Judgment : Hodgson JA ; Santow JA ; Ipp JA : New South Wales Court of Appeal : 5th May 2005

1 **HODGSON JA:** By Statement of Liquidated Claim filed in the District Court on 5 May 2005, the opponent Total claimed $260,048.93 in respect of a cause of action based on s.15(2)(a)(i) of the Building & Construction Security of Payment Act 1999 (the Act). In the Statement of Claim, Total also claimed interest pursuant to s.83A of the District Court Act from 23 March 2005 and costs. The claimant Nepean filed a Defence to this Statement of Claim on 9 June 2005; and on 20 June 2005, Total filed a Notice of Motion seeking the following orders:

1. Pursuant to Part 11A Rule 2 of the District Court Rules, summary judgment be entered for the plaintiff.
2. Costs.
3. Further or other order.

2 This Notice of Motion was heard by Garling DCJ on 22 July 2005, and the primary judge gave judgment on 29 July 2005 in which he decided that Total's motion should succeed. From the material before this Court, it appears that the orders that the primary judge made were an order in accordance with paragraph 1 of Total's Notice of Motion and an order that Nepean pay Total's costs of the Notice of Motion.

3 I would take that order as meaning, at least, that judgment should be entered in favour of Total for $260,048.93 and that Nepean should pay Total's costs of the Notice of Motion. What it means as regards the claim for interest, and the costs of the proceedings, is less clear; and this has not been the subject of argument before us.

4 Nepean has applied for leave to appeal from the decision of the primary judge, and the application for leave was argued on the basis that, if leave was granted, the appeal would be disposed of without further argument.

5 I would comment however that the effect of the order of the primary judge is that a final judgment be entered for (at least) $260,048.93; so although the order arose out of the Notice of Motion, it would appear to finally dispose of rights of the parties and thus not be interlocutory.

6 An order that summary judgment be entered is in my opinion different from an order that merely grants leave to enter judgment, as considered in ***Cox Brothers (Australia) Ltd. v. Cox*** (1934) 50 CLR 314 and ***Prelea v. Westpac Banking Corporation***, NSWCA, 3/7/92.

7 In any event, having regard to the effect of the order, the amount involved and the issues, it is appropriate to proceed immediately to consideration of the merits of an appeal.

CIRCUMSTANCES

8 During 2004, Total was engaged as a subcontractor to Nepean in the supply and installation of pipes for a very large construction project known as the Eastern Creek UR 3R Facility. Nepean was in turn a subcontractor to the head contractor for the project, GRD Minproc Pty. Limited. It is common ground that this work was performed by Total pursuant to a construction contract, within the meaning of the Act, between Total and Nepean.

9 Pursuant to that contract, Total served a number of progress claims. Progress claim 1, dated 26 May 2004, was for $118,581.21; progress claim 2, dated 24 June 2004 was for $184,333.97; progress claim 3, dated 26 July 2004, was for $147,680.50; and progress claim 4 (dated 26 August 2004) was for $67,474.80. It appears that, pursuant to those claims, Nepean paid Total $470,973.06.

10 There is in evidence progress claim 5, dated 30 September 2004, claiming $221,403.18. The evidence does not make it clear whether or not this was served on Total at about that time, although it seems a reasonable inference that it was. However, whether or not it was served at that time does not affect the result of the case. No payment has been made by Nepean in respect of it.

11 On 12 November 2004, a meeting of directors of Total resolved that the company be placed into voluntary administration, and that an administrator be appointed.

12 There is in evidence progress claim 6, dated 17 November 2004, claiming $38,645.75 in respect of what are identified as Variations 4-6. Again, it is not clear whether or not this was served at around that time.

13 On 9 March 2005, a document purporting to be a payment claim under the Act was served by Total on Nepean, claiming $260,048.93 and attaching copies of progress claim 5 and progress claim 6.

14 No payment schedule was served within 10 business days after service of that document, and no part of the claimed amount was paid.

15 On 5 May 2005, Total commenced the subject proceedings. The Defence filed by Nepean in substance raised only one matter, namely a claim that the document served on 9 March 2005 was not a payment claim within the meaning of the Act "because it failed to identify the construction work (or related goods or services) to which the progress payment related, as required by s.13(2)(a) of the Act".

16 As noted above, Total brought a Notice of Motion seeking summary judgment, giving rise to the orders challenged in these proceedings.

STATUTORY PROVISIONS

17 This appeal raises questions concerning ss.13, 14 and 15 of the Act, which are as follows:

13 Payment claims

*(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the **claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.*

(2) A payment claim:
(a) must identify the construction work (or related goods and services) to which the progress payment relates, and
*(b) must indicate the amount of the progress payment that the claimant claims to be due (the **claimed amount**), and*
(c) must state that it is made under this Act.
(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.

18 The Act also makes provision for adjudication of payment claims on the application of a claimant, in ss.17-26. There are provisions restricting the issues that can be considered by adjudicators in resolving such disputes, in particular s.20(2B), s.21(4) and s.22(2). Those provisions are as follows:

20 Adjudication responses …
(2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

21 Adjudication procedures …

(4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:

(a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and

(b) may set deadlines for further submissions and comments by the parties, and

(c) may call a conference of the parties, and

(d) may carry out an inspection of any matter to which the claim relates.

