SUPREME COURT OF QUEENSLAND

CITATION:	*Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2009] QSC 357
PARTIES:	**NEUMANN CONTRACTORS PTY LTD** (applicant) **v** **TRASPUNT NO 5 PTY LTD** (respondent)
FILE NO:	BS 7752 of 2009
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	11 November 2009
DELIVERED AT:	Supreme Court at Brisbane
HEARING DATE:	15 September 2009
JUDGE:	P Lyons J
ORDERS:	**The respondent pay to the applicant $683,558.15 including $25,250.40 interest to this day (at a rate of 10% per annum) and that the respondent pay the applicant's costs of the proceeding to be assessed.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where the applicant made a payment claim against the respondent under the *Building & Construction Industry Payments Act 2004* (Qld) (*BCIP Act*) – where the respondent has not delivered a payment schedule – where the applicant seeks judgment for the amount claimed in the payment claim – where the respondent challenges the validity of the payment claim CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where there is no payment statement – allegation of misleading conduct – whether available as a defence to an application for judgment CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO

AND RECOVERY OF PROGRESS PAYMENTS – where there is no payment statement – alleged existence of earlier payment claim – whether second claim is in breach of s 17(5) *BCIP Act* – whether breach of s 17(5) of *BCIP Act* is available ground for resisting judgment – whether alleged prior claim is a valid claim

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where there is no payment statement – where the respondent alleges the applicant made claim fraudulently – where there is no substantial prospect the respondent would succeed

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – where there are allegations of absence of good faith and abuse of process – whether these matters constitute defence to an application for judgment, doubted – where the allegations are not established

ESTOPPEL – ESTOPPEL IN PAIS – EQUITABLE ESTOPPEL – GENERAL PRINCIPLES – where estoppel is alleged to be based on course of conduct – representation must be clear and unambiguous – whether estoppel is available as a defence to an application for judgment on a payment claim – estoppel not made out

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – CHAMBERS – where there is an application for judgment without trial – principles applied by analogy with application for summary judgment

Austruct Qld P/L v Independent Pub Group P/L [2009] QSC 1, applied
Bitania Pty Ltd & Anor v Parkline Constructions Pty Ltd [2006] NSWCA 238, applied
Bolton Properties P/L v JK Investments (Australia) P/L [2009] QCA 135, cited
Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor [2006] NSWSC 1, followed
Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd [2005] NSWCA 229, applied
Coordinated Constructions Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd and Ors [2005] NSWCA 228, followed
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232, considered

Foodco Management Pty Ltd v Go My Travel Pty Ltd [2002] 2 Qd R 249, cited
G W Enterprises Pty Ltd v Xentex Industries Pty Ltd & Ors [2006] QSC 399, cited
Gray v Morris [2004] 2 Qd R 118, considered
Kell & Rigby Pty Ltd v Flurrie Pty Ltd [2006] NSWSC 906, considered
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993, considered
La Baysse & Anor v Botel [2003] QSC 212, applied
Legione & Anor v Hateley (1983) 152 CLR 406, cited
Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890, considered
Northside Projects P/L v Trad & Anor [2009] QSC 264, cited
Swain v Hillman [2001] 1 All ER 91, considered
Williams & Ors v Spautz (1992) 174 CLR 509, considered
Zebicon Pty Ltd v Remo Constructions Pty Ltd [2008] NSWSC 1408, followed

Acts Interpretations Act 1954 (Qld), s 39
Building & Construction Industry Payments Act 2004 (Qld), s 5, s 7, s 8, s 10, s 12, s 13, s 17, s 18, s 19, s 99, s 100, s 103
Trade Practices Act 1974 (Cth) s 52

Uniform Civil Procedure Rules 1999 (Qld) r 292, r 293, r 371, r 658

COUNSEL: M D Ambrose for the applicant
D R Cooper SC with S B Whitten for the respondent

SOLICITORS: Clayton Utz for the applicant
Frews Lawyers for the respondent

[1] **P LYONS J:** Neumann Contractors Pty Ltd (*Neumann*) made a payment claim (the *June 2009 claim*) against Traspunt, under the *Building & Construction Industry Payments Act 2004* (Qld) (*BCIP Act*). It was served under cover of a letter dated 10 June 2009, addressed to Traspunt. Traspunt has not delivered a payment schedule. Neumann seeks judgment for the amount claimed in the payment claim. Traspunt challenges the validity of the payment claim on a number of grounds, and raises other matters which, it contends, have the effect that judgment should not be granted without a trial.

