

JUDGMENT : McDOUGALL J : Supreme Court, New South Wales, Equity Division T&C List. 27th April 2007.

1 The plaintiff (Fernandes) and the defendant (Centennial) entered into a construction contract whereby Fernandes undertook to carry out construction work for Centennial. It is common ground that the provisions of the *Building and Construction Industry Security of Payment Act 1999* (the Act) applied to that contract.

2 On 4 December 2006, Fernandes sent Centennial a document described as “tax invoice 05”, claiming payment of \$919,427.52 inclusive of GST. There was a schedule attached to that tax invoice identifying the construction work that was the subject of the claim. The invoice stated that it was “prepared under” the Act. Centennial did not provide a payment schedule. Fernandes seeks judgment for the amount claimed by tax invoice 05.

The issue

3 The only issue between the parties is whether tax invoice 05 is a “payment claim” that complies with the requirement of s 13(2)(c) of the Act: ie, whether tax invoice 05 is a payment claim that states that it is made under the Act.

4 If that issue is resolved in favour of Fernandes, it is entitled to judgment in the amount claimed together with interest and costs. If that issue is resolved in favour of Centennial, the proceedings must be dismissed with costs.

Relevant provisions of the Act

5 Section 8(1) of the Act provides that on and from each reference date under a construction contract, a person who has undertaken to carry out construction work, or supply related goods and services, under the contract is entitled to a progress payment.

6 Section 13(1) provides that a person referred to in s 8(1) who is or who claims to be entitled to a progress payment may serve a payment claim on the person who is or may be liable to make that payment.

7 Section 13(2) specifies some three requirements, which (as the parties accepted) must be complied with if a payment claim is to be effective for the purposes of the Act.

8 The expression “payment claim” is defined in s 4 of the Act to mean “a claim referred to in s 13”.

9 I set out sections 8(1) and 13(1) of the Act:

“8 Rights to progress payments

- (1) On and from each reference date under a construction contract, a person:
 - (a) who has undertaken to carry out construction work under the contract, or
 - (b) who has undertaken to supply related goods and services under the contract,
 is entitled to a progress payment.

...

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.”

Tax invoice 05

10 Tax invoice 05 was directed by Fernandes to Centennial (no point is taken as to what may be the technical misnomer of Centennial). It identifies the relevant construction contract. It states:
 “Our Tax Invoice for structured [sic] steel deck and civil works complete is as set out below:

Total amount claimed to Date as per attached schedule Exc GST	\$2,498,202.00
Total Previous payme [sic] Exc GST	\$1,662,358.80
Amount excl. GST claimed	<u>\$ 835,843.20</u>
Add GST	<u>\$83,584.32</u>
Total Inc GST	\$ 919,427.52
...”	

11 They are then given bank details. The document concludes with a signature on behalf of Fernandes. At the foot of the document the following appears:

“This invoice is prepared under the Building and Construction Industry security [sic] of payments [sic] Act 1999.”

12 The document was sent by facsimile transmission. The facsimile transmission refers to it as “tax invoice 5” and makes no reference to the Act.

The relevant principles

13 In *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, the Court of Appeal considered what were “[t]he basic and essential requirements” laid down by the Act for there to be a valid adjudication by an adjudicator. Hodgson JA (with whom Mason P and Giles JA agreed) said at 441 [53] that those basic and essential requirements included “[t]he service by the claimant on the respondent of a payment claim”. His Honour referred in this context to s 13. However, it is plain from the next paragraph, [54], that his Honour did not intend to refer to “more detailed requirements” such as “section 13(2) as to the content of payment claims”. His Honour then said in the following paragraph, [55], “that the legislature did not intend that the exact compliance with all the more detailed requirements was essential to the existence of a determination”.