22 Adjudicator's determination …

(2) In determining an adjudication application, the adjudicator is to consider the following matters only:

(a) the provisions of this Act,

(b) the provisions of the construction contract from which the application arose,

(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,

(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,

(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

DECISION OF PRIMARY JUDGE

19 The primary judge referred to a statement by me in ***Estate Property Holdings Pty. Ltd. v. Barclay Mowlem Construction Ltd.*** [2004] NSWCA 393, 61 NSWLR 575, at [17] that *"s.13(2)(a) of the Act requires that a payment claim identify the construction work for which payment is claimed in the claim, nor merely the construction work as a whole that is being carried out under the relevant construction contract"*; and referred to statements concerning the nature and degree of identification required in ***Multiplex Constructions Pty. Limited v. Luikens*** [2003] NSWSC 1140 **and *Isis Projects Pty. Limited v. Clarence Street Pty. Limited*** [2004] NSWSC 714.

20 The primary judge referred to the contentions of the parties, and continued: *It seems to me that this Act was put in place for a purpose. That is, to allow parties to a contract to deal with it quickly and efficiently. It is put in, as I understand it, so subcontractors can render accounts and have them paid with not as much problem and fuss as there was in the past. And it does provide a fairly, I suppose, draconian type of section where a Court can simply order that these monies be paid.*

It seems to me that when you have a contract such as this one, which has been going on for some period of time, where there is a large amount of money involved, I think over $700,000, where payments of about $470,000 odd and maybe even more than that had already been made, where those payments had been made in a form similar to this and where the parties had been able to work it out and understand it, this falls into no different category to those Palmer J spoke of and indeed McDougall J spoke of when you are looking at these sorts of matters. That is, that the parties should be able to deal with these matters in the way they had previously dealt with them, without having to have every single item itemised to the degree which I think has been required here.

I am satisfied therefore that the plaintiff's motion should succeed.

GROUNDS OF APPEAL

21 Nepean seeks to appeal on the following grounds:

1. His Honour erred in finding that the respondent was entitled to summary judgment in the sum of $269,094.63.

2. His Honour erred in finding that the payment claim was a valid payment claim for the purposes of section 13(2)(a) of the Act.

3. His Honour's finding that the respondent had provided sufficient particulars of the construction work for which payment was sought so as to constitute a valid payment claim was a finding contrary to the weight of evidence.

4. His Honour erred in finding that due to the fact that the claimant had previously paid "payment claims" of similar form and content, the claimant was deemed or presumed to have known what particular construction work the payment claim was for.

SUBMISSIONS

22 Mr. Donaldson SC for Nepean submitted that the primary judge acted contrary to the principles in ***General Steel Industries Inc. v. Commissioner for Railways (NSW)*** (1964) 112 CLR 125 in giving summary judgment in favour of Total, in circumstances where there was a triable issue which, in at least two respects, was not appropriate for summary disposal. First, there was a dispute in the evidence as to whether progress claims 5 and 6 had the same amount of detail as previous progress claims; and second, in that the determination of whether the material in progress claims 5 and 6 was or was not sufficient for Nepean to understand for what work the claim was being made would require appreciation of the nature of the project and the knowledge of the parties, on the basis of which the claim would be understood; and the relevant contract was not before the primary judge and the circumstances were not explored.

23 As to the requirements for identification, Mr. Donaldson referred to pars.[36] and [37] of the judgment of McDougall J in ***Isis Projects***; and also to par.[25] of my judgment **in *Co-ordinated Construction Co. Pty. Limited v. Climatech (Canberra) Pty. Limited*** [2005] NSWCA 229, and to par.[42] of the judgment of Basten JA in the same case.

WHAT IDENTIFICATION IS REQUIRED?

24 Paragraphs [36] and [37] of the judgment of McDougall J in ***Isis Projects*** were as follows:

*36 In my judgment, the approach to be taken to this question is that described by Palmer J in **Multiplex Constructions Pty ltd v Luikens & Anor** [2003] NSWSC 1140. His Honour dealt at paras [72] and following with the question of "what a payment schedule should show". In my respectful opinion, his Honour's observations are (as is in any event apparent from para [76]) applicable equally to payment claims. His Honour pointed out that, in considering whether a payment claim or a payment schedule contained sufficient detail, it was necessary to bear in mind that they were given and received by people experienced in the building industry and familiar with the particular contract, the history of construction work on the project and the broad issues underlying the dispute. He said:*

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

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

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

37 In principle, I think, the requirement in s 13(2)(a) that a payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where:

(1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;

(2) That reference is supplemented by a single line item description of the work;

(3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;

(4) There is a summary that pulls all the details together and states the amount claimed.

25 McDougall J's decision in this case was upheld, and the passages from the judgment of Palmer J in *Multiplex* referred to him by him were substantially endorsed, by the Court of Appeal: ***Clarence Street Pty. Limited v. ISIS Projects Pty. Limited*** [2005] NSWCA 391. In the course of his judgment in that case, Mason P, with whom Giles JA and Santow JA agreed, said this:

*30 In **Multiplex**, Palmer J was considering the requirements for a valid payment schedule. The function of that document is apparent from the statutory scheme to which reference has already been made. Section 14(2) provides that the payment schedule must identify the payment claim to which it relates, and must indicate the amount of the payment (if any) that the recipient of the payment claim proposes to make. Section 14(3) requires the recipient to indicate why payment in full is withheld and the reasons for doing so. The joinder of issue thus achieved sets the parameters for the matters that may be contested if an adjudication under the Act ensues (cf s20(2A) and (2B)).*

*31 I respectfully agree with the principles stated by Palmer J in **Multiplex**. I would however point to two matters that need to be borne in mind when they are applied to a situation such as the present, ie testing the validity of a payment claim. The first is that a "**payment claim**" is no more than a claim. It must comply with s13, but (unlike a payment schedule) it is not its function to identify the scope of a dispute. Many claims will not be disputed, but if they are, it is a matter for the respondent to the payment claim to state the extent and reasons for failing to pay the sum withheld.*

