SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCI 2024 0129

ASD CORPORATION AUSTRALIA PTY LTD (ACN 167 889 992) — Applicant

v

ALOIS BABICKA as trustee for ALOIS BABICKA FIRST TESTAMENTARY TRUST & ORS
(according to the attached Schedule) — Respondents

S EAPCI 2024 0130

ASD CORPORATION AUSTRALIA PTY LTD (ACN 167 889 992) — Applicant

v

NADIA ANNE MARIE BABICKA & ORS
(according to the attached Schedule) — Respondents

S EAPCI 2024 0131

ASD CORPORATION AUSTRALIA PTY LTD (ACN 167 889 992) — Applicant

v

MAZS INVESTMENT GROUP PTY LTD as trustee for M & A FAMILY TRUST & ORS
(according to the attached Schedule) — Respondents

JUDGES:	BEACH, RICHARDS and DONAGHUE JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	18 February 2026
DATE OF JUDGMENT:	3 March 2026
MEDIUM NEUTRAL CITATION:	[2026] VSCA 27
JUDGMENT APPEALED FROM:	[2024] VSC 587 (Garde J)

CONTRACT – Construction of commercial contracts — Entitlement to claim progress payments under s 9, *Building and Construction Industry Security of Payment Act 2002* — Whether contractual precondition to claim progress payments for Structure stage had been met — Contract entitled applicant to claim payment for Structure stage when 'building's structural steel frame and concrete panel works' had been 'completed and approved by a building surveyor' — Contractual preconditions to entitlement to progress payments partly corresponded to mandatory notification stages and inspections under *Building Act 1993,* with further preconditions — Builder entitled to milestone payment only when work had been 'approved' – No requirement under *Building Act 1993* for affirmative approval of building work — Whether precondition of 'approval by a building surveyor' in contract supplementary to statutory regime — Builder entitled to progress payment only when agreed works 'approved' — Concrete panel works not inspected — Agreed works not 'approved' — Leave to appeal refused.

Building and Construction Industry Security of Payment Act 2002, ss 3, 9; *Building Act 1993*, ss 33(1), 34, 35A, 76, 238; *Building Regulations 2018*, regs 167, 171.

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104, applied.

Counsel

Applicant in S EAPCI 2024 0129 & S EAPCI 2024 0130 & S EAPCI 2024 0131:	Mr JAF Twigg KC and Mr AR Morrison
First respondents in S EAPCI 2024 0129 & S EAPCI 2024 0130:	Mr R Andrew KC and Mr A Blunt
First respondent in S EAPCI 2024 0131:	No appearance
Second respondent in S EAPCI 2024 0129 & S EAPCI 2024 0130 & S EAPCI 2024 0131:	No appearance
Third respondent in S EAPCI 2024 0129 & S EAPCI 2024 0130 & S EAPCI 2024 0131:	No appearance

Solicitors

Applicant in S EAPCI 2024 0129 & S EAPCI 2024 0130 & S EAPCI 2024 0131:	Ward & Co Legal Consultants

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Second respondent in S EAPCI 2024 0129 & S EAPCI 2024 0130 & S EAPCI 2024 0131:	No appearance
Third respondent in S EAPCI 2024 0129 & S EAPCI 2024 0130 & S EAPCI 2024 0131:	No appearance

BEACH JA:

1 I agree with Donaghue JA.

RICHARDS JA:

2 I agree with Donaghue JA.

DONAGHUE JA:

3 These are applications for leave to appeal from three proceedings in the Supreme Court between the applicant builder, ASD Corporation Australia Pty Ltd ('the builder'), and the owners[1] of various allotments of land who contracted with the builder to construct warehouses on their land.

4 The single substantive issue raised by the application concerns the proper construction of the contracts entered into between the builder and the owners. Specifically, it concerns the interpretation of the special condition providing for the builder's entitlement to claim certain staged milestone payments.

Background

5 On 22 October 2022, the builder entered into substantially similar contracts with the three owners of different allotments of land in Coburg North for the construction of warehouses.

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1 The owners are, collectively, the first respondent in each proceeding. The first respondent in the third proceeding (being MAZS Investment Group Pty Ltd atf M & A Family Trust) went into voluntary liquidation on 7 October 2025. On 18 February 2026, the Court granted leave to proceed against that respondent pursuant to s 500(2) of the *Corporations Act 2001* (Cth), subject to the builder undertaking not to take any step to recover any sum of money from the first respondent pursuant to any order made by this Court without first obtaining the leave of this Court. The liquidator did not oppose the application for leave to proceed, and indicated that it did not seek to participate in the application for leave to appeal or (if leave was granted) in the appeal.

