SUPREME COURT OF QUEENSLAND

CITATION:	*MWB Everton Park Pty Ltd as trustee for MWB Everton Park Unit Trust v Devcon Building Co Pty Ltd* [2024] QCA 94
PARTIES:	**MWB EVERTON PARK PTY LTD ACN 602 739 613 as trustee for MWB EVERTON PARK UNIT TRUST** ABN 86 721 124 419 (applicant) **v** **DEVCON BUILDING CO PTY LTD** ACN 059 540 895 (respondent)
FILE NO/S:	Appeal No 13996 of 2023 DC No 2677 of 2023
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2023] QDC 184 (Loury KC DCJ)
DELIVERED ON:	24 May 2024
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2024
JUDGES:	Dalton JA and Brown and Kelly JJ
ORDERS:	**1. Leave to appeal be granted.** **2. The appeal be allowed.** **3. Order 1 of the orders made below be set aside and that, in lieu thereof, there be an order dismissing the originating application against MWB Everton Park Pty Ltd.** **4. The respondent pay the appellant's costs below, and of this appeal.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PAYMENT CLAIMS – where the respondent contracted with the applicant to construct 56 townhouses – where the respondent argued two sets of documents it sent to the applicant constituted a payment claim under s 68 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) and the applicant's payment schedule was therefore issued out of time – whether the documents identified the

construction work the subject of the claim, stated the amount of the progress payment, and requested payment of the claimed amount – whether the documents constituted a payment claim

Building Industry Fairness (Security of Payment) Act 2017 (Qld), s 68, s 78
District Court of Queensland Act 1967 (Qld), s 118(3)

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190, cited
Iris Broadbeach Business Pty Ltd v Descon Group Australia Pty Ltd [2024] QSC 16, disapproved
KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd & Ors [2019] QSC 178, applied
Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd [2011] 1 Qd R 17; [2009] QSC 376, cited
Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd (2019) 2 QR 190; [2019] QCA 177, cited
Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd [2017] NSWSC 194, cited
T & M Buckley Pty Ltd v 57 Moss Road Pty Ltd [2010] QCA 381, cited

COUNSEL: R Varshney for the applicant
S B Whitten for the respondent

SOLICITORS: Wallace Law Group for the applicant
CDI Lawyers for the respondent

[1] **DALTON JA:** This is an application for leave to appeal made pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld). I would grant leave to appeal. In my view, the decision below was incorrect. It might be difficult to argue that it produced a substantial injustice, for it required payment of a payment claim under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (the BIFA). By their nature, such payments are on account so that ultimately injustice produced by the decision might not have a permanent impact upon the applicant. In that respect, there was no material to show that, in the short term, having to pay in accordance with the judgment below would cause the applicant harm. However, issues of law arise as to the statutory definition of payment claim under the BIFA, which are of a type likely to occur frequently. For this reason I think leave should be granted and the decision below set aside. Because I am of the view that the appeal should be granted, I will refer to the applicant as the appellant for the remainder of this judgment.

[2] The judge below set out the factual background to two applications which came before her on 26 September 2023:

> "[1] On 3 September 2021, Devcon Building Co Pty Ltd (Devcon) entered into a construction contract with Zhongyuan Investments Pty Ltd (Zhongyuan) to design and build 4 townhouses for $1,166,000.

[2] On 12 November 2021, Devcon entered into a construction contract with MWB Everton Park Pty Ltd (MWB) to design and construct 56 townhouses for $17,216,874.

[3] Zhongyuan and MWB are related entities and are represented by the same legal representatives. The development manager for each entity is Bik Kiang Lau who has sworn an affidavit in each of the proceedings. The applications in each of the matters are the same. For convenience they were heard together. Similarly, for convenience this judgement deals with both applications.

[4] Devcon has brought two applications pursuant to section 78(2)(a) of the *Building Industry Fairness (Security of Payment) Act* 2017 (*BIF Act*) seeking the payment of $149,485.60 from MWB in relation to a progress claim; and seeking the payment of $54,185.35 from Zhongyuan in relation to a progress claim.

[5] The central issue at the heart of each of the applications is whether the progress claim is a 'payment claim' pursuant to the *BIF Act*. A secondary issue arises with respect to the application against Zhongyuan as to whether a warning notice pursuant to section 99 of the *BIF Act* was given enlivening the jurisdiction of this court."

