CATCH WORDS : Building Contract – Building and Construction Industry Security of Payment Act 2002 ss.9, 14, 15, 16 – Payment claim – Payment schedule – Whether service of payment claim on agent of Principal satisfied requirements of s.14(1) of the Act.

Procedure – Summary judgment application – Whether real question to be tried.

HIS HONOUR JUDGE: HABERSBERGER J: Supreme Court of Victoria at Melbourne. Commercial & Equity. Building Cases List. 10th November 2006

1 This is an application by the plaintiff, Abigroup Contractors Pty Ltd ("Abigroup"), for summary judgment against the defendant, River Street Developments Pty Ltd ("RSD"), in the sum of $4,568,787.94 plus GST, together with interest to the date of judgment and the costs of this proceeding. Abigroup's claim was made pursuant to the provisions of the *Building and Construction Industry Security of Payment Act* 2002 ("the Act").

The Factual Background

2 On 31 October 2003 Abigroup entered into a building contract with RSD under which Abigroup agreed to design and construct the Riviera Apartments at 69-73 River Street, Richmond for the sum of $68,654,467 ("the Contract"). Trevor Main & Associates Pty Ltd ("TMA") was named in Annexure Part A of the Contract as the Superintendent under the Contract. Clause 42.1(j)(ii) of the Contract stated that in cl. 42.1 the term "Quantity Surveyor" meant David Stewart of WT Partnership Australia Pty Ltd ("WTP").

3 Clause 42.1(b) of the Contract provided that at the times for payment claims stated in Annexure Part A, which was the 28th day of each month: *"... the Contractor shall deliver to the Quantity Surveyor and the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Quantity Surveyor 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, including the supply of unfixed (but on-site) goods and materials and (subject to Clause 42.2) off-site goods and materials together with all amounts then otherwise due to the Contractor arising out of the Contract..."*

4 Relevantly, cl. 42.1 also provided as follows:

"(e) Within 10 Business Days (being the maximum time allowed under section 15 of the Building and Construction Industry Security of Payment Act 2002 (Vic) ('Security of Payment Act') of receipt of a claim for payment, the Quantity Surveyor shall assess the claim (on a Cost to Complete Basis) and shall issue to the Principal and to the Contractor (with a copy to the Superintendent) a payment certificate stating the amount of the payment which is to be made by the Principal to the Contractor or by the Contractor to the Principal in accordance with the Contract. The Quantity Surveyor 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...

(f) If:

(i) the Contractor fails to make a claim for payment under this Clause 42.1, the Quantity Surveyor may nevertheless issue a payment certificate and the Principal or the Contractor, as the case may be, shall pay the amount so certified within 14 days of that Certificate; or

(ii) the Contractor or the Principal disputes the amount certified by the Quantity Surveyor or the Quantity Surveyor fails to certify within the time required, then the matter may be referred to the Superintendent who shall within 5 business days review the Quantity Surveyor's certification (if applicable) and the payment claim, and determine the amount to be paid to the Contractor on a Cost to Complete Basis. If the Superintendent determines that the amount payable differs from the Quantity Surveyor's certification or the Quantity Surveyor has failed to issue a payment certificate, the Superintendent must issue a progress certificate to the Contractor, the Principal and the Quantity Surveyor and this will be deemed to be the payment certificate for the purposes of this Contract.

(g) Subject to the provisions of the Contract, within 28 days of receipt by the Quantity Surveyor of a claim for payment or within 14 days of issue by the Quantity Surveyor of the Quantity Surveyor'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.

(h) Payment of moneys shall not be evidence of the value or quality of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided under Clause 42.6

(i) The Principal shall take all reasonable steps so that the Quantity Surveyor:

(i) will act honestly and fairly and arrive at a reasonable measure or value of work in accordance with the Contract in assessing the Contractor's payment claims on a Cost to Complete Basis; and

(ii) will act within the times required by the Contract is [sic] issuing payment certificates under this clause 42.1. ...

(k) The Quantity Surveyor and (where applicable) the Superintendent act as agents of the Principal in issuing payment certificates and exercising all related functions."

5 Pursuant to a Builder's Side Deed made between Capital Finance Australia Limited ("Capital") as Financier, Abigroup as Builder, RSD as Customer and Abigroup Limited as Guarantor, the parties agreed amongst other things that Abigroup and RSD "must not" vary the Contract by agreement with each other without the prior written consent of Capital, or vary the Works without the prior written consent of Capital where the effect of any one variation would increase the price payable for the Works by more than $100,000 (net of GST) or the aggregate of all variations would increase the price payable for the Works by more than $500,000 (net of GST). Execution of the Builder's Side Deed was a condition precedent to the coming into effect of the Contract. (cl. 6.3 and Annexure Part K of the Contract).

6 By a letter of offer dated 2 July 2003 from Capital to RSD, Capital required that any construction advances be subject to certification by its "project auditor and valuer". That role was filled by the Quantity Surveyor, WTP.

7 The date for Practical Completion of the Works set out in Annexure Part A of the Contract was 13 September 2005. Practical Completion of the Works was certified by the Superintendent in three separable portions as being 24 October 2005, 28 October 2005 and 7 November 2005 respectively.

8 On 28 November 2005 Abigroup faxed to Mr David Stewart of WTP, with copies to Ms Shannon Percy of WTP and Mr Fraser Main of TMA, Progress Claim No 26 in the sum of $4,736,535.97. The calculation of that amount was summarised in a letter dated 28 November 2005 as follows:

Total Work Completed to Date as per attached Sheet	$68,654,467.00
Variations as per attached Sheet:	$4,608,496.97
Total	$73,262,963.97
Less Previously Paid	$68,526,428.00
This Claim No. 26	**$4,736,535.97**

The letter also stated that "this Payment Claim is issued in accordance with Section 14 of the *Victorian Building and Construction Industry Security of Payment Act* 2002".

