

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

S ECI 2018 00137

JOHN BEEVER (AUST) PTY LIMITED (ACN 006 337 113)

Plaintiff

v

PAPER AUSTRALIA PTY LTD (ACN 061 583 533)

Defendant

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JUDGE: LYONS J  
WHERE HELD: Melbourne  
DATE OF HEARING: 28 November 2018  
DATE OF JUDGMENT: 5 March 2019  
CASE MAY BE CITED AS: John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd  
MEDIUM NEUTRAL CITATION: [2019] VSC 126

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BUILDING AND CONSTRUCTION - Whether payment claim identifies the construction work to which the progress payment relates - Whether payment claim states that it is made under the Act - Sections 14(2)(c) and 14(2)(e) of the *Building and Construction Industry Security of Payment Act 2002* (Vic)

PRACTICE AND PROCEDURE - Nature of judgment pursuant to s 16(2) and s 17(2) of the *Building and Construction Industry Security of Payment Act 2002* (Vic)

PRACTICE AND PROCEDURE - Application for summary judgment - Whether summary judgment appropriate where question of law but no disputed facts.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J A F Twigg QC with Mr N J Phillpott	Champions Lawyers
For the Defendant	Mr J R Gurr	Corrs Chambers Westgarth

HIS HONOUR:

**Introduction**

- 1 The plaintiff, John Beever (Aust) Pty Limited ('John Beever') seeks judgment against the defendant, Paper Australia Pty Ltd ('Paper Australia') in the sum of approximately \$435,000 plus interest pursuant to ss 16(2) and 17(2) of the *Building and Construction Industry Security of Payment Act 2002* (the 'Act'). I will discuss the nature of this application for judgment later in these reasons.
- 2 The principal issues in dispute relate to whether the plaintiff has complied with the requirements of s 14(2) of the Act in serving three purportedly valid payment claims on the defendant for construction work performed by the plaintiff for the defendant.
- 3 The first issue relates to the first two payment claims: it is whether they 'identify the construction work' to which the progress payments relate, as required by s 14(2)(c) of the Act (the 'identification requirement'). This is in circumstances where each payment claim does not, on its face, provide details of the construction work to which each claim relates, but refers to the relevant contract details, the period of work and the amount claimed, and details of the work were previously provided to the defendant.
- 4 The second issue in dispute relates to the third payment claim: it is whether that claim 'states that it was made under the Act', as required by s 14(2)(e) of the Act (the 'statement requirement'). This in circumstances where such a statement was not included on the payment claim or in the covering email attaching the claim, but was contained in an email attaching an earlier version of the claim on the same day.
- 5 There is a further issue raised in respect of the interest claimed by the plaintiff in relation to the payment claims. It seeks interest on the payment claims calculated in accordance with s 12(2) of the Act. The issue is whether the claim for interest (which comprises one-third of the amount sought by the plaintiff) can and should be reduced in accordance with the discretion imposed by s 58 of the *Supreme Court Act 1986* (Vic).

6 For the reasons that follow, I have determined that the plaintiff:

- (1) is entitled to summary judgment on the first two payment claims, as they meet the identification requirement under the Act;
- (2) is not entitled to summary judgment on the third payment claim, as it does not meet the statement requirement under the Act.

7 Before determining the interest question, I wish to hear further argument on the nature and effect of the interest provisions in ss 12, 23 and 28I of the Act and the operation of ss 58 and 60 of the *Supreme Court Act 1986*.

### The facts

#### **Background**

8 The circumstances leading to this application were not in dispute and can be shortly stated.

9 The plaintiff was engaged by the defendant to perform mechanical and associated works pursuant to two contracts with defendant. One contract was entered into on or about 27 September 2013, pursuant to which the plaintiff was engaged to perform mechanical installation works in relation to the defendant's de-inking plant ('DIP', 'Contract 700' and the 'Contract 700 works'). A related, earlier contract was entered into on or about 9 August 2013, pursuant to which the plaintiff was engaged to install mechanical equipment, piping and structural steel in the pulper area and bale building for the DIP ('Contract 705' and the 'Contract 705 works').

10 The plaintiff seeks judgment for amounts it asserts are owed to it in respect of the following purported payment claims made under s 14 of the Act:

- (1) a claim under Contract 705 for work done in May 2014 for \$166,229.01 (the 'May claim');
- (2) a claim under Contract 700 for work done in June 2014 for \$185,467.20 (the 'June claim'); and

- (3) a claim under Contract 705 for work done in July 2014 for \$406,197.46 (the 'July claim').

11 It is not disputed that these claims were sent to, and received by, the defendant. In respect of the May and June claims, the defendant did not respond by providing a payment schedule in accordance with s 15 of the Act. As a result, by virtue of s 16(2) of the Act, the plaintiff seeks judgment for the amount of those claims.

12 In respect of the July claim, the defendant responded by providing a payment schedule in accordance with s 15 of the Act disputing all but \$82,049 of the claim. Payment of that undisputed amount has not been made by the defendant. As a result, the plaintiff seeks judgment pursuant to s 17(2) of the Act.

#### **The lead up to the May claim**

13 On 3 June 2014, the plaintiff emailed the May 2014 'monthly invoice claim ... for PE705 Mech Package 03 for [the defendant's] review and approval'.<sup>1</sup> The claim was titled 'APM MARYVALE DIP PROJECT MECH INSTALL PACKAGE 03: MAY CLAIM, 31ST MAY 2014'. It also attached the supporting documentation to verify the variation claims. The claim and supporting documentation totalled 15 pages, which sought amounts owing under contract 705 for work done in May 2014 totalling \$171,655.21 including GST.

14 On 16 July 2014, the defendant advised the plaintiff that it did not approve the claim issued on 3 June and attached a revised assessment.<sup>2</sup>

15 On 18 July 2014, the plaintiff emailed a revised claim in accordance with the revised assessment of the defendant.<sup>3</sup> The email was headed 'Revised Claim PE705 May'. The revised claim was in the same general form as the claim served on 3 June 2014. It was also titled 'APM MARYVALE DIP PROJECT MECH INSTALL PACKAGE 03:

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<sup>1</sup> Exhibit JN-1 to the affidavit of Justin Noonan sworn 16 August 2018 ('JN-1') 659-674.

<sup>2</sup> Exhibit JN-2 to the further affidavit of Justin Noonan sworn 17 October 2018 ('JN-2') 733-38.

<sup>3</sup> JN-2 (n 2) 739-42.

MAY CLAIM, 31ST MAY 2014' and claimed \$166,299.01 including GST. It was not paid by the defendant.

