Court of Appeal
Supreme Court

New South Wales

Case Name:	Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd
Medium Neutral Citation:	[2023] NSWCA 56
Hearing Date(s):	10 March 2023
Decision Date:	30 March 2023
Before:	Leeming JA at [1]; Mitchelmore JA at [70]; Adamson JA at [71]
Decision:	(1) Allow the appeal. (2) Set aside the orders of the Court below and, in lieu thereof, make the following orders (a) Declare that, subject to order (2)(b) below, the first respondent holds the sum of $7.7 million on trust for the appellant. (b) Declare that the trust in order (2)(a) above is subject to a charge in favour of the second to fifth respondents in the amount of $1,157,557.64 (excluding GST). (3) Unless a written application for a different order is made within 14 days, the respondents to pay the appellant's costs of the appeal and of the proceedings in the Court below.
Catchwords:	CONTRACT — settlement deed — whether settlement sum constituted surplus bond moneys held on trust — whether settlement sum in excess of amount required to meet contractual obligations supported by performance bonds CONTRACT — performance bonds — deed of indemnity relating to issue of performance bonds — whether trust provisions in deed of indemnity created security interest for purposes of Personal Property

	Securities Act 2009 (Cth)
Legislation Cited:	Acts Interpretation Act 1901 (Cth), s 15AA Building and Construction Industry Security of Payment Act 2002 (Vic) Corporations Act 2001 (Cth), s 444E Evidence Act 1995 (NSW), s 191 Personal Property Securities Act 2009 (Cth), ss 12, 151, 153, 267, 267A
Cases Cited:	2 Elizabeth Bay Road Pty Ltd v The Owners - Strata Plan No 73943 (2014) 88 NSWLR 488; [2014] NSWCA 409 Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd [2022] NSWSC 1601 Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq) (2000) 202 CLR 588; [2000] HCA 25 Birdon Pty Ltd v Houben Marine Pty Ltd (2011) 197 FCR 25; [2011] FCAFC 126 Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd [2020] NSWCA 63 Cargill International SA v Bangladesh Sugar and Food Industries Corp [1996] 4 All ER 563 Cargill International SA v Bangladesh Sugar and Food Industries Corp [1997] EWCA Civ 2757; [1998] 2 All ER 406 CSR Ltd v Eddy (2005) 226 CLR 1; [2005] HCA 64 Diversa Pty Ltd v Taiping Trustees Ltd [2022] FCA 316; 401 ALR 161 DJ Builders & Son Pty Ltd (in liq) v Queensland Building and Construction Commission [No 3] [2021] FCA 1041 Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544; [2017] HCA 12 Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd (2005) 62 NSWLR 385; [2005] NSWCA 49 Fitness First Australia Pty Ltd v Fenshaw Pty Ltd (2016) 92 NSWLR 128; [2016] NSWCA 207 Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd [1998] 3 VR 812 Gold Valley Iron Pty Ltd (in liq) v OPS Screening & Crushing Equipment Pty Ltd [2022] WASCA 134 Grey v Inland Revenue Commissioners [1958] Ch 375

Halloran v Minister Administering National Parks and Wildlife Act 1974 (2006) 229 CLR 545; [2006] HCA 3
Iskra v MMIR Pty Ltd [2019] NSWCA 126
ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue [2003] NSWSC 697 at [266]-[270]
Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd [2023] HCA 6
Maxcon Constructions Pty Ltd v Vadasz (2018) 264 CLR 46; [2018] HCA 5
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37
Mulley v Hayes (2021) 286 FCR 360; [2021] FCA 1111
Oliver v Nine Network Australia Pty Ltd [2019] FCA 583
Owners of Strata Plan 58161 and Hanssen Pty Ltd [No 2] [2023] WASAT 7
Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd [2020] NSWCA 172
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1; [2018] HCA 4
Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia (1991) 30 FCR 491
Re Universal Distributing Co Ltd (in Liq) (1933) 48 CLR 171; [1933] HCA 2
Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd (2016) 260 CLR 340; [2016] HCA 52
State of Queensland v Epoca Constructions Pty Ltd [2006] QSC 324
Stiassny v North Shore City Council [2008] 1 NZLR 825; [2008] NZ CCLR 7
Stiassny v North Shore City Council [2009] 1 NZLR 342; [2008] NZCA 522
Thurin v Krongold Constructions (Aust) Pty Ltd [2022] VSCA 226
Tradigrain SA v State Trading Corporation of India [2005] EWHC 2206 (Comm); [2006] 1 Lloyd's Rep 216

Texts Cited:

Explanatory Memorandum (as replaced), Personal Property Securities Bill 2009 (Cth)
P Davenport, Construction Claims (4th ed, Federation Press, 2020)
N Denys and R Clay (eds), Hudson's Building and Engineering Contracts (14th ed, Sweet & Maxwell, 2020)

E McKendrick, Goode on Commercial law (5th ed, Penguin Books, 2016)

Category:	Principal judgment
Parties:	Allianz Australia Insurance Ltd (Appellant) Probuild Constructions (Aust) Pty Ltd (subject to a deed of company arrangement) (First Respondent) Salvatore Algeri (as joint and several deed administrator Probuild Constructions (Aust) Pty Ltd (subject to a deed of company arrangement)) (Second Respondent) Jason Mark Tracy (as joint and several deed administrator Probuild Constructions (Aust) Pty Ltd (subject to a deed of company arrangement)) (Third Respondent) Matthew James Donnelly (as joint and several deed administrator Probuild Constructions (Aust) Pty Ltd (subject to a deed of company arrangement)) (Fourth Respondent) David Michael Orr (as joint and several deed administrator Probuild Constructions (Aust) Pty Ltd (subject to a deed of company arrangement)) (Fifth Respondent)
Representation:	Counsel: J Giles SC / A Campbell (Appellant) H N G Austin KC / D Krochmalik (Respondents) Solicitors: DLA Piper Australia (Appellant) King & Wood Mallesons (Respondents)
File Number(s):	2022/368018
Decision under appeal:	
Court or Tribunal:	Supreme Court
Jurisdiction:	Equity
Citation:	Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd [2022] NSWSC 1601
Date of Decision:	23 November 2022
Before:	Stevenson J

File Number(s): 2022/304260

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **LEEMING JA**: This appeal concerns whether the appellant (Allianz) has any entitlement to $7.7 million paid by May21 Pty Ltd to the solicitors of the first respondent (Probuild), who thereafter paid the $7.7 million to their client. The payment was made pursuant to a Settlement Deed between May21 and Probuild following the appointment of administrators to the latter. Probuild had earlier promised in cl 2.6 of a Deed of Indemnity to which it and Allianz were parties, and pursuant to which Allianz undertook to issue performance bonds on Probuild's request, that it would hold "Surplus Bond Moneys" it received from May21 on trust for Allianz. Allianz's claim turns on two issues:

(1) Was the settlement sum of $7.7 million paid by May21 to the solicitors for Probuild in two tranches "Surplus Bond Moneys" within the meaning of cl 2.6 of the Deed of Indemnity?

(2) If so, did the trust created by cl 2.6 vest in Probuild by reason of ss 267 or 267A of the *Personal Property Securities Act 2009* (Cth), after administrators were appointed to Probuild?

2 I agree with Adamson JA that both questions should be resolved favourably to Allianz and that the appeal should therefore be allowed. I agree with the orders her Honour proposes. I prefer to state my own reasons, partly because I give different emphasis to the contractual language, and partly for the reasons given by Callaway JA in a not dissimilar context in *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812 at 831 in that the second issue involves important questions of commercial law which are not as well settled as they might be. Adamson JA's reasons relieve me from the need to reproduce most of the clauses in the Deed of Indemnity and the Settlement Deed.

Factual background

3 The primary facts are uncontroversial. May21 entered into a Building Contract with Probuild in October 2017 in relation to a development in Melbourne. The Building Contract was based on AS 4300-1995, and made provision for the provision of two performance bonds, each in the amount of 2.5% of the Contract Sum. The Contract Sum was in the order of $690 million. A few days beforehand, Probuild (and some other related companies) entered into a Deed of Indemnity with Allianz, in which Probuild agreed to indemnify Allianz for any loss suffered by it as a result of issuing any performance bonds, and undertook that any "Surplus Bond Moneys" received by it would be held on trust for Allianz and returned to Allianz forthwith. Allianz in due course issued two performance bonds, each in the amount of $17,266,092.05, in favour of May21. Slightly more than four years later, on 23 February 2022, Probuild entered voluntary administration, which was an event of default under the Building Contract. On 24 March 2022, May21 called on the bonds in full, and Allianz paid the $34,532,184.10 million to May21 the following day, as well as demanding pursuant to the indemnity in the Deed that Probuild pay it the full value of the bonds.

4 There ensued a dispute between Probuild and May21 along familiar lines. May21 claimed that Probuild's breach entitled it to damages in excess of $84 million. Probuild claimed that it was entitled to be paid for work done under the Building Contract in excess of $37 million. Probuild exercised its rights under the *Building and Construction Industry Security of Payment Act 2002* (Vic). The result was an adjudication dated 16 May 2022 in Probuild's favour of $12,181,271.30. Probuild was prima facie entitled to obtain a certificate which was enforceable as if it were a judgment, but without prejudice to the parties' rights on a final hearing of the claims on which it was based (the regime is described in more detail in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [3]-[18], especially, in relation to the enforceability of a certificate but without prejudice to the parties' rights determined at a final hearing, at [17]-[18]). Handley JA writing for this Court said in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* (2005) 62 NSWLR 385; [2005] NSWCA 49 at [22]:

> It is clear that the Act confers statutory rights on a builder to receive an interim or progress payment and enables that right to be determined informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can be determined in the normal manner.

