JUDGMENT : Nicholas J : Supreme Court of New South Wales : 9th April 2003.

1 By its Notice of Motion the Plaintiff seeks summary judgment against the Defendant pursuant to SCR Pt 13 r 2 in the sum of $13,962,904.00 pursuant to s 15(2)(a) *Building and Construction Industry Security of Payment Act* 1999 (NSW) (the Act). The amount claimed is the unpaid portion of the amount claimed by the Plaintiff in its payment claim dated 20 December 2002. The Defendant opposes the application and asserts that there are a number of triable issues in relation to the payment claim.

Background

2 By written agreement dated 18 July 2001 (the contract), the Plaintiff, as head contractor, agreed to design and construct certain works at Nos. 461-465 Glebe Point Road, Glebe, New South Wales (the works) for the Defendant as principal. The works included the construction of a multi-story residential building consisting of 46 apartments, basement car parking, landscaping works, residential gymnasium and a swimming pool (the Blackwattle Project). The contract incorporated the Australian Standard general conditions of contract for design and construct AS 4300-1995, as amended, as well as numerous other documents specified in para 5 of the Summons filed 11 February 2003. The Superintendent under the contract was Greencliff (CPL) Developments Pty Ltd of the same address as the Defendant, namely 281 Elizabeth Street, Sydney, New South Wales.

3 On 20 December 2002 the Plaintiff served on the Superintendent by facsimile Progress Claim No. 20 for the sum of $14,915,255.00 inclusive of GST, pursuant to cl 42.1 of the contract.

4 On 20 December 2002 the Plaintiff served on the Defendant by facsimile the documents which evidence a claim for the same amount as made in Progress Claim No. 20. The Plaintiff contends that these documents constitute a payment claim within the meaning of s 13 of the Act and are hereafter referred to as the payment claim.

5 On 23 January 2003 the Superintendent issued payment certificate No. 20 in accordance with cl 42.1 of the contract which assessed the amount payable under Progress Claim No. 20 to be $952,351.00.

6 On 28 January 2003 the Defendant paid the Plaintiff the sum of $952,351.00 in accordance with payment certificate No. 20.

7 On 11 February 2003 the Plaintiff suspended the carrying out of works under the contract, apparently in reliance upon ss 15(2)(b) and 27 of the Act.

8 There is no issue as to service of each claim, and it is common ground that the Defendant did not provide to the Plaintiff a payment schedule within the meaning of s 14 of the Act within 10 business days after service of the payment claim as prescribed, or at all.

9 The unpaid portion of the amount claimed in the payment claim after deducting the sum of $652,351.00 is the sum of $13,962,904.00 for which the Plaintiff seeks judgment under s 15(2)(a) of the Act.

The documents

10 The contract is a lump sum contract. Under the formal instrument of agreement the parties agreed, relevantly, in these terms:

> "*1. Subject to the Terms and Conditions of the Contract and in consideration of the Principal paying the Contractor the lump sum of $26,618,856.00 inclusive of goods and services tax, the Contractor will carry out the work under the Contract on the terms and conditions contained in the Contract documents*".

11 As item 46 in the Annexure Part A to the contract shows, the time under cl 42.1 for payment claims is the 28th day of each month or next working day.

12 To the extent relevant, cl 42.1 of the Contract provides:

> "*42.1 At the times for payment claims or upon completion of the stages of the work under the Contract stated in Annexure Part A and upon the issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.5, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then otherwise due to the Contractor arising out of the Contract. ...*
>
> *If the Contractor submits a payment claim before the time for lodgement of that payment claim, such early lodgement shall not require the Superintendent to issue the payment certificate in respect of that payment claim earlier than would have been the case had the Contractor submitted the payment claim in accordance with the Contract.*
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> *Within 14 days of receipt of a claim for payment, the Superintendent shall assess the claim and shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the Superintendent's opinion, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall also set out, as applicable, in any payment certificate issued pursuant to Clause 42, the allowances made for—*
>
> *(a) the value of work carried out by the Contractor in the performance of the Contract to the date of the claim;*
> *(b) amounts otherwise due from—*

(i) the Principal to the Contractor; and
(ii) the Contractor to the Principal;
(c) amounts assessed under Clause 46.4 and not duly disputed;
(d) amounts paid previously under the Contract;
(e) amounts previously deducted for retention moneys pursuant to Annexure Part A; and
(f) retention moneys to be deducted pursuant to Annexure Part A,
arising out of the Contract resulting in the balance due to the Contractor or the Principal, as the case may be.
...

