SUPREME COURT OF QUEENSLAND

CITATION:	*T & M Buckley P/L v 57 Moss Rd P/L* [2010] QCA 381
PARTIES:	**T & M BUCKLEY PTY LTD** **(t/a SHAILER CONSTRUCTIONS)** ACN 010 052 043 (plaintiff/respondent/cross appellant) **v** **57 MOSS RD PTY LTD** ACN 125 428 444 (defendant/applicant/cross respondent)
FILE NO/S:	Appeal No 3052 of 2010 DC No 2720 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	12 October 2010
JUDGES:	Fraser and White JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Refuse the applicant's application to adduce further evidence;**

2. **Refuse the applicant's application for leave to appeal;**

3. **Grant the respondent leave to cross-appeal;**

4. **Allow the cross-appeal and set aside the decision of the District Court insofar as it concerns that part of the claim for summary judgment in the sum of $77,563;**

5. **There be summary judgment for the respondent in the sum of $77,563 together with interest thereon pursuant to s 15(2) *Building and Construction Industry Payments Act* 2004 (Qld) at the rate of 18 per cent per annum from 10 June 2009 to 5 March 2010;**

6. The applicant pay the respondent's costs of and incidental to the applications for leave and the costs of the appeal and cross-appeal.

CATCHWORDS: CONTRACT – BUILDING, ENGINEERING AND RELATED CONTRACT – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where respondent served on applicant a payment claim pursuant to s 17 of the *Building and Construction Industry Payments Act* 2004 (Qld) ('the Act') – where applicant failed to serve a payment schedule pursuant to s 18 of the Act – where applicant seeks to appeal summary judgment given in favour of respondent on a part of the payment claim – where respondent seeks to cross-appeal summary judgment – whether the trial judge erred in deciding whether respondent's payment claim sufficiently identified the relevant construction work or related goods and services to which the claim related and was a valid payment claim for the purposes of the Act – whether applicant should be given leave to appeal – whether respondent should be given leave to cross-appeal

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where applicant contended that it had paid the interest component of the payment claim but did not swear to payment in affidavit – where trial judge refused to allow applicant to give evidence as to payment without affidavit in accordance with r 295 *Uniform Civil Procedure Rules* 1999 (Qld) – where applicant sought to file further affidavit material in appeal proceedings – whether trial judge erred in failing to exercise discretion so as to allow further evidence to be adduced otherwise than by affidavit – whether applicant should be given leave to adduce further evidence by affidavit

Building and Construction Industry Payments Act 2004 (Qld), s 17, s 19
Uniform Civil Procedure Rules 1999 (Qld), r 292, r 295

Baxbex Pty Ltd v Bickle [2009] QSC 194, distinguished
Brookhollow Pty Ltd v R & R Consultants Pty Ltd [2006] NSWSC 1, cited
Clarence Street Pty Ltd v Isis Projects Pty Ltd (2005) 64 NSWLR 448; [2005] NSWCA 391, followed
Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) 21 BCL 364; [2005] NSWCA 229, followed
Gantley Pty Ltd v Phoenix International Group Pty Ltd [2010] VSC 106, cited

Isis Projects Pty Ltd v Clarence Street Pty Ltd [2004] NSWSC 714, cited
Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140, cited
Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) 64 NSWLR 462; [2005] NSWCA 409, followed
Neumann Contractors P/L v Peet Beachton Syndicate Limited [2009] QSC 376, cited
Parkview v Fortia [2009] NSWSC 1065, cited
Pickering v McArthur [2005] QCA 294, cited
R J Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390; [2008] QCA 397, cited
Tenix Alliance P/L v Magaldi Power P/L [2010] QSC 7, cited

COUNSEL: S Moody for the respondent/cross appellant
M E Pope for the applicant/cross respondent

SOLICITORS: Mills Oakley Lawyers for the respondent/cross appellant
Derek Geddes Lawyers for the applicant/cross respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Philippides J. I agree with those reasons and with the orders proposed by her Honour.

[2] **WHITE JA:** I have read the reasons for judgment of Philippides J and agree with those reasons and the orders proposed by her Honour

[3] **PHILIPPIDES J:** The applicant, 57 Moss Rd Pty Ltd, and respondent, T & M Buckley Pty Ltd, were parties to a written contract for the construction by the respondent of a project at 57 Moss Road, Wakerley in Queensland, referred to as the "Seaforth at Manly" project. The present proceedings arose out of a payment claim for $95,472 served on the applicant by the respondent pursuant to s 17 of the *Building and Construction Industry Payments Act* 2004 (Qld) ("*BCIPA*").