*32 Secondly, I draw attention to the fact that Palmer J is referring (at [78] of his reasons) to s14(3), which states matters that the respondent to the payment claim "**must indicate**". This is also the language of s13(2)(b). By contrast, s13(2)(a) (with which the present appeal is concerned) defines what the claimant "**must identify**". It is however unnecessary in the present case to consider the difference between identification and indication.*

26 In ***Climatech***, I said this:

25 I note also that s.13(2)(a) requires that a payment claim "identify" the construction work or related goods or services to which the payment relates. This requirement must be interpreted, in my opinion, having regard to the

requirement in s.14(3) that the payment schedule indicate the respondents' reasons for withholding payment, the limitation on the adjudication response in s.20(2B) to those reasons, and the corresponding limitation in s.22(2)(c), as well as the circumstance that, for the reasons given above, payment claims may include amounts that are not (in a narrow sense) for construction work that has actually been carried out for related goods and services that have actually been supplied. In my opinion, the relevant construction work or related goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim; and in the case of "delay damages" of the kind involved in this case, it is generally sufficient (assuming that the contract itself is sufficiently identified) that the basis of contractual entitlement be shown. In my opinion, that would generally be enough to ground identification, at least by way of inference, of the construction work or related goods or services to which the payment relates.

27 In the same case, Basten JA said this:

*42 In **John Holland v Cardno MBK**, Einstein J expressed the view that, in order to satisfy the statutory scheme, a payment claim did not need to be **"comprehensible by the respondent in terms of its supporting materials"**: ibid at [21]. However, as Hodgson JA notes at [25] above, the claim must **"identify"** the work, goods or services to which the payment sought relates. The term **"identify"** should be given a purposive construction: what must be done must be sufficient to draw the attention of the principal to the fact that an entitlement to a payment is asserted, arising under the contract to which both the contractor and the principal are parties. In that sense, the claim, to be valid, must be reasonably comprehensible to the other party. If the entitlement does not arise absent the supply of supporting documentation, then the claim must be accompanied by that documentation, unless it has already been provided. On the other hand, it may be that the distinction between a "claim" and a **"reply"** by way of a payment schedule (see s 14(1)), on the one hand, and "submissions" on the other, suggest that the precise contractual basis for the entitlement may not need to be identified in the claim, nor addressed in the response. Rather, the claim should assert, in full, the factual basis upon which it is made, including the provision of documents where necessary, whereas the reliance on a relevant contractual provision may be dealt with by way of submissions, if the matter comes before an adjudicator. It would then follow that the requirement in s 20(2B) that the "reasons" for withholding payment must be limited to those identified in the payment schedule, would not preclude the principal from undertaking the same exercise it its submissions, namely the identification of the absence of justification in terms of specific contractual provisions.*

28 There is force in Mr. Donaldson's submissions that there was an issue raised below that could possibly lead to a decision that the work to which the payment claim related was not identified in the sense that, in all the circumstances, the material in the payment claim was not sufficient to convey to Nepean just what was the work for which payment was claimed. However, even if that is correct, this would not necessarily justify allowance of the appeal. In my opinion, there is a substantial question whether this would make the document other than a payment claim under the Act.

CONSEQUENCES OF NON-COMPLIANCE WITH S.13(2)(a)

29 In ***Brodyn v. Davenport*** [2004] NSWCA 394, 61 NSWLR 421, the following appears in my judgment, with which Mason P and Giles JA agreed:

52 However, it is plain in my opinion that for a document purporting to an adjudicator's determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator's determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.

53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
2. The service by the claimant on the respondent of a payment claim (s.13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).

54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. ***Project Blue Sky Inc. v. Australian Broadcasting Authority*** *(1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf.* ***R v. Hickman; Ex Parte Fox and Clinton*** *(1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance.*

56 It was said in the passage in ***Anisminic*** *quoted by* McDougall J *that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in* ***Craig v. South Australia*** *(1995) 184 CLR 163 at 177 the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s.22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s.22(2), especially in pars.(b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is* ***"duly made"*** *by a claimant, if not contained in the adjudication application (s.17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (ss.20(1), 22(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s.22(2), or bona fide addresses the requirements of s.22(2) as to what is to be considered. To that extent, I disagree with the views expressed by Palmer J in* ***Multiplex Constructions Pty. Limited v. Luikens*** *[2003] NSWSC 1140.*

30 In ***Climatech***, following the passage set out above, I said this:

26 In my opinion, failure adequately to set out in a payment claim the basis of the claim could be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant adequately sets out the basis of the claim in submissions put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material (because of the provisions of s.20(2B) and s.22(2)(c) of the Act), he or she is not appropriately satisfied of the claimant's entitlement. Generally however, in my opinion, it is for the adjudicator to determine if the basis of the claim is adequately set out in the payment claim, and if not, whether on this ground a relevant amount claim should be excluded from the amount of the progress payment determined under s.22(1).