Subject to the provisions of the Contract, within 28 days of receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, and within 14 days of the issue of a Final Certificate, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in such certificate as due to the Contractor or to the Principal, as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause 42.1 shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or the Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable".

13 The documents said to constitute the payment claim are part of Exhibit A, pp 246-266. The letter (p 246), from the Plaintiff to the Defendant dated 20 December 2002 omitting formal parts, is in the following terms:
"*416-465 Glebe Point Road, Glebe*
PROGRESS CLAIM NO 20
Please find enclosed our Payment Claim which indicates the amount of the progress payment that WCG claims to be due for work carried out to 20 December 2002, in the net sum of Fourteen Million, Nine Hundred and Fifteen Thousand, Two Hundred and Fifty Five Dollars including GST ($14,915,255)".

14 Exhibit A, p 247 was the first page of the documents which gave particulars which identified the items of work claimed to have been done under the contract, and the amounts of payments claimed to be due for the work done. Page 247 contains as a heading the words "PROGRESS CLAIM SUMMARY" beneath which the site of the project, the claim period and claim number are identified. Immediately beneath that information appear the following words: "*This Claim is made under the Building and Construction Industry Security of Payment Act 1999*".

15 The documents which constitute Progress Claim No. 20 are found in Exhibit A at pp 224-245. Omitting formal parts, the letter (p 224) from the Plaintiff to the Superintendent dated 20 December 2002 is in the following terms:
"*461-465 Glebe Point Road, Glebe*
PROGRESS CLAIM NO 20
Please find enclose details of our Progress Claim No. 20, for work carried out to 20 December 2002, in the net sum of Fourteen Million, Nine Hundred and Fifteen Thousand, Two Hundred and fifty Five Dollars including GST ($14,915,255). This is not a tax invoice.
We hereby certify that as at the date of this Progress Claim, no wages are due or owing by WALTER Construction Group Limited, and all insurances required under the Building Contract are current.
Please note that we would be pleased to provide any additional information you may require to assist in your assessment of our Claim.
We look forward to receiving your progress payment certificate in due course. A tax invoice will be issued upon certification".

The Plaintiff's contentions

16 In outline, the Plaintiff's case that the payment claim dated 20 December 2002 was a valid payment claim under the Act proceeded as follows. It was common ground that on that date service had been effected of Progress Claim No. 20 on the Superintendent pursuant to cl 42.1 of the Contract, and of the payment claim on the Defendant.

17 It then contended that it had satisfied the several requirements of s 13 of the Act which provides:
"*13(1) A person who is entitled to a progress payment under a construction contract (the **claimant**) may serve a payment claim on the person who under the contract is 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 for the construction work done (or related goods and services supplied) to which the payment relates (the **claimed amount**), and*
(c) must state that it is made under this Act".

18 Service on the Defendant being the person liable to make the payment under the contract met the requirement of s 13(1). It was then contended that the requirements of s 13(2) were met in that:
(a) the construction work (or related goods and services) to which the progress payment related was identified (Exhibit A pp 247-265);

(b) the amount of the progress payment claimed to be due for the construction work (or related goods and services supplied) to which the payment relates was indicated (Exhibit A pp 246-247); and

(c) the payment claim stated that it is made under the Act as to which the statement appearing in Exhibit A on p 247, quoted in para 14, was relied upon.

19 Accordingly, s 14 of the Act falls for consideration, the relevant provisions of which are:

*"14(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 ...*

(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".

20 It is common ground that no payment schedule has been provided. The consequence of the failure to do so within either time required by subs 14(4), is that the Defendant became liable to pay the claimed amount to the Plaintiff on the due date for the progress payment to which the payment claim related.

21 Under cl 42.1 of the contract the due date for payment was 28 days from 28 December 2002 which was said to be 15 January 2003.

22 The progress certificate issued by the Superintendent on 23 January 2003 for the sum of $952,351.00 was outside the time provided for by the contract. It was not a payment schedule under s 14(2) and (3) and it was not provided within the requisite period under s 14(4)(b) of the Act.