[4] The respondent (as plaintiff) commenced proceedings in the District Court against the applicant (as defendant) to recover the amount of the payment claim as a debt due and owing pursuant to s 19(2)(a)(i) *BCIPA*, the applicant having failed to serve a payment schedule pursuant to s 18 *BCIPA*.

[5] By application filed 15 February 2010, the respondent sought summary judgment in respect of its payment claim pursuant to rule 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the *UCPR*"). On 5 March 2010, summary judgment was given in favour of the respondent on a part of the payment claim in the sum of $19,100.74.

[6] The applicant seeks leave to appeal against that decision. The respondent in turn seeks leave to cross-appeal. The hearing before this court proceeded on the basis that both parties were content that the submissions concerning each of the applications for leave also addressed the substantive appeals.

Decision at first instance

[7] The payment claim in issue was entitled "Payment Claim No. 12" and expressed to be for work up to and including 15 May 2009. It stated:

Value of Work Done from 16/4/09 to 15/5/09	
Sediment Control as attached Claim No 30	$2,772
Suspension costs	$73,635
Total Claimed this Month	$76,407
Less Retention	-$7,641
	$68,766
Interest on Late Payment Adjustment (no retentions to be held)	$16,871
Retentions incorrectly held on interest charged previously	$1,156
	$86,793
Plus GST this Claim	$8,679
Progress Payment Claimed	$95,472

[8] As can be seen the payment claim comprised four discrete claims, being:

(a) $2,772 for "Sediment Control as attached Claim No 30";

(b) $73,635 for "Suspension Costs" (made up of $76,407 "Claimed this Month" less $7,641 "Retention");

(c) $16,871 for "Interest on Late Payment Adjustment"; and

(d) $1,156 for "Retentions incorrectly held on interest charged previously".

[9] The Payment Claim had three attachments:

(a) a document titled "Seaforth at Manly – Claim No 30 – Sediment Control Costs";

(b) a document titled "Seaforth at Manly – Claim No 31 – Interest on Late Payment"; and

(c) a document titled "Seaforth at Manly – Claim No 33 – Suspension of Time costs".

[10] Section 17(2) *BCIPA* provides that a payment claim–

> "(a) must identify the construction work or related goods and services to which the progress payment relates; and
>
> (b) must state the amount of the progress payment that the claimant claims to be payable… ; and
>
> (c) must state that it is made under this Act."

[11] An issue raised before the learned judge by the applicant was that the payment claim was not a valid payment claim for the purposes of *BCIPA* because it did not sufficiently identify the construction work to which it related as required by s 17(2)(a) *BCIPA*. (There was no issue as to the satisfaction of s 17(2)(b) and (c)).

[12] In considering what was required for a valid payment claim in terms of s 17(2)(a) *BCIPA* and the correct approach in determining whether there was sufficient identification for the purposes of that section, the judge at first instance quoted extensively from the decision of White J (as she then was) in *Neumann Contractors P/L v Peet Beachton Syndicate Limited* [2009] QSC 376 where the authorities dealing with the New South Wales equivalent to the *BCIPA* were canvassed.

[13] His Honour noted White J's reference to what Hodgson JA said in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229 (at [25]) that, "the relevant construction work … must be identified sufficiently to enable the respondent to understand the basis of the claim." His Honour also noted the comments of Basten JA (at [42]) in the same case that the expression "identified" should be given a purposive construction and that:

> " …what must be done must be sufficient to draw the attention of the principal to the fact that an entitlement to a payment is asserted, arising under the contract to which both the contractor and the principal are parties. In that sense, the claim, to be valid, must be reasonably comprehensible to the other party."

[14] His Honour also noted White J's reference to *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* [2005] NSWCA 409 and Hodgson JA's view (at [36]) that a payment claim cannot be treated as a nullity for failure to comply with s 13(2)(a) of the New South Wales Act (being in identical terms to s 17(2)(a)), "unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made". His Honour also had regard to Santow JA's observations (at [48]) that the requirements underlying s 13(2)(a) are satisfied by "a relatively undemanding test", although still one with some content, and that it is an objective and not subjective test as to whether the payment claim sufficiently identifies the construction work the subject of the claim. Further, the evaluation of the sufficiency of the identification takes into account the background knowledge of each of the parties derived from their past dealings and exchanges of documentation.