5 It is settled that courts will only interfere with the result of an adjudication under the New South Wales statute in cases of jurisdictional error: *Probuild v Shade Systems* at [53], [83] and [108], as noted in *Iskra v MMIR Pty Ltd* [2019] NSWCA 126 at [50] and *Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd* [2020] NSWCA 172 at [19], and as explained in P Davenport, *Construction Claims* (4th ed, Federation Press, 2020) at 63-66. The same is true of the South Australian counterpart: *Maxcon Constructions Pty Ltd v Vadasz* (2018) 264 CLR 46; [2018] HCA 5 at [5]. It is also tolerably clear that the adjudicator, who need not be legally trained, who need not conduct a public hearing, who will not apply the rules of evidence and, importantly, whose determination does not prejudice the parties' rights let alone resolve their dispute, does not exercise judicial power. In *Birdon Pty Ltd v Houben Marine Pty Ltd* (2011) 197 FCR 25; [2011] FCAFC 126, Keane CJ said at [33] and [53], in the course of rejecting submissions that the regime under the New South Wales statute contravened Chapter III of the Commonwealth Constitution, that:

> [T]he Security of Payment Act is not concerned to give effect to the rights of the parties under the construction agreement. As is apparent from the terms of s 32(2), it expressly leaves the determination of those rights to the courts. The process for which the Security of Payment Act provides does not involve a determination, even of a provisional kind, of the actual rights of the parties under their construction contract. Section 23 contemplates an "assessment" by the adjudicator, and this assessment may be enforced as if it were a judgment of a court of competent jurisdiction but only insofar as a court has not determined, or does not determine, otherwise.
>
> …
>
> … It is readily apparent from the terms of ss 22-25 of the Act that the adjudication certificate which s 25 makes enforceable as if it were a judgment of a court is not the product of the exercise of judicial power …

6 The other member of the majority, Buchanan J, wrote to substantially the same effect, noting at [172] that:

> [N]ot every aspect of every controversy need be addressed by the use of judicial power, whether the judicial power of the Commonwealth or any other judicial power. It is not outside the authority or legitimate function of a non-judicial body to come to a view about legal questions, or employ its own opinion about such matters in the discharge of its administrative or other

> functions, even if that results in the creation of a legally binding obligation under a statutory scheme. Such a process does not involve, or usurp, the exercise of judicial power and does not operate as a binding declaration of rights.

7 While the arguments in that appeal ranged widely over a challenge to the statutory regime, it had been common ground that the adjudicator did not exercise judicial power, and thus the decision is not strictly authority for that proposition: *CSR Ltd v Eddy* (2005) 226 CLR 1; [2005] HCA 64 at [13]. But it was held in *State of Queensland v Epoca Constructions Pty Ltd* [2006] QSC 324 that an adjudicator's determination was administrative and not judicial, relying on the decision not being final and authoritative (at [31]), was susceptible to collateral challenge (at [32]), did not attract most of the ordinary trappings of judicial power (at [33]), and did not require legal qualifications (at [34]). The correctness of that conclusion is, to my mind, apparent.

Litigation in the Supreme Court of Victoria between May21 and Probuild

8 By proceedings commenced in the Supreme Court of Victoria on 27 May 2022, May21 sought to quash that determination on the basis of jurisdictional error or error of law on the face of the record.

9 By originating motion filed on 30 May 2022, May21 sought interlocutory relief preventing the issue of a certificate and any other steps by way of enforcement. Orders were made on 31 May 2022 whereby Probuild undertook not to take steps to enforce the determination in its favour, and May21 undertook to pay $12,181.271.30 into Court.

10 May21's challenge was never determined, nor was it the subject of argument in this Court. However, I do not wish my silence to be taken as some form of tacit endorsement that all aspects of it were soundly based. To the contrary, much is difficult to reconcile with settled principle.

11 For example, ground 3 was a claim confined to error of law on the face of the record, but that is inconsistent with what was held by the High Court in *Probuild* and the other decisions mentioned above. As presently advised, I am unaware of any difference in the Victorian legislation which could even arguably render that reasoning inapplicable.

12 Ground 1 of May21's challenge was a claim based on the proposition that the adjudicator was exercising judicial power. But it is extremely difficult to see how the streamlined regime, with no oral hearing, and a determination by an adjudicator who need not be legally qualified and which does *not* resolve the parties' dispute could constitute an exercise of judicial power, especially in light of the views expressed in *Birdon Pty Ltd v Houben Marine Pty Ltd* and *State of Queensland v Epoca Constructions Pty Ltd*.

13 The primary basis upon which it was said that there was an exercise of judicial power in respect of a matter arising under Chapter III of the Constitution was that "[t]he parties to the adjudication were corporations registered under and created by the *Corporations Act 2001* (Cth) and so their rights and liabilities owe their existence to federal law", relying on *Mulley v Hayes* (2021) 286 FCR 360; [2021] FCA 1111. True it is that an obiter passage in that judgment at [11], citing an earlier obiter statement by the same judge in *Oliver v Nine Network Australia Pty Ltd* [2019] FCA 583, states that that view is arguable. Those views have been held to be incorrect both within the Federal Court (*DJ Builders & Son Pty Ltd (in liq) v Queensland Building and Construction Commission [No 3]* [2021] FCA 1041 at [16]) and by the Victorian Court of Appeal in *Thurin v Krongold Constructions (Aust) Pty Ltd* [2022] VSCA 226 at [116]-[117]. Lest any such arguments be made opportunistically in some other forum which is not a "court of a State", as indeed occurred in Western Australia: see *Owners of Strata Plan 58161 and Hanssen Pty Ltd [No 2]* [2023] WASAT 7, it is as well to note that it was rejected at [43] by a tribunal over which Pritchard JA presided as "not capable of legal argument". As presently advised, I respectfully agree.

14 However, ground 2 of May21's originating motion included a conventional challenge of jurisdictional error, in part based on the absence of a reference date, in accordance with what was held in *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340; [2016] HCA 52 (cf by way of example *Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd* [2020] NSWCA 63). The strength of this ground cannot be assessed from the materials in the appeal books, but I do not wish to be

understood as suggesting that the *entirety* of May21's challenge to the adjudication was bad in law.

15 There was no determination of May21's claim that the certificate was void, or of any of the arguments advanced by May21 in support of its challenge to the certificate. Nor was there any final determination of Probuild's claim that it was entitled to payment, still less any determination of May21's claim that Probuild was in breach. Instead, the parties compromised their dispute following a mediation.

16 By Deed of Settlement dated 6 July 2022, May21 agreed to pay Probuild $7.7 million, with May21 receiving the balance of the amount paid into Court. Each of May21 and Probuild granted general releases. In addition, Probuild undertook to provide certain services which would facilitate May21's new builder being able to complete the development. On 21 July 2022 the Deed of Company Arrangement was executed. On 22 July 2022, the $7.7 million was paid to the King & Wood Mallesons' trust account in accordance with the payment provisions in the Deed of Settlement, and was in turn paid in two tranches of $3.85 million on 26 July and 2 September 2022.

Allianz's proceedings in the Supreme Court of New South Wales

17 The Deed of Indemnity was governed by the law of New South Wales and provided that the parties submitted to the non-exclusive jurisdiction of courts of that State. Allianz commenced proceedings in the Commercial List on 12 October 2022. They were heard on a final basis some 5 weeks later, on 17 November 2022, and determined on 23 November 2022: *Allianz Australia Insurance Ltd v Probuild Constructions (Aust) Pty Ltd* [2022] NSWSC 1601. An appeal was filed on 6 December 2022, an interlocutory regime was put in place on 13 December, with the appeal being listed for hearing in the second week of March 2023.

18 Allianz made no attempt to identify any connection between the $34,532,184.10 paid by it to May21 pursuant to the performance bonds, and the $7.7 million paid by May21 to Probuild pursuant to the Settlement Deed. Probuild stressed that the $7.7 million reflected a commercial compromise, the reality that May21's much larger claim against Probuild was worthless given

Probuild's financial circumstances, and the additional promise it gave to facilitate completion of the development. Allianz said that none of that mattered, that the additional promises merely reflected the working out of Probuild's existing contractual obligations, and that its entitlement to the $7.7 million turned on the fact that it was an amount paid by May21 to Probuild at a time when, consensually, it had been established that May21 had no claim to that amount.

19 "Surplus Bond Moneys" were defined in the Deed of Indemnity to mean:

> any money paid by [Allianz] in relation to a Bond in excess of the amount required by [May21] to meet the contractual obligation which the Bond supports (and "Surplus Bond Moneys" received by [Probuild] will include amounts payable by [May21] to [Probuild] as reimbursement of, or as damages arising from, [May21's] receipt of Surplus Bond Moneys.

20 The primary judge accepted Probuild's submission that the clause was to be divided into two halves: "any money paid by the surety in relation to a bond" and, separately, "in excess of the amount required by the beneficiary to meet the contractual obligation which the bond supports", each of which had to be satisfied before Allianz could establish the existence of any "Surplus Bond Moneys". His Honour identified those two elements at [28]-[30] and noted at [32], prior to undertaking the legal analysis, that during oral submissions "it emerged that there was little dispute about this". His Honour then considered that the $7.7 million was "an overall settlement compromising a range of financial and practical imperatives on the part of both Probuild and May21" (at [65]), and that Allianz had failed to establish a sufficient connection between its payment of the bond moneys and Probuild's receipt of the $7.7 million under the Settlement Deed so as "to warrant what I consider to be necessary to conclude that, in substance, the receipt was from that payment": at [69].

21 I am far from sure that it was correct for his Honour to proceed on the basis that there was no dispute as to the construction of the definition, although it is quite apparent why his Honour was of that view.

22 What seems to have occurred is the not uncommon situation that the parties *claim* they are in agreement, but in fact they are not. Senior counsel then appearing for Allianz is recorded as saying, at the commencement of his address in reply:

> I don't want to be unfair to my learned friend, but it does seem to me to be fair to say that there actually isn't a construction issue in relation to cl 2.6. We both seem to be in furious agreement that if what can be identified is some money paid by Allianz that's over and above the amount that May 21 was entitled to and that money is reimbursed to Probuild, then it's held on trust for Probuild. That's what I say the clause means. That's what my learned friend say so the clause means …

23 The transcript does not, of course, record intonation or pauses which may have revealed the extent to which that statement of there not being any issue of construction accorded with or departed from the separate elements urged upon his Honour by Probuild. Nothing turns on this, save to explain why the primary judge may have proceeded without further reasoning to an approach based on dividing the definition into two halves. Irrespective of the way the argument was conducted at first instance, the issue is one of construction and this Court is just as well placed as was the primary judge to identify the legal meaning of cl 2.6, and in this Court senior counsel for Allianz (who had not appeared below) emphasised that the clause had to be read as a whole.

The construction of the definition of "Surplus Bond Moneys" in cl 2.6

24 I respectfully disagree with the construction of cl 2.6 adopted by the primary judge. Dividing the definition into two halves is not the natural way of construing the clause merely as a matter of impression, at least to my eyes. Instead, as Mr Giles SC emphasised, the definition on its face requires answering a single question: "Has there been an amount paid on the bond which can be seen or, perhaps more accurately, is seen at the time of receipt by Probuild as having been in excess of the amount required by the beneficiary?"

25 But disputes as to the legal meaning of contractual language tend not to be satisfactorily resolved merely by assertions based on matters of impression. After all, a "first blush" grammatical and ordinary meaning may be displaced by a "'less' grammatical and 'less' ordinary meaning": *2 Elizabeth Bay Road Pty Ltd v The Owners - Strata Plan No 73943* (2014) 88 NSWLR 488; [2014] NSWCA 409 at [85]. The starting point of explaining reasons for the legal meaning of the definition is a grammatical and syntactical parsing of its wording, which is more subtle than it may appear, as well as being something on which the primary judge does not appear to have enjoyed the benefit of full

submissions. It will be seen that a division of the definition in cl 2.6 into two elements does not accord with its grammatical construction. Nor does it accord with its evident commercial purpose.

