JUDGMENT: Einstein J : Supreme Court in New South Wales : 3rd December 2003.

The proceedings

1 The two sets of proceedings before the Court concern a dispute under a building contract dated 13 February 2002 ["the contract"] between Leighton Contractors Pty Ltd ["Leighton"] and Campbelltown Catholic Club Ltd ["the Club"] for the carrying on of works at certain premises at Campbelltown. The general conditions of contract were in the form AS 4000-1997. Leighton was the "Contractor" and the Club was the "Principal" under the contract.

2 The Club's architect, Scott Carver Pty Ltd ["Carver"] was appointed as the Superintendent under the contract.

3 In proceedings 55030 of 2003 ["the first proceedings"] Leighton as plaintiff, seeks summary judgment against the Club in respect of a payment claim [referred to during the proceedings as “progress claim 18”] for an amount of $3,068,468.70 which Leighton asserts complied with the *Building and Construction Industry Security of Payment Act 1999 (NSW)* ["the Act"] and was served pursuant to section 13 (1) of the Act.

4 In proceedings 55033 of 2003 ["the second proceedings"] the Club as plaintiff seeks:

- a declaration that the Club does not owe any amount to Leighton in respect of progress claim 18 in excess of the amount specified in progress certificate 00188.18 issued by Carver on 6 August 2003; and
- an order that Leighton pay to the Club such sum as it might recover against the Club in the first proceedings.

5 Leighton by Notice of Motion seeks orders dismissing the Summons as disclosing no reasonable cause of action or as an abuse of process.

6 The essence of the competing positions taken by the parties requires close analysis of the Act and its application to the communications between the parties. It is appropriate to note that the Act which has been amended once, has been the subject of recent curial examination and remains a source of difficulty, there having been a number of sometimes consistent and sometimes inconsistent judicial pronouncements in relation to aspects of its interpretation and application.

The evidence

The facts

28 November 2001

7 On 28 November 2001 Leighton submit a tender to the Club for the “alterations and additions to Campbelltown Catholic Club including the new underground carpark”. (TB 177)

13 February 2002

8 Leighton and the Club enter into the Contract whereby Leighton agrees to undertake certain construction and refurbishment works for the Club. Under the Contract, Carver was appointed as the Superintendent. (TB 734-836)

1 March 2002

9 Leighton submits progress claim 1 on 1 March 2002. (TB 1)

3 April 2002

10 Leighton submits progress claim 2 on 3 April 2002. (TB 3)

8 April 2002

11 On 8 April 2002 Leighton first gives notice to the Club that they will be making a claim for a variation as a result of the excavation of rock. The facsimile reads as follows: *"We are submitting notification that we are encountering rock material in the southern end of the bulk excavation works. We are monitoring the extent of the rock and we will be submitting a variation and extension of time claim once the extent of the material has been established." (TB 180)*

12 April 2002

12 The Superintendent advises Leighton that it needs to demonstrate that the material encountered by Leighton on site falls within the contractual definition of “rock” as a variation. (TB 186)

1 May 2002

13 Leighton submits progress claim 3 on 1 May 2002. (TB 5)

4 June 2002

14 Leighton submits progress claim 4 on 4 June 2002. (TB 6)

4 July 2002

15 Leighton submits progress claim 5 on 4 July 2002. (TB 8)

24 July 2002

16 On 24 July 2002 Mr Thebridge, an Architect and an associate director of Carver, visits the site and photographs the construction area above the rock excavation. (TB 254 – 286)

31 July 2002

17 Leighton submits progress claim 6 on 31 July 2002. (TB 10)

18 On the same day as the submission of the progress claim, Leighton submits variation LV12 in the amount of $736,487 for a latent condition – rock excavation. (TB 287)

23 August 2002

19 By two letters dated 23 August 2002 Leighton notifies the Superintendent that disputes have arisen under clause 42.1 of the Contract in relation to the removal of rock and the replacement of granular fill beneath the car park ("First Notice of Dispute"). (TB 891-892) These letters were copied to Mr Muter of the Club.

4 September 2002
20 Leighton submits progress claim 7 on 4 September 2002. (TB 12)

2 October 2002
21 Leighton submits progress claim 8 on 2 October 2002. (TB 14)

1 November 2002
22 Leighton submits progress claim 9 on 1 November 2002. (TB 15)

2 December 2002
23 Leighton submits progress claim 10 on 2 December 2002. (TB 18)

13 December 2002
24 Site meeting to assess the issue of practical completion. (TB 309)

19 December 2002
25 Leighton submits progress claim 11 on 19 December 2002. (TB 21)

3 February 2003
26 Leighton submits progress claim 12 on 3 February 2003. (TB 24)

3 March 2003
27 Leighton submits progress claim 13 on 3 March 2003. (TB 27)

31 March 2003
28 Leighton submits progress claim 14 on 31 March 2003. (TB 29)

2 April 2003
29 Leighton issue Notice to Show Cause. (TB 893 – 897)

11 April 2003
30 The Club issues a Notice in Reply to the Notice to Show Cause. (TB 898 – 901)

30 April 2003
31 Leighton submits progress claim 15 on 30 April 2003. (TB 32)

19 May 2003
32 Leighton issue Second Notice of Dispute ("Second Notice of Dispute"). (TB 902-906)

28 May 2003
33 Leighton submits progress claim 16 on 28 May 2003. (TB 34)

1 July 2003
34 Leighton submits progress claim 17 on 1 July 2003. (TB 35)

3 July 2003
35 The Club issues a Reply to the Second Notice of Dispute. (TB 907-912)

28 July 2003
36 By facsimile Leighton writes to the Club enclosing Progress Claim no. 18. (TB 36-43, 913-920) The covering letter was in the following terms:
"Dear Sir,
CAMPBELLTOWN CATHOLIC CLUB
ROGRESS CLAIM NO.18 – JULY 2003
We attach Progress Claim No. 18 for work complete on the above Project for the period ending 28 July 2003 for the sum of $2,789,517.00 (excluding GST) for your review and subsequent certification.
The Statutory Declaration for this Claim is also attached.
This is a payment claim made under the Building and Construction Industry Security of Payments Act 1999 (NSW) (as amended)." (TB 36)

37 Leighton writes to the Superintendent enclosing Progress Claim No.18. (TB 44, 921-928) The covering letter, addressed to Mark Thebridge of Scott Carver Pty Limited was in almost identical terms:
"Dear Sir,
CAMPBELLTOWN CATHOLIC CLUB
PROGRESS CLAIM NO.18 – JULY 2003
We attach Progress Claim No. 18 for work complete on the above Project for the period ending 28 July 2003 for the sum of $2,789,517.00 (excluding GST) for your review and subsequent certification.
The Statutory Declaration for this Claim is also attached." (TB 921)

6 August 2003
38 The Superintendent issues a letter to Leighton in relation to progress claim no. 18, including progress payment certificate, certifying the amount due to Leighton as $23,674. (TB 45) The letter was in the following terms:
"Attn: Mr Jack Boulenaz

Dear Sir

RE: Campbelltown Catholic Club

We enclose our certificate No 00188.18 to the value of $23,674 including GST covering your progress claim No. 18.

We enclose Rider Hunt's report relating to the assessment of the progress claim. This documentation combined with the previous correspondence issued in relation to the various claims for works, identified as rejected or not approved in the Rider Hunt report, outlines the difference between the claimed amount and the certified value.

We have not received any reply correspondence for the majority of the L or LV variation claims made. We have previously requested further details about these claims.

The Contract Summary identifies variations (note 5) with which Rider Hunt have had ongoing dialogue with Leightons. We understand that the majority of these variations have agreement in principal, however, we have previously requested that Leightons confirm this as correct and accepted. We await this confirmation."

13 August 2003

39 Leighton sends a letter to the Club requesting payment of $23,674 pursuant to the payment certificate. The letter, attaching a tax invoice (TB 945) and the progress payment certificate (TB 946), stated:

"Dear Sir

CAMPBELLTOWN CATHOLIC CLUB

PROGRESS CLAIM NO. 18 JULY 2003

In accordance with Clause 37 of the Contract we attach our Tax Invoice No. 16468 in the amount of $23674.00 (GST inclusive) together with the Progress Claim Certificate issued by Scott Carver Pty Ltd....

In requesting payment we register the fact that the Certified Amount is significantly less than that requested in our Progress Claim, and that we do not agree with all the reasons relating to the reduction of the Claim.

Should you have any queries on the above please contact Jack Boulenaz [number given]" (TB 944-946)

40 Leighton also sends a letter to the Club demanding payment of $3,068,468.70. The letter was in the following terms:

"Dear Mr Muter

CAMPBELLTOWN CATHOLIC CLUB

On 28 July 2002 we served on the Club by facsimile a payment claim made pursuant to section 13(1) of the Building and Construction Industry Security of Payment Act 1999 (NSW) ("Act").

The Club had, pursuant to section 14(4) of the Act, 10 business days from 28 July 2003 to serve a payment schedule. That time expired on 11 August 2003 and no payment schedule was served.

The consequences of this failure by the Club is that the Club has become liable to pay the full amount claimed in the payment claim being $2,789,517.00 plus GST, by the due date for payment.

Section 11(1) of the Act provides that the due date for payment is the date on which the payment becomes due and payable in accordance with the terms of the contract. The relevant contractual provision is clause 37.2 which is unclear. The due date for payment appears to be either 7 days from receipt by the Club of the two certificates issued by the Superintendent, or 17 days from the payment claim. Further, the parties have to date, adopted a different course of acting in relation to payment. The Superintendent issues one certificate to us, we pass on a copy to you and issue you with a tax invoice, and you pay within 7 days of receipt of the certificate and tax invoice.