23 The Plaintiff submitted that as a consequence of failing to provide a payment schedule the Defendant became liable to pay the unpaid portion of the claimed amount being the sum of $13,962,904.00, pursuant to s 15(1) and (2)(a) of the Act. Those subsections provide:

"15(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.

15(2) In those circumstances, the claimant:

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

24 Thus the Plaintiff contends it is entitled to summary judgment in respect of the sum of $13,962,904.00 pursuant to s 15(2)(a) of the Act.

The Defendant's contentions

25 The Defendant contends that the payment claim is not a valid claim within the meaning of s 13 of the Act. It puts its case on four bases as serious issues to be tried in opposition to the claim for summary judgment.

26 Firstly, the Defendant submits that the payment claim was premature. It was argued that under cl 42.1 of the contract the time for making the December payment claim was 28 December 2002. As there was no entitlement under the contract to a progress claim as at 20 December 2002, the Plaintiff was not then entitled to serve a payment claim purportedly pursuant to s 13 of the Act. It was put that s 13(1) is predicated on the Plaintiff establishing prior to service of a statutory payment claim its present entitlement to a progress payment under the contract.

27 It was said that this followed from the proper construction of s 8, the relevant provisions of which are:

"8(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 ...

... is entitled to a progress payment under this Act, calculated by reference to that date.

*(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:

(i) a date on which a claim for a progress payment may be made, or

(ii) a date by reference to which the amount of a progress payment is to be calculated,

in relation to work carried out or to be carried out (or related goods and services supplied or to be supplied) under the contract, or".

In this case the reference date under the contract was the 28th day of each month, and there was no contractual entitlement to make a progress claim earlier.

28 Secondly, it was submitted that as a precondition to being entitled to serve a payment claim the claimant must be, in the words of s 13(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 s 9(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 s 9(a). It followed that the requirement of s 13(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 s 13(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 s 13(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 s 13(1) must be a reference to the statutory entitlement created in the previous sections and not to the entitlement under the contract.

33 Thirdly it was submitted that the payment claim did not relate to construction work (or related goods and services) within the meaning of s 13(2)(a).

34 The definition of "construction work" is to be found in s 5 of the Act. It provides:

*"(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 or structure 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 and structures, 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 or structure, 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 or structure,

(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."

35 The definition of "related goods and services" is in s 6 which provides:

*"(1) In this Act, **related goods and services**, in relation to construction work, means any of the following goods and services:*

(a) goods of the following kind:
(i) materials and components to form part of any building, structure or work arising from construction work,
(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,
(b) services of the following kind:
(i) the provision of labour to carry out construction work,
(ii) architectural, design, surveying or quantity surveying services in relation to construction work,
(iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,
(c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.
*(2) Despite subsection (1), **related goods and services** does not include any goods or services of a kind prescribed by the regulations for the purposes of this subsection".*

36 It was submitted that the payment claim includes items which are outside the definitions thereby rendering it invalid as a claim within the statute.

37 These items are part of claimed variations in the total sum of $13,607,059.00 (Exhibit A p 247), details of which are at Exhibit A pp 251-264. The Schedule (p 264) discloses *"item LTR00922"* described as *"EOT Consolidated Claim (EOT, 19A, 25, 26, 26A and 26B only)"* for the sum of $3,140,022.00. This is a consolidation of extension of time claims previously made by the Contractor. Also disclosed is item LTR00928 described as "Special measures claim" for the sum of $1,863,799.00. The last item appears as LTR01032 described as "Further Entitlements claim" for the sum of $3,000,000.00. Reference was made to the letter dated 28 November 2002 from the Plaintiff to the Superintendent (Exhibit A p 264A) in which items LTR00922 and LTR00928 were referred to.

38 It was submitted that these claims, on their face, could not be said to relate to "*construction work*" or to be "related goods and services" as those terms are defined in ss 5 and 6 respectively.

39 In particular it was submitted that a progress payment made in respect of an extension of time claim cannot constitute a payment that relates to construction work as required by s 13(2)(a) of the Act. It was put that the introductory words to s 5 namely "... construction work means any of the following work ..." shows that physical work is contemplated as fundamental to an entitlement to a payment claim. Consequential loss occasioned by delay to the progress of the works under the contract is in a substantially different category.