Text – "any" and "excess"

26 I start with the text. The syntactical structure of the definition is that the opening words "any money" are followed by two qualifying clauses ("paid by [Allianz] in relation to a Bond" and "in excess of the amount required by [May21] to meet the contractual obligation which the Bond supports") and then followed by a further extending limb of the definition, being the words in brackets. The words in brackets may be passed over for the time being, because they do not affect the syntax of what precedes them.

27 There are two reasons why, simply as a matter of parsing of the language, I cannot accept the construction advanced by Probuild. The first turns on "any". The second turns on "excess".

28 "Any" is a word which bears a range of meanings. In the adjectival sense deployed in the definition, it captures all things falling within the terms to which it applies, although countenancing the possibility that there are none, as was noted in *Fitness First Australia Pty Ltd v Fenshaw Pty Ltd* (2016) 92 NSWLR 128; [2016] NSWCA 207 at [45]. Thus, "Please return any overdue library books" is a request which contemplates the possibility that the people to whom the request is directed have no overdue books on loan, but that if they do, then all such books are to be returned.

29 The words "any money" may as a matter of grammar merely apply to the immediately following clause ("paid by [Allianz] in relation to a Bond"). But they are also capable of extending to the second clause ("in excess of the amount required by [May21] to meet the contractual obligation which the Bond supports"). A restaurant might have a rule to the effect that "Any money paid in tips by customers in excess of $100" is to be shared equally between the front-of-house and the kitchen; if so it is clear that "any money" applies to "in excess of $100". Clause 2.6 is similar to the restaurant's rule in an important way. Except on a night when no patron tips, there will always be *some* money paid in tips. Ordinarily, the critical question would be whether the tips totalled more

than $100; exceptionally, if there are no tips, then the rule has no application. Likewise the premise of the definition in cl 2.6 is that money has been paid by Allianz in relation to a bond. Otherwise the clause can never apply. The important question is whether any money out of the moneys paid by Allianz in relation to a bond answers the description in the second clause. It is therefore wrong to divide the clause so as to confine the operation of "any" to the words "money paid by [Allianz] in relation to a Bond", thereby excluding the operation of "any money" from its effect on the relevant part of the definition, namely, "in excess of the amount required by the beneficiary to meet the contractual obligation which the Bond supports". It is those later words which on a natural reading of the language drive the operation of the definition. The point I am seeking to make is nothing more and nothing less than that it would be wrong to confine the operation of the word "any" to words which *invariably* will be satisfied if the clause applies.

30 I now turn from the force of "any" to the semantic content of "excess". In order to determine whether there is an excess, it is necessary to perform a subtraction. An excess is the difference between two things. Here the definition identifies two amounts of money. The excess is the difference between the money paid by Allianz and the amount required to meet the contractual obligations supported by the bond. Another way of putting this is that until and unless one has identified two amounts, it is not possible to determine whether one is in excess of the other.

31 It is quite plain that the two amounts reflect payments of money at different times. The first will have been paid shortly after a call has been made on a bond. The second is likely only to be determined considerably later, when the contractual entitlement supported by the bond has been quantified. The words in brackets at the end of the definition make it clear that this might be much later, after a judgment for damages is given.

32 Once again, those considerations tend to suggest that the clause is to be considered as a whole, rather than as being divided into two severable elements. Of course there can never be an excess until and unless May21's contractual obligation has been determined and quantified. But when that

occurs, the clause requires regard to be had to both the money paid by Allianz and the contractual entitlement of May21.

33 The result of the foregoing analysis confirms the ordinary meaning of the words. It is wrong to confine the scope of "any" to the first element of the definition "any money paid by [Allianz]"; the word also applies to the words which follow, necessarily so having regard to the contingent aspect of "any" and the certainty that if the clause applies, money will have been paid by Allianz. As a matter of meaning, one cannot determine whether there is an "excess" until one has compared the two amounts of money in the definition, namely, (i) "any money paid by [Allianz]" and (ii) "the amount required by [Probuild] to meet the contractual obligations which the Bond supports". Both reasons tell against a construction which splits the clause into two separate severable elements.

Commercial purpose

34 Neither party placed any great weight upon any other provisions in the Deed of Indemnity for the purpose of construction, and so I turn to the commercial purpose. I do so applying what was recently restated in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* [2023] HCA 6 at [27], by reference to *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544; [2017] HCA 12 at [16]:

> It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it.

35 The premise of cl 2.6 is that a call has been made on a bond. The Building Contract required performance bonds to be unconditional bank guarantees or insurance bonds or otherwise as May21 agreed. Argument in this Court proceeded in accordance with the explanation given by Morison J in *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563 at 568-571 (including by reference to Australian authorities) that the bond is to be paid without question absent a lack of good faith, but ordinarily there will be an accounting at a later date between the parties which will finally

determine their rights and obligations. At that later stage, it may be determined that an overpayment has been made, which is recoverable by the indemnifier (Probuild) from the beneficiary (May21). His Lordship concluded at 571:

> As a matter of general principle, therefore, in the light of the commercial purpose of such bonds, the authorities to which I have referred and the textbook comments, I take the view that if there has been a call on a bond which turns out to exceed the true loss sustained, then the party who provided the bond is entitled to recover the overpayment. It seems to me that the account party may hold the amount recovered in trust for the bank, (where, for example, the bank had not been paid by him) but that does not affect his right to bring the claim in his own name.

36 I shall return to the second sentence in that passage when dealing with the notice of contention. An appeal was dismissed, with no doubt being cast upon the matters mentioned above: *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1997] EWCA Civ 2757; [1998] 2 All ER 406. Potter LJ, who delivered the leading judgment of the Court of Appeal, referred to the "considerably commercial advantages" conferred by a performance bond as follows at 413:

> Not only does the buyer have an unquestionably solvent source from which to claim compensation for a breach by the seller, at least to the extent of the bond, but payment can be obtained from the seller's bank on demand without proof of damage and without prejudice to any subsequent claim against the seller for a higher sum by way of damages. In these circumstances the obligation to account later to the seller, in respect of what turns out to be an overpayment, is a necessary corrective if a balance of commercial fairness is to be maintained between the parties.

37 The need for there to be a subsequent accounting between the beneficiary of the performance bond and the principal, with the beneficiary being obliged to pay any surplus to the principal, was regarded as uncontroversial by E McKendrick, *Goode on Commercial law* (5th ed, Penguin Books, 2016) at [35.168], and in N Denys and R Clay (eds), *Hudson's Building and Engineering Contracts* (14th ed, Sweet & Maxwell, 2020) at [10-090].

38 These authorities were reviewed by Christopher Clarke J in *Tradigrain SA v State Trading Corporation of India* [2005] EWHC 2206 (Comm); [2006] 1 Lloyd's Rep 216, who concluded that in the facts of that case there was an implied term that the buyers account to the sellers for any amount paid under the bond which exceeded the buyers' loss, which was due to the sellers as a

debt. There was plainly argument as to whether the overpayment was held on trust, for at [35] under the heading "Trust" his Lordship said:

> It is not necessary for present purposes for me to determine the precise nature of the obligation owed by the Sellers upon receipt of the overpayment, just as in *Tomlinson (A) Hauliers Ltd v Hepburn* [1966] AC 451 Lord Reid did not find it necessary to decide whether the obligation of a bailee with a limited interest in goods, who has insured up to the full value of the goods entrusted to him, to account to the owner for their value when received from insurers, was a trust in the strict sense.

39 The concept of "Surplus Bond Moneys", and the purpose of cl 2.6, is to address the not unlikely situation indicated in the passages of Morrison J and Potter LJ and Christopher Clarke J reproduced above. From the perspective of the parties in 2017 prior to entering into the Deed of Indemnity and the Building Contract, it was entirely foreseeable that there might turn out to have been an overpayment by Allianz, which will have led to May21 paying (whether voluntarily or because a court has ordered it to do so) the excess to Probuild.

40 In those circumstances, it was no part of the bargain between Allianz and Probuild that Probuild should retain any part of what turned out to be a call on a bond which was greater than May21's entitlement. There is nothing in the context to suggest that anything more is required in order to generate "Surplus Bond Moneys". In particular, there is nothing to suggest there should be some requirement of, or analogous to, a process of identifying or tracing the money. It would be invidious to place that burden on either party, but especially invidious on Allianz, which is the party in whose favour the clause is drafted, for the benefit only to be available upon proof of a process of identification or tracing of funds in the hands of the beneficiary.

41 It needs steadily to be borne in mind that Allianz was providing a facility to Probuild whereby it would issue bonds upon which a developer may make a call. Allianz charged a fee (roughly, 0.9% per annum) for each bond issued, and of course received an indemnity from Probuild for all payments made and any other loss incurred under or in connection with any bond (this was cl 1.1 of the Deed of Indemnity, and is central to the argument on the notice of contention). If by the time it is determined that the beneficiary (May21) has called on a bond in an amount in excess of its entitlement, and Probuild has not fully indemnified Allianz, then there is no basis to impute to the parties that

Probuild is entitled to retain the excess. That comes about not because Allianz can identify some "objective" sense, to use the language employed by Probuild, in which the excess reflects part of the money paid by Allianz to May21. It comes about because it turns out that more money has been paid by Allianz to May21 than May21 was entitled, for which May21 must account to Probuild, and there is no basis that as between surety and indemnifier, the indemnifier should keep *any* amounts which turn out wrongly to have been called by the beneficiary. There is no reason in those circumstances not to give "any" its natural meaning.

42 Probuild emphasised that Allianz adduced no evidence to demonstrate any correspondence between the two payments. That led to this exchange:

> AUSTIN: … [T]here was no attempt made to show that there was any correspondence, relationship, reference, any substantial connection between the payment originally made and the payment later made, which would have enabled it to be said to have been the money originally paid by Allianz.
>
> LEEMING: That's the problem isn't it. You introduced the definite article. You say there's [been] no attempt made to prove or adduce evidence to show that it's **the** money paid by the surety. That's not what the clause asks. (Emphasis added.)

43 The question posed by the definition in cl 2.6 is not whether some relationship has been established between the two payments so that one can be seen to be connected with the other. The question posed by cl 2.6 is whether, when one subtracts from the amount paid by Allianz the amount to which May21 was entitled, there is *any* excess.

