

JUDGMENT : Einstein J. New South Wales Supreme Court. Equity Div. T&C. 7th June 2006

The proceedings

- 1 The final hearing of these proceedings has been brought on as a matter of urgency. Baulderstone Hornibrook Pty Ltd ["BHPL"] seeks judgment in the sum of \$105,411, 474.00 pursuant to the provisions of the *Building and Construction Industry Security of Payment Act 1999 (NSW)* ["the Act"].

The relevant provisions of the Act

- 2 The relevant sections of the Act are:

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.

15 Consequences of not paying claimant where no payment schedule

- (1) This section applies if the respondent:
- (a) becomes liable to pay the claimed amount to the claimant under section 14 (4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and
- (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) In those circumstances, the claimant: ...
- (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract. ...

27 Claimant may suspend work

- (1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 24.
- (2) The right conferred by subsection (1) exists until the end of the period of 3 business days immediately following the date on which the claimant receives payment for the amount that is payable by the respondent under section 15 (1), 16 (1) or 23 (2).
- (2A) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of related goods and services, incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply, the respondent is liable to pay the claimant the amount of any such loss or expenses.
- (3) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension.

The facts

- 3 The evidence establishes the following matters each of which were conveniently set out in the outline submissions of Queensland Investment Corporation ["QIC"]:

- i. On 5 June 2003, QIC (as Principal) and BHPL (as Contractor) executed a contract under which BHPL agreed to design and construct the Westpoint Shopping Centre Redevelopment at Blacktown (the *Contract*).
 - ii. The contract sum (referred to in the Contract as the “Warranted Maximum Price”) was \$224,171,704.
 - iii. In December 2004, BHPL commenced making its progress claims as *payment claims* under section 13 of the Act, being payment claim no. 28 under the Contract. Since that time, BHPL has served monthly payment claims under the Act. In respect of each such payment claim, QIC has served a payment schedule under the Act. In all but two cases, BHPL has then made an adjudication application under the Act.
 - iv. In the three most recent adjudications under the Act, (being payment claim nos. 39, 40 and 41), BHPL has claimed in its payment claim amounts exceeding \$80 million. In the adjudication of each of those payment claims, the adjudicator has in each case determined the amount payable to BHPL was less than \$2 million (and in one case the adjudicated amount was nil).
 - v. On 11 April 2006, BHPL served payment claim no. 42 on QIC. The payment claim claimed \$105,411,474. The payment claim was accompanied by more than 70 folders of documentary material. The covering letter described the payment claim as being made in accordance with clause 42 of the Contract. That clause of the Contract contained the contractual arrangements relating to the making and payment of progress claims. The covering letter also stated that the payment claim is made under the Act.
 - vi. On 28 April 2006, eight folders of documents were delivered to BHPL. That material included a document which had the heading “*Payment Schedule under the Building & Construction Industry Security of Payment Act 1999 (NSW)*”. That document (the *Document headed Payment Schedule*) was the first hole punched document in the top folder in the box. A letter was also provided on the letterhead of the Principal’s Representative. At the time of service, the letter was physically separate from the eight folders.
 - vii. Behind the Document headed Payment Schedule, was a document headed “APP Progress Payment Certificate”, issued in accordance with the Contract.
 - viii. Immediately following that document, was a document headed “Payment Recommendation for BHPL Payment Claim No. 42 Payment Period to 31 March 2006 for APP Corporation Pty Ltd”. That document took up the balance of the top folder and the remaining 7 folders.
 - ix. It is common ground that the above-mentioned documentary material was provided to BHPL on 28 April 2006, and that date was within the period of 10 business days after BHPL’s payment claim was served (on 11 April 2006). (Public holidays for Easter and Anzac day fell within that period.)
 - x. On or about 14 May 2006, BHPL sent to QIC a document purporting to be a notice under section 15(2)(b) of the Act of BHPL’s intention to suspend carrying out construction work. An entitlement to issue such a notice only exists if QIC did not, by providing the documentary material to BHPL on 28 April 2006, provide a payment schedule under s.14 of the Act.
- 4 It is important to recognise that the materials in the eight folders served to fulfil two functions:
- i. first as constituting a payment schedule within the meaning of the Act;
 - ii. second as providing a progress payment certificate [as required by clause 42(6) of the contract.
[essentially following suite with the payment claim made pursuant to clause 42 as well as being made under the Act]
- 5 The payment schedule
- (1) identifies the payment certificate as an attachment [at “A Preliminary paragraph 5”]
 - (2) at “**C respondents reasons why scheduled amount is less than claimed amount or why the respondent is withholding payment**”, includes the following:
 2. (Particular Reasons) In relation to particular amounts comprising the difference between the Scheduled Amount and the Claimed Amount and having regard to but without limiting any of the reasons set out in paragraph 1 of this section, all of the particular reasons and calculations set out in the Payment Certificate (with which the Respondent agrees and gives as its own reasons for the purposes of this Payment Schedule) in addition to the further reasons expressly set out in this Payment Schedule.
- 6 Hence the payment schedule for *its own* purposes includes the whole of the eight folders [and this for the reason that what is set out in the payment certificate is incorporated in the payment schedule as additional reasons for there being no reason for making a payment].