### **The lead up to the June claim**

16 On 4 July 2014, the plaintiff emailed the June 2014 'PE700 Mech 02 claim ... for [the defendant's]' review'.<sup>4</sup> The attachment was titled '2014O APM Mech Install 02 June Claim 2014.pdf'. The attached claim was in the same general form as the claim for May under contract 705. It was headed 'PE700 APM MARYVALE DIP PROJECT MECH INSTALL PACKAGE 02: JUNE CLAIM, 30TH JUNE 2014'. It listed the amounts owing under contract 700 as \$185,467.20 including GST.

17 In response to an email from the defendant on 10 July 2014, the plaintiff provided supporting documentation in relation to the variation claims.<sup>5</sup> The claimed sum of \$185,467.20 was not paid by the defendant.

18 On 11 August 2014 at 11:26 am, the plaintiff emailed the defendant in relation to the payment of the revised claim for May under contract 705 and the claim for June under contract 700.<sup>6</sup> The email provided:

Can you advise as to the status of certification of our May claim for PE705 Mech #03 submitted on 18/7/14 and our June claim for PE700 Mech #02 submitted on 4/7/14 (supporting docs submitted on 10/7/14)?

As we have now left site we would like to be in a position to issue invoices for these claims and to issue final claims on the contracts.

### **The May claim and the June claim**

19 On 11 August 2014 at 6:36 pm, the plaintiff served on the defendant by email the May claim, the June claim and the first version of the July claim (the '6:36pm email').<sup>7</sup> The 6:36 pm email stated:

Further to my previous email.

Please find attached our invoices for the following:

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<sup>4</sup> JN-1 (n 1) 252-4.

<sup>5</sup> JN-1 (n 1) 256-67.

<sup>6</sup> JN-1 (n 1) 269.

<sup>7</sup> JN-1 (n 1) 268-9.

- \* June claim for PE700 Mech Package 02 (INV 231) [i.e. the June claim]
- \* May claim for PE705 Mech Package 03 (INV 230) [i.e. the May claim]
- \* July claim for PE702 Mech Package 01 (“Deed of Settlement March 2014” amounts to this contract - INV232)

Please also find attached our July progress claims PE700 & PE705 including supporting schedules & documentation. [i.e. the first version of the July claim]

Please note that all claims are payment claims made under the “*Building and Construction Industry Security of Payment Act 2002 (VIC)*”.

20 The May claim<sup>8</sup> was a tax invoice No 230 addressed to the defendant for \$166,229.01, being the revised amount claimed on 18 July 2014. It included the statement that it was a payment claim under the Act. The May claim identified the construction work as follows:

Project No: 20139 PE705 - DIP Plant Mechanical Package 03

Order No / Contract: 50030556

Att: BARBARA LONT

**Description:**

Progress Claim 6 (MAY 2014).

21 The June claim<sup>9</sup> was a tax invoice No 231 addressed to the defendant for \$185,467.20 being the amount claimed on 4 July 2014. It included the statement that it was a payment claim under the Act. The June claim identified the construction work as follows:

Project No: 20140 PE700 - DIP Plant Mechanical Package 02

Order No / Contract: 50031324

Att: BARBARA LONT

**Description:**

Progress Claim 6 (JUNE 2014).

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<sup>8</sup> JN-1 (n 1) 271.

<sup>9</sup> JN-1 (n 1) 272.

## The July claim

22 The form of the July claim annexed to the 6:36pm email was not produced. This was because a revised version was sent by email from the plaintiff to the defendant at 9:49 pm on 11 August 2014 (the '9:49 pm email').<sup>10</sup> It was sent in the same email chain as the earlier emails on 11 August 2014. The 9:49 pm email states:

Apologies, I have noted an error in the July claims sent through this evening.

The negative Variation 27 recorded under 20139 PE705 Mech 03, does in fact relate to 20140 PE700 Mech 02 and has already been claimed as Variation 16 in the May claim for this contract.

Hence, please find attached revised July progress claims and associated schedules for the two contracts. Please disregard the original July progress claims and schedules sent through earlier (supporting documentation sent through is still applicable).

23 The form of the July claim was different to the May claim and the June Claim. It was not an invoice. Rather, it was a document titled 'Progress Payment Claim Form' in respect of contract '20139 - PE705 - DIP Plant Mechanical Package 03'.<sup>11</sup> It stated '[w]e hereby apply for a Progress Payment of \$406,197.56' (including GST) for the work completed to 31 July 2014.

24 It is not in dispute that the July claim contained sufficient information to identify the construction work that are the subject of the progress payment. It contained the same kind of supporting documentation as that provided by the plaintiff on 3 June 2014, which formed the basis of the May claim, and on 18 July 2014, which formed the basis of the June claim. However, neither the 9:49 pm email nor the July claim attached to that email contained a statement to the effect that the claim was a payment claim made under the Act.

25 On 25 August 2014, the defendant served a payment schedule in relation to the July claim pursuant to s 15 of the Act.<sup>12</sup> The defendant objected to paying all but \$82,049 excluding GST.

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<sup>10</sup> JN-1 (n 1) 286.

<sup>11</sup> JN-1 (n 1) 292.

<sup>12</sup> JN-1 (n 1) 675.

26 I note in passing that it is not in dispute that, by reason of the service of the May claim, the June claim and the July claim on 11 August 2014, the amounts claimed (to the extent that they were not disputed) fell due for payment on 23 September 2014. However, the plaintiff did not issue this proceeding until 15 June 2018. This application was issued on 23 August 2018.

27 I will now address the issues relating to s 14 of the Act.

### The parties' arguments

#### **The May claim and the June claim**

28 The defendant submitted that the May claim and the June claim did not meet the identification requirement of s 14(2)(c) of the Act, namely that they 'must identify the construction work or related goods and services to which the progress payment relates'. This is because of the limited description of the works contained in the May claim and the June claim served on 11 August as set out above. As noted above, in substance, each of the May and June claims referred only to the relevant contract, the period of work and the amount claimed.

29 The defendant relied upon authorities such as *Jemzone v Trytan Pty Ltd* ('Jemzone')<sup>13</sup> and *Protectavale Pty Ltd v K2K Pty Ltd* ('Protectavale')<sup>14</sup> to the effect that:

- (1) courts should require strict compliance with the provisions of s 14(2) given the special statutory rights conferred by it; and
- (2) the terms of the identification requirement are clear: it requires a claimant to objectively identify particular work that is the subject of the progress payment on the face of the payment claim.

30 The plaintiff submitted each of the May claim and the June claim comply with the identification requirement. The plaintiff relied upon authorities to the effect that, for the purpose of the identification requirement, a payment claim must be read in

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<sup>13</sup> (2002) 42 ACSR 42 ('Jemzone').