44 During the hearing, Probuild accepted that the clause would be satisfied by something more relaxed than the principles involved in equitable tracing, but declined to enunciate what that test was, although denying that it was sufficient merely to identify an excess without identifying a relationship between the original money paid by Allianz and the money required to meet contractual obligations. It was said, repeatedly, that it was an "objective" test. That must be correct, but does not greatly advance the position unless that objective test is articulated. The inability of Probuild to articulate a test governing its construction of the gloss it seeks to impose on the general words "any money … in excess" is a further factor telling against the construction it propounds.

45 Both sides mentioned cl 3.1(g) of the Settlement Deed (which Adamson JA has reproduced), Mr Giles in order to put it to one side, Mr Austin in order to rely upon it. But the terms of the bargain struck years later between Probuild and May21 cannot affect the construction of cl 2.6 in the Deed of Indemnity between Allianz and Probuild.

46 As a matter of ordinary commercial understanding, Allianz had no choice but to make payments in accordance with the bonds issued by it, and, without any criticism of May21, the demand may well exceed that to which it has a valid entitlement. The evident commercial purpose is that if and when such surplus is received by Probuild, Allianz should be entitled to its return.

47 For those reasons, I respectfully disagree with the primary judge. Text and commercial purpose point in the same direction. The clause only applies if money has been paid by Allianz. The critical inquiry posed by the definition is whether there is "any" "excess". That turns on identifying the contractual obligation supported by the bond, and asking whether what was paid by Allianz exceeds that amount. If so, there are "Surplus Bond Moneys" equal to the excess.

The notice of contention

48 If was common ground in this Court that if and when Surplus Bond Moneys were received by Probuild, Probuild held them on trust for Allianz, on terms that it must forthwith pay them to Allianz. There is no reason to doubt that the parties, when they identified specific property and used the language of "trust", are to be taken to have meant what they said: cf *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588; [2000] HCA 25 at [34]-[35].

49 Indeed, cl 2.6 confirms the position which would obtain even in the absence of an express declaration of trust, if what was suggested by Morison J in *Cargill* be correct. There can be no doubt in light of cl 2.6 that as between Probuild and Allianz, Probuild at all times held Surplus Bond Moneys on trust in favour of Allianz.

50 A more precise analysis of the trust might be significant in some other case. The agreement between May21 and Probuild required the amount to be paid into the King and Wood Malleson's trust account, with half not to be released

until certain conditions (relating to the assistance provided by Probuild) were satisfied. Thus when the trust in cl 2.6 was first constituted, the trust property was Probuild's merely equitable interest in the money (ie the debt owed by its solicitor's bank to its customer the law firm). There is no difficulty in a trust of equitable property. However, there is a longstanding question as to the legal nature of the beneficiary of a trust declaring itself a trustee, which may be encapsulated in the question: is there a sub-trust or does the person in the position of Probuild "disappear from the picture", to use the Upjohn J's language in *Grey v Inland Revenue Commissioners* [1958] Ch 375 at 382, reviewed and endorsed by Barrett J in *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* [2003] NSWSC 697 at [266]-[270]. If, in accordance with what Barrett J considered and which appears now also to be supported by *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545; [2006] HCA 3 at [72], Probuild were not regarded as holding its equitable interest in the funds in King and Wood Mallesons' trust account as a bare trustee, but instead had dropped out of the picture, it would be difficult to see how the PPSA could apply. However, after this was raised during the hearing, Allianz explicitly renounced any reliance upon the point, on the basis of how the case had been run. I shall therefore put to one side the position prior to 2 September 2022. Thereafter, Probuild became the legal owner of the Surplus Bond Money, holding it – subject to the effect of the PPSA – on trust for Allianz.

51 It is not necessary in order to resolve the notice of contention to summarise the operation of the PPSA. The parties divided on whether there was a "security interest" within the meaning of s 12. That requires the identification of a "transaction" which in substance secures payment or performance of an obligation.

52 Sections 12(1) and (2) provide:

> **12 Meaning of security interest**
>
> (1) A security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).
>
> Note: For the application of this Act to interests, see section 8.

> (2) For example, a security interest includes an interest in personal property provided by any of the following transactions, if the transaction, in substance, secures payment or performance of an obligation:
>
> (a) a fixed charge;
>
> (b) a floating charge;
>
> (c) a chattel mortgage;
>
> (d) a conditional sale agreement (including an agreement to sell subject to retention of title);
>
> (e) a hire purchase agreement;
>
> (f) a pledge;
>
> (g) a trust receipt;
>
> (h) a consignment (whether or not a commercial consignment);
>
> (i) a lease of goods (whether or not a PPS lease);
>
> (j) an assignment;
>
> (k) a transfer of title;
>
> (l) a flawed asset arrangement.

53 What matters is s 12(1). It is necessary and sufficient in order for an interest in personal property to amount to a "security interest" that s 12(1) be satisfied. It is neither necessary nor sufficient in order for an interest in personal property to be a "security interest" for it to be one of the enumerated examples in s 12(2). That is because the transaction must also "in substance, secur[e] payment or performance of an obligation", and because s 12(2) proceeds by way of example rather than being exhaustive. Thus, as Beach J observed in *Diversa Pty Ltd v Taiping Trustees Ltd* [2022] FCA 316; 401 ALR 161 at [173], "the examples included in s 12(2) do not set the boundaries of the interests that the terms of s 12(1) may capture, but rather may broaden the scope of s 12(1)". Although the Court was taken in some detail to s 12(2), it was not suggested that any of the examples in s 12(2) applied, including "trust receipt" in s 12(2)(g).

54 Probuild did not rely on s 12(2). Instead, it contended that:

> cl 2.6(a) of the Deed of Indemnity, which purported to create a trust, also contained discrete payment obligations (separate from the constitution of the trust contended for by Allianz) such that Allianz's interest in the Settlement Sum was, in essence, "an interest in personal property provided for by a transaction that, in substance, secures payment for performance of an obligation" (PPSA, s 12(1)). (Emphasis omitted.)

55 Probuild's submission was advanced to the primary judge, and to this Court, on two alternative bases:

> first, by reference to Probuild's obligations to pay the Surplus Bond Moneys 'forthwith' to Allianz or at its direction in cll 2.6(a)(i) and 2.6(b) (that is, in addition to the separate obligation to hold those funds on trust for Allianz); and/or
>
> secondly, by reference to Probuild's distinct obligation to indemnify Allianz against all loss in cl 1.1 under the Deed of Indemnity.

56 On the construction adopted by the primary judge, the questions under the PPSA did not arise, and his Honour did not express any concluded view on either basis, although tentatively favouring Probuild in relation to the first (at [79]), and Allianz in relation to the second (at [81]).

57 According to Probuild, the "transaction" required by s 12(1) was the trust created by cl 2.6(a) on receipt by Probuild of Surplus Bond Moneys. The "interest" in personal property was Allianz's beneficial interest in the Surplus Bond Moneys under that trust. The question posed by s 12(1) is whether the transaction in substance secures payment or performance of either (a) Probuild's obligation "forthwith" to pay Surplus Bond Moneys to Allianz, or (b) Probuild's obligation to indemnify Allianz under cl 1.1 of the Deed of Indemnity.

58 I do not accept the first aspect of this submission. The trust created by cl 2.6 on receipt of Surplus Bond Moneys operates then and there to impose both proprietary and personal obligations upon the trustee. The proprietary obligation is that if and when Probuild obtains title to Surplus Bond Moneys, Allianz has beneficial ownership of them. The personal obligation is to pay the Surplus Bond Moneys to Allianz forthwith. It is not unusual for a trust to give rise to both proprietary and personal rights on the part of a beneficiary; indeed it is the norm (for example, after a trustee has resolved to make a distribution of money, or an *in specie* distribution, to a beneficiary). I do not agree with the proposition that the obligation to pay the Surplus Bond Moneys forthwith to Allianz is "separate" from the obligation to hold those funds on trust for Allianz, or that there is a "discrete payment obligation" which is separate from the constitution of the trust. Rather, both the absence of any beneficial title to the Surplus Bond Moneys and the obligation to pay Surplus Bond Moneys forthwith to Allianz were incidents of the same trust created by the same clause of the

Deed of Indemnity. I consider that this accords with what was said by the New Zealand Court of Appeal in *Stiassny v North Shore City Council* [2009] 1 NZLR 342 at [29] in the context of a materially identical provision in the New Zealand *Personal Property Securities Act 1999*, to the effect that it is necessary for the beneficiary's interest in property under the trust to secure some obligation independent of the trust.

59 Nor do I accept the second way in which Probuild advances this case. Of it, the primary judge said at [81]:

> Probuild's obligation of indemnity under cl 1.1(a) arose on its execution of the Deed of Indemnity. Its obligation to make payment of the amount the subject of the indemnity was subject to Allianz making the demand referred to in cl 1.1(b). The enlivenment of the trust referred to in cl 2.6(a) was contingent on Probuild receiving Surplus Bond Moneys. Once such moneys were received, they were to be subject to the obligation to return them "forthwith" to Allianz, on account of Probuild's obligation of indemnity under cl 1.1(a), and whether or not Allianz had made a demand under cl 1.1(b). In those circumstances, I see substance in Allianz's submission that Probuild's obligation under cl 2.6(a) cannot be seen to be security for its obligation under cl 1.1 because those obligations would arise at different times and in different circumstances and, possibly, in respect of different money.

60 While his Honour refrained from expressing a final view, I respectfully agree with his analysis. Clause 1.1 of the Deed of Indemnity required Probuild to indemnify Allianz for all loss. It is separate from, and pre-dates, any trust created by cl 2.6. If and when the trust created by cl 2.6 comes into existence, it was on terms that it be extinguished "forthwith". This is far removed from some fund or asset in which Allianz could have an interest that in substance secured Probuild's obligation to indemnify it.

61 To the extent that the broad words of s 12(1) are capable of applying literally to Allianz's beneficial interest in the Surplus Bond Moneys once received by Probuild, they do so only in a technical sense. Section 12(1) requires that the interest "in substance" secures Probuild's obligation to indemnity Allianz. As a matter of substance, that is not the case in respect of Probuild's interest as trustee of the Surplus Bond Moneys because it never enjoyed any beneficial interest in those moneys.

62 That is to say, the effect of cl 2.6 (which Probuild contends is the "transaction" upon which s 12(1) turns) is that, contingently, if and when Surplus Bond

Moneys are received by Probuild, then all it ever receives is a bare title to the moneys which is held on trust for the benefit of Allianz and must be returned to Allianz forthwith. In no sense is Probuild's title as trustee, or Probuild's obligation to pay Surplus Bond Moneys forthwith to their beneficial owner a form of security for Probuild's primary obligation to indemnify Allianz.