31 However, a possibly contrary view was expressed by Basten JA in ***Co-Ordinated Construction Co. Ltd. v. J.M. Hargreaves (NSW) Pty. Limited*** [2005] NSWCA 228 and in ***Climatech***. In ***Hargreaves***, Basten JA said this:

72 The next step in the reasoning in Brodyn was to say, at [55], that all that was intended by the legislature was compliance with certain identified "basic requirements", which may not have been exhaustively stated in that case, and ***"a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power"*** *– for which proposition* ***R v Hickman; Ex parte Fox and Clinton*** *(1945) 70 CLR 598 is cited – and that there be* ***"no substantial denial of the measure of nature justice that the Act requires to be given"****. Each of these three elements could require further consideration.*

*73 First, although the statement of "****basic requirements****" is said not necessarily to be exhaustive, one of the factors which appears to have been excluded is compliance by the claimant with s 13(2) of the Act. According to that provision, a payment claim* ***"must"*** *do certain things. The basis for reading "must" as* ***"must but need not"*** *is not explained. It does not appear to accord with the approach adopted, albeit in relation to very different legislation, in SAAP. On the other hand,* ***Brodyn*** *may be read as saying that satisfaction of this condition depends on the opinion of the adjudicator: see* ***Climatech*** *[2005] NSWCA 229 at [43]-[48].*

74 Further, at [56] ***Brodyn*** *cast doubt on the proposition that "compliance with the requirements of s 22(2)" is a precondition to a valid exercise of power. It is suggested that the matters identified in that provision could involve* ***"extremely doubtful questions of fact or law"****. The judgment continues:* ***"… it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered."***

That is suggested to be inconsistent with views expressed by Palmer J in ***Multiplex Constructions Pty Ltd v Luikens*** *[2003] NSWSC 1140. This reasoning would seem to say that what might be required by s 22(2) is not merely consideration of the matters (and only the matters) there identified, but also reaching a legally correct conclusion. That, however, is not what the section requires. Nor did Palmer J, in my view, suggest otherwise.*

75 Secondly, the reliance on Hickman is arguably misplaced. That case required the reconciliation of apparently mandatory provisions of certain regulations with a privative clause which purported to exclude all forms of prerogative relief. There are no such provisions requiring reconciliation in the Act.

*76 Thirdly, the argument that a failure to accord the statutory measure of natural justice is only a basic requirement if the denial is "substantial" is inconsistent with the reasoning of the High Court in **Re Refugee Review Tribunal; Ex parte Aala** (2000) 204 CLR 82 at [17]. What may have been intended was a reflection that the content of procedural fairness, given the statutory context, was limited, but that is a different point.*

*77 These considerations suggest that there may be room for debate as to the second question identified by Hodgson JA at [47] above, namely whether **Brodyn "set the requirements for validity too low, particularly in relation to the application of s 22 of the Act"**. However, the answer to that question may well depend upon a particular understanding of what **Brodyn** decided in this regard, a matter which has yet to be debated.*

32 And in ***Climatech***, Basten JA said this:

43 The next question is whether the existence of a valid payment claim, which complies with s 13(2) is an essential precondition to a valid determination. A related question is whether, even if there is a valid claim, a determination which appears to go beyond the parameters of the claim is itself a valid determination: see [24] and [26] above.

*44 For reasons explained in **Hargreaves** at [72]-[77], it is not possible to construe s.13(2) as doing otherwise than imposing mandatory requirements with respect to the making of payment claims. However, it does not follow that the Court should set aside a determination in circumstances where, in its view, the claim does not satisfy those requirements, or the determination goes beyond the parameters of the claim, properly understood. Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to inferior courts, it has been said that there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker's opinion in that regard: see **Parisienne Basket Shoes Pty Ltd v Whyte** (1938) 59 CLR 369 at 391 (Dixon J). A factor favouring that approach is "the inconvenience that may arise from classifying a factual reference in a statutory formulation as a jurisdictional fact": **Timbarra Protection Coalition Inc v Ross Mining NL** (1999) 46 NSWLR 55 at 72 (Spigelman CJ).*

45 In the present case, three factors militate in favour of treating elements identified in s 13(2) as properly dependent upon the satisfaction or opinion of the adjudicator. First, what is or may be a sufficient identification of matters for the purposes of a claim falls within the special experience which a qualified adjudicator is intended to bring to the task and is one which may well require evaluative judgment. Secondly, the requirement relates to a procedural step in the claim process, rather than some external criterion. Thirdly, the overall purpose of the Act, as reflected in its objects and procedures, is to provide a speedy and effective means of ensuring that progress payments are made during the course of the administration of a construction contract, without undue formality or resort to the law.

46 In my view the omission of reference to s 13(2) in the list of mandatory requirements identified in Brodyn, should be understood as giving effect to these principles.

33 For reasons I will give, I do not think that Basten JA's view ultimately leads to a different result from my view.

34 In my opinion, a document which purports to be a payment claim does not fail to be a payment claim, within the meaning of the Act, merely because it can be seen, after a full investigation of all the facts and circumstances, not to successfully identify all the construction work for which payment is claimed. This could be the case, for example, if there is some typographical omission or other error in relation to one of a large number of items included in the claim; and the question whether or not the other party, by reason of its knowledge of the project, would have been able to fill in or correct that error could be one depending on a great deal of evidence concerning the circumstances of the case. In my opinion, it is inconceivable that it was the intention of the legislature that the existence of a payment claim under the Act should depend on that kind of consideration.

35 It is true that, if a payment claim does not identify the work in a way comprehensible to the respondent to the claim, the respondent will be in difficulty in formulating a payment schedule, and this may give rise to further difficulty in any adjudication proceedings, inter alia because of the provisions to which I referred in par.[18] above. But in my opinion, if a respondent is unable to identify some of the work in respect of which a payment claim is made, it can in the payment schedule say it does not propose to make any payment in respect of that work because it cannot identify the work, and because for that reason it disputes that the work was done or done to a standard justifying payment, or was within the contract or within any variation of it, and that any pre-condition to payment was satisfied. If an adjudicator then determined that the work was not identified in the payment claim, presumably he or she would not award any payment in respect of that work; and if the adjudicator determined that it was identified, the adjudicator could address matters put in issue in that general way by the respondent.