<sup>14</sup> [2008] FCA 1248 [29] ('Protectavale') which in fact involved a payment claim and a payment schedule.

context, including the factual context in which it is issued. It relied upon authorities including *Clarence Street Pty Ltd v ISIS Projects Pty Ltd* ('Clarence Street'),<sup>15</sup> *Coordinated Construction Co. Pty Ltd v Climatech (Canberra) Pty Ltd* ('Climatech'),<sup>16</sup> and *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In Liq)* ('Nepean').<sup>17</sup>

31 The plaintiff submitted that, in the context of the emails preceding the May claim and the June claim, each of those claims sufficiently identified the construction work to which the claim relates for the purposes of the identification requirement. In reply, the defendant submitted that these documents could have been, but were not, referred to in the payment claim: as a result, the identification requirement had not been met.

### **The July claim**

32 The defendant submitted that the July claim did not comply with the statement requirement because it did not on its face state that it was made under the Act. In response, the plaintiff again submitted that the July claim must be read in context for the purpose of the statement requirement. That context must include the 6:36 pm email serving the first version of the July claim which was clear that it was a claim made under the Act.

33 As is evident, the arguments of the parties in relation to each of the claims depend upon the proper construction of s 14(2) of the Act. I will now turn to that question.

### **The Law**

#### **The Act**

34 The Act came into force in 2002 and was subsequently amended in 2006 by the *Building and Construction Industry Security of Payment (Amendment) Act 2006* (the 'Amending Act').

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<sup>15</sup> (2005) 64 NSWLR 448 ('Clarence Street').

<sup>16</sup> [2005] NSWCA 229 ('Climatech').

<sup>17</sup> (2005) 64 NSWLR 462 ('Nepean').

35 Section 1 of the Act provides that '[t]he main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts'.

36 Section 3 details the object of the Act:

**3 Object of Act**

- (1) The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to that payment in accordance with this Act.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves –
  - (a) the making of a payment claim by the person claiming payment; and
  - (b) the provision of a payment schedule by the person by whom the payment is payable; and
  - (c) the referral of any disputed claim to an adjudicator for determination; and
  - (d) the payment of the amount of the progress payment determined by the adjudicator; and
  - (e) the recovery of the progress payment in the event of a failure to pay.
- (4) It is intended that this Act does not limit –
  - (a) any other entitlement that a claimant may have under a construction contract; or
  - (b) any other remedy that a claimant may have for recovering that other entitlement.

37 Part 2 of the Act is concerned with rights to progress payments for the performance of work or supply of goods and services under a construction contract. In particular, s 9(1) relevantly provides that on and from each reference date under a construction contract, a person who has undertaken to carry out construction work under the

contract is entitled to a 'progress payment' under the Act, calculated by reference to that date.

38 'Progress payment' is relevantly defined in s 4 of the Act as 'a payment to which a person is entitled under section 9', and includes (without affecting that entitlement) –

- (a) the final payment for –
  - (i) construction work carried out under a construction contract; or
  - (ii) related goods and services supplied under the contract; or
- (b) a single or one-off payment for –
  - (i) construction work carried out under a construction contract; or
  - (ii) related goods and services supplied under the contract; or
- (c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment");

39 A progress payment is calculated in accordance with ss 10, 10A and 11 of the Act.

Section 10(1) relevantly provides:

**10 Amount of progress payment**

- (1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be –
  - (a) the amount calculated in accordance with the terms of the contract; or
  - (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of –
    - (i) construction work carried out or undertaken to be carried out by the person under the contract; or
    - (ii) related goods and services supplied or undertaken to be supplied by the person under the contract –as the case requires.

40 Further, s 12 provides for the due date of a progress payment:

## 12 Due date for payment

- (1) A progress payment under a construction contract becomes due and payable—
  - (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract; or
  - (b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.
- (2) Interest is payable on the unpaid amount of a progress payment that has become due and payable in accordance with subsection (1) at the greater of the following rates—
  - (a) the rate for the time being fixed under section 2 of the **Penalty Interest Rates Act 1983**; or
  - (b) the rate specified under the construction contract.

41 Part 3 provides a procedure for recovering progress payments to which a claimant is entitled under the Act. Division 1 of that part concerns payment claims and payment schedules. Section 14 of the Act relevantly provides:

## 14 Payment claims

- (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
- (2) A payment claim—
  - (a) must be in the relevant prescribed form (if any); and
  - (b) must contain the prescribed information (if any); and
  - (c) must identify the construction work or related goods and services to which the progress payment relates; and
  - (d) must indicate the amount of the progress payment that the claimant claims to be due (the *claimed amount*); and
  - (e) must state that it is made under this Act.
- (3) The claimed amount—
  - (a) may include any amount that the respondent is liable to pay the claimant under section 29(4);
  - (b) must not include any excluded amount.

**Note**

Section 10(3) provides that a progress payment must not include an excluded amount.

- (4) A payment claim in respect of a progress payment (other than a payment claim in respect of a progress payment that is a final, single or one-off payment) may be served only within –
  - (a) the period determined by or in accordance with the terms of the construction contract in respect of the carrying out of the item of construction work or the supply of the item of related goods and services to which the claim relates; or
  - (b) the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment –whichever is the later.

42 Section 15 provides for payment schedules to be given in response to a payment claim by a claimant.

**15 Payment schedules**

- (1) A person on whom a payment claim is served (the *respondent*) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule –
  - (a) must identify the payment claim to which it relates; and
  - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the *scheduled amount*); and
  - (c) must identify any amount of the claim that the respondent alleges is an excluded amount; and
  - (d) must be in the relevant prescribed form (if any); and
  - (e) must contain the prescribed information (if any).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If –

- (a) a claimant serves a payment claim on a respondent;  
and
- (b) the respondent does not provide a payment schedule to the claimant –
  - (i) within the time required by the relevant construction contract; or
  - (ii) within 10 business days after the payment claim is served;

whichever time expires earlier –

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

43 Sections 16 and 17 respectively provide for the recovery of a payment claim where a payment schedule is not served on a claimant in response to a payment claim or is served but not paid:

**16 Consequences of not paying claimant where no payment schedule**

- (1) This section applies if the respondent –
  - (a) becomes liable to pay the claimed amount to the claimant under section 15(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section; and
  - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant –
  - (a) may –
    - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
    - (ii) make an adjudication application under section 18(1)(b) in relation to the payment claim; and
  - (b) may serve notice on the respondent of the claimant's intention –
    - (i) to suspend carrying out construction work under the construction contract; or

- (ii) to suspend supplying related goods and services under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt –
  - (a) judgment in favour of the claimant is not to be given unless the court is satisfied –
    - (i) of the existence of the circumstances referred to in subsection (1); and
    - (ii) that the claimed amount does not include any excluded amount; and
  - (b) the respondent is not, in those proceedings, entitled –
    - (i) to bring any cross-claim against the claimant; or
    - (ii) to raise any defence in relation to matters arising under the construction contract.

