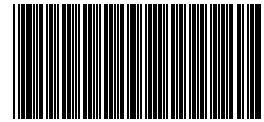




Filed: 15 August 2025 5:16 PM



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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00085250

TITLE OF PROCEEDINGS

First Applicant	BETTAR HOLDINGS PTY. LIMITED trading as Hunt Collaborative ACN 050061946
First Prospective Respondent	RWC BROOKVALE INVESTMENT PTY LTD ACN 670150437

FILING DETAILS

Filed for	RWC BROOKVALE INVESTMENT PTY LTD, Prospective Respondent 1
Legal representative	Dale Cliff
Legal representative reference	
Telephone	

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Bettar Holdings Pty Ltc v RWC Brookvale Investments Pty Ltd Amended Outline 15.08.25.pdf)

[attach.]

IN THE SUPREME COURT OF NEW SOUTH WALES, COURT OF APPEAL

Number: 85250 of 2025

Appellant: **BETTAR HOLDINGS PTY LTD (TRADING AS HUNT
COLLABORATIVE)
ACN 050 061 946**

AND

Respondent: **RWC BROOKVALE INVESTMENT PTY LTD
ACN 670 150 437**

Amended Submissions of the Respondent

These Amended Submissions dated 15 August 2025 are filed pursuant to rule 51.36(1)(b) of the Uniform Civil Procedure Rules 2005 (NSW). Omission of matter is indicated with strike-through, and insertion of matter is underlined.

1. The appeal should be dismissed because:
 - a. it is based entirely upon an alleged statutory debt arising from non-compliance with a payment claim pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) and accordingly the appellant had to comply with the strict requirements of that legislation;
 - b. there was no concluded agreement between the parties for performance of construction work;
 - c. in the absence of any concluded agreement the alleged claim based on estoppel does not assist;
 - d. the payment claim is based upon hourly rates for alleged construction management services which rates do not appear anywhere in the terms proposed by the appellant;
 - e. the payment claim did not reasonably identify the construction work to which it related such that the basis of the claim was reasonably comprehensible to the respondent;

- f. more than half of the payment claim was for an amount constituting damages for breach of contract or loss of opportunity to receive in full a contracted lump sum price;
- g. the payment claim was not served on the defendant's ordinary place of business within the meaning of section 31 of the Act;
- h. there is no demonstrated error in the exercise of discretion at first instance to award indemnity costs.

The appellant's pleaded case

2. The appellant pleads:-

- a. that it provided the respondent with the appellant's preferred form of contract and proposed commercial terms for the provision of construction management services on 24 October 2023;
- b. that by email dated 27 October 2023 sent at 2.47pm the defendant agreed to the commercial terms in the appellant's second commercial terms letter (amended statement of claim paragraph 7, Red 4L-P);
- c. in the alternative that subsequent to 27 October 2023 the parties "*conducted themselves on the basis that an agreement had been reached for the plaintiff to carry out the Services on the Project*" (amended statement of claim paragraph 9, Red 4S-U);
- d. a course of conduct in October and November 2023 which was said to constitute an acceptance by the parties of a "*common assumption*" that an agreement had been reached on 27 October 2023.

3. An alternative promissory estoppel is pleaded in paragraphs 16–19 of the amended statement of claim (Red 6E-K) namely that the same email pleaded in paragraph 7 of the amended statement of claim (Red 4L-P) which was said to constitute acceptance of the appellant's proposal constituted a representation that the respondent would accept the terms proposed by the appellant.

Was there a construction contract?

4. A payment claim can only be issued with respect to a progress payment owing under a construction contract (sections 8 and 13 of the Act). “Construction contract” is defined in section 4 to mean:

“...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”