[15] The learned judge set out the following extract from *Neumann Contractors Pty Ltd* dealing with other pertinent authorities:

> "[26] In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 Palmer J summarised how a claimant might comply with the New South Wales equivalent of s 17 of the *Payments Act*. His Honour said, relevantly, that:
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> > '… a payment claim which does not, on its face, purport in a reasonable way to:
> >
> > - identify the construction work to which the claim relates; or
> >
> > - indicate the amount claimed; or
> >
> > - state that it is made under the Act

> fails to comply with an essential and mandatory requirement [of the Act] so that it is a nullity for the purposes of the Act.'

His Honour observed (at [44]-[45]):

> 'A payment claim under the Act is, in many respects, like a Statement of Claim in litigation. In pleading a Statement of Claim, the plaintiff sets out only the facts and circumstances required to establish entitlement to the relief sought; the Statement of Claim does not attempt to negative in advance all possible defences to the claim. It is for the defendant to decide which defence it is to raise; the plaintiff, in a reply, answers only those defences which the defendant has pleaded.
>
> If it purports reasonably on its face to state what section 13(2)(a) and (b) require it to state, it will have disclosed the critical elements of the claimant's claim. It is then for the respondent either to admit the claim or to decide what defences to raise.'

[27] … [In] *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391 … Mason P set out a passage from the trial judge:

> '[37] In principle, I think, the requirement in section 13(2)(a) that the payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where,
>
> (1) the payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;
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> (2) that reference is supplemented by a single line description of the work;
>
> (3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;
>
> (4) there is a summary that pulls all the details together and states the amount claimed.'

[28] In *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 a decision under the *Building and Construction Industry Security of Payment Act* 2002 (VIC), s 14(3) of which is the same as s 17, Finkelstein J observed (at [12]):

> '… a payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim. If a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. That is to say, a payment claim must put the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule. … That is not an unreasonable price to pay to obtain the benefits of the statute.'

The invoice under consideration in that case indicated the amount claimed to be due by taking the contract sum and making a number of adjustments. Whilst certain items were set out in sufficient detail, his Honour concluded that what was noticeably absent was:

> '… any identification of the work previously completed and paid for and the work (apart from the variations) to which the invoice relates.
>
> … The only information provided is that the amount is referable to the 'Contract Sum' and 'Payments Received (at [14])'."

[16] The learned judge concluded his reference to the authorities by quoting from the judgment of Daubney J in *Baxbex Pty Ltd v Bickle* [2009] QSC 194 at [18] that in relation to a payment claim, "precision and particularity must be required to a degree reasonably sufficient to apprize the parties of the real issues in the dispute".

[17] The learned judge then dealt with each part of the payment claim as follows:

> "[21] In the matter before me, the claim for $2,772.00 for sediment control costs refers to claim no. 30. In that document there are items referred to 'as attached breakdown sheet' and 'as QCIG breakdown attached'. There is no dispute these documents were not in fact attached. In my opinion following Daubney J in *Baxbex Pty Ltd v Bickle*, those documents should have been attached for the claim to be a valid claim. That is, unless the documents have already been supplied to the [applicant] as to which there was no evidence before me.
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> [22] Further, in my opinion the claim for preliminary suspension costs lacks identification. No basis is set out for the claim for variable preliminary value of $618,533.00 nor the 36 weeks period for the calculation relied upon to claim these costs over 30 days at $2,454.50 per day. That is, how is that value and number of weeks arrived at.
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> [23] However, as to the [applicant's] claim the suspension costs were not under the contract, the [applicant's] director did not

> swear to the relevant circumstances in his affidavit. I consider this is a point the respondent cannot rely upon to oppose summary judgment.
>
> [24] The claim for interest on late payments of $16,871 is in my opinion identified in the schedule attached to the claim. To this extent the claim is valid. Interest and 'delay charges' can be for construction work (*Co-ordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd and others* (2005) NSWCA 228. As to the claim by the [applicant] that it has paid the interest that was also not sworn to.
>
> [25] In my opinion the claim for 'retentions incorrectly held and interest charged previously' in the sum of $1,156.00 is not identified for the purposes of the *BCIPA* and is not a valid claim."