9 Three other pages accompanied Abigroup's letter. The first was a document headed "Trade Summary". It broke the original contract sum of $68,654,467 into 32 separate items and showed that all of the contracted work had been completed and previously certified and that nothing further was claimed in this progress claim in respect of the 32 items. The balance of the Trade Summary document was as follows:

	Revised Contract Value	% Completed	Total Value Of Work Completed	Previously Certified	Claim This Month	Value of Work To Complete
...						
ORIGINAL CONTRACT SUM	68,654,467		68,654,467	68,654,467	0	(0)
VARIATIONS as attached	4,313,651	100.00%	4,313,651	879,390	3,434,261	0
PC Adj. as attached	294,846	100.00%	294,846	(322,069)	616,915	0
Liquidated Damages		0.00%	0	(685,360)	685,360	0
ADJUSTED CONTRACT SUM	73,262,964					
TOTAL VALUATION TO DATE			73,262,964	68,536,428	4,736,536	(0)
Less Previously Paid			68,526,428			
			4,736,536			

10 The second accompanying page of Progress Claim No 26 was a document headed "Prime & Provisional Sums Register". It showed how the figure of $616,915 for "PC Adj." was calculated - $2,160 for VQ56 "Sanitry [sic] Accessories (Supply only)" and $614,755 for VQ39R "Landscaping".

11 The third accompanying page of Progress Claim No 26 was a document headed "Head Contract Variation Register". It showed how the figure of $3,434,261 for "variations" was calculated. Fifteen separate variations and extension of time claims ranging from one in the sum of $2,325 to one in the sum of $1,638,000 were listed.

12 On 12 December 2005 Mr Tony Griffin of WTP emailed to Mr David Brotherton of Abigroup what he called "our Progress Report No 26". I shall refer hereafter to this as "Payment Certificate No 26". It consisted of a document headed "Valuation for Payment [Excl GST]" dated 8 December 2005 which certified the amount of $154,185 as due for payment, as at the valuation date of 5 December 2005. This amount was calculated as follows:

CONTRACT		
CONTRACT SUM	$	68,654,467
CONTRACT SUM ADJUSTMENTS	$	1,053,575
PROVISIONAL SUM ADJUSTMENTS	$	(322,069)
ADJUSTED CONTRACT SUM	$	69,385,973
STATEMENT		
VALUE OF WORKS COMPLETED TO VALUATION DATE	$	69,365,973
LESS: RETENTION AMOUNT		0
NET VALUATION	$	69,365,973
LESS: PREVIOUS VALUATION	$	(69,211,788)
LESS: AMOUNTS OTHERWISE DUE FROM THE CONRACTOR TO THE PRINCIPAL (as Clause 42.1(e)(ii)B	$	0
THIS VALUATION AMOUNT	**$**	**154,185**

13 Accompanying this first document were three other documents. The first was headed "*Value to Complete Certificate [Excl GST]*" in the sum of $204,000. The second document was a one page break-up of *"Prime Cost Sum Adjustments"* and "*Approved Variations"* showing how the respective amounts of ($322,069) and $1,053,575 were calculated. It also showed that $20,000 of work was yet to be completed in respect of approved variation No 18. The third document listed the 32 items constituting the original contract sum and, like Abigroup's Trade Summary, it showed that all of this work had been completed and previously certified. The balance of this third document was as follows:

PROJECT STATUS:

TRADE	CONTRACT VALUE	PREVIOUS APPROVED VALUE	COMPLETE TO DATE (OVERALL)	ON SITE CLAIM	OFF-SITE/ON-SITE & UNFIXED MATERIALS	TOTAL CLAIM APPROVED	VALUE TO COMPLETE
PROJECT SUMMARY							
Construction Contract Sum	68,654,467	68,654,467	100.00%	68,654,467	-	68,654,467	-
Provisional Sum Adjustments	(322,069)	(322,069)	100.00%	(322,069)	-	(322,069)	-
Variations	1,053,575	879,390	98.10%	1,033,575	-	1,033,575	20,000
PROJECT TOTAL	**69,385,973**	**59,211,788**	**99.97%**	**69,365,973**	**-**	**69,365,973**	**20,000**
		VALUE OF WORK COMPLETED (EXCL. GST)				$69,365,973	
		LESS: PREVIOUSLY CERTIFIED				$69,211,788	
		LESS: LIQUIDATED DAMAGES THIS CLAIM				$ -	
		AMOUNT DUE FOR PAYMENT (EXCL. GST)				$ 154,185	

14 On 17 February 2006 Abigroup commenced this proceeding in the Building Cases List claiming that Payment Schedule No 26, provided by WTP as agent for RSD, did not satisfy the requirement in s. 15(3) of the Act that the payment schedule *"indicate"* why the amount proposed to be paid was "*less than the claimed amount"* and RSD's "*reasons for withholding payment"*. Accordingly, Abigroup claimed that pursuant to ss. 15(4) and 16(2)(a) of the Act it was entitled to recover from RSD the sum of $4,736,535.97 as a debt due to Abigroup.

15 RSD entered an appearance on 27 February 2006 and delivered a defence on 29 March 2006. Notwithstanding the seven day time limit set out in rule 3.04(1) of the *Supreme Court (Miscellaneous Civil Proceedings) Rules* 1998, Abigroup did not issue its summons for directions until 31 March 2006 returnable on 7 April 2006. On 6 April 2006 Abigroup issued its summons for summary judgment also returnable on 7 April 2006. The application was supported by an affidavit sworn on 6 April 2006 by Mr David Brotherton, Abigroup's Senior Contracts Administrator. On the return day an order was made giving Abigroup leave to file and serve an

amended statement of claim and RSD leave to file and serve an amended defence and giving directions for the filing of further affidavits and the exchange of written submissions in preparation for the hearing of the summary judgment application on 22 May 2006.