5. The appellant did not plead an “*other arrangement*” but expressly relies upon there being an agreement between the parties arising from the respondent’s email of 27 October 2023 sent at 2.47pm. However such email on a plain reading does not, objectively, indicate any form of concluded agreement. It refers to Hannas’ intention to send the appellant a “*letter of intent*” which would include the commercial agreement between both parties and a draft contract to be used under the CM (contract management) agreement. That is hardly the words of acceptance.
6. The appellant impermissibly focuses on the words in the second paragraph of the email namely “*Hannas agreed to the commercial conditions noted in your attached letter of offer*”. However the plaintiff conveniently ignores the balance of that paragraph which refers to a draft CM contract being agreed between both parties and execution of a contract between “*Hannas and Hunt Co for the Brookvale project*”. Hannas was not even one of the contracting parties. It was the development manager for the project.
7. The fundamental difficulty with the appellant’s submissions is a failure to address the basic requirements of a contract namely that there be a consensus on terms as properly observed by the learned trial judge at paragraph 64 of the reasons (Red 33B-J). The appellant does not plead nor identify the terms of any agreement between the parties.
8. By paragraph 8 of the amended statement of claim it is pleaded that ‘*by no later than 27 October 2023 there was an agreement between the Plaintiff and the Defendant to perform construction management services (the Services) for the project*’ (Red 4P-R). However the terms upon which the appellant was to perform such services i.e. what it was supposed to do and how much it would be paid are not pleaded nor identified in the evidence. It would seem not even the parties to the alleged contract were agreed.
9. The appellant at paragraphs 24-37 of its submissions refer to various words in the email of 27 October 2023 sent at 2.47pm which have the tenor of a concluded

agreement. However that is secondary to identifying the terms of the alleged agreement. The appellant's submissions do not address that issue.

10. The trial judge properly found the email of 27 October 2023 did not objectively constitute a concluded agreement between the parties. At paragraph 66 of the reasons (Red 33Q-34H) it was held the terms of an arrangement between the parties had not been settled. The pleaded case is that by the email the defendant agreed to the 'commercial terms' in the plaintiff's second commercial terms letter. The '*commercial conditions*' in that correspondence did not include rates of pay which could form the basis of a progress payment.
11. Reliance upon a finding by the trial judge that Hannas knew the plaintiff was working on the Brookvale project and performing the kind of task that a construction manager performs at paragraph 29 of the appellant's submissions does not assist. The appellant chose not to commence proceedings for the actual work it performed but rather a statutory debt. To do so it must establish a construction contract within the meaning of the legislation. Performing ad hoc work at the request of Hannas does not constitute a concluded agreement between the appellant and the respondents.
12. Reliance upon the subsequent conduct of the respondent in paragraph 30 of the appellant's submissions also does not assist. If anything the conduct of the parties after 27 October 2023 indicated objectively they were unable to reach a concluded agreement. So much is clear from the email exchange between Mr Webb and Mr Bettar on 2 November 2023 referring to '*draft contract*'.¹
13. Furthermore on 3 November 2023 at 2.43pm Mr Ogden from Hannas sent Mr Bettar a '*draft amended AS4916 construction management agreement*' for review and comment. The email went on to say that there are a number of highlighted items which would require further discussion, instructions and completion. A word version in the '*interim*' was provided to '*begin the review*'.² The draft contract attached to that email had been prepared by HWL Ebsworth lawyers³ and bore little resemblance to anything the parties had previously discussed.
14. On 3 November 2023 at 1.25pm Mr Bettar sent an email to Mr Webb asking if he could start contracting subcontractors for Brookvale. Mr Webb responded on 6 November

¹ Pages 228-230 of the exhibits to the affidavit of Mr Bettar, Blue, vol 1, 116-119.

² *ibid* at page 344, Blue, vol 1, 120.

³ *ibid* at 235-338, Blue, vol 1, 121-162.

2023 confirming that Mr Bettar could ‘*speak*’ with the sub-contractors.⁴ Again hardly an exchange which evidenced a concluded agreement.

15. On 44 13 November 2023 at 4.02pm Mr Bettar sent an email to Mr Ogden and others at Hannas complaining about the complexity of the contract provided by Mr Ogden and identifying fundamental mistakes.⁵ Mr Bettar made significant changes to the contract and returned it to Hannas.⁶ On 14 and 15 November 2023 the parties continued to exchange versions of the contract.⁷ The parties continued to negotiate the terms of a concluded agreement up to 30 November 2023.⁸
16. The communication from Mr Hanna on 11 December 2023 could not be evidence of a concluded agreement as it came after the appellant had been told it would not be appointed to the Brookvale project and Mr Bettar had claimed he had incurred costs.
17. Moreover the draft contract and conditions provided by the appellant did not name the parties to the agreement and were silent as to how project management fees would be paid at all.
18. At paragraph 36 of the appellant’s submissions it seems to be contended that the use of the word ‘*assurance*’ constitutes an objective intention to form a concluded agreement. That is not the case. The ‘*assurance*’ was to enable the plaintiff to ‘*discuss the project with you team and push forward*’. The ‘*assurance*’ was not directed to the point that the respondent had agreed to whatever contract was being proposed by the appellant but rather towards discussion of the project within the respondent’s team. The learned trial judge was uncertain about what the appellant was to ‘*push forward*’ with.⁹⁹
19. It is not correct that the learned trial judge found against the appellant on a different ground namely that there was no evidence of any contract directly with the respondent as contended in paragraph 39 of the appellant’s submissions. The learned trial judge at page 63 of the reasons quite properly observed that all of the negotiations were between the appellant and officers/employees of Hanna (Red, 33B-33J). That is factually correct. It also highlights the difficulties with the appellant’s proposition that there was a