The issues

As raised by the summons

- 7 BHPL’s Summons raised the following two issues:
- i. first, that the letter accompanying the eight volumes stated that it attached a copy of the Progress Payment Certificate for Payment Claim No 42, and did not refer to any payment schedule. [“the letter issue”]
 - ii. second, that the Document headed Payment Schedule was signed by a partner of Allens.
- 8 Contention 13 in BHPL’s Summons is in the following terms:
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 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.

As raised by the submissions

- 9 In BHPL's written submissions of 29 May 2006, no issue was taken about the *authority* of Mr Young of Allens to sign the payment schedule; rather BHPL's case appeared to be that it was not permissible for a solicitor to sign the payment schedule, irrespective of any actual or ostensible authority of the solicitor to do so.
- 10 At the hearing on 30 May 2006, BHPL's case was stated to be that QIC had not proved that it authorised Mr Young of Allens to sign the payment schedule [see transcript 17.19 to 18.08; transcript 34.15 to 34.22].
- 11 At the hearing of 2 June 2006, BHPL stated that it did not take any point about authority to sign, but that BHPL's case was that QIC was required to prove that Allens had authority to author or bring into existence the payment schedule [transcript 86.46 to .54].
- 12 Hence the principal issue then advanced concerned the contention that the payment schedule was not provided by QIC [transcript 15.42].
- 13 The proposition was that there were only two candidates capable of having been authorised by QIC to provide the payment schedule:
 - i. Mr Young, the partner of Allens;
 - ii. Mr McCondach, who on the undisputed evidence delivered the eight volumes to QIC's office.
- 14 The submission to the effect that neither of these candidates were shown on the evidence to have been so authorised is dealt with below.

Non issues

- 15 It is especially important to keep the non issues in focus:
 - i. No issue is raised in BHPL's Summons that the Document headed Payment Schedule does not satisfy the content requirements set out in sub-section 14(2)(a) of the Act [*the payment schedule must identify the payment claim to which it relates*]. Nor could any such issue be seriously raised, because the Document headed Payment Schedule clearly identifies the payment claim to which it relates, both by date and amount.
 - ii. No issue is raised in BHPL's Summons that the Document headed Payment Schedule does not satisfy the content requirements set out in sub-section 14(2)(b) of the Act [*the payment schedule must indicate the amount of the payment (if any) that the respondent proposes to make*]. Nor could any such issue be seriously raised, because the Document headed Payment Schedule clearly indicates that amount, next to the words "Amount that Respondent proposes to pay".
 - iii. Nor is any issue raised in BHPL's Summons that the Document headed Payment Schedule does not satisfy the content requirements set out in sub-section 14(3) of the Act [*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*]. Nor could any such issue be seriously raised, because the Document headed Payment Schedule stated "*The reasons why the Scheduled Amount is less than the claimed amount and the reasons for withholding payment are set out in the Attachment below*" following which appeared an attachment setting out detailed reasons and supporting material.

The authorities – general principles

- 16 In *Procorp* [2006] NSWSC 205 an attempt was made [at 10] to provide an overview of the principles which presently inform the proper construction of the Act.