16 It should be noted, however, that other events occurred subsequent to WTP's response to Abigroup's Progress Claim No 26. According to the affidavit of Leslie Alan Smith, the sole director of RSD, sworn on 3 May 2006, RSD disputed the amount certified by the Quantity Surveyor, WTP, in Payment Certificate No 26 and the matter was referred to the Superintendent, TMA, pursuant to cl. 42.1(f)(ii) of the Contract. No date was given by Mr Smith as to when that referral took place. There is a reference in TMA's letter of 23 December 2005 to Abigroup to "correspondence from River Street Developments dated 21 December 2005" but there is no specific statement that this correspondence referred to Abigroup's Progress Claim No 26. On 23 December 2005, the Superintendent provided progress certificate No 2 to Abigroup, with copies to RSD, WTP and Capital. It showed that according to TMA the amount payable by RSD to Abigroup was $68,954.12, as at the valuation date of 5 December 2005.

17 Also on 23 December 2005 the Quantity Surveyor, WTP, issued a revised Progress Report No 26 which stated that the amount due *from Abigroup* to RSD was $14,981. This revised Report was attached to a letter from WTP to Capital with copies to TMA and RSD but not to Abigroup.

18 On 20 December 2005 Mr Smith wrote on behalf of RSD to Abigroup advising that, as the construction loan facility with Capital had been finalised and any further payments to Abigroup would be funded by RSD, there was no requirement for WTP "to be assessing and certifying any future claims". He advised that "in line with the relevant contract conditions" all future claims would be assessed and certified by the Superintendent.

19 On 30 January 2006 Abigroup faxed to Mr David Stewart of WTP, with copies to Ms Shannon Percy of WTP, Mr Fraser Main of TMA and Mr Frank Mercuri of TMA, Progress Claim No 27 in the sum of $4,019,311.97. The calculation of that amount was summarised in the Trade Summary document accompanying letter dated 30 January 2006 as follows:

	Revised Contract Value	% Completed	Total Value Of Work Completed	Previously Certified	Claim This Month	Value of Work To Complete
...						
ORIGINAL CONTRACT SUM	68,854,467		68,854,467	68,614,467	40,000	(0)
VARIATIONS as attached	4,395,973	100.00%	4,395,973	1,033,575	3,362,398	0
PC Adj. as attached	294,845	100.00%	294,845	(322,069)	616,914	0
ADJUSTED CONTRACT SUM	73,345,285					
TOTAL VALUATION TO DATE			73,345,285	69,325,973	4,019,312	(0)
Less Previously Certified			69,325,973			
			4,019,312			

Whilst the "PC Adj." amount was, apart from a rounding difference of $1, the same as that in Progress Claim No 26, the "Variations" amount was over $70,000 less. The figure for "Previously Certified" was higher than that for "Previously Paid" in Progress Claim No 26. Further, nowhere in Progress Claim No 27 was there any reference to an amount of $685,360 for liquidated damages.

20 On 10 February 2006 the Superintendent, TMA, issued, purportedly in accordance with cl.42.1(f)(ii) of the Contract, progress certificate No 3 to Abigroup, with a copy to RSD. It showed an amount payable by RSD to Abigroup in the sum of $167,748.03, as at the valuation date of 10 February 2006. The letter from TMA which forwarded progress certificate No 3 to Abigroup stated as follows:

"This Assessment is different from the claim submitted by Abigroup due to the following reasons:
• It reflects actual payments made by the Principal to the Contractor
• It reflects that not all as-built drawings and operation and maintenance manuals have been provided
• It includes payment for approved Variations only."

21 On 27 February 2006 Abigroup provided a tax invoice to RSD in that amount plus GST. RSD paid that sum plus GST to Abigroup on that day. In making its application for summary judgment, Abigroup has given credit for the amount of $167,748.03 paid by RSD.

22 On 9 March 2006 TMA issued progress certificate No 4 to Abigroup, with a copy to RSD. It purported to be in response to Abigroup's Progress Claim No 28, although there was no such document in evidence before me. TMA's progress certificate No 4 stated that the amount payable by RSD to Abigroup was "Nil", as at the valuation date of 6 March 2006.

23 On 13 April 2006 TMA issued progress certificate No 5 to Abigroup, with a copy to RSD. Although no claim had been made by Abigroup, TMA stated that its certificate was issued in accordance with cl. 42.1(f)(i) and (ii) of the Contract. It stated that the amount due *from Abigroup* to RSD was $979,750, as at the valuation date of 12 April 2006. Attached to the certificate were variation orders 34 to 37, each issued by TMA on 13 April 2006, which together reduced the contract sum by $979,750 for various deletions, credits and items of defective work.

24 In order to complete the factual background it should also be noted that many of the variations, extensions of time and prime cost items claimed in Progress Claim No 26 had previously been claimed by Abigroup and rejected by WTP in earlier Payment Certificates. According to the affidavit of David James Stewart sworn 4 May 2006: *"In around April 2005, Abigroup began to include in their monthly progress claims significant amounts for claims in relation to unapproved variations and costs in relation to extension of time claims which had not been approved by the Superintendent."*

25 Mr Stewart said that following receipt of Progress Claim No 20 in around late April 2005, he was asked in a telephone conversation with Dean Amon of Abigroup why WTP had not certified a number of claimed variations for payment. Mr Stewart deposed that he told Mr Amon that he could not certify any variations unless he had received confirmation from the Superintendent that they had been accepted and agreed as contract sum adjustments. Mr Stewart stated that despite this and other later conversations with Mr Amon to the same effect, Abigroup continued to include the amounts it had claimed for variations in Progress Claim No 20 in later Progress Claims. It also continued to claim the amounts for other variations which had not been approved by the Superintendent in these later Progress Claims.

26 Progress Claim No 25 was exhibited to one of the affidavits in opposition to the application for summary judgment. A comparison of Progress Claim No 25 with Progress Claim No 26 shows that there were at least 13 variation and extension of time claims totalling $3,396,385 and one prime cost item claim of $614,755 from Progress Claim No 25 which were simply repeated in Progress Claim No 26.

