *in fact* work done under the contract or is it sufficient that the construction work is *claimed to be* work done under the contract?

14. During the course of submissions, counsel for Canberra Drilling gave as an example that it would not be sufficient to establish the jurisdiction of the adjudicator if the payment claim in the present case included items alleged to be construction work for which a claim was made if that work was undertaken on a site in the Northern Territory, that is, obviously unrelated to the relevant construction contract.
15. Counsel sought to distinguish the case of *Ampcontrol SWG Pty Ltd v Gujarat NRE Wonga Pty Ltd* [2013] NSWSC 707 in which Hammerschlag J had said, in relation to payment claims, that “the assertion of entitlement is sufficient to enliven the operation of the Act” and that the court was not required “to become enmeshed in a determination of the contractual efficacy of the plaintiff’s claim (or the defendants response to it)”: see [19] and [25]. The point of distinction was said to be that in that case, the work done was clearly “under” the relevant contract, the issue instead being whether a particular contractual milestone had been reached that would authorise a valid payment claim.
16. Counsel for Canberra Drilling also drew attention to the decision of the High Court in *Southern Han* in relation to whether or not the existence of a reference date was a jurisdictional fact. He drew attention to the rejection by the court of a submission that it was sufficient that a person *claim* that a reference date has arisen: *Southern Han* at [55]-[57]. He submitted that by parity of reasoning it was not sufficient that there be a claim that work was “under the contract”, and hence that it was open to challenge the jurisdiction of the adjudicator on the basis that it was not.
17. He then submitted that the court should make findings as to whether the work was performed under the contract and further, whether the 2017 work was work for which Haides was entitled to be paid. Alternatively, he submitted that these issues should be remitted for further hearing and determination.
18. Counsel for Haides sought to support the reasoning of the primary judge. He also submitted that the claim made before the primary judge and the evidence put to the primary judge were such that Canberra Drilling had accepted that the 2017 work was in fact part of the contract even though it contended that no additional payment was due. He submitted that it was enough that the 2017 work be found to be part of the original contract in order to support the jurisdiction of the adjudicator and the outcome reached by the primary judge.

### **The context for the issue in the present case**

19. Prior to *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190; 78 NSWLR 393, there were a number of single judge decisions which held, based on the reference in *Brodyn* to “basic and essential requirements” that the requirements of the equivalent to s 15(4) in the NSW Act were not essential to the existence of a valid adjudication decision: *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 705 at [19]; *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801 at [27].

20. The decision in *Chase Oyster Bar* altered the approach to the validity of adjudication decisions, focusing attention on jurisdictional error. Following *Chase Oyster Bar*, McDougall J found that compliance with s 13(5) of the NSW Act (the equivalent of s 15(5) in the SOP Act) was jurisdictional: *The Trustees of the Roman Catholic Church for the Diocese of Lismore v T F Woollam and Son* [2012] NSWSC 1559 at [48]-[49]. Similarly, in *Winyu Pty Ltd v King* [2015] ACTSC 387 the parties accepted, in light of the decision in *Chase Oyster Bar*, that the requirements of s 15(4) were jurisdictional so that if, as a fact, the work claimed in a payment claim to have been done within the 12 month period had not been at all done then no valid payment claim had been served.
21. In the present case the finding by the primary judge that s 15(4) created a jurisdictional requirement was relied upon by Canberra Drilling and not challenged by Haides by any notice of contention. In reaching that conclusion the primary judge relied upon the description of the “precise sequence of time stipulations” referred to in *Chase Oyster Bar* at [46] and, we infer, the result in that case which found that one of those time stipulations was a jurisdictional requirement.
22. Therefore, the present appeal proceeded on the basis that compliance with s 15(4) was a necessary prerequisite to the jurisdiction of the adjudicator. The issue between the parties was whether it was sufficient to *claim* that the work has been done under the construction contract or whether *the objective fact* of the work being done under the construction contract is a condition of the adjudicator exercising jurisdiction.

### ***Chase Oyster Bar***

23. Given the importance of accurately identifying the scope of the jurisdictional requirements imposed by s 15(4), it is worth revisiting the approach to the determination of those matters which are jurisdictional requirements in the sense referred to in *Chase Oyster Bar*.
24. In *Chase Oyster Bar* the question was whether or not the requirements in s 17(2)(a) of the NSW Act (the equivalent to s 19(2) of the SOP Act) were jurisdictional. The court found that they were.
25. So far as the identification of a jurisdictional as opposed to a non-jurisdictional requirement is concerned, the reasons of Spigelman CJ provide a useful model for the analysis of whether or not a provision of the SOP Act is jurisdictional.
26. His Honour said that “[t]here is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined”: [33]. The High Court had adopted the formulation of a “criterion, satisfaction of which enlivened the power of the decision-maker”: [34].
27. He identified the relevant question as that which was propounded in the joint judgment in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [91]-[92]:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this



context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

Traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory.

