

## Article Information

Authors: Daniel Fitzpatrick, Joshua Lam

Service: Construction Litigation, Projects, Infrastructure & Construction, Property & Development, Public Private Partnerships

Sector: Electricity & Gas Regulation, Energy & Resources, Infrastructure, Mining, Oil & Gas, Power & Utilities, Real Estate, Renewables, Transport & Logistics

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## It's not fixed price, if you believe it: The curious case of the cost plus Payment Claim

**Is an unanswered "cost plus" payment claim valid in statutory debt proceedings if its contract is "fixed price"? The decision in *Manariti v Universal Property Group*<sup>[1]</sup> answers this ancient Security of Payment riddle.**

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### Background

The statutory debt sanction for unanswered payment claims made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SoP Act**) is notorious. Respondents who have failed to provide a payment schedule are barred under s 15(4) of the SoP Act from raising cross-claims or defences arising under the construction contract and this has been interpreted broadly by the Courts in recent years, which has prevented challenges by respondents as to the claims not being for construction work and services under the relevant contract but instead being damages claims (not recoverable under the SoP Act). *Manariti* provides yet another example of this approach, but in a context that demonstrates just how detached statutory debts under s 15(2)(a) of the SoP Act can be from the underlying progress payment the Claimant is entitled to.

### Facts

Manariti entered into a construction contract with UPG to carry out plumbing works as part of UPG's multi-dwelling housing development. On 31 March 2024, Manariti served on UPG, described as a payment claim made under the SoP Act, a covering email with attachments including an invoice, subcontractor statement, and a detailed spreadsheet showing the calculation of the Claimed Amount.

The spreadsheet (detailing costs / margin) clearly outlined Manariti's claim was made on a "cost plus" basis, observed by the Court of Appeal as an "*ostensibly curious shift*" from the fixed price calculations underpinning Manariti's payment claims.

UPG did not pay the claimed amount nor serve a payment schedule. Consequently, Manariti sought summary judgment in its s 15(2)(a) proceedings in the District Court. The District Court refused summary judgment on the basis that there was a real issue to be tried as to the validity of the payment claim. Manariti then appealed to the Court of Appeal.

### Decision

The Court of Appeal granted leave to appeal and allowed the appeal, with costs, concluding that in this case (where the existence of a contract was not in doubt) that summary judgment should be entered if the Court was satisfied that there was no triable issue about the existence of the circumstances in s 15(1) of the SoP Act, relevantly:

- service of a payment claim
- failure to provide a payment schedule; and
- failure to pay the claimed amount on or before the due date for payment.

The two arguments advanced as to why there was a triable issue were that the Payment Claim did not identify the

construction work to which the progress payment relates and that it was not made on a proper basis, i.e. it was not for “construction work” but for amounts asserted as recoverable under the general law by way of damages. Both arguments failed. The spreadsheet was sufficient reference to the work to which the claimed progress payment relates and the precedent in *Enermech*<sup>[2]</sup> that ‘it is not a condition of the validity of a payment claim that it is demonstrably a claim “for” construction work or related goods and services’. Any dispute as to the characterisation of the claims has to be raised in a Payment Schedule.

### **Takeaways**

Whether the contract in this case was “fixed price” but varied to “cost plus” prior to Manariti’s payment claim, or whether the “cost plus” entitlement was based on a speculative or imagined re-interpretation of the actual contract provisions will likely remain a matter only known to the parties in this case.

What is curious though is the Court of Appeal’s complete indifference to the terms of the contract. The fact there was a construction contract in place was sufficient for the purposes of the statutory debt proceedings – there is no material enquiry as to its terms notwithstanding the apparent significance of the shift could have led to speculation that the payment claim was made in respect of a different contract to the true contract between the parties.

Curious also that the result confirms that while SoP statutory debts arise from the statutory right to a progress payment (and in many respects treated like progress payments), they can certainly include amounts that would never be recoverable through adjudication. The result is certainly a good one for claimants and again emphasises the risk respondents run if they fail to provide valid and timely payment schedules and steer the dispute into the safer harbour of adjudication.

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[1] *Manariti Plumbing Pty Ltd v Universal Property Group Ltd* [2025] NSWCA 135.

[2] *Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd* (2024) 115 NSWLR 56; [2024] NSWCA 162.