JUDGMENT : GILES JA; TOBIAS JA; BASTEN JA; Supreme Court of New South Wales. Court of Appeal. 14th February 2007

1 **GILES JA**: I agree with Tobias JA, and with the additional observations of Basten JA.

2 **TOBIAS JA**: On 5 June 2003 the respondent (as principal) and the appellant (as contractor) executed a contract (the contract) whereby the appellant agreed to design and construct for the respondent the Westpoint Shopping Centre redevelopment at Blacktown (the project). The contract sum (referred to therein as the "*warranted maximum price*") was $224,171,704.

3 It would appear that prior to December 2004 the appellant (referred to in some documents as "BHPL") made progress claims under the contract upon the respondent. Thereafter it served those claims as *payment claims* pursuant to s 13(1) of the *Building and Construction Industry Security of Payment Act* 1999 (the Act). The first such claim made under the Act was Progress Claim No.28 under the contract.

4 Since December 2004 the appellant had served payment claims under the Act (referred to by the appellant as monthly payment schedules) on a monthly basis. In reply to each such claim, the respondent provided a payment schedule to the appellant pursuant to s 14(1) of the Act. In all but two cases, the appellant then made an adjudication application under s 17(1)(b) of the Act.

5 Prior to serving Payment Claim No.42 which is the subject of the proceedings, the appellant had served Payment Claims Nos. 39, 40 and 41 in each of which an amount exceeding $80 million was claimed. In reply to each of those claims the respondent provided a payment schedule to the appellant pursuant to s 14(1) in which, I infer, the amount of the payment proposed to be made by the respondent to the appellant was either nil or a relatively small amount. Each of those payment claims was the subject of adjudication pursuant to s 17(1)(b) and in each case the adjudicator determined the amount payable by the respondent to the appellant as being less than $2 million. In one case the adjudicated amount was nil.

6 On 11 April 2006 the appellant served Payment Claim No.42 on the respondent pursuant to s 13(1) of the Act. As required by s 13(2)(b) of the Act the amount of the progress payment claimed was $105,411,474 (the claimed amount). More than 70 folders of documentary material accompanied the claim. A covering letter described the payment claim as being made in accordance with cl.42 of the contract which contained the contractual arrangements between the parties relating to the making and payment of progress claims. The covering letter also stated that the payment claim was made under the Act as required by s 13(2)(c).

7 On 28 April 2006 (being within 10 business days after the payment claim had been served), the respondent delivered to the appellant a box containing eight folders of documents. They included a document which had the heading "*Payment Schedule under the Building and Construction Industry Security of Payment Act 1999 (NSW)*". That document (referred to by the primary judge as the "*Document headed Payment Schedule*", a description I also adopt), was the first hole-punched document in the top folder in the box of folders delivered to the appellant. Physically separate from the eight folders, but delivered at the same time to the appellant, was a letter on the letterhead of the "*Principal's Representative*", a Mr Ron Aquilina, who had been appointed as such by the respondent pursuant to cl 23.1 of the contract. One of the functions of the Principal's Representative related to acting as a certifier with respect to the payment of progress claims. Where he so acted, he was required by cl 23.1(a)(iii)(B) of the contract to act "*reasonably and independently*".

8 Behind the Document headed Payment Schedule was another document headed "APP Progress Payment Certificate" issued in accordance with the contract. APP was APP Corporation Pty Limited which employed Mr Aquilina. Whether APP or Mr Aquilina was the Principal's Representative does not matter for present purposes.

9 Immediately following the document headed "*APP Progress Payment Certificate*" was a document headed "Payment Recommendation for BHPL Payment Claim No.42 Payment Period to 31 March 2006 for APP Corporation Pty Limited". That document took up the balance of the top folder and the remaining seven folders.

10 It was common ground that the above-mentioned documentary material was delivered to the appellant on 28 April 2006 and that that date was within the period of 10 business days after the appellant's payment claim was served on the respondent on 11 April 2006. Accordingly, s 14(4)(b)(ii) of the Act was complied with. It was further common ground that if the Document headed Payment Schedule complied with s 14(1) of the Act, there was no issue that it complied with s 14(2) and (3).

11 However, the issue between the parties was that the appellant contended that the Document headed Payment Schedule did not constitute a payment schedule as required by s 14(1) of the Act so that, as the respondent had not provided a payment schedule to the appellant (as claimant) for the purposes of s 14(4), it became liable to pay the claimed amount to the appellant pursuant to s 15(1)(a). As the respondent had failed to pay the claimed amount, the appellant on or about 13 May 2006 served notice on the respondent pursuant to s 15(2)(b) of its intention to suspend carrying out construction work and on 17 May 2006 it notified the respondent that it was in fact suspending work pursuant to ss 15(2) and 27(1) of the Act.

12 On the same day as it suspended work, the appellant instituted proceedings in the Supreme Court pursuant to s 15(2)(a)(i) of the Act seeking judgment for the claimed amount upon the ground that the respondent had not provided a payment schedule to the appellant in accordance with s 14(4)(b) of the Act. It particularised that allegation in the following terms: *"On 28 April 2006 BHPL received a letter from Mr Ron Aquilina, the Principal's Representative. The letter stated that it attached 'a copy of the Progress Payment Certificate for Payment Claim*

No.42'. It made no reference to any payment schedule. Attached to the letter was, amongst other items, a document entitled 'Payment Schedule under the Building and Construction Industry Payment Act 1999 (NSW) (the 'Document'). The letter did not refer to the Document. The Document was signed by Mr Dan Young, a partner of the firm of solicitors known as Allens Arthur Robinson."

13 The following issues were litigated before the primary judge:

(a) Whether the letter of the Principal's Representative accompanying the eight volumes and which stated that pursuant to c 42.1(b) of the contract it attached a copy of Progress Payment Certificate for Payment Claim No.42 but did not refer to any payment schedule being provided under the Act was fatal to the respondent's claim that it had provided a payment schedule (being the Document headed Payment Schedule) for the purpose of s 14(1) of the Act?

(b) Whether the fact that the Document headed Payment Schedule was signed by a partner of Allens Arthur Robinson (Allens) deprived that document of being a payment schedule within the meaning of s 14(1)?

14 In his judgment delivered on 7 June 2006 the primary judge, Einstein J, rejected the appellant's contention that the Document headed "*Payment Schedule* was not a payment schedule provided to the appellant within the meaning of ss 14(1) and 14(4)(b) of the Act. Accordingly, he declared that that Document was a payment schedule in accordance with s 14 of the Act and, further, that it was delivered within the time specified in s 14(4). His Honour further declared that the appellant had no entitlement to serve a notice on the respondent of its intention to suspend the carrying out of construction work pursuant to s 14(2)(b) of the Act or to actively suspend the carrying out of that work under the contract pursuant to s 27 of the Act. Other consequential orders were also made. It is against those declarations and orders that the appellant now appeals to this Court.

The relevant statutory provisions

15 The sections of the Act relevant to the issues in the appeal are as follows:

"13 Payment claims

(1) A person referred to in section 8 (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 identify the construction work (or related goods and services) to which the progress payment relates, and

(b) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"), and

(c) must state that it is made under this Act. …

14 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").

(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."

The primary judge's reasons

16 After stating the facts his Honour observed (at [4]) that the materials provided by the respondent in the eight folders served to fulfil two functions: first, as constituting a payment schedule within the meaning of s 14(1) of the Act and, second, as providing a progress payment certificate as required by cl 42(6) of the contract. He therefore held that the payment schedule included the whole of the eight folders.

17 As to the first of the issues referred to in [13] above, his Honour accepted the respondent's submissions that it was immaterial that the Document headed Payment Schedule was not referred to in the Principal's Representative's letter which attached a copy of Progress Payment Certificate for Payment Claim No.42 pursuant to cl 42(1)(b) of the contract so that the absence of any such reference did not deny the fact that the Document headed Payment Schedule was in fact provided to the appellant. His Honour therefore accepted the submission that when the documents that were provided to the appellant on 28 April 2006 were read as a whole, there was no possible

way that a reasonable person could conclude that they did not include a payment schedule within the meaning of s 14.

18 There was no doubt that the payment claim served upon the respondent by the appellant on 11 April 2006 served as a progress claim under cl 42 of the contract as well as a payment claim made under s.13 of the Act. Under cl 42 the Principal's Representative was required to certify the amount of the progress claim: hence the Principal's Representative's letter and the Progress Payment Certificate included in the eight folders.

19 Given that there was no requirement in s 14(2) of the Act that a payment schedule must state that it is made under the Act (a requirement only for a payment claim: see s 13(2)(c)), it was immaterial that the Principal's Representative's letter made no reference to the Act and did not use the expression "*payment schedule*".

20 In any event, the first document in the eight folders was headed "*Payment Schedule under the Building and Construction Industry Security of Payment Act (1999) NSW*". That heading made it plain that what was being provided to the appellant on 28 April was intended to include a payment schedule under the Act. The document stated that it was from the respondent; it identified the payment claim to which it related by date and amount; it indicated the amount of the payment (if any) that the respondent proposed to make and further indicated in an attachment the reasons why the scheduled amount was less than the claimed amount.

21 In essence, the appellant did not dispute any of the foregoing findings. Its case before the primary judge was rather different. It contended that the Document headed Payment Schedule, which had been delivered by a Mr McCondach to the appellant's offices and which had been signed by Mr Young, a partner of Allens, was a document in respect of which there was no evidence that the respondent had been involved in its preparation or had authorised that it be provided to the appellant. Nor was there evidence, although Mr Young signed the document "*for Queensland Investment Corporation*", that he was authorised to do so. Finally, although Progress Payment Certificate for Payment Claim No.42 was signed by Mr Aquilina of APP as "*Principal's Representative*", he was only acting pursuant to the contract as certifier in respect of the appellant's progress claim under the contract and was not acting nor purporting to act nor authorised to act as the respondent's representative for the purpose of providing a payment schedule under s 14(1) of the Act.