63 There is also to my mind a deal of artificiality in the approach taken by Probuild to its characterisation of the "transaction" for the purposes of s 12(1). In substance there was a single transaction between those parties, creating a facility whereby for a fee Probuild could obtain the benefit of performance bonds required to carry on its business. Probuild requested Allianz to issue bonds in favour of May21, and Allianz did so. An aspect known to both parties of Allianz issuing performance bonds to a beneficiary nominated by Probuild, was the possibility that the beneficiary (ie May21) might call on the bonds in an amount which, as it turned out, was in excess of its entitlement to do so. It was also known to both parties that in that event, the beneficiary would have to account to Probuild for the surplus. Clause 2.6 responded to those circumstances, all of which were contemplated at the outset, and reflected the parties' agreement that moneys which, with the benefit of hindsight, should never have been the subject of a call should be treated to the extent possible as owned by Allianz. Rather than securing payment or the performance of an obligation, the trust responds to the foreseen possibility of an excessive call on the bonds.

64 Some of the parties' submissions were addressed to the trustee's right of indemnity, and the superior proprietary interest in trust property which is created to support a trustee's rights of exoneration or recoupment. But those submissions go nowhere, at least on the facts of this case, for there is nothing to suggest that there is any content to those rights beyond what has been agreed, for the purposes of this litigation, namely that Probuild's administrators (the second to fifth respondents) have a first ranking entitlement to $1,157,557.64 of the $7.7 million.

65 Repeatedly during submissions, Probuild maintained that the effect of the trust was to place Allianz in a superior position to an unsecured creditor, and

therefore cl 2.6 was to be regarded as creating a security interest. Thus it was said:

> Because if it's there to protect against insolvency risk, and to elevate an otherwise unsecured creditor who's entitled to be paid an amount of money to having a ranking which is superior to unsecured creditors, then one would understand that to be a form of security, we would say.

66 The submission correctly makes the point that the effect of the trust created (or confirmed) by cl 2.6 is to enhance the position of Allianz, which otherwise would be an unsecured creditor. However, an advantageous effect in that manner is not sufficient to engage s 12(1). Counsel for Probuild did not submit to the contrary. Rather, each time that submission was made, senior counsel confirmed after being prompted that he did not in fact submit that the definition of "security interest" would be satisfied merely by regard to the effect vis-a-vis unsecured creditors. He was correct to do so. Although the definition turns on an assessment of the "substance" of a transaction, it would be contrary to the statute to depart from the definition and have regard merely to the effect of a transaction. When regard is had to the statutory text, rather than the economic effect, I cannot see how the newly created trust, which is promised to be extinguished forthwith, can be regarded in substance as securing Probuild's obligation to indemnify Allianz.

67 I return to the passages from *Cargill* and *Tradigrain* reproduced above. If Probuild receives funds which, following an accounting, turn out to have been called in excess of May21's entitlement, I am inclined to agree with Morison J that they would without more be held on trust by Probuild for Allianz. That could be displaced by the parties' agreement, but if the parties' agreement were silent, it would not be difficult to impute such an intention to them. The purpose of the call having been to pay funds to which May21 was entitled, to the extent that it turns out May21 was not so entitled, that excess in the hands of Probuild is readily regarded as being held on trust for Alllianz, by analogy with the reasoning in *Re Australian Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491. That would be a further reason supporting the conclusion that s 12(1) is not engaged. However, this point not having been argued, and it not being necessary to my conclusion, I do not rely upon it.

68 Probuild placed reliance on references to "security" in the documents executed by Probuild and Allianz. In particular, it pointed to the fact that the term sheet establishing the key terms of the parties' bargain referred as "Security to be taken" to the Deed of Indemnity to be executed. But financial institutions use "security" in a range of ways, including to refer to documents to be executed prior to funds being called or drawn upon, which may or may not give rise to security interests for the purposes of the PPSA. A familiar example is a personal guarantee required by a lender before funds are drawn down. The language does not in the present case impact upon the characterisation of the trust created by cl 2.6 for the purposes of the PPSA.

Orders

69 For those reasons, the appeal should be allowed and orders made as sought by Allianz. The appeal required leave pursuant to s 444E of the *Corporations Act 2001* (Cth), which was granted without opposition during the hearing. The effect of allowing the appeal will be to discharge order 1 made on 13 December 2022 preventing the respondents dealing with the $7.7 million (save for their first ranking entitlement). I agree with the orders proposed by Adamson JA. If any party seeks a further order as to costs or interest (the notice of appeal sought a special order, but no basis so far as I can see was developed in Allianz's submissions), application may be made within 14 days in accordance with UCPR Pt 36.16.

70 **MITCHELMORE JA**: I have had the benefit of reading the draft reasons of Adamson JA and the orders her Honour proposes, and the reasons of Leeming JA. I agree with the orders proposed by Adamson JA for the reasons given both by her Honour and by Leeming JA.

71 **ADAMSON JA**: The appellant, Allianz Australia Insurance Ltd (Allianz), appeals against the judgment of Stevenson J (the primary judge) dismissing its claim for a declaration that the first respondent, Probuild Constructions (Aust) Pty Ltd (subject to a deed of company arrangement) (Probuild), holds the sum of $7.7 million paid to it by May21 Pty Ltd (May21), on trust for Allianz.

72 The second to fifth respondents are the deed administrators, appointed pursuant to the deed of company arrangement executed in respect of Probuild on 21 July 2022.

73 The single ground of appeal is as follows:

> "On the proper construction of the deed of indemnity dated 25 September 2017 (Deed of Indemnity) and the deed of settlement dated 6 July 2022 (Settlement Deed) and in the events that have happened, the primary judge should have found that the amount paid under the Settlement Deed represented Surplus Bond Moneys (as defined in the Deed of Indemnity)."

The facts

74 The facts, which were largely uncontested, principally derive from a series of agreements to which either May21 or Probuild, or both, was a party.

The building contract between May21 and Probuild

75 May21, as principal, and Probuild, as contractor, entered into a contract on 2 October 2017 whereby Probuild would perform works for May21 with respect to a project known as the West Side Development (the building contract). Clause 5.2 of the building contract required Probuild to provide 5% of the contract sum in the form of two performance bonds each totalling 2.5% of the contract sum. The purpose of this "security" was, by cl 5.1, to "ensur[e] the due and proper performance" by Probuild of its obligations to May21 under the building contract.

76 Clause 5.6 of the building contract provided, in substance, that May21 had a right of recourse to the security (including, where relevant, to convert it to cash) at any time and that Probuild was prohibited from enjoining May21 in any way from its right to recourse the security.

77 Clause 42 of the building contract provided for payment claims at particular junctures in the performance of the building contract. Clause 42.1 relevantly provided that payment did not amount to evidence of the value of work or an admission of liability but "shall be a payment on account only, except as provided under cl 42.6."

78 Clause 42.6 provided for a final certificate to be issued by the Superintendent (a defined term) following receipt of Probuild's final payment claim. Fourteen days after issue of the final certificate, May21 was obliged to release the

security provided: cl 42.6. May21 was not otherwise authorised to release the security.

79 Clause 42.8 entitled May21 to deduct from moneys due to Probuild any money due and payable to it from Probuild, irrespective of whether there was a dispute about its right to set off.

80 The effect of cll 44.2, 44.3 and 44.4 was that, if Probuild entered into a deed of company arrangement (which constituted, by definition, a substantial breach) and May21 considered that damages may not be an adequate remedy, May21 was entitled to give Probuild a notice to show cause why May21 should not take the work out of the hands of Probuild and terminate the building contract.

81 Clause 44.4 also provided that if May21 took the works out of the hands of Probuild and/or terminated the building contract, Probuild would not (subject to exceptions) be entitled to any further payment. In such circumstances, Probuild was required to assign or novate contracts with sub-contractors and third parties and make available for collection plant and materials and documents it had produced in connection with the performance of the building contract. In that event, Probuild was required to return to May21 "immediately" any of May21's property. Under cl 44.5, May21 was also entitled to use Probuild's construction plant and documents without compensation but was obliged to return them on completion.

The deed of indemnity between Probuild and Allianz dated 25 September 2017

82 Parties, including Probuild and Allianz, entered into a deed of indemnity on 25 September 2017.

83 In cl 1.1, Probuild unconditionally and irrevocably indemnified Allianz for all loss suffered by it as a result of issuing a performance bond at Probuild's request and agreed to pay, on demand, the amount of such loss to Allianz.

84 Clause 2.6 of the deed provided:

> "2.6 Surplus Bond Moneys
>
> (a) The Indemnifier [in this case, Probuild] undertakes in favour of the Surety [Allianz] that: ·
>
> (i) any Surplus Bond Moneys received by it will be held on trust in favour of the Surety and must be returned to the Surety forthwith;

and

(ii) it will hold all right, title or interest in Surplus Bond Moneys for the benefit of the Surety.

(b) If required by the Surety, the Indemnifier will authorise and direct a beneficiary that may receive Surplus Bond Moneys to pay those Surplus Bond Moneys directly to the Surety.

(c) For the purposes of this clause 2.6, 'Surplus Bond Moneys' means any money paid by the Surety in relation to a Bond in excess of the amount required by the beneficiary to meet the contractual obligation which the Bond supports (and 'Surplus Bond Moneys' received by an Indemnifier will include amounts payable by a beneficiary to an Indemnifier as reimbursement of, or as damages arising from, the beneficiary's receipt of Surplus Bond Moneys)."

85 It was common ground that, on 24 November 2017, at Probuild's request, Allianz provided two performance bonds to May21 in accordance with cl 5 of the building contract.

86 On 23 February 2022, Probuild went into voluntary administration. On 4 March 2022, May21 served a notice on Probuild, pursuant to cl 44.11 of the building contract, to take the remaining works away from Probuild. May21 engaged a new contractor to perform the works. On 25 March 2022, May21 demanded payment from Allianz under the bonds. Allianz paid May21 $34.5 million in accordance with the two bonds.

87 There were disputes between Probuild and May21. On 13 May 2022, May21 claimed to be entitled to approximately $84 million in damages arising from Probuild's breaches of the building contract.

The adjudication and determination

88 Probuild lodged a claim of $37.85 million for adjudication pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (SOPA). On 16 May 2022, Probuild obtained an adjudication determination (the determination) in its favour for $12.18 million. May21 commenced proceedings in the Supreme Court of Victoria for judicial review of the determination. Further, May21 alleged that Probuild was liable to it for damages of $78.54 million (a slight reduction from its claim made on 13 May 2022).

89 On 3 June 2022, May21 paid an amount of $12.18 million into court, pending determination of its application for judicial review, in accordance with an order made in the proceedings.