36 That is, I do not think a payment claim can be treated as a nullity for failure to comply with s.13(2)(a) of the Act, unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made.

37 I do not think this view is inconsistent in the result with that expressed by Basten JA in ***Hargreaves*** and ***Climatech***. He expressed the view that successful identification is a mandatory requirement, but that intervention by the Court was not justified because the legislature has indicated an intention to treat that requirement as dependent on the satisfaction of an adjudicator. That must mean that a payment claim which purports in a reasonable way to identify the work in respect of which the claim is made is sufficient to support a valid determination by an adjudicator, even if it could be proved to a court that the payment claim did not successfully identify all of the work in question.

38 If a payment claim which thus purports to identify the work in respect of which the claim is made is sufficient to support a valid determination, as Basten JA says, it would in my opinion be wholly inconsistent with the scheme of the Act if it was not also sufficient to support a cause of action under s.15 of the Act in a case where no payment schedule is served. Otherwise, a respondent could avoid the effect of the Act by not serving a payment schedule, and defending the s.15 proceedings by raising a question as to identification, which could be as to just one of many items in a claim and could be such as to depend upon a very detailed examination of all the circumstances of the contract.

CONCLUSION

39 In the present case, in my opinion the payment claim and accompanying progress claims 5 and 6 did purport in a reasonable way to identify the work in respect of which the claim was made, and there was no submission to the contrary. In those circumstances, it would not be a defence to the cause of action under s.15 of the Act to show that the payment claim was not in all the circumstances entirely successful in identifying all the work; so even though that question could arguably require a final hearing, rather than being one appropriate for summary disposal, this is not enough to raise an arguable defence or to justify setting aside the summary judgment. In case of a payment claim that purports in a reasonable way to identify the work to which the progress payment relates, where the respondent cannot identify all the work in question, the respondent's remedy is not to ignore the payment claim but to serve a payment schedule as discussed in par.[35].

40 I propose the following orders:
1. Leave to appeal granted, Notice of Appeal to be filed within 7 days.
2. Appeal dismissed.
3. Appellant to pay respondent's costs of the application for leave and of the appeal.

41 **SANTOW JA**:
INTRODUCTION
This leave to appeal essentially concerns what are the minimum requirements for a valid "*payment claim*", so as to satisfy the statutory requirement that it "*must identify the construction work (or related goods and services) to which the progress payment relates*"; s13(2)(a) of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Act"). I shall refer to this by shorthand as "the identification requirement". That question arises under an Act whose object and the means of achieving it, are stated in the Act itself.

42 The Act states as "*the object*" of that Act "*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 supplying of those goods and services*"; s3(1) of the Act [emphasis added].

43 The Act then states at s3(2) that: *"[T]he 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 payment claim by the person claiming the 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".

44 Thus the overall purpose of the Act is in my opinion correctly stated by Basten JA in ***Co-ordinated Construction Co Pty Limited v Climatech (Canberra) Pty Limited*** (2005) NSWCA 229 at [45]: "*…to provide a speedy and effective means of ensuring that progress payments are made during the course of the administration of a construction contract,* ***without undue formality or resort to the law***" [emphasis added].

45 This leave to appeal seeks to set aside a summary judgment whereby Total Process Services Pty Ltd ("Total") (the respondent in this appeal and claimant in the sense that it is the party claiming payment) was adjudged entitled to recover the unpaid portion of the claimed amount from Nepean Engineering Pty Ltd ("Nepean") (the appellant in this appeal and "respondent" to the payment claim). This was as a debt due to Total, that entitlement relying upon s15(2)(a)(i) of the Act. It applies where no responding payment schedule had been furnished by Nepean. It was here not furnished on the basis that Nepean considered that the payment claim failed to satisfy s13(2)(a) of the Act, as it was said not to identify the construction work to which the progress payment relates.

46 I have had the advantage of reading the judgment of Hodgson JA. While I agree in the result, I would wish to go further in identifying the minimum requirements for a valid payment claim. Hodgson JA concluded that, "*the payment claim and accompanying progress claims 5 and 6 did purport in a reasonable way to identify the work in respect of which the claim was made*". This was with the result that "*it would not be a defence to the cause of action under s15 of the Act to show that the payment claim was not in all the circumstances entirely successful in identifying all the work*". Thus "*even though that question could arguably require final hearing, rather than being one*

appropriate for summary disposal, this is not enough to raise an arguable defence or to justify setting aside the summary judgment"; see Hodgson JA at (39).

47 I agree with Hodgson JA that the identification requirement in s13(2)(a) of the Act is not to be made so demanding as to preclude a summary judgment in an appropriate case. I also agree that this is such a case, that is, one where the identification requirement has been satisfied, though tested only in proceedings by way of summary judgment. I would however wish to give additional content to his formulation of the test for what is the minimum necessary to satisfy the identification requirement; that the payment claim "*purport in a reasonable way to identify the work*". I respectfully disagree that a payment claim cannot be treated as a nullity "*unless the failure is patent on its face*".