- 14 The question for consideration in *Brodyn* was whether an adjudicator's determination was valid. The effect of the decision is that a determination may be valid even if the process leading to the adjudication was initiated by a payment claim that did not comply with the "more detailed requirements" of s 13(2). Neither party in these proceedings submitted that the decision in *Brodyn* was in any way relevant to the issue propounded for determination. They accepted that the issue was to be determined by reference to the test laid down in a number of decisions, to which I now turn.
- 15 Austin J considered the requirements of s 13(2)(c) in *Jemzone Pty Ltd v Trytan Pty Limited* (2002) 42 ACSR 42 at 50-51 [41]-[46]. His Honour said in para [41] that "if a claimant wishes to take advantage of the special statutory rights offered by the Act, which override general contractual rights and place the claimant in a privileged position, the payment claim must on its face contain all the ingredients required by the Act. While the court should not take an unduly strict approach to the construction of the claim, it ought not to cure a defect in the claim document by reference to extraneous circumstances or previous communications."
- 16 In para [45], his Honour noted that the document propounded by the plaintiff stated that it was an "invoice ... subject to" the Act. His Honour said in para [46] that "[t]his is not a statement that the document is a payment claim made under the Act." His Honour said, having regard to the mechanisms set in train by the service of a valid payment claim, "it must be clear on the face of the document that it purports to be a payment claim made under the Act." It is clear that his Honour thought that an objective test must be applied.
- 17 In *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, Nicholas J said at para [82] that in deciding whether a document complies with s 13(2), an objective test should be applied and that the Court should 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." His Honour repeated this test in *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365 at [28].
- 18 In *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Limited* [2003] NSWSC 1103, Einstein J referred to the analysis of Nicholas J in *Parist*. His Honour said at para [58] that "[t]here is no room for ambiguity of any type and it is critical that the recipient of a payment claim be made aware by the terms of that claim that the provisions of the Act have been engaged." (his Honour's emphasis).
- 19 In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor* [2006] NSWSC 1, Palmer J summarised the authorities at para [41]. His Honour said, among other things, that "a payment claim which does not, on its face, purport in a reasonable way to ... state that it is made under the Act fails to comply with an essential and mandatory requirement of s 13(2), so that it is a nullity for the purposes of the Act."
- 20 The parties accepted that the issue was to be resolved having regard to the approach described in the cases to which I have referred. I should perhaps note that Mr G E Underwood of counsel, who appeared for Fernandes, submitted (basing himself, I think, on observations made by Einstein J in *Leighton*) that there might be some difference between the approach taken by Austin J in *Jemzone* and the approach taken by Nicholas J in *Walter* and followed in the subsequent decisions to which I have referred. I am not sure that this is correct. In my view, Austin J made it plain that the test was objective, but that it required due acknowledgment to be given to the statutory consequences of services of a formally valid payment claim. I do not perceive in the later cases any different approach to the question of principle.

The parties' submissions

- 21 The parties provided me with detailed written submissions. Without being disrespectful, I do not intend to set them out in detail. Mr Underwood submitted that s 13(2)(c) did not state that the precise words "payment claim" should be used, and that what was needed was a clear indication (viewing the document objectively) that:
- (1) it was a claim for payment; and
 - (2) it was made pursuant to the provisions of the Act: ie, that the claimant intended, by the service of the document, to engage the relevant mechanisms of the Act.
- 22 Thus, Mr Underwood submitted, a reasonable person reading tax invoice 05 would take from it that it was a claim for payment – ie, a payment claim – and that it was made under the Act.
- 23 For Centennial, Mr G J K Rich of counsel submitted that the word "invoice" was not ordinarily used to describe a document that constitutes a claim or demand for payment. He referred to the relevant provisions of *A New Tax System (Good and Services) Act 1999*. I have to say that I see little of relevance in those provisions except that s 195-1 notes, as Mr Rich accepted, that an invoice is "a document notifying an obligation to make payment".
- 24 Mr Rich submitted that there was no room for ambiguity of any type, and that the statement that the tax invoice was "prepared under" the Act involved ambiguity.
- 25 Thus, Mr Rich submitted, it was not clear on the face of the tax invoice that it was, or purported to be, a tax invoice under the Act.
- 26 Mr Rich placed considerable emphasis on the precise wording of the notation referring to the Act, and compared it to the wording of documents that had been rejected. He submitted that the wording was relevantly indistinguishable from that considered by Austin J in *Jemzone* to be insufficient to comply with s 13(2)(c). I do not think that this is a helpful approach. The decided cases provide valuable guidance as to the approach to be taken. But the application of that approach depends on an objective analysis of the document in context, not on a

comparison of the precise wording of the document with the wording of another document considered in other proceedings.