40 As to the items which include delay or disruption costs, reference was made to cl 36 of the contract which provides:

"36 Where the Contractor has been granted an extension of time under Clause 35.5 for any delay or disruption caused by any of the events referred to in Clause 35.5(b)(i), the Principal shall pay to the Contractor such extra costs as are necessarily incurred by the Contractor by reason of the delay.
Where the Contractor has been granted an extension of time under Clause 35.5 for any delay caused by any other event for which payment of extra costs for delay or disruption is provided for in Annexure Part A or elsewhere in the Contract, the Principal shall pay to the Contractor such extra costs as are necessarily incurred by the Contractor by reason of the delay.
Nothing in this Clause 36 shall—
(a) oblige the Principal to pay extra costs for delay or disruption which have already been included in the value of a variation or any other payment under the Contract; or
(b) limit the Principal's liability for damages for breach of contract".

41 It was submitted that the precondition to the valuation of such a claim was the grant of an extension of time under cl 35.5 of the contract which had not been made in respect of the claims to which the items related. It was therefore submitted that to the extent that the payment claim sued upon includes items for delay or disruption costs for which an extension of time has not been granted the Plaintiff had failed to establish its entitlement to a progress payment as required by s 13(1).

42 Fourthly, it was submitted that the contract, being a lump sum contract pursuant to which the Plaintiff agreed to construct the project for the sum of $26,618,856.00 inclusive of GST, was a contract to which the Act does not apply. Reliance was placed upon s 7(2)(c) which provides:

"7(2) This Act does not apply to:
(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied".

43 It was put that the consideration payable for the work carried out under the contract in this case was by reason of the covenant in the contract as set out para 10 above. In such circumstances it cannot be said that the consideration payable should be understood to have been calculated by reference to the value of the work carried out or the value of the goods and services supplied.

44 Finally, the Defendant submitted that summary judgment should be refused having regard to the allegations raised in its Cross-Claim that the Plaintiff's conduct in serving the payment claim in the form therein pleaded was misleading and deceptive within the meaning of s 52 of the *Trade Practices Act* 1974 (Cth) para 45.

45 As I understood the submission, it was that the circumstances of the service of Progress Claim No. 20 (Exhibit A pp 224-245) with service of the payment claim (Exhibit A pp 246-266) when considered with the contents of the covering letters for each claim (Exhibit A p 224 and 246 respectively) and the placement of the statement "This Claim is made under the Building and Construction Industry Security of Payment Act 1999" on the document (Exhibit A p 247) found the inference that the Plaintiff intended to mislead and deceive the Defendant by concealing that the payment claim was made under the statute. It was this conduct of the Plaintiff in deploying both sets of documents at the same time that was said to be misleading and deceptive.

46 There was no evidence before the court apart from the document. It was submitted that this evidence was sufficient to establish circumstances which gave rise to serious triable issues.

The December payment claim

47 There was evidence relevant to the question as to the time for making the payment claim under the contract for the month of December 2002. The Plaintiff submitted that this evidence established that the parties had agreed that the claim for that month should be made on 20 December instead of 28 December 2002 as provided under the contract.

48 The evidence was in the affidavit of Mr Paul William Barber, a director of the Defendant, sworn 28 February 2003. It contained paragraph 21(d) which stated:

> *"21 Having reviewed the letter dated 20 December 2002, I say that, had I seen the letter and its enclosure at any time prior to 24 January 2003, I would:*
>
> *(d) remained cognisant of the arrangement for early lodgment of progress claim 20 to which I refer above, and would therefore have regarded the letter dated 20 December 2002 as having been submitted by WCG pursuant to and consistent with that arrangement".*

49 There was also the evidence in the affidavit of Jacques Yvan Gnany, a project director employed by the Superintendent, sworn 28 February 2003. In paragraph 12 of his affidavit he deposed to a meeting on 5 December 2002 attended by himself, Mr Barber, Mr David Winney (the commercial manager employed by the Plaintiff) and some others at which the timing of the payment of the November 2002 progress claim and the timing of the submission of the Plaintiff's December 2002 progress claim were discussed. On behalf of the Plaintiff the preference was expressed for payment of the November 2002 progress claim before Christmas although earlier than ordinarily would be the case, to enable the Plaintiff to pay its subcontractor's claims before the Christmas shutdown. Either Mr Barber or Mr Gnany informed the Plaintiff that arrangements would be made by the Defendant to meet the Plaintiff's preference.