27 In the affidavit of Fraser Alexander McLeod Main, a director of TMA, and the affidavit of Frank Mercuri, a project manager employed by TMA, both sworn on 4 May 2006, the history of the Superintendent's responses to these variation, extension of time and prime cost item claims was set out in some detail. Correspondence between TMA and Abigroup was exhibited to Mr Mercuri's affidavit. A reading of this material gave a fair indication of why these claims had been rejected by the Superintendent.

The Act

28 It was common ground that the Act was modelled on the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the NSW Act"). Decisions on the NSW Act are therefore highly persuasive.

29 Section 1 of the Act states that: *"The main purpose of this Act is to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts."*

Section 3 of the Act, which is concerned with the object of the Act, sets out procedures whereby a person who has carried out construction work or supplied 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 or the supplying of those goods and services.

30 It is quite clear from s.47 of the Act that any debts arising under these procedures and any determinations issued by an adjudicator are only provisional. As Barrett J said in ***Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd***.[1] *"The consequences the Act produces go, in commercial terms, to matters of cash flow and credit risk without definitive and final creation of legal rights."*

31 It is also well established that, in the words of McDougall J, "the evident intention of the legislature" is that the "entitlement to progress payments should be resolved expeditiously" and "with a minimum of formality and expense."[2]

The Test for Summary Judgment

32 In **Fancourt v Mercantile Credit Ltd**,[3] the High Court said: *"The power to order summary or final judgment is one that should be exercised with great care. It should never be exercised unless it is clear that there is no real question to be tried."*

33 In ***Australian Can Co Pty Ltd v Levin & Co Pty Ltd***[4] the Full Court, after a review of the cases, stated: *"From all this it appears that where there is a real case to be investigated either in fact or law, leave to defend should be given ... But in whatever language the discrimen is expressed to determine in what cases liberty to the plaintiff to sign judgment or liberty to the defendant to defend should be given, the length at which or the detail in which or the vigour with which counsel has argued the matter cannot be the determining factor. ... Whatever the language various Courts have used, it seems to us that the substance of the criterion to be applied is that after the matter involved has been explained to the Judge there must be a real uncertainty without full argument or further investigation of the facts as to the plaintiff's right to judgment."*[5]

1 [2005] NSWSC 1152 at [39].
2 ***Barclay Mowlem Construction Ltd v Tesrol Walsh Bay Pty Ltd*** [2004] NSWSC 1232 at [13].
3 (1983) 154 CLR 87 at 99 per Mason, Murphy, Wilson, Deane and Dawson JJ.
4 [1947] VLR 332.
5 [1947] VLR 332 at 334-335 per Herring CJ and Lowe J.

34 Rule 22.06(1)(b) of the Supreme Court (General Civil Procedure) Rules 2005 provides that on the hearing of a summary judgment application the Court may give such judgment for the plaintiff against the defendant on the claim or part of the claim in question as is appropriate "unless the defendant satisfied the Court that in respect of that claim or part a question ought to be tried or that there ought to be some other reason to a trial of that claim or part" In ***Perpetual Trustee Co Ltd v Jacobs***, [6] Batt J, as his Honour then was, held that the test propounded by the above subrule was "not intended to be different from that established by, and by judicial decision under, the former order 14, where the relevant words were, 'a good defence to the action on the merits', but it is intended to express more accurately the test which had been developed from the original rule." [7]

35 Before considering the application of this test to the facts of this case, it is appropriate to refer to a number of issues which RSD submitted raised real questions to be tried. I will set out the competing arguments in respect of each one in turn.

Service

36 The primary issue relied on by RSD as raising a real question to be tried was the submission that there had been no service of Progress Claim No 26 on RSD in accordance with s. 14(1) of the Act. That provision requires that the payment claim be served "on the person who under the contract is liable to make the payment". Clearly, that person was RSD, but instead of serving RSD with the payment claim, Abigroup faxed it to the Quantity Surveyor, WTP, with a copy to the Superintendent, TMA. Mr Delany SC, who appeared with Mr Andrew for RSD, submitted that this service satisfied neither the requirements of the Act nor the provisions of the Contract.

37 Section 50(1) of the Act referred to service of a notice or document:

"(a) by delivering it to the person personally; or
(b) by lodging it during normal office hours at the person's ordinary place of business; or
(c) by sending it by post or facsimile addressed to the person's ordinary place of business; or
(d) in such manner as may be prescribed for the purposes of this section."

Clause 7 of the Contract provided that a notice under the Contract was only given to a party if it was:

"(a) delivered or posted to that party at the address stated in Annexure Part A, or
(b) faxed to that party at the facsimile number stated in Annexure Part A."

WTP was not mentioned at all in Annexure Part A so that there was no address or facsimile number at which it could be served under cl. 7. Indeed, there was no facsimile number stated in Annexure Part A for the Superintendent.

38 Mr Smith said in his affidavit that he: *"became aware of the content of the payment claims a couple of weeks after the claim was certified because Abigroup's payment claims and WTP's payment certifications were reproduced in the monthly report the Quantity Surveyor prepared for the Financier."*

Thus, he would appear to be accepting that RSD indirectly received a copy of Progress Claim No 26 some time after 28 November 2005. Nevertheless, Abigroup's application for summary judgment was squarely based on the proposition that RSD was served on that day by virtue of it being faxed to its agent, WTP. If that proposition is not established to the requisite degree of certainty then Abigroup's application must fail at the outset.