Section 14

- 17 The considerations which inform the proper construction of s 14 have also been developed through a number of authorities. Not all of these authorities are consistent. However it is always important to look very closely at the precise facts under consideration and to focus upon the ratio decidendi in relation to each decision. As the defendant has submitted:
 - i. Some care needs to be taken when making analogies with cases relating to compliance with s.13(2). That section has a specific requirement that a payment claim must state that it is made under the Act (s.13(2)(c)). There is no corresponding requirement in relation to a payment schedule under s.14.
 - ii. That important distinction explains why McDougall J in *Barclay Mowlem* (supra) was able to conclude that a letter which made no reference to the Act and did not use the phrase "payment schedule" was nonetheless a payment schedule for the purpose of s.14 of the Act.
 - iii. That distinction also explains the close attention paid to the covering letters in *Parist Holdings* (supra) and *Leighton Contractors* (supra), both of which cases involved covering letters containing the s.13(2)(c) endorsement but enclosures which did not contain that endorsement. In both of those cases it was found that when the documents were read as a whole, the requirements of s.13 had been satisfied because the s.13(2)(c) endorsement in the covering letter was sufficient compliance.

Section 13

- 18 The following general outline overview of a number of authorities furnished by the defendant is accepted as giving a balanced overview of a number of authorities have dealing with whether documents claiming to be payment claims had satisfied the requirements of s 13 of the Act:

- In *Barclay Mowlem Construction Ltd v Tesrol Walsh Bay Pty Ltd* [2004] NSWSC 1232, McDougall J had to decide whether a letter which had been provided to the builder amounted to a payment schedule for the purpose of s.14 of the Act. The letter did not make any reference to the Act, nor did it describe itself as a “payment schedule” or make any reference to those words. Presented with those facts, McDougall J said the following:

“[10] In an earlier judgment in these proceedings, given on an unsuccessful application by BMC for summary judgment ([2004] NSWSC 716), I set out in para [8] the approach I thought should be taken in considering whether a document purporting to be a payment schedule complied with the relevant mandatory requirements of the Act.

[11] I said:

8 In *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140, Palmer J set out the approach that the court should take in considering whether documents purporting to be payment claims or payment schedules complied with the relevant mandatory requirements of the Act. He noted that they were exchanged between parties who, because of their experience in the building industry and with the particular contract, knew the history of the project and the issues in dispute, and that they would be likely to contain material in an abbreviated form unintelligible to the uninformed reader but comprehensible to the parties. He said:

76 A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant’s payment claim. **A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court.** Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute. (emphasis added)

77 A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.

78 Section 14(3) of the Act, in requiring a respondent to “indicate” its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. **The use of the word “indicate” rather than “state”, “specify” or “set out”, conveys an impression that some want of precision and particularity is permissible** as long as the essence of “the reason” for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication. (emphasis added)

[12] Mr Rudge SC, who appeared with Mr Sibtain of Counsel for BMC, reminded me that what Palmer J had said in *Multiplex* was directed to an issue raised under s 20(2B) of the Act. That subsection prevents a respondent from raising, in an adjudication response, a reason for non payment that was not included in the payment schedule.

[13] I accept the point. However, I remain of the view that what Palmer J said in *Multiplex* indicates the approach that should be taken in dealing with the first issue. It is consistent with the evident intention of the legislature, that entitlement to progress payments should be resolved expeditiously, **that this be done with a minimum of formality and expense.**” (emphasis added)

- McDougall J went on to make the following findings:

“[17] When one reads the 18 May letter, I think that it emerges clearly that TWB did not propose to pay BMC anything in respect of the payment claim. In other words, I think, it is plain from the letter, read as a whole, that TWB proposed in it to pay nothing in respect of the payment claim.

[18] If it were necessary to do so, I would consider that the context known to the parties supports this view. For example, the letter of 12 May 2004 (referred to in that part of the 18 May letter that deals with the extension of time costs) said that the claim was “surprising” and “invalid”.