⁴ ibid at 339-340, Blue, vol 1, 163-165.

⁵ ibid at 369, Blue, vol 1, 173-174.

⁶ ibid at 379-486, Blue, vol 1, 177-284.

⁷ ibid at 487-969, Blue, vol 1, 285-402, vol 2, 403-509.

⁸ ibid at 971 and 972, Blue, vol 2, 645-647.

⁹ Reasons at [71] Red, 35M-W.

concluded agreement between the appellant and the respondent when the pleaded acceptance by email of 27 October 2023 referred to execution of a contract between *'Hannas and Hunt Co for the Brookvale project'*.

20. As the learned trial judge properly held at paragraph 70 of the reasons (Red 35G-L) there is no pleading of any agency between Hannas and the respondent. The matters referred to in paragraph 41 of the appellant's submissions do not establish the agency of Hannas on behalf of the respondent. That Mr Hanna swore he was authorised to make an affidavit for the purpose of the proceedings on behalf of the respondent is not to the point. Similarly the statement by Mr Hanna in his affidavit that invited Mr Bettar to submit a claim for his costs does not constitute an invitation or authorisation for Mr Hanna to receive a payment claim within the meaning of the Act.
21. It is quite wrong to suggest that the respondent implicitly conceded that Mr Hanna was authorised to receive payment claims on behalf of the respondent by reason of what is pleaded in paragraph 8B of the amended defence (Red 14K-M). That paragraph constitutes a denial that the payment claim was received by the ~~defendant~~ respondent by 5 January 2024 on the grounds it was received by the respondent on 15 January 2024. That does not constitute any admission by the respondent that Mr Hanna was authorised to receive payment claims on behalf of the respondent. The authority of an agent whether actual or ostensible is conferred by the principal and not by the conduct of the agent.¹⁰
22. It lies ill in the mouth of the appellant to suggest as it does in paragraph 42 of its submissions that the respondent should have adduced evidence as to any limits or absence of authority on the part of Hannas. It was for the appellant to plead agency which it failed to do. The fundamental premise for sending the payment claim and commencing the proceedings was the alleged construction contract pleaded in paragraph 7 of the amended statement of claim (Red 4L-P). The particulars of that allegation referred to emails from persons who were not officers or employees of the respondent. It was therefore incumbent upon the appellant to plead agency not for the respondent to plead or give evidence with respect to something which did not form part of the appellant's pleaded case.

¹⁰ *183 Eastwood Pty Ltd v Dragon Property Development and Investment* [2023] NSWCA 72 per Ward P (with whom Bell CJ and Leeming JA agreed) at [96] and [123].
3438-8178-8476, v. 3

Estoppel

23. Given that the email of 27 October 2023 sent at 2.47pm made it abundantly clear that no agreement had been reached the claim based on estoppel (both conventional and promissory) must fail. Any claim for estoppel proceeds on the basis that one party induces another to make an assumption that a state of affairs exists knowing or intending the other to act on that assumption.¹¹
24. Objectively the email of 27 October 2023 sent at 2.47pm contained no such inducement as it clearly referred to further draft contracts to be agreed and execution of such contracts.
25. It does not assist the plaintiff to assert as it does by paragraph 10 of the amended statement of claim that there was conduct in October and November of 2023 which “*evidenced*” the common assumption when there was no such assumption.
26. Reliance upon *Ryledar v Euphoric* in paragraph 46 of the appellant's submissions is misplaced. The findings of fact at first instance in this case was that there was no common assumption adopted by the parties as they were still negotiating the terms of any agreement between them. That cannot be sensibly disputed.
27. Similarly reliance upon the finding at first instance at paragraph 67 of the reasons that Hannas knew that the appellant was working on the Brookvale project and performing the kind of tasks that a construction manager performs is also misplaced. As the learned trial judge held at the paragraph 71 of the reasons the pleading of promissory or conventional estoppel were not fully developed in submissions and the particular promise or conduct relied upon was not specifically identified (Red, 35M-W).
28. Importantly the appellant must establish that the respondent is estopped from denying the existence of the pleaded contract. The equitable remedy of estoppel would only be relevant here if the relevant terms of such contract are properly identified. On any construction of the evidence they were not.

