

## Article Information

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Service: Construction Litigation, Projects Infrastructure & Construction

Sector: Infrastructure

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## The 'one contract rule' confirmed: Ventia Australia v BSA Advance Property Solutions

**The Supreme Court has again been asked whether a payment claim made in respect of multiple work orders issued under a standing order contract was a valid payment claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) (SoP Act).**

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The decision is *Ventia Australia Pty Ltd v BSA Advanced Property Solutions (Fire) Pty Ltd*<sup>[1]</sup> and is of interest to parties to standing order contracts and the industry more generally as confirming the 'one contract rule' under the security of payment regime.

### Facts

Ventia and BSA were parties to a standing order contract<sup>[2]</sup> (the **Subcontract**) entered into in 2016 providing that BSA could be engaged to perform specific building services works<sup>[3]</sup> detailed in a work order issued by Ventia. The standing order contract providing that each issued work order formed a separate contract, governed by the terms of the standing order contract and terms (as to price, quantities, timing etc) detailed in the work order.

In early 2021, a payment dispute arose over a payment claim for \$2.979M BSA had issued just shortly before the Subcontract was terminated. BSA obtained an adjudication determination under the SoP Act in its favour (for \$2.69M).

Ventia commenced the proceedings challenging the determination on the basis that BSA's payment claim was invalid under s13(1) of the SoP Act as it claimed amounts referable to multiple work orders<sup>[4]</sup> each of which formed a separate contract. Ventia relied upon the 'one contract rule' derived from the *Nebax*<sup>[5]</sup> decision in 2012, in which section 13(5) of the Act (as it then was) was found to prevent 'the service of more than one payment claim per reference date per construction contract'.<sup>[6]</sup>

### Decision

The Court upheld the 'one contract' rule as a jurisdictional fact<sup>[7]</sup> that a payment claim must satisfy as consistent with the correct 'in the singular'<sup>[8]</sup> construction of the relevant provisions of the SoP Act in force at 2016. The fact that a claimant's entitlement to a progress payment was conditioned on the existence of a single "reference date" was found to be significant, as was the "need for speed" in the "brutally fast" adjudication process.

The Court also upheld the 'comprehensive' provisions of the Subcontract deeming the formation of a separate contract upon issue of each work order (including against a challenge that they were void under section 34 of the SoP Act) and rejected an argument that the standing order contract itself was a singular 'construction contract' within the meaning of the SoP Act as it constituted an 'other arrangement'.<sup>[9]</sup>

### Implications

The *Ventia* decision confirms that payment claims made in respect of multiple work orders under standing order contracts entered into prior to 21 October 2019<sup>[10]</sup> are likely to be invalid for the purposes of the SoP Act. Further, while the Court was careful to point out that the abolition of reference dates for construction contracts entered into on and from 21 October 2019 could change this position, the "need for speed" and consistently 'singular' drafting remains, suggesting that

the 'one contract' rule is here to stay.

This being the case, it means that valid SoP Act payment claims cannot be made in respect of multiple work orders issued under standing order contracts, no matter how uneconomical or impractical it may be to pursue the claims individually. There is no recognised '*imperative to make adjudication applications as affordable as possible*'<sup>[11]</sup> capable of voiding the provisions of standing order contracts deeming that each work order forms a separate contract.

The practical deterrent of the additional filing fees, legal fees and adjudicators fees such separate claims will attract is a burden claimants will have to bear. In response to adjudication applications related to an individual 'work order', respondent head contractor's will (typically) remain entitled to raise all nature of defences, set offs and back-charges potentially across the entire project.

The *Ventia* decision is also significant in that by confirming the 'one contract rule' as a jurisdictional obstacle under the SoP Act (a result many respondents will be keen to replicate) it may well encourage the use of standing order contracts and drafting in place of standard subcontracts.

An extreme expression of that approach would be drafting that deemed a 'work direction' to the subcontractor for additional work (normally understood as a variation direction) as forming a separate agreement<sup>[12]</sup> and therefore required to be claimed separately. Subcontractors should take notice of any such drafting should it emerge.

*This article has been written for general educational purposes only, and is not to be taken as legal advice.*

<sup>[1]</sup> [2021] NSWSC 1534.

<sup>[2]</sup> Also commonly referred to as 'standing order' or 'purchase order' contracts.

<sup>[3]</sup> Building essential services across NSW Land and Housing Corporation properties throughout Sydney.

<sup>[4]</sup> A total of just seven, noting that over the course of each year of the Subcontract, some 8600 work orders were issued to BSA.

<sup>[5]</sup> *Rail Corporation of NSW v Nebax Constructions Pty Ltd* [2012] NSWSC 6.

<sup>[6]</sup> [44] *Nebax*.

<sup>[7]</sup> Finding against obiter dicta in *Ausipile v Bothar Boring* [2021] QCA 223 that the issue needs to be raised in a payment schedule.

<sup>[8]</sup> Notwithstanding s 8(b) of *Interpretation Act 1901* (Cth) potentially opening the door to a plural interpretation.

<sup>[9]</sup> '**construction contract** means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party'.

<sup>[10]</sup> The construction being underpinned by repealed 'reference date' provisions in force prior to that date.

<sup>[11]</sup> [93] *Ventia*.

<sup>[12]</sup> The directed work to be carried out at the directed price calculated at rates stated in the subcontract and otherwise in accordance with the terms of the subcontract.