Background

[2] Neumann's claim arose out of a contract made between it and Traspunt on about 10 January 2008. The contract was for the performance of engineering works, including earthworks, for a development called Elysian Grove Estate, at Caboolture. The work included the stripping of topsoil prior to excavation; and the spreading of soil on footpaths and allotments. It also made provision for the removal and

replacement of unsuitable material. In the course of the work, it became necessary to excavate a basin. This was, apparently, the subject of a direction from the Superintendent.

[3] The contractual documents included General Conditions of Contract (AS 2124-1992) (*AS 2124*). AS 2124 required Traspunt to ensure that a Superintendent was engaged. Bayside Consulting Pty Ltd (*Bayside Consulting*) was the Superintendent for the contract.

[4] Clause 42.1 of AS 2124 made provision for Neumann to deliver claims (including progress claims) to the Superintendent. The Superintendent was required to issue a payment certificate within 14 days of receipt of a claim, no doubt after consideration of the claim. Subject to the contract, Traspunt was required to pay the amount so certified within 28 days of receipt of the certificate. Under cl 42.6 of AS 2124, the issue of a certificate did not prejudice any claim which Traspunt or Neumann might have.

[5] Clause 7 of AS 2124 provided for the service of notices to the address stated in the contract. The clause seemed to be concerned with notices to be served either on Traspunt, Neumann or the Superintendent. The address for Traspunt identified in the contract was PO Box 506, Kippa Ring, Queensland.

[6] A significant number of claims (one of the parties says 31, the other says there were in total 20 claims, but the precise number does not matter) have been made by Neumann under the procedure set out in cl 42.1. In each of those cases, the claim was first sent to the Superintendent, and not to Traspunt. I was referred to two examples of such claims, being Claims 6 and 7. Claim 6 commenced with a letter to Bayside Consulting of 2 April 2008 enclosing what is described as a progress claim. That was accompanied by a further letter to Bayside Consulting relating to extensions of time and additional works. There then followed a summary of the claim, on what appears to be a standard form. At the foot of the standard form is an endorsement stating that the claim was made pursuant to s 17(1) of the *BCIP Act*, and requiring payment by what is referred to as the "Due Date". That is followed by a Bill of Quantities, and other material in support of the claim.

[7] For Claim 6, a certificate was issued by Bayside Consulting on 21 April 2008, which was then sent by Neumann to Traspunt, together with a tax invoice for the amount certified.

[8] Claim 7 was, in material respects, the same, save that it related to further work.

[9] Mr Maccheroni is the Civil Contracting Manager for Neumann. He gave evidence that claims other than claims 1 to 5 and 18 included the endorsement on the form relating to the *BCIP Act*, to which I have referred. He also gave evidence that, earlier this year, when Neumann was not in a position to pay similar claims, an agreement was reached to allow it time to obtain funds to do so.

[10] Prior to 14 May 2009, a claim by Neumann for the payment of moneys was prepared by a Mr Peters, who is employed by Neumann as a project engineer (the *May 2009 claim*). The claim was intended to be a payment claim under the *BCIP Act*. It was sent to Trask Development Corporation, on about 14 May 2009.

[11] The May 2009 claim was subsequently reviewed by Mr Maccheroni. He formed the view that it failed to meet essential requirements of the *BCIP Act*, and directed Mr Peters not to pursue it. He also directed Mr Peters to prepare the June 2009 claim, which was sent to Traspunt on about 10 June 2009. The procedure which had been followed for the earlier claims of first sending the claim to Bayside Consulting, and then sending a certificate and a tax invoice to Traspunt, was not followed for the May 2009 claim and the June 2009 claim.

[12] Broadly speaking, the June 2009 claim is in two parts. The first part is described as Variation 70, and is composed of three claims for earthworks. The second part is described as Variation 71. It claims amounts previously claimed for work done under the contract, but withheld pursuant to a decision of the Superintendent, in relation to a claim by Traspunt for liquidated damages for delay by Neumann.

[13] No payment schedule was sent in response to the June claim, or, for that matter, in response to the May 2009 claim.