Accordingly, it is not clear when the due date for payment is. The latest it can possibly be however, is 7 days from the date we issue you with a copy of the latest payment certificate and tax invoice. We issued these to the Club by an earlier fax today, 13 August 2003. The Club must pay the full amount to which we are entitled, $3,068,468.70 by Wednesday 20 August 2003. We enclose a tax invoice for $3,068,468.70.

If you fail to pay the full amount claimed, the following consequences are imposed by the Act:

(a) we may recover the unpaid amount as a debt due to us in any court of competent jurisdiction, pursuant to section 15(2)(a);

(b) if we commence proceedings to recover the amount as a debt due then in those proceedings the Club is not entitled to bring any cross-claim or raise any defence in relation to matters arising under the contract, pursuant to section 15(4)(b);

(c) interest is payable on the full amount at the rate of 9% (being the rate currently prescribed under the Supreme Court Act 1970) pursuant to section 11(2) of the Act; and

(d) we are entitled to suspend works on 2 days' notice to the Club pursuant to sections 15(2)(b) and 27(1).

If we do not receive payment of the full amount as required by 20 August 2003 then we will commence proceedings in the Supreme Court, and take any other action available to us, without any further notification to the Club." (TB 947-948)

14 August 2003

41 Mr Muter of the Club sends a facsimile to Leighton remitting payment of $23,674, however rejecting the demand for payment of $3,068,468.78. The letter dated 14 August 2003 was in the following terms:

"Dear Mr Bouton,

I refer to your letter of 13 August 2003.

On 28 July 2003 you served progress claim number 18 for the sum of $2,789,517.00 (excluding GST) on the Superintendent as well as on me.

On 6 August 2003, the Superintendent sent to you a progress certificate payment schedule evidencing the Superintendent's opinion of the monies due from us to you pursuant to the progress claim and the reasons for any difference. In my view that schedule complies with the requirements of the Building and Construction Industry Security of

Payment Act as it identifies the payment of the progress claim, the amount of the payment that the Superintendent proposes to make and the Superintendent's reasons for withholding payment.
Also on 6 August 2003, the Superintendent sent me a certificate for the sum of $23,674 including GST, the amount certified by him as due under progress claim number 18. We received your tax invoice for that sum on 13 August 2003 and the funds transfer is currently being done.
I reject your demand for payment of the sum of $3,068,468.70." (TB 950)

18 August 2003

42 On 18 August 2003 Leighton sends a letter to the Club in response to the Club's facsimile of 14 August 2003. The letter reads as follows:
"Dear Mr Muter,
CAMPBELLTOWN CATHOLIC CLUB
I refer to your facsimile of 14 August 2003.
The Club appears to have misunderstood the Building and Construction Industry Security of Payment Act 1999 (NSW).
On 28 July 2003 we made a progress claim in accordance wit the Contract to the Superintendent as required by clause 37.1 of the Contract. In accordance with clause 37.2 of the Contract the Superintendent responded on 6 August 2003. The Superintendent certified an amount due to us of $23,674 including GST. In accordance with previous practice that we have adopted we sent you a copy of that certificate by our facsimile of 13 August 2003 together with a tax invoice for $23,674. We note you are in the process of transferring that money to us.
Also on 28 July 2003 and separately, we made a payment claim under section 13(1) of the Act to the Club, being the person liable to make payment in accordance with the terms of the Contract. The Club was required by section 14(4) of the Act to provide to us a payment schedule in response to the payment claim within 10 business days which expired on 11 August 2003. Having failed to serve that payment schedule the Club is now liable for the full amount claimed in the payment claim. Given that the Club has now paid $23,674, the amount due to us by the due date for payment, being no later than 20 August 2003, is $3,044,794.70. If we do not receive payment of that amount by 20 August 2003 we will, as previously indicated, commence proceedings to recover that amount without any further notification to you." (TB 951)

21 August 2003

43 Leighton commences proceedings no 55030 of 2003 on 21 August 2003.

9 September 2003

44 9 September 2003 is the date certified by the Superintendent for practical completion. (TB 476g)

19 September 2003

45 The Club commences proceedings no 55033 of 2003.

The Issues

46 There are a number of disparate issues raised by the pleadings. These are generally the subject of careful submissions by the parties. The convenient course is to commence by identifying the issues for determination in the first proceedings as set out in the overview written submissions of the Club. Where either party sought to litigate other issues or moved slightly outside the initial description of the issues given by the Club which follows, those issues will be identified later in the judgment.

Relevant sections of the Act

47 A number of sections of the Act required to be examined during these proceedings.

48 They included, inter alia:

"3 Object of Act

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.
(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
(a) the making of a payment claim by the person claiming payment, and
(b) the provision of a payment schedule by the person by whom the payment is payable, and
(c) the referral of any disputed claim to an adjudicator for determination, and
(d) the payment of the progress payment so determined.
(4) It is intended that this Act does not limit:
(a) any other entitlement that a claimant may have under a construction contract, or
(b) any other remedy that a claimant may have for recovering any such other entitlement....

4 Definitions

In this Act...
payment claim *means a claim referred to in section 13.*
payment schedule *means a schedule referred to in section 14.*
progress payment *means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):*

(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or

(b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or

(c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment")....

5 Definition of "construction work"

(1) In this Act, construction work means any of the following work:

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection,

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems,

(d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension,

(e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including:

(i) site clearance, earth-moving, excavation, tunnelling and boring, and

(ii) the laying of foundations, and

(iii) the erection, maintenance or dismantling of scaffolding, and

(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site, and

(v) site restoration, landscaping and the provision of roadways and other access works,

(f) he painting or decorating of the internal or external surfaces of any building, structure or works,

(g) any other work of a kind prescribed by the regulations for the purposes of this subsection.

(2) Despite subsection (1), construction work does not include any of the following work:

(a) the drilling for, or extraction of, oil or natural gas,

(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose,

(c) any other work of a kind prescribed by the regulations for the purposes of this subsection....

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.

*(2) In this section, **reference date**, in relation to a construction contract, means:*

(a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or

(b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.

9 Amount of progress payment

The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

(a) the amount calculated in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.

10 Valuation of construction work and related goods and services

(1) Construction work carried out or undertaken to be carried out under a construction contract is to be valued:

(a) in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the work, and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and

(iv) if any of the work is defective, the estimated cost of rectifying the defect.

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued:

(a) in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the goods and services, and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and

(iv) if any of the goods are defective, the estimated cost of rectifying the defect,

and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

11 Due date for payment

(1) A progress payment under a construction contract becomes due and payable:

(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

(2) Interest is payable on the unpaid amount of a progress payment that has become due and payable at the rate:

(a) prescribed under the Supreme Court Act 1970 in respect of unpaid judgments of the Supreme Court, or

(b) specified under the construction contract,

whichever is the greater.

(3) If a progress payment becomes due and payable, the claimant is entitled to exercise a lien in respect of the unpaid amount over any unfixed plant or materials supplied by the claimant for use in connection with the carrying out of construction work for the respondent.

(4) Any lien or charge over the unfixed plant or materials existing before the date on which the progress payment becomes due and payable takes priority over a lien under subsection (3).

(5) Subsection (3) does not confer on the claimant any right against a third party who is the owner of the unfixed plant or materials....

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.

(3) The claimed amount may include any amount:

(a) that the respondent is liable to pay the claimant under section 27 (2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

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:

(a) may:

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and

(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.

(3) A notice referred to in subsection (2) (b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the claimed amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract.

32 Effect of Part on civil proceedings

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

34 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement (whether in writing or not):

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act,

is void."

The issues for determination in the first proceedings as set out in the Club's overview written submissions

49 The Club identified these issues as follows:

"The Club denies that Leighton is entitled to summary judgment in the amount of $3,043,694.70 or at all under the Act upon the following grounds:

(a) The Alleged Payment Claim was not a valid payment claim within s.13(2) of the Act because:

(i) it did not identify construction work (or related goods and services) as required by s.13(2)(a);

(ii) there was no progress payment claimed as required by s.13(2)(b);

(iii) it did not bear the endorsement required by s.13(2)(c);

(b) Leighton was and is not a person entitled or who claims to be entitled to a progress payment within s.13(1) because:

(i) it was not a person entitled to a progress payment under s.8(1);

(ii) as at the date of the Alleged Payment Claim there was no reference date as and from which Leighton was entitled to a progress payment within s.8(1) and (2);

(iii) there was no amount calculated in accordance with the terms of the Contract which constituted a progress payment to which Leighton was entitled under s.9(a);

(iv) as at the date of the Alleged Payment Claim there was no progress payment under the Contract which had become due and payable within the meaning of s.11(1);

(c) The Alleged Payment Claim was not a valid payment claim (in whole or in part) under s.13 of the Act:

(i) to the extent that it claimed $736,487 for rock excavation, because it was not served within 12 months after such work was last carried out as required by s.13(4)(b);

(ii) to the extent that it claimed $936,325 for Delay Costs, because such claim was not permitted by the Act, the Delay Costs not being construction work to which the progress payment claimed by Leighton related.

(d) Alternatively, if the Alleged Payment Claim were a valid payment claim, the Club was not liable to pay the amount claimed by Leighton by reason that the Club served on Leighton a payment schedule within the meaning of s.14 of the Act, being the Certificate issued by Carver on 6 August 2003.

[Overview submissions [2.1]]

50 The convenient course is to next set out a deal of the Club's detailed overview submissions addressing these issues. As appropriate the responsive submissions of Leighton will be referred to, the convenient course being to determine the issues seriatim.

Is there a Payment Claim? [section 13(2)(a)]

The Club's submission

"Construction Work Not Identified

3.1 To be valid and effective under the Act, a payment claim must "identify the construction work (or related goods and services) to which the progress payment relates": s.13(2)(a). The progress payment is that referred to in s.13(1) as elsewhere defined in the Act.