50 There was also the evidence in the affidavit of Sean Andrew Fry, a quantity surveyor engaged by the Defendant, sworn 28 February 2003. In paragraph 11 he deposed to having had a telephone conversation with Mr Winney in early December 2002 in which the Plaintiff's December progress claim was discussed. He says that Mr Winney stated that he was trying to work out what precedent was set from the Christmas claim last year in relation to when the Plaintiff actually submitted that claim. He requested a copy of the December 2001 progress claim. Mr Fry, having located it, informed Mr Barber that it was dated 20 December 2001 and thereupon sent the first two pages of the December 2001 claim to Mr Winney.

51 The evidence was, unsurprisingly, not challenged. There was no evidence before the court which suggested that the Defendant did not accept the Plaintiff's entitlement to make the payment claim under the contract on 20 December 2002. It seems clear to me from the whole of the evidence, and I so find, that the parties had agreed that the payment claim under cl 42.1 of the contract should be submitted earlier than 28 December 2002 and that the Defendant accepted Progress Claim No. 20 served on 20 December 2002 as made in accordance with the contract. Using the language of s 8(2)(a)(i) of the Act I find that the parties agreed that the date on which the claim for the December progress payment may be made was 20 December 2002. (That the parties to a contract may do so was recognised in ***Brewarrina Shire Council v Beckhaus Civic Pty Ltd*** [2003] NSWCA 4 by Ipp JA where he said at para 53:

> *"53 As the contract was entered into on 3 October 2001, it seems that the first claim for payment was made prematurely. It may be that the parties, by their conduct, accepted that claims for payment should be made at times different to the times specified in cl 42.1, or that the monthly periods were to be calculated in a way that differed from that required by the contract. But there was no evidence to this effect and this does not appear to have been an issue before Macready AJ".*

The issues considered

The claim is premature

52 In ***Beckhaus v Brewarrina Council***, Macready, AJ, considered a submission with reference to s 13(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:

> *"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 ss 3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s 34) 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 s 12 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 s 13(1) refers to a contractual entitlement.

61 The trigger that commences the process that leads to the statutory rights in s 15(2) is the service of the claim under s 13. 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 s 8. 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, s 9 uses similar words to s 13 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 s 13 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".

(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 para 51).

"*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 clause 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 clause 42.2). .... While clause 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 s 13(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 s 13(1) of the Act is unsound.

56 Nevertheless it is appropriate to consider the alternative response to the Defendant's submission. On behalf of the Plaintiff it was put that under the contract a payment claim is not invalid if submitted before time, reliance being placed on that part of cl 42.1 which provides: *"If the Contractor submits a payment claim before the time for lodgment of that payment claim, such early lodgment shall not require the Superintendent to issue the payment certificate in respect of that payment claim earlier than would have been the case had the Contractor submitted the payment claim in accordance with the Contract".*

57 Thus a payment claim under the contract which is submitted before the agreed time will be treated as operative from that time as far as the Superintendent's obligation to issue a payment certificate is concerned. Accordingly, so it was argued, where (as in this case) the contract allows for early lodgment of a payment claim, the validity of a payment claim under s 13(1) will not be affected if it is made or served prior to the reference date fixed pursuant to s 8(2)(a)(i).

58 The provision under cl 42.1 of the contract relied upon by the Plaintiff establishes a procedure for dealing with a payment claim which has not been submitted in accordance with the contract, as its words make plain. In my

opinion, this arrangement is irrelevant to the identification of the date for the purpose of fixing the reference date under s 8(2)(a)(i).

59 The entitlement of a claimant pursuant to s 8(1)(a) and s 13(1) turns on the identification of the reference date as defined by s 8(2)(a)(i). It does not seem to me that there can be any statutory entitlement to a progress claim calculated otherwise than by reference to that date, noting that under s 8(1)(a) the entitlement is expressed to be "... on and from each reference date". The Act gives the Contractor a statutory right to recover money by issuing a claim (s 8 and s 13). It has been said that the Act offers to a claimant special statutory rights which override general contractual rights and place the claimant in a privileged position (***Jemzone Pty Ltd v Trytan Pty Ltd*** (2002) NSWSC 395 at para 41 per Austin J). In order to exercise these rights compliance with the requirements which establish them are necessary.

60 The date in this case was the 28th day of each month, unless varied by agreement. It follows that, but for the agreement to change the date to 20 December 2002, I would conclude that the Plaintiff was not entitled to make the statutory claim. In my opinion the Plaintiff's alternative submission must fail.

