

SUPREME COURT OF QUEENSLAND

CITATION: *Allencon Pty Ltd v Palmgrove Holdings Pty Ltd trading as Carruthers Contracting* [2023] QCA 6

PARTIES: **ALLENCON PTY LTD**
ACN 117 278 047
(appellant)
v
PALMGROVE HOLDINGS PTY LTD (TRADING AS CARRUTHERS CONTRACTING)
ACN 010 870 925
(respondent)

FILE NO/S: Appeal No 6456 of 2022
DC No 356 of 2022

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Brisbane – [2022] QDC 90 (Burnett DCJ)

DELIVERED ON: 3 February 2023

DELIVERED AT: Brisbane

HEARING DATE: 12 October 2022

JUDGES: Mullins P and McMurdo and Flanagan JJA

ORDERS:

- 1. The appeal be allowed.**
- 2. The orders made in the District Court on 6 May 2022 be set aside.**
- 3. The respondent pay to the appellant the sum of \$351,734.88 pursuant to s 77(2) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld).**
- 4. The respondent pay to the appellant interest at the rate of 7 per cent per annum on the sum of:**
 - a. \$554,307 from 28 January to 28 February 2022; and**
 - b. \$351,734.88 from 1 March 2022 to the date of payment.**
- 5. The respondent pay the appellant’s costs of the proceeding at first instance on the standard basis.**
- 6. The respondent pay the appellant’s costs of the appeal on the standard basis.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND

RELATED CONTRACTS – REMUNERATION – where the appellant and the respondent entered into a written subcontract whereby the appellant agreed to construct roadworks for a lump sum payment – where the appellant achieved practical completion of the works and submitted a payment claim to the respondent – where the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (“the BIFA”) governs the process by which one party submits, and the other party responds to, a payment claim – where the subcontract prescribed a period within which the respondent was required to respond to the payment claim – whether the BIFA gave statutory effect to that period in the subcontract – whether there was an inconsistency between the terms of the subcontract and the provisions of the BIFA – when the respondent was required to respond to the payment claim – whether the respondent responded out of time – whether the appellant is entitled to payment of the full amount claimed in the payment claim

Building Industry Fairness (Security of Payment) Act 2017 (Qld), s 68, s 69, s 75, s 76, s 77

Thiess Pty Ltd v Lane Cove Nominee Company Pty Ltd [2009] NSWCA 52, cited

COUNSEL: D G Clothier KC, with B A Vass, for the appellant
M D Ambrose KC, with L M Campbell, for the respondent

SOLICITORS: Piper Alderman for the appellant
Batch Mewing Lawyers for the respondent

- [1] **MULLINS P:** I agree with McMurdo JA.
- [2] **McMURDO JA:** In 2021, the appellant (Allencon) and the respondent (Carruthers) entered into a written subcontract by which Allencon agreed to construct roadworks for a lump sum of \$2.08 million. Allencon claims to have achieved practical completion of the works by 10 December 2021. It submitted a claim in an amount of \$955,079.48 (the Claim) on 24 December 2021.
- [3] The Claim included an amount of \$400,772.48 which was outstanding from a previous claim and which Carruthers then paid on 4 January 2022. Carruthers made a further payment, in response to the Claim, of \$202,572.12 on 1 March 2022. Carruthers did not pay the balance of the claim, which was an amount of \$351,734.88 (the disputed sum).
- [4] By an Originating Application filed in the District Court, Allencon sought orders for the payment of the disputed sum,¹ upon two bases. The first of them, which is that advanced by Allencon in this appeal, is that the disputed sum is a debt due and owing pursuant to s 78(2)(a) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (BIFA). The second was that it was a debt due and owing pursuant to the terms of the subcontract. That second argument could not be

¹ The Originating Application was filed on 10 February 2022, at which point the amount outstanding according to the Claim was \$554,307.00. The application was heard on 10 March 2022, by which time Allencon had made the further payment of \$202,572.12.

determined without a factual inquiry as to whether practical completion had been achieved. That factual inquiry is unnecessary for the determination of this appeal, as the parties agree.