48 I acknowledge that the law does regularly employ the concept of reasonableness notwithstanding that it be what the late Julius Stone called a "legal category of indeterminate reference". But here, consistent with the object of the Act and the means for its achievement, I consider that there must be sufficient specificity in the payment claim for its recipient actually to be able to identify a "*payment claim*" for the purpose of determining whether to pay, or to respond by way of a payment schedule indicating the extent of payment, if any. Nepean needs to be in a position to determine in meaningful fashion whether to make payment, or else dispute it with reasons so as in that case to permit adjudication of the dispute, utilising the summary procedures under the Act. Those requirements underlying s13(2)(a) are satisfied in my view by a relatively undemanding test, though still one with some content; one which recognises the mandatory character of s13(2)(a) signalled by the word "must". It is that "*the relevant construction work (or related goods and services) must be identified sufficiently to enable the respondent to understand the basis of the claim*". This moreover is an objective not subjective test, taking into account the background knowledge each of the parties derive from their past dealings and exchange of documentation. I here respectfully agree with what Hodgson JA earlier said in ***Climatech***: "*I note also that s 13(2)(a) requires that a payment claim 'identify' the construction work or related goods or services to which the payment relates. This requirement must be interpreted, in my opinion, having regard to the requirement in s14(3) that the payment schedule indicate the respondents' reasons for withholding payment, the limitation on the adjudication response in s20(2B) to those reasons, and the corresponding limitation in s22(2)(c), as well as the circumstance that, … payment claims may include amounts that are not (in a narrow sense) for construction work that has actually been carried out (or) for related goods and services that have actually been supplied.* ***In my opinion, the relevant construction work or related goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim****; ….*" (at [25]) [emphasis added]

DISPOSITION

49 I adopt gratefully the exposition of the factual background to this appeal as set out in the judgment of Hodgson JA though for reasons earlier foreshadowed, I do need to say something more about the description of the payment claim in issue in the present case. I should note at the outset that there was no suggestion that the payment claim was not made in good faith and in purported compliance with s13(2) of the Act, both minimal requirements of the Act.

Description of Payment Claim

50 The payment claim in dispute is set out at AB, 55. It is dated 22 February 2005. The payment claim incorporates two outstanding progress claims, progress claim 5 and progress claim 6 (AB, 56-65) in similar format. They were correctly treated as inseverable.

51 The amount listed as claimed under progress claim 5 is $201,275.62 (to which is added GST of $20, 127.56). The amount listed as claimed under progress claim 6 is $35,132.50 (to which is added GST of $3,513.25). The sum total claimed, including GST, was therefore $260,048.93 in the document headed "Final Claim" (AB, 55).

52 Attached to that overall payment claim were progress claims 5 and 6. Progress claim 5 is set out at AB, 61-65. It is there described as a "*pro forma tax/ invoice statement*". It bears the date 30 September 2004 (AB, 61) and is for an amount claimed of (with GST) $221,403.18. It earlier sets out "*works carried out to date*" plus "*variations*" for a "*works to date*" aggregate of $672,248.68. There follows by way of deduction a figure for "*payments to date*" and "*outstanding to date*".

53 The invoice is followed by four pages of spreadsheets relating to contract works performed (AB, 62-65). These spreadsheets were properly understood by the parties as listing the specifications of the pipes welded, in terms of the type and size of the pipes (T, 13). They contain data as to the number of lengths of pipe supplied and the diameters of those lengths, the number of gaskets and other fittings and the numbers of butt welds performed (affidavit of Peter Maloy, 17 June 2005: AB, 50).

54 For example, at AB, 62 in the first two columns, "SC1" refers to steel carbon 1 pipes and "DN" appears to be the diameter of the pipes. The references to PP1, PP2 and PP3 are to quantities claimed in previous progress claims (T, 32).

55 It is clear and undisputed that the work for which payment is claimed consisted of welds on pipes and their installation; see para 6 of the affidavit of Mohammad Uppal, the engineer from Nepean, of 14 July 2005 and exhibit PMI. The only complaint articulated by the appellant was that the physical location of the welds was not specified; that is to say, it was not clear to which weld on which pipe the references in the spreadsheets referred (T, 13-14, 26). It was however conceded in argument that it would be possible (if inconvenient) to identify the new welds by referring to previous progress claims and eliminating from the list those already claimed (T, 14, 30).

That to my mind disposes of any conceivable deficiency from that omission, though I would not consider that the omission precluded compliance with s13(2)(a) in any event.

Progress Claim 6

56 Progress claim 6 is set out at AB, 56-59. It consists of a similar pro forma tax invoice statement dated 17 November 2004 for an "*amount claimed*" (with GST) of $38,645.75. The invoice stated that the claim relates to "variations 4-6" (AB, 56). It is followed by three pages of spreadsheets entitled Variation No 4, Variation No 5 and Variation No 6 (AB, 57-59). Reference is made in the invoice in the cumulative total to "Approved Variations". No claim is made for them; they form part of the cumulative figure for "*Total Works to Date*" of $707,381.18. There follows by way of deduction a figure of "*payments to date*" and "*outstanding to date*" leaving a net $201,275.62 (being the amount in progress claim 5).

57 On these spreadsheets are listed a series of two or three line entries indicating variations made to lines of piping, the labour required to perform these variations, and in some cases, the reason why variation was required (most frequently "*due to drawing error*"). No isometric drawing numbers are provided to allow the physical location of the variations to be identified (affidavit of Mohammad Uppal, 14 July 2005: AB,109T-114U). I make the same comment on that omission.