[18] The learned judge concluded:

> "[26] In the circumstances it is my opinion except for the sum of $16,871.00 the balance of the payment claim in this case does not have the precision and particularity to a degree reasonably sufficient to apprize the parties of the real issues in the dispute (per Daubney J). Further, the inclusion of an invalid sum in the claim is not enough to render the claim invalid (*Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd* [2010] QSC 7 per Fryberg J at p 6)."

[19] His Honour held that s 19(4)(b)(ii) *BCIPA* precluded the applicant's claim for a set-off, but the applicant had a real prospect of successfully defending the balance of the claim, other than the claim for interest of $16,871, in respect of which summary judgment was awarded together with $2,229.74 (being interest 18 per cent per annum from 10 June 2009 to 5 March 2010).

The applicant's application for leave to appeal

[20] The applicant requires leave to appeal against the judgment of the learned District Court judge, as it is less than the jurisdiction limit in the Magistrates Court, and additionally, the judgment did not finally dispose of the rights of the parties. The proposed grounds of appeal are stated to be that:

> "(i) His Honour erred in having found that the payment claim did not comply with the Building and Construction Industry Payments Act 2004 in an action in which the payment claim constituted the cause of action and gave leave to defend in relation to part of the action, failed to give leave to defend in relation to the entire action.
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> (ii) His Honour erred in refusing to allow the tender of documentary evidence which proved that the amount he awarded in his judgment, had previously been paid by the defendant.
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> (iii) His Honour erred in refusing to allow the tender of documentary evidence on the basis that it was not contained in a filed affidavit before the court.

(iv) His Honour erred in refusing to allow the tender of documentary evidence that was admissible against the plaintiff.

(v) His Honour erred in failing to allow Mr Garlick to call or give evidence to show that the interest of $16,871.00 for which judgment was awarded had been paid.

(vi) His Honour erred in failing to find in favour of the defendant in particular that the amount of interest in the sum of $16,871.00 had previously been paid by the defendant to the plaintiff.

(vii) His Honour erred in failing to allow the defendant's Set-Off."

[21] The applicant contended that there are two important questions of law involved in its application, being:

(i) whether, in an application of summary judgment relying on a payment claim issued pursuant to *BCIPA*, it is permissible to divide the payment claim into its component parts and give judgment for part of it; and

(ii) whether the learned judge applied the *UCPR* in such a way as to deny the applicant procedural fairness.

The respondent's application for leave to cross-appeal

[22] The respondent seeks leave to cross-appeal, having been granted an extension of time to bring that application, on the basis of the following proposed grounds of appeal:

(i) The learned judge erred at law by failing to apply the correct test to ascertain whether all or any part of the respondent's payment claim was a valid payment claim for the purposes of s 17(1) and (2) of *BCIPA*; and

(ii) His Honour erred at law insofar as he found that the respondent's payment claim (insofar as it related to the claims for "sediment control", "preliminary suspension costs" and "retentions incorrectly held on interest charged previously") did not sufficiently identify the relevant construction work or related goods and services to which the claim related, and was thus not a valid payment claim for the purposes of the *BCIPA*.

[23] Relying on *Pickering v McArthur* [2005] QCA 294, the applicant contended that leave ought not to be given to the respondent on its application, even if error could be shown because it could not demonstrate a substantial injustice resulting from the exercise of the judge's discretion in giving the applicant leave to defend in relation to those aspects of the payment claim that did not concern the claim to interest.

Failure to allow the applicant to adduce further evidence

[24] The applicant's complaint that the learned judge erred in failing to exercise his discretion so as to allow further evidence to be adduced otherwise than by affidavit as required by rule 295 of the *UCPR* has no prospects of success and may be dealt with briefly.

[25] At the hearing of the summary judgment application, the applicant contended that it had paid the interest component of the payment claim, although the applicant's affidavit did not swear to such payment being made or exhibit any documentary proof of the payment. The learned judge refused to allow Mr Garlick (who, in addition to appearing as counsel for the applicant, was its sole director) to give evidence as to the payment or to tender documents from the Bar Table concerning the matter, indicating that an affidavit was required. His Honour suggested that an adjournment could be requested so that the additional affidavit material could be placed before the court, but that suggestion was not taken up by the applicant.