- [5] Allencon's claim under the BIFA is advanced in this way:
- (a) the Claim, which was delivered pursuant to cl 42.1 of the subcontract, was also a payment claim as defined by s 68 of the BIFA;
 - (b) as a payment claim under the BIFA, it required, in response, a payment schedule according to s 69 and s 76 of the BIFA;
 - (c) by s 76(1), the payment schedule was required to be given within whichever of two periods ended first, namely the period (if any) within which Carruthers had to give the payment schedule under the subcontract, or a period of 15 business days after the delivery of the Claim;
 - (d) the subcontract, by cll 42.1 and 42.13, required the payment schedule to be given within 21 calendar days after receipt of the Claim, a period which ended on 14 January 2022;
 - (e) the period of 15 business days after the Claim was delivered expired on 28 January 2022, because of the occurrence of a number of days which were excluded as business days as defined by schedule 2 in the BIFA;
 - (f) Carruthers did not give a response to the Claim by 14 January 2022;
 - (g) therefore, Carruthers did not give a payment schedule as required by s 76, and by s 77(2), Carruthers became liable to pay the amount claimed under the Claim on the due date for the payment to which the Claim related.
- [6] In the judgment under appeal,² the judge accepted that the Claim was not only a claim for payment according to cl 42.1 of the subcontract, but also a payment claim under the BIFA.³ He further found that the response on behalf of Carruthers, which was delivered on 28 January 2022, was a payment schedule as defined in the BIFA.
- [7] However the judge rejected Allencon's case upon the basis that there was an inconsistency between the terms of the BIFA (according to which, the judge said, the period for delivery of the payment scheduled expired on 31 January) and the terms of the subcontract (according to which it expired on 14 January). The judge thereby accepted Allencon's argument that the subcontract required a response which constituted a payment schedule under the BIFA by that earlier date. However, the judge reasoned, that involved an inconsistency between the terms of the subcontract and the terms of the BIFA, with the result that the subcontract was of no effect to that extent: s 200 of the BIFA.
- [8] That reasoning did not correspond with the submissions which Carruthers had made to the judge. Its case was and remains that, in the terms of s 76(1)(a) of the BIFA, the subcontract did not provide a period within which the payment schedule was required to be given. Consequently, the period for the delivery of the payment schedule expired on 31 January and the payment schedule was given within the required period.

² *Allencon Pty Ltd v Palmgrove Holdings Pty Ltd* [2022] QDC 90 (the Judgment).

³ Judgment [27].

- [9] Carruthers does not seek to support the outcome by the judge's reasoning, which in my respectful opinion, was erroneous. If the subcontract by its terms required a payment schedule to be given within a certain period, that involved no inconsistency with the BIFA. Rather, it was a circumstance for which the BIFA specifically provided by giving the subcontract period a statutory effect depending upon whether that period ended earlier than a period of 15 business days.
- [10] The critical issue in this appeal is whether the subcontract did prescribe a period for the delivery of a payment schedule in response to a payment claim. For the reasons that follow, that should be answered in the affirmative with the result that the appeal should be allowed with judgment for Allencon for the disputed sum and interest.

Relevant terms of the BIFA

- [11] By s 3(2)(b) and (c), the main purpose of the BIFA is to be achieved primarily by granting an entitlement to progress payments, whether or not the relevant contract makes provision for them, and establishing a procedure for making payment claims, responding to payment claims, the adjudication of disputed payment claims and the recovery of amounts claimed.
- [12] By s 63, a claimant's entitlements and remedies under the relevant chapter of the BIFA do not limit another entitlement a claimant may have under a construction contract or any remedy it may have in that respect.
- [13] Section 70 provides that for each "reference date" under a construction contract, a person is entitled to a progress payment if the person has carried out construction work, or supplied related goods and services, under the contract. Section 64 defines the term progress payment to mean a payment to which a person is entitled under s 70 including the final payment for construction work, a single or one-off payment or a payment based on an event or date.
- [14] Section 71 provides:
- "71 Amount of progress payment
- The amount of a progress payment to which a person is entitled under a construction contract is—
- (a) if the contract provides for the matter—the amount calculated in accordance with the contract; or
- (b) if the contract does not provide for the matter—the amount calculated on the basis of the value of construction work carried out, or related goods and services supplied, by the person in accordance with the contract."
- [15] Section 72 provides that construction work carried out under a construction contract is to be valued, if the contract provides for the matter – in accordance with the contract, or if not, having regard to the contract price for the work, any other rates or prices stated in the contract, any variation agreed by the parties to the contract price or those other rates or prices and any estimated cost of rectifying any defect.
- [16] It is thereby evident that a progress payment, for which the BIFA provides, is calculated according to what the parties have provided in their contract.
- [17] Section 68 defines what constitutes a payment claim:

“68 Meaning of payment claim

- (1) A *payment claim*, for a progress payment, is a written document that—
 - (a) identifies the construction work or related goods and services to which the progress payment relates; and
 - (b) states the amount (the *claimed amount*) of the progress payment that the claimant claims is payable by the respondent; and
 - (c) requests payment of the claimed amount; and
 - (d) includes the other information prescribed by regulation.
- (2) The amount claimed in the payment claim may include an amount that—
 - (a) the respondent is liable to pay the claimant under section 98(3); or
 - (b) is held under the construction contract by the respondent and that the claimant claims is due for release.
- (3) A written document bearing the word ‘invoice’ is taken to satisfy subsection (1)(c).”

[18] Section 69 defines what constitutes a payment schedule:

“69 Meaning of payment schedule

A *payment schedule*, responding to a payment claim, is a written document that—

- (a) identifies the payment claim to which it responds; and
- (b) states the amount of the payment, if any, that the respondent proposes to make; and
- (c) if the amount proposed to be paid is less than the amount stated in the payment claim—states why the amount proposed to be paid is less, including the respondent’s reasons for withholding any payment; and
- (d) includes the other information prescribed by regulation.”

[19] Section 73 provides for when a progress payment becomes payable:

“73 Due date for payment

- (1) A progress payment under a construction contract becomes payable—

- (a) if the contract provides for the matter—on the day on which the payment becomes payable under the contract; or

...

- (b) if the contract does not provide for the matter—on the day that is 10 business days after the day a payment claim for the progress payment is made under part 3.

- (2) Interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates—

- (a) the rate stated in the contract;
- (b) the rate prescribed under the *Civil Proceedings Act 2011*, section 59(3) for a money order debt.

...”.

[20] Section 75 provides in part as follows:

“75 Making payment claim

- (1) A person (the *claimant*) who is, or who claims to be, entitled to a progress payment may give a payment claim to the person (the *respondent*) who, under the relevant construction contract, is or may be liable to make the payment.
- (2) Unless the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—
 - (a) the period, if any, worked out under the construction contract;
 - (b) the period of 6 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.
- (3) If the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—
 - (a) the period, if any, worked out under the relevant construction contract;
 - (b) 28 days after the end of the last defects liability period for the construction contract;
 - (c) 6 months after the completion of all construction work to be carried out under the construction contract;

- (d) 6 months after the complete supply of related goods and services to be supplied under the construction contract.
- (4) The claimant can not make more than 1 payment claim for each reference date under the construction contract.
- (5) A payment claim may include an amount that was included in a previous payment claim.
- ...”

[21] Section 76 provides:

“76 Responding to payment claim

- (1) If given a payment claim, a respondent must respond to the payment claim by giving the claimant a payment schedule within whichever of the following periods ends first—
 - (a) the period, if any, within which the respondent must give the payment schedule under the relevant construction contract;
 - (b) 15 business days after the payment claim is given to the respondent.

Maximum penalty—100 penalty units.

Note—

A failure to give a payment schedule as required under this section is also grounds for taking disciplinary action under the *Queensland Building and Construction Commission Act 1991*.

- (2) However, the respondent is not required to give the claimant the payment schedule if the amount claimed in the payment claim is paid in full on or before the due date for the progress payment to which the payment claim relates.
- (3) If the respondent gives the claimant a payment schedule, the respondent must pay the claimant the amount proposed in the payment schedule no later than the due date for the progress payment to which the payment schedule relates.

Maximum penalty—100 penalty units.

- (4) Subsection (3) does not apply to an amount to the extent the respondent is required to retain the amount under chapter 3, part 4A.”

[22] Section 77 provides:

“77 Consequences of failing to give payment schedule

- (1) This section applies if a respondent given a payment claim does not respond to the claim by giving the claimant a payment schedule as required under section 76.
- (2) The respondent is liable to pay the amount claimed under the payment claim to the claimant on the due date for the progress payment to which the payment claim relates.”

[23] As will appear, cl 42.13 of the subcontract refers to the statutory predecessor of the BIFA, namely the now repealed *Building and Construction Industry Payments Act 2004* (Qld). Section 206 of the BIFA provides that a reference in a document to that Act may, if the context permits, be taken to be a reference to the BIFA.