22 The basis of the foregoing submission was that, when exercising a certifying function under the contract, Mr Aquilina was required by cl 23.1(a)(iii)(B) to act reasonably and independently and, therefore, could not at, the same time as he was so acting dependently of the respondent, also act as its authorised agent for the purpose of providing a payment schedule to the appellant pursuant to s 14.

23 In [35] his Honour rejected the appellant's submission that the Document headed Payment Schedule was not a payment schedule provided by the respondent to the appellant within the meaning of s 14 and that Allens had no authority to author or bring into existence that document.

24 His Honour therefore considered that the following matters were "*trite*" (at [36]):

"*i. There are no requirements in s.14 of the Act that in order for a document to be a "payment schedule" it must be signed in a particular manner or by a particular person.*

ii. Indeed, there are no requirements that the payment schedule be signed at all.

iii. The only relevant requirement is that the payment schedule be provided by the respondent [being the person on whom the payment claim has been served] to the claimant (s.14(1));

iv. The question as to whether the payment schedule has been provided to the claimant by the respondent is a question of fact.

v. That question of fact is answered in the affirmative on the evidence before the Court."

25 The primary judge then held (at [37]) that it was common ground that the 28 April documents were provided by Mr McCondach to the appellant; that the Document headed Payment Schedule on its face identified the entity providing it as the respondent; that it was not necessary for any signature to appear on the document; that Mr Young, a partner of Allens, signed the document for the respondent; and that Progress Payment Certificate of Payment Claim No.42 signed by Mr Aquilina of APP as Principal's Representative (and which was part of the Document headed Payment Schedule) had been addressed to the appellant. These facts, his Honour held at [42], were sufficient to prove that the Document headed Payment Schedule was provided by the respondent for the purpose of s 14 and that it was, therefore, unnecessary to consider the further evidence that was called with respect to the question of authority.

26 Nevertheless, the respondent was permitted to re-open its case for the purpose of adducing evidence as to the authority of Allens. The express scope of the firm's retainer was set out in a letter from Allens to the respondent dated 30 July 1998 which was signed by the respondent and returned to Allens on 24 August 1998. The letter relevantly stated as follows under the heading "***OUR ROLE***":

"*The work we are to do is draft documentation for the delivery of design and construction services for extensions to Westpoint (including, if appropriate, tender documents), finalise documents with the selected contractor* ***and deal with other matters as they arise in relation to the Westpoint extensions project****.*

You will give us our instructions." (Emphasis added)

27 The appellant submitted that the terms of the retainer did not constitute a general authority but was a generic description of the work for which Allens was retained if and when instructions were forthcoming and that, absent such instructions, Allens were not authorised to "*deal with other matters as they arise in relation to the Westpoint*

extensions project". In other words, unless the respondent authorised Allens to prepare and provide on its behalf the Document headed Payment Schedule, it was not authorised to perform that task without specific instructions to do so, of which there was no evidence.

28 The primary judge rejected (in [46]) that submission on the basis that, first, the bringing into existence of a payment schedule in reply to a payment claim received by the respondent in relation to the project clearly fell within the description of "*other matters as they arise in relation to the Westpoint extensions project*". Second, the preparation of a payment schedule in reply to a payment claim was incidental to the object of Allens' retainer to deal with other matters as they arose in relation to the project, so that express instructions or authority were not required. Third, it followed that Allens had implied authority to bring the Document headed Payment Schedule into existence. Fourth, the sentence "*You will give us our instructions*" did not, on the proper interpretation of the retainer letter, impose a limitation on Allens' authority. The purpose of that sentence his Honour held was to identify the particular natural person who was to give Allens their instructions on behalf of the respondent. That person was, relevantly, a Mr Douglas who was the addressee of the letter of 30 July 1998.

29 Fifth, there was evidence from a Mr Ritchie of Allens that the firm had been involved in preparing the monthly payment schedules in reply to the appellant's monthly payment claims which had first commenced under the Act in December 2004. Accordingly, it should be inferred from that fact that when the appellant served its payment claim on 11 April 2006, the respondent's retaining of Allens in respect of the preparation of the monthly payment schedules extended as a matter of course to the preparation of a payment schedule in response to that claim.

30 In this regard the evidence was that Allens had been preparing such payment schedules on the respondent's behalf without objection from the appellant for well over a year by the time the 11 April 2006 payment claim was served.

31 Accordingly, his Honour considered (at [47]) that the foregoing evidence clearly established that Allens was authorised, either expressly or impliedly, by the respondent to prepare the subject payment schedule. If that was so, then the firm was authorised to provide the payment schedule to the appellant in accordance with s 14(1) of the Act.

The submissions on the appeal

32 In its written submissions filed for the purpose of the appeal, the appellant accepted that there was no doubt that it received a document purporting to be a payment schedule within the time prescribed by s 14 of the Act. The question for determination by the primary judge was one of fact, namely, whether or not the respondent provided the appellant with a payment schedule in accordance with s 14(1). The appellant's principal case on the appeal was that his Honour ignored most of the evidence before him in relation to that question. Rather, he found that the respondent had provided a payment schedule mainly because the document relied on suggested, by recitation of the words "*From: [the respondent]*", that it had in fact been provided by the respondent.

33 However it submitted that the balance of the unchallenged evidence before the primary judge established that the respondent had no involvement, either directly or indirectly, in the preparation or delivery (and thus the provision) of the purported payment schedule. That evidence was that the Document headed Payment Schedule was prepared by Allens who then caused it to be delivered to the appellant. However, there was no evidence before his Honour to establish that the respondent authorised or instructed the solicitors to perform this particular task.

34 In fact, the evidence was that the solicitors had so acted on the instructions of Mr Douglas, who had ceased to be an employee of the respondent on 30 June 2000. Accordingly, whilst the solicitors' intentions were no doubt well meaning, unless they were authorised by the respondent to prepare and deliver the payment schedule, it could not have been provided by the respondent in accordance with the requirements of s 14(1) of the Act.

35 All of the evidence adduced in the proceedings before the primary judge was tendered by the respondent and was unchallenged. No evidence was adduced by the appellant. However, the appellant submitted that no evidence was adduced from any officer or employee of the respondent in relation to its (or their) involvement in the provision of the purported payment schedule to the appellant, either directly or by way of instructions to an authorised representative of the respondent such as Mr Douglas, Mr McCondach or Allens.

36 So far as Mr Douglas was concerned, he had ceased to be an employee of the respondent on 30 June 2000, and Mr McCondach was a quantity surveyor employed by WT Partnership, who were engaged by the respondent to assist the Principal's Representative in connection with its administration of the contract.

37 According to the appellant, the unchallenged evidence before his Honour, in relation to the creation and delivery of the purported payment schedule was that from 23 September 2002 a company associated with Mr Douglas, Adagee Pty Ltd (Adagee), performed certain services not for the respondent but for QIC Properties Pty Ltd (QICP). QICP was engaged on 23 September 2002 by the respondent to perform certain development management services for it in relation to the project. Accordingly, it was submitted that any work in relation to the project performed by Mr Douglas was carried out in his capacity as an employee of Adagee. There was no evidence as to the nature and extent of Adagee's retainer by QICP.

38 The payment claim was accepted by the appellant as being both a progress claim under the contract and a payment claim under s 13 of the Act. As a progress claim under the contract it was served on the Principal's Representative as the contract required. As a payment claim under the Act, it was served on the respondent.

39 On 12 April 2006 Mr Douglas, who had received a copy of the payment claim, requested the Principal's Representative (Mr Aquilina), an employee of APP, to forward a copy of the payment claim to Allens. Mr Douglas then contacted Mr Ritchie, a solicitor employed by Allens, and informed him that he had made that request.

40 Inferentially, it would appear from the evidence adduced by the respondent that the Document headed Payment Schedule was prepared by Allens. However, there was no evidence from any officer or employee of the respondent suggesting that, either directly or by inference, prior to 28 April 2006 they had asked Allens to prepare a payment schedule in reply to the payment claim that had been served on 11 April 2006. Mr Douglas' evidence, however, was that on 26 April 2006 he informed Mr Ritchie that Allens were authorised to sign the payment schedule on behalf of the respondent. The appellant submitted that there was no evidence that Mr Douglas was authorised by the respondent to so instruct Allens. However, it needs to be borne in mind that, according to the respondent's submission, Allens' letter of retainer of 31 July 1998 noted that Mr Douglas would give instructions to it. On the appellant's construction of the retainer letter, Allens were not authorised to deal with any "*other matters as they arise in relation to the Westpoint extensions project*" absent those instructions.

41 As far as Mr McCondach's evidence was concerned, after they had prepared the Document headed Payment Schedule, Allens sent the document to him. Upon its receipt he carried out what his Honour referred to as "secretarial acts" culminating in his placing the purported payment schedule into one of eight lever arch folders that also contained the payment certificate and associated documents issued by the Principal's Representative as part of his independent assessment of the appellant's progress claim for payment made under the contract. He then delivered the documents to the appellant's offices on 28 April 2006.

42 The appellant submitted that not only did his Honour fail to determine what it was that the Act envisaged in terms of the provision of a payment schedule, but he also ignored the evidence referred to in the preceding paragraphs. In ignoring that evidence his Honour did not undertake the requisite analysis to enable him to answer the question stated by him in [36] of his judgment, namely, the question as to whether the Document headed Payment Schedule had been provided to the appellant by the respondent, that being a question of fact.