Claim does not relate to construction work (or related goods and services)

61 As has been noted (para 41) an objection to the validity of the claim is that it includes items not capable of being valued because none of the extension of time claims upon which these items depend have been granted. I have elsewhere expressed the opinion that proof of entitlement to payment under the contract is not required to establish entitlement to a progress payment under s 13(1) (para 55). In my view compliance with the contractual requirements for payment of these items is irrelevant to the entitlement to serve the statutory payment claim. Failure to comply with such requirements does not render the statutory payment claim invalid.

62 Essentially the Defendant submits that a progress payment made in respect of an extension of time claim cannot constitute a payment that relates to construction work (or related goods and services) under s 13(2)(a). It seems to me the submission misconceives the requirement under the subsection.

63 Section 13(2)(a) requires the payment claim to identify the construction work to which the progress claim relates. In ***Jemzone Pty Ltd v Trytan Pty Ltd*** at para 43, Austin J stated his opinion that 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.

64 Further, in ***Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd*** (2002) NSWCA 136 Davies AJA at para 20 said:

> *"(20) However, subs (2) of s 13 of the Act should not be approached in an unduly technical manner keeping in mind the considerations to which counsel pointed. The terms used by subs (2) of s 13 are well understood words of the English language. They should be given their normal and natural meaning. As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner".*

65 Doubtless it is a purpose of the requirement that a respondent served with a payment claim is provided with adequate information to enable it to provide a payment schedule under s 14.

66 The payment claim of 20 December 2002 adequately identifies the work (or related goods and services) to which the progress payment relates, and that is sufficient to meet the requirement of s 13(2)(a). The requirement is that the construction work (and/or related goods and services) to which the progress payment relates be identified. It is clear to me from the contents of the payment claim that they were, being the work and related goods and services provided under the contract in respect of the project at Nos. 461-465 Glebe Point Road, Glebe, New South Wales.

67 To demonstrate compliance with s 13(2)(a) it is irrelevant, in my opinion, 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 s 5 or s 6 respectively. Inclusion of a disputed item does not render a payment claim invalid. The statutory requirement for provision of payment schedules and the scheme for adjudication allow for the ventilation and determination of disputes following service of a payment claim under s 13. The Minister made this clear in his second reading speech when he said: *"Under part 3, when a payment claim is made, and the other party, called the respondent, does not intend to pay the full amount of the payment claim, it must issue a payment schedule stating the amount, if any, of the payment claim which will be paid and the reasons for not payment the amount claimed. The time for issue of the payment schedule is 10 business days after receipt of the payment claim. The payment schedule alerts the claimant to the existence of a dispute over payment and allows the claimant to immediately commence the adjudication process available under the legislation. This is a critical component of the bill as it provides a statutory early warning to claimants that the respondent does not propose to pay their claim in full".*

68 In a challenge which raises the question of compliance with s 13(2)(a) the question is not whether an item of the payment claim relates to construction work or related goods and services within s 5 and s 6 respectively, but whether the payment claim adequately identifies such work or goods and services. In this case the payment claim of 20 December 2002 clearly did so.

69 For these reasons the challenge to the validity of the payment claim on the ground of non-compliance with s 13(2)(a) must fail.

Application of the Act to the contract

70 At the outset the application of the Act to construction contracts must be kept in mind. Section 7(1) provides:

"7(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales".

71 Contracts to which the Act does not apply are described in s 7(2). The Defendant submits that this contract is within s 7(2)(c). A lump sum contract is not specifically excluded.

72 The determination of the Defendant's submission involves deciding where the onus of proof lies as to whether a contract is within a category under s 7(2) having regard to the proper construction of s 7 as a whole in its general statutory context. The relevant principle was stated in ***Vines v Djordjevitch*** (1955) 91 CLR 512 at 519: *"But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the parties seeking to rely upon the additional or special matter".*

73 Further consideration to the question was given in ***Chugg v Pacific Dunlop Ltd*** (1990) 170 CLR 249. The judgment of Dawson, Toohey and Gaudron JJ at 258-259 includes the following passage: *"Although the form of language may provide assistance, ultimately the question whether some particular matter is a matter of exception is to be determined "upon considerations of substance and not of form": Dowling v Bowie. And, of course, the necessity to have regard to substantive and not merely formal considerations is emphasized by the words of s. 168(1) of the Magistrates (Summary Proceedings) Act and like legislative provisions which make it clear that a matter may be classified as a statutory exception "whether it does or does not accompany the description of the offence".*