Relevant provisions of the subcontract

[24] The subcontract included the terms and conditions of AS 2545-1993 operating with particulars agreed in annexure A and with the amendments to the standard terms and conditions agreed in annexure B.

[25] Clause 42.1 of the conditions was as follows:

“42.1 Payment Claims, Certificates, Calculations and Time for Payment

At the times for payment claims stated in the Annexure and upon issue of a Certificate of Substantial Completion and within the time prescribed by Clause 42.7, the Subcontractor shall deliver to the Main Contractor’s Representative claims for payment supported by evidence of the amount due to the Subcontractor and such information as the Main Contractor’s Representative may reasonably require. Claims for payment shall include the value of work carried out by the Subcontractor in the performance of the Subcontract to that time together with all amounts then due to the Subcontractor arising out of or in connection with the Subcontract or for any alleged breach thereof.

Within 21 days after receipt of a claim for payment, the Main Contractor’s Representative shall issue to the Main Contractor and to the Subcontractor a payment certificate stating the payment which, in the opinion of the Main Contractor’s Representative, is to be made by the Main Contractor to the Subcontractor or by the Subcontractor to the Main Contractor. The Main Contractor’s Representative shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Subcontractor, the reasons for the difference. The Main Contractor’s Representative shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Subcontract and amounts otherwise due from the Main

Contractor to the Subcontractor and/or due from the Subcontractor to the Main Contractor arising out of or in connection with the Subcontract including but not limited to any amount due or to be credited under any other provisions of the Subcontract.

If the Subcontractor fails to make a claim for payment under Clause 42.1, the Main Contractor's Representative may nevertheless issue a payment certificate.

Subject to the provisions of the Subcontract, within 35 days after receipt by the Main Contractor's Representative of a claim for payment or within 14 days of issue by the Main Contractor's Representative of the Main Contractor's Representative's payment certificate, whichever is the earlier, the Main Contractor shall pay to the Subcontractor or the Subcontractor shall pay to the Main Contractor, as the case may be, an amount not less than the amount shown in the Certificate as due to the Subcontractor or to the Main Contractor as the case may be, or if no payment certificate has been issued, the Main Contractor shall pay the amount of the Subcontractor's claim. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Main Contractor or Subcontractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Clause 42.8.

Notwithstanding Clause 42.4, the Main Contractor shall be obliged to pay for an item of unfixed plant and materials where that item is—

- (i) to be imported into Australia, provided the Subcontractor has given the Main Contractor a clean on board bill of lading or its equivalent, drawn or endorsed to the order of the Main Contractor and, where appropriate, a customs invoice for the item; or
- (ii) listed in the Annexure and which is not an item to be imported into Australia, provided the Subcontractor establishes to the satisfaction of the Main Contractor's Representative that the Subcontractor has paid for the item, and the item is properly stored, labelled the property of the Main Contractor and adequately protected.

Upon payment to the Subcontractor of the amount which includes the value of the item, the item shall be the property of the Main Contractor free of any lien or charge.

Except as provided in the Subcontract, the Main Contractor shall not be obliged to pay for any item of unfixed plant and materials which is not incorporated in the Works.”

[26] Clause 42.10 of the conditions provided:

“42.10. Set Offs by the Main Contractor

The Main Contractor may deduct from moneys due to the Subcontractor any money due from the Subcontractor to the Main Contractor otherwise than under the Subcontract and if those moneys are insufficient, the Main Contractor may, subject to Clause 5.5, have recourse to retention moneys and, if they are insufficient, then to security under the Subcontract.”

[27] By annexure B the parties added conditions including cl 42.13 as follows:

“42.13. Security of Payment

- (a) In this clause, the “BCIPA” means the Building and Construction Industry Payments Act 2004 (Qld).
- (b) The Parties agree that the Superintendent is the agent of the Principal for the purposes of:
 - (i) accepting service of payment claims served by the Contractor under the BCIPA;
 - (ii) assessing payment claims served by the Contractor under the BCIPA; and
 - (iii) Providing the Contractor with payment schedules under the BCIPA.
- (c) If the Contractor delivers or arranges to deliver to the Principal any written communication in relation to the BCIPA, the Contractor must ensure that a copy of the written communication is provided to the Superintendent at the same time.
- (d) Without affecting the Principal's right to issue payment schedules itself, the Principal authorises the Superintendent to issue payment schedules on the Principal's behalf. If within the time allowed by the BCIPA for service of a payment schedule. by the Principal, the Principal does not:
 - (i) give the required notice itself; or
 - (ii) notify the Contractor that the Superintendent does not have authority from the Principal to issue the payment schedule on its behalf, then a payment certificate issued by the Superintendent under the Contract which relates to the relevant period shall be taken to be the payment

schedule for the purpose of the BCIPA, whether or not it is expressly stated to be a payment schedule. ...”