3.2 It is clear that the Act contemplates a regime for the presentation by a builder to a proprietor (in cases such as the present) of a series of payment claims, each of which has its own reference date under the subject contract on and from which the builder becomes entitled to a progress payment: s.8(1). In the case of the Contract, a new reference date (whenever it is) will arise at monthly intervals. Indeed, Leighton sent to the Club in the period leading to the Alleged Payment Claim other purported payment claims at monthly intervals.

3.3 The response to a payment claim by the proprietor is the provision of a "payment schedule" under s.14, which must not only indicate the amount of payment the proprietor is prepared to make but also the reasons for withholding payment: s.14(3). It is manifest, therefore, that if a proprietor is to provide proper reasons for rejecting items claimed in the payment claim in a meaningful and informative manner, the proprietor must itself receive an adequate, specific and descriptive identification of the construction work to which the builder's payment claim relates. This accords not just with general principle in respect of demands for payment with "self-executing" consequences, but particularly with the objects, structure and intention of the Act.

3.4 Moreover, the builder must provide sufficient identification of the work to which the particular claimed progress payment relates (eg having regard to items and amounts claimed in earlier payment claims) as will enable the proprietor to make an informed decision as to whether to make or deny payment.

3.5 The Alleged Payment Claim does not satisfy any of these requirements.

3.6 Leighton's document, as appears on its face, is a generic claim in respect of the whole of the contract works and claimed variations, covering a period of 18 months (this was Progress Claim No. 18). It purports to set out the whole of the work carried out under the Contract, and the amount claimed for the whole of that work, giving credit for all amounts previously certified by the Superintendent (and presumably paid). It does not identify the items of work for which Leighton asserts it has been paid, and the items of work for which it alleges it has not been paid. It is simply not possible for the reasonable reader of the Alleged Payment Claim to discern, let alone make any informed decision about, just what construction work it is to which this specific claimed progress payment relates. The use of such generic terms as "electrical", "external works" and the like compound the problem. The Alleged Payment Claim is not a payment claim under s.13 of the Act.

*3.7 The above analysis reflects the principles expressed by Austin J in **Jemzone Pty Limited v Trytan Pty Limited** (2002) 42 ACSR 42 at 50-1:*

"43 Section 13(2)(a) requires the payment claim to identify the construction work to which the progress payment relates. In my opinion, this requires the claimant to identify the particular work that is the subject of the progress payment, rather than simply to identify in general terms the work that is the subject of the construction contract as a whole. The document in question refers to "motel construction for Jemzone Pty Ltd". That falls well short of satisfying the requirement of s.13(2)(a). The letter sets out a table which calculates the amount due, but the table does not identify any particular construction work other than variations. It merely begins by specifying a balance owing as at 9 February 2001, and then makes adjustments for variations and payments and other matters. At no stage is there any statement purporting to identify the work carried out since the making of the last payment claim.

44 Section 13(2)(b) requires that the progress claim must indicate the amount of the progress payment that the claimant claims to be due for the construction work done. This requirement is also not satisfied by the document in question. Since the document fails to identify the construction work to which the progress payment relates, it cannot, and does not, indicate the amount of the progress payment said to be due for that construction work. It merely identifies an overall balance owing and makes some adjustments to that balance".

*3.8 Austin J's view was not shared by Nicholas J in **Walter Construction Group Limited v CPL (Surry Hills) Pty Limited** [2003] NSWSC 266 where it was said at [63]-[66] that it was sufficient if the claim document merely identified the construction work in terms of the contract and location with respect to which it was undertaken. The principles enunciated by Austin J are, the Club submits, those which would satisfy the ordinary expectations of the construction industry and the community generally, and which give purpose and effect to the statutory provisions."*

Holding

51 In my view the following submissions of Leighton on this issue are of substance. In short:

· Section 13(2)(a) requires to be construed in a manner which facilitates the operation of the Act.

· By section 9(a), the amount of a progress payment is *"the amount calculated in accordance with the terms of the contract"*. The requirement in section 13(2)(a) to *"identify the construction work ... to which the progress payment relates"* requires to be construed in a manner which facilitates this calculation.

· Under clause 37.1 of the Contract, each progress claim *"shall include details of the value of WUC done and may include details of other moneys then due to the Contractor pursuant to the provisions of the Contract"*. Clause 37.2(a) of the Contract then requires the Superintendent to issue *"a progress certificate payment schedule evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor"*.

· The contractual scheme contemplates a claim for, and an assessment of, inter alia, *"the value of WUC done"* and a credit for the amount previously certified.

· Accordingly, it is necessary to assess the value of the relevant work done and to give an appropriate credit for the purposes of both the Contract and the Act. It follows that the Payment Claim will not fail to comply with section 13(2)(a) merely because it has been prepared on this basis.

52 I would respectfully agree with the view taken by Nicholas J in Walter at [65] that a purpose of the Section 13(2)(a) requirement is that a respondent served with a payment claim be provided with adequate information to enable it to provide a payment schedule under section 14.

53 Nicholas J was in that case satisfied that the subject payment claim adequately identified the work (or related goods and services) to which the progress payment related. This was essentially a question of fact and it is somewhat difficult from the description (given at [13], [14] and [15]) in that judgment to follow the precise detail which would have appeared in the documents giving particulars identifying the items of work claimed to have been carried out under the Contract [the documents appear to have been included in Exhibit A before his Honour]. It does not seem to me to be a proper reading of the judgment (at [66] and in particular the last sentence of that paragraph) to regard it as a holding that all that was necessary was to state in a payment claim that it covered work and related goods and services provided under a particular contract in respect of a named project.

54 I am further in agreement with the following view taken by Davies AJA in ***Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd*** [2002] NSWCA 136, paragraph 20: *"However, subs (2) of s13 of the Act should not be approached in an unduly technical manner keeping in mind the considerations to which counsel pointed. The terms used in subs (2) of s13 are well understood words of the English language. They should be given their normal and natural meanings. As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner."*

55 To the extent that the authorities disclose a difference of approach in this regard, my view is that the analyses and expressions of opinion by Nicholas J in both ***Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd*** [2003] NSWSC 266 ("Walter"), paragraphs 63-66 and 81-85, and in ***Parist Holdings Ltd v WT Partnership Australia Pty Ltd*** [2003] NSWSC 365 ("Parist"), paragraphs 27-29 adopted by Bergin J in ***Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd*** [2003] NSWSC 869, paragraphs 30-34, should be preferred to the views expressed as *obiter* by Austin J in ***Jemzone Pty Ltd v Trytan Pty Ltd*** [2002] NSWSC 395 ("Jemzone"), generally for the reasons set out above.

56 In the result each of the Club's submissions in respect of the proposition that the subject Payment Claim was invalid for the reason that it failed to identify the construction work (or related goods and services) to which the progress payment relates is rejected. In the present case I am satisfied that the payment claim identified the construction work (or related goods and services) to which it related. The Payment Claim complied with section 13(2)(a), the salient considerations being that it:

(i) identified the Contract and the Campbelltown Catholic Club project (TB 838, 845);

(ii) provided a main summary of the Contract price, the amount approved to date, the amount previously certified and the balance due (TB 839);

(iii) included a summary of the work carried out broken down into different trades and stating the % complete for each trade. 34 items are specifically set out under the heading "Trade" (TB 840-841); and

(iv) included a breakdown of all the variations claimed which states the % complete for each variation. There are in excess of 100 variations individually described over more than 2 pages (TB 842-844).

Was a Progress Payment claimed? [section 13(2)(b)]

The Club's submission

No Progress Payment Claimed

3.9 S.13(2)(b) requires that a payment claim, to be valid and effective, must "indicate the amount of the progress payment that the claimant claims to be due". The Alleged Payment Claim fails this requirement.

3.10 In providing the Alleged Payment Claim, Leighton elected to adopt a format which duplicated the material it sent under the contract to the Superintendent from whom it sought review and certification. Thus, the Alleged Payment Claim did not seek any payment from the Club at all, but rather attached Progress Claim No. 18 for the "review and subsequent certification". Clearly, the expression of a sum (which itself is not precise having regard to the GST exclusion) for review and certification does not constitute an amount claimed to be due under the Act from the Club. Leighton's attempt to pass off what was, and was intended to be, a progress claim made to the Superintendent as a payment claim under the Act fails.

3.11 The reference to the "Total Amount Due" on the first page of the attachment to the covering letter does not save the document, for that is merely the amount submitted to the Superintendent for review and certification by him.

3.12 Finally, the incorporation of the Statutory Declaration "for this Claim" confirms that the Alleged Payment Claim was not in fact a payment claim under s.13.

57 I have given close consideration to the particular submission appearing in paragraphs 3.9 – 3.12 of the above submissions on the special facts presently before the Court. In ***Emag Constructions Pty Limited v Highrise Concrete Contractors (Aust) Pty Limited*** [2003] NSWSC 903 the Court had occasion in another context to consider 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]).

58 The same approach requires to be taken to the very special significance of the wording to be found in a payment claim made under the Act. That this is apparent is to be seen from the draughtsman having included the express requirement in section 13(2)(c) that a payment claim *must* state that it is made under the Act. There 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. The appropriate test is that identified in ***Parist*** by Nicholas J at paragraph 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 par 20; **Beckhaus v Brewarrina Council** [2002] NSWSC 960 para 73-76; **Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd** [2003] NSWSC 266 paras 63-65; 81-85. 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 fair and proper consideration would be left in any doubt as to its meaning" [**Walter Construction Group Pty Ltd** para 82]*

59 The question is a close one in terms of the document here claimed to have constituted the relevant payment claim. The so-called progress claim is in fact enclosed as an attachment to the covering letter. The covering letter which uses the words "*This is a payment claim made under the [Act] "*. The attached document does not use those words. Whilst in other fields of discourse this may be regarded as a matter of no moment, it must be appreciated that one could have a circumstance where a covering letter may enclose a number of documents, yet still *itself* purporting to be the vehicle conveying the section 13(2)(c) endorsement. It would not be appropriate to hold that the endorsement provision had been complied with if, for example, *only some* of those enclosed documents were claimed to be *the* relevant payment claim. This is not an area in which the recipient of the payment claim should be in any doubt *from its terms* as to *what it is* and as to the fact *that it is made under the Act.*

60 The covering letter of the document in question in fact attaches as the last sheet, what is referred to in the covering letter as "*the statutory declaration for this claim"*. Those words are meaningless in this context, having no part to play in relation to the procedure under the Act which purports to be engaged by the last sentence of the covering letter. The statutory declaration would be relevant where a progress claim was made to the Superintendent, but is not relevant where the Act is sought to be engaged and forms no part of a payment claim.