43 On the evidence before the primary judge, the appellant therefore submitted that
(a) the preparation of the Document headed Payment Schedule was instigated by Mr Douglas, an employee of Adagee;
(b) the document was prepared by Allens and signed by Mr Young, a partner of Allens;
(c) Allens forwarded the document to Mr McCondach, an employee of W T Partnership, who delivered it to the appellant; and
(d) none of those persons disclosed by the evidence as being involved in the preparation of the payment schedule were officers or employees of the respondent. Inferentially, the submission extended to the proposition that none of those persons were either expressly or impliedly authorised to perform the tasks they did with respect to the Document headed Payment Schedule on behalf of the respondent.

44 Accordingly, it was submitted that if the persons involved in the preparation and delivery of the document to the appellant had no authority to do what they were doing, then such authority could not be inferred merely because they undertook the work. They had neither express nor ostensible authority to carry out the particular task in question. Absent that authority, and absent any involvement by any officer or employee of the respondent directly or indirectly in the preparation and delivery of the Document headed Payment Schedule to the appellant, it must follow, so it was submitted, that the purported payment schedule was not one which had been provided by the respondent to the appellant within the meaning of s 14(1) of the Act.

45 It will be appreciated that the underlying proposition contended for by the appellant is that a payment schedule must be provided by a respondent or by someone authorised on its behalf, to the claimant for the purposes of complying with ss 14(1) and 14(4)(b) of the Act. Critically, the respondent could only **provide** a payment schedule to the appellant within the meaning of s 14(1) if it had some direct or indirect involvement in its preparation or delivery or had authorised, expressly or impliedly, some other person to prepare and/or deliver it. In the present case, there was no evidence to support any such involvement or authorisation with the result that the statutory requirements had not been complied with. His Honour had therefore erred in finding to the contrary.

46 The appellant also submitted that his Honour had erred in finding that the terms of Allens' retainer constituted sufficient authorisation for them to provide the Document headed Payment Schedule to the appellant on the respondent's behalf without specific instructions to do so from the respondent or someone authorised to give those instructions. It was submitted that in their context, the words "*deal with other matters as they arise*" in relation to the project did no more than contemplate that the respondent might instruct Allens to carry out further work on the project beyond "*documentation for the delivery of the design and construction services*". The expression "*deal with other matters as they may arise in relation to*" the project were vague and ambiguous and could not be construed as authorising Allens, without further instructions from the respondent, to do anything they wished in relation to the project.

47 As no such instructions were forthcoming, the retainer letter did not authorise Allens to exercise the respondent's legal rights under the Act on its behalf, including the provision of a payment schedule in reply to the appellant's payment claim.

48 The appellant further submitted that his Honour erred in finding (in [46(ii)]) that, as a solicitor had implied authority to do all such things as were incidental to the object of the retainer, Allens were authorised to provide the Document headed Payment Schedule even if the express terms of the retainer contained no such authority.

49 Although accepting that a solicitor does have implied authority to do all such things as are incidental to the object of his retainer, such matters did not, so the appellant submitted, extend to the provision of a payment schedule pursuant to the provisions of the Act. The provision of a payment schedule could not be said to be incidental to the terms of the retainer. In particular, if Allens' implied authority extended to the provision of a payment schedule, why would it not also operate to authorise Allens, of its own volition, to perform any other acts on the respondent's behalf in connection with the project such as terminating the contract with the appellant even if the appellant was not in breach or the respondent was not otherwise entitled to take such action?

50 I would have thought that the answer to the last submission was fairly obvious. However, the submission extends to the proposition that even if the appellant was in breach of the contract entitling the respondent to terminate it in accordance with its terms, the giving of a notice of termination by Allens with the express authority or instructions of the respondent would not be an act which was incidental to dealing with other matters as they arise in relation to the project within the meaning of the retainer.

51 In any event, any implied authority of Allens could not be inconsistent with the express terms of the retainer and, on the appellant's argument, the retainer provided expressly that Allens was authorised to deal with other matters as they arose in relation to the project only in circumstances where an instruction to that effect was given by the respondent or, presumably, someone authorised by the respondent to give those instructions.

52 The appellant then submitted that his Honour had erred in finding that Allens had in fact been historically involved in preparing the monthly payment schedules in response to monthly payment claims so that the Court could infer that its retainer by the respondent included preparing payment schedules in response to such claims. The evidence upon which his Honour relied was contained in an affidavit of Mr Anthony Ritchie sworn 23 May 2006, a solicitor employed by Allens. He deposed that he had been involved in the preparation of payment schedules in response to monthly payment claims by the appellant. In fact his evidence, contained in par 5 of the affidavit, was that he had been involved in preparing payment schedules in response to the monthly payment claims made by the appellant under the contract and in preparing adjudication responses to the monthly adjudication applications made by the appellant under the Act.

53 Mr Ritchie further deposed (in par 8) that since 31 December 2004 the appellant had delivered a payment claim every month and the respondent had provided a payment schedule. On each occasion, the appellant had then made an adjudication application with the exception of Payment Claim No.29 and the payment claim the subject of the project litigation.

54 However, the appellant submitted that this evidence was deficient in that it contained no detail as to precisely what role Mr Ritchie or Allens had played in the preparation of each payment schedule; there was no evidence of when Mr Ritchie or Allens began their involvement in the preparation of payment schedules; there was no evidence of what knowledge the respondent had of whatever role Allens had played in relation to such preparation nor the circumstances in which Allens had come to be involved in the preparation of monthly payment schedules; and finally, there was no evidence that Allens had actually provided any of the previous payment schedules to the appellant.

The appellant's submissions should be rejected

55 In my opinion each of the alleged deficiencies relied upon by the appellant in the preceding paragraphs is without substance. The unchallenged evidence in par 8 of Mr Ritchie's affidavit was that since 31 December 2004 with two exceptions, one of which is the subject of this litigation, the appellant has delivered a payment claim every month and the respondent has provided a payment schedule in reply. Further, it is clear from par 5 of Mr Ritchie's affidavit that he was involved in preparing those payment schedules as well as preparing responses to the monthly adjudication applications made by the appellant under the Act. The clear inference is that Allens had prepared all payment schedules since 31 December 2004.

56 Furthermore, it does not matter what precise role Mr Ritchie or Allens played in the preparation of the payment schedules: the unchallenged evidence was that Mr Ritchie was involved in their preparation. It matters not that, in respect of detail, Allens would have been assisted, as one would have expected, by other persons such as Mr Douglas or Mr Aquilina. Furthermore, to suggest that there was no evidence that Allens provided the monthly payment schedules to the appellant in the sense, I assume, that they did not actually deliver them seems to me to be beside the point. There was no doubt that the monthly payment schedules were delivered given Mr Ritchie's unchallenged evidence that in respect of each payment schedule the appellant made a monthly adjudication application. Finally, the suggestion that there was no evidence of what knowledge the respondent had of whatever role Allens played in the preparation of the monthly payment schedules seems to me to defy reality.

57 The clear inference is that the monthly payment schedules were being prepared by Allens with the knowledge of and in accordance with the express or implied instructions of the respondent, there being no suggestion that the respondent had paid to the appellant any sum greater than the amount, if any, which had been determined on the monthly adjudication. The inescapable inference is that the respondent was clearly aware of and, at the very least, impliedly authorised Allens' involvement in the preparation of the payment schedules and the subsequent monthly adjudication applications by the appellant in response thereto.

58 In my opinion it is but a short step to infer that at some point Allens had been authorised or instructed by the respondent automatically to prepare monthly payment schedules in accordance with the advice of the respondent's experts as to the details of the claims and the responses thereto and that that authority and knowledge extended to all payment claims served on the respondent by the appellant under the Act, including the payment claim the subject of the present proceedings.

59 The service of payment claims by the appellant on the respondent, the inevitable provision of a payment schedule in reply and the consequent making of an adjudication application by the appellant in response had been a characteristic of the relationship between the parties since 31 December 2004. To suggest that a payment claim of $105,411,474 served upon the respondent was one to which the respondent did not wish to reply by way of a payment schedule in accordance with past practice, need only be stated to be rejected as defying common sense and reality.

60 The inevitable consequence of the appellant's submissions is that, suddenly and without explanation, the respondent had withdrawn any implied authority to Allens to proceed to reply to Payment Claim No.42, in accordance with past practice, by way of the provision of a payment schedule and that, without its knowledge, Allens had in the present case embarked on an unauthorised folic of its own. To adopt the appellant's submission in these circumstances would result in a commercial nonsense.

61 In any event, the unchallenged evidence of Mr Douglas was that, since the letter from Allens of 30 July 1998 addressed to him and setting out Allens' retainer, it was he, Mr Douglas, who had given instructions to Allens in respect of the project. Mr Douglas further deposed that on 12 April 2006 he requested Mr Aquilina of APP to forward Payment Claim No.42, which had been received by APP on or about 11 April 2006, to Allens. At the same time he telephoned Mr Ritchie of Allens and informed him that APP was querying the payment claim, as he was aware that Allens would need to have regard to the payment claim for the purpose of preparing the respondent's payment schedule in reply.

62 On or about 26 April 2006 Mr Douglas telephoned Mr Ritchie and informed him that "*Allens is as usual authorised to sign the payment schedule on behalf of QICP*". The payment schedule was to be provided in reply to the payment claim received from the appellant on 11 April 2006 and Mr Douglas confirmed that the payment schedule in question was prepared, signed and provided to the appellant with his authority.