(Footnotes omitted.)

28. Important indicators of whether or not a matter is jurisdictional are “the mode of expression of the element directly in issue” and “the structure of the legislative scheme”: [40]-[42].
29. So far as the first of these was concerned, his Honour said that “[s]ubstantial, indeed often, but not always, determinative, weight must be given to language which is in mandatory form”. In that case he referred to the language of s 17(2) which said that an adjudication application “cannot be made unless ...” and found that that language had a mandatory import.
30. So far as the structure of the legislative scheme under the NSW Act was concerned there were, in that case, two particular relevant considerations. First, the point in time in the decision-making process at which the element under consideration occurred and second, the treatment of time limits in the scheme as a whole. His Honour considered significant that the element occurred at the application stage of the decision-making process rather than involving a matter to be adjudicated on in the course of the inquiry. It could therefore be characterised as an essential preliminary. Further, his Honour set out the precise sequence of time stipulations provided for in the NSW Act and emphasised that they were “a critical aspect of the scheme’s purpose to ensure prompt resolution of disputes about payment”: [47]. These his Honour said strongly suggested “that Parliament intended the time limits to operate precisely in accordance with their terms”: [50].
31. His Honour said that the adverse effects of a finding that an element is jurisdictional should be considered before reaching a final conclusion: [52]. He concluded that the possible adverse effects of finding the requirement to be jurisdictional were not sufficient to “overcome the force of the text and structure of the legislative scheme” and hence found that the time limit in s 17(2) was a jurisdictional one: see [55]-[56].
32. McDougall JA’s reasons on this aspect of the case were to similar effect. Basten JA agreed with both McDougall JA and Spigelman CJ on this point.

## **Consideration**

33. The question in this case comes against a legislative background which includes the following:
  - (a) Notwithstanding some minor differences in the language used in the NSW Act and SOP Act, both the existence of a “construction contract” and a relevant

“reference date” are essential preconditions to the jurisdiction of an adjudicator: *Brodyn* at [53]; *Southern Han* at [44]-[62].

- (b) In order for there to be a valid payment claim it is only necessary that there be a *claimed* entitlement to a progress payment. As pointed out in *Pines Living* at [18], the SOP Act was based upon the model provided by the NSW Act. In doing so, although there are minor variations in the language of the relevant sections, it aimed to adopt the “tried and tested legislative framework” provided by the NSW Act. The language of the NSW Act had, prior to 2002, given rise to the argument that a payment claim could only be made when the claiming party was actually entitled to a progress payment under a construction contract. That is because s 13 then read “a person who is entitled to a progress payment ...”. The possibility of that argument and the legislative response to it is described in *Southern Han* at [51]-[54]. The amendments made in 2002 altered the language of s 13 (the equivalent of s 15 in the SOP Act) so that it referred to the claimant as a person “who is *or claims to be* entitled” and the respondent to the claim as a person who “is *or may be liable* to make the payment”. That change in language destroyed the possibility that actual entitlement was an essential precondition to the making of a payment claim. Rather, it made it clear that it was a claimed entitlement under the construction contract which gave rise to the entitlement to the making of a payment claim. The post amendment form of language was the “tried and tested” language which was adopted in the Territory.
  - (c) Section 15(4) relates to the timing of a payment claim. Its purpose is to define the outer limits of the period during which a claim can be made. Its interpretation must be determined in light of that purpose.
- 34. Both the text and the structure of the legislation indicate that the question of whether the relevant work was done under the relevant construction contract is one to be determined by the adjudicator within the adjudicator’s jurisdiction and not a question which is a jurisdictional fact to be determined in court.
  - 35. So far as the text of the relevant provisions is concerned, *Southern Han* at [59]-[61] illustrates how the analysis of the text of the relevant provisions provides an indication as to whether or not a particular requirement is jurisdictional or not. In the SOP Act, ss 11, 12 and 15 do not indicate that the contractual connection between the work for which payment is claimed and the construction contract should be a jurisdictional fact.
  - 36. Section 10(1) draws a distinction between the timing of the right to progress payments (“on and from each reference date under a construction contract”) and the entitlement of the person (“a person is entitled to a payment”). A reference date and a construction contract are both jurisdictional requirements. The entitlement of the person to payment occurs in the context of ss 11 and 12 which necessarily anticipate the procedure for recovery of progress payments set out in Pt 4 of the SOP Act.
  - 37. Sections 11 and 12 provide more detail about the scope of the entitlement under s 10. They make reference to matters worked out or valued “under the contract” because the substantive entitlement in s 10 is the amount due under the contract or valued by reference to the work carried out “under the contract”.