- A similar approach was taken in *Springs Golf Club Pty Ltd v Profile Golf Pty Ltd* [2006] NSWSC 344, where Rein AJ found that a letter, which did not describe itself as a payment schedule, and did not refer to the Act, and did not describe the claim to which it was responding as a “payment claim”, was nonetheless a payment schedule within the meaning of section 14 of the Act.

- In *Isis Projects v Clarence Street* [2004] NSWSC 714, McDougall J stated that the approach described by Palmer J in *Multiplex Constructions v Luikens* (supra) was also applicable to determining whether a document claimed to be a payment claim satisfied the requirements of s.13(2) of the Act.
 - That approach was approved by the Court of Appeal in *Clarence Street Pty Limited v Isis Projects Pty Limited* [2005] NSWCA 391 at [27]-[32]. In that case Mason P (with whom Giles JA and Santow JA agreed) went on to say at [28]:

“[28] To similar effect are the following remarks of Davies AJA (Handley JA and Stein JA concurring) in *Hawkins Construction (Aust) Pty Ltd v Mac’s Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20]:

[Section 13] should not be approached in an unduly technical manner ... The terms used by subs (2) of s 13 are well understood words of the English language. They should be given their normal and natural meaning. As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner.” (emphasis added)

[See also Nepean Engineering Pty Limited v Total Process Services Pty Limited (in liq) [2005] NSWCA 409 at [24] – [27].]
 - In relation to whether a payment claim complies with the requirements of s.13(2), Nicholas J in *Parist Holdings Pty Limited v WT Partnership Australia Pty Limited* [2003] NSWSC 365 at [28] said:

“[28] The principles relevant to the question of compliance with s13(2) were discussed in *Hawkins Construction (Aust) Pty Ltd v Mac’s Industrial Pipework Pty Ltd* (2002) NSWCA 136 para20; *Beckhaus Civil Pty Ltd v Council of the Shire of Brewarrina* (2002) NSWSC 960 para73-para76; *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* (2003) NSWSC 266 para63-para65; para81-para85. It must be clear on the face of the document(s) which constitute the statutory payment claim that the information conveyed meets the requirements of s13(2). “The test is an objective one. In deciding the meaning conveyed by a notice a court will ask whether a reasonable person who had considered the notice as a whole and given it fair and proper consideration would be left in any doubt as to its meaning” (*Walter Construction Group Pty Ltd para82*). [emphasis added]
 - Those principles were cited with approval in *Leighton Contractors Pty Limited v Campbelltown Catholic Club Limited* [2003] NSWSC 1103 at [58].
- 19 BHPL has drawn attention to the decision in *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903 which involved a complex set of facts including a circumstance in which a firm of solicitors had no record of having received a facsimile and an exchange of correspondence between the solicitors as to whether or not one firm acted or should be regarded as acting for one of the parties. The question of agency can obviously be of enormous importance. The point was highlighted in *Emag* at [59]: “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. Prudence dictates that those responsible for complying with the service provisions take steps to be in a position to strictly prove service in the usual way. One only example of the difficulties which may arise is where a solicitor who may have been instructed to act in relation to an adjudication application has his/her instructions withdrawn. There are no provisions similar to those to be found in the Supreme Court Rules 1970 for notices of ceasing to act and the like. 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. “
- 20 Earlier in the same judgment, reference was made to the necessity for strict compliance to the letter with the codified procedures provided for in the Act. That judgment made the point that the whole of the rationale underpinning the procedures laid down by the Act is directed at providing a quick and efficient set of procedures permitting recovery of progress payments and the quick resolution of disputes in that regard; hence time limits under the Act being strict, and the consequence of failure to comply with the stipulated time limits being significant (cf *Emag* at [35] [38] [41]-[43]).
- 21 In *Leighton v Catholic Club* [2003] NSWSC 1103 one of the issues concerned whether or not the particular document claimed to have constituted the relevant payment claim had achieved that status in terms of the proper construction of the Act. Without repeating the detailed analysis in respect of a number of problems apparent from the so-called progress claim, the ultimate conclusion (at [65]) was that a reasonable person reading the covering letter and the attachments as a whole would have been left in no material doubt as to its meaning essentially conveyed by the last sentence in the covering letter.
- 22 Taylor was another complex set of circumstances involving inter alia a claimed 'constructive resubmission' of a payment schedule.