[26] Leaving to one side the distinct peculiarity, to say the least, of the proposal that Mr Garlick give evidence for the applicant, in addition to appearing as its counsel, the approach taken by the judge in requiring that any additional evidence be adduced in the usual manner in affidavit form in accordance with rule 295 *UCPR* was entirely correct and reveals no appealable error.

[27] I note that, in support of its application, the applicant sought leave to file further affidavit material before this Court to refute the respondent's entitlement to the interest claim awarded at first instance. The applicant has not demonstrated any basis on which it should be permitted to place further evidence before this Court and that application should be refused. The appropriate occasion to have put any relevant evidence before the Court was at the hearing of the summary judgment application; there is no suggestion that the additional material was not available to be put before that Court.

[28] I would therefore refuse leave to appeal on the basis that there was an error by the judge in not permitting evidence to be adduced otherwise than by affidavit.

Error in determining whether the respondent's payment claim sufficiently identified the construction work

[29] Before considering the first ground which the applicant seeks leave to ventilate, being whether a payment claim is severable, it is convenient to consider the respondent's application for leave to cross-appeal. That concerns whether the learned judge erred in the test he adopted in determining whether the payment claim sufficiently identified the construction work or related goods and services for the purposes of s 17(2)(a) *BCIPA* so that it was a valid payment claim.

[30] The respondent contended that the learned judge erred in failing to apply the correct test, by proceeding on the basis expressed at [26] of the reasons that, to be a valid payment claim what was required was, as Daubney J stated in *Baxbex Pty Ltd*, "precision and particularity … to a degree reasonably sufficient to apprise the parties of the real issues in the dispute". That quoted proposition is derived from Palmer J's statement in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (at [76]), which was adopted by McDougall J in *Isis Projects Pty Ltd v Clarence Street Pty Ltd* [2004] NSWSC 714 (at [36]). However, the respondent's argument is that that proposition if applied to the identification required of a payment claim postulates an incorrect test. In developing this argument, the respondent noted that, while the Court of Appeal in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391 upheld the decision of McDougall J and substantially endorsed the passages from the judgment of Palmer J in *Multiplex Constructions* cited by McDougall J, an important qualification was made concerning the applicability of the dicta to payment claims (see *Nepean Engineering Pty Ltd* (at [25])).

[31] In my view there is merit in the respondent's submissions. In *Clarence Street Pty Ltd* [2005] NSWCA 391 Mason P (with whom Giles JA and Santow JA agreed) observed (at [30] - [32]) that, in *Multiplex Constructions*, Palmer J was in fact considering the requirements for a valid payment schedule which has a different function from a payment claim. A payment schedule is required to identify the payment claim to which it relates, indicate the amount of the payment (if any) that is proposed to be made and why payment in full is withheld. The joinder of issue thus achieved sets the parameters for the matters that may be contested if an adjudication ensues. On the other hand, as Mason P pointed out (at [31]), when it is the validity of a payment claim that is in issue, it must be borne in mind that:

> "… a 'payment claim' is no more than a claim. It must comply with s 13, but (unlike a payment schedule) it is not its function to identify the scope of a dispute. Many claims will not be disputed, but if they are, it is a matter for the respondent to the payment claim to state the extent and reasons for failing to pay the sum withheld."

[32] It is apparent that, in relying on the statement quoted from *Baxbex Pty Ltd*, the learned judge overlooked the matters referred to by Mason P and set too high a bar in respect of what was required for the purposes of s 17(2)(a) *BCIPA.* Moreover, he adopted an approach that was inconsistent with the other line of authority to which he had referred.

[33] The respondent also submitted, relying on the approach taken in the New South Wales authorities of *Nepean Engineering Pty Ltd* (at [34]-[38], [76]), *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 (at [33]-[36], [40]-[41]), and *Parkview v Fortia* [2009] NSWSC 1065 (at [30], [33]) that a payment claim should be found to be valid if it purports in a reasonable way on its face to identify the relevant construction work to which the payment claim relates. The respondent further submitted that, in determining what degree of identification is required for a payment claim to be valid, it is to be noted that s 17(2)(a) *BCIPA* merely specifies that the payment claim must "identify" the relevant work and does not, for example, require that particulars be given as to how the claimed amount is calculated.