61 For those reasons the attachment of the statutory declaration was otiose. Further the words "*for this claim*" which appear in the sentence "*the statutory declaration for this claim is also attached*", suggest quite incorrectly, that the attachment is an attachment by way of a document forming part of the payment claim made under the Act. These are matters which are calculated to lead to confusion to the recipient of the covering letter and of its enclosures. They are calculated to logically put the recipient in mind of the progress claim procedure generally adopted under the contract condition.

62 Then there is the question concerning the tail end of the first paragraph of the covering letter. It will be recalled that this paragraph was in the following terms: "*We attach Progress Claim No. 18 for work complete on the above Project for the period ending 28 July 2003 for the sum of $2,789,517.00 (excluding GST) for your review and subsequent certification.*"

63 The words "*for your review and subsequent certification*" are unnecessary and otiose. They could and should have been left out. There is no particular occasion for comment once the necessary section 13(2)(c) endorsement appears. What might, in place of these tail end words, have been unexceptional, but would be neither necessary nor particularly desirable, could have been words such as: "*your attention is drawn to the provisions of section 14 (1) of the Act in this regard*". Even that form of wording could cause difficulty because it is no part of the role of the sender of a payment claim to endeavour to inform the recipient of any particular provisions of the Act.

64 What then is to be made of the tail end words to this paragraph? The sending of a payment claim is a formal act so that if the words "*for your review*" are to be read as no more than as synonymous with "*for your attention*", there would not, it seems to me, be any particular problem raised by those words. However the words "*for your review and subsequent certification"* are the very words used and to be expected to be used when the contractor submits progress claims to the Superintendent under contract condition 37.1. So that arguably the recipient of the covering letter could be expected to find the full phrase curious, and the more so because of the reference to the anticipated "*subsequent certification*" by the recipient of the claim. These words are not particularly apt at all to describe the entitlement of a person on whom a payment claim is served, to reply to the claim by providing a payment schedule to the claimant. Here again they are apt to cause confusion and in an environment where the statutory scheme requires strict compliance to the letter with the codified procedures.

65 Ultimately I have come to the conclusion that notwithstanding the above described anomalies in the unnecessary use of the tail end words in the first paragraph of the covering letter and the attachment of the so-called *"Statutory*

Declaration for this claim", 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.

66 There is no, it seems to me, substance in the Club's submission that the reference in the first paragraph of the covering letter to the claim being "for the sum of $2,789,517 (excluding GST)" is problematic in the circumstances. The page which follows makes plain that the total amount due and the subject of the claim was $3,068,468.

67 For those reasons the Club's submissions on the section 13 (2) (b) "*No Progress Payment Claimed*" issues are rejected.

The Endorsement [section 13(2)(c)]

The Club's submission

"3.13 The document which purports to identify the construction work for the purpose of s.13(2)(a) is the attached Progress Claim No. 18. If the requirements of the Act as to form are to be satisfied, it is that document (if it were otherwise a payment claim within s.13) which must bear the required endorsement to satisfy s.13(2)(c). It does not do so and there has been no strict compliance with the statutory provisions, as is required."

68 As will appear from the reasons already given, the issue here raised is one of particular moment in the context of the rigorous provisions of the Act. The Act gives a very short window of opportunity to the recipient of a payment claim to reply to that claim. There is no occasion provided for in the Act for any request for more particulars [as for example for confirmation as to which part of the materials served are said to comprise the payment claim] to be made by the respondent to the person who serves the payment claim. Strict compliance with the statutory provisions is required and in relation to this particular subsection there is the greatest of importance in it being complied with to the letter. Only the payment claim itself must state that it is made under the Act.

69 At a factual level the matter is resolved by answering the question as to whether or not on the one hand the "payment claim" comprised the covering first page letter or on the other hand, comprised the whole of the subject materials including that page. In my view the latter is the correct analysis leading to the result that Leighton in fact complied with the section 13(2)(c) requirement.

Leighton not within s13(1) ["Person referred to in section 8(1)"; General Analysis]

The Club's submission

"Structure of the Act

4.1 As is obvious from the array of judicial views expressed in the series of cases spawned by this legislation, the Act does not lend itself to ready comprehension. However, the following emerges from an analysis of the provisions:-

- *Leighton may serve a payment claim if it is a "person referred in s.8(1) who is or who claims to be entitled to a progress payment".*
- *Turning to s.8(1), it provides that on and from "each reference date under a construction contract" a person who undertakes work or supplies goods and services is entitled to a progress payment.*
- *To give meaning to this provision, it is necessary to consider the meaning of two of its terms ie. "reference date" and "progress payment". "Reference date" is defined in s.8(2) to mean a date determined by or in accordance with the terms of the contract as the date on which a "claim for a progress payment" may be made (provided that if there is no express provision therefore the reference date will be the last day of the month).*
- *The meaning of "progress payment" in s.8 is to be determined from its definition in s.4, which strangely is that it is a "payment to which a person is entitled under s. 8".*

4.2 Read literally, these circular and inelegant provisions permit a payment claim to be served by a person who under s.8(1) is at each reference date a person entitled to a progress payment, being a payment to which that person is entitled under s.8(1). To understand how the provisions can have any effective operation, it is necessary to analyse the requirements for the reference date and progress payment.

Reference Date

4.3 Reference date is fixed by s.8(2), firstly (by s8(2)(a)) as being a date determined by or in accordance with the "terms of the contract as the date on which a claim for a progress payment may be made". This may mean either:
(i) the date fixed by the contract for the making of a claim for a progress payment under the Act; or
(ii) the date fixed by the contract for the making of a claim for a progress payment under the contract.
Secondly, if no date is fixed by the contract then (by s8(2)(b)) the date is
(iii) the last day of the month.

4.4 Clearly the Contract between Leighton and the Club did not fix a date for a claim to a progress payment under the Act (ie. (i) above) – it makes no reference to the Act.

4.5 It is submitted that the term "claim for a progress payment" in s.8(2)(a), properly construed, refers to a progress payment under the contract (i.e (ii) above); if so, the Contract here provided that the date for a claim for a progress payment could only be made by Leighton upon the Club, after the Superintendent received and processed Leighton's progress claim. Clause 37 lays down a regime by which Leighton was to lodge, with the Superintendent, by the 28th day of each month its monthly progress claim for the Superintendent's review and certification. Only after certification under clause 37.2 was Leighton entitled to submit a claim to the Club. Leighton became entitled to make to the Club its claim for its progress payment based on Progress Claim No. 18 only on 6 August when the Superintendent issued the Certificate. Accordingly, the appropriate reference date was 6 August, so that Leighton was not a person entitled to a progress claim in terms of s.13(1) and s.8(1) as at 28 July when it issued the Alleged Payment Claim (the Club will seek leave to amend this Defence accordingly).

4.6 The only other possibility, for which Leighton contends, is that the term refers to the date on which under Clause 37.1 of the Contract Leighton may lodge a progress claim i.e 28th day of the month. But that cannot be the date to which the Act refers, because such a progress claim is not a claim on the Club as proprietor but is made to the Superintendent for review and certification.

4.7 Alternatively, if (as per (iii) above) the Contract makes no express provision as to when a claim for a progress payment may be made (because the claim to the Superintendent envisaged by clause 37.1 is not a claim upon the Club) then s.(2)(b) deems the reference date to be the last day of the month, here 31 July and again the Alleged Payment Claim will be ineffective (again, leave will be sought to incorporate this alternative in the Defence).

4.8 For the above reasons, the Alleged Payment Claim could have only have been valid if it had been issued upon the Superintendent's certification on 6 August 2003. It was not and consequently is ineffective. Leighton will still not be a person entitled to a progress payment as that term is properly to be construed:..."

70 In my view the submissions of Leighton on this issue are of substance. They are broadly adopted in what follows.

71 The contention of the Club that as at the date upon which the Plaintiff served the Payment Claim, the Plaintiff was not entitled to a progress payment in any amount, in that the Superintendent had not certified the amount claimed or any part thereof as payable, so that there simply was *no amount* calculated in accordance with the terms of the Contract as required by section 9 of the Act (Defence, paragraph C18(a)) is rejected. The contention has been considered and in my view correctly rejected on a number of occasions:

"Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd [2002] NSWCA 238, paragraphs 74-75:

[74] "Section 8 means that, on and from 25th of each month (s8(2)(a)(i)), the plaintiff became entitled to a progress payment in accordance with the provisions of the Act. The amount of that payment was as calculated in accordance with the contract (s9(a)). Such payment became payable in accordance with the provisions of the Act at the end of the following month (s11(a)). In so far as the plaintiff submitted to the contrary, on the basis that the contract made no provision as to when a progress payment became due and payable in accordance with the terms of the Act, I would reject that submission: in my opinion, s11(a) is referring to the terms of the contract in respect of progress payments payable under the contract.