Dealing with 'the letter issue'

- 23 Each of the following submissions by QIC is accepted as of substance:
- i. In the present case, the only question appears to be whether the contents of the letter from the Principal's Representative accompanying the eight folders (the *Accompanying Letter*) somehow alter the character of the documents in the eight folders in such a way that they do not satisfy the minimum requirements of s.14.
 - ii. The *Accompanying Letter* (which states “Pursuant to Clause 42(1)(b) of the Contract please find attached a copy of the Progress Payment Certificate for Payment Claim 42”) only relates to the document within the eight

- folders that has the heading "Progress Payment Certificate", and the attachments to that document. Under the Contract, a Progress Claim Certificate is required to be issued by the Principal's Representative.
- iii. It is immaterial that the Document headed Payment Schedule is not referred to in the Accompanying Letter. The absence of any reference to it in the Accompanying Letter does not deny the fact that the Document headed Payment Schedule was in fact provided. No suggestion is made, nor could it be, that BHPL was misled by the contents of the Accompanying Letter and did not understand that the eight folders included a payment schedule under section 14.
 - iv. When the documents that were provided to BHPL on 28 April 2006 are read as a whole there is no possible way that a reasonable person could conclude that those documents did not include a payment schedule within the meaning of s.14 of the Act.
 - v. The documents provided to BHPL on 28 April 2006 need to be considered in the light of the form of the payment claim that BHPL had served on 11 April 2006. The covering letter sent by BHPL on 11 April 2006 made it plain that the documents enclosed with that letter were a progress claim under Clause 42 of the Contract *as well as* being a payment claim made under the Act.
 - vi. Under clause 42 of the Contract, the Principal's Representative is required to certify the amount of the progress claim; hence, the Accompanying Letter, and the Progress Payment Certificate included in the eight folders.
 - vii. The documents provided to BHPL on 28 April 2006 consisted of the following. First, the Accompanying Letter stating "Pursuant to Clause 42(1)(b) of the Contract please find attached a copy of the Progress Payment Certificate for Payment Claim 42". That statement made it plain that the eight folders *included* a Progress Payment Certificate relating to payment claim 42 which BHPL had enclosed with its 11 April letter (and which BHPL had endorsed as a payment claim made under the Act).
 - viii. Given that there is no requirement under s.14 of the Act that an endorsement be included to the effect that the payment schedule is *made under the Act*, it is immaterial that the Accompanying Letter made no reference to the Act, and did not use the phrase "*payment schedule*".
 - ix. In any event, the first document in the eight folders was a document headed "*Payment Schedule under the Building & Construction Industry Security of Payment Act 1999 (NSW)*". That heading made it plain that what was being provided to BHPL on 28 April was intended to include a payment schedule under the Act. The document stated that it was from QIC, it identified the payment claim to which it related by date and amount, it indicated the amount of the payment (if any) that QIC proposed to make and it indicated in an attachment the reasons why the scheduled amount was less than the claimed amount.
 - x. In these circumstances, a reasonable person who had considered the documents as a whole and given it fair and proper consideration would be left in doubt that the documents provided on 28 April 2006 included a payment schedule within the meaning of s.14 of the Act, which responded to BHPL's Progress Claim No.42 (which BHPL had endorsed as a payment claim under the Act).

The wider attack on the provision of the Payment Schedule: the position and activities of Mr McCondach

- 24 The evidence given by Mr McCondach of relevance was as follows:
- i. that he is a quantity surveyor employed by WT Partnership;
 - ii. that WT Partnership had been engaged by the defendant to assist the Principal's Representative in connection with its superintendence and administration of the subject contract;
 - iii. that he had had a day-to-day involvement in the following matters:
 - a) assisting APP with the assessment of cost related claims;
 - b) assisting APP with valuing variations;
 - c) assisting APP with assessing and certifying payments.
 - iv. that he physically assembled the eight folders of documents which in due course were delivered to the plaintiff and which when delivered included the document headed "Payment Schedule";
 - v. that the document headed "payment schedule" had been received by him from Allens and that he had copied the document for assembling into the subject folders.