The settlement deed between May21 and Probuild dated 6 July 2022

90 Ultimately, on 6 July 2022, May21 and Probuild entered into a settlement deed.

91 Because of the emphasis placed by both parties on the recitals to the settlement deed (which were accepted by the parties to these proceedings to be accurate), they are reproduced in full:

> "A. [May21] and Probuild are parties to a contract dated 2 October 2017 (Contract) for design and construction works (Works) at West Side Place (Stage 1) at 250 Spencer Street, Melbourne VIC 3000 (Project).
>
> B. On 23 February 2022, Probuild entered into voluntary administration and on 4 March 2022, [May21] issued a notice to take the remaining works out of Probuild's hands.
>
> C. A dispute arose between [May21] and Probuild (Dispute) relating to the parties' entitlements to various claims under the terms of the Contract and otherwise at law.
>
> D. On 16 May 2022, a determination was made by an adjudicator in respect of Probuild's February Payment Claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (reference 2022ADJTVICA057) awarding Probuild with $12,181,271.30 plus GST and adjudicator's fees (Adjudication Determination).
>
> E. [May21] has alleged that it has suffered loss and damage of $78,536,277.00 arising from the Project.
>
> F. By proceeding number S ECI 2022 01984 commenced by [May21] in the Supreme Court of Victoria (Proceeding), [May21] sought, among other things, judicial review of the Adjudication Determination and an injunction restraining Probuild from enforcing the Adjudication Determination.
>
> G. Pursuant to Orders made by Justice Riordan in the Proceeding, on 31 May 2022 [May21] paid $12,181,271.30 (inclusive of GST) into Court with respect to the Adjudication Determination.
>
> H. Without admission of liability, [May21] and Probuild have agreed to settle the Dispute and the Proceeding on the terms set out in this Deed."

92 May21 agreed to pay Probuild $7.7 million, including GST (the settlement sum) (cl 2.1). Clause 2.2(d) of the settlement deed provided that, of the funds which had been paid into Court, $7.7 million was to be paid to the trust account of Probuild's solicitors; and the balance was to be paid to the trust account of May21's solicitors.

93 Clause 2.2(e) provided:

> "Upon receipt of the funds set out in clause 2.2(d)(ii)(A) into [Probuild's solicitors' trust account], the parties acknowledge and agree that [Probuild's solicitors] may release:
>
> (i) $3,850,000.00 (inclusive of GST) to Probuild promptly upon receipt; and

(ii) $3,850,000.00 (inclusive of GST) to Probuild upon the earlier of:

(A) Probuild: achieving all outcomes contemplated under clause 4.1; or

(B) 31 August 2022."

94 Probuild and May21 gave mutual releases with respect to all claims arising under the building contract, including the determination and the claim for judicial review of it (cl 3.3).

95 Clause 3.1(g) provided that, once paid, May21:

> "represents and warrants that there are no surplus bond proceeds owing to [May21] under the Contract, following payment to [May21] of the proceeds of the [builder] Securities on or around 25 March 2022 pursuant to clause 5 of the Contract."

96 Clause 4.1 of the settlement deed set out the obligations of Probuild with respect to matters such as provision of documents and assistance with subcontractors. The evident intention of this clause was to oblige Probuild to co-operate with May21 to facilitate the resumption of construction with the replacement builder and those sub-contractors which had contracted with Probuild for the performance of works covered by the building contract.

97 As referred to above, on 21 July 2022, a deed of company arrangement was executed in respect of Probuild.

98 On 22 July 2022, May21 paid the settlement sum to Probuild's solicitors who paid it into the fund established by the deed of company arrangement.

99 An agreed statement of facts pursuant to s 191 of the *Evidence Act 1995* (NSW) was tendered in the proceedings in the Court below. It provided, in substance, that the deed administrators were entitled to a lien (pursuant to *Re Universal Distributing Co Ltd (in Liq)* (1933) 48 CLR 171; [1933] HCA 2) in the sum of $1,157,557.64, excluding GST, over the settlement sum ($7.7 million) and that this lien has priority over Allianz's claim over the $7.7 million sum. For simplicity, I propose to refer to $7.7 million as if it were the putative trust property, although the putative trust property would be, if Allianz succeeds, a lesser sum ($7.7 million less $1,157,557.64 plus GST).

The issues between the parties

100 Allianz contended that the disputes between May21 and Probuild resulted in an agreement (reflected in the settlement deed) that May21 had $7.7 million more

than it was entitled to and that, accordingly, it had to "repay" it to Probuild, which then held it on trust for Allianz because, on that analysis, Allianz has necessarily paid too much (as determined in retrospect) when it complied with the performance bonds at the request of May21 and paid $34.5 million to May21.

101 Allianz contended that the settlement sum was "Surplus Bond Moneys" within the meaning of cl 2.6(c) of the deed of indemnity and that, accordingly, Probuild held it on trust for its benefit pursuant to cl 2.6(a). It submitted that the commercial object of imposing a trust for the benefit of Allianz on any "surplus" money received by Probuild from May21 was to give effect to the parties' intention that the money paid to Probuild was not money which Probuild was entitled to retain for its own benefit but could only ever hold for the benefit of Allianz. Allianz argued that the purpose of the clause was to ensure that Probuild would never receive the money beneficially and that any surplus would be reimbursed to Allianz even if Probuild became insolvent.

102 Probuild argued that Allianz was required to establish and had not established that the money that May21 paid Probuild was, first, money paid *by* Allianz; second, in relation to performance bonds; and, third, in excess of the amount required by May21 to meet the contractual obligations which the performance bonds supported. As to the first element, Probuild contended that the source of the $7.7 million was the sum of $12.18 million which May21 had paid into court in accordance with a court order.

103 As to the second element, Probuild contended that the money was not paid "in relation to performance bonds" because it had been paid as a compromise of Probuild's payment claim under SOPA pursuant to its statutory right to a progress payment (for works completed but not yet paid for), which did not depend on any net indebtedness from May21 to Probuild and was quantified by reference to the application of a statutory formula to the building contract. May21 argued that the settlement sum paid pursuant to the settlement deed (being the $7.7 million) represented the resolution of a "broader relationship" between Probuild and May21.

104 As to the third element, Probuild contended that Allianz could not prove that the funds were in excess of the amount of the performance bonds since May21 had an extant claim against Probuild for some $78 million, albeit one in respect of which it had released Probuild under the settlement deed.

The judgment

105 The primary judge, at [32], identified two factual questions: whether the $7.7 million received by Probuild:

(1) represented the amount of its "contractual obligation" to May21 under the building contract; and

(2) represented, corresponded to, or was referable to, the $34.5 million which Allianz paid to May21 on 25 March 2022 in excess of that contractual obligation.

106 The primary judge accepted at [52] that, although it was not clear what the parties sought to achieve by cl 3.1(g) of the settlement deed, cl 3.1(g) indicated that the parties had taken into account the $34.5 million which Allianz paid to May21 pursuant to the bonds.

107 The primary judge said at [54] that the inference was open that Probuild and May21 intended that the $7.7 million payable by May21 to Probuild pursuant to the settlement deed represented the excess of that required to meet May21's claims against Probuild under the building contract. However, the primary judge considered, at [55], there to be "other possibilities".

108 Another possibility which the primary judge identified was that the $7.7 million was "referable" to the $12.18 million (being the adjudication determination) and indicated that Probuild agreed to compromise that amount by accepting a reduction in that amount, notwithstanding that it had an immediate right to enforce that determination, subject to the outcome of May21's application for judicial review (the prospects of which were not the subject of evidence). The primary judge also referred, at [58], to the difficulties which May21 would be likely to encounter in prosecuting its claim for $78.5 million in damages in Probuild's administration, as well as May21's interest in obtaining Probuild's co-operation in the resumption of work by the replacement builder (through the non-monetary obligations provided for in cl 4 of the settlement deed, which were not contained in the building contract).

109 The primary judge concluded, in respect of (1) above:

> "64 In the circumstances, I do not see how I could conclude that the Settlement Deed bespoke the parties' agreement that the Settlement Sum of $7.7 million was the amount in excess of Probuild's 'contractual obligation' to May21.
>
> 65 Rather, it was an overall settlement compromising a range of financial and practical imperatives on the part of both Probuild and May21.
>
> 66 Accordingly, Allianz has failed to demonstrate that the $34.5 million it paid to May21 under the Bonds was an amount 'in excess of the amount required' to be paid to May21 "to meet the contractual obligation which the Bond supports" and has thus failed to establish that the Settlement Sum represents Surplus Bond Moneys for the purpose of cl 2.6 of the Deed of Indemnity."

110 As to (2) above, the primary judge found, at [67], that Allianz had failed to establish the necessary link between the money paid under the bonds ($34.5 million) on 25 March 2022 and the $7.7 million paid by May21 to Probuild on 22 July 2022. His Honour said, at [68]:

> "… all that Allianz has been able to demonstrate is that its payment to May21 and Probuild's receipt from May21 arose out of circumstances having a connection with the project the subject of the Building Contract. But those circumstances, and their connection with the project, were very different in nature and were temporally remote."

111 The primary judge concluded, at [69], that Allianz had not established a sufficient connection between the payment to May21 pursuant to the bonds and May21's payment of $7.7 million to Probuild. For these reasons, the primary judge concluded that Allianz was not entitled to the declaration sought.

112 On this basis, it was not necessary for the primary judge to determine Probuild's alternative submission (which is the subject of the notice of contention): that the trust created by cl 2.6(a) of the deed of indemnity constituted a "security interest" because it secured payment under cl 1.1 of that deed, which would not have priority because it had not been registered under the *Personal Property Securities Act 2009* (Cth) (PPSA).

113 The primary judge said, at [81]:

> "Probuild's obligation of indemnity under cl 1.1(a) arose on its execution of the Deed of Indemnity. Its obligation to make payment of the amount the subject of the indemnity was subject to Allianz making the demand referred to in cl 1.1(b). The enlivenment of the trust referred to in cl 2.6(a) was contingent on Probuild receiving Surplus Bond Moneys. Once such moneys were received, they were to be subject to the obligation to return them 'forthwith' to Allianz, on

> account of Probuild's obligation of indemnity under cl 1.1(a), and whether or not Allianz had made a demand under cl 1.1(b). In those circumstances, I see substance in Allianz's submission that Probuild's obligation under cl 2.6(a) cannot be seen to be security for its obligation under cl 1.1 because those obligations would arise at different times and in different circumstances and, possibly, in respect of different money."