[14] On 26 June 2009, Traspunt wrote to Neumann in relation to the June claim. The letter referred to clause 42.1 of AS 2124, noting that claims for payment are to be delivered to the Superintendent.

[15] Neumann responded on 26 June 2009 stating that Traspunt seemed "to be labouring under a misapprehension." The response stated that the payment claimed was lodged under the *BCIP Act*, which required service on the Principal and not on the Superintendent. It stated that by reason of the failure to provide a payment schedule within the time specified in the *BCIP Act*, Traspunt was now liable to pay the amount claimed. Traspunt has not done so.

The proceedings

[16] Neumann commenced these proceeding on 20 July 2009, by way of originating application, and seeks judgment. Its submissions rely on r 658 of the *Uniform Civil Procedure Rules 1999* (*UCPR*), which permits the Court, at any stage of the proceedings, to make any order, including a judgment, which the nature of the case requires. Traspunt's submissions challenge whether matters raised in the application are fit for summary disposal, suggesting that the application was being dealt with as an application for summary judgment under r 292. At the hearing, I was left with the impression that that was the basis on which both parties were proceeding.

[17] Rule 292 permits an application for judgment after a defendant has filed a notice of intention to defend. That step is taken in proceedings commenced by claim.[1] In *R v Urbancic*,[2] Muir J noted that r 293, which is the analogous rule for applications for summary judgment by a defendant, applied to proceedings commenced by way of application, as well as by way of claim. The same reasoning would apply to an application under r 292. It seems to me therefore, that r 292 may be treated as regulating Neumann's application.

[18] Rule 658 was considered by Jones J in *La Baysse & Anor v Botel*.[3] An application had been made for recovery of possession of premises. His Honour noted that the proceeding should have been commenced by claim. He also noted that under r 14 the Court may order, where proceedings have been started by application which should have been started by a claim, that proceedings continue as if started by claim, and give such directions as the Court thinks appropriate. For that reason, also, it seems that the proceeding could be treated as if it had been started by claim; and accordingly that an application could be brought under r 292. The bringing of the application before a defence has been filed could be treated as an irregularity under r 371.

[19] Accordingly, I propose to proceed on the basis that the application can be made under r 292 of the *UCPR*.

[20] The test for determining whether judgment should be given summarily is set out in r 292(2), as follows:

> "(2) if the court is satisfied that-
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> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
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> (b) there is no need for a trial of the claim or the part of the claim;
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> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[21] Under the rules which preceded the *UCPR*, summary judgment would normally only be granted where a plaintiff established that there was no real question to be tried.[4] However r 292 is deliberately expressed in different language to its predecessor. In *Deputy Commissioner of Taxation v Salcedo*,[5] McMurdo P,[6] while noting the well established general principle that issues raised in proceedings will be determined summarily only in the clearest of cases, observed that r 292 should be applied using its clear and unambiguous language, and keeping in mind that the purpose of the UCPR was to facilitate the just and expeditious resolution of the real issues in proceedings, at a minimum of expense.

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1 See rr 134, 137, 22 and 23.
2 [2000] QSC 170 at [25].
3 [2003] QSC 212.
4 See *Fancourt & Anor v Mercantile Credits Limited* (1983) CLR 87, 99.
5 [2005] 2 Qd R 232.
6 At 233.

[22] In the same case, Atkinson J expressed a rather similar view.[7] Williams JA (with whom both the other members of the Court agreed) rejected stricter tests for the grant of summary relief based on *Gray v Morris*,[8] which had been relied on at first instance for the proposition that the *UCPR* had not effected any substantial change in the approach to summary judgment.[9] His Honour referred to *Swain v Hillman*,[10] where a test, formulated as a real prospect of success, was said to require a realistic prospect of success, to be contrasted with prospects of success which might be described as fanciful. However it was said in *Swain* that the discretion to give summary judgment did not arise merely because the Court concludes that success is improbable – an approach adopted by Wilson J in *Foodco Management Pty Ltd v Go My Travel Pty Ltd*.[11] Williams JA went on to point out that the overriding consideration must be the "just disposition of the case – there must be a fair hearing."[12] To generally similar effect are the views of the majority in *Bolton Properties P/L v JK Investments (Australia) P/L*.[13]

[23] Before dealing with the issues that were debated at the hearing, it is convenient to identify relevant provisions of the *BCIP Act*:

BCIP Act

5 Act does not limit claimant's other rights

A claimant's entitlements and remedies under this Act do not limit—

(a) another entitlement a claimant may have under a construction contract; or

(b) any remedy a claimant may have for recovering the other entitlement.