[3] In the event, the primary judge found that the "secondary issue" in respect to the application against Zhongyuan was determinative of that matter and dismissed that application. There is no appeal in relation to this point.

[4] As to the application against MWB, the primary judge determined that a payment claim had been made pursuant to the BIFA and ordered that MWB pay the amount of that claim, together with interest, to the respondent. The appeal is on the basis that the judge below incorrectly applied s 68 of the BIFA, and made errors dealing with the factual matters which were before her.

The Statutory Provisions

[5] The primary judge set out the statutory provisions and the essence of the argument about s 68 of the BIFA as follows:

"[6] Section 78(2) provides:

78 Consequences of failing to pay claimant

(1) This section applies if a respondent given a payment claim for a progress payment does not pay the amount owed to the claimant in full on or before the due date for the progress payment.

(2) The claimant may either–

(a) recover the unpaid portion of the amount owed from the respondent, as a debt owing to the claimant, in a court of competent jurisdiction; or

(b) ...

[7] 'Payment claim' is defined in section 68 which states:

(1) A ***payment claim***, for a progress payment, is a written document that–

(a) identifies the construction work or related goods and services to which the progress payment relates; and

(b) states the amount (the claimed amount) of the progress payment that the claimant claims is payable by the respondent; and

(c) requests payment of the claimed amount; and

(d) includes the other information prescribed by regulation.

[8] The respondents' principal argument in each application is that the payment claim upon which Devcon relies in each application does not meet the requirements of section 68. It is therefore not a payment claim pursuant to the *BIF Act* and Devcon is not entitled to judgment."

[6] The object of the BIFA is, "… to help people working in the building and construction industry in being paid for the work they do" – s 3(1). Section 3(2) of the BIFA shows that purpose is to be achieved by:

"…

(b) granting an entitlement to progress payments, whether or not the relevant contract makes provision for progress payments; and

(c) establishing a procedure for –

(i) making payment claims; and

(ii) responding to payment claims …"

[7] Sections 68 and 78 of the BIFA (set out above) mean that the builder's entitlement to progress payments under the Act depends upon the builder giving a payment claim as defined. It has been remarked in the case law that analogous provisions give a builder an entitlement which is extra-contractual, and which depends upon compliance with the relevant legislation.[1]

Contractual Provisions

[8] The parties' contract incorporated the general conditions AS4000–1997. The builder had the right to claim "payment progressively" on the "21st day of each month" for work done to that date – cl 37.1 and Item 28 of annexure part A. Clause 37.1 of the contract provided for each progress claim to be given in writing to the superintendent and to include details of the value of the work under contract which the builder had done, and any other monies then due to the builder pursuant to the

[1] *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd* (2019) 2 QR 190, [12]; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, [209] and *Parkview Constructions Pty Ltd v Total Lifestyle Windows Pty Ltd* [2017] NSWSC 194, [50]-[51].

contract. Clause 37.2 of the contract provided that, within 10 business days after receiving the progress claim, the superintendent was to issue to both the principal and builder a progress certificate, evidencing the superintendent's opinion of the monies due from the principal to the builder pursuant to the progress claim.

Documentation sent to the Principal

[9] This case concerns two sets of documents sent by the builder to the principal.

Purported Payment Claim Under BIFA

[10] On 30 June 2023, the builder sent an email to the principal. The subject was "C117FLO - Claim 17 300623". The substance of the email was, "Please see attached claim 17 for the Elysium project. Also attached is the stat dec for this claim. If you have any questions please let me know."

[11] There were two attachments to the email. The first was a three page spreadsheet. It was headed with the builder's name, the title "Project Summary" and the words "Progress Claim". It was dated 30 June 2023. It showed a "Ref Date", "Wednesday, 21 June 2023". It was shown as claim 17. The building project address was identified, as was the principal, the appellant. It showed a table which listed 42 trades. Against each trade was listed a contract value as a monetary sum. This was followed by another monetary sum in a column headed "Previously Claimed". The next column showed a percentage in a column labelled "% Complete". Against each trade was then a monetary amount under a column headed "Current Claim", and then finally a last column headed "Remaining Balance", which contained another monetary figure. To the right of that was a wide column headed "Summary of Work Complete This Claim". There was nothing at all entered in this column.