[75] Accordingly, on and from 25 April 2001, the plaintiff was entitled to make a payment claim under the Act, and was entitled to be paid pursuant to that payment claim the amount calculated in accordance with the terms of the contract. That amount contemplated the accumulation of entitlements from previous monthly progress claims. The claim under the Act which the plaintiff made on 2 May 2001 enclosed copies of the three progress claims (Nos. 9, 10 and 11) and thereby sufficiently particularised under s13(2) a claim for a total of $74,191.65, being the total of the amounts specified under those three progress claims, less GST. The defendant disclaimed any submission that the inclusion of the additional $231.93 invalidated the payment claim; and accordingly, the plaintiff's claim under the Act was a valid claim to the extent of $74,191.65."

Beckhaus v Brewarrina Council [2002] NSWSC 960, paragraphs 55 and 60-65:

[55] "Thus, in the present circumstances as the contract has the relevant provisions a contractor is entitled under s8 to a statutory 'progress payment' under the Act on the date the progress claim may be made under the contract. Such a statutory progress payment becomes due and payable under s11 on the date when the contractual payment becomes due and payable. In this case it is 14 days after the submission of the contractual progress claim."

[60] "The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words "person who is entitled to a progress payment under a construction contract" in s13(1) refers to a contractual entitlement.

[61] The trigger that commences the process that leads to the statutory rights in s15(2) is the service of the claim under s13. That can only be done by a person who 'is entitled to a progress payment under a construction contract'. The words 'progress payment' are a defined term in the Act. It means a payment to which a person is entitled under s8. That section fixes the time of the 'entitlement' given by the section by reference to the contractual dates for making claims or, if there is no contractual provision, for making claims by reference to a four week period. Section 9 deals with the amount of such a statutory progress payment. Importantly, s9 uses similar words to s13 in that it refers to 'a progress payment to which a person is entitled in respect of a construction contract' and then directs determination of that amount by reference to both contractual amounts or if no contractual amount on the basis of the value of the work done.

[62] Section 11 then deals with the due date for payment in respect of 'a progress payment under a construction contract'. It does it also by reference to contractual due dates and if no such provision then by reference to a two-week period. One thus has a series of sections which create a statutory right to a progress payment by fixing entitlement, the date for making claims, amount of claims and due date for payment of claims. The statutory right to claim is for both situations, namely, where a contract provides for such claims and where it does not.

[63] Thus s13 merely continues on the statutory procedure and the opening words must be a reference to the statutory entitlement created in the previous sections not the contractual entitlement submitted by the defendant. If the defendant's submission were correct it would mean that in respect of contracts which do not provide for progress payments there is no ability to recover the statutory right to progress claims in Division 3. This consequence makes otiose the earlier provisions of the Act and defeats its express object which is to:- 'ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services.'

[64] In my view the submissions of the defendant are simply not arguable.

[65] As under 42.1 the plaintiff is entitled to progress payments there is no reason why he cannot make the statutory claim at the same time as his contractual claim. The statutory claim must comply with Section 13(2). On its face the document appears to do this and there was no submission to the contrary."

Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd [2003] NSWSC 266, paragraphs 28-32 and 52-55:

[28] "...it was submitted that as a precondition to being entitled to serve a payment claim the claimant must be, in the words of s13(1), "entitled to a progress payment under a construction contract". Reliance was placed upon the process under cl 42.1 of the contract which follows delivery by the Contractor of a claim for payment whereby liability of the principal for payment is established. This process obliges the Superintendent to assess the claim within 14 days and to issue a payment certificate stating the amount of payment to be made. It also provides that within 28 days of receipt of a claim for payment, or within 14 days of issuing a payment certificate, (whichever is the earlier) the principal is obliged to pay an amount not less than that shown on the payment certificate, or if no certificate is issued, the amount of the claim.

[29] It was submitted that under the contract no obligation to pay arises until the expiry of the relevant time period. In this case, the time for issuing the payment certificate expired on 3 January 2003 absent which the Plaintiff became entitled to payment upon expiry of the period ending 17 January 2003. Thus it was put that as at 20 December 2002 under the contract the Plaintiff was not entitled to payment of progress payment 20, and the Defendant was not liable to pay it. In other words, until the process by either certification or lapse of time had taken place the amount payable would not be established.

[30] This situation attracted consideration of s9(a) of the Act which provides: '9 The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:

(a) The amount calculated in accordance with the terms of the contract, or'

[31] It was then submitted that, absent proof of entitlement to an amount calculated in accordance with the terms of the contract, the amount of a progress payment to which a person was entitled would not be established within the meaning of s9(a). It followed that the requirement of s13(2)(b) would not be met. It was argued that the expression in this sub-para "the amount of the progress payment that the claimant claims to be due for the construction work done" refers to the amount which has actually been determined under the contract to be due and payable to the claimant. In this case, therefore, there having been no determination as at 20 December 2002, of an amount pursuant to cl 42.1 of the contract, no amount could properly be indicated in the payment claim "to be due" and, consequentially, it was not a valid claim within the meaning of s13(1).

*[32] Reference was made to **Beckhaus v Brewarrina Council** [2002] NSWSC 960 in which the court considered a submission to similar effect, namely that unless a progress payment under a contract is due and payable in accordance with the terms of the contract there is no statutory entitlement under the Act, that is to say the words "person who is entitled to a progress payment under a construction contract" in s13(1) refers to a contractual entitlement. It was submitted that Macready, AJ, erred in rejecting the submission when he held (para 63) that the opening words of s13(1) must be a reference to the statutory entitlement created in the previous sections and not to the entitlement under the contract....*

[52] In Beckhaus v Brewarrina Council, Macready, AJ, considered a submission with reference to s13(1) of the Act that unless a progress payment under a contract is due and payable in accordance with the terms of the contract there is no statutory entitlement under the Act. After detailing relevant provisions of the Act he expressed his conclusions as follows:

[At this point, Justice Nicholas set out paragraphs 60-65 of ***Beckhaus*** which are set out above]

(There was no challenge to these findings in the appeal from His Honour's order for summary judgment: ***Brewarrina Shire Council v Beckhaus Civil Pty Ltd*** [2003] NSWCA 4).

*[53] I respectfully agree with his Honour's analysis and conclusion. They are consistent with the opinion of Heydon JA in **Fyntray Constructions Pty Ltd v Macind Drainage and Hydraulic Services Pty Ltd** [2002] NSWCA 238 at para51).*

'51 Fourthly, the two limbs of that part of the definition of "reference date" appearing in section 8(2)(a) reveal a legislative intention to permit payment claims to be made either by reference to a contractual date for making a claim (that is, under cl 42.1) or by reference to a contractual date by reference to which the amount of the progress payment is to be calculated (that is, taking into account cl 42.2). .... While cl 42.1 compels monthly claims, section 8 contemplates entitlements to progress payments arising not only by reason of the dates for making claims under cl 42.1, but by reason of a date by reference to which the amount of the progress

payment is to be calculated under cl 42.2, and the latter date includes periods which may be greater than the preceding month'. (See also Hodgson, JA paras 74, 75).

[54] As has been found, it was agreed that the contract date for making the claim for December was 20 December 2002. That being so, in my opinion the Plaintiff, on that date, was a person entitled to a progress payment within the meaning of s13(1).

[55] In my opinion, therefore, the Defendant's submission that a claimant's entitlement to the amount claimed must be established under the contract before a person is entitled to make or serve a payment claim under s13(1) of the Act is unsound."

Karimbla Construction v Alliance Group Building [2003] NSWSC 617, paragraph 6:

[6] "In view of the way the alleged debt is described in the statutory demand and the fact that the so-called "payment claim" of 3 January 2002 is asserted by Alliance as the sole source of that debt, the only issues relevant to the question whether, as Karimbla maintains, there is a genuine dispute as to the existence of the debt are issues going to the effect of the 3 January 2002 document from the perspective of the Security of Payment Act. The debt's source is precisely stated in the statutory demand: it is said to be the payment claim under s13, with the result that it is a payment liability under s14(4) that is asserted in the statutory demand to be the debt claimed. For that reason, I consider it inappropriate to address the question whether the parties' contract or any other matter may have been the source of a debt of $394,364.13 on the part of Karimbla, independently of the Security of Payment Act.";

72 The defendant's submission in terms of the proper interpretation of sections 9, 10 and 11 has the potential to frustrate the operation of the Act whenever the relevant construction contract requires certification of a progress claim and payment of the amount certified.

73 That submission is also inconsistent with the following views expressed by McDougall J in ***Abacus v Davenport*** [2003] NSWSC 1027:

"30 Although it is not clear from the summons, Abacus' case, so far as I could understand it (and I interpose that my understanding was hindered by the failure of Abacus specifically to address its submissions, written or oral, to the individual errors of law and jurisdictional errors asserted in the summons) was that the five errors of law that I have set out constituted jurisdictional errors of law. That was said to be the case because the Act did not permit an adjudicator to 'step into the shoes of architect [sic]'. In other words, as I understood the submission, it was Abacus' case that where, under a contractual mechanism such as clause 10.02, the architect (or person fulfilling the role of the architect) had certified the amount of a progress claim, the builder's only entitlement was to the progress claim so certified, and an adjudicator under the Act had no power to re-evaluate the architect's certification ...

33 I do accept the submission that was put for Abacus that the legislature intended that, so far as possible, an adjudicator should determine a builder's entitlement to a progress payment in accordance with any applicable terms of the contract. That follows from ss 9(a) and 10(1)(a) of the Act; cf ***Musico*** *at para [77].*

34 Clause 10 of the contract deals with payment and adjustment of the contract sum. Clause 10.01 provides for the making of progress claims. Clause 10.02 provides for the issue (by the architect) of progress certificates. Clause 10.07 provides that, in effect, the builder's entitlement is to be paid, as a progress payment, 'the amount specified by that certificate'.

35 It cannot be correct to say that an adjudicator under the Act is bound by the terms of any progress certificate issued, under a contractual regime of the kind that I have described, by the architect or someone in the position of the architect. That would mean that an adjudicator could not make a determination that was inconsistent with a certificate that was (for example) manifestly wrong. Indeed, it would mean that an adjudicator could not make a determination that was inconsistent with a certificate that had been issued in bad faith, or as the result of fraudulent collusion to the disadvantage of the builder.