7 Object of Act

The object of this Act is to ensure that a person is entitled to receive, and is able to recover, progress payments if the person—

(a) undertakes to carry out construction work under a construction contract; or

(b) undertakes to supply related goods and services under a construction contract.

8 How object is to be achieved

The object is to be achieved by—

(a) granting an entitlement to progress payments whether or not the relevant contract makes provision for progress payments; and

(b) establishing a procedure that involves—

(i) the making of a payment claim by the person claiming payment; and

(ii) the provision of a payment schedule by the person by whom the payment is payable; and

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7 At page 241.
8 [2004] 2 Qd R 118.
9 See page 234.
10 [2001] 1 All ER 91, 92, 94 , 95.
11 [2002] 2 Qd R 249, 254.
12 *Salcedo* at 235.
13 [2009] QCA 135.

(iii) the referral of a disputed claim, or a claim that is not paid, to an adjudicator for decision; and

(iv) the payment of the progress payment decided by the adjudicator.

10 Meaning of construction work

(1) ***Construction work*** means any of the following work—

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

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

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

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

(e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including—

(i) site clearance, earthmoving, excavation, tunnelling and boring; and

(ii) the laying of foundations; and

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

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

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

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

(g) carrying out the testing of soils and road making materials during the construction and maintenance of roads;

(h) any other work of a kind prescribed under a regulation for this subsection.

12 Rights to progress payments

From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract.

13 Amount of progress payment

The amount of a progress payment to which a person is entitled in relation to a construction contract is—

(a) the amount calculated under the contract; or

(b) if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract.

17 Payment claims

(1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the ***claimant***) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the ***respondent***).

(2) 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 (the ***claimed amount***);

and

(c) must state that it is made under this Act.

(3) The claimed amount may include any amount—

(a) that the respondent is liable to pay the claimant under section 33(3); or

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

(4) A payment claim may be served only within the later of—

(a) the period worked out under the construction contract; or

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

(5) A claimant can not serve more than 1 payment claim in relation to 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.

18 Payment schedules

(1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.

(2) A payment schedule—

(a) must identify the payment claim to which it relates; and

(b) must state the amount of the payment, if any, that the respondent proposes to make (the ***scheduled amount***).

(3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.

(4) Subsection (5) applies if—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not serve a payment schedule on the claimant within the earlier of—

(i) the time required by the relevant construction contract; or

(ii) 10 business days after the payment claim is served.

(5) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

19 Consequences of not paying claimant if no payment schedule

(1) This section applies if the respondent—

(a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section; and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) The claimant—

(a) may—

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

(ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; and

(b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.

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

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

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

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

(i) to bring any counterclaim against the claimant; or

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

99 No contracting out

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

(2) A provision of any contract, agreement or arrangement (whether in writing or not) is void to the extent to which it—

(a) is contrary to this Act; or

(b) purports to annul, exclude, modify, restrict or otherwise change the effect of a provision of this Act, or would otherwise have the effect of excluding, modifying, restricting or otherwise changing the effect of a provision of this Act; or

(c) may reasonably be construed as an attempt to deter a person from taking action under this Act.

100 Effect of pt 3 on civil proceedings

(1) Subject to section 99, nothing in part 3 affects any right that a party to a construction contract—

(a) may have under the contract; or

(b) may have under part 2 in relation to the contract; or

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

(2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).
(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—

(a) must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and
(b) may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings.

Neumann's cause of action

[24] The liability which Neumann seeks to enforce arises under s 18(5) of the *BCIP Act*. Liability arises if a person who is a claimant for the purposes of the *BCIP Act* serves a payment claim on a respondent, and the respondent does not serve a payment schedule within the time identified in the *BCIP Act*.[14] The respondent then becomes liable to pay the claim on the due date.