63 Nevertheless, the appellant submitted that it had not been established that Mr Douglas had any authority from the respondent to so instruct Allens. The submission went so far as to assert that there was no evidence of any knowledge, on the part of any employee or officer of the respondent, of Allens preparing or signing any of the previous monthly payment schedules. Yet the unchallenged evidence of Mr Douglas was that, at least since the 30 July 1998 letter containing Allens' retainer was signed on behalf of the respondent, it was he who had given instructions to Allens in respect of the project.

64 To suggest that Mr Douglas was not authorised to so instruct Allens to prepare the monthly payment schedule would require the inference that either Allens did not charge the respondent for the work it did pursuant to those instructions or that the respondent declined to pay for that work because Mr Douglas did not have its authority to instruct Allens to perform it. Again, such inferences are simply commercially unrealistic.

65 As I have already observed, the underlying, albeit unstated, premise of the appellant's submissions is that the respondent had neither knowledge of, nor had authorised Mr Douglas to instruct Allens to prepare any of, the monthly payment schedules, let alone prepare submissions in response to the appellant's monthly adjudication applications – notwithstanding that it would be appropriate to infer that the only money paid by the respondent to the appellant was the amount of the adjudicated sum. The evidence disclosed that that amount was generally significantly less than the claimed amount. To suggest in these circumstances that Mr Douglas was not authorised by the respondent to instruct Allens or Allens were not authorised to carry out those instructions pursuant to its retainer is a proposition that I am not prepared to adopt.

66 Notwithstanding the foregoing, the appellant finally submitted that the failure to call any evidence from an officer of the respondent to explain what precisely Allens had done, to the respondent's knowledge, on any occasion calling for the preparation of a payment schedule was fatal to this part of the respondent's case. I am not prepared to accede to that submission in the light of the views I have expressed above. I would therefore reject the appellant's submission that the only possible conclusion on the unchallenged evidence before the primary judge was that the Document headed Payment Schedule received by the appellant on 28 April 2006 was provided to it by persons who were not acting with the authority, express, implied or inferred, of the respondent.

67 The appellant submitted that as a payment schedule has a very important role to play under the Act (with which I agree), it therefore made good sense that if a respondent was to clothe its solicitor with authority to prepare, sign and provide payment schedules on its behalf, there needed to be a clear communication of that authority and of its limits or terms. However, it does not follow that in the absence of such clear communication of authority in a particular case such as the present, where there is no evidence of specific instructions from the respondent to Mr Douglas and/or to Allens to prepare and provide the Document headed Payment Schedule to the appellant, the necessary authority of the respondent in respect of that payment schedule cannot be implied or inferred from the nature of Allens' retainer; from the unchallenged fact that since 1998 all instructions to Allens pursuant to that retainer were given by Mr Douglas without apparent demur from the respondent; from the unchallenged fact that

since 31 December 2004, with one exception, all monthly payment claims were the subject of monthly payment schedules followed by monthly adjudication applications in all of which instructions were given by Mr Douglas to, and work performed by, Allens.

68 It would be erroneous to find in the present case that the Document headed Payment Schedule was not provided by the respondent to the appellant because its preparation and service upon the appellant by Allens on Mr Douglas' instructions constituted an unauthorised frolic on their part. Such a proposition makes no commercial sense given the history of the payment claims/payment schedules between the parties for a period in excess of a year. It should, therefore, be rejected.

Alleged errors in the judgment of the primary judge

69 The appellant sought to identify four errors in his Honour's judgment. The first related to his finding that on the basis of facts found by him in [37]-[41] of his judgment, it had been proven that the Document headed Payment Schedule was provided by the respondent to the appellant and it was therefore unnecessary to consider any issues of authority. The appellant described this aspect of his Honour's judgment as "*looking only at the surface*".

70 The second error related to his Honour's findings in [46] of his judgment that Allens were authorised by the respondent to prepare the Document headed Payment Schedule. It was submitted that there was no evidence to support that conclusion whether based on express authority, implied authority, or inferred express authority.

71 The third and fourth errors raised by the appellant related to the respondent's notice of contention.

72 The first additional ground upon which the respondent sought to uphold the primary judge's decision was that the respondent, through Mr Douglas, had in fact authorised Allens to provide the purported payment schedule on its behalf. The appellant submitted that there was no evidence that Mr Douglas had such authority. The second ground of contention was that Mr Lee and/or Mr Harvey (officers of the respondent) had on 2 June 2006 ratified the provision of the purported payment schedule. The appellant submitted that any such ratification was ineffective in displacing the rights which had accrued to the appellant under the Act on 28 April 2006 when the 10 business days within which the respondent was required to provide a payment schedule pursuant to s 14(4)(b)(ii) expired.

The "looking only at the surface" error

73 The issue raised with respect to this ground of challenge was, according to the appellant, whether s 14(1) was satisfied where a payment schedule was provided only in the sense of being furnished or supplied to the claimant (in this case the appellant) and which on its face purported to emanate from the respondent. In this respect his Honour had found (in [38] of his judgment) that the Document headed Payment Schedule had been signed by Mr Young of Allens for "*Queensland Investment Corporation*".

74 The respondent submitted that s 14 did not require a corporate respondent to a payment claim under the Act to prove the actual authority of the natural persons who were involved in the preparation, signing or delivery of a payment schedule. Where the payment schedule on its face recorded that it was being provided by the respondent and was in fact a reply to the appellant's payment claim which had been served on the respondent and otherwise complied with the requirements of ss 14(2) and (3), then that was sufficient to satisfy the requirement in s 14(1) that the respondent had replied to the appellant's payment claim by providing a payment schedule.

75 The internal workings of the respondent including questions as to the authority of those who prepared the payment schedule was, so the respondent submitted, irrelevant especially where it did not claim that the payment schedule was not its document. It mattered not, so it was submitted, that a payment schedule was provided to a claimant by a named person or even an unidentified person as there was no requirement in s 14 for the document to be signed or otherwise identified with the respondent except to the extent that it must comply with s 14(2) by identifying the payment to which it related and indicating the amount of the payment (if any) that the respondent proposed to make.

76 Although in the present case the Document headed Payment Schedule identified pursuant to s 14(2)(b) the amount that the respondent proposed to make (being the "*scheduled amount*") as nil, had it identified that amount as more than nil and the amount had been paid, then it would have been impossible (so it was submitted) for the appellant to have asserted that the payment schedule did not constitute the respondent's reply to its payment claim.

77 It would be illogical and a nonsense, it was submitted, in the circumstances postulated for it to be alleged that if the scheduled amount (being more than nil) was paid and accepted by the claimant, it could then allege that the respondent was liable for the whole of the claimed amount upon the basis that the respondent had failed to provide a payment schedule to the claimant within the meaning of s 14(4)(b) of the Act. Why, therefore, should it make any difference that the scheduled amount was nil?

78 In par 4 of the respondent's written submissions it stated that on 28 April 2006 (being within the period allowed by the Act for the provision of a payment schedule), the appellant received a document that:

> "*(a) was headed 'Payment Schedule under the Building & Construction Industry Security of Payment Act 1999 (NSW)';*
>
> *(b) was marked 'To: Baulderstone Hornibrook Pty Limited (**Claimant**)' and was stated to relate to the payment claim dated 11 April 2006;*
>
> *(c) was stated on its first page to be 'From: Queensland investment Corporation (**Respondent**)';*

(d) contained a signature above the words 'for Queensland Investment Corporation';
(e) complied with the requirements of s.14(2) and (3) of the Act (as was found by the trial judge … and as is common ground between the parties)." (Emphasis provided)

79 In par 6 of those submissions the respondent further contended that the document in question had sufficient characteristics for the Court to conclude that the respondent had provided a payment schedule for the purposes of s 14(1) of the Act and that accordingly the appeal should be dismissed.

80 In par 7 its submissions in reply the appellant stated the following: *"If the matters contained in paragraph 4 of the [respondent's written submissions] were the only matters of fact, then the submission in paragraph 6 of the [respondent's written submissions] may have had some merit."*

It seems to me that this was a significant and proper concession on the appellant's part. However, it sought to avoid the effect of that concession by submitting that the circumstances in which the appellant was provided with the Document headed Payment Schedule were inconsistent with the proposition that it was provided to it by the respondent.

81 Those circumstances, as I understand the appellant's submissions, were contained in the evidence tendered on behalf of the respondent which, so it was submitted, established that the respondent had no involvement at all in either the preparation or the delivery of the document. Accordingly, it could not have provided a payment schedule as required by s 14(1) of the Act.

82 The gravamen of the foregoing submission seems to be that had the respondent not called the evidence it did on the issue of authority but had done no more than tender the document referred to in par 4 of its written submissions, the appellant's case that the respondent had failed to provide a payment schedule to the appellant within the meaning of ss 14(1) and (4)(b) would have failed. It was only because the respondent tendered evidence with respect to the question of authority that the appellant was able to assert on the basis of that evidence that the Document headed Payment Schedule was, in fact, not that of the respondent.

83 In other words, once there was evidence relating to the issue of authority, it was open to the appellant affirmatively to assert that that evidence established that the Document headed Payment Schedule was not that of the respondent as there was no evidence that it authorised or was otherwise involved in its preparation, provision and supply to the appellant. In other words, the respondent had been hoisted on its own petard.

84 As a consequence of the decision of this Court in ***Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*** [2006] NSWCA 259 at [51]–[52] per Hodgson JA with whom Handley JA and Hunt AJA relevantly agreed, the appellant accepted that the onus of proof was on it to establish that the Document headed Payment Schedule with which it was furnished or served on 28 April 2006 was not a payment schedule which was authorised to be provided to it by the respondent or by some other person or persons who had the respondent's authority to provide it on its behalf. It sought to discharge this onus by pointing to alleged deficiencies in the respondent's evidence which, apart from relevant documents, was constituted entirely by affidavit evidence in respect of which the deponents were not cross-examined, as establishing affirmatively that the respondent did not authorise that the subject document should be provided to the appellant.