6 The contracts provided that the builder was entitled to claim milestone payments for the completion of defined stages of work. Specifically, special condition 4 ('SC-4') stated that the builder was 'entitled to claim milestone payments for the stages and percentages of the Contract Price' in accordance with the table of stages listed. The 'Structure' stage was defined as follows:

> *Structure Stage* means the stage when a building's structural steel frame and concrete panel works has been completed and approved by a building surveyor.

7 The only question raised by this application concerns the proper construction of the requirement that the 'structural steel frame and concrete panel works' be 'approved by a building surveyor'.

8 On 31 August 2022, a building surveyor (Mr Shafto) had issued building permits for the construction of the warehouses under the contracts. As was required by reg 171 of the *Building Regulations 2018* ('Regulations'), those building permits required mandatory inspections at certain specified stages of construction ('mandatory notification stages'), including inspection of the 'framework — prior to lining'.[2]

9 After the steel framework had been completed, Mr Shafto authorised a registered building inspector (Mr Muj) to conduct the inspection of that framework on his behalf.[3]

10 On 10 August 2023 and 17 October 2023, Mr Muj inspected the structural steel frames on each lot and issued certificates of compliance with respect to those frames. Mr Muj's evidence, which was challenged but ultimately accepted by the trial judge, was that he did not inspect or approve the precast concrete panels.[4]

11 On 8 August 2023, the builder issued invoices for progress payments at the Structure stage to two of the owners. Those invoices were paid.[5]

12 On 19 October 2023, the builder issued a payment claim for the Structure stage milestone to the third owner (being MAZS Investment Group). On 1 November 2023, payment claims for a subsequent milestone were issued to the other two owners. These three payment claims were disputed by the owners ('disputed payments').[6]

13 The builder responded by invoking the mechanisms created by the *Building and Construction Industry Security of Payment Act 2002* ('*Security of Payment Act*'). The object of that Act is, relevantly, 'to ensure that any person who undertakes to carry out construction work … is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work' (s 3(1)). 'The means by which the Act ensures that a person is *entitled* to receive a progress payment is by granting a

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2 *Babicka v ASD Corporation Aust Pty Ltd* [2024] VSC 587, [60] ('Reasons').
3 Reasons, [61]–[62], [70].
4 Reasons, [67], [71].
5 Reasons, [6].
6 Reasons, [7]–[9].

statutory entitlement to that payment in accordance with this Act' (s 3(2) (emphasis added)). 'The means by which this Act ensures that a person is able to *recover* a progress payment is by establishing a procedure that involves … the referral of any disputed claim to an adjudicator for determination' and 'the payment of the amount of the progress payment determined by the adjudicator' (s 3(3)).

14 The entitlement to receive progress payments is created by s 9(1) of the *Security of Payment Act*. It is conferred 'on and from each reference date under a construction contract'. By s 9(2), 'reference date' is defined as follows:

> In this section, ***reference date***, in relation to a construction contract, means—
>
> (a) a date determined by or in accordance with the terms of the contract as—
>
> (i) a date on which a claim for a progress payment may be made; or
>
> (ii) a date by reference to which the amount of a progress payment is to be calculated—
>
> in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods or services supplied or to be supplied under the contract …

15 Accordingly, the 'reference date' for the purposes of s 9 is determined 'in accordance with the terms of the contract as … a date on which a claim for a progress payment may be made'. In the present case, the identification of that date therefore turns on the interpretation of SC-4 (specifically, on whether the definition of the Structure stage had been met).

16 The builder made a payment claim under Pt 3 of the *Security of Payment Act* with respect to the disputed payments. Ultimately, in November 2023, an adjudicator determined that each of the claims were payable. Judgment was subsequently entered against the owners in the County Court in December 2023 for the amounts determined by the adjudicator.

17 The owners commenced proceedings for judicial review seeking orders quashing the determinations made by the adjudicator and setting aside the judgments of the County Court. Each owner submitted that the relevant reference dates had not been reached when the payment claims were made, and therefore that the adjudicator had no power to make the determinations.