58 Mr Maloy in his earlier mentioned affidavit at para 4 explains the format of the relevant invoices which I quote below:

"*4. I annex and mark respectively "B", "C", "D" and "E", Progress Claims numbers 1, 2, 3 and 4. Those progress claims all provided the same level of detail as progress claim 5 in identifying the work the subject of the claim and also, with the obvious exception of the first progress claim, set out the materials supplied and the hours of labour performed in respect of each previous progress claim. This format was required by the defendant as it allowed a ready comparison of the actual costs and usage of materials and labour with the "Materials Take Off" or MTO which was the original estimate of the requirements of the job as to materials and labour. It was therefore necessary to set out all the work that had been performed on the project, aggregate that work and then price that work to reach a total value for the work performed on the project and then deduct from that total figure payments which the defendant had already made, with the balance figure becoming the amount of the progress claim. In respect of progress claims 1, 2, 3 and 4, all were paid by the defendant based on information in that level of detail.*"

59 It can be taken that the reference to "*format*" was not disputed. There was dispute as to whether the relevant progress claims all provided the same level of detail, in terms of the location on the relevant pipes where either welds occurred (progress claim 5) or the variations occurred (progress claim 6). Although the trial judge, Garling DCJ, relied, inter alia, on the fact that past payments of about $470,000 had been made on payment claims in a form similar to those progress claims 5 and 6, that is now disputed at least so far as the location of the welds are concerned. This would be the kind of matter that, if relevant, would be tested properly were the matter to have gone to trial, rather than be resolved by way of summary judgment. But I consider that identifying the physical location of the welds or the precise location of the variations on particular pipings were neither of them necessary in order for the payment claim to "*identify the construction work … to which the progress payment relates*".

60 Nor do I consider that, even if the variations were not sufficiently described for Nepean to know whether or not there were in truth variations to the contract, this would render progress claim 6 one which failed to "*identify the construction work … to which the progress payment relates*" for purposes of s13(2)(a) of the Act. The respondent to the payment claim (Nepean) could have simply responded by payment schedule declining to pay on that basis. Then that issue could have gone to speedy and informal adjudication under the Act, without it being either necessary or appropriate for any court hearing formally to determine that matter. To deem otherwise would be antithetical to the stated object of the Act and the stated means to achieving it.

61 That takes me to what I consider to be the minimum requirement to satisfy s13(2)(a) of the Act. In answering that question, the distinction needs to be kept clearly in mind between what is **sufficient** to satisfy s13(2)(a) of the Act and what is **necessary** to do so. Thus when McDougall J at first instance in *Isis Projects Ltd v Clarence Street Pty Ltd* [2004] NSWSC 714 at [37] and [38], (approved on appeal *Clarence Street Pty Ltd v Isis Projects Ltd* [2005] NSWCA 391 on 16 November 2005) concluded that the requirement in s13(2)(a) was capable of being satisfied by the following, he did not purport to be exhaustive as to what would do so. Nor was he to be understood as treating a payment claim in identical format to previous payments as a necessary condition for compliance, as distinct from a circumstance which pointed to the payment claim being, in an objective sense, well capable of being understood by the parties circumstanced as they were. I quote McDougall J with that in mind:

"*[37] In principle, I think, the requirement in s 13(2)(a) that a payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where:*

(1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;

(2) That reference is supplemented by a single line item description of the work;

(3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;

(4) There is a summary that pulls all the details together and states the amount claimed.

[38] Where payment claims in that format have been used, apparently without objection, on 11 previous occasions, it is very difficult to understand how the use of the same format on the 12th and 13th occasions could be said not

to comply with the requirements of s 13(2)(a). If payments claims in that format had sufficiently identified the construction work to which the progress payment claimed related on 11 previous occasions, I find it hard to understand how they would lose that character on the 12th and 13th occasion."

62 The proper starting point is the overall purpose under the Act whose objects I have earlier set out. Although in *Climatech* Basten JA was directing himself to the distinct question whether the existence of a valid payment claim which complies with s13(2) was an essential pre-condition to a valid determination by the adjudicator of the Act, what he says as to that purpose is equally applicable here. It is "*to provide a speedy and effective means of insuring that progress payments are made during the course of the administration of a construction contract, without undue formality or resort to the law*" (at [45]).

63 I agree generally with Hodgson JA's observation at [38] that "*if a payment claim which thus purports to identify the work in respect of which the claim is made is sufficient to the support of valid determination, as Basten JA says, it would … be wholly inconsistent with the scheme of the Act if it was not also sufficient to support a cause of action under s15 of the Act in a case where no payment schedule is served*". This is however subject to one reservation. It is inherent in Hodgson JA's earlier observation in ***Climatech*** at [25] where he observed that "*the relevant construction work or related goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim*", in the objective sense of a party circumstanced as Nepean.

64 Here, Nepean has, clearly enough, information sufficient to understand the basis of the claim. As Mason P observed on appeal in ***Clarence Street Pty Ltd*** (supra):

"[36] According to the appellant, the focus of the inquiry should have been whether Progress Claim 12 and Progress Claim 13 provided sufficient detail of the work the subject of the claims to enable the appellant to make its own assessment of the amount payable and to prepare a payment schedule accordingly. Once again, this tends to state the problem in terms of circularity rather than offer a basis for arguing that the trial judge erred in construing and applying s13(2)(a). It also tends to elide the distinction between the informative and the persuasive roles of a payment claim. Section 13(2) prescribes matters that must be brought to the attention of the recipient, who then has the option of paying in full or submitting a payment schedule explaining why payment is withheld. It may be expected that a claimant will be considered to persuade the other party to accept the claim and pay promptly, but s13(2) makes no prescription in this regard."

65 I understand Mason P to be rejecting that persuasive content is necessary "*to enable the appellant to make its own assessment of the amount payable and to prepare a payment schedule accordingly*". But he does not disavow the necessity for identification of construction work to which the progress claim relates at the minimum level where the respondent to the claim is able to understand the basis of the claim. But there is no legal necessity to include any material directed merely to persuading the respondent to accept the claim and pay promptly.