One indication that a matter may be a matter of exception rather than part of the statement of a general rule is that it sets up some new or different matter from the subject matter of the rule. See ***Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen***, per Dixon J. Such is ordinarily the case where, in the terms used in ***Reg. v Edwards***, there is a prohibition on the doing of an act "save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities". See ***Reg. v Hunt***, where Lord Griffiths considered the statement from "***Reg. v Edwards*** "an excellent guide to construction". If the new mater is a matter peculiarly within the knowledge of the defendant, then that may provide a strong indication that it is a matter of exception upon which the defendant bears the onus of proof".

(See also ***ADI Ltd v Environment Protection Authority; Environment Protection Authority v ADI Ltd*** (2000) A Crim R 335 per Foster AJA, paras 11-19.)

74 A stated object of the Act is in s 3(1) which provides:

"3(1) The object of this Act 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".

75 In his second reading speech (Hansard, Assembly, 8 September 1999 p 104) the Minister said: *"With certain exceptions, the bill benefits anyone who is party to a construction contract, whether written or oral. Construction contracts include contracts for the supply of related goods and services, such as the provision of architectural, engineering and surveying services, the supply of building materials or components to form part of a building or structure, and the supply or hire of plant or materials for use in construction work. Builders are also able to use the legislation in relation to obtaining payments from their clients.*

Particular types of contracts are excluded from the operation of the legislation. The main exclusions are: contracts for residential building work with the person who resides in or proposes to reside in the premises on which the work is carried out; employment contracts; contracts of insurance or loans or guarantees with recognised financial institutions; contracts where the payment is not made in monetary terms, for example, a contract where in return for carrying out construction work the contractor is to receive the right to lease or operate the building or structure; and contracts for construction work carried out outside New South Wales".

76 It seems clear to me that the intention of the legislature is that the Act applies to any construction contract, s 7(1) being a statement of general application. It is also clear that its intention is that the classes of contract described in s 7(2) are exceptions to the general rule so that if a party wishes to avoid its application it must demonstrate that the contract is within an excepted class. Obviously, it is probable that the features of a contract which might bring it within an excepted class will be within the knowledge of the party seeking to avoid the Act. Consistent with the principles referred to, that circumstance is further indication of the intention that the onus of proof concerning the exception is on the party claiming that the contract is within it.

77 The Defendant led no evidence to establish that the contract in this case is one under which it was agreed that the consideration payable was to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied under it. It relied upon the condition to pay the lump sum as sufficient to indicate that it was within s 7(2)(c).

78 In my opinion nothing on the face of the contract indicates that it is within the exception, and there is no other evidence to that effect. Furthermore, in my opinion, such evidence as there is negates a finding that the contract is

within the excepted class. For example, reference may be made to the Invitation and Instruction to Tenderers (Exhibit A p 218) part of which states:

"*Project Statement*

The documents forming the tender package are for the construction for a multi-story residential building consisting of a total of 46 apartments, basement car parking, landscaping works, residential gymnasium and swimming pool. The site address is ....".

Indeed it may be said that the contract, on its face, leaves little room for doubt that the lump sum agreed was calculated with reference to the value of the undertaking. If support is necessary, reference may be made to cl 40 (variations and valuations thereof), cl 41 (daywork and valuation thereof) and cl 42 (which provides the process whereby progress claims are made, involving valuation of work carried out by the Contractor in performance of the contract to the time of the claim).

79 Accordingly, the submission that the Act does not apply to the contract must be rejected.

Misleading and deceptive conduct

80 As a further basis for opposing an order for summary judgment the Defendant relied upon allegations pleaded in the Cross-Claim filed 18 February 2003 that the Plaintiff, by serving the payment claim in the form in which it was, had engaged in conduct which was misleading and deceptive in contravention of s 52 *Trade Practices Act*.

81 I have endeavoured to encapsulate the Plaintiff's submission in para 40 and 45. In summary, it is that it was not reasonably apparent from the form and contents of both sets of documents that the Plaintiff was making a payment claim under the Act. So understood the submission was that the payment claim was either ambiguous or so lacking in clarity as to its true nature and effect that the Plaintiff's conduct in serving it was misleading and deceptive, alternatively that its service at the same time as service of the progress claim documents was conduct intended to mislead and deceive.