The Claim

- [28] The Claim was in the form of a tax invoice addressed by Allencon to Carruthers. It was described as “Progress Claim – Dec 2021/Practical Completion”. It claimed the sum of \$955,079.48 to which I have referred. It gave particulars of that amount by reference to 28 items of work and materials, each of which was quantified. It gave details of the amounts previously paid. The Claim thereby contained the details required for a payment claim as defined by s 68. It was unnecessary for the document to expressly refer to the BIFA. I agree with the primary judge that the Claim was not only made pursuant to cl 42.1 of the subcontract, but was also a payment claim under the BIFA. That was not in dispute before the primary judge.⁴
- [29] Carruthers here accepts that the “simple” elements of a payment claim which are set out in s 68 could be met within the same document which constitutes a progress claim under cl 42.1. It says that a payment claim under the BIFA might not meet the requirements of cl 42.1, but that is of no present relevance. Carruthers accepts that generally it would be expected that any contractual progress claim under an Australian Standard form contract would likely also meet the criteria of a payment claim under the BIFA.

The required response to the Claim

- [30] As the Claim constituted a payment claim under the BIFA, it required, in response, a payment schedule. The subcontract provided for this circumstance, by cl 42.13. As noted earlier, that clause referred to the previous statute, but those references are to be taken as references to the BIFA. Clause 42.13 mistakenly referred to “the Principal” and its agent “the Superintendent”. It is accepted that they were intended references to Carruthers as “the Main Contractor” and “the Main Contractor’s Representative”, and that the “Contractor” in the clause is a reference to Allencon.
- [31] By cl 42.13(b) the parties agreed that the Main Contractor’s Representative would be its agent for the purposes of accepting and assessing payment claims and providing payment schedules under the BIFA.
- [32] By cl 42.13(d) the Representative was authorised to issue payment schedules on behalf of Carruthers with the reservation by Carruthers to issue payment schedules itself. If Carruthers did not do so, then absent a notification to Allencon that the Representative was unauthorised to issue the payment schedule, a payment certificate issued by the Representative under the Subcontract which related to the relevant period was to be taken to be the payment schedule for the purposes of the BIFA.
- [33] A payment certificate under cl 42.1 had to be issued within 21 days after receipt of a claim for payment. Because the BIFA defined a business day to exclude a Saturday or Sunday, in every case a period of 15 business days from the delivery of a payment claim would be at least as long as a period of 21 days. Consequently, in every case where (as here) a claim for payment under cl 42.1 also constituted a

payment claim under the BIFA, a response was required within 21 days. Carruthers' Representative was to respond according to cl 42.1, and by cl 42.13, the Representative was authorised to respond by a payment schedule.