66 Apart from the guidance that a purposive construction of the Act provides, there are indications in the text itself that point to the broad approach that I have described. Thus in s13(2)(a) the connotation of the word "*relates*", like its cognate expression "*in relation to*", "*requires no more than a relationship, whether direct or indirect, between two subject matters …* "; McHugh J in ***O'Grady v The Northern Queensland Company*** (1990) 169 CLR 356 at 376. That is of course subject to any contrary indication derived from context or drafting, there being none such evinced here.

67 Brennan J in *O'Grady* (supra) at 364-5 is to similar effect. He emphasised that in the context of the legislation in question the phrase "*in relation to*" afforded a connection, which could be direct or indirect, between "*proceedings*" on the one hand and "*mining*" on the other. He observed that the latter was widely defined, going beyond what would be ordinarily understood by the phrase "*mining as such*".

68 So too "*construction work*", defined in s5 of the Act, goes well beyond construction work as such. The definition, quoted below, identifies a series of categories of construction work used in a very broad sense. This strongly supports that identifying the construction work to which the progress claim relates requires no more in physical detail than identifying a particular category of construction work. There can be no necessity to identify for example the location on a particular pipe of a particular weld, as prerequisite for the payment claim to be valid in a case such as the present. Thus to quote the definition of "*construction work*", taken from s5 of the Act:

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) the 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.

69 Nor should too much be made of any contradistinction between the word "*identify*" and the word "*indicate*" though it does have some significance. In s13(2)(b) the requirement to "*indicate*" the amount of the progress payment that the claimant claims to be due is in contrast to "*identify*" in s13(2)(a). There is a reciprocal provision under s14 dealing with payment schedules. There s14(2)(a) requires the payment schedule to "***identify** the payment claim to which it relates*" but to "***indicate** the amount of the payment (if any) that the respondent proposes to make …*". What is significant is that s14(3) merely requires that the schedule "***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*". That supports the conclusion that the reasons for not paying do not need to descend into excessive detail.

70 This puts into perspective the requirement in s20(2)(b) of the Act that the "*reasons*" for withholding payment must be limited to those identified in the payment schedule. That the reasons may be merely "*indicated*" renders that requirement perfectly comprehensible in terms of the object of the Act. It does not imply that the payment claim must be correct in every detail, so long as the basis of the claim can be understood by its recipient for purposes of responding in terms of the Act. Thus it is perfectly open to the respondent to indicate as a reason for not paying that, for example, it cannot be ascertained whether the variation was or was not within the scope of the contract from the detail provided. The notion that the claimant should set out how it can be concluded that the variation was in truth a variation to the contract falls into the realm of persuasion rather than identification of the construction work to which the progress payment relates.

71 In ***Petrusevski v Bulldogs Rugby League Club Ltd*** [2003] FCA 61 Sackville J construed the word "*identify*" for purposes of representative proceedings requiring that group members be described or otherwise identified. He posed the question why it was necessary in terms of the legislation to describe or identify group members in a representative proceeding. The answer was that a person must be able to ascertain from the description of the represented group whether he or she is a member of that group; at [19 - 21]. Here similarly, the purpose under the Act is simply to ascertain the basis of the claim, for purposes of determining whether to issue a payment schedule and, if one is provided, to indicate the amount of the payment, if any, that the respondent proposes to make.

72 Such a purpose is compatible with the payment claim being in some detail incorrect. If the construction work has been identified in categories broadly in line with the definition of construction work contemplated by the construction contract, which may itself be merely oral, this should ordinarily enable the respondent to understand the basis of the claim and be able to respond accordingly, so satisfying s13(2)(a) and notwithstanding that there may be some error in non-essential descriptive details.

73 It could not be the case that the question whether the claim complies with s13(2) is a matter solely for adjudication under s17. If it were solely a matter for the adjudicator to determine, there would then be no means of resolving compliance with s13(2) if there were no payment schedule and therefore no adjudication. I consider summary judgment under s15 can in an appropriate case be resisted on that basis and resolved in such proceedings provided argument perhaps even of an extensive kind is capable of doing so. Compare Barwick CJ in ***General Steel Industries Inc v Commissioner for Railways (NSW)*** (1964) 112 CLR 125 at 130 where he said: "*On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed.*"

Given the test I would adopt for s13(2)(a) of the Act, I consider such argument was capable of resolving the matter in favour of compliance and did so.

OVERALL CONCLUSION

74 For the reasons earlier stated, I agree in the overall conclusion reached by Hodgson JA and with the orders he proposes. In particular applying the test as I have formulated it and so as to comport with the object of the Act, I agree that the payment claim satisfied what are mandatory requirements in s13(2)(a) of the Act.

75 **IPP JA:** I have had the benefit of reading the reasons to be published by Hodgson JA and Santow JA.

76 In regard to the issue the subject of this application for leave to appeal, for the reasons given by Hodgson JA I would construe the *Building and Construction Industry Security of Payment Act* 1999 (NSW) as follows. Provided

that a payment claim is made in good faith and purports to comply with s 13(2) of the Act, the merits of that claim, including the question whether the claim complies with s 13(2), is a matter for adjudication under s 17 and not a ground for resisting summary judgment in proceedings under s 15. In particular, if no adjudication is sought summary judgment cannot be resisted on grounds that could have been raised by way of a payment schedule leading to adjudication.

77 I agree with the orders proposed by Hodgson JA.

Mr. S. Donaldson with Mr. G. Carolan for claimant instructed by Marsdens Law Group, Campbelltown for claimant
Mr. P. Merity for opponent instructed by Peter Merity, Parramatta for opponent