Other arrangement

29. As stated above the appellant did not plead any ‘*other arrangement*’. The appellant does not deal with this failure in its written submissions.

¹¹ *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 487 per Brennan J at 413.
3438-8178-8476, v. 3

30. In any event the learned trial judge at paragraph 69 of the reasons held that the appellant did not identify either in its pleadings or submissions the basis upon which it asserted it had an arrangement with the respondent for performing the tasks it performed between 30 October 2020 and 8 December 2023 for reward (Red 34W-35F). Merely referring back to the respondent's email of 27 October does not assist. For the reasons already stated the exchange of correspondence between the parties to that point in time (and thereafter) did not constitute an agreement or arrangement to perform work on any certain terms.

Was the payment claim in accordance with the Act?

31. Pursuant to section 13(2) of the Act a payment claim must identify the construction work or related goods and services to which the progress payment relates and indicate the amount of the progress payment that the claimant claims to be due.
32. The payment claim is broken down into four relevant parts the first three of which claim various daily rates for periods up to six weeks. However nowhere in the payment claim is the nature of the construction work (or related goods and services) properly identified. There is merely a reference to certain persons, their position, a period of time and a daily rate.
33. Even accepting that an overly formal or technical approach should not be taken with respect to a payment claim¹² the court could not in the circumstances of this case be satisfied that the relevant construction work or related goods and services was sufficiently identified. This assessment is to be made on an objective basis derived from the parties' past dealings and exchanges of documentation.¹³
34. None of the documents provided by the appellant set out a daily rate by which anyone was to be paid. The draft conditions of contract in particular clauses 13 and 14 thereof¹⁴ provide for a construction manager's fee by reference to schedules which do not form part of the standard conditions. It seems the project management fee was to be a percentage of profit together with a bonus.

¹² *Watpac Constructions (NSW) Pty Ltd v Charter Hall Funds Management Ltd* [2017] NSWSC 865.

¹³ *MWB Everton Park Pty Ltd as trustee for MWB Everton Park Unit Trust v Devcon Building Co Pty Ltd* [2024] QCA 94 per Dalton JA at [24].

¹⁴ Page 70 of the exhibits to the affidavit of Mr Bettar, Blue, vol 1, 89.
3438-8178-8476, v. 3

35. However in the absence of any suggested daily rates the alleged payment claim does not reasonably identify the construction work to which it relates.
36. The fourth part of the payment claim (and by far the greatest proportion) is a percentage of the profit and overhead which the appellant expected to receive if the contract had gone ahead. That is a claim for damages for loss of an opportunity to receive in full a contracted lump sum. That cannot properly form the basis of a payment claim under the Act.¹⁵
37. Reliance upon *WNA Construction Pty Ltd v Canberra Building and Maintenance Pty Ltd* referred to in paragraph 69 of the appellant's submissions does not assist as it is distinguishable from the present circumstances. In that case there was a contract prepared by the respondent setting out hourly rates for the work to be performed.¹⁶ More importantly the payment claim and the invoices attached thereto provided significantly more detail than the payment claim in this proceeding.¹⁷
38. Contrary to paragraphs 74 and 75 of the appellant's submissions the learned trial judge properly applied the reasoning of Hodgson JA in *Nepean Engineering v Total Process Services*. The passage referred to at paragraph 72 of the appellant's submissions is not to the point. The finding at first instance was that there was a '*patent*' failure to comply with section 13(2)(a). Contrary to its assertions the appellant did not by its payment claim purport in a reasonable way to identify the particular work in respect of which the claim was made nor the contractual basis for the claim.
39. Contrary to paragraph 79 of the appellant's submissions the payment claim did not on its face identify the services that were claimed to have been provided. There is no indication at all in the payment claim the construction work that was performed on a contractual basis for each of the claims. In the words of the section the construction work is not identified.

¹⁵ *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Constructions Pty Ltd and ors* (2016) 260 CLR 340 at [66] and [67].