18 The trial judge, in a single set of reasons given in all three proceedings, quashed the determinations of the adjudicator. In a subsequent judgment, his Honour set aside the judgments of the County Court that were based upon those determinations.[7] There is no application for leave to appeal against that subsequent judgment.

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7 *Babicka v ASD Corporation Australia Pty Ltd (No 2)* [2024] VSC 751.

The judge's reasons

19 The trial judge held that the builder was not entitled to receive progress payments with respect to the 'Structure' stage because that entitlement was conditional upon a building's 'structural steel frame and concrete panel work [having] been completed and approved by a building surveyor', and no such approval had been given.[8]

20 His Honour recognised that the relevant building permits required mandatory inspection of the 'framework — prior to lining'. He accepted that inspections had been carried out by Mr Muj, an authorised building inspector, on 10 August and 17 October 2023. He also accepted that Mr Muj was authorised under s 238(1) of the *Building Act 1993* ('*Building Act*') to undertake the mandatory inspections of the structural steel frames under the building permits on behalf of a building surveyor.[9] However, his Honour held that s 238(1) 'applies to the performance of functions under the *Building Act* and regulations' and that it 'has no wider application'.[10] He characterised Mr Muj's inspections as no more than a 'mandatory inspection under a building permit which … a registered building inspector carried out on behalf of the relevant building surveyor'.[11]

21 The judge held that the inspections carried out by Mr Muj did *not* satisfy SC-4 because Mr Muj was not 'a building surveyor'. His Honour reasoned:

> Under the Structure stage … completed works have to be approved by 'a building surveyor'. The provisions are construed objectively. A reasonable businessperson would understand that they required the works to be inspected and approved by a building surveyor and would not have any doubt or ambiguity about what was required. The provisions have a clear commercial purpose. They are intended to ensure that the works are completed to a standard which is approved by a building surveyor. The provisions give assurance to the owners and their financiers. Approval by a building surveyor of the Structure stage or Base stage would ordinarily be in writing given its importance to the owners and builder.[12]

22 It followed from that reasoning that the precondition for the builder's entitlement to receive progress payments in respect of the Structure stage had not arisen. As his Honour put it:

> Mr Muj was not authorised to give the Structure stage approval under the contracts. He was not a building surveyor, and it was necessary that the Structure stage approval be given by a building surveyor. The contracts make no provision for the delegation of this responsibility.[13]

23 His Honour continued:

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8 Reasons, [75].
9 Reasons, [62], [68].
10 Reasons, [59].
11 Reasons, [67].
12 Reasons, [63] (emphasis added).
13 Reasons, [69].

> [I]t is plain that Mr Muj was carrying out a framework inspection as required by the relevant building surveyor in the building permit. This is what he had authority to do … He was not carrying out an inspection with a view to approval of the Structure stage. He was not a building surveyor and was not authorised under the contracts to approve the Structure stage of works.[14]

24 Importantly, in addition to the above reasoning, his Honour also found that Mr Muj's inspections had been 'limited to an inspection of the structural steel frames of the warehouses' and that, while the builder had 'emailed Mr Shafto and Mr Muj requesting an inspection of both precast panels and structural steel', no inspection of the concrete panel work took place.[15] That finding is not challenged in this application.

25 His Honour's ultimate conclusion as to the completion of the structural stage was that 'the structural steel frame *and the concrete panel works* had not been inspected or approved by a building surveyor'.[16]

26 The judge also accepted the owners' submission that it was a precondition to satisfying a later stage under SC-4 that each earlier stage had been completed. For that reason, the two payment claims for completion of the subsequent stage were premature, because the Structure stage had not been attained.[17]

27 In the result, his Honour determined that orders in the nature of certiorari quashing the three determinations of the adjudicator should be made.

The application for leave to appeal

28 The single ground of appeal proposed by the builder is:

> The trial judge misconstrued the approval requirement in Special Condition 4 of the formal instrument of agreement of each of the Contracts and therefore concluded that the Structure Stage milestone for progress payment had not been met.
>
> The trial judge ought to have found that, to the extent that approval of the works was required, Special Condition 4 of the formal instrument of agreement of each of the Contracts required satisfactory completion of the mandatory inspection, as required by the Building Permit and *Building Act 1993*, for the approval requirement in the Structure Stage milestone to have been met.

29 In opposing the grant of leave to appeal, the owners submit that the argument embodied in the above ground is new, and contradictory to that which was run below.