39 Mr Burnside QC, who appeared with Mr Caleo for Abigroup, submitted that, as WTP acted as "the agent" of RSD "in issuing payment certificates and exercising all related functions" (cl. 42.1(k) of the Contract) WTP acted as the agent of RSD in receiving payment claims. Whilst acknowledging that there had to be strict compliance with the Act, Mr Burnside submitted that the Act did not displace the operation of common law principles of agency in relation to the service of payment claims. This was particularly the case, he submitted, where the Contract specifically referred to the Contractor delivering "claims for payment" to the Quantity Surveyor, and the Superintendent, but not the Principal, (cl. 42(1)(b)) and where in providing for the response by the Quantity Surveyor to a payment claim by the Contractor, the parties had specifically referred in the Contract to the time limit stated in s. 15 of the Act (cl. 42.1(e)). Mr Burnside also drew attention to the wording of cl. 42.10 of the Contract, which provided that if a subcontractor notified Abigroup that it was entitled and intended to suspend work pursuant to the Act, Abigroup had to promptly give the Superintendent a copy of that notice. He submitted that this provision fortified the idea that for particular purposes the Quantity Survey or the Superintendent could be the agent of the Principal, even when compliance with the Act was in question.

40 In support of the submission that the Act did not displace the operation of common law principles of agency in relation to the service of payment claims, Mr Burnside referred me to the decision of Barrett J in ***Karimbla Construction Services Pty Ltd v Alliance Group Building Services Pty Ltd***.[8] In that case, one of the questions for his Honour was whether there was a genuine dispute between the parties about the existence of the debt which formed the basis of a statutory demand (s. 459H(1)(a) of the *Corporations Act* 2001 (Cth)). That depended in part on whether a document sent on behalf of Karimbla Constructions Services Pty Ltd ("Karimbla") by another company in the same group constituted a payment schedule within the meaning of s. 14 of the NSW Act. His Honour set out the arguments advanced by Karimbla in the course of holding that a genuine dispute as to the existence of the debt did exist. Included in those arguments was the submission that: *"there is nothing express or implied in the legislation displacing the operation of the common law rule qui facit per alium facit per se, with the*

[6] Unreported, 14 April 1994. BC 9406346.
[7] BC 9406346 at 13-14.
[8] [2003] NSWSC 617.

result that a document signed and provided by an agent of Karimbla acting on its behalf in the matter is as good as one signed and provided by Karimbla itself." [9]

41 Mr Burnside submitted that Barratt J's decision meant that his Honour accepted the correctness of that submission made by Karimbla. I do not agree. As his Honour was at pains to explain, his function at that stage of the case was not "*to make any adjudication of the issues raised*" by the submissions[10] but simply "*to determine whether the contentions of Karimbla in support of the proposition that no debt has arisen under s. 14(4) possess a sufficient degree of cogency to warrant further investigation*".[11] In other words, was there a "*serious question to be tried*"?[12] It therefore seems to me that the most that Abigroup can obtain from the decision is that Barrett J accepted that the agency proposition could not be dismissed as unarguable.

42 Mr Delany submitted that in any event *Karimbla Construction* was not in point because it was concerned with s.14 of the NSW Act, the equivalent of s.15 of the Victorian Act, which talked in terms of "providing a payment schedule" and not of "serving" such a document. Acceptance that an agent could on behalf of a principal "provide" a payment schedule to the claimant did not mean that an agent could on behalf of the principal be "served" with a payment claim.

43 Mr Delaney also referred me to the decision of Einstein J in ***Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd***.[13] In that case, the question was whether there had been proper service under the NSW Act of an adjudication application. That document had been served on a firm of solicitors acting for Emag Constructions Pty Ltd ("Emag"). His Honour found as a fact that the solicitor had stated that his firm had no instructions to accept service.[14] Further, his Honour held that "there was neither actual authority in the plaintiff's solicitors to receive a copy of the adjudication application nor ostensible authority in that regard".[15] Those findings were sufficient to resolve the dispute.

44 However, his Honour then went on to say by way of obiter dictum that: *"In my view the character of the subject legislation is such that the general principles of actual or ostensible authority in solicitors to receive service of copies of relevant notices must yield to the strictures of the strict requirement to prove service. The service provisions of the Act require to be complied with in terms."* [16]

45 The rationale of his Honour's approach is to be found in an earlier passage in his judgment, where he said: *"Service being effected in accordance with the Act is critical as it governs the commencement of the time limitations following such service. The consequence of non-compliance with the time limitation periods is harsh. As was submitted to the court by counsel for the plaintiff, the Act exhibits* ***'zero tolerance'*** *for delay. To borrow a phrase from the world of contract, and in particular conveyancing, in a real sense* ***time is of the essence.***" [17]

Reading these two passages together would suggest to me that his Honour was of the view that service on the solicitors would not have been in compliance with the Act even where they had actual authority to receive service of notices. Strict compliance with the Act was required. Thus, his Honour stated in ***Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd***: [18] *"In my view it is simply critical for a rigid approach to be taken to compliance with the terms of the Act, particularly for the reason that the legislation provides for a fast dual-track interim determination, reserving the parties' final legal entitlements for subsequent determination."*

46 Mr Delany submitted that, properly construed, there was nothing in cl. 42(1)(k) of the Contract to suggest that the parties intended that the agency would extend to accepting service of notices under the Act on behalf of the Principal. The exercising of "all related functions" was concerned with the assessing and determining of payment claims so that payment certificates could be issued and possibly even "provided" by the agent, but not with the agent accepting service of the claims. Mr Delany further submitted that if the parties had intended that the Quantity Surveyor or the Superintendent be the agent of the Principal for the purposes of service of payment claims, it would have been a very easy matter to say so.

47 Mr Delany also referred to the fact that under the Side Deed, the Quantity Surveyor acted on behalf of the Financier not the Principal. He submitted that this militated against the proposition that WTP was the agent of RSD for the purposes of s.14 of the Act.

48 Mr Burnside acknowledged that there would have been no issue if Abigroup had also served Progress Claim No 26 on RSD. He submitted, however, that this would unnecessarily increase the amount of paper passing between the parties to achieve the obvious and only imaginable outcome, which was that the second document was handed on to WTP who had to respond to it. Mr Burnside submitted that such a construction of the Act did not sit easily with the stated objects of the Act and would make the Act unworkable.