**17 Consequences of not paying claimant in accordance with payment schedule**

- (1) This section applies if –
  - (a) a claimant serves a payment claim on a respondent; and
  - (b) the respondent provides a payment schedule to the claimant –
    - (i) within the time required by the relevant construction contract; or
    - (ii) within 10 business days after the payment claim is served –whichever time expires earlier; and
  - (c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant; and
  - (d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant –
  - (a) may –

- (i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction; or
- (ii) make an adjudication application under section 18(1)(a)(ii) in relation to the payment claim; and
- (b) may serve notice on the respondent of the claimant's intention to suspend –
  - (i) carrying out construction work under the construction contract; or
  - (ii) supplying related goods and services under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the scheduled amount from the respondent as a debt –
  - (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and
  - (b) the respondent is not, in those proceedings, entitled –
    - (i) to bring any cross-claim against the claimant; or
    - (ii) to raise any defence in relation to matters arising under the construction contract.

44 I note also that s 47 provides:

**47 Effect of Part on civil proceedings**

- (1) Subject to section 48, nothing in this Part affects any right that a party to a construction contract –
  - (a) may have under the contract; or
  - (b) may have under Part 2 in respect of the contract; or
  - (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
- (2) Nothing done under or for the purposes of this Part affects any proceedings arising under a construction contract (including any arbitration proceedings or other dispute resolution proceedings), whether under this Part or otherwise, except as provided by subsections (3) and (4).

- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—
  - (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order, determination or award it makes in those proceedings; and
  - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.
- (4) In any arbitration proceedings or other dispute resolution proceedings under the construction contract, the person determining the arbitration or dispute must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or determination or award the person makes in those proceedings.
- (5) Nothing in this Part affects any right that a principal may have under any contract except as expressly provided for in this Act.

### **The purpose of the Act**

45 In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd ('Hickory')*<sup>18</sup> Vickery J summarised the purpose and effect of the Act, much of which is relevant to the issues in this case. His Honour stated:

The Act has had a substantial effect in shifting the power balance between principals and sub-contractors in construction contracts in Victoria and in other States and Territories where legislation in similar terms and with the same objects has been enacted. Sub-contractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which complements the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as future enforceable claims, that cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act.

The Victorian Act also preserves a claimant's right to commence proceedings under the relevant construction contract, including proceedings in a court, and any arbitration proceedings or other dispute resolution proceedings: s 48 [sic: s 47]. Further, in any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal is required to make allowance for any sum paid pursuant to the Act in any order which is made: s 48(3) [sic: s 47(3)].

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<sup>18</sup> (2009) 26 VR 112 (*'Hickory'*) 120-1 [42]-[46].

The principle that the respondent to a payment claim for a progress payment “should pay now and argue later” is given full effect under the Act. This regime promotes the object of the Act, being to facilitate timely payments between the parties to a construction contract and to provide for the rapid resolution of disputes arising in respect of progress claims under construction contracts.

From this analysis, I readily accept the observation made in a number of recent authorities that the Act places the claimant in a privileged position in the sense that it acquires rights that go beyond its contractual rights.

The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality. The *Building and Construction Industry Security of Payment Act 1999* (NSW) has led to a spate of litigation in its relatively short life. If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.

46 With respect, I adopt his Honour’s comments. I note in passing that the last paragraph was cited with approval by the Court of Appeal in *Pearl Hill Pty Ltd v Concorp Construction Group (VIC) Pty Ltd*.<sup>19</sup>

47 Further, similar comments on the purpose and effect of the Act were made by the Court of Appeal in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* (“SSC”).<sup>20</sup> In particular, the Court adopted the following comments of Warren CJ and Tate JA (with whom Kaye JA agreed) in *Saville v Hallmarc Constructions Pty Ltd*<sup>21</sup> as follows:

- (1) [the Act] operates in a ‘rough and ready’ way to preserve the cash flow to a builder notwithstanding that the builder might ultimately be required to refund the money received and yet have an inability to repay;
- (2) it imposes a mandatory regime regardless of the parties’ contract with extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses;
- (3) at each stage of the regime for enforcement of the statutory right to progress payments, it lays down clear specifications of time and other requirements to be observed, rendering it not difficult to understand ‘that the availability of those rights should depend on strict

<sup>19</sup> (2011) 32 VR 247, 249–50 [11].

<sup>20</sup> [2016] VSCA 119 (“SSC”) [49]–[51].

<sup>21</sup> (2015) 47 VR 177, 207–8 [80] (citations omitted).

observance of the statutory requirements that are involved in their creation’;

- (4) as adjudication determinations are capable of being filed as a judgment for debt in a court of competent jurisdiction, a respondent to a payment claim should not be at risk of suffering a judgment where a temporal limitation has not been complied with by the claimant;
- (5) a claimant has alternative remedies; ‘even if the door to adjudication is closed, the door to judgment remains open’.

### **The nature of this application**

48 The purpose and effect of the Act is relevant to the nature of this application. This proceeding was commenced by writ. The plaintiff’s summons dated 23 August 2018 sought “judgment” for the plaintiff. The application proceeded on the basis that judgment was sought in respect of the May and June claims pursuant to s 16(2) of the Act and in respect of the July claim pursuant to s 17(2) of the Act.

49 The nature of an application for judgment under s 16(2) or s 17(2) of the Act was not the subject of any real debate before me. This is in contrast to the application made by the same plaintiff heard by this Court on 28 June 2018 and which is the subject of the judgment of Digby J in *John Beever (Aust) Pty Ltd v Road Corporation* (*‘Road Corp’*)<sup>22</sup> delivered on 26 October 2018. I only became aware of the judgment in *Road Corp* after the hearing of this application.

50 In *Road Corp*, Digby J held that where a plaintiff issues a writ and then a summons for judgment under s 16(2) of the Act, the plaintiff seeks ‘summary judgment’ under s 61 of the *Civil Procedure Act 2010* (*‘CPA’*) in accordance with rule 22 of the *Supreme Court (General Civil Procedure) Rules 2015* with the result that the ‘no reasonable prospects of success’ test for summary judgment applies.<sup>23</sup>

51 In so holding, his Honour noted that this approach accorded with that taken by Judge Woodward in *SJ Higgins Pty Ltd v The Bays Healthcare Group Inc* (*‘SJ Higgins’*).<sup>24</sup>

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<sup>22</sup> [2018] VSC 635 (*‘Road Corp’*).