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14 Reasons, [74].

15 Reasons, [66]–[67] (as to the inspection on 10 August 2023) and [71] (as to the inspection on 17 October 2023).

16 Reasons, [75] (emphasis added).

17 Reasons, [77]–[84], [97], applying *Cardona v Brown* (2012) 35 VR 538, 554 [67] (Tate JA, Bongiorno JA agreeing at 540 [1], Osborn JA agreeing at 562 [102]); [2012] VSCA 174.

They contend that in the court below the builder accepted that the Structure stage included a requirement that the concrete panels be completed and approved by a building surveyor, and argued that such approval had been given. The builder now submits that the only approval necessary is that required under the *Building Act*, which does not require any inspection or approval of concrete panel works. In reliance upon well-known authorities,[18] the owners contend that the builder should not be permitted to advance a different case on appeal to that advanced below, and that leave to appeal should be refused for that reason.

30 There is force in that submission. However, I have decided to address the proposed ground on its merits in circumstances where: (i) the builder contends that its case below 'evolved' from its opening submissions, and on that basis denies that it is raising a new point on appeal; (ii) the argument involves a question of law; and (iii) full argument has been advanced and, having considered that argument, I have concluded that the proposed ground of appeal should fail.

The builder's argument

31 The builder's central contention is that, on the proper construction of SC-4, the Structure stage progress payment reference date was the date on which two conditions were satisfied, being: (i) the steel frame and concrete panel works were complete; and (ii) such approvals as were necessary under the building permits and the *Building Act* for the framework mandatory notification stage were obtained.

32 The relevant principles governing the construction of commercial contracts are well-established, and they were not in dispute between the parties. As a plurality of the High Court said in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*:

> 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.
>
> 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.
>
> …
>
> Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is

[18] *Coulton v Holcombe* (1986) 162 CLR 1, 7–8 (Gibbs CJ, Wilson, Brennan and Dawson JJ); [1986] HCA 33; *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481, 483 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ); [1985] HCA 28. See also *Whisprun v Pty Ltd v Dixon* (2003) 77 ALJR 1598, 1608 [51]–[52] (Gleeson CJ, McHugh and Gummow JJ); [2003] HCA 48; *Mayfair Land Holdings Pty Ltd v Terafortis Ltd* [2025] VSCA 343, [15] (Walker, Orr and Kenny JJA).

> entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties ... intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".[19]

33 The builder argues that, applying the above principles, the reference in SC-4 to 'approval by a building surveyor' should be understood as commercial shorthand for the mandatory inspection of the framework stage that is required to be performed in accordance with the *Building Act* and reg 167 of the Regulations. It contends that the objective intention of the parties with respect to the 'approval' required by SC-4 in order to enliven the builder's entitlement to a progress payment was not to superimpose a requirement for approval over and above what was required by that legislation.

34 For reasons that I will explain, in this case it is ultimately the ordinary meaning of the text of SC-4 that is determinative. However, I accept the builder's contention that the meaning of that text must be determined in context, which in this case includes the fact that the parties agreed to contracts that were to operate in an area that is subject to the regulatory framework created by the *Building Act* and Regulations. For that reason, it is necessary to address the relevant elements of that framework.

The Building Act and Building Regulations

35 The relevant parts of the regulatory framework are as follows:

(a) Section 76 of the *Building Act* provides that a private builder surveyor may be appointed to carry out functions including 'the issuing of building permits' and 'the carrying out of inspections of … building work under Part 4'.

(b) Section 33(1) of the *Building Act* provides that the person named as the builder in a building permit issued for building work must ensure that the relevant building surveyor is notified without delay of the completion of each mandatory notification stage of that work. Breach of that requirement attracts a significant penalty. The phrase 'mandatory notification stage' is defined in s 3 to mean 'a prescribed stage of building work'. By reason of reg 167(c) of the Regulations, 'the completion of framework' is a 'mandatory notification stage'.

(c) Section 34 of the *Building Act* provides that, upon being notified that a mandatory notification stage has been completed, the relevant building surveyor 'must cause the building work to be inspected in person'.