85 At the end of the day the respondent conceded that once the issue was raised that the payment schedule purportedly provided to the appellant was not so provided by the respondent or by a person or persons authorised by it to do so, the respondent could not rely on the matters referred to in [79] above as satisfying the statutory requirement that it had provided a payment schedule to the appellant.

86 Nevertheless, the respondent submitted, in my opinion correctly, that once the issue of authority was raised the onus lay at all times upon the appellant affirmatively to establish that the Document headed Payment Schedule was not authorised by the respondent to be provided to the appellant. It was not sufficient, in my view, for the appellant to merely point to deficiencies or gaps in the evidence in support of the proposition that that evidence did not establish that the document prepared by Allens and furnished to the appellant was not what it purported to be, namely the respondent's payment schedule in reply to the appellant's payment claim. On the contrary, the onus remained upon the appellant to establish that the Document headed Payment Schedule was not authorised by the respondent: in other words, it was required to prove the negative and the respondent was not required to prove the positive.

87 Accordingly, the only manner in which the appellant could establish that the Document headed Payment Schedule provided to the appellant on 28 April 2006 was not a payment schedule within the meaning of s 14(1) of the Act was if it could establish that that document was not the respondent's document in that it had neither expressly nor impliedly authorised the document in question being provided to the appellant. In my opinion that onus was not discharged by the assertion that the evidence did not show authorisation of the provision of the document. That assertion left matters neutral.

88 On one view of the evidence in the present case it established no more than that there was no evidence that the respondent had authorised the document being so provided to the appellant. But that is not the same as a finding that the respondent had not authorised the provision of the Document headed Payment Schedule to the appellant.

The issue of authority error

89 I have already referred in [26] above to the letter from Allen Allen & Hemsley to the respondent dated 30 July 1998. It is necessary to refer further to the contents of that letter. It was addressed to Mr Alex Douglas,

Queensland Investment Corporation. It commenced with the words "*Dear Alex*" and was headed "WESTPOINT SHOPPING CENTRE – EXTENSION WORKS – OUR LEGAL SERVICES". Its opening sentence was as follows: "*Thank you for your instructions to act for Queensland Investment Corporation ('QIC')*". Under the heading "OUR ROLE" it set out the paragraph which I have extracted in [26] above but which I repeat for convenience:

"*The work we are to do is draft documentation for the delivery of design and construction services for extensions to Westpoint (including, if appropriate, tender documents), finalise documents with the selected contractor and deal with other matters as they arise in relation to the Westpoint extensions project.*

You will give us our instructions."

90 Paragraph 2 of the letter under the heading "THE LAWYERS WHO WILL BE WORKING WITH YOU" stated the matter would be handled by the author of the letter, Mr Dan Young (Partner) and a named senior associate acting under Mr Young's supervision. Under the heading "OUR LEGAL FEES" it was stated "*our fees will be calculated on the basis of the value of the services we provide, having regard, amongst other things, to time spent on the matter*."

91 The appellant submitted that the retainer constituted by the letter of 30 July 1998 was terminated when the firm changed its name to Allens Arthur Robinson as and from 1 July 2001. On 19 July 2001 Mr Tom Poulton, the managing partner of the new firm, wrote to Dr Doug McTaggert, CEO of the respondent, referring to the fact that Allens Arthur Robinson had commenced operations as an integrated regional law firm on 1 July 2001 and enclosing new standard Terms of Appointment proposing that they should apply on every occasion from 1 July 2001 that the respondent or its related entities "*instruct us*". The letter continued: "*Naturally, these Terms of Appointment are subject to arrangements between us concerning the scope of our role in a matter, details of the team from Allens Arthur Robinson working with you and the particular basis of charging for each matter. If you have any questions as to the practical impact of the Terms of Appointment on any of our existing matters, please contact us immediately*".

92 Under the heading "CURRENT MATTERS", the following appeared: "*The commencement of Allens Arthur Robinson will have no disruptive effect whatever on the management of ongoing matters. The same legal team will be working with you and the same high standard that you expect of Allen Allen & Hemsley will be met or surpassed by Allens Arthur Robinson*".

93 There followed a document headed "STANDARD TERMS OF APPOINTMENT" dated 1 July 2001. It commenced by requesting that the Terms be read subject to any other correspondence or arrangements "*between us*". Under the heading "SCOPE OF OUR ROLE", reference was made to the need to give full instructions at each step in the matter. The document continued: "*We will set out our understanding of the scope of our role in the engagement letter for the matter. You should assume that we won't undertake tasks unless they are set out in that letter or in subsequent correspondence between us*".

94 The only letter in evidence which could be described as an engagement letter setting out the scope of the solicitor's role in the matter of the extension works to the Westpoint Shopping Centre, was that of 30 July 1998 addressed to Mr Douglas. In my opinion there is no inconsistency between the letters of 30 July 1998 and 19 July 2001. It should be inferred that the respondent and Allens proceeded upon the basis that Allens' role with respect to the project was as set out in the letter of 30 July 1998 so that, for instance, the documentation which ultimately resulted in the contract for the project entered into on 5 June 2003 was prepared by Allens in accordance with the terms of its role as set out in that letter.

95 Mr Douglas left the respondent's employment on 30 June 2000. On 1 July 2000 an agreement was entered into between the respondent as "*the Principal*" and Adagee referred to as the "*the Consultant*". Mr Douglas was, apparently, a director of Adagee. Pursuant to that agreement the respondent appointed Adagee to carry out the "*Consultancy Services*" in accordance with the contract. Those services were set out in the Terms of Reference as a schedule to the agreement and stated that the objective of the consultant was to provide development management services for the proposed Westpoint redevelopment in Blacktown. It then provided that the services included, but were not limited to, a series of items which were then listed and which included, relevantly, the following:

- Manage the budgeting of income for the development including monitoring and forecasting incomes throughout the redevelopment;
- Oversee the Project Manager in his administration of the building contract and the management plan, including attendance in meetings;
- Prepare monthly project update reports to the QIC Board including reports to the Board for funding of the redevelopment.

96 Under the heading "***Assistance***" it was stated that the consultant would be assisted in his duties by others who are or will be commissioned or employed by QIC at its cost including the quantity surveyor, W T Partnership and Legal Consultant – Allen Allen & Hemsley.

97 Although the appellant submitted that there was no specific term of reference that related to the preparation of payment schedules under the Act, it should be noted that first, the Act only commenced on 26 March 2000 whereas the agreement was entered into on 1 July 2000 and, second and most significantly, that the list of terms of reference were specifically stated to be inclusive and not exclusive.

98 Clause 14 of the Agreement was headed "TERM OF THE CONTRACT" and provided as follows:

"*Subject to the terms hereof the contract shall commence on 1 July 2000 and shall continue in force until 30 June 2002 or until its earlier termination*".

99 However, the term to which cl 14 was subject was, relevantly, cl 12.5 which provided as follows:

"*The Principal shall notify the Consultant prior to 1 April 2002 if the contract is not intended to be renewed. If such notice is not given before 1 April 2002 the contract expiry date shall be extended to a date three months following the issue of such notice.*"

There was no proof that any such notice had been given.

100 Accordingly, in the absence of any such evidence, the agreement was still on foot as at April 2006. The appellant nevertheless submitted that the onus was upon the respondent to establish the negative, namely, that no notice had been given notifying the consultant that the contract was not intended to be renewed. However, as the appellant was asserting that the consultancy agreement of 1 July 2000 had expired or otherwise terminated, the onus clearly lay upon it to establish that fact. In other words, the onus lay upon the appellant to establish that a notice had been given and that the contract had expired three months after the issue of such notice. That onus was not discharged.

101 On 23 September 2002 the respondent entered into a Development Management Agreement with QICP whose managing director was at the material time Mr David Harvey. Given that the address of both the respondent and QICP was the same, it would be reasonable to infer that the latter was a subsidiary of the former.

102 In his affidavit sworn 2 June 2006 Mr Harvey set out certain provisions of the Development Management Agreement which related to the provision of development management services by QICP to the Westpoint Shopping Centre redevelopment. Pursuant to cl 2.1 of the agreement, the respondent appointed QICP to provide the "*Services*" in accordance with the agreement. Clause 1.1 defined the "*Services*" as, amongst other things, "*Development Management Services*" which in turn was defined as "*the services described in Schedule 1 to the extent that they may be required in connection with any Development*". "*Development*" was defined as "*any Works*" and the word "*Works*" was defined as "*any works to be carried out by or on behalf of [the respondent] at or in connection with the Westpoint Shopping Centre] from time to time*".

103 Schedule 1 of the Development Management Agreement set out a range of services including under the heading "*Financial and Legal Management*" the following:

· generally undertaking the financial and legal management of the Works;

· identifying and managing compliance with all legislative and Authority requirements applying to the Works;

· monitoring all the costs incurred in connection with the Works;

· ensuring that all appropriate legal and other documentation required in connection with the Works is prepared and entered into by the relevant parties;

· attending to all notices, correspondence, communications, enquiries and reports from or to authorities or any third parties in connection with the Works.

104 Schedule 1 also provided under the heading "*External Consultants*" the following:

· selecting, engaging and managing Development Manager Appointed Consultants to be used.

The expression "*Development Manager Appointed Consultants*" was defined to mean consultants used by the Development Manager (QICP) in accordance with cl 6 to provide services to the respondent in connection with the disciplines referred to in Schedule 4. Clause 6 empowered QICP at any time it reasonably considered necessary to utilise the services of Development Manager Appointed Consultants in connection with the provision of any Services. Schedule 4 provided that such consultants might be engaged in connection with the following disciplines including project management, construction contract administration and legal.