The ground of appeal

114 Mr Giles SC, who appeared with Ms Campbell for Allianz, put, in substance, that its arguments, which were rejected by the primary judge, ought to have been accepted. He relied on the fact that the sum of $7.7 million paid under the settlement deed comprised a final resolution between Probuild and May21 of *all* claims or amounts payable under the building contract and took into account the $34.5 million which Allianz had paid to May21 on the bonds when called on to do so. Thus, he submitted that the sum of $7.7 million represented the amount by which the $34.5 million paid pursuant to the bonds had exceeded May21's entitlement and was, therefore, Surplus Bond Moneys.

115 Mr Giles contended that the primary judge had, incorrectly, attributed significance to the actual intentions of Probuild and May21 in arriving at the settlement when determining the question whether the $7.7 million comprised Surplus Bond Moneys, since the question was an objective one. He submitted that May21's promise to pay Probuild $7.7 million was inconsistent with an objective intention (on the part of either) that May21 would retain *all* of the $34.5 million paid by Allianz in response to May21's call on the bonds.

116 Mr Giles further submitted that the primary judge had posited the wrong question by asking whether payment under the performance bonds was the *sole* reason the $7.7 million was paid. He contended that a trust under cl 2.6(a) of the deed of indemnity was created when an excess was paid, irrespective of the label placed on it by May21 and Probuild.

117 In response, Mr Austin KC, who appeared with Mr Krochmalik on behalf of Probuild, contended that the primary judge was correct for the reasons his Honour gave. It also relied on its notice of contention (which will be addressed below).

118 Probuild refuted Allianz's claim on two bases: first, that the settlement deed was not a final account between Probuild and May21 under the building

contract but a "global commercial compromise" of a "much wider suite of rights and liabilities"; and, secondly, that to qualify as Surplus Bond Moneys, the settlement sum must have originally been paid by Allianz in relation to a bond and that this had not been established. Mr Austin placed particular significance on cl 4 of the settlement deed and the non-monetary obligations which it imposed on Probuild.

Consideration

The appeal ground

119 The principles which apply to the construction of commercial contracts were identified by the primary judge and are not in dispute. In *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37, the plurality (French CJ, Nettle and Gordon JJ) said at [46]-[49]:

> "46 The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose.
>
> 47 In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.
>
> 48 Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.
>
> 49 However, sometimes, recourse to events, circumstances and things external to the contract is necessary. …"
>
> [Footnotes omitted.]

120 I consider that the primary judge erred in requiring a greater connection to be proved between, on the one hand, the payment of $7.7 million by May21 to Probuild, and, on the other, the payment of $34.5 million pursuant to the bonds than was established by the evidence and, in particular, the settlement deed. While there were several disputes between Probuild and May21, there was no other relationship between Probuild and May21 other than the one which arose under the building contract. Thus the only reason money was paid by May21 to Probuild was because their respective rights and obligations under the building

contract had merged into the rights and obligations under the settlement deed, the purpose of which was to resolve *all* disputes between them arising from the building contract.

121 To require the type of proof which the primary judge found was lacking in the present case was inimical to the commercial purpose of the deed of indemnity, which was designed to give Allianz a beneficial interest in "*any* money paid by [Allianz] in relation to a Bond in excess of the amount required by [May21] to meet the contractual obligation which the Bond supports (and 'Surplus Bond Moneys' received by [Allianz] will include amounts payable by [May21] to [Probuild] as reimbursement of, or as damages arising from, [May21's] receipt of Surplus Bond Moneys)" (emphasis added): cl 2.6(c) of the deed of indemnity.

122 The contractual obligation which the bonds supported was Probuild's obligations to May21 under the building contract. Allianz paid $34.5 million to May21 upon request pursuant to the bonds. By reason of the settlement deed, Probuild and May21 agreed that, taking into account the $34.5 million already paid, there was a credit to Probuild of $7.7 million. In other words, May21 was only entitled to retain $26.8 million ($34.5 million less $7.7 million), not the whole $34.5 million that it had been paid.

123 Although the parties to the settlement deed did not identify the sum of $7.7 million as the "reimbursement of, or damages arising from, Surplus Bond Moneys" (as provided for in cl 2.6(c) of the deed of indemnity), the characterisation of these moneys is to be determined as a matter of substance and not form. Were it otherwise, May21 and Probuild would be in a position to determine the characterisation in their own interests (thereby defeating the trust and advancing Probuild's own interests) to the detriment of Allianz's interests and the commercial purpose of the deed of indemnity. Further, I am not persuaded that there is any warrant for requiring Allianz to prove that the "sole" reason the money was paid was because of the performance bonds.

124 It is also of significance that, while Mr Austin accepted that the funds paid by Allianz to May21 pursuant to the bonds could be used for any purpose by May21, he did not explain why such moneys did not constitute moneys "paid in

relation to a Bond" within the meaning of the definition of "Surplus Bond Moneys" in cl 2.6(c) of the deed of indemnity. Further, although Mr Austin accepted that it was not necessary for Allianz to show that the funds could be traced, he did not posit an alternative test to determine whether moneys paid by May21 to Probuild fell within the definition in cl 2.6(c) of the deed of indemnity and were, therefore, held on trust for Allianz. Mr Austin referred to procedural steps (such as the issue of subpoenas) which could have been taken by Allianz to ascertain more of what occurred between Probuild and May21 but did not articulate how such processes could have been used to discharge the onus of proof which lay on Allianz to establish the characterisation of the $7.7 million which May21 agreed to pay to Probuild as Surplus Bond Moneys.

125 The terms of the settlement deed were sufficient, in light of the evidence as to the payment to May21 of the performance bonds, to establish that the $7.7 million constituted Surplus Bond Moneys. That the $7.7 million was *in fact* paid from the $12.18 million that May21 had paid into court pending determination of its application for judicial review of the determination does not alter the character of the $7.7 million.

126 I regard the reference to cl 4 of the settlement deed (which, although differently worded, picked up and restated, in large measure, Probuild's obligations under cl 44.4 of the building contract) as beside the point. Whatever non-monetary consideration flowed from Probuild to May21 cannot alter the fact that May21 agreed to "repay" (or reimburse) the amount by which the bond moneys exceeded its entitlement from Probuild, being the $7.7 million. Further, whether or not Probuild performed its obligations under cl 4.1, it was entitled to $3.85 million of the $7.7 million as soon as the money was paid out of Court to Probuild's solicitors' trust account; and the balance of $3.85 million by 31 August 2022 at the latest: cl 2.2(e) of the settlement deed.

127 Further, the primary judge's construction of the deed of indemnity was at odds with the commercial purpose of the deed of indemnity, which was to create an immediate trust in favour of Allianz of any such sum on receipt, thereby ensuring that the $7.7 million (as Surplus Bond Moneys) never became the

(beneficial) property of Probuild but which vested in Allianz at the time of its receipt by Probuild. It would not make commercial sense for Allianz, as a stranger to the building contract, its performance and any resolution of disputes arising under it, to put itself in a position where it was necessary for it to go beyond the terms of the settlement deed and examine the interstices of what had occurred between May21 and Probuild. The terms of the settlement deed were sufficient to discharge Allianz's onus in the present case.

128 For these reasons, the primary judge was in error to find that Allianz had not proved a sufficient connection between the $7.7 million which May21 was liable to pay Probuild under the settlement deed (to resolve all mutual claims between them) and the $34.5 million which Allianz had paid to May21 under the bonds. Allianz is entitled to the declaration it sought. The ground of appeal has been made out.

The notice of contention

129 In its notice of contention, Probuild relied on the following ground:

> "The primary judge ought to have concluded that, if the amount paid to the First Respondent (Probuild) pursuant to the deed of settlement dated 6 July 2022 (Settlement Amount) was in fact, on receipt by Probuild, held on trust by it in favour of the Appellant (Allianz) as 'Surplus Bond Moneys' by reason of the operation of the Deed of Indemnity dated 25 September 2017 (Deed of Indemnity) (as Allianz contended below and contends in this Court), then:
>
> (a) clause 2.6(a) of the Deed of Indemnity created a security interest over 'Surplus Bond Moneys' (as defined) within the meaning of subsection 12(1) of the *Personal Property Securities Act 2009* (Cth) (PPSA); and
>
> (b) given that the said security interest was, at all relevant times, unperfected by registration (or otherwise), this security interest vested in Probuild upon payment of the Settlement Amount to Probuild by operation of section 267, alternatively, section 267A of the PPSA."

130 Before addressing the submissions, it is necessary to identify the relevant provisions of the PPSA.

131 Section 12(1) of the PPSA defines "security interest" as follows:

> "(1) A ***security interest*** means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property)."

132 It was common ground that none of the other sub-sections in s 12 of the PPSA (including s 12(2)(g) which provides that a security interest includes an interest

in personal property provided by "a trust receipt" if the payment, in substance, secures payment or the performance of an obligation) expressly applied in terms to the present case.

133 Section 151(1) of the PPSA prohibits the registration of a financing statement or a financing charge statement unless the person applying to register the statement believes on reasonable grounds that the person described in the statement "is, or will become, a secured party in relation to the collateral". The first example given under s 151(1) is where the collateral is "all present and after-acquired property" (of the grantor). This provision was relied on by Mr Austin in support of a submission that a "security interest" can be created in property that has not been received at the time the interest is created and may not be received (see the discussion below).

134 Section 153 of the PPSA sets out the data that must be included in a financing statement, including the "class" to which the collateral belongs. This was also relied on by Mr Austin to support his submission that it was not necessary that the collateral be specified directly at the time of the creation of the security interest.

135 Section 267 of the PPSA provides for vesting of unperfected security interests in the grantor upon, relevantly, the grantor executing a deed of company arrangement: s 267(1)(a)(iii).

136 Section 267A(1) of the PPSA provides, in substance, that if a security interest has not been registered before, relevantly the grantor executes a deed of company arrangement (the critical time), then it vests in the grantor either at the critical time or when it attaches.

137 In the Court below, Probuild argued, in the alternative, that, if there were Surplus Bond Moneys held on trust for Allianz, Allianz had a "security interest" in the $7.7 million held by Probuild, which was unenforceable, by reason of the PPSA, because it had not been perfected by registration prior to Probuild's entry into the deed of company arrangement.

138 It was common ground that Allianz had not registered its interest under the deed of indemnity. The issue between the parties was whether cl 2.6(a) of the

deed of indemnity created a "security interest" over Surplus Bond Moneys within the meaning of s 12 of the PPSA.

139 Mr Austin argued that the trust was a security interest because it secured the following:

(1) Probuild's obligation to pay the Surplus Bond Moneys "forthwith" to Allianz or at its direction (cll 2.6(a)(i) and 2.6(b) of the deed of indemnity) in addition to its separate obligation to hold those funds on trust for Allianz; and/or

(2) Probuild's obligation to indemnify Allianz against all loss pursuant to cl 1.1 of the deed of indemnity.