<sup>23</sup> *Ibid* [61].

<sup>24</sup> [2018] VCC 805 (*‘SJ Higgins’*) [61] nn 74.

52 His Honour also agreed with Judge Woodward's remarks in *SJ Higgins* to the effect that when summary judgment is sought pursuant to s 16(2) or s 17(2) of the Act, the only defences the Court can consider are those that may undermine the statutory pre-requisites identified in ss 14 and 15 of the Act; and that such an application does not open up consideration of any counterclaim by the defendant.<sup>25</sup> I note that this is consistent with s 17(4) of the Act, extracted above.

53 In this application, the plaintiff's written submissions did not deal with the issue of whether this application was for summary judgment and the appropriate test to be applied in the determination of the application. However, the plaintiff relied upon the judgment in *SJ Higgins* referred to above.<sup>26</sup> The defendant in its written outline of submissions noted under the heading '[t]he test for summary judgment – no real question to be tried' that '[t]he power to order summary judgement is to be exercised with caution, and only when it is clear that there is no question to be tried'.<sup>27</sup> However, the argument before me proceeded on the basis that:

- (1) there was no dispute regarding the facts relating to each of the May, June and July claims; and
- (2) the relevant question for determination by the Court was whether each of those claims met the requirements of s 14(2) of the Act.

54 As a result, I will proceed with this application for 'judgment' as an application for summary judgment. This application involves the determination of a question of law relating to the requirements imposed by s 14(2) of the Act in the context of the undisputed facts relating to each of the May, June and July claims. I have considered

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<sup>25</sup> *Road Corp* (n 22) [63] citing *SJ Higgins* (n 24) [27]–[29].

<sup>26</sup> Plaintiff's Outline of Submissions dated 17 August 2018 (filed 26 November 2018) [5] citing *SJ Higgins* (n 24) [28]–[29].

<sup>27</sup> Defendant's Outline of Submissions dated 3 October 2018 (filed 4 October 2018) [6], referring to *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27 [27]–[35], relating to s 61 of the *Civil Procedure Act 2010*, and applied in *SJ Higgins* (n 24) [30] in relation to an application for summary judgement under the Act. I note that the plaintiff referred to *SJ Higgins* but not the test adopted by Judge Woodward at [30] in relation to the principles to be applied in deciding an application for summary judgement under the Act.

whether it is appropriate in this case for such a legal question to be determined on a summary judgment application. In my view, it is. This for a number of reasons.

55 First, there were no disputed facts in this case. Second, in summary judgment applications where facts are not in dispute, the Courts, while noting the caution to be exercised, have referred to the desirability of resolving even complex legal questions after full legal argument.<sup>28</sup> It is true that those statement are usually in the context of whether the plaintiff has a arguable claim. But the reasoning apples with equal force to legal issue raised by way of defence. As Latham CJ said in *Dey*:

If, as a result of argument, the court reaches a clear decision which could not be altered by any evidence which could be adduced at the trial, then it is proper in the interests of both parties to dismiss the action instead of allowing the parties to incur completely useless expense.<sup>29</sup>

56 Third, it is necessary to consider the nature of the legal question to be determined. In this case, the question is whether the statutory requirements of s 14(2) of the Act have been satisfied. I have heard full argument on that legal issue and there is nothing further that could usefully be advanced at trial in relation to it. Indeed, I have reached concluded views on the legal issues that are raised and their application to the undisputed facts in this case.

57 Fourth, there is the statutory context in which this application brought. This is an application for summary judgment based on the defendant's non-payment of the undisputed amount of a payment claim, pursuant to ss 16(2) and 17(2) of the Act. As set out above, the clear purpose of the Act, including these sections, is to ensure the prompt payment of such unpaid and undisputed amounts: that is consistent with summary judgment procedure in appropriate cases.

58 Fifth, there is the CPA. As noted above, summary judgment applications are now determined pursuant to s 61 of the CPA. However, it is of primary importance, in

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<sup>28</sup> See, eg, *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 ('Dey') 84-5 (Latham CJ); *General Steel Industries Inc v Commissioner for Railways* (NSW) (1964) 112 CLR 125, 130 (Barwick CJ). See also the approach adopted in *Theseus Exploration NL v Foyster* (1972) 126 CLR 507, 514 (Barwick CJ), 515 (Gibbs J), 523 (Stephen J) concerning a summary judgment application on questions of law.

<sup>29</sup> *Dey* (n 28) 85.

my view, to bear in mind the overarching purpose of the CPA and the rules of the Court in relation to civil proceedings, namely, to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. In a case such as this, where the legal issue for determination on undisputed facts has been fully argued, the determination of the legal issue now gives effect to that purpose.

59 As a result, I will now consider the parties' arguments on whether the requirements of s 14(2) of the Act have been satisfied.

### The case law

60 The defendant relied upon authorities to the effect that if a claimant wishes to take advantage of the special statutory rights offered by the Act, the relevant payment claim must on its face contain all the ingredients required by the Act. In particular, it relied upon the judgments of Austin J in *Jemzone* and of Finkelstein J in *Protectavale*.

61 For example, in *Jemzone*, Austin J said about the New South Wales statutory equivalent of the identification requirement:

First, as a general matter, it seems to me that if a claimant wishes to take advantage of the special statutory rights offered by the Act, which override general contractual rights and place the claimant in a privileged position, the payment claim must on its face contain all the ingredients required by the Act. While the court should not take an unduly strict approach to the construction of the claim, it ought not to cure defects in the claim document by reference to extraneous circumstances or previous communications. In the present case there was some evidence given by Mr Nott suggesting that when he received the document dated 14 March 2001, he was able to identify the work to which it related. In my opinion, evidence of that kind does not relieve the claimant of the obligation of ensuring that the payment claim complies with s 13(2) on its face

Section 13(2)(a) requires that the payment claim identify the construction work to which the progress payment relates. In my opinion, this requires the claimant to identify the particular work that is the subject of the progress payment, rather than simply to identify in general terms the work that is the subject of the construction contract as a whole. The document in question refers to "motel construction for Jemzone Pty Ltd". That falls well short of satisfying the requirement of s 13(2)(a).<sup>30</sup>

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<sup>30</sup> *Jemzone* (n 13) 50 [41]-[43].

62 I note that the comments of Austin J at [43] were adopted by Vickery J in *Gantley Pty Ltd v Phoenix International Group Pty Ltd*.<sup>31</sup>

63 In relation to the statement requirement, Austin J said:

Section 13(2)(c) requires the payment claim to state that it is made under the Act. The document in question states:

This invoice is subject to the *Building and Construction Industry Security of Payment Act 1999*, No 46.