9 [2003] NSWSC 617 at [11].
10 [2003] NSWSC 617 at [12].
11 [2003] NSWSC 617 at [9].
12 [2003] NSWSC 617 at [12].
13 [2003] NSWSC 903.
14 [2003] NSWSC 903 at [42].
15 [2003] NSWSC 903 at [58].
16 [2003] NSWSC 903 at [59].
17 [2003] NSWSC 903 at [38].
18 [2005] NSWSC 439 at [49].

The Payment Claim

49 An issue raised during the course of the hearing was whether Abigroup's Progress Claim No 26 was "a payment claim" within the meaning of s.14 of the Act. Mr Delany submitted that the inclusion of the claim to be paid $685,360 for *"Liquidated Damages"* meant that the Progress Claim did not satisfy the requirement in s.14(3) that *"a payment claim"* must *"identify the construction work or related goods and services to which the progress payment relates"*. He submitted that this single line entry did not identify any "construction work" or "related goods and services" to which the progress payment related. Clearly it did not come within the statutory definitions of those terms.[19]

50 It was apparent that this item had been included by Abigroup in an attempt to off-set or reverse the deduction by WTP of $685,360 for liquidated damages which it had previously certified were payable by Abigroup to RTD in Payment Certificate No 25. Mr Delany submitted that this procedure was not contemplated by s.14. Rather, if Abigroup disputed the deduction for liquidated damages in Payment Certificate No 25, it could have made an adjudication application under s.18 of the Act or utilised the dispute resolution provisions in the Contract.[20]

51 Mr Burnside submitted that Progress Claim No 26 did satisfy the requirements of s.14(3) of the Act and accordingly that it was a valid "payment claim". He submitted that all of the construction work and related goods and services to which this claim for payment related were identified in the four documents constituting Progress Claim No 26. Given the method of calculating the amount of the claimed progress payment, it was necessary to include the reversal of the liquidated damages deduction in order to make the arithmetic work. Mr Burnside accepted, however, for the purposes of this application, that if Progress Claim No 26 did include a claim for payment of an amount not within s.14 then it would not be a valid "*payment claim*".

52 It seems to me that Progress Claim No 26 did identify all of the construction work and related goods and services to which the claim for payment related. The real question, in my opinion, is whether it was permissible for Abigroup, in effect, to reverse the Quantity Surveyor's decision in respect of liquidated damages by claiming back the deduction or whether it was required at the time it received Payment Certificate No 25, if it wanted to challenge that decision, to follow one of the dispute procedures laid down in either the Act or the Contract. An alternative approach may have been for Abigroup to make its progress claim after crediting amounts previously paid and without taking into account the deduction for liquidated damages. Presumably the Quantity Surveyor would then make the deduction in each subsequent payment schedule. What does seem rather incongruous and possibly invalid is that there could be a series of Payment Certificates by the Quantity Surveyor making the deduction for liquidated damages followed each time by a series of Progress Claims in which the Contractor simply reversed that deduction and made a claim for payment of that amount.

A Second Claim

53 The next issue raised was that Progress Claim No 26 was not in accordance with s.14 of the Act because, by substantially duplicating claims previously made, it infringed s.14(2). That provision states: *"A claimant may serve only one payment claim in respect of a specific progress payment."*

As previously stated, there was a very substantial duplication in Progress Claim No 26 of the variation, extension of time and prime cost item claims from Progress Claim No 25. But some claims in Progress Claim No 26 were new, including the liquidated damages claim. It was therefore submitted that either the whole of Progress Claim No 26, or at least a substantial part of it, was an impermissible second claim.

54 Mr Delany relied on certain amendments to the NSW Act as indicating that s.14(2) arguably did prohibit second claims. When the NSW Act was passed in 1999 there was no equivalent in s.13 to s.14(2) in the Victorian Act. In 2003 s.13 of the NSW Act was amended to include the following sub-sections:

"(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."

55 I was also informed that similar amendments had been proposed for the Victorian Act. The *Building and Construction Industry Security of Payment (Amendment) Act* 2006 was assented to on 27 July 2006. The relevant sections of the amending Act are yet to be proclaimed. Nevertheless, the amendments to the NSW Act and the proposed amendments to the Victorian Act were relied on by RSD as an indication that there was doubt about whether the Act before the amendment allowed second or more claims, that is including in a payment claim an amount that has been the subject of a previous claim or claims.

56 Mr Burnside submitted that s.14(2) of the Act did not have the meaning attributed to it by RSD. He referred to s.9 of the Act which stated that a person who has undertaken to carry out construction work, or to supply related goods and services, under the contract was entitled to a progress payment on and from each reference date. In this case, that was the 28th day of each month. Thus, Mr Burnside submitted, s.14(2) meant that the claimant could only serve one payment claim in respect of each reference date or period. Progress Claim No 26 did not, therefore, infringe s.14(2) of the Act.

[19] See ss.5 and 6 of the Act.

[20] See cl.47.

57 Mr Burnside submitted that any contrary view would be unworkable. He illustrated the point by giving the example of a builder who claimed payment for 50% of the cost of a particular item, saying half of the relevant work had been performed. That claim was disputed by the owner and only 10% of the claim was allowed. In the next payment claim the builder sought payment of 75% of the cost of that item, only to be met with the argument that the claim for the first 40% was invalid because it had already been claimed and second claims were not permitted. On this analysis the builder could never receive a progress payment for that 40%. Mr Delany sought to meet this point by arguing that 40% sought in the second payment claim would not be disallowed because the first claim for the 40% had been invalid because the work had not been done.

58 Mr Delany also submitted that the above complication did not arise in this case because it was not a case of extra work being performed. It was simply a repetition of previously rejected variation, extension of time and prime cost item claims.