¹⁶ Reasons at [9] and [10], Red 21Q-22L.

¹⁷ *ibid* at [18]-[24], Red 24P-25P.

Service of the payment claim

40. The payment claim is said to have been served on 21 December 2023 by an email to Mr Webb and Mr Hanna and further by ordinary mail on that day addressed to the defendant at Suite 26.02, Governor Phillip Tower, 1 Farrer Place Sydney NSW 2000.
41. It is not controversial that the mailing address was that of Hannas Group which was the development manager of the project. The registered office of the respondent is in Brisbane and its principal place of business as Level 7, 44 Martin Place Sydney NSW 2000.
42. Pursuant to section 31 of the Act a payment claim may be served on a person relevantly by sending it by post addressed to the person's ordinary place of business or by email to an email address specified by the person for service of documents of that kind. In this case there was no email address specified by the respondent for the receipt of payment claims. Accordingly the appellant must establish that it mailed the progress claim to the respondent's ordinary place of business.
43. The evidence establishes that the respondent conducts its business from level 7, 44 Martin Place Sydney NSW 2000. There is no suggestion that its ordinary place of business is somewhere else or particularly Suite 26.02, Governor Phillip Tower, 1 Farrer Place Sydney NSW 2000.
44. The appellant contends service of the payment claim on Hannas Group was sufficient because all the emails received with respect to the project came from Hannas and any meetings regarding the project were at the office of Hannas. However that is explicable because Hannas was the development manager for the project. It does not establish that the respondent's ordinary place of business was anywhere other than that recorded in the ASIC records. Accordingly the payment claim was never served in accordance with the Act and the statutory debt does not arise.
45. The appellant contends that the payment claim was served on the respondent by an email to Mr Hanna. However that email address must have been specified by the '*person*' which in this case was the respondent. There is no evidence that the respondent specified that Mr Hanna could receive emails on its behalf.

46. The appellant by paragraph 90 of its submissions appears to rely upon a conversation between Mr Hanna and Mr Bettar in which Mr Hanna said he was happy for Mr Bettar to *'submit a claim to cover your reasonable cost'*. It is contended by that statement Mr Hanna (not the respondent) was *'implicitly saying that such a claim could be submitted to him by email'*. That does not arise from the conversation between Mr Bettar and Mr Hanna. Moreover as indicated above Mr Hanna cannot give himself authority to receive emails on behalf of the respondent. Such authority must come from the respondent about which there no evidence.
47. The appellant contends at paragraphs 95-97 of its submissions that the payment claim was also served by ordinary post on the respondent because Hanna's Construction Services (where the payment claim was mailed) was the agent of the respondent for the purposes of receiving payment claims under the Act. As stated above the learned trial judge properly found that there was no pleaded agency between Hannas and the respondent and no evidence of the agency between those entities. The matters relied upon by the appellant at paragraphs 41-43 of its outline (being the conduct of Mr Hanna) do not constitute authorisation by the respondent for Hannas to receive payment claims on the respondent's behalf.

Indemnity costs

48. There is no demonstrated error in the decision at first instance to award indemnity costs. The appellant argues that the learned trial judge was wrong to find that the proceedings were doomed to fail. It is argued that just because a litigant's argument is rejected does not mean it was doomed to fail.
49. Contrary to the appellant's submissions the trial judge not only rejected the appellant's arguments at first instance she specifically found in paragraph 25 of her reasons on the question of costs that the proceedings were doomed to fail (Red 53N). The learned trial judge properly observed that there was no proper basis for the claim under the Act because there was no agreement or arrangement between the parties as required by the Act. The learned trial judge also held that the payment claim was not served upon the defendant as required. Both of those findings were open on the evidence. It did not turn on questions of credibility. The relevant facts were not in dispute.

50. The *Calderbank* offer of \$33,000 was not a '*demand to capitulate*'. As the trial judge held in paragraph 22 of her reasons on costs the respondent had made it clear in the letters of 31 January 2024 and 25 July 2024 that the appellant's claim would not succeed which would result in the appellant receiving nothing (Red 52Q-W). Accordingly an offer of \$33,000 was not a '*demand to capitulate*'. At the very least the appellant should be ordered to pay indemnity costs from 25 July 2024 in accordance with the *Calderbank* principles.

MD Martin KC

Counsel for the respondent

~~18 July~~ 15 August 2025