[12] Under this part of the "Project Summary" were smaller lists under sub-headings. The first was a list of 11 items under the heading "Civil Variations"; then three items under the heading "Stage 1 Variations"; two items under the heading "Stage 2 Variations", and one item under the heading "Stage 3 Variations".

[13] In a small box at the bottom right of this first page was a "Claim Summary", which showed a monetary amount against the description, contract works complete to the date of the document; another amount against the description variations completed to the date of the document and, subtracted from that, the amount claimed prior to the date of the document. Under this was an even smaller box which showed, against the words "Amount Due this Claim (ex GST)", $135,896.00; against the words "Plus 10% GST", $13,589.60, and lastly, against the words "Amount Due this Claim (inc GST)", $149,485.60.

[14] There followed two more pages in similar form, one headed "Civil Works", which showed an amount due this claim (inc GST) of $190,957.62, and the other headed "Stage 1", which showed "Amount Due this Claim (Inc GST)" of $36,651.71.

[15] The second document attached to the 30 June 2023 email was a statutory declaration by a director of the builder who declared that, "I am making this statutory declaration in connection with the payment of Progress Claim No 17 dated 30th June 2023 pursuant to the Contract". The declaration was to the effect that the

builder's workers and subcontractors had been paid, and there were no threatened disputes or material disclosures to make.

Contractual Progress Claim

[16] On 17 July 2023, the builder sent the appellant a second set of documents by email. This time the subject was "Tax Invoices – Elysium – Progress Claim #17 – Civils + Part V03, V07 and V08 and Stage 1". The text of the email was, "Please find attached Tax Invoices for Progress Claim 17 Civils – 117 Flockton Street, Everton Park, along with Invoice for Part V03, Part V07, Part V08 and Tax Invoice for Stage 1. If you could please organise payment at your earliest convenience."

[17] Attached were the same three pages of tables which had been attached to the 30 June 2023 email, along with another two tables in similar form, one relating to Stage 2 and the other to Stage 3. The same statutory declaration as had been attached to the 30 June 2023 email was attached. Also attached were five invoices. Each were from the builder addressed to the appellant; each had a separate invoice number; each was dated 17 July 2023. The first was an invoice for "Claim 17 as per Progress Claim breakdown/summary". This was in an amount of $93,502.29. The next was in relation to variation V03, in an amount of $3,378.66. The next invoice was in relation to variation V07, in an amount of $3,407.90. The fourth invoice was in relation to variation V08 in an amount of $48,608.78, and the last was in relation to "Claim 17 as per Progress Claim breakdown/summary" in an amount of $3,966.63.

[18] At the foot of each invoice was the request, "Please settle the full amount within five business days". There was also the statement, "This claim is made under the Building Industry Fairness (Security of Payment) Act 2017" and a declaration that all subcontractors had been paid "as at the date of this payment claim".

[19] The appellant treated the receipt of those invoices as a payment claim under the BIFA and responded with a payment schedule (see s 69 of the BIFA).

Dispute Contentious

[20] The builder's claim was that the documents of 30 June 2023 constituted a payment claim and that the payment schedule was therefore issued out of time. The appellant principal's argument below, and on appeal, was that the documents of 30 June 2023 did not meet the statutory definition of a payment claim and that the first time a payment claim was given was on 17 July 2023. Accordingly, it contended its payment schedule had been given within time.

[21] As a general proposition, I observe that the two sets of documents (one sent 30 June 2023 and the other sent 17 July 2023), show a confusion on the part of the builder between the concept of a payment claim under the BIFA and a progress claim under the contract. As the case law referred to at [7] shows, if a builder wishes to take advantage of the provisions for statutory payment claims under the BIFA, it is incumbent on the builder to set up an accounting system which conforms to that Act, with professional advice if necessary.

Documents sent 30 June 2023 Not a Payment Claim as Defined

[22] In my view, there are three independent reasons why the documents sent on 30 June 2023 do not meet the statutory definition of a payment claim.

Section 68(1)(a) "Identifies the Construction Work"

[23] The appellant contended that the documents attached to the email of 30 June 2023 did not identify the construction work to which the progress claim related within the meaning of s 68(1)(a) of the BIFA.