Entitled to a Progress Payment

59 The next issue raised on behalf of RSD was that Abigroup was not a person who was "entitled to a progress payment under a construction contract" within the meaning of s.14(1) of the Act. This was because virtually all of the claim was based on variation, extension of time and prime cost item claims which had not been approved by the Superintendent and therefore it was submitted that there was no entitlement to payment under the Contract.

60 Mr Delany submitted that Abigroup was not "entitled to a progress payment under the construction contract" because under cl.40.4 of the Contract it was not entitled to an extension of time or extra payment unless the Superintendent had approved the variation. Section 11(1) of the Act referred to construction work being valued "in accordance with the terms of the contract" and s.12(a) referred to payment becoming due and payable "in accordance with the terms of the contract". Therefore, Abigroup had no entitlement to make a payment claim in respect of these claims.

61 Mr Delany referred to the NSW Act where s.13, the equivalent of s.14 in the Victorian Act, had been amended, by the addition of the words "*or who claims to be*", to read: *"A person referred to in section 8(1) who is or who claims to be entitled to a progress payment..."*

Again, I was informed that the Victorian Act was to be amended in similar fashion so that s.14(1) would read: *"A person referred to in section (1) who is or who claims to be entitled to a progress payment..."*

62 In ***Walter Construction Group Limited v CPL (Surrey Hills) Pty Ltd***,[21] Nicholas J held that: *"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."*

Further, his Honour rejected the objection to the validity of the claim that it included items not capable of being valued because none of the extension of time claims upon which items depended had been granted. He stated that: *"... proof of entitlement to payment under the contract is not required to establish entitlement to a progress payment under s.13(1) ... 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."* [22]

63 Mr Burnside relied on the decision in ***Walter Construction***. He drew my attention to the fact that it was decided under the original wording of s.13 of the NSW Act, which was the same as the current wording of s.14 of the Victorian Act. Thus, even under the unamended version, Mr Burnside submitted, RSD's argument about entitlement found no support in ***Walter Construction***.

No Payment Schedule

64 As previously stated, Abigroup's application was based on the allegation that Payment Certificate No 26 was not "*a payment schedule*" within the meaning of s.15 of the Act. It was said by Abigroup that, contrary to s.15(3), Payment Certificate No 26 did not "*indicate*" why the amount certified by WTP was "*less than the claimed amount*". RSD disputed this allegation so the next issue was whether Payment Certificate No 26 was "*a payment schedule*".

65 Mr Delany pointed out that in his affidavit Mr Brotherton did not depose that he did not know or understand why the variations and delay damages had been rejected. That was so, it was submitted, because, as RSD's affidavits showed, Abigroup well knew that the variations and delay claims had been rejected or not approved by the Superintendent. Further, Abigroup knew that such claims would not be certified by the Quantity Surveyor unless they had already been approved under the Contract by the Superintendent.

66 Mr Delany submitted that case law dealing with the equivalent New South Wales legislation established that the question whether or not a document constituted a payment schedule within the meaning of s.15 of the Act was one that needed to be considered by reference to the contractual and factual context, and was a question which should not be determined on an application for summary judgment.[23]

67 I was referred to the following passages from the judgment of Palmer J in ***Multiplex Constructions Pty Ltd v Luikens***:[24]

[21] [2003] NSWSC 266 at [55].
[22] [2003] NSWSC 266 at [61].
[23] ***Barclay Mowlem Construction Ltd v Tesrol Walsh Bay Pty Ltd*** [2004] NSWSC 716 at [10] – [11] per McDougall J.
[24] [2003] NSWSC 1140 at [76] – [78].

"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 for 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.

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.

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."

68 Mr Delany further submitted that the reasons did not have to be "indicated" with "excessive detail".[25] The test was whether the response to the claim indicated reasons "with sufficient particularity" to enable Abigroup to understand what the reasons were.[26] For that purpose, he submitted, the earlier communications in relation to each item repeated in Progress Claim No 26 needed to be reviewed. It was apparent on review of this material that Abigroup well knew the reasons for rejection of Progress Claim No 26.

69 Mr Delany referred to the process of walking around the site discussing the Progress Claims, which had been described by Shannon Percy of WTP and Frank Mercuri in their affidavits. He accepted, however, that there was no such procedure followed in respect of Progress Claim No 26, no doubt because Ms Percy was on leave. Nevertheless, Mr Delany argued that given the repetition of earlier claims that had been discussed and rejected, that procedure was not required in order for Mr Brotherton of Abigroup to understand from his accumulated knowledge why Payment Certificate No 26 only provided for payment of a small amount of the payment claim.

70 Mr Delany further submitted that when one looked at the wording of Payment Certificate No 26 it was obvious that the reason why the claim was largely rejected was because the variation, extension of time and prime cost item claims had not been approved by the Superintendent. Approved variations and prime cost sum adjustments allowed by WTP were set out in one of the documents constituting Payment Certificate No 26. He submitted that the same applied to the treatment of the claim for reversal of the liquidated damages deduction because the dash indicated that the adding back of that amount was not accepted.

71 Finally, Mr Delany submitted that the requirements in relation to payment schedules should be *"applied in a common sense, practical manner"* [27] which recognises that payment claims and payment schedules are exchanged in the course of a busy construction project without the opportunity for detailed drafting.