36 Further, as was submitted for Renascent, it is not uncommon for building contracts to provide that it is the proprietor, or someone who is the proprietor's alter ego or agent, to occupy the certifying role that, under the form of contract presently under consideration, is occupied by the architect. In those circumstances, if the submission for Abacus be correct, an adjudicator would be bound by a certificate issued by a proprietor, or by its agent or alter ego, in bad faith, or one that flatly and obviously disregarded the rights of the builder.

37 Such a construction would undermine in a very serious way the evident intention of the legislature that is embodied in the Act. It would enable an unscrupulous proprietor (either by itself, if the contract so permitted, or with the collusion of an unscrupulous certifier) to set at nought the entitlement to progress payments that the Act provides and protects.

38 I do not think that the construction advocated by Abacus is required by the Act. It is correct to say that the amount of a progress payment is to be 'the amount calculated in accordance with the terms of the contract' where the contract makes provision for that matter (s 9(a)). It is equally correct to say that construction work is to be valued 'in accordance with the terms of the contract' where the contract makes provision for that matter (s 10(1)(a)). However, a reference to calculation or valuation 'in accordance with the terms of the contract' is a reference to the contractual mechanism for determination of that which is to be calculated or valued, not to the person who, under the contract, is to make that calculation or valuation. In the present case, it means that Mr Davenport was bound to calculate the progress payment in accordance with cl 10.02 of the contract. It does not mean that Mr Davenport was bound by the architect's earlier performance (or attempted or purported performance) of that task.

39 In the present case, what Mr Davenport was required to do was to undertake for himself the task that the architect had purported to undertake. He was not required simply and only to apply his rubber stamp and initials to the results of the architect's labours.

40 I therefore reject the fundamental proposition on which Abacus' case was based. Nonetheless, it is necessary to examine each of the errors of law to see whether jurisdictional error is demonstrated."

74 Whilst there is some substance in the Club's submission concerning the circularity where section 4 defines *"progress payment"* as meaning "a payment to which a person is entitled under section 8", when section 8 then merely uses the same term *"progress payment"*, it is plainly necessary to make sense of the statutory scheme. And it is also necessary to endeavour to keep in mind the terms of [and reason for] the amendment to section 13 (1) which inter alia added the words *"or who claims to be"*, hence expanding the description of persons having the right to serve a payment claim as provided for under the anterior form of wording. In that regard the legislature clearly intended to broaden the scope of section 13(1).

75 The particular focus placed by the Club on the meaning of the words "*claim for a progress payment may be made*" appearing in section 8(2)(a) is shortly answered in the present context by the fact that Leighton was entitled under the subject contract to make a progress claim by a procedure, the first stage of which involved written notification to the superintendent. [Contract clause 37.1] Hence the section 8(2)(a) "*date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made*", was the date when Leighton was entitled to give its progress claim to the Superintendent.

76 I note in passing that the 2nd sentence of clause 37.1 appears to mean that if a progress claim is lodged with the Superintendent on a date earlier than the 28th day of a particular month, it is deemed to have been made on the 28th day of the month.

77 For those reasons the Club's broader submission that Leighton was not as at 28 July a person entitled to make a claim for a progress payment within the meaning of section 8(2)(a) is rejected.

Progress Payment [Section 13(1) – Person entitled to a progress payment]

The Club's submission

"*4.9 Whether Leighton is a person entitled to, or claims to be a person entitled to, a progress payment in terms of s.13(1) also depend upon the meaning to be attributed to progress payment ie in s.8(1) and s.13(1). As observed above, the definition provision in the Act is of little assistance however; the term is to be construed in its statutory context:* ***Project Blue Sky Inc. v Australian Broadcasting Authority*** *(1998) 194 CLR 355 at 381. In that context, in particular by reference to ss.9, 10 and 11, its meaning can be readily discerned. Thus, a builder will become entitled to a progress payment (s.8) in the sense used in those sections, that is, in the amount specified in s.9 or s.10, and at the time identified by s.11.*

4.10 S.9 expressly provides that the amount of any progress payment to which Leighton became entitled is to be determined by reference to the amount calculated in accordance with the terms of the contract, and the progress payment so calculated becomes due and payable under s.11 on a date calculated in accordance with the terms of the contract.

4.11 Upon its proper construction, this is the only sensible way the Act can be read and can take effect. In this way, the sections are coherent and cohesive. The result is that Leighton will be a person entitled under the Act, at the relevant reference date, to a progress payment in the amount and upon the date determined in accordance with the terms of the contract. In this case, as at 28 July when the Alleged Payment Claim was issued, Leighton was not entitled to any amount calculated in accordance with the Contract. It became so entitled only upon issue of the Superintendent's Certificate on 6 August (and then only for $23,674 being the amount certified – since paid). Leighton was not on 28 July a person entitled to a progress payment under s.13(1) of the Act."

78 For the reasons already given these submissions which supplement and/or overlap with the earlier submissions are rejected.

Claim to be entitled [section 13(1)]

The Club's submission

"*4.12 Leighton alternatively says it is a person who claims to be entitled to a progress payment within s.13(1). It is accepted that these additional words recently inserted by amendment must have some meaning. Clearly enough the legislature intended to broaden the scope of the section. Nevertheless, the legislation could not contemplate a specious or spurious claim and must be taken to refer to a claim which is genuine or bona fide. The peremptory procedures available under the Act, with their potentially serious consequences for the parties, would otherwise be open to ready abuse. A contractor could serve a purported payment claim, knowing full well that there were no monies owing, in the expectation that (if the requirements for a payment schedule under the Act were overlooked or not appreciated), he might thereby acquire a right to a substantial sum without justification.*

4.13. Leighton did not have a genuine claim to any sum from the Club on 28 July, or before 6 August (upon certification) as it well knew. Even then, its claim was limited to a small sum which was soon paid. Leighton cannot assert that, in terms of the statutory provisions properly construed, it has any genuine or bona fide claim that would bring it within s.13(1) of the Act."

79 This submission is rejected. The intention of the legislature is clear from the terms of section 13 (1). A person who has undertaken to carry out construction work or who has undertaken to supply related goods and services under the

construction contract, *who is* or *who claims to be entitled to a progress payment* under the contract, may serve a payment claim on the person who is or may be liable to make a payment under the contract.

Dual or Inter-related Systems [General matters]

The Club's submission

"5.1 In its Outline of Submissions, Leighton places heavy reliance upon authorities cited [at para 3.8] for its contention that the regime for certification and payment under the Contract has no relevance, in particular having regard to the so-called "dual system" of statutory and contractual liability contemplated by the Act [paragraph 3.9].

5.2 Significantly, Leighton does not refer to the recent decision of the Court of Appeal in ***De Martin and Gasparini Pty Limited v Energy Australia*** *(2002) 55 NSWLR 577. Santow JA, with whom the other members of the Court agreed, said [at 590]: The term "progress payments" is not fully articulated in the Building and Construction Act. Austin J recently considered that term in* ***Jemzone Pty Ltd v Trytan Pty Ltd*** *(2002) 42 ACSR 42. He considered that the definition of progress payment under the Building and Construction Act was "unhelpful". Austin J held in that case that the meaning of the term was rather to be derived from the specific contract in question. The Building and Construction Act was seen as making "default provisions to fill in contractual gaps He concluded at (49[37]) that:"...If the act was intended to apply in the case of final payment on practical completion, it would have been a simple matter for the drafter ...to refer to the entitlement to receive all payments due...rather than only "specified progress payments".*
I agree with that conclusion.

Santow JA expressly agreed with the conclusion of Austin J at [57].

5.3 The views so expressed are consistent with the analysis of the statutory provisions undertaken above and with the operation and effect of the Act indicated above. With respect to further authorities cited by Leighton in its Outline of Submissions, the following observations are made.

5.4 Leighton relies on ***Walter Construction Group Ltd v CPL (Surry Hills) Pty Limited*** *[2003] NSWSC 266 in which Nicholas J decided that decided that a "progress payment" referred to the amount claimed by the contractor under the Act, rather than under the contract. Nicholas J at [52] followed the decision of Macready AJ in* ***Beckhaus v Brewarrina Council*** *[2002] NSWSC 960 at [60]-[65] that the Act creates a "dual system" in relation to progress payments, which creates rights, irrespective of the contractual provisions. However, this line of authority is inconsistent with the decision of Austin J in* ***Jemzone,*** *which was approved by the Court of Appeal in* ***De Martin.***

5.5 In ***Beckhaus*** *there was no appeal from the decision of Macready AJ on this issue [****Brewarrina Shire Council v Beckhaus Civil Pty Ltd*** *[2003] NSWCA 4] (as Nicholas J noted in Walter at [52]). However, this may be explained on the basis that resolution of the question could not have affected the outcome of the appeal. On the facts of that case, the Superintendent's certificate was issued after the expiry of the relevant time period, with the consequence that the amount stated in the progress claim became the amount payable by way of a progress payment under the contract In the instant case, the certificate by Carver was served within the required period [****Beckhaus Civil Pty Ltd v Brewarrina Shire Council*** *[2002] NSWSC 960 at [2], [17] and [19]].*

5.6 The second matter on which Nicholas J relied in ***Walter*** *at [53] concerned the observations of Heydon JA in* ***Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Limited*** *[2002] NSWCA 238 at [51]. In fact, Fyntray is distinguishable on its facts from Walter and the present case. In Fyntray, the progress payment was immediately payable upon lodgement of the progress claim under clause 42.1, subject to a right in the payee to make deductions for which it was obliged to give reasons [Fyntray at [6]]. There was no requirement for certification by a Superintendent, as a precondition to the payee's liability, as in the present case and in* ***Walter*** *[See at [12]].*

5.7 Accordingly, the Court ought apply ***De Martin*** *and* ***Jemzone,*** *with the consequence that the progress payment referred to in the relevant section is that which falls duly under the Contract albeit the Act provides an expeditious means of recovery of amounts so due. In the present case there was no amount due under the Contract as at 28 July, being the date of the alleged payment claim. This result also gives effect to the object of the Act as specified in s.3 and the Minister's second reading speeches. [See also Second Reading Speakers for the Act on 8.9.99, Hansard, page 107 (Legislative Assembly) and the Amendment Act on 12.11.02, Hansard page 6541 (Legislative Assembly)]"*

80 It seems to me that there is substance in Leighton's submission that absent an appropriate definition, Austin J in ***Jemzone***, paragraphs 35-39, is seen to have only decided that the expression "*progress payment*" should be given the meaning it has under the construction contract. On that basis, his Honour held that this expression did not include a final payment. Santow JA expressed his agreement with this view in ***De Martin & Gasparini Pty Ltd v Energy Australia*** [2002] NSWCA 330.