82 Section 13(2)(c) requires the payment claim to state that it is made under the Act. It must be clear on the face of the document that it purports to be a payment claim under the Act. The test is an objective one. In deciding the meaning conveyed by a notice a court will ask whether a reasonable person who had considered the notice as a whole and given it fair and proper consideration would be left in any doubt as to its meaning. (See, eg, ***Central Pacific (Campus) Pty Ltd v Staged Developments Australia Pty Ltd*** (1998) V ConvR 54-575 at 66,909).

83 Also apt is the statement in ***Pyneboard v Trade Practices Commission*** (1982) 39 ALR 565 at 571: *"Provided a notice makes it reasonably clear, in the circumstances in which it is given and on a fair reading of its terms, what information or documents are required, the requirements .... as to clarity will be satisfied. In this regard, the mere fact that parsing and analysis in the artificial atmosphere of the courtroom can lead to the identification of a number of latent ambiguities will not invalidate what, as a matter of commonsense, is reasonably clear".* (See also ***Beckhaus v Brewarrina Council*** paras 73-76).

84 The covering letter with the payment claim documents (Exhibit A p 246) is headed "PROGRESS CLAIM NO. 20". Its text refers to the enclosed "Payment Claim". As part of the introductory information included on the first page of the enclosed claim is a clear statement that the claim is made under the Act.

85 Much reliance is placed upon the circumstances in which the payment claim was served upon the Defendant. Progress claim No. 20 was served on the same date under cover of letter (Exhibit A p 224) the contents of which are set out in para 15 above. It is evident that, as required by the contract, it was addressed to the Superintendent. The letter in respect of each claim was marked for the attention of Mr Paul Barber, a director of the Defendant. In my view a reasonable person in the position of Mr Barber upon receipt of both sets of documents on the same date may fairly be taken to have read them with some care, and would have appreciated the different information conveyed in each letter. He would also have seen that the first page of the documents sent under cover of the letter addressed to the Superintendent (Exhibit A p 225) also contained in its heading the statement that the claim was made under the Act. Such an exercise might reasonably be expected to have caused his attention to focus on the content of the payment claim and to reflect on its significance.

86 In ***Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd*** (1981-1982) 149 CLR 191 at 199, Gibbs CJ said: *"Section 52 does not expressly state what persons or class of persons should be considered as the possible victims for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive. It seems clear enough that consideration must be given to the class of consumers likely to be affected by the conduct. Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion by (sic) regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests. What is reasonable will or (sic) course depend on all the circumstances".* (To similar effect see Mason J at p 209, 211).

87 In my opinion a reasonable recipient, having read the documents with the appropriate degree of attention, would have no difficulty in identifying the payment claim documents and in realising that they constituted a payment claim under the Act. Neither the Plaintiff's conduct in serving the payment claim of itself, nor serving it on the same day as it served Progress Claim No. 20, in the form and of the content described, constitutes misleading and deceptive conduct on its part. The matters relied upon by the Defendant provide no basis for an inference that it was the Plaintiff's intention to conceal the making of the statutory payment claim. Certainly, in my opinion, no triable issue arises on the evidence before the court. The submission is without substance.

Conclusion

88 Having regard to s 15(4) of the Act, I am satisfied as to the existence of the circumstances referred to in subs (1) that:

(a) the Defendant is liable to pay the amount claimed to the Plaintiff under s 14(4) as a consequence of having failed to provide a payment schedule to it within the time allowed by that section; and

(b) it has failed 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.

89 For the reasons given I am satisfied that the Plaintiff is entitled under s 15(2)(a) to summary judgment for the sum of $13,962,904.00.

90 I expect the parties to agree on the amount of interest, if any, payable in respect of the claim. In the circumstances it is appropriate that I direct the Plaintiff to bring in short minutes of orders which give effect to the reasons for decision. The parties may also address me in relation to costs. Directions may also be given in relation to the further conduct of the issues arising on the Cross-Claim. Arrangements should be made with my Associate by 16 April 2003 for the relisting of this matter.

G Inatey SC/B McManus – Plaintiff Corrs Chambers Westgarth
S Finch SC/R Cheney – Defendant Holding Redlich