72 Mr Burnside submitted that it was quite clear from the wording of s.15 of the Act that the payment schedule must indicate the reason why the scheduled amount was less than the amount claimed. He accepted that the indication could be brief and limited in detail. But, he submitted, it must exist and here there was simply no indication at all. The indication had to be sufficient to identify the area of dispute between the parties because the payment claim and the payment schedule set the ground for what could be considered by the adjudicator. As was said by the New South Wales Court of Appeal in ***Clarence Street Pty Ltd v ISIS Projects Pty Ltd***. [28] *"The joinder of issue thus achieved sets the parameters for the matters that may be contested if an adjudication under the Act ensues ..."*

Estoppel

73 The next issue raised by RSD was that it would be contrary to equity to allow Abigroup to re-submit its claims for variations, extensions of time and prime cost items (claims which it knew had been rejected previously) and then to seek to rely on the Act by alleging non-compliance with s.15, when the course of dealing between the parties in respect of the earlier Progress Claims showed that Abigroup was prepared to follow the walk around the site and discussion procedure and to accept the wording of subsequent Payment Certificates as providing sufficient detail of the reasons why claims had not been accepted. Mr Delany submitted that Abigroup, having permitted and encouraged RSD to proceed on the basis that there was no non-compliance with the Act, should be estopped from alleging that Payment Certificate No 26 was not a valid payment schedule.

[25] ***Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in Liquidation)*** [2005[NSWCA 409 at [69] per Santow JA.
[26] ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [70] per Palmer J.
[27] ***Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd*** [2002] NSWCA 136 per Davies AJA at [20], with whom Handley JA and Stein JA agreed.
[28] [2005] NSWCA 391 at [30] per Mason P, with whom Giles JA and Santow JA agreed.

74 Mr Burnside submitted that there was no requirement on Abigroup to point out to RSD that the Payment Certificate issued on its behalf by WTP did not constitute "payment schedules" within the meaning of the Act. He further submitted that there was no evidence that Abigroup was aware that RSD was acting on this false assumption about the validity of the Payment Certificates. In the circumstances, he submitted, no estoppel could arise.

Set Off

75 The penultimate issue was whether RSD was entitled to a set off of $979,750 pursuant to TMA's progress certificate No 5 dated 13 April 2006. Mr Delany submitted that this certificate had been issued by the Superintendent pursuant to cl. 42.1(f) of the Contract. He argued that the Court should not ignore subsequent certificates and determinations following the one sued on by the Contractor.

76 If, contrary to all of RSD's submissions, Abigroup was held to be entitled to summary judgment, then Mr Delaney submitted, the amount of that judgment should take into account the fact that under the Superintendent's progress certificate No 5 there was also an amount owing to RSD "on account" and the two amounts should be set off against each other. Thus, the judgment should be in the sum of, not $4,568,787.94 plus GST and interest but that amount less $979,750, or $3,589,037 plus GST and interest. Alternatively, he submitted that, if the subsequent certificate gave rise to a counterclaim rather than a right of set off, then there should be a stay on an equivalent portion of the judgment.

77 The short answer by Abigroup to this issue was that as the progress certificate relied on by RSD was given by the Superintendent and not the Quantity Surveyor, it was a nullity. Mr Burnside submitted that the circumstances contemplated by s.42(1)(f) of the Contract had not arisen. This, of course, was disputed by RSD.

78 The longer answer was that the right of set off claimed by RSD did not exist. Apart from the set off procedure within the certifying process itself, the Act did not contemplate any right of set off with respect to progress payments, which were after all only provisional. Mr Burnside submitted that the approach was not altered by the fact that in the time taken to issue the proceeding and bring on the application for summary judgment other payment claims had been made and different responses provided. He submitted that Abigroup's entitlement to recover the full amount of Progress Claim No 26 plus GST and interest was not affected by these subsequent developments.

A Superseded Payment Claim

79 A related issue which was touched on by the parties but not really developed was:

(a) whether Abigroup could sue on Progress Claim No 26 when it had served Progress Claim No 27, before it commenced this proceeding; alternatively

(b) whether Abigroup could sue on Progress Claim No 26 when it had served Progress Claim No 27 for a lesser amount than that claimed in Progress Claim No 26, before it commenced this proceeding; alternatively

(c) whether Abigroup could sue on Progress claim No 26 when it had served Progress claim No 27 for a lesser amount than that claimed in Progress claim No 26 and the Superintendent, TMA, had responded by progress certificate No 3 which stated that the amount payable by RSD to Abigroup was the sum of $167,748.03, all of which occurred before it commenced this proceeding.

80 Another way of describing the issue was whether, in the circumstances, Progress Claim No 26 had been superseded by Progress claim No 27 and was therefore no longer relevant. Given the developments that had occurred in the nine or so weeks between the provision by WTP of Payment Certificate No 26 and the commencement of the proceeding and the fact that, very early on in the seven or so weeks between that step and the issuing of the application for summary judgment, RSD had paid to Abigroup the full amount certified as owing in TMA's progress certificate No 3, could it be submitted that it was arguable that the amount of any debt owed by RSD to Abigroup at the time of the summary judgment application was a real question to be tried?

Consideration of the Issues

81 Having carefully considered each of the issues discussed above, I have concluded that it is not possible to say that I am left in no doubt on the whole of the material that there are no real questions to be tried. In particular, I consider that each of the issues of *"Service", "The Payment Claim", "No Payment Schedule"* and "*A Superseded Payment Claim"* definitely raises a real question to be tried. In reaching that conclusion I have borne in mind Mr Burnside's exhortation not to overlook that any judgment, whether summary or not, is only provisional pending the final determination of the right of the parties. Nevertheless, this does not seem to me to be an appropriate case for summary judgment. Given the well established principle that "*the nature of the summary judgment procedure makes it undesirable, if a court is going to give leave to defend, that it give detailed reasons for doing so*",[29] I do not propose to say any more about why I consider that there are real questions to be tried in this proceeding. My reasons are to be found in some of the relevant submissions made by RSD, which I have set out above.

82 Subject to hearing from counsel, the order which I propose making is that the defendant have leave to defend the plaintiff's claim.

Mr JWK Burnside QC with Mr CM Caleo instructed by Clayton Utz
Mr EJ Delany SC with Mr R Andrew instructed by Phillips Fox

[29] ***Ticco Pty Ltd v Complete Family Healthcare Services Pty Ltd*** [2005] VSCA 221 at [34] per Hollingworth AJA, with whom Charles JA agreed.