[34] In considering those submissions, it is relevant to have regard to the comments of Mason P in *Clarence Street Pty Ltd* in relation to an argument that the focus of inquiry should be as to whether the progress claim provided sufficient detail of the work the subject of the claim to enable the recipient to make its own assessment of the amount payable and to prepare a payment schedule accordingly. His Honour observed:

> "[36] … Once again, this tends to state the problem in terms of circularity … It also tends to elide the distinction between the informative and the persuasive roles of a payment claim. Section 13(2) prescribes matters that must be brought to the attention of the recipient, who then has the option of paying in full or submitting a payment schedule explaining why payment is withheld. It may be expected that a claimant will be concerned to persuade the other party to accept the claim and pay promptly, but s 13(2) makes no prescription in this regard.
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> …

> [38] There is a distinction between understanding a claim and accepting it. Section 13(2)(a) is concerned only with identification of the subject matter of the payment claim in the sense of the construction work (or related goods and services) to which it relates.
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> …
>
> [39] … I do not suggest that it was wrong to examine the issue from the vantage points of the parties to the particular contract, including the way the recipient would have viewed the later claims in light of the pattern of earlier ones. But the focus must remain on the objective circumstances, not the subjective intentions or perceptions of one of the parties. The Court must take its guidance from the statutory language, which is both simple and clear, in my opinion."

[35] In *Nepean Engineering Pty Ltd*, Hodgson JA (with whom Ipp JA agreed) in considering the degree of identification required for a payment claim, had regard to the observations in *Clarence Street Pty Ltd* concerning the different functions of a payment claim and payment schedule and to his statements in *Climatech Pty Ltd* (at [25]) that what was required was sufficient identification "to enable the respondent to understand the basis of the claim". His Honour noted Basten JA's statements in *Climatech Pty Ltd* (at [42]) that to be valid a claim must be reasonably comprehensible to the other party, and expressed the degree of identification required in terms of whether in all the circumstances, the material in the payment claim was sufficient to convey to the recipient just what was the work for which payment was claimed (at [28]). What was required was that the payment claim purport in a reasonable way to identify the work the subject of the claim, and a payment claim was not a nullity for failure to identify the work unless the failure was patent on its face. The payment claim did not cease to satisfy the requirement concerning identification because it could be subsequently shown that the payment claim was not entirely successful in identifying all of the work.

[36] Santow JA (at [47]-[48]) expressed the view that, in respect of the minimum necessary to satisfy the identification requirement that the payment claim "purport in a reasonable way to identify the work" there must be "sufficient specificity in the payment claim for its recipient actually to be able to identify a 'payment claim' for the purpose of determining whether to pay, or to respond by way of a payment schedule indicating the extent of payment, if any." But having said that, his Honour stated his agreement with what Hodgson JA said in *Climatech Pty Ltd* that what was required was sufficient identification "to enable the respondent to understand the basis of the claim" and disavowed the notion that there was a legal necessity to include any material directed merely to persuading a respondent to accept a payment claim (at [25]).

[37] The approach taken in *Climatech Pty Ltd* and *Nepean Engineering Pty Ltd* indicates what is required in determining whether there has been sufficient identification for the purpose of s 17(2)(a). In the present case, however, the learned judge applied a more stringent test, by focusing on the dicta quoted from *Baxbex Pty Ltd* that the degree of identification required for a valid payment claim was such as to apprize the parties of the real issues in dispute.

[38] Dealing with the claim for suspension costs, the payment claim sought an amount of $73,635 for "suspension costs" made up of $76,407 "claimed this month" less $7,641 "retention". As mentioned, it was supported by an attachment. It stated that the claim was for the 30 day period from 16 April 2009 to 15 May 2009 at a rate of $2,454.80. It also specified a "variable preliminary value" of $2,454.50 per day (calculated by using the sum of $618,533 for 36 weeks). The learned judge held that that claim, although properly a claim under the contract, was not valid because the attachment failed to specify how the "variable preliminary value" was calculated or where the 36 week period came from. I accept the respondent's submission that the judge erred in the approach he took. The issue for determination was not whether the payment claim explained in every respect the means by which a particular claim item had been calculated, but whether the relevant construction work or related goods and services was sufficiently identified as explained above. That is, whether the payment claim reasonably identified the construction work to which it related such that the basis of the claim was reasonably comprehensible to the applicant.