The position of the Principal's Representative

- 25 The burden of BHPL's submissions in relation to the position of Mr McCondach requires particular focus on the requirement that the Principal's Representative is to act reasonably and independently. It is next convenient to consider that question in terms of the subject Contract and the authorities.
- 26 One of the functions of the Principal's Representative under the Contract is to act as a certifier by issuing a payment certificate in respect of payment claims made by BHPL under the Contract.
- 27 Clause 23.1 of the Contract is in the following terms:
- "(a) [QIC] shall ensure that at all times there is a Principal's Representative and shall endeavour to ensure that in the exercise of the functions of the Principal's Representative under the Contract, the Principal's Representative ...
- (iii) where the Principal's Representative is acting as a certifier under paragraph (d):
- (A) ...
 - (B) acts reasonably and independently

- (d) despite any other provision of the Contract where the function of the Principal's Representative under the Contract involves the granting of an extension of time, the certification of payment, the certification of Practical Completion or any valuation under Clause 40.4:
- (i) the Principal's Representative shall act as certifier in the exercise of that function; and
 - (ii) [QIC] shall not be responsible or liable for any Claim by [BHPL] arising from or in connection with the exercise by the Principal's Representative of that function (including without limitation any determination made (or failure to make any determination)).
- nothing of this Clause 23.1(d) shall prevent [BHPL] from raising a dispute as to its contractual entitlements in relation to any determination made by the Principal's Representative (or a failure to make any determination)."
- 28 Thus, pursuant to the Contract, when acting as the certifier in respect of any claim for payment, the Principal's Representative [and any company or individual engaged to assist the Principal's Representative in that function] must act, inter alia, independently (cl. 23.1(d)).
- 29 There is nothing inconsistent about the Principal's Representative, having to discharge independent duties in relation to certain functions. In **Brewarrina Shire Council v Beckhaus Civil Pty Limited** (2003) 19 BCL 177 it was held by Mason P, that: "there is no doubt that the Superintendent has duties to the Contractor under cl. 23 of the Contract and that, even though the Superintendent may have close connections with the proprietor, he owes what could be termed fiduciary duties to the Contractor..."
- 30 In **Peninsula Balmain Pty Limited v Abigroup Contractors Pty Limited** [2002] NSWCA 211, Hodgson JA quoted the following extract with approval: "in circumstances where the Superintendent is empowered to grant an extension of time even when the contractor has not applied for it, must the Superintendent exercise this right fairly? ... the answer to this question under AS 2124 is an explicit yes. The Principal shall ensure that at all times ... the Superintendent ... acts honestly and fairly. It may be arguable, then, that the Principal will be in breach of Contract to the contractor if the Superintendent does not exercise its right to unilaterally extend time in the contractor's favour."
- 31 Hodgson JA (at [50]) observed as follows: "the authorities ... are not altogether clear as to whether a person in the position of a superintendent of a building contract is the owner's agent in exercising all of the functions of the superintendent. However, in my opinion the better view (supported by Perini, Dixon, Egan and London Borough of Merton, and not refuted by Suttcliffe) is that the superintendent is the owner's agent in all matters only in a very loose sense, and that, **when exercising certifying functions in respect of which the superintendent must act honestly and impartially, the superintendent is not acting as the owner's agent, in the strict legal sense.** In my opinion, this is confirmed by the consideration that the issue of a certificate by the superintendent does not bind the owner to an extent beyond what is prescribed in the building contract itself, so that the owner can challenge such certificates. If the superintendent was acting as the owner's agent in the strict sense, the issue of the certificate would be an act done by the owner through its agent, which the owner could not then challenge". [emphasis added]
- 32 In the result is plain enough that QIC is required under the Contract:
- i. to ensure that there is a Principal's Representative properly appointed;
 - ii. to endeavour to ensure that the Principal's Representative acts honestly, reasonably and independently in relation to the exercise of the functions prescribed by the Contract to be carried out by such representative's activities [such as certification of payments due or sought under the Contract].
- 33 Equally duties which, to use the words of Mason P in *Beckhaus* (supra), "could be termed fiduciary duties" are owed by the Principal's Representative in relation to the exercise of the functions prescribed by the Contract to be carried out by such representative's activities.