105 The appellant referred to cl 3.1 of the Development Management Agreement which vested in QICP as the Development Manager all powers necessary to carry out its "*Obligations*" under the agreement. That word was defined to include any legal, contractual, statutory or other obligation, commitment, duty, undertaking or liability. Clause 3.2 provided that without limiting cl 3.1, for the purposes of carrying out its Obligations under the agreement the respondent authorised QICP from time to time to, inter alia, act as agent of the respondent in carrying out its Obligations including, without limitation to

"*(i) subject to the prior approval of the Owner [the respondent], commence legal proceedings in any court or take other action for the enforcement of any Right of the*"

respondent. The word "*Right*" was defined to include, relevantly, any legal, contractual, statutory or other right, power or authority.

106 The appellant submitted first, that the management agreement was not cast sufficiently widely to authorise QICP, the Development Manager, to prepare or authorise others to prepare a payment schedule under the Act. Second, that QICP was only entitled to act as the respondent's agent in taking action for the enforcement of any Right of the respondent subject to its prior approval. Third, although the inclusive definition of "*Right*" included the issuing, preparation and provision of a payment schedule as it involved the enforcement of the statutory power to

provide a payment schedule to the appellant pursuant to s 14(1) of the Act, this was subject to the respondent's prior approval which was absent. Fourth, although QICP as Development Management was empowered to engage Development Management Appointed Consultants to provide services to the respondent in connection with the disciplines referred to in Schedule 4, those disciplines were not of sufficient width as to authorise the engagement of Mr Douglas although, clearly, they expressly included the discipline of the law.

107 In my opinion there is no substance in these submissions of the appellant. First, the Development Management Services which QICP was required and authorised to provide to the respondent included undertaking the legal and financial management of the Works which, in my opinion, was of sufficient width to include under the rubric "Financial Management" the assessment of payment claims made by the appellant pursuant to s 13 of the Act and the preparation of payment schedules in reply to those payment claims. The receipt of the former and the provision of the latter clearly involved the financial management of the Works.

108 Furthermore, the requirements to monitor all costs incurred in connection with the Works and to ensure that all appropriate legal and other documentation required in connection with the Works was prepared were also of sufficient width to include the preparation and provision of payment schedules under the Act.

109 Second, QICP was empowered to appoint Development Consultants to provide to the respondent the services to which I have referred in connection with the discipline set out in Schedule 4 which included project management, construction contract administration and legal. Accordingly, QICP was empowered to engage Allens to perform the legal management of the Works and to ensure that all appropriate legal documentation required in connection with the Works was prepared. In my opinion, it must follow that QICP was authorised by the respondent to engage Allens to prepare, and then provide to the appellant, the payment schedules.

110 Third, QICP was empowered to engage Adagee and/or Mr Douglas given his expertise in the area of project management and construction contract administration. In this respect in his affidavit of 1 June 2006 Mr Douglas deposed that he had been employed by the respondent prior to 30 June 2000 as Manager, Property Investment and, after Adagee entered into the 1 July 2000 consultancy agreement with the respondent, he was referred to as "Development Consultant".

111 Fourth, Mr Douglas deposed without objection that on or about 23 September 2002 Adagee became a consultant to QICP, that his role at QICP was initially referred to as "Development Consultant" and then from 6 February 2003 as "Project Director" and from February 2006 as "Consultant".

112 It follows from the foregoing that in my opinion, first, Allens were engaged by the respondent to provide all relevant legal services with respect to the project which included, either expressly or impliedly, the preparation and provision of payment schedules under the Act. Clearly, Allens' role was to ensure when the respondent received payment claims that the provisions of the Act were complied with in order to protect the respondent's interests. That protection clearly extended to ensuring that payment schedules in reply to payment claims were prepared and provided to the appellant within the time limits set out in s 14(4)(b)(ii). At the very least, the prior conduct of the parties and the circumstances of the case relating to the history of the making of payment claims, the providing of payment schedules and adjudications justify a finding of implied authority in relation to the preparation and provision of a payment schedule in the present case: *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at 583A-C, 587A-C.

113 Second, Mr Douglas through Adagee was authorised pursuant to the Consultancy Agreement entered into between Adagee and the respondent on 1 July 2000 to provide development management services for the project. Given the non-exclusive terms of reference setting out the services to be provided by Adagee, it is clear that Mr Douglas through Adagee was authorised to provide any relevant service relating to the project including the overseeing of the Project Manager and his administration of the building contract with respect thereto. The giving of instructions either to the Principal's Representative or to Allens with respect to the preparation of payment schedules in reply to the service upon the respondent of payment claims by the appellant in my view fell well within the services which Adagee contracted to provide.

114 Third, the evidence to which I shall now refer in my opinion establishes that Mr Douglas, whether formally or otherwise, was authorised either directly by the respondent or through QICP to provide instructions to Allens with respect to the preparation and provision of payment schedules pursuant to s 14 of the Act.

115 The evidence established the following with respect to the preparation of the Document headed Payment Schedule. The appellant's payment claim was dated 11 April 2006. It was addressed first to the respondent and expressly marked to the attention of Mr Douglas. It was addressed secondly to APP Corporation and marked to the attention of Mr Aquilina. APP Corporation and/or Mr Aquilina were the Principal's Representative who was required pursuant to cl 42.1(b) of the contract to issue to the appellant a payment certificate upon receipt of a claim for payment. Furthermore, cl 42.1(a) provided that claims for payment by the appellant were to be delivered to the Principal's Representative. It was common ground that the letter of 11 April 2006 had a dual purpose, namely, as Payment Claim No.42 under the contract and as a payment claim made under s 13 of the Act.

116 Accordingly, insofar as the letter constituted a payment claim under the contract, it was properly addressed to APP Corporation and marked to the attention of Mr Aquilina. Insofar as it was a payment claim under s 13 of the Act, it was properly addressed to the respondent and marked to the attention of Mr Douglas. It is therefore clear

from the letter itself that the appellant regarded Mr Douglas as having the authority of the respondent to receive the letter of 11 April 2006 as a payment claim made under s 13 of the Act.

117 If Mr Douglas had authority to receive the claim on behalf of the respondent it is difficult not to infer that he also had the authority of the respondent to the knowledge of the appellant to deal with the payment claim in accordance with the provisions of the Act. This obviously included the giving of instructions for the preparation and provision of a payment schedule in reply to the payment claim.

118 In his affidavit sworn 1 June 2006 Mr Douglas deposed that since at least the date of his signature of acceptance of Allens' retainer letter of 30 July 1998 he had given instructions to Allens on behalf of the respondent in respect of the project. The primary judge accepted this as evidence that the instructions given to Allens were on behalf of the respondent only in the sense that it represented Mr Douglas' state of mind that he was providing those instructions on behalf of the respondent.

119 Mr Douglas then deposed that on 12 April 2006 he requested Mr Aquilina of APP to forward a copy of Payment Claim No.42 to Allens. He then spoke to Mr Ritchie, special counsel of Allens, and informed him that a copy of the payment claim was being couriered by APP to the firm. His purpose in so informing Mr Ritchie was that he was aware, no doubt from past practice, that Allens would require the payment claim for the purpose of preparing the respondent's payment schedule in reply to it.

120 Mr Douglas then deposed that on 26 April 2006 he had a telephone conversation with Mr Ritchie in which he used words to the effect that "*Allens is as usual authorised to sign the payment schedule on behalf of QICP*".

121 Mr Harvey, the Managing Director of QICP, in par 8 of his affidavit sworn 2 June 2006 deposed that as long as he had held his present position with QICP (since 2005) Allens had advised and represented the respondent in relation to the project. He further deposed (in par 9) that QICP had engaged a number of consultants to assist it in carrying out the "*Services*" in pursuance of the management agreement. Those consultants included Adagee, whose director was Mr Douglas, and which was the consultant engaged by QICP in relation to the project.

122 In relation to the project Mr Harvey deposed in par 10 of his affidavit that Adagee had performed consulting services for QICP, was paid for those services by QICP and that Mr Douglas in turn carried out the services on behalf of Adagee, all with Mr Harvey's knowledge and consent. Further, to his knowledge, Mr Douglas was the person giving instructions to Allens in relation to the project since at least 30 July 1998.

123 In par 13 of his affidavit, Mr Harvey deposed, again without objection, that he was authorised by the respondent to make the following statements:

> "(a) I have made reasonable enquiries as to the documents referred to in the following categories of documents:
>
> (i) …;
>
> (ii) documents recording any specific instructions given to Allens by or on behalf of QICP to prepare, sign and arrange for delivery of the payment schedule dated 28 April 2004 (sic) for QICP in reply to Baulderstone Hornibrook Pty Limited's payment claim of 11 April 2006 under the *Building and Construction Industry Security of Payments Act* 1999 (NSW). The only document falling within that category is the document referred to in the affidavit of Adrian Zanatta sworn 1 June 2006 which is to be filed in these proceedings. I also understand that certain instructions were given to Allens orally by Mr Douglas."

124 Mr Zanatta in his affidavit sworn 1 June 2006 deposed in par 1 that he was employed by QICP as Contracts Manager and was also a solicitor of the Supreme Court of Queensland. As Contracts Manager he was responsible for providing legal advice in relation to various issues that arose during the course of the business carried on by the respondent and its various subsidiaries including QICP. His role also included instructing the respondent's solicitors, including Allens.