[39] Approaching the question in that manner, the respondent has demonstrated that the learned judge erred in finding that there was a real prospect of the applicant defending the payment claim on the basis that the payment claim did not sufficiently identify that part that related to suspension of time costs. For the same reasons, the learned judge erred in the approach he took in finding that the claim for retentions ($1,156) was invalid. Those items were identified in a manner that sufficiently allowed the applicant to understand the basis for the claims.

[40] The same applies in relation to the claim for sediment control costs. The payment claim sought an amount of $2,772 for "Sediment Control as attached Claim No 30". That description, in conjunction with the attachment, was sufficient to identify the relevant construction work to which that part of the claim related for the purposes of s 17(2)(a) *BCIPA*. It is to be noted that the attachment particularised the claim for sediment control costs in considerable detail, providing a description of the items of cost, unit, quantity, rate amount, extent of completion and claim value.

[41] In relation to the claim for sediment control costs, there is an additional difficulty in the approach taken by the judge. The learned judge held, relying on *Baxbex Pty Ltd*, that the claim lacked sufficient identification because the relevant attachment provided with the payment claim referred to various supplier invoices that were not also attached to the payment claim. I agree with the respondent's submission that in this regard the judge misconstrued the remarks of Daubney J in *Baxbex Pty Ltd* and thus erred in considering what was required in terms of s 17(2)(a). Daubney J's conclusion in *Baxbex Pty Ltd*, that the payment claim there under consideration did not comply with s 17(2)(a), was made in circumstances where the payment claim referred to an attached schedule which provided no information as to the construction work to which the claim related, other than merely invoking invoices by invoice number and date, but without attaching or providing those invoices. *Baxbex Pty Ltd* does not stand for the proposition implicit in the judge's reasons that a failure to provide documents referred to in a payment claim or attachment thereto *per se* results in there being a deficiency in identification for the purposes of s 17(2)(a). In the present case, the fact that the attachment referred to certain supplier invoices without also attaching them did not detract from the identification that was provided being sufficient.

[42] In my view, the respondent ought to be given leave on its cross-appeal and that appeal should be allowed. The respondent has demonstrated that the learned judge erred in the approach taken in deciding whether the respondent's payment claim (insofar as it related to the claims for "sediment control", "preliminary suspension costs" and "retentions incorrectly held on interest charged previously") sufficiently identified the relevant construction work or related goods and services to which the claim related, and was a valid payment claim for the purposes of the *BCIPA*. For the reasons that I have indicated, I do not think that there is a question that ought to be tried as to whether the payment claim complies with s 17(2)(a) *BCIPA*. There is no real prospect of successfully defending the summary judgment on that basis. In my view, the respondent has demonstrated that the learned judge erred in the exercise of his discretion in refusing to give summary judgment in the respondent's favour in respect of the entire payment claim. As a result, the respondent has suffered a substantial injustice in being denied the benefit of the process established by the *BCIPA*, which is designed to provide a speedy and effective means of ensuring cash flow (*R J Neller Building P/L v Ainsworth* [2008] QCA 397 at [39]).

[43] It follows that the further issue raised on the applicant's application for leave as to whether, in relation to a payment claim which is in part insufficiently identified, the payment claim is severable so as to save from invalidity that part which is sufficiently identified (the approach favoured by Fryberg J in *Tenix Alliance Pty Ltd v Magaldi Power P/L* [2010] QSC 7; see also *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106) does not require determination. I would refuse leave in respect of that ground.

Orders

[44] The orders that I would propose are:

1. Refuse the applicant's application to adduce further evidence;

2. Refuse the applicant's application for leave to appeal;

3. Grant the respondent leave to cross-appeal;

4. Allow the cross-appeal and set aside the decision of the District Court insofar as it concerns that part of the claim for summary judgment in the sum of $77,563;

5. There be summary judgment for the respondent in the sum of $77,563 together with interest thereon pursuant to s 15(2) *Building and Construction Industry Payments Act* 2004 (Qld) at the rate of 18 per cent per annum from 10 June 2009 to 5 March 2010;

6. The applicant pay the respondent's costs of and incidental to the applications for leave and the costs of the appeal and cross-appeal.