140 Mr Austin submitted that the purpose of the creation of a trust of Surplus Bond Moneys (by operation of cl 2.6 of the deed of indemnity) was to guard against insolvency risk and was, in these circumstances, a "security device". In support of his submission, he relied on the following passage from *Gold Valley Iron Pty Ltd (in liq) v OPS Screening & Crushing Equipment Pty Ltd* [2022] WASCA 134 (*Gold Valley*), where Buss P and Murphy JA said:

> "196 The PPSA adopts a functional approach and focuses on the substance of the transaction in determining whether an interest is a 'security interest'. See, generally, Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) [2.4].
>
> 197 The statutory direction in s 12(1) that regard must be had to what the transaction does "in substance", and "without regard to the form of the transaction or the identity of the person who has title to the property", indicates that close attention must be given to what the transaction purports to do. The relevant substance of the transaction is its business or economic substance.
>
> 198 Whether a transaction that provides for an interest in personal property, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property) is a question of characterisation of the transaction to which the parties have agreed. It is not merely a question of the intention of the parties and it is not merely a question of interpretation. …"
>
> [Footnotes and citations omitted.]

141 Mr Austin contended that, if cl 2.6 of the deed of indemnity created a right in personal property in order to secure the performance of an obligation, it was to be characterised as securing a payment which was covered by the PPSA. While Mr Austin purported to accept that it did not follow that any "device" that gave a creditor a better outcome than would be the case if the creditor were unsecured, is a security, nonetheless, he said, in oral submissions, that "if it's

held on trust, it's not available to Probuild's creditors, ergo it's a form of security." (**tr 37.49-50**)

142 For the following reasons (which accord with those advanced by Mr Giles), I am not persuaded that the primary judge's decision can be supported on the basis set out in the Notice of Contention.

143 It is useful at the outset to address two decisions which were referred to in argument, *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588; [2000] HCA 25 (*Associated Alloys*) and *Stiassny v North Shore City Council* [2009] 1 NZLR 342; [2008] NZCA 522; (*Stiassny CA*). In both of these cases, one party has sought, by creating a trust in its favour, to protect its right to receive payment from the other party in the event of the other party's insolvency.

144 In *Associated Alloys*, a buyer of steel (the respondent) owed money to the seller (the appellant) pursuant to invoices issued by the seller. The seller retained title to the steel until payment of each invoice. Further, the buyer was obliged to hold on trust for the seller any proceeds which it derived from the manufacture or construction of the steel equal to the amount owing to the seller at the time of receipt.

145 The Court, by majority (Gaudron, McHugh, Gummow and Hayne JJ, Kirby J dissenting), held that the proceeds term of each invoice was effective to constitute an express trust over future-acquired monetary receipts of the buyer received as a result of the manufacture and sale of the seller's goods supplied pursuant to the invoice. The majority held that the buyer was obliged to apply the trust moneys by accounting to or at the direction of the seller after the debt was due: [31] and [45]. The agreement to constitute a trust of after-acquired property did not comprise a charge for the purposes of the *Corporations Law* ([48]). The PPSA did not arise for consideration in *Associated Alloys*, which was ultimately decided on the basis that, although the seller had obtained a construction of the term in its favour, the seller had failed to establish a sufficient link between the funds held by the buyer and the goods supplied by the seller under any particular invoice.

146 *Stiassny CA* was an appeal by a local council against a decision of the High Court of New Zealand (High Court (NZ)) following an application by receivers as to whether the council had a proprietary interest in particular funds. The circumstances in which the question arose were as follows. The council operated a weekly rubbish collection and disposal service. In order to recover the cost of this service, the council required users to put rubbish in branded plastic bags for collection. The council entered into a contract with Chequer Packaging Ltd (CPL) which required CPL to supply, merchandise and distribute the bags to retailers at a set price, which was made up of the fees charged by the council for collection and CPL's own fee. The council would invoice CPL for the collection fees. CPL went into receivership. Its receivers applied for directions as to whether the council had a proprietary interest in the fees portion of the sale price.

147 The High Court (NZ) (Harrison J) held, first, that CPL was not holding the collection fees on the council's behalf but, second, that even if the council had had a proprietary interest in the collection fees, that interest would have constituted a security interest for the purposes of the *Personal Property Securities Act 1999* (NZ) (the NZ Act), which was similar legislation to the PPSA, which would have ranked after the security of the appointer: *Stiassny* v *North Shore City Council* [2008] 1 NZLR 825; [2008] NZ CCLR 7. An appeal to the Court of Appeal of New Zealand (Court of Appeal (NZ)) (*Stiassny CA*) was dismissed.

148 The council sought to characterise its interest in the funds as that of a beneficiary of a trust and argued, on that basis, that its interest in the funds was not a security interest under the NZ Act. The Court of Appeal (NZ) accepted the argument that the interest of a beneficiary of a trust does not, without more, amount to a security interest and said, of present relevance, at [29]:

> "… A security interest under s 17(1) [the equivalent to s 12 of the PPSA] must 'in substance [secure] payment or performance of an obligation'. The interest held by a beneficiary does not secure any obligation independent of those arising pursuant to the trust."

149 However, the council was unsuccessful because the Court of Appeal (NZ) held that the council's interest was not that of a beneficiary of a trust.

150 While I understood the parties to the present appeal to accept the correctness of the proposition in *Stiassny*, at [29], that the interest of a beneficiary under a trust *without more* is not a security interest, there was a significant issue whether the trust secured *another* obligation or payment, thereby putting it outside the "without more" principle in *Stiassny*.

151 I am not persuaded that Probuild's obligation to pay the Surplus Bond Moneys was separate from the trust. The operation of cl 2.6 of the deed of indemnity was contingent on the receipt by Probuild of Surplus Bond Moneys. The trust created by cl 2.6(a) did not secure any *separate* obligation to pay the amount of the Surplus Bond Moneys since Probuild's obligation to pay Allianz (by transferring the trust property to it forthwith on receipt) was a term of the trust. I do not read the passages from *Gold Valley* set out above as authorising an approach which disregards the need for a separate obligation when determining whether there is a security interest under the PPSA.

152 This is an important distinction between the present case and *Associated Alloys* where the trustee's/buyer's obligation to pay the beneficiary/seller was *not* a term of the trust. Rather, the trustee's/buyer's obligation to pay the trust money to the beneficiary/seller was an alternative way of effecting performance of a separate and parallel payment obligation (to pay the seller for the steel). Thus, to the extent that *Associated Alloys* bears on the present case, it does not support Probuild's argument that the interest of the beneficiary of the trust is a security interest since, unlike the buyer in *Associated Alloys*, Probuild's obligation to pay the Surplus Bond Moneys derived exclusively from the terms of the trust.

153 Nor am I persuaded that the trust created by cl 2.6(a) of the deed of indemnity operated as security for Probuild's obligation pursuant to cl 1.1 of the deed of indemnity to pay Allianz, on demand, the full amount that Allianz had paid May21 pursuant to the performance bonds. The obligation under cl 1.1 was separate and distinct from the trust of Surplus Bond Moneys created by cl 2.6(a). A breach of cl 1.1 was not a prerequisite for the creation of the trust under cl 2.6(a), which arose on receipt by Probuild of Surplus Bond Moneys.

154 Indeed, Mr Austin accepted that even if Probuild had repaid Allianz the entire amount which Allianz had paid to May21 under the performance bonds, Probuild would still hold any Surplus Bond Moneys on trust for Allianz and be obliged, by the terms of the trust, to pay Allianz (subject only to its obligation to make restitution for those funds in that scenario). In these circumstances, I do not consider that the trust constitutes security for Probuild's obligation pursuant to cl 1.1 of the deed of indemnity.

155 There are additional reasons why the trust created by cl 2.6(a) is not a security interest. The creation of such trust by the operation of cl 2.6(a) was *wholly* contingent on a payment to Probuild of Surplus Bond Moneys, which in turn depended on the respective rights and liabilities of Probuild and May21 between themselves under the building contract. That is, no trust came into existence unless and until Probuild received Surplus Bond Moneys from May21.

156 This situation would appear to have been contemplated by cl 2.6 of the Explanatory Memorandum to the Bill which became the PPSA, which said, of present relevance (in relation to what became s 12 of the PPSA):

> "A security interest would be created by a transaction that is a flawed asset arrangements that in substance secures payment or performance of an obligation. However, a security interest would ***not*** be created by an arrangement under which whether one person owes another person an obligation is conditional on the occurrence of certain events: because there is no interest in property that can be the object of the security interest.
>
> **Example**
>
> Person A buys its inventory from Person B on terms requiring it to pay within 90 days. However, if Person B fails to meet its supply obligations, then Person A is entitled to deduct an amount from the account owed to Person B in accordance with a formula specified in the contract. In substance, the account owed by Person A secures performance of Person B's obligation to supply inventory to Person A. Person B's account is a flawed asset: because Person B's entitlement to be paid the account is conditional on it continuing to supply inventory to Person A.
>
> **Example**
>
> An arrangement between Person B and Person A obliges Person A to pay Person B an amount on the occurrence of certain events. Person B does not have an interest in personal property that could be the object of a security interest."
>
> [Emphasis in original.]

157 The Court is obliged to prefer a construction of s 12 which would advance the purpose of the PPSA: s 15AA of the *Acts Interpretation Act 1901* (Cth). The evident purpose of the PPSA is to inform those dealing with a company which of its assets are already pledged as security. In these circumstances, it is improbable that Parliament intended a contingent arrangement of the kind in issue in the present case to be registered since there would be no utility in such registration. A search of the register would not inform the searcher (or enable him or her to ascertain) whether there were any Surplus Bond Moneys and, if so, the amount of such Surplus Bond Moneys.

158 It follows from the reasons set out above that I am not persuaded that the primary judge's decision can be justified on the ground set out in the notice of contention.

159 I note for completeness that the appellant sought an order that the first respondent account to it in the amount of $6,542,442.36 interest from 22 July 2022 compounded monthly at the rate set out Practice Note SC Gen 16. No submissions were made as to the compounding of interest. Further, it is not necessary to order an account, which would follow from the orders which I propose.

Proposed orders

160 I propose the following orders:

(1) Allow the appeal.

(2) Set aside the orders of the Court below and, in lieu thereof, make the following orders

(a) Declare that, subject to order (2)(b) below, the first respondent holds the sum of $7.7 million on trust for the appellant.

(b) Declare that the trust in order (2)(a) above is subject to a charge in favour of the second to fifth respondents in the amount of $1,157,557.64 (excluding GST).

(3) Unless a written application for a different order is made within 14 days, the respondents to pay the appellant's costs of the appeal and of the proceedings in the Court below.

****