This is not a statement that the document is a payment claim made under the Act. I do not accept the submission by the plaintiff that a payment claim should expressly draw the recipient's attention to the Act and the provisions concerning the issuing of a payment schedule. Section 13(2) makes no such requirement. Since, however, the issuing of a proper payment claim has the serious consequences for the recipient of requiring full payment regardless of any genuine dispute or offsetting claim, unless a payment schedule is lodged within time, it must be clear on the face of the document that it purports to be a payment claim made under the Act. The defect on the face of the document is not overcome by evidence that the recipient was not misled. The requirement was not satisfied in the present case.<sup>32</sup>

64 In *Protectavale*, Finkelstein J was considering the validity of a payment claim under s 13 and payment schedule under s 14 of the Act. He said:

The [Act] places the claimant in a privileged position in the sense that he acquires rights that go beyond his contractual rights: *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42, 50. The premise that underlies the legislation is that cash flow is the lifeblood of the construction industry (*Amflo Constructions Pty Ltd v Jefferies* [2003] NSWSC 856 at [27]) and that the principal under a construction contract should pay now and argue later (*Multiplex Constructions* [2003] NSWSC 1140 at [96]).<sup>33</sup>

65 In determining that the payment claim did not meet the identification requirement, Finkelstein J considered:<sup>34</sup>

- (1) the test for whether a claim is a payment claim is an objective one: it must be clear from the terms of the document that it contains the required information;

<sup>31</sup> [2010] VSC 106 ('*Gantley*') [46].

<sup>32</sup> (2002) 42 ACSR 42 [41], [43], [45]–[46].

<sup>33</sup> *Protectavale* (n 14) [7].

<sup>34</sup> *Protectavale* (n 14) [10]–[12].

- (2) the terms must be read in context including the history of the project and any issues which may have arisen between the parties regarding payment;
- (3) the manner in which compliance is tested is not overly demanding and should not be approached in an unduly technical manner or from an unduly critical viewpoint;
- (4) nonetheless, a payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim.

66 On the assumption that the payment claim was valid, Finkelstein J concluded that the payment schedule was invalid. The payment schedule was said to arise from a series of documents referred to in an email. His Honour concluded:

Protectavale contends that in aggregate those communications constitute a payment schedule. I cannot accept that submission. One purpose of a payment schedule is to articulate the reasons for withholding payment or offering to pay less than the claimed amount with a degree of precision and particularity to apprise the contractor of the case it will have to meet if it decides to pursue an adjudication: *Multiplex Constructions* [2003] NSWSC 1140 at [69]-[70]. Another purpose is to set the limits for an adjudicator if there is to be a dispute about the claim. In my view a payment schedule cannot artificially be constructed out of a series of documents by showing that those documents in combination contain all the necessary information required of a payment schedule. It also should be evident that, viewing the matter objectively, it was intended that the documents constitute a payment schedule. That is not the position here.<sup>35</sup>

67 The defendant also drew support from the general comments of Court of Appeal in SSC set out above in [47] above to the effect that the availability of rights under the Act must depend upon strict compliance with the statutory requirements. But that begs the question: what does s 14(2) of the Act require?

68 In several decisions since 2005, intermediate appellate courts, particularly the NSW Court of Appeal, have considered, in various contexts, the requirement of s 14(2)(c) of the Act that the payment claim 'must identify the construction work ... to which the progress payment relates'. Such authorities were relied upon by the plaintiff.

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<sup>35</sup> *Protectavale* (n 14) [29].

69 For example, in *Clarence Street* (on which the plaintiff relies), Mason P (with whom Giles and Santow JJA agreed) approved at [34] of the trial judge's following application of the principles in *Multiplex Constructions Pty Ltd v Luikens*:<sup>36</sup>

[37] In principle, I think, the requirement in s 13(2)(a) that a payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where:

- (1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;
- (2) That reference is supplemented by a single line item description of the work;
- (3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;
- (4) There is a summary that pulls all the details together and states the amount claimed.<sup>37</sup>

70 In doing so, Mason P distinguished the nature and purpose of a payment claim from a payment schedule, noting that that 'payment claim' is no more than claim and that, unlike a payment schedule, 'it is not its function to identify the scope of the dispute'.<sup>38</sup>

71 Mason P rejected the argument that the purpose of the payment claim was to provide sufficient detail of the work the subject of the claim to enable the party to make its own assessment of the amount payable and to prepare a payment schedule accordingly. In doing so, he noted that there is a distinction between understanding the claim and accepting it, the identification requirement 'only being concerned with the identification of the subject matter of the payment claim in the sense of the construction work ... to which it relates'.<sup>39</sup>

72 His Honour concluded as follows:

The Court must take its guidance from the statutory language, which is both simple and clear, in my opinion.

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<sup>36</sup> [2003] NSWSC 1140.

<sup>37</sup> *Clarence Street* (n 15) 455–6 [33] quoting *Isis Projects Pty Ltd v Clarence Street Pty Ltd* [2004] NSWSC 714 [37] (McDougall J).

<sup>38</sup> *Clarence Street* (n 15) [31].

<sup>39</sup> *Clarence Street* (n 15) [38].

The payment claims are to be read in context, including the context of industry conventions and the usage adopted by the parties in their earlier contractual dealings. Construction work for which a claim is made may be identified by reference to earlier documents such as variation claims and other documents capable of being identified by reference to the contract or the earlier dealings of the parties. This list is not intended to be exhaustive.<sup>40</sup>

73 In *Climatech*, the New South Wales Court of Appeal was considering whether a claim for ‘delay damages’ could be the subject of a payment claim under the section, on the basis that ‘delay damages’ were a claim for damages rather than a claim for the supply of goods and services. The Court concluded that a claim for such damages could constitute a payment claim. In doing so, Hodgson JA (with whom Ipp JA agreed) stated:

In my opinion, the relevant construction work or related goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim; and in the case of “delay damages” of the kind involved in this case, it is generally sufficient (assuming that the contract itself is sufficiently identified) that the basis of contractual entitlement be shown. In my opinion, that would generally be enough to ground identification, at least by way of inference, of the construction work or related goods or services to which the payment relates.

...