Decision

- 27 In my view, the approach to be taken can be summarised as follows:
- (1) For a document to be a valid payment claim under the Act, it must, among other things, be a “payment claim” and state that it is made under the Act.
 - (2) The test is objective.
 - (3) In applying the test, the document should be considered as a whole and in context. The context may include not only all the terms of the document but also (as for example was the case in *Leighton*) the terms of any covering letter, or facsimile transmission sheet, pursuant to which the document was sent to its recipient.
 - (4) Further, the context may extend beyond the terms of the document and any covering note to the “factual matrix” – at least, insofar as that matrix is one that is (or should be) known to both parties, and therefore to the hypothetical reasonable observer by whom the analysis of the document is undertaken.
- 28 In the present case, it is clear, and the hypothetical reasonable observer would know, that:
- (1) Fernandes and Centennial were parties to a construction contract;
 - (2) Fernandes carried out work for Centennial under that construction contract;
 - (3) Fernandes was entitled to be paid, in accordance with the terms of the contract, for work carried out by it under the contract; and
 - (4) The Act applied to that contract.
- 29 It is clear on the face of the document that Fernandes was claiming payment: the use of the words “total amount claimed to Date” and, after allowance for previous payments, the words “amount ... claimed” admit of no doubt.
- 30 It is equally clear that the amount claimed was claimed for construction work. The schedule attached to the tax invoice admits of no doubt.
- 31 Finally, it is clear that the amount claimed was claimed not only for construction work but also pursuant to the construction contract. The heading of the tax invoice, and the heading of the schedule, admit of no doubt.
- 32 Thus, on an objective analysis, it is clear that by tax invoice 05 Fernandes was making a claim for payment for construction work carried out by it for Centennial pursuant to the construction contract made between them.
- 33 It is undoubtedly correct to say, as Mr Rich submitted, that this analysis (each step of which he conceded was appropriate) does not of itself compel the conclusion that the tax invoice must be regarded as a payment claim. No doubt, the construction contract provided for progress payments. A document in the form of the tax invoice might be no more than a claim to a progress payment, relying on the contract and not on the provisions of the Act.
- 34 However, the objective test must also take into account the statement that the invoice “is prepared under” the Act. The verb “to prepare” connotes to make or get ready for use, to make ready or assemble, to make ready or dispose, to put things into readiness, or to make something by a regular process (see **The Australian Oxford Dictionary**, 2nd edition, 2004).
- 35 The Act contains no provisions for the “preparation” of a payment schedule, unless s 13(2), when it sets out certain things that a payment claim “must” do, can be regarded as directed to the preparation of a payment claim. If s 13(2) is to be so construed, then a statement that a claim for payment (in this case, the tax invoice) is “prepared under” the Act must necessarily indicate that the claimant intends to engage the operation of the Act.
- 36 Alternatively, if s 13(2) is not regarded as dealing with the “preparation” of payment claims, then any objective analysis of tax invoice 05 would have to ask what was intended to be achieved by the use of the particular form of words appearing at its foot. Presumably, any reasonable person looking at the tax invoice in context would assume that Fernandes sought to achieve some object by the use of those words; one would not ordinarily assume that words placed on a claim for payment, and making reference to an Act of Parliament having very direct relevance to the field of industry in which the claimant and the recipient was engaged, was intended as mere embroidery or decoration.
- 37 In my view, the approach to construction of a document purporting (or alleged) to be a payment claim under the Act should reflect in substance the approach to the construction of commercial contracts that has been laid down by decisions of the highest authority. I refer to the observation of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503 at 514, that the courts should construe commercial contracts “fairly and broadly, without being too astute or subtle in finding defects”. Barwick CJ expressed a similar view in *The Council of the Upper Hunter County District v Australian Chilling and Freezing Co Limited* (1968) 118 CLR 429 at 437: in searching for the parties’ intention, “no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements.”
- 38 Thus, the question is whether, taking a fair but broad approach, without being pedantic or astute to find defects, the document in question would convey to its recipient that the claimant intended by the document to engage the operation of the Act. As I have said before, that question is to be resolved objectively, having regard to all relevant matters of context.
- 39 When the question is stated thus, I think that the issue in the present case must be resolved in favour of Fernandes. Clearly, the tax invoice was a claim made by Fernandes for the consideration of Centennial. The statement that the tax invoice is “prepared under” the Act should be taken to mean that in considering the claim, Centennial

should be aware that it was made under the Act. As I have noted, the relevant context includes the fact that the Act applied to the contract. The Act created rights and obligations in respect of the performance of construction work under that contract. The parties must have been aware of those matters; and the statement to which I have referred reminded Centennial of the relevance of the Act.

- 40 Once it is accepted that Fernandes sought to achieve something by the sentence appearing at the foot of tax invoice 05, it is very difficult to understand what that “something” should have been except a notification that Fernandes sought by the document to engage the operation of the Act. Although the verb “prepare” is not entirely apt for this purpose, it is not so inapt that its use should be held to defeat the evident purpose of the sentence.
- 41 In other words, I think that the sentence in question, read fairly and not pedantically, would convey to a reasonable reader apprised of the relevant factual context that Fernandes was seeking by the service of the document to engage the operation of the Act. Since that is what s 13(2)(c) seeks to achieve (as Austin J in *Jemzone* and Einstein J in *Leighton* made clear), it follows that the present document complies sufficiently with the requirements of s 13(2)(c) and is, on the only issue argued by the parties, a valid payment claim.

Conclusion and orders

- 42 It follows that Fernandes is entitled to judgment. I make the following orders:
- (1) Direct entry of judgment in favour of the plaintiff in the sum of \$919,427.52 together with interest to the date of entry of judgment.
 - (2) Order the defendant to pay the plaintiff’s costs of the proceedings.

G E Underwood (Plaintiff) instructed by Vincent CCL Pty Ltd
G K J Rich (Defendant) instructed by Clayton Utz