125 Mr Zanatta then deposed in par 3 that on the morning of 28 April 2006 he prepared a file note (to which he had added comments in italics to make the notes more comprehensible) which read:

> *"T/O Jim Ritchie*
>
> *working out Payment Schedule/Certificate → AAR will sign [this note records Mr Ritchie informing me that Allens was currently preparing the Payment Schedule to which was to be attached APP's Payment Certificate and that Allens would sign the Payment Schedule. I wrote "Payment Schedule/Certificate" because this was shorthand for Mr Ritchie telling me that APP's Payment Certificate would be attached to the Payment Schedule.]*"

126 An affidavit dated 2 June 2006 was also sworn by Mr Stephen Leigh, Deputy Head, Global Real Estate of the respondent. His responsibilities included relevantly, being a director of QICP and in that role he was the respondent's officer with responsibility for overseeing that company. He deposed that he had personal knowledge of the project as a result of that role.

127 Mr Leigh further deposed in par 14 that the retaining by the respondent of Allens referred to in the letter of 30 July 1998 and 19 July 2001 had not been revoked; nor had the nomination of Mr Douglas as a person who might give instructions to Allens on behalf of the respondent in respect of the firm's retainer. He then deposed in par 5 that he was aware that Mr Douglas was a director of Adagee which provided consultancy services to QICP, but neither that fact nor the engagement by the respondent of QICP to provide services in connection with the project had any effect on Mr Douglas' authority to instruct Allens on behalf of the respondent.

128 In my opinion it follows from the foregoing evidence that, at the very least,

(a) Allens' retainer letter dated 30 July 1998 to "deal with other matters as they arise in relation to the Westpoint extensions project" was still in force as at 28 April 2006;

(b) Mr Douglas was authorised either directly by the respondent or indirectly by the respondent through QICP pursuant to the management agreement between it and the respondent to instruct Allens with respect to the legal and financial issues raised by the receipt by Mr Douglas on behalf of the respondent of the appellant's payment claim dated 11 April 2006;

(c) the retainer of Allens either directly by the respondent or as a consultant engaged by QICP through its management agreement with the respondent, extended to the provision of legal services relating to the financial and legal management of the project including ensuring that all appropriate legal and other documentation required in connection with the project was prepared and which, in the present context, included the preparation of payment schedules in reply to the appellant's payment claims and provision of that payment schedule to the appellant within the time limit provided by s 14(4) of the Act;

(d) Mr Douglas, having authority directly from the respondent or indirectly through QICP to give instructions to Allens with respect to the preparation of payment schedules, was therefore authorised to instruct Mr Ritchie of Allens to sign the Document headed Payment Schedule on behalf of the respondent and that his instruction to Mr Ritchie to do so was made with the knowledge and consent of Mr Zanatta, the Contracts Manager at QICP, who had engaged Mr Douglas, through Adagee, as a QICP consultant whose engagement as such was acknowledged by Mr Harvey, QICP's Managing Director.

129 In my opinion, the foregoing establishes that Mr Douglas had either the express or implied authority of the respondent, either directly or indirectly through QICP pursuant to the latter's management agreement with the respondent, to instruct Allens to prepare a payment schedule on behalf of the respondent in reply to its receipt of the appellant's payment claim dated 11 April 2006 and to sign that document on behalf of the respondent and to provide it to the appellant.

130 I would therefore find that to the extent to which the appellant has put in issue the authority of Allens and/or Mr Douglas to prepare and provide the Document headed Payment Schedule to the appellant, the evidence affirmatively established that the respondent so authorised Mr Douglas and Allens accordingly.

131 Alternatively, the evidence is such that the appellant has not discharged the onus that clearly lay upon it and which it accepted of establishing that the payment schedule in question as prepared by Allens and provided to the appellant was unauthorised by the respondent.

132 During the course of oral argument, and when faced with propositions which he understandably found difficult to respond to, senior counsel for the appellant was forced to shift ground and to argue that neither Allens nor Mr Douglas had the respondent's authority to exercise their discretion as to the content of the Document headed Payment Schedule. In other words, there was no evidence that the respondent authorised Allens to prepare that document in a manner which relied wholly upon the discretion of Allens on the one hand and on Mr Douglas' instructions on the other. Thus, the respondent had no knowledge of the content of the document that was provided to the appellant and so could not have consented to it.

133 It was therefore not open to Allens to decide the form and content of the payment schedule. They were not authorised by the respondent to exercise complete discretion as to the nature and extent of its contents. There was no evidence that Allens had been authorised by the respondent to exercise a discretion of the width contended for.

134 In other words, although Mr Douglas and Mr Zanatta's evidence established that Mr Ritchie was authorised to sign the Document headed Payment Schedule, no other evidence established that Allens had authority on behalf of the respondent to determine the entire form and content of that document without reference back to the respondent or its agents. Accordingly, the question was whether Allens had authority to produce a document such as the payment schedule in the present case in such form and containing such material as Allens thought fit.

135 In my opinion there is no substance in these submissions. Common sense and commercial reality dictate that, from the respondent's point of view, Allens' retainer was, with the assistance of the appropriate consultants, to provide a payment schedule in reply to the appellant's payment claim which protected the respondent's interests. It was not for the respondent to instruct Allens as to how to provide the services in respect of which they had been expressly retained. The position is a fortiori in the present case where the evidence was, and his Honour found, that APP's progress payment certificate issued in accordance with the contract was required by cl 42.1(b) of the contract to state the amount which in the opinion of the Principal's Representative was to be made by the principal to the contractor. It was therefore necessary for the certificate to set out the calculations employed in arriving at that amount and, if the amount was more or less than the amount claimed by the contractor, the reasons for the difference.

136 It is apparent that those requirements mirrored the requirements of s 14(2) and, in particular, s 14(3) of the Act. In these circumstances it is hardly surprising that APP's payment recommendation with respect to the appellant's Payment Claim No.42 made under the contract formed the basis of, and was incorporated into, the payment schedule prepared by Allens. In [23 (vii)] of his judgment, the primary judge found that Progress Payment

Certificate for Payment Claim No.42 was included in the eight folders of documents which formed part of the payment schedule provided to the appellant on 28 April 2006.

137 Accordingly, given that I have found that the respondent, either directly or indirectly through QICP, expressly authorised Allens to prepare and provide to the appellant the Document headed Payment Schedule of 28 April 2006, and my further finding of inferred express authority based upon evidence that Allens had been involved in preparing monthly payment schedules in reply to monthly payment claims by the appellant since 31 December 2004, it follows that it is unnecessary for me to deal with the further bases upon which the respondent seeks to uphold the primary judge's decision being the implied authority in a lawyer/client retainer and the ratification issue advanced by the respondent in its notice of contention.

Conclusion

138 In my opinion, the challenges by the appellant to the primary judge's decision should be rejected. At the very least, the appellant has failed to establish on the balance of probabilities that the preparation by Allens of the Document headed Payment Schedule and its provision to the appellant on 28 April 2006 was unauthorised by the respondent. That is sufficient to dispose of the appeal although I reiterate that in my opinion the evidence affirmatively established that the respondent, either directly or indirectly, authorised the preparation and provision of that document to the appellant. It follows that the respondent provided a valid payment schedule to the appellant in accordance with s 14 of the Act in reply to the latter's payment claim dated 11 April 2006.

139 In light of the foregoing I would therefore propose that the appeal be dismissed with costs.

140 **BASTEN JA**: A person who claims to be entitled to a progress payment with respect to construction work may make a "payment claim" pursuant to s 13 of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Security of Payment Act"). The person on whom the claim is served, referred to in the Act as "the respondent", is liable for the amount of the payment claim unless it provides to the claimant a "payment schedule" within the prescribed period of 10 business days: s 14(4). If the payment schedule indicates that the respondent intends to pay an amount which is less than the claim, it must provide reasons for withholding payment of the balance: s 14(3).

141 As Tobias JA explains, a payment claim was made by the Appellant and served on the Respondent. A document purporting to be a payment schedule was provided to the Appellant within the prescribed period. The present dispute turns on the assertion by the Appellant that the document was not provided by the Respondent and therefore was not in compliance with s 14(1) of the Security of Payment Act.

142 The proceedings were commenced on 17 May 2006 by the Appellant issuing a summons in the Equity Division, claiming a judgment for the amount of the payment claim, the Respondent not having paid any part of that amount. However, pursuant to s 15(4), the Appellant was not entitled to a judgment in its favour "unless the court is satisfied of the existence of the circumstances referred to in subsection (1)". Section 15(1)(a) identifies the first circumstance as the respondent having become liable to pay the claim "as a consequence of having failed to provide a payment schedule to the claimant". It was that which the Appellant was required to prove. Given that a document purporting to be a payment schedule, and otherwise satisfying that description, had been provided within the prescribed time, the Appellant took upon itself the burden of proving that the document had not been provided by the Respondent.