So far as this case is concerned, there is no suggestion that the contractual basis for the amounts claimed was not adequately indicated in the payment claim. The complaint is that the payment claim did not indicate that the claim was for related goods or services supplied. However, in my opinion, if a claim is in substance a claim for related goods or services supplied, it is not essential that it be explicitly identified as such in the payment claim: generally it is enough that the claim and its basis (in the contract and/or as a matter of valuation) be set out with sufficient clarity.<sup>41</sup>

74 Further, Basten JA said:

In *John Holland v Cardno MBK*, Einstein J expressed the view that, in order to satisfy the statutory scheme, a payment claim did not need to be “comprehensible by the respondent in terms of its supporting materials”: *ibid* at [21]. However, as Hodgson JA notes at [25] above, the claim must “identify” the work, goods or services to which the payment sought relates. The term “identify” should be given a purposive construction: what must be done must be sufficient to draw the attention of the principal to the fact that an entitlement to a payment is asserted, arising under the contract to which both the contractor and the principal are parties. In that sense, the claim, to be valid, must be reasonably comprehensible to the other party. If the entitlement does not arise absent the supply of supporting documentation,

<sup>40</sup> *Clarence Street* (n 15) [39]–[40] (emphasis added).

<sup>41</sup> *Climatech* (n 16) [25]–[27].

then the claim must be accompanied by that documentation, unless it has already been provided.<sup>42</sup>

75 In *Nepean*, the New South Wales Court of Appeal considered whether a payment claim complied with the section if, after full investigation, the claim was found not to identify successfully all the construction work for which payment was claimed. The Court concluded that the claim would comply to the extent the work was sufficiently identified. In so concluding, Hodgson JA (with whom Ipp JA agreed) had regard to *Clarence Street* and the passage in his judgment in *Climatech*, set out above.<sup>43</sup>

76 Santow JA expressed the view that the minimum necessary to satisfy the identification requirement was that payment claim ‘purport in a reasonable way to identify the work’.<sup>44</sup> He considered that there must be ‘sufficient specificity in the payment claim for its recipient actually to be able to identify a “payment claim” for the purpose of determining whether to pay, or to respond by way of a payment schedule indicating the extent of payment, if any’.<sup>45</sup> He noted that the test was objective ‘taking into account the background knowledge each of the parties derive from their past dealings and exchange of documentation’.<sup>46</sup> He agreed with Hodgson JA in *Climatech* that ‘the relevant construction work (or related goods and services) must be identified sufficiently to enable the respondent to understand the basis of the claim’<sup>47</sup> adding that understanding was to be assessed ‘in the objective sense of a party circumstanced as *Nepean*’.<sup>48</sup>

77 His Honour later referred to the judgment of Mason P in *Clarence Street*, noting that Mason P rejected that:

... persuasive content is necessary “to enable the appellant to make its own assessment of the amount payable and to prepare a payment schedule accordingly”. But he does not disavow the necessity for identification of construction work to which the progress claim relates at the minimum level where the respondent to the claim is able to understand the basis of the claim.

<sup>42</sup> *Climatech* (n 16) [42] (emphasis added).

<sup>43</sup> *Nepean* (n 17) [25]–[28], [30]–[35].

<sup>44</sup> *Nepean* (n 17) [47].

<sup>45</sup> *Nepean* (n 17) [48].

<sup>46</sup> *Nepean* (n 17) [48].

<sup>47</sup> *Nepean* (n 17) [48].

<sup>48</sup> *Nepean* (n 17) [63].

But there is no legal necessity to include any material directed merely to persuading the respondent to accept the claim and pay promptly.

Apart from the guidance that a purposive construction of the Act provides, there are indications in the text itself that point to the broad approach that I have described. Thus in s 13(2)(a) the connotation of the word “relates”, like its cognate expression “in relation to”, “requires no more than a relationship, whether direct or indirect, between two subject matters ...”; McHugh J in *O’Grady v The Northern Queensland Co Ltd* (1990) 169 CLR 356 at 356. That is of course subject to any contrary indication derived from context or drafting, there being none such evinced here.

...

So too “construction work”, defined in s 5 of the Act, goes well beyond construction work as such. The definition, quoted below, identifies a series of categories of construction work used in a very broad sense. This strongly supports that identifying the construction work to which the progress claim relates requires no more in physical detail than identifying a particular category of construction work.<sup>49</sup>

78 In *T & M Buckley Pty Ltd v 57 Moss Rd Pty Ltd* (*‘Buckley’*),<sup>50</sup> the Queensland Court of Appeal considered the identification requirement contained in s 12(2)(a) of the relevant Queensland Act. The respondent argued that that the trial judge erred in holding that the payment claim ‘must contain precision and particularity to a degree reasonably sufficient to apprise the parties of the real issues in dispute’. The Court agreed with the respondent.

79 Philippides J (with whom Fraser and White JJA agreed) undertook a thorough analysis of the intermediate authorities referred to above.<sup>51</sup> He concluded that the correct test for the identification requirement, consistent with *Climatech* and *Nepean*, was for the payment claim to identify the construction work to enable the respondent in a reasonable way to understand the basis of the claim.<sup>52</sup> He concluded:

The issue for determination was not whether the payment claim explained in every respect the means by which a particular claim item had been calculated, but whether the relevant construction work or related goods and services was sufficiently identified as explained above. That is, whether the payment claim reasonably identified the construction work to which it related

<sup>49</sup> *Nepean* (n 17) [65]–[66], [68].

<sup>50</sup> [2010] QCA 381 (*‘Buckley’*).

<sup>51</sup> *Buckley* (n 50) [29]–[37].

<sup>52</sup> *Buckley* (n 50) [35]–[37].

such that the basis of the claim was reasonably comprehensible to the applicant.<sup>53</sup>

80 With respect, I agree with His Honour's conclusions.

81 There are two further authorities of relevance in relation to the identification requirement and the context in which the payment claim was served. First, in *Leighton v Arogen*,<sup>54</sup> McDougall J said:

It is convenient to start with this point. It may be accepted that payment claims and payment schedules are to be understood as the parties to the relevant construction contract would have understood them. Thus, documents which appear to be extremely summary, or to the uninformed but not unintelligent observer brief to the point of incomprehensibility, may be sufficiently meaningful to the parties to enable them to know, respectively, the bases on which a particular payment claim is advanced and the bases on which it is opposed.

In this context, it may well be appropriate to take into account, in particular factual circumstances, the background knowledge of the parties as shown (for example) by correspondence passing between them before and at the time the payment claim and payment schedule were exchanged. That material might enable the Court to have a more informed understanding of the way that the parties would have perceived, and understood, the real issues sought to be raised.<sup>55</sup>

82 Second, Vickery J in *Gantley* concluded, after reviewing *Protectavale* and *Nepean*, as follows:

What is necessary is an identification of the work which is sufficient to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is not an overly exacting exercise. It is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively, that is from the perspective of a reasonable party who is in the position of the recipient. In evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information.<sup>56</sup>

83 From my review of these authorities, many are of which are appellate authorities, the following principles are clear:

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<sup>53</sup> *Buckley* (n 50) [38].