[24] In determining whether or not a document identifies the work, goods and services to which the claim relates, the Courts take a practical, and not overly technical, attitude. In *T & M Buckley Pty Ltd v 57 Moss Road Pty Ltd*[2] Philippides J, writing in this Court, said that 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 … That is, whether the payment claim reasonably identified the construction work to which it related such that the basis of the claim was reasonably comprehensible to the applicant." It has been accepted by the Courts that, in deciding whether or not work has been sufficiently identified, the background of each of the parties "derived from their past dealings and exchanges of documentation" is to be taken into account.[3]

[25] In *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd*[4] Brown J found that a trade summary, such as was enclosed with both the 30 June and 17 July emails, was not sufficient to identify work done for the purpose of the statutory definition because it only provided reference to a percentage of a category of work. In my view, that reasoning is apposite here. The contract was for the construction of 56 townhouses. In those circumstances, it was all but meaningless to say that 5% of concreting or 12% of plumbing had been completed. More description was needed if the document was to sufficiently identify the construction work, related goods and services, for the purpose of s 68(1)(a).[5]

[26] In my view, the documentation sent under cover of the email of 30 June 2023 did not sufficiently identify the construction work or related goods and services which a payment claim must, having regard to s 68(1)(a). It did not matter that the claim was the 17th progress claim and that, as the primary judge remarked, it was substantially in the same form as the earlier claims. Nor did it matter that someone on behalf of the principal did not swear that they did not understand what work had been done in respect of the 17th claim (or any of the preceding claims).[6] Unless something which meets the statutory definition of a payment claim is delivered to the principal, the principal has no statutory obligation to make a payment or respond with a payment schedule. Contractual concepts such as waiver (if that is what the primary judge had in mind) are irrelevant to this. Further, whether or not the document claimed to be a payment claim meets the statutory definition must be a

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2 [2010] QCA 381, [38].

3 *Neumann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2009] QSC 376, [25], per White J.

4 [2019] QSC 178.

5 In different factual circumstances, a trade summary or trade breakdown might be sufficient. Hypothetically, if the contract was to build a single domestic dwelling and the only concreting was to the driveway, a description that 50% of the concreting had been achieved would allow the party receiving the claim to understand what work the builder said had been done.

6 See [13] and [16] of the judgment below.

matter of objective construction; the Court cannot be concerned with a subjective understanding of the principal.

Section 68(1)(b) "States the Amount … of the Progress Payment"

[27] Section 68(1)(b) of the BIFA requires a payment claim to state "the amount (the claimed amount) of the progress payment that the claimant claims is payable by the respondent".

[28] In trying to understand why more than one table was attached to the emails of 30 June and 17 July 2023, it assists to understand that the contract work was in several parts. The first was "Earthworks, civil & bio-rehabilitation". Stage 1 was defined as townhouses 1 to 18; Stage 2 as townhouses 19 to 41, and Stage 3 as townhouses 42 to 56. When read together with the contract, it appears that by 30 June 2023, work under the Earthworks/civil works part of the contract had begun, as had work under Stages 1 and 2, at least.

[29] The amounts at the end of the various tables attached to the emails of 30 June 2023 and 17 July 2023 are not, on their face, related to each other. It cannot be seen, for example, that the tables relating to Civil works, Stage 1 and 2 works are subsets of the total claim on page 1 of the spreadsheet.

[30] Counsel for the respondent told the primary judge below that the claim of $149,485.60 at the bottom of the first table was the only relevant figure. He said, "… that's the only relevant page because when one looks over the other pages, they're breakdowns of different areas of work, so civil works and stage 1. They're just different areas of the works. The relevant part which makes the progress claim and the amount due for the claim is clearly set out on the project summary."[7] The same submission was made before this Court, namely:

> "Although the Payment Claim and the subsequent spreadsheets possess these common features, it is clear that the works outlined in these spreadsheets relate to different areas of work and are not to be considered when interpreting whether the Claim complies with section 68(1)(b) of the Act."[8]

[31] There was no evidence to that effect before the primary judge, and I cannot see how the submission could fairly or logically be made. Civil works and Stages 1–3 were separable parts of the works under the contract, and the tables showed that $190,957.62 was "due this claim" in respect of civil works, and $36,651.71 was "due this claim" in respect of Stage 1. How that related to the "amount due this claim (incl GST) $149,485.60" is not apparent to me, and counsel for the respondent could not explain it on the hearing of this appeal.