Dealing with the issue concerning Mr McCondach's activities

- 34 The essential flaw in BHPL's case concerning the activities of Mr McCondach reposes in the fact that his only activities here of relevance:
- i. were purely mechanical/secretarial acts comprising papers being placed into folders and the physical transportation of the folders to the Plaintiffs offices [as was conceded by BHPL at transcript 24.16-.26];
 - ii. fell entirely outside the exercise of the functions prescribed by the Contract to be carried out by the Principal's Representative [as for example certification of payments due or sought under the Contract];
 - iii. did not and could not be regarded as a breach of any duty [akin to a fiduciary duty] or a duty to act honestly, reasonably and independently, in relation to the exercise of the functions prescribed by the Contract to be carried out by any Principal's Representative [or in this case by an indirect assistant].

Whether the payment schedule was provided by QIC

- 35 BHPL's submissions in this regard:
- i. whether going to the contention that the payment schedule was not provided by QIC or
 - ii. whether going to the contention that Allens had no authority to author or bring into existence the payment schedule
- are of no substance.
- 36 The following matters are trite:
- 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.
- 37 It is common ground that the 28 April documents were provided by Mr McCondach to BHPL on 28 April 2006 [cf transcript 19.4 as to there being no issue but that payment schedule was in fact delivered to QIC].
- 38 The payment schedule on its face identifies the entity providing it as "Queensland Investment Corporation (Respondent)". The typed segment of the payment schedule reads:
"Signed:
Queensland Investment Corporation."
- 39 As already observed:
- i. it was not necessary for any signature to appear upon the document at all;
 - ii. it was not necessary for QIC to sign the payment schedule at all.
- 40 In fact Mr Young a partner of Allens, signed the document "for Queensland Investment Corporation".
- 41 The Progress Payment Certificate for Payment Claim 42 signed by Mr Aquilina of APP Corporation Pty Ltd as "Principal's Representative" [which as already indicated was a part of the payment schedule] had been addressed to BHPL and copied to Mr McCondach.
- 42 These facts are sufficient to prove that the payment schedule was provided by QIC. It was entirely unnecessary to go any further.

The additional evidence called by QIC

- 43 In the event, QIC following an adjournment permitted to reopen its case, elected to go further by adducing evidence of the authority of Allens.
- 44 The express scope of Allens' retainer is set out in the 30 July 1998 letter from Allens to QIC, which was signed by QIC and returned to Allens on 24 August 1998. That letter stated as follows:
"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.** (emphasis added)
You will give us our instructions." [the later correspondence is dealt with below]
- 45 BHPL (at t91.17-.21 and t91.39-.41) submitted that that paragraph is not a form of general authority but it is a generic description of the work which is going to be followed if and when instructions are forthcoming and that Allens could not go off, having received the letter, and organise a loan in connection with the project.
- 46 QIC's responsive submissions are accepted as of substance and adopted.
- i. the bringing into existence of a payment schedule in reply to a payment claim received by QIC in relation to the Westpoint extensions project clearly falls within the express description "*deal with other matters as they arise in relation to the Westpoint Extensions Project*".
 - ii. there is in any event implied in law in the lawyer/client retainer a term that the lawyer has authority to do all such things incidental to the object of the retainer [see *Riley Solicitors Manual*, paragraph 3100.10 and 3105.5; *Polkinghorne v Holland* (1934) 51 CLR 143 at 156; *Ex parte Maxwell* (1955) 72 WN (NSW) 333 at 336; *Strangas v Young* (1975) 1 BPR 97,005; *Forestview Nominees Pty Limited v Perron Investments Pty Limited* (1999) 93 FCR 117 at 127 and 139; *Olympic Holdings Pty Limited v Lochel* [2004] WASC 61 at [172]; [cf Dal Pont "*Law of Agency*", Butterworths 2001 (at [1.35, 8.23]).
 - iii. bringing into existence a payment schedule in reply to a payment claim received by QIC in relation to the Westpoint project is work that clearly falls within that implied authority.
 - iv. the sentence "*you will give us our instructions*" does not, on a proper interpretation of the retainer letter, impose a limitation on Allens' authority. That sentence does not have the effect that Allens has no authority to do anything that would otherwise fall within the scope of the retainer unless and until Allens received a specific instruction from QIC to do that matter. The purpose of the sentence is rather to identify which particular natural persons (relevantly, Mr Douglas) can be expected to give QIC's instructions.
 - v. in any event, the evidence of Mr Ritchie (of Allens) is to the effect that Allens had been involved in *preparing payment schedules* in response to the monthly payment claims made by BHPL, which first commenced being made under the Act in December 2004.
 - vi. the proper inference from that evidence is that by the time BHPL served its payment claim on 11 April 2006, the retainer of Allens by QIC included preparing payment schedules in response to BHPL's payment claims. Allens had been doing that work for well over a year by the time the 11 April 2006 payment claim was served.
- 47 For those reasons, the further evidence [albeit unnecessary for reasons set out above] clearly proved that Allens was authorised by QIC to prepare the payment schedule.