143 In support of its summons, the Appellant also filed on 17 May 2006 a statement setting out its contentions, being the matters which it was required to prove to obtain a judgment. The critical part of that pleading was paragraph 13 which read as follows:

"*13. QIC did not provide a payment schedule by 28 April 2006 within the meaning of section 14 of the Act.*

Particulars

On 28 April 2006 BHPL received a letter from Mr Ron Aquilina, the Principal's representative. The letter stated that it attached 'a copy of the Progress Payment Certificate for Payment Claim No 42'. It made no reference to any payment schedule. Attached to the letter was, amongst other items, a document entitled 'Payment Schedule under the Building and Construction Industry [Security] of Payment Act 1999 (NSW)' ('the ***Document****'). The letter did not refer to the Document. The Document was signed by Mr Dan Young, a partner of the firm of solicitors known as Allens Arthur Robinson.*"

144 On 25 May 2006 Allens Arthur Robinson, the solicitors for the Respondent, wrote to the Appellant's solicitors, Clayton Utz, Sydney, noting the reference to the last assertion in the particulars of paragraph 13 and stating: "*It is not clear on the face of the pleading why your client has referred to the fact that the payment schedule was signed by Mr Young. Whilst the issue of authority to sign is not raised in your client's pleading, and we do not understand you to be raising that issue, we put you on notice that should you raise the issue of authority we will file an affidavit verifying this firm's authority to sign payment schedules on behalf our client.*"

145 The pleading was obscure and the comment was appropriate. The response from Clayton Utz was less than revealing. By letter dated 26 May 2006, they stated: "*In relation to the last paragraph of your facsimile, the issues raised in paragraph 13 fall squarly (sic) within a number of decisions of the Supreme Court and are thus appropriately raised in that paragraph.*"

The response was as obscure as the pleading.

146 On the same day, Allens Arthur Robinson wrote again, stating in relation to this matter: *"At present we do not know whether one of the issues raised in paragraph 13 of your client's contentions is the authority of Dan Young to sign the document our client says is a payment schedule. If your client does not raise this as an issue then our client does not propose to include any evidence about this, particularly as section 14 of the Act includes no express requirement that a payment schedule be signed by the party providing it."*

Quite unhelpfully, Clayton Utz responded, again on 26 May: *"In relation to the last paragraph of your facsimile, we have nothing further to add. It is a matter for your client to determine the evidence which it wishes to adduce."*

147 By further letter of 26 May, Allens Arthur Robinson again raised the question as to the import of paragraph 13. *"Our question was really directed to whether authority (ie of Dan Young to sign the payment schedule) is in fact one of the issues raised in paragraph 13. We note from our telephone discussion subsequent to your fax that you will discuss this matter with your counsel and respond to us further. Could you please provide us with that response as a matter of urgency."*

148 Clayton Utz responded on 29 May 2006, but provided no further information. It may be inferred that the refusal to clarify the point which had been raised was deliberate and was approved by counsel. On 29 May 2006 Allens Arthur Robinson responded in the following terms: *"The purpose of our fax of 26 May was to obtain greater clarity regarding your client's case. We note that you have declined to provide that clarity. We will be proceeding tomorrow in any event and we shall tender your fax together with the earlier correspondence regarding the pleadings on the issue of costs, which as you know, QIC is seeking from your client on an indemnity basis."*

149 As the complaint of lack of authority now relied upon as critical to the Appellant's case was obscurely pleaded, the clarification sought should have been provided. The pre-trial correspondence from the Appellant's solicitors is unedifying and the position adopted was unprofessional.

150 On 29 May counsel for the Appellant provided written submissions, which had been directed to be filed prior to the hearing on 30 May 2006. In the written submissions, reference was made to a passage in the judgment of Einstein J in ***Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd*** [2005] NSWSC 439 at [37]-[39], to the effect that the document relied upon as a "payment schedule" in that case having been provided not by the respondent, but by its solicitor, did not comply with s 14(1).

151 The submissions also referred to his Honour's comments in ***Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd*** [2003] NSWSC 903 at [59], where his Honour had stated: *"In my view the character of the subject legislation is such that general principles of actual or ostensible authority in solicitors to receive service of copies of relevant notices must yield to the strictures of the strict requirement to prove service. The service provisions of the Act require to be complied with in terms. … The Act here under consideration simply proceeds by requiring particular steps to be taken by the parties and by the adjudicator and proof of strict compliance with the Act is necessary for the achievement of the quick and efficient recovery of progress payments and resolution of disputes in that regard."*

The submission continued: *"Reliance by QIC on the purported payment schedule being signed by Mr Young is misconceived for the reasons referred to by Einstein J in* ***Emag*** *and* ***Taylor****."*

152 Even express reference to *Emag*, would not have clarified the basis of reliance by the Appellant. *Emag* was a case in which a claimant had served an adjudication application on solicitors acting for a respondent, rather than serving the application on the respondent personally. There was an issue as to whether the solicitors had authority to accept service. The case was thus concerned with authority to accept service and no more. The passage relied upon must be understood in that context. When the present matter came on for hearing before Einstein J on 30 May 2006, senior counsel for the Appellant made it clear that delivery of the payment schedule was not the issue. He stated (Tcpt, p19(10)): *"We are not talking about delivery here, we are talking about the formulation and compilation of and for those purposes the payment schedule."*

153 Express reference to ***Taylor Projects Group*** would have taken the matter somewhat further. It would appear from that case that Einstein J was of the view that a letter provided by a solicitor could not constitute a response by a respondent, although his Honour did not need to determine the question and did not need to consider questions of authority. The scope of the dictum was somewhat obscure, as his Honour determined the issue on the basis that the letter did not on its face satisfy the statutory requirements for a payment schedule and did not "even purport to be a provision of a payment schedule" at [50]. However, importantly for the present case, *Taylor Projects Group* was not concerned with questions of authority, nor was it in terms adopted by senior counsel for the appellant in the course of argument before Einstein J. Rather the point relied on was the identity of the person responsible for 'formulating and compiling' the payment schedule. In his judgment in the present matter, Einstein J referred only cursorily to *Taylor Projects Group*, at [22], and no complaint is made of that by the Appellant.

154 The Respondent argued that the term "provided", which is used in relation to a payment schedule in various provisions of the Security of Payment Act, should be equated to "service". There is, it was contended, no requirement in s 14 that a payment schedule be signed by or on behalf of the Respondent, nor is there any express requirement that the Respondent personally compile the contents of the payment schedule. Being a company it must act through employees or agents and the Security of Payment Act is silent on that issue, imposing no constraints on how the payment schedule is prepared. Accordingly, once questions of delivery or service were put to one side, the Respondent contended that there was no sustainable argument presented by the Appellant.

155 The matter is ultimately a question of statutory construction: what is intended by the requirement in s 14(1) that a payment schedule be "provided" by the respondent? It seems to have been common ground during the hearing of the appeal that the term "provide" meant furnish or supply, a concept involving the transmission of a document from one person to another. In this respect, the case as outlined before the primary judge, involving the ministerial act of formulating or compiling the document, was not pressed.

156 Accordingly, the issue resolved itself into a question as to whether a person with authority from the Respondent authorised the delivery of the payment schedule in the form in which it was handed over to the Appellant. That involved more than simply authorising the ministerial act of delivering a document to the Appellant; it involved the delivery of the specific document, having a specific statutory purpose. There was, in this case, no suggestion that the payment schedule was delivered by mistake or that the wrong document was delivered, or that it was delivered to the wrong person. The Appellant's case turned on proof of the fact that the delivery occurred without the authority of the Respondent.

157 The operation of s 14(1) has been considered by this Court, particularly in ***Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*** [2006] NSWCA 259, but the issue in that and other cases has been whether the obligation to "provide" the payment schedule required that the document actually be brought to the notice of the claimant, or whether service as permitted by s 109X of the *Corporations Act* 2001 (Cth) or in accordance with s 31 of the Security of Payment Act, would be sufficient. Hodgson JA (with whom Handley JA and Hunt AJA relevantly agreed) held that a payment schedule is a "notice" for the purposes of s 31 of the Security of Payment Act: at [59]. His Honour considered whether the legislature had intended to treat payment claims (required to be served) and payment schedules (required to be provided) differently in the sense that service could be effected whether or not the other person had actual knowledge of the document, whereas provision could not. His Honour rejected the contention that some differential result had been intended: at [60]. His Honour continued at [61]: "*The use of the word 'provide' rather than the word 'serve' does carry a suggestion that a different meaning is intended, and that accordingly s 31 does not apply in the case of the word 'provide'. Against this, however, I do not think the legislature would have (1) used a problematic word like 'provide' with the intention that it have a different meaning from 'serve', (2) given useful instructions as to how service may be effected, yet (3) given no instructions whatsoever as to how provision may be effected. When this consideration is combined with the consideration raised in the previous paragraph, in my opinion this justifies the conclusion, reached by the primary judge in this case, that 'provide' does not mean anything different from 'serve', and that s 31 applies to 'provision' as well as to 'service'.*"

158 The claim in the present case was for an amount in excess of $105 million. If the Respondent did not provide a payment schedule, it would become liable to pay the full amount of the claim. The documentary material which accompanied the claim was said to involve more than 70 folders. Providing a response was clearly a significant task. The payment schedule which was provided encompassed eight folders. If the payment schedule had been provided anonymously, one would readily infer that it had been provided by the Respondent, being the party with a substantial commercial interest in taking that course. The only other party or parties with such a commercial interest would be those which had been contracted by the Respondent to undertake the task and which might be liable for substantial damages if they failed to do so.

159 It was not argued by the Appellant that a payment schedule could not be provided by the Respondent, through a duly authorised agent: the argument was that the agent which in fact provided the schedule was not so authorised.

160 As Tobias JA explains, the underlying premise, namely that an officious bystander had gone to the trouble of providing the payment schedule, is inherently implausible. As his Honour concludes, the Appellant has failed to make out the implausible premise to its case. Furthermore, I share his Honour's satisfaction that the Respondent has affirmatively proved that the payment schedule was provided to the Appellant by a duly authorised agent, for the reasons he gives.

161 If there is a tenable submission which is not resolved by this reasoning, I gratefully adopt the more extended explanation of the case and the submissions in the reasons of Tobias JA. The appeal should be dismissed with costs.

J T Gleeson SC / S A Kerr / B Arste for the appellant instructed by Clayton Utz, Sydney
F M Douglas QC / N Kidd for the respondent instructed by R: Allens Arthur Robinson, Sydney