

**JUDGMENT : Johnstone DCJ.** New South Wales. District Court. 6<sup>th</sup> January 2006

- (1) The plaintiff moves on a notice of motion filed 3 March 2006, seeking summary judgment in accordance with s 15(4) of the *Building and Construction Industries Security of Payment Act 1999* (New South Wales).
- (2) The plaintiff relies on a letter dated 28 November 2005 as evidence of the payment claim (annexure D to the affidavit of Gregory Quinn sworn 28 April 2006).
- (3) The defendant argues that this document is not sufficient to amount to a payment claim within the meaning of s 13(2)(b).
- (4) The defendant submits that neither the letter of 28 November 2005 and the annexures to that letter, nor the other correspondence to which the letter refers, is sufficient to identify the construction work.
- (5) It is submitted that this is not a case of poor description, inadequate description or invalid description, but simply that there is no description at all. In this regard the warranties annexed to the letter are said not to be descriptive but are merely warranties.
- (6) Accordingly it is argued that the defendant was left, on receipt of that letter, uninformed as to what the claim for \$77,842.21 related to.
- (7) The authorities say:
  - (a) There must be a reasonable attempt to identify the works: *Brookhollow Pty Limited v R & R Consultants Pty Limited* [2006] NSWSC 1.
  - (b) That if there is some description, albeit not successfully identifying all of the construction work, the payment claim is not thereby invalidated.
  - (c) Important to the present case is the following statement by Hodgson J in the case of *Nepean Engineering Pty Limited v Total Process Service Pty Limited (in liquidation)* [2005] NSWCA 409:

*“It is true that if a payment claim does not identify the work in a way comprehensible to the respondent to the claim the respondent will be in difficulty in formulating a payment schedule and this may give rise to further difficulty in any adjudication proceedings inter alia because of the provisions to which I referred in para 18 above and in my opinion if a respondent is unable to identify some of the work in respect of which a payment claim is made it can, in the payment schedule, say it does not propose to make any payment in respect of the work because it cannot identify the work and because for that reason it disputes the work. It disputes that the work was done or done to a standard justifying payment or was within the contract or within the variation of it and that any pre condition to payment was satisfied. If an adjudicator then determined that the work was not identified in the payment claim, presumably he or she would not award any payment in respect of that work; and if the adjudicator determined that it was identified the adjudicator could address matters put in issue in that general way by the respondent.”* (at [35]).
- (8) I am satisfied that the documentation here was sufficient to constitute a valid payment schedule. In this regard it did provide sufficient material to identify the relevant construction work to which it related. If that identification was, in some way, inadequate or otherwise deficient the defendant's remedy was to serve by way of response a payment schedule under s 14 of the Act. To raise these issues here today is too late.
- (9) I will therefore enter summary judgment for the plaintiff in the sum of \$77,842.21 together with interest thereon from 28 November 2005, at the rate prescribed under the *Civil Procedure Act 2005*.
- (10) I order the defendant to pay the plaintiff's costs of the motion filed 3 March 2006 including any reserved costs as agreed or as assessed on the ordinary basis.

Mr I Roberts (Plaintiff) instructed by Dibbs Abbott Stillman  
Ms F Clarke (Defendant) instructed by Davis Legal