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19 (2015) 256 CLR 104, 116 [46]–[47], 118 [51] (French CJ, Nettle and Gordon JJ); [2015] HCA 37. See also *Perpetual Ltd v Myer Pty Ltd* [2019] VSCA 98, [75] (Whelan, Niall and Hargrave JJA); *PCCEF Pty Ltd v Geelong Football Club Ltd* [2019] VSCA 144, [27] (Whelan, McLeish and Emerton JJA); *Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2020] VSCA 201, [70] (Whelan JA and Riordan AJA).

(d) The words 'must cause' in s 34 suggest that a relevant building surveyor is not required to carry out the inspection under that section personally. So much is confirmed by s 35B, which provides that the relevant building surveyor must not cause a person to carry out an inspection under s 34 'on behalf of' the relevant building surveyor unless, relevantly, the person who conducts the inspection 'is registered as a building surveyor or a building inspector under Part 11 and the person's registration authorises the carrying out of that inspection'. It is further confirmed by ss 238(1) and (2) of the *Building Act*, which provide that a building surveyor may rely on a certificate by a registered building practitioner (issued following inspection) that building work complies with the Act or Regulations.

(e) Section 35A of the *Building Act* requires that, on completion of an inspection under s 34, the relevant building surveyor must ensure that a record of the inspection containing the prescribed information is made. On receipt of a written request from, amongst others, the owner of the land on which the building work was carried out, the relevant building surveyor must without delay provide a copy of that record to that owner.

36 It may be noted that the provisions summarised above do not require a relevant building surveyor to 'approve' particular building work following mandatory notification and inspection. All they require is that when work reaches a 'mandatory notification stage' the work must be 'inspected in person'. The work may then continue unless the relevant building surveyor directs that the work stop (s 33(2)) or gives a direction to fix the building work under Div 2 of Pt 4. There is no requirement under the *Building Act* for an affirmative 'approval' of building work.[20] For that reason, the builder's argument that the words 'approved by a building surveyor' in SC-4 direct attention only to the mandatory statutory inspections necessarily entails the proposition that those words should be construed as meaning 'not disapproved by a building surveyor' following a mandatory inspection.

37 Having regard to the above regulatory regime, there is much to be said for the conclusion that the objective intention of the parties is that the requirement for 'approval by a building surveyor' is informed by the statute (and for that reason that approval is capable of being provided an authorised building *inspector* who a building *surveyor* has caused to carry out an inspection). I would not readily conclude that commercial parties intended that a mandatory inspection of particular work that satisfies the requirements of the *Building Act* is not also sufficient to satisfy SC-4. That would have the consequence that, in cases where a building *inspector* had carried out the inspections required to comply with the *Building Act*, a duplicate inspection by a building *surveyor* would be needed before the builder would be entitled to the milestone payment. That construction of SC-4 would be apt to increase cost and delay, in circumstances where the essential purpose of both inspections would be to ensure

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20 Cf *Domestic Building Contracts Act 1995*, s 40(1) (definition of 'frame stage'), which regulates the progress payments that may be recovered under a major domestic building contract. The contracts in this case were not major domestic building contracts and were not subject to the *Domestic Building Contracts Act 1995*.

that the relevant work had been completed to the requisite standard. In those circumstances, I consider that a reasonable businessperson would have understood the definition of the Structure stage in SC-4 — in so far as it relates to the structural steel frame — to entitle the builder to receive a milestone payment upon satisfactory completion of the mandatory inspection of the steel framework that must occur under the *Building Act*.

38 In other words, *if* the parties had agreed that the builder was entitled to a milestone payment upon the structural steel frame (by itself) being completed and approved by a building *surveyor*, then in circumstances where s 33(1) and s 34 of the *Building Act* provides for mandatory inspection of 'the completion of framework', but expressly allow the relevant building surveyor to 'cause' that inspection to be carried out by a building *inspector*, there would have been considerable force in the argument that the completion of such an inspection without the making of any directions under Div 2 of Pt 4 would have constituted 'approval by a building surveyor' so as to enliven the entitlement to a milestone payment under SC-4. To the extent that the trial judge held otherwise, I respectfully disagree.[21] It follows that I likewise do not accept that the requirement in SC-4 for approval by a 'building surveyor' has a 'clear commercial purpose'[22] that is distinct from that served by the *Building Act* regime.

39 But that conclusion does not assist the builder in this case. That follows because the parties did *not* agree that the builder was entitled to a milestone payment upon the structural steel frame (by itself) being completed and approved.