[32] The primary judge appears, however, to have accepted the statement made by counsel, for at [15] of the judgment below she says:

> "MWB further argues that the amounts set out in the further spreadsheets titled 'Civil Works' and 'Stage 1' sent with progress claim number 17 contain different amounts which are unable to be reconciled with some of the amounts in progress claim number 17.

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7 T 1-6.

8 Paragraph 43, respondent's amended written submissions.

> Those further spreadsheets, however, relate to different areas of work and do not fall within the description of 'payment claim' in the *BIF Act*."

[33] This must be an error in the fact finding process. I cannot see that the documents attached to the email of 30 June 2023 stated one amount, which was the claimed amount of the progress payment.[9] It does not appear from the email of 30 June 2023, or any of the attachments, what the amount of the payment claim is. In my view then, the email and its attachments could not be considered to be a payment claim having regard to s 68(1)(b).

Section 68(1)(c) Requests Payment of the Claimed Amount

[34] Lastly, it does not seem to me that the email of 30 June 2023, together with the attachments, requested payment of the claimed amount. Section 68(1)(c) must be interpreted against the whole of s 68, and in particular, meaning ought to be given to the words "requests payment of the claimed amount" as an independent statutory requirement of a written notice which must also identify construction work to which a progress claim relates, and state the amount of the progress payment which is claimed by the builder as payable by the principal.

[35] The respondent's argument that the words "amount due this claim" were a request for payment must be rejected. The statement of the "amount due this claim" was an identification by the builder of the progress payment which it claimed was payable by the principal. That identification was required by s 68(1)(b). Something more was required by s 68(1)(c); there had to be a request for payment of the amount claimed. Had the documentation been headed "Invoice", rather than "Project Summary", that would have been sufficient because s 68(3) says, "A written document bearing the word 'invoice' is taken to satisfy subsection (1)(c)". Statements such as those found at the bottom of the tax invoices which were attached to the email of 17 July 2023 would have satisfied s 68(1)(c). It might be accepted that no particular form of words is necessary.[10] However, something which amounts to a request for payment needs either to be express in the document or necessarily, and clearly, implied in the document. Here, I cannot see that there was anything in the email and attachments of 30 June 2023 which requested payment.

[36] The respondent referred us to *Iris Broadbeach Business Pty Ltd v Descon Group Australia Pty Ltd*.[11] In that case a document which was not an invoice was found to be a payment claim, even though it did not expressly request payment of the identified amount. The single judge in that case identified that s 68(1)(b) and s 68(1)(c) of the BIFA imposed independent requirements, both of which had to be met, and that the section had to be read to give s 68(1)(c) "work to do" – [132]. In that case the judge was prepared to find that the documentation impliedly included a request for payment because the document was headed "Progress Claim"; gave a figure for a "Total Progress Claim Value for the Month (Incl GST)"; was annotated to the effect that "This Progress Claim is submitted under the *Building Industry Fairness (Security of Payment) Act* 2017 …", and was accompanied by a statutory declaration which, like the declaration here, recited that the statutory declaration

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9 Only one payment claim is allowed for any one reference period – s 75(4) of the BIFA.

10 *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd* [2007] QSC 333, [20].

11 [2024] QSC 16.

was made "in connection with the payment of Progress Claim No …". While I cannot see any relevant distinction between the documents in this case and the documents in *Iris Broadbeach Business*, I am afraid that I am not persuaded by the analysis in that case. I do not think it can be said that the documents comprising the email and attachments of 30 June 2023 made a request for payment, independently of identifying the amount the subject of the claim.

[37] In the circumstances, I would order that leave to appeal is granted; the appeal is allowed; Order 1 of the orders made below be set aside and that, in lieu thereof, there be an order dismissing the originating application against MWB Everton Park Pty Ltd. The respondent should pay the appellant's costs below, and of this appeal.

[38] **BROWN J:** I have read the reasons of Dalton JA and agree with those reasons and the proposed orders.

[39] **KELLY J:** I agree with the reasons of Dalton JA and with the orders proposed by her Honour.