The 2001 correspondence

- 48 BHPL submitted that the correspondence between QIC and Allens that took place in 2001 superseded the July 1998 retainer letter.
- 49 The finding is that the 2001 letters do not alter the scope of the retainer established by the July 1998 retainer letter. The Allens' letter to QIC dated 19 July 2001 and the Allens' letter to QIC dated 30 October 2001 each contain the sentence "*these terms of appointment are subject to arrangements between us concerning the scope of our role in a matter*". There was no superseding of the scope of authority contained in the July 1998 retainer.
- 50 The finding is that:
- i. the 31 July 1998 retainer letter together with the authority implied by law from the terms of that document, gave Allens authority to prepare payment schedules on behalf of QIC,
 - ii. no further instruction was required in order for that authority to be conferred.

Ultimate finding

- 51 The ultimate finding is that the document headed payment schedule, which was provided to BHPL in the present case:
- clearly stated that it was a payment schedule under the Act, and explicitly addressed the contents requirements set out in section 14(2) and (3) of the Act.
 - was a payment schedule within the meaning of the Act.
 - was provided to BHPL by QIC.

Orders

- 52 The orders of the Court are:
1. Declare that the QIC's document headed "Payment Schedule under the Building and Construction Industry Security of Payment Act 1999 (NSW)" dated 28 April 2006 as referred to in paragraph 13 of the Plaintiff/Cross-Defendant's (BHPL) Construction & Technology List Statement dated 17 May 2006 (the Payment Schedule) was a payment schedule in accordance with section 14 of the *Building and Construction Industry of Payment Act 1999* (NSW) (the Act).
 2. Declare that the Payment Schedule was delivered within the time specified in section 14(4) of the Act.
 3. Declare that BHPL has no entitlement, and has never had an entitlement, to:
 - (a) serve a notice on QIC of its intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the design and construct contract between the parties (the Contract) pursuant to section 15(2)(b) of the Act in connection with its payment claim, which was served on QIC under cover of letter headed "Payment Claim Nr. 42 March 2006" and dated 11 April 2006 (the Payment Claim); or
 - (b) suspend the carrying out of construction work (or the supply of related goods and services) under the Contract pursuant to section 27 of the Act in connection with s15 of the Act in respect of the Payment Claim.
 4. Declare that the purported notice under section 15(2)(b) of the Act of BHPL's intention to suspend carrying out construction work, sent to BHPL to QIC dated 13 May 2006, is invalid and of no force or effect.
 5. Declare that BHPL has no entitlement to apply for an adjudication in respect of the Payment Claim pursuant to section 15(2)(a)(ii) of the Act.
 6. Declare that BHPL has no entitlement to apply for an adjudication in respect of the Payment Claim pursuant to section 17(1)(a)(i) of the Act.
 7. Reserve leave to the parties to address on costs and on other orders suggested as appropriate, if any.

Mr S Finch SC, Mr S Kerr, Ms Arste (Plaintiff) instructed by Clayton Utz
Mr F Douglas QC, Mr NJ Kidd (Defendant) instructed by Allens Arthur Robinson