<sup>54</sup> [2012] NSWSC 1323.

<sup>55</sup> *Ibid* [69]–[70] (emphasis added).

<sup>56</sup> *Gantley* (n 31) [51] (emphasis added); see generally [46]–[50].

- (1) the test of whether a claim is a payment claim for the purpose of the Act is objective;
- (2) however, the manner in which compliance is tested is not overly demanding and should not be approached in an unduly technical manner or from an unduly critical point of view;
- (3) for the purposes of the identification requirement, it is necessary that the payment claim reasonably identifies the construction work to which it relates such that the basis of the claim is reasonably comprehensible to the recipient party when considered objectively i.e. from the perspective of a reasonable party who is in the position of the recipient;
- (4) in evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties from their past dealings and prior exchanges of information including correspondence passing between them before and at the time of the payment claim. To that extent, the Court may go beyond the face of the document itself.

### Analysis

#### **The May claim and the June claim**

84 In light of these principles, I have concluded that the defendant has no reasonable prospects of success in respect of each of the May claim and the June claim. This is because I consider that each of the May and June claims satisfies the identification requirement and is thus a payment claim under the Act. Each claim, in the circumstances in which it was prepared, identified construction work to which it related sufficiently to enable the defendant reasonably to understand the basis of the claim.

85 I am conscious that the information provided on the face of each of the May claim and June claim is not, of itself, sufficient to identify the construction work to which

the progress payment relates. However, for the reasons set out above, in considering the identification requirement, the Court must consider the objective context and circumstances in which it was prepared and to that extent is not limited to the face of the document.

86 In the case of the May claim, the relevant circumstances are emails passing between the plaintiff and the defendant in relation to the subject matter of the claim on 3 June, 16 and 18 July, and 11 August 2014 at 11:26 am. These emails objectively made clear to the defendant the nature of the works which were the subject of the claim and the amount ultimately claimed by the plaintiff for those works.

87 In the case of the June claim, the relevant circumstances are emails passing between the plaintiff and the defendant in relation to the subject matter of the claim on 4 and 10 July 2014, and 11 August at 11:26 am. These emails also objectively made clear to the defendant the nature of the works which were the subject of the claim and the amount ultimately claimed by the plaintiff for those works.

88 It was in this context that the plaintiff sent its second email on 11 August 2014 (i.e the 6:36 pm email) which enclosed the May claim and the June claim. Each of those documents in turn identified the relevant contracts, the period of time to which the works related and the amounts claimed consistent with the prior emails.

89 In the particular circumstances of this case, I have concluded that, viewed objectively, taking into account the correspondence between the lead up to the May claim and the June claim, each claim reasonably identifies to the defendant the construction work to which it relates for the purpose of s 14(2)(c) of the Act.

### **The July claim**

90 The position in respect of the July claim is different. For the reasons that follow, I have concluded that the defence advanced by the defendant in respect of the July claim has reasonable prospects of success. This is because I have formed the view that the July claim does not meet the statement requirement.

91 The authorities referred to above relate, for the most part, to the identification requirement, rather than the statement requirement. However, I consider that the general principle that compliance with s 14(2)(c) is not to be approached in an unduly technical manner also applies to the statement requirement in s 14(2)(e).

92 That said, the statement requirement in its terms is clear: it requires that the payment claim 'must state that it is made under this Act'.

93 Further, it is important to acknowledge the significance of the statement requirement. It is of critical importance that the recipient of a claim is aware that the claim is a payment claim for the purposes of the Act. This is so that the recipient may comply with the time requirements imposed on them in respect of the service of any payment schedule under s 15 of the Act. As noted by the Court of Appeal in SSC set out at [47] above, the Act lays down clear specifications of time to be observed, rendering it not difficult to understand that the availability of the rights conferred upon a person seeking payment under the Act should depend upon strict observance of the statutory requirements that are involved in their creation.

94 In the present case, the July claim did not state that it was claim made under the Act. In my view, a purposive and non-technical construction of the statement requirement would authorise a Court to look at the covering correspondence serving the payment claim to determine whether the statement requirement has been met. However, in this case, the 9:47 pm email serving the July claim also did not state that it was claim made under the Act.

95 The plaintiff relies upon the 6:36 pm email attaching the May claim, the June claim and the earlier version of the July claim which stated '[p]lease note that all claims are payment claims made under the "*Building and Construction Industry Security of Payment Act 2002 (VIC)*". But this email is not the email which served the July claim now relied upon by the plaintiff.

96 In this context, it is significant that the form of the July claim was very different to the form of the May claim and the June claim. Each of the May claim and the June

claim consisted of an invoice for payment. Each stated that “This is a payment claim under the “*Building and Construction Industry Security of Payment Act 2002 (VIC)*”.

97 By contrast, as noted above, the July claim was not an invoice. Rather, it was a document entitled ‘Progress Payment Claim Form’ in respect of contract “20139-PE 705-did Plant mechanical package 03”. It stated ‘[w]e hereby apply for a Progress Payment of \$406,197.56’ for the work completed to 31 July 2014.

98 In all the circumstances, I have concluded that the July claim does not meet the statement requirement. This is because of the failure of each of the July claim or the 9:37 pm email by which it was served to contain the statement requirement: that the claim was made under the Act. This is notwithstanding the terms of the 6:36pm email particularly given the differences between the form of the May and June claims on the one hand and the July claim on the other. Viewed objectively, I do not consider that the statement requirement has been met: there was real doubt that a reasonable recipient in the shoes of the defendant would have reasonably concluded that the July claim was a payment claim under the Act.

99 I reach this conclusion notwithstanding the defendant in fact treated the July claim as a payment claim under the Act, including by providing a payment schedule on 25 August 2014 objecting to all but \$82,047 of the July claim. As the authorities referred to above make clear, the focus must remain on the ‘objective circumstances, not the subjective intentions or perception of one of the parties’.<sup>57</sup>

### **Conclusion**

100 As a result, I have concluded that the plaintiff is entitled to summary judgment in respect of the May claim and the June claim. It is not entitled to summary judgment in respect of the July claim.

101 There remains the question of interest to be awarded in respect of the May claim and the June claim in light of the above. I have given some consideration to this issue.

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<sup>57</sup> *Clarence Street* (n 15) [39] (Mason P).

However, before determining it, I wish to hear further argument on the nature and effect of the interest provisions in the Act since its amendment in 2006 and the operation of ss 58 and 60 of the *Supreme Court Act 1986*.

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