38. In contrast to ss 10, 11 and 12 which fall within Pt 3 “Right to progress payments”, s 15 falls within Pt 4 “Procedure for recovering progress payment”. As pointed out above, s 15(1) allows a payment claim by a person “who claims to be entitled to a progress payment”. In order that there be a valid payment claim it is not necessary to establish the entitlement to payment of a particular amount or any amount. The language of s 15(1) means that all issues in relation to the connection between the work done and the relevant contract may form part of the claim rather than being preconditions to it. The language does not indicate that a distinction is to be drawn between some issues which may be subject of a claim and other issues which give rise to factual preconditions to a claim. The exception arising from the language is that there must, in fact, be a “construction contract”. Yet the language that makes that clear (“the person who, *under the construction contract concerned*, is or may be liable”) also makes clear that the liability “under” that contract is something that may be claimed rather than established as a jurisdictional fact (“is or may be liable”).
39. Section 15(4) defines the end of the period in which a payment plan may be made. The language of s 15(4)(a) makes it clear that there must be a “construction contract” but contains nothing which makes the link between the work done and the construction contract a preliminary jurisdictional issue. Similarly, the language of s 15(4)(b), the provision relevant in the present case, does not support such a conclusion. Rather, it refers to “the construction work to which the claim relates”. That ties the construction work to the claim rather than to the contract. It is consistent with there being an entitlement to claim that work is done under the contract and inconsistent with that issue being a preliminary jurisdictional matter.
40. An interpretation of s 15(4) which does not make the connection between the work done and the relevant contract a jurisdictional issue is consistent with the structure and purpose of the SOP Act. The legislation aims to permit the adjudication process to determine on an interim basis the entitlement to a progress payment. That is a task given to the adjudicator and, in the interests of speed and certainty, significant limitations placed on the scope of that exercise by s 24. It would be inconsistent with the statutory scheme to find that an essential precondition to the making of a claim, and hence the exercise of the adjudication powers under the SOP Act, was that the work was done “under” the relevant construction contract.
41. If it was a jurisdictional requirement that the work which is claimed to have been done under the construction contract was in fact work done under that construction contract then, notwithstanding the determination of the adjudicator, it would be open to a party in a position of Canberra Drilling to subsequently challenge the determination in court by proving that upon the terms of the contract properly construed and the factual circumstances established in court the work was not performed pursuant to the contract. That would involve contested mixed questions of fact and law. The determination of those questions would involve contested evidence which, as the circumstances in the present case illustrate, may involve fully traversing the contractual relationship between the parties. It would in contrast to the procedure before the adjudicator, usually involve cross-examination of witnesses. It would significantly undermine the scheme of the SOP Act which involves “rough and ready” determination of these issues by the adjudicator and preservation of the parties’ substantive rights to litigate the matter in due course.

42. Contrary to Canberra Drilling's submission, the statements of Hammerschlag J in *Ampcontrol* are equally apposite in this case. Whether the challenge to contractual entitlement is based upon a contention that the work was "under" the contract or for some other contractual reason, it would be "inimical to the philosophy and out of step with the express wording of" the Act if the court were to become "enmeshed in the contractual efficacy of the [payment] claim".
43. For these reasons, the principal contention of Canberra Drilling must be rejected. Given that the issue of whether or not the 2017 work was performed under the contract was not an issue going to the jurisdiction of the adjudicator, it was not necessary for the primary judge to make findings on whether the 2017 work was done under the contract and, if not, find that s 15(4) had not been complied with. In the light of our conclusion, it is not necessary to consider Haides' contention that, in any event, the 2017 work was done under the relevant construction contract.
44. The proceedings were argued below on the basis that it was necessary for Canberra Drilling to establish jurisdictional error. Following the conclusion of argument in the proceedings before the primary judge, Canberra Drilling filed an Amended Originating Application which also sought leave to appeal under s 43 of the SOP Act. As was pointed out in *Pines Living* at [19], s 43 is a provision which differs from the NSW Act and for which "there is no clear explanation why the legislature thought it was appropriate". On the appeal, counsel for Canberra Drilling accepted that the appeal should be determined on the basis of the jurisdictional arguments raised and, if they were not successful, separate consideration did not need to be given to the possible operation of s 43 in relation to non-jurisdictional error.

## Order

45. The order of the Court is:

1. The appeal is dismissed with costs.

I certify that the preceding forty-five [45] numbered paragraphs are a true copy of the Reasons for Judgment of the Court.

Associate:

Date: 28 May 2019