81 The definition of "*progress payment*" has, it should be noted, been amended expressly to include, inter alia, a final payment.

Alleged Payment Claim Invalid – Rock Excavation [section 13(4)(b)]

The Club's submission

"6.1 A payment claim may only be served within the time limit set by s.13(4), relevantly for present purposes the period of twelve months "after the construction work to which the claim relates was last carried out"; s.13(4)(b).

6.2 In the present case, the Alleged Payment Claim includes an amount of $736,487 for rock excavation carried out more than twelve months before 28 July 2003 (date of the Alleged Payment Claim [Affidavit of M Thebridge 13

November 2003 paragraph 25]). Other items totalling $274,798 were similarly carried out twelve months before 28 July [M Thebridge Affidavit paragraph 57].

*6.3 Having regard to the substantial nature of this statute-barred component (and the impermissible Delay Costs Claim referred to below), the Alleged Payment Claim falls. Two decisions of the Court to contrary effect [**Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd** [2003] NSWSC 266 at [64]-[69] per Nichols J; **Paynter Dixon Construction Pty Ltd v JF & CG Tiltson Pty Ltd** [2003] NSWSC 869 at [34] per Bergin J] are explained by the comparatively lesser substance of the invalid portions of the payment claims there considered. Where the amount claimed is substantially denied efficacy by the Act, the whole payment claim is infected by such invalidity. This must necessarily be so where the factor which results in exclusion from the reach of the Act is not merely a characterisation of the item claim (eg was item X construction work or something else? Were goods in fact supplied?), but rather the absolute time for bringing of a claim. This is consistent with the requirements of the Act for expedition.. However the Club respectfully submits that these decisions are in error.*

6.4 Alternatively, if the Alleged Payment Claim is not invalid in its entirety, it is certainly so to the extent of the rock excavation and other time barred claims. Moreover, in the exercise of it's discretion, the Court ought not give judgment, whether a summary or otherwise, in respect of a payment claim, the substantial portion of which offends the Act's requirements. S.15(4) does not, in terms, eliminate all judicial discretion in awarding judgment under the Act. The present case is an appropriate case for the refusal of judgment."

82 There is no issue but that some of the rock excavation work the subject of the payment claim was carried out earlier than twelve months prior to 28 July 2003.

83 It is appropriate as a general matter to note the holdings (at [67] and [68]) by Nicholas J in ***Walter Construction:***
- *that to demonstrate compliance with section 13 (2) (a) it is irrelevant that an item which is a component of a payment claim may be disputed, albeit on the ground that such item cannot be categorised as either work or goods and services within the meaning of section 5 or section 6 respectively; and*
- *that in a challenge which raises the question of compliance with section 13 (2) (a), the question is not whether an item of the payment claim relates to construction work or related goods and services within section 5 and section 6 respectively, but whether the payment claim adequately identified such work will goods and services [68].*

84 As is accepted by the Club that line of reasoning was expressly followed by Bergin J in *Paynter*. In my view that line of reasoning was correct. The matter is clearly relevant to the proper approach to be taken to the similar but by no means identical question albeit now raised in the context of the prohibition to be found in section 13 (4) (b).

85 No previous decision appears to have dealt with the requirements of section 13 (4) (b).

86 It seems necessary to stand back from the issue and to seek to place it into context.

87 Construction work involves as the norm, work which may be expected to be carried out over a period of time. The laying of foundations is an example. This is unlikely to take one hour and may take days or weeks or even longer.

88 Presumably the same may be said in relation to the provision of related goods and services.

89 The legislature appears to have had to cope with these realities in determining how to describe the period of time within which a payment claim could be served.

90 By definition or real world practice it would be likely that a payment claim would cover disparate forms of construction work carried out over the same or different periods/brackets of time and would similarly likely cover the provision of related goods and services over the same or different periods/brackets of time.

91 It would seem unlikely that the legislature would have intended that a payment claim in respect of any particular item of construction work [as for example the laying of a particular brick] could only be served within the period of 12 months after completion of the work comprising that particular item.

92 Possibly the same may also be said in relation to it being unlikely that the legislature would have intended that a payment claim in respect of a particular *unit* of construction work [as for example the laying of a brick course or concourse] could only be served within the period of 12 months after completion of the work comprising that unit of construction work. On the other hand perhaps it is arguable that the legislature may have so intended.

93 The legislature in fact enacted section 13 (4) in the following terms: "*A payment claim may be served only within....*
(b) the period of 12 months after the construction work to which the claim relates was ***last*** *carried out (or the related good and services to which the claim relates were last supplied)..."*

94 To my mind properly construed the subsection in its reference to *"the construction work to which the claim relates"* should be regarded as referring in a general way to the construction work or to the related goods and services. Hence as long as any item of construction work to which the claim *relates* [in that general sense], was carried on during the 12 month period prior to the service of a payment claim, that payment claim could also, unexceptionally, include items of construction work carried on prior to that 12 month period.

95 The same proposition would hold good in terms of the supply of related goods and services.

96 This construction is in effect that contended for by Leighton which submitted that:
- necessarily the phrase "*the construction work to which the claim relates"* is the entirety of the works the subject of the claim;
- it is then necessary to determine when that work *"was last carried out;* and

· if any work has been carried out within 12 months of the date of the payment claim, the payment claim would have been served within the required period.

97 The Club submitted that this construction would necessarily involve a rewriting of the subsection by shifting the word "last" so that the subsection would in effect read as follows: *"A payment claim may be served only within.... the period of 12 months after the **last** construction work to which the claim relates was carried out (or the related good and services to which the claim relates were last supplied)"*

98 Whether this submission of the Club be correct or incorrect, to my mind the construction to which I have referred is the correct construction. It is consistent with the Minister's second reading speech for the Amendment Act: *"There will also be a limit upon how long after construction work is **completed** that a claimant can continue to make payment claims under the Act. The period will be 12 months after the last work was carried out or the goods or services were last provided, or a later date if provided for under the contract."* (emphasis added).

99 Likewise this construction seems to be consistent with the amendment to the definition in section 4 of *"progress payment"* to include *"final payment"*. A final payment typically involves a final accounting for the entire project, a significant portion of which will have been carried out in many cases more than 12 months *before* any claim for a final payment may be made.

100 Any other construction would it seems to me, as a matter of the practicable working of the section, pose real difficulties of application. The construction avoids a limitation period seen to run on a daily basis. Further it would seem to avoid an otherwise necessary vouching of the particular items or units of work in terms of the precise dates when such work was carried out which would seem to raise particular difficulties.

101 Ultimately the matter is one of impression aided it seems to me, with some legitimacy, by reference to the Minister's second reading speech for the Amendment Act.

102 It follows that the challenge to the validity of the payment claim based upon section 13 (4) (b) and other items raising the same issue fails.

Payment Claim Invalid – Delay Costs [section 13(2)(a); section 5]

The Club's submission

"7.1 S.13(2)(a) limits the ambit of a payment claim to identified "construction work" and s.5 provides a definition of "construction work". In the present case, the summaries attached to the Alleged Payment Claim include an amount of $936,325 described as "Delay Costs – to 28/07/03 (Contract rate for delay)". This claim does not constitute "construction work" under s.5 of the Act. Rather, the Delay Costs appear to be a claim for damages under clause 34 of the Contract, which is entirely different from "construction work", as defined in s.5.

7.2 Accordingly, for the reasons set out in relation to the rock excavation claim, the Alleged Payment Claim was invalid, or at least, the amount of the Delay Costs ought be excised from any consideration by the Court of the Alleged Payment Claim."

103 This matter may be dealt with very shortly indeed. In my view the approach taken by Nicholas J in Walter (at [67] and [68]) is squarely in point and is correct. An item which is a component of a payment claim may be disputed, albeit on the ground that such item cannot be categorised as either work or goods and services within the meaning of section 5 or section 6 respectively. That approach was expressly followed in **Paynter** (at [39]) where Bergin J said: *"It may well be that a payment claim might include amounts for services or other matters that do not fall within the definition of construction work or related goods and services. But that does not mean that a payment claim that also has within it claims for construction work is invalid."*

104 It follows that the payment claim was not invalid insofar as the inclusion within it of the so-called delay costs.

Leighton was served with a Payment Schedule [section 14(1)]

The Club's submission

"8.1 S.14(1) makes provision for a reply to a payment claim by the provision of a "payment schedule". If (contrary to the foregoing submissions) it be held that the Alleged Payment Claim constitutes a payment claim under s.13, then the Club served a payment schedule in the form of Carver's letter of 6 August 2003. Should the Court hold that the Alleged Payment Claim is valid, though it takes the form of a claim upon the Superintendent for certification, it follows that Carver's letter and its enclosures should equally be regarded as satisfying the requirements of s.14 as a payment schedule from the Club.