- [34] It is true, as Carruthers argues, that the required content of a payment certificate under cl 42.1 was not identical to the required content of a payment schedule under the BIFA. Nevertheless, everything which was required for a payment schedule was also required for a payment certificate under cl 42.1.
- [35] The required elements of a payment schedule are set out in s 69. First, the document must identify the payment claim to which it responds. It is true, as Carruthers submits, that the Representative could issue a payment certificate where the Subcontractor had failed to make a claim for payment under cl 42.1. But the present question is what was required of a payment certificate which was given in response to a claim for payment. The Representative was required to set out the reasons for a difference between the amount claimed and the amount arrived at by the Representative. In every case, that would identify the payment claim to which the Representative's document responded. And for the same reason, in every case a payment certificate would meet the other requirements for payment schedule. It was by this means that the parties were able to agree, as they did by cl 42.13(d), that a payment certificate issued by the Representative which related to the relevant period should be taken to be the payment schedule for the purposes of the BIFA.
- [36] According to cl 42.13, it was open to Carruthers to give the payment schedule itself or to notify Allencon that the Representative was not authorised to issue the payment schedule on its behalf. Carruthers was able to do so "within the time allowed by the [BIFA] for service of a payment schedule ...". That time was prescribed by s 76. If, on the proper construction of the subcontract, the parties agreed the period within which the payment schedule was to be given would be the period for a response under cl 42.1, then there could have been no impracticality or inconvenience from Carruthers being able to revoke the Representative's authority to issue a payment schedule. On the other hand, if the parties had not so agreed, there could have been the impractical circumstance of the Representative having issued within the 21 days, a document having a provisional or conditional effect as a payment schedule, because its effect could be negated by a subsequent withdrawal of the Representative's authority.
- [37] An agreement with that effect should not be attributed to the parties where the language of the subcontract supports an alternative construction. Further, the BIFA makes no allowance for a payment schedule which is of a provisional or conditional effect. Once given, a payment schedule creates a statutory entitlement to be paid the amount proposed in the payment schedule: s 76(3). It also creates an immediate entitlement in the claimant to apply for adjudication of the payment claim, where the amount stated in the payment schedule is less than the amount stated in the payment claim: s 79(1). If possible, the subcontract should be construed to avoid the inconsistencies which would result from an agreement that a payment schedule should have that conditional or suspended effect.⁵
- [38] In summary, it can be seen that by the combined operation of cll 42.1 and 42.13, where a claim for payment contains a payment claim under the BIFA, the required

⁵ s 200 of the BIFA.

response under cl 42.1 will inevitably satisfy the requirements of a payment schedule, and that response will be given by the Representative as authorised by cl 42.13. The parties agreed that in such a case (absent the revocation within the period of 21 days of the Representative's authority to give the payment schedule) a payment schedule here was to be given within that period of 21 days. In this case, that period expired on 14 January 2022, with the consequence that Carruthers failed to give a payment schedule as required under s 76 and it became liable to pay the amount claimed.

- [39] Carruthers sought support for its argument from the decision of the New South Wales Court of Appeal in *Thiess Pty Ltd v Lane Cove Nominee Company Pty Ltd*.⁶ However the terms of that contract were materially different from those in the present case. That contract provided for progress payments, to be claimed with an accompanying certificate from an "Independent Verifier" of the amount payable for that progress payment claim, and certificates from the Verifier and another independent consultant, described as the Contractor Quality Manager, as to the performance of the work. It contained a term by which the respondent (called the Trustee) was to issue what was called a payment schedule within four business days of receipt of the payment claim. It provided that the payment schedule might be for an amount less than the amount claimed, but importantly, not for an amount less than the amount certified by the Independent Verifier except in certain specified circumstances. The contract contained a regime for the resolution of disputes as to the amount certified by the Independent Verifier. Further, that contract, unlike the present one, contained no reference to the relevant Act,⁷ let alone a provision whereby the response to the contractual claim was to constitute the response to the statutory claim. In the principal judgment, which was given by Giles JA, it was said that an important element of the contractual progress payment claim was the requirement for the Independent Verifier's certificate, since it provided a minimum for the amount to be stated in the payment schedule.⁸ What mattered was that the contract required the Independent Verifier's certificate, which conditioned the response by the payment schedule for which that term provided, and that this indicated that a payment schedule under the contract was "a reply to the contractual progress payment claim and not a reply to a statutory payment claim, which may be served (as here) with express departure from the requirements of the contractual progress claim."⁹ The judgment does not provide significant support for Carruthers' case.

Conclusion

- [40] I would order as follows:
1. The appeal be allowed.
 2. The orders made in the District Court on 6 May 2022 be set aside.
 3. The respondent pay to the appellant the sum of \$351,734.88 pursuant to s 77(2) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld).

⁶ [2009] NSWCA 53.

⁷ *Building and Construction Industry Security of Payment Act 1999* (NSW).

⁸ [2009] NSWCA 53 [37].

⁹ *Ibid* [50].

4. The respondent pay to the appellant interest at the rate of 7 per cent per annum on the sum of:
 - a. \$554,307 from 28 January to 28 February 2022; and
 - b. \$351,734.88 from 1 March 2022 to the date of payment.
 5. The respondent pay the appellant's costs of the proceeding at first instance on the standard basis.
 6. The respondent pay the appellant's costs of the appeal on the standard basis.
- [41] **FLANAGAN JA:** I agree with McMurdo JA.