[25] The right to judgment is then regulated by s 19, which applies if liability under s 18 is established and there is a failure to pay the whole or any part of the claimed amount. The establishment of those matters is necessary for the applicant to obtain judgment.[15]

[26] A claimant is a person who has undertaken to carry out construction work (or to supply related goods and services) under a construction contract.[16] A construction contract is a contract under which one party undertakes to carry out construction work for (or to supply related goods and services to) another party.[17]

[27] There has been no suggestion that the work in respect of which Neumann makes its claim is not construction work; nor has it been suggested that the contract between Neumann and Traspunt is not a construction contract.

[28] Section 12 of the *BCIP Act* accordingly created in Neumann a right to a progress payment for construction work, from each reference date. The term reference date is defined[18] to mean a date on which, under the contract, a claim for a progress payment may be made under the contract; or if the contract does not provide for a

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14 See s 18(4) and (5).
15 See s 19(4) (a) and s 19(1).
16 See s 12.
17 See schedule 2 of the *BCIP Act*.
18 In schedule 2 of the *BCIP Act*.

reference date, the last day of each month commencing with the month in which construction work was first carried out. There has been no suggestion that the June 2009 payment claim did not seek a progress payment as from a reference date.

[29] The amount of the progress payment is, where the contract makes provision for calculation of the amount, the amount so calculated.[19] There is some debate about whether the amount claimed has been calculated in accordance with the contract, the significance of which I shall discuss later.

[30] Under s 17(2) a payment claim must identify the construction work to which a progress payment relates; it must state the amount the claimant claims to be payable; and it must state that it is made under the *BCIP Act*. Traspunt contends that the requirements of s 17(2) were not met.

[31] Under s 17(4) a payment claim may be served only within 12 months after the construction work to which it relates was last carried out, unless that contract otherwise provides. Traspunt contends that some of the work was carried out more than 12 months before the payment claim was served. That matter will be discussed later.

[32] Section 17(5) provides that a claimant cannot serve more than one payment claim in relation to each reference date under the construction contract. Traspunt says that the June 2009 claim, being virtually identical to the May 2009 claim, offends this provision.

[33] An issue raised in these proceedings is whether Traspunt can rely on ss 17(4) and 17(5) to resist judgment. That issue will be considered later in these reasons.

[34] It will be apparent that some of the matters raised by Traspunt go to the question whether Neumann's cause of action is established. However, there are other matters that it raises.

Content of payment claim

[35] Traspunt submits that Neumann's claim does not "identify" the construction work as required by s 17(2)(a) of the *BCIP Act*. In particular, it says that the basis of the claim cannot be understood or verified by it "without the source data and accurate 'as constructed' plans". It also says that part of the claim is not for construction work.

[36] As previously noted there were two parts to the claim, Variation No. 70 and Variation No. 71. Variation No. 70 is in an amount of $454,107.16. In a schedule which is included with the claim, that amount was said to be payable "for the balance of the final earthworks quantities." The three parts to this claim were

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19 See s13.

described by reference to items in a schedule of rates taken from the contract (although there is some debate about the applicability of these items to the work which was the subject of the claim).

[37] The first part of this claim refers to the stripping of topsoil prior to excavation work. It is accompanied by an explanation of approximately one page in length. The explanation refers to the work as being "the stripping of in situ material (after clearing)". It is accompanied by a plan of the site showing differences between the original surface level (adjusted to allow for stripping to a depth of 100mm which was the subject of a provisional allowance) and the surveyed "post strip" surface level. The quantity excavated is identified; and deducted from this is the quantity for which payment has previously been claimed. The balance became the subject of part of the June 2009 claim.

[38] For the second part of the claim relating to Variation 70 there is an explanation which is over a page in length. The work is identified as the re-spreading of material classified as appropriate for use as topsoil for footpaths and allotments. There follows an explanation of the calculation on which this part of the June 2009 claim is based. It is, in effect, a re-calculation of the total amount of topsoil spread on footpaths and allotments. It relies in part on calculations in the first part of Variation 70. In the calculation, account is taken of the quantities of materials spread as topsoil for which Neumann has previously claimed payment. Attached to this part of the claim is a diagram with survey data of the topsoil stockpile, showing a figure which seems to correspond with the reduction in an existing stockpile. There is also a cross-section which schematically relates the finished level with topsoil in place, to the subsurface, which, the explanation indicates, is the sub-surface after stripping of unsuitable materials. Excavation of more material was required than was anticipated by the provisional quantities.