8.2 In summary, on the basis that the Certificate constituted the service of a payment schedule upon Leighton, Leighton had no entitlement to bring these proceedings or seek summary judgment against the Club, and the proceedings and application for summary judgment ought be dismissed."

105 Leighton's short answer to this submission of the Club is that it is clear from the evidence (paragraphs 14-16 of the affidavit of Stephen John Muter sworn on 7 November 2003 and paragraphs 10-12 of the Thebridge Affidavit) that the Superintendent was not even aware of the Payment Claim. Accordingly, there is no basis on which it can properly be suggested that the Superintendent's certificate was a payment schedule for the purposes of section 14.

106 This short answer provides some useful adjectival information. The question of whether or not the certificate was a payment schedule within the meaning of section 14 is however one of analysis of the document. That analysis permits a negative answer to the question. In this respect I adopt as correct the following Leighton submissions:

"6.4 The Plaintiff says that the Certificate is not a payment schedule complying with sections 14(1) and (2) of the Act in that:

(a) it does not reply to the Payment Claim, but instead, clearly on its face, to the Contract Progress Claim. The Defendant's facsimiles of 14 and 19 August 2003 (paragraphs 15 and 18 and Exhibits "MEB7" and "MEB9" to the First Bouton Affidavit") use the phrase "evidencing the Superintendent's opinion" which makes it clear that the Defendant is of the view that the Superintendent, when issuing the Certificate, was acting in accordance with the requirements of clause 37.2 of the Contract to respond to a progress claim made under the Contract;

(b) it does not identify the Payment Claim, being the payment claim to which it relates; and

(c) it does not indicate the amount of the payment that the Defendant proposes to make ***("Scheduled Amount").***

6.5 The Defendant submits that the Certificate indicates the Scheduled Amount (Defence, paragraph C5). The Plaintiff says that the Certificate fails to comply with section 14(3) of the Act in that does not indicate:

(a) why the Scheduled Amount is less than the claimed amount; or

(b) the Defendant's reasons for withholding payment."

107 The more extensive answer to this submission of the Club is that provided for in Leighton's overview submissions which are adopted as correct in this regard and were as follows:

"Was the Certificate served by the Defendant, or an agent of the Defendant?

6.2 The Plaintiff says that the Certificate is not a payment schedule complying with section 14(1) of the Act in that it was not served by the Defendant, being the person on whom the Payment Claim was served, and being the person who is or may be liable to make the payment.

6.3 The Defendant submits that it provided the Certificate by the Superintendent, its architect (Defence, paragraph C5). The Plaintiff says that:

(a) this is inconsistent with the Defence in which the Defendant has accepted that the Certificate was issued by the Superintendent under the Contract, rather than the Act. This necessarily follows from paragraphs C10 and C11 of the Defence and paragraphs 15 and 18 and Exhibits "MEB7" and "MEB9" to the First Bouton Affidavit;

(b) in Karimbla, paragraph 11, Justice Barrett found that a payment schedule could be provided by an agent of the principal. However, in issuing progress certificates pursuant to clause 37.2 of the Contract the Superintendent was acting as an independent certifier and not as an agent of the Defendant. This clear from:

(i) His Honour Hodgson JA (with whom Mason P and Stein JA agreed) who said in ***Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd*** **("Abigroup")** [2002] NSWCA 211, paragraph 50: *"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 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 Sutcliffe) 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 any 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).

The authorities referred to by His Honour Hodgson JA were:
Perini Corporation v Commonwealth of Australia [1969] 2 NSWLR 530;
Dixon v South Australian Railways Commissioner (1923) 34 CLR 71;
South Australian Railways Commissioner v Egan (1973) 130 CLR 506;
London Borough of Merton v Stanley Hugh Leach Ltd (1985) 32 BLR 51; and
Sutcliffe v Thackrah [1974] AC 727.

The contract in question in ***Abigroup*** was AS2124-1992 which is the immediate predecessor to AS4000-1997 which forms part of the Contract. The Superintendent's role under both contracts is identical for present purposes; and

(ii) Dorter and Sharkey who consider it "...almost unreasonable and unrealistic to expect a person in such a situation to wear two hats simultaneously and be a professional contortionist" at paragraph 7.520; and

(c) the Defendant has made it clear in correspondence to the Plaintiff that the Superintendent was acting independently when issuing the Certificate. The Defendant's facsimiles of 14 and 19 August 2003 (paragraphs 15 and 18 and Exhibits "MEB7" and "MEB9" to the First Bouton Affidavit") both provide relevantly "...evidencing the ***Superintendent's*** *opinion..." and "...the payment that the* ***Superintendent*** *proposes to make and the* ***Superintendent's*** *reasons for withholding payment."* (emphasis added)"

Dealing with the second set of proceedings

108 In my view the second set of proceedings require to be summarily dismissed. The reasons are as follows:

- Clearly enough the proceedings are brought only to frustrate the application for summary judgment in the first proceedings.
- Contract condition 37.2 makes plain that neither a progress certificate payment schedule nor a payment of moneys is to be evidence that the subject work under the contract has been carried out satisfactorily and further makes plain that payment other than final payment is to be payment on account only. Hence the declaration sought in paragraph 1 of the summons would not be declaratory of the parties rights inter se in any final sense.
- The proceedings amount to an abuse of process, being a backdoor route to in substance, outflank section 15 of the Act.

· The overriding purpose rule [Part 1, Rule 3 (1), (2)] may be mobilised where as here the forensic tactic in commencing the second proceedings is antithetic to the facilitation of the just, quick and cheap resolution of the real issues in the proceedings. In the present context the reference to "real issues in the proceedings" translates into the issues which will be determinative of the parties final rights against one another.

· Section 63 of the Supreme Court Act expresses a fundamental principle of the Act which is the avoidance of multiplicity of proceedings. The second set of proceedings flies in the face of that principle.

109 These reasons are sufficient to justify the summary dismissal of the second proceedings. There are disparate other reasons to the same end. Declarations of right are final and not interlocutory orders having the effect of creating a res judicata or an issue estoppel: ***Marra Developments Ltd v B W Rofe Pty Ltd*** [1977] 2 NSWLR 616 per Hutley JA at 626. The subject declaration sought in the second proceedings fails to comply with this criterion.

110 Further as a general rule the power to make a declaration will not be exercised when the Court is called upon to answer a question that is purely hypothetical. In its submission in relation to this principle, the Club contended that "[t]here would appear to be a genuine dispute between Leighton and the Club as to the amount which was owing under the contract at the time progress claim No. 18 was served". The purpose of the Act is to permit a contractor to sidestep curial proceedings concerning resolution of *that form of genuine dispute* by utilising the payment claim and other provisions of the Act with the expressed aim that in so doing, the contractor may have the benefit of the peremptory interim determination of such issue. That purpose would be turned on its head if proceedings in the nature of the second proceedings were permitted to go forward.

111 During the hearing, reference was made to the entitlement of the Club to commence substantive proceedings for relief concerning the parties rights under the contract, which relief would be final in character and would upon final determination have the effect of creating a res judicata or an issue estoppel. The entitlement of parties to commence proceedings of this type at an appropriate time is recognised in section 32 of the Act.

The discretionary power to order summary judgment

112 The Club put forward a number of submissions in support of the proposition that it was inappropriate for the Court to exercise its discretion to grant summary judgment in the first proceedings. None of these submissions were of substance. They generally contended that even if the Club failed to resist the force of the Leighton claim in the first proceedings, the Club had demonstrated a bona fide arguable case that it had powerful defences as to substantial portions, if not the whole of the claims made against it in the first proceedings, so that although Leighton may be shown to have satisfied the requirements of the Act, this was a case where the exercise of the discretion to grant summary judgment should be withheld. The submissions fly in the face of the clear intent of the Act and are calculated to undermine section 15 [and in particular section 15 (4)], and section 16 [and in particular section 16 (4)]. The terms of subsections (4) (a) of each of sections 15 and 16 make plain that judgment in favour of the relevant claim is not to be given in curial proceedings unless the Court is satisfied of the existence of the circumstances referred to in subsections 1. The Court here being satisfied of the existence of those circumstances, there is no occasion presently shown for an otherwise exercise of the Court's undoubted discretion to give or to withhold summary judgment in any proceedings, for the Court presently to withhold the grant of that relief. The discretion requires to be exercised in a principled way. The legislative scheme constituted by the Act makes quite plain that the proper exercise of the discretion presently is to grant summary judgment in favour of Leighton as sought in the first proceedings.

Short Minutes of Order

113 The parties are to bring in short minutes of order. Costs may then be argued.

Rulings on procedure and evidence

114 During the hearing some questions as to procedure were raised. The Court approached the hearing upon the basis that the convenient course was to determine the issues raised by the application for summary judgment in the first proceedings at the same time as hearing the Club's motion in the second proceedings.

115 During the hearing certain rulings on evidentiary matters were reserved for decision in the judgment. The rulings are as follows:

MFI P 1 The Review Discussion Paper entitled “Options for enhancing the [Act]”

This document is sought to be tendered pursuant to section 34 (2) (e) of the *Interpretation Act*, the assertion being that it is the document referred to in the second paragraph of the second reading speech concerning the amendment Bill. It may be technically admissible on this basis but the discussion paper is not of assistance in relation to the issues presently before the Court and in my view should be rejected under section 135 of the *Evidence Act 1995* on the basis that the probative value of the document is outweighed by the danger that the admission into evidence of the document would amount to a waste of time.

MFI P 2 The “Report on a Review of the [Act]” said to be the document referred to in Hansard at page 7539, is allowed but is of no particular assistance on the matters litigated.

MFI P 3 This is simply the Hansard extract page 7539 which is unexceptional and is only admitted to identify the subject page so that the ruling in relation to MFI P 2 may be given.

Mr GE Underwood instructed by Mallesons Stephen Jaques
Mr MLD Einfeld QC, Mr TD Castle instructed by Dibbs Barker Gosling