Approval of concrete panel works is required by SC-4

40 The builder correctly accepted (in oral argument) that it is open to the parties to a contract to supplement the mandatory inspections and approvals under the *Building Act*. It is likewise open to the parties to specify that any entitlement to milestone payments arises only upon satisfaction of such supplementary requirements. In my opinion, that is what the parties did when they agreed to the terms of SC-4. To the extent that this made the entitlement to milestone payments dependent on approvals that are additional to those required by the *Building Act*, I reject the builder's argument that this is inconsistent with the *Building Act*. It is simply a contractual supplementation of the statutory scheme.

41 The builder submits that the preferable construction of SC-4 is that it does not require any inspection or approval in relation to concrete panel works. It contends that the language of SC-4 is 'properly understood [as] commercial shorthand for the inspection of the mandatory framework stage', and that the building surveyor is not engaged to perform any commercial function as between the parties. As developed in oral argument, the builder advances three main propositions in support of that submission.

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21 Reasons, [63], [69], [74].

22 Reasons, [63].

42 *First*, the builder contends that the preferable construction of SC-4 is that it does not require approval of the concrete panel works because such an approval would be 'devoid of content'. I do not accept that submission. It is true that neither the *Building Act* (nor the building permit issued thereunder) required notification, inspection or approval of concrete panel works. However, even on the builder's construction of SC-4, its entitlement to the Structure milestone payment depends in part upon whether the 'concrete panel works ha[ve] been completed'. That being so, the approval of 'concrete panel works' is apt to require, at least, consideration of whether the concrete panel works that the contract requires are complete.

43 Furthermore, as the owners pointed out, the *Building Act* does not prescribe the content of the inspection that is required upon 'the completion of framework' (that being a mandatory notification stage under s 33). Thus, even in the context of a mandatory inspection of the steel framework under ss 33 and 34 of the *Building Act*, it is left to the professional judgment of the building surveyor to determine what (if any) action is required following that inspection. The 'approval' that is required is not devoid of content. The same is true of the required 'approval' of the concrete panel works.

44 *Secondly*, the builder submits that the preferable construction of SC-4 is that it does not require a building surveyor to approve the concrete panel work because that would 'work a commercial nonsense' in circumstances where the building surveyor was not engaged to perform or required to perform inspections other than the mandatory inspections under the *Building Act*, and the builder could not *compel* a building surveyor to inspect or approve any work that is not subject to mandatory inspection under the *Building Act*. The builder contends that its inability to compel the building surveyor to inspect and approve the concrete panels would have the consequence that it would have been required to complete the work, without it becoming entitled to further payments. I reject that argument. Particularly in the absence of any evidence, I see no reason to conclude that a building surveyor would refuse to inspect (or cause to be inspected) stages of building work — over and above the mandatory statutory inspections — if requested to do so and if appropriately remunerated. While I readily accept that the purpose of SC-4 in providing for staged milestone payments is to provide the builder with cashflow to progress and complete the works under the contract, the entitlement to those milestone payments depends on the objective intention of the parties as to when that entitlement was to arise.

45 The 'commercial nonsense' submission would be even weaker if, as the judge found, the reference to 'approval by a building surveyor' in SC-4 is appropriately construed as meaning approval given by 'any' qualified building surveyor.[23] That construction would mean that if (hypothetically) Mr Shafto had refused to inspect or approve the structural steel frame, the builder could have shopped around until it could find a building surveyor who would grant the necessary approval, and thereby enlivened its entitlement to the Structure milestone payment. If the builder can obtain the necessary approval from *any* building surveyor, then the fact that it cannot *compel* a particular building surveyor to inspect and approve the concrete panels would be of little

23 Reasons, [64].

moment. The builder attacks the proposition that 'any' building surveyor can give the approval to which SC-4 refers, while the owners defend it. I am inclined to doubt the correctness of that proposition, which would produce commercial inconvenience and uncertainty in the event that different building surveyors gave conflicting opinions. Ultimately, however, in light of my rejection of the 'commercial nonsense' submission in the previous paragraph, it is not necessary to reach a concluded view on this point.

46 *Thirdly*, the builder advanced a brief argument based upon the certification role given to a superintendent under the contract. The argument is difficult to follow.[24] It includes the contention that the building surveyor was not engaged in order to certify payments under the contract, that being the role of the superintendent. In oral submissions, the builder further submitted that there is no need for a superimposition of an extra certification process by the building surveyor, noting that, unlike the terms providing for the appointment of a superintendent, the contract contains no 'controlling mechanism' governing a building surveyor's appointment or duties. The builder also submits that there was no reason to suppose that the owners or their financier relied upon the 'approval' of the building surveyor for an assurance as to the completion of the works. However, it then submits that, to the extent that any such assurance was intended to arise from SC-4, it came only from the phrase 'the steel frame and concrete panel works are complete'. The factual basis for that claim is unclear. In my view, the fact that some provisions of the contracts contemplated a particular role for a superintendent does not have any bearing on the meaning of the specific language in SC-4 that requires the 'approval of a building surveyor' as a precondition to entitlement to the Structure milestone payment.

47 For the above reasons I conclude that effect should be given to the language of SC-4, which provides that the builder was entitled to the Structure milestone payment only when the structural steel frame *and* the concrete panel work had been 'approved'.[25] I do not accept that the objective intention of the parties in agreeing to that language was that the builder's entitlement to the milestone payment turned solely upon completion of the inspection of the steel framework. Indeed, to construe SC-4 in that way would be to ignore its language. That language identifies the preconditions to entitlement to the Structure milestone payment in terms that partly correspond to steps that must occur under the *Building Act*, but also add further preconditions that arise from the contract itself (ie, the requirement that the concrete panel work has been completed and 'approved by a building surveyor').

Disposition

48 Before the trial judge, the builder did not dispute the above construction of SC-4. Instead, it attempted to establish that the concrete panel work had in fact been

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24 The owners responded to the argument in part by pointing out that no superintendent was in fact named in the contract (the relevant place for this having been left blank), and that the argument below had not referred to the superintendent and so the evidence did not explore the reason for this.

25 That conclusion does not depend upon construing special condition 4 *contra proferentem* (as the owners contended it should be construed).

approved as required. That attempt failed for two reasons. It failed because — in common with his Honour's reasoning concerning the structural steel frame — the judge found that an inspection by a building inspector did not satisfy the contractual requirement that the work be 'approved by a building surveyor'.[26] But, critically, it also failed because the judge found as a fact — after an evidential contest on the point — that no inspection of the concrete panel works took place *at all* (whether by a building inspector or a building surveyor).[27] In oral argument, the builder accepted that this second reason was one of the reasons that it was unsuccessful before the trial judge.

49 That second reason has the consequence that — on factual findings that are not sought to be challenged on appeal — the builder's entitlement to the Structural milestone payments was not enlivened. The judge was correct to so find. That is the case irrespective of whether the 'approval' of the concrete panel works that is required by SC-4 had to be given by a building surveyor, or whether it could have been given by a building inspector who a building surveyor had caused to inspect the concrete panel work. It is therefore unnecessary to resolve that question.[28]

50 I would dismiss the application for leave to appeal.

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26 Reasons, [69], [74], [75]. I have expressed my disagreement with that conclusion above.

27 Reasons, [67], [71]. See also [75].

28 The answer to that question might be different to the answer that applies to the structural steel framework, because the latter answer turns in part on statutory provisions that expressly authorised a building surveyor to delegate the inspection of the framework to a building inspector. Those provisions may not be engaged with respect to an inspection that is not required by the *Building Act 1993*.

SCHEDULE OF PARTIES

S EAPCI 2024 0129

ASD CORPORATION AUSTRALIA PTY LTD (ACN 167 889 992)	Applicant
and	
ALOIS BABICKA atf ALOIS BABICKA FIRST TESTAMENTARY TRUST	First respondent
WILLIAM TIMOTHY SULLIVAN	Second respondent
THE COUNTY COURT OF VICTORIA	Third respondent

S EAPCI 2024 0130

ASD CORPORATION AUSTRALIA PTY LTD (ACN 167 889 992)	Applicant
and	
NADIA ANNE MARIE BABICKA	First respondent
WILLIAM TIMOTHY SULLIVAN	Second respondent
THE COUNTY COURT OF VICTORIA	Third respondent

S EAPCI 2024 0131

ASD CORPORATION AUSTRALIA PTY LTD (ACN 167 889 992)	Applicant
and	
MAZS INVESTMENT GROUP PTY LTD atf M & A FAMILY TRUST	First respondent

WILLIAM TIMOTHY SULLIVAN	Second respondent
THE COUNTY COURT OF VICTORIA	Third respondent