[39] There is also an explanation of the third part of Variation 70. This was more than two pages in length. Again, it is apparent that it involves re-measuring the amounts excavated under the contract, taking into account amounts for which claims had been previously made, and giving credit for those claims. Included with the material was a geo-technical report, and a plan of the site identifying the location and depth of unsuitable material.

[40] In my view, the material included with the June 2009 claim provided ample identification of the construction work to which the claim related. It described the work. It included plans showing the location of the work.

[41] In reaching that conclusion, I have been conscious of the evidence of Mr Trask that he was not able to understand the claim without the assistance of an expert; and that recourse to "as constructed" plans and detailed electronic survey data is necessary to determine whether or not work has been done in conformity with the contract's requirements. I note, however, that it is not a requirement of s 17(2) that the payment claim establish that the work has been done, or that it has been done in accordance with the contract. It is sufficient that it identify the work to which the claimed progress payment relates. Nor, it seems to me, does the fact that Mr Trask

requires expert assistance to understand the claim because of the technical information contained in it, demonstrate that the claim did not identify the construction work to which it related. The evidence seems directed to an understanding of the technical explanation for the claim, rather than the identification the construction work. Even if that were not correct, the evidence does not suggest that the document does not identify the construction work, even if an understanding of it requires the assistance of an expert.

[42] In my view, Traspunt has no real prospect of successfully defending Neumann's claim, on the basis that Variation 70, the June 2009 claim, did not identify the construction work to which it related.

[43] Variation 71 is for an amount being held as a retention amount against liquidated damages. Traspunt submits that it is not a claim for construction work. In my view, that is not correct. In *Coordinated Constructions Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd and Ors*[20] the Court was considering a claim for "delay damages", being the extra amount payable under a construction contract for periods for which an extension of time was granted under the contract. It was held that such payments can amount, for the purposes of the New South Wales legislation, to payments claimed to be due for construction work.[21] I agree with this view. For moneys retained for liquidated damages, there is a stronger argument that the claimed payment relates to construction work. Moneys which are withheld on the basis of an entitlement to liquidated damages are moneys which would otherwise be payable for construction work.

[44] The identification of the construction work to which this part of the June claim relates is not so straightforward. There is a sense in which it can be said that a claim for moneys which have been withheld as liquidated damages is a claim for moneys payable in respect of the work generally. In *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*,[22] another case relating to a claim for "delay damages", Hodgson JA expressed the view that while the construction work must be identified sufficiently to enable the party to whom it is addressed to understand the basis of the claim, for a claim for "delay damages" it would generally be sufficient to show the basis of the contractual entitlement; that would, by inference, sufficiently identify the construction work.[23]

[45] Material included in the June 2009 claim relating to Variation No 71 dealt with the extension of time claims made by Neumann at various times under the contract. Amongst that material was a report, which identified the contract, and the contractual basis for the claims for the extensions of time. The material also included Payment Certificate 16, which confirmed the total value of the construction work done under the contract, but rejected the claims for extension of time by, in effect, refusing to certify for the unpaid amounts on the ground that Neumann was required to pay liquidated damages to Traspunt. While it may be true

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20 [2005] NSWCA 228, cited in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229.

21 See *Climatech* at [22], [34].

22 [2005] NSWCA 229.

23 *Climatech* at [25].

to say that this part of the June 2009 claim does not identify specific construction work, that is not the nature of the claim. The construction work to which this part of the claim relates is generally identified, which it seems to me, is all that can be done in a case like this. Moreover, sufficient information was provided to enable Traspunt to understand the basis for this part of the claim, and to respond in a payment schedule if it chose to do so.

[46] I am therefore of the view that Traspunt has no real prospect of successfully defending Neumann's claim, on the basis that the June 2009 claim does not identify the construction work to which Variation No. 71 relates; or because part of the claim is not for construction work.

[47] It is unnecessary for me to express a view as to whether this matter can be raised by way of defence to the claim, or as a basis for opposing an application for judgment.

Misleading conduct

[48] Traspunt submits that Neumann, by making all claims prior to May 2009 under cl 42.1 of the contract, represented that it was relying solely on its rights under the contract, rather than its rights under the *BCIP Act*, notwithstanding that many of those claims contained an endorsement referring to the *BCIP Act*. It appears to assert that Neumann's conduct was misleading, and contrary to s 52 of the *Trade Practices Act 1974* (Cth) (*TP Act*). It is then said that this conduct precludes Neumann from relying on the *BCIP Act* in making the June 2009 payment claim. Traspunt seems to suggest that the fact that a deed of extension was entered into between the parties provides support for the representation it alleges. It also submits that Neumann's conduct in seeking to rely on its rights under the *BCIP Act* without prior notice to Traspunt, is misleading and deceptive conduct, "having regard to all the circumstances".

[49] It is first necessary to consider whether a breach of s 52 of the *TP Act* can now be relied upon as a defence to Neumann's claim. Section 19(4)(b) of the *BCIP Act* has the effect that Traspunt is not entitled in these proceedings to bring a counterclaim against Neumann, or to raise any defence "in relation to matters arising under the construction contract".

[50] In *Bitania Pty Ltd & Anor v Parkline Constructions Pty Ltd*,[24] the New South Wales Court of Appeal considered the provision of the New South Wales legislation which is equivalent to s 19(4)(b). The view to which it came was that the provision should be construed as not prohibiting a defence based upon misleading conduct undertaken in the service of the payment claim for the purpose of creating a statutory right under that legislation, particularly in a case where the alleged misleading conduct resulted in the failure to provide a payment schedule, a necessary element in the claimant's cause of action.[25] That decision was applied by

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[24] [2006] NSWCA 238.

[25] See [96]; [12] and [17].

Dutney J in *Austruct Qld P/L v Independent Pub Group P/L.*[26] I am prepared to proceed on the basis that these decisions are correct.

[51] The only documents to which I was referred in respect to the claims made prior to May 2009 were some of the claims themselves. I have previously summarised their contents. Those documents included a tax invoice, where the following words appeared "UNDER THE TERMS OF THE CONTRACT PAYMENT IS DUE ON OR BEFORE:", followed by a date. The documentation also included payment certificates issued by the Superintendent, obviously under the contract. Prior to the presentation of documents to Traspunt, progress claims had been submitted to the Superintendent. Submission of claims to the Superintendent is required under AS 2124. That course of conduct, and the documents, strongly indicate that the claims prior to May 2009 were made under and in accordance with the procedures set out in the contract.

[52] The claim made in June 2009 followed a different course. There was no suggestion that reliance was placed on the contract for the right to payment, or that the procedure specified in it was being followed. It is plain that that was not being done. Unlike the earlier claims, no certificate from the Superintendent was included. The June 2009 claim included a letter from Neumann to Traspunt in which the following appeared:

> "This Payment Claim is submitted under the '*Building and Construction Industry Payments Act 2004* (Qld)'."

[53] The letter of 10 June 2009 also identified a "Reference date", language found in the *BCIP Act* and something not included in the claims prior to May 2009. Moreover, the June 2009 letter described the claim as a "Payment Claim". The letter was accompanied by a document identified as a "Payment Claim For Work Excuted (*sic*) to 31/05/2009" which included a table headed "Payment Claim Summary" and at the foot of which was endorsed "this is a payment claim made under the Building and Construction Industry Payment Act 2004 (Qld)". Prior to May 2009, the documents described each claim as a "Progress Claim", an expression used generally consistently throughout those documents. The rather extensive schedules which accompanied the June 2009 claim had an endorsement at the foot of each page which included the expression "Payment Claim". The schedules with the claims made prior to May 2009 did not include an endorsement at the bottom of each page.

[54] In my view, the only sensible characterisation that can be applied to the conduct of Neumann in the period prior to May 2009 was that it made claims to Traspunt pursuant to its contractual rights. Indeed, as has been pointed out, it was prepared to grant additional time to Traspunt to meet its payment obligations. However I can see nothing in the conduct of Neumann which represented that Neumann, at subsequent times, would rely solely on its contractual rights, and not on its rights under the *BCIP Act*.

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[26] [2009] QSC 1 at [64]-[65].

[55] Traspunt's argument seems to be that if Neumann were, against the background of its previous conduct, to choose to act under the *BCIP Act*, it would be misleading for Neumann to do so, at least without some warning to Traspunt of the change. Even if it were possible to identify some relevant representation based on Neumann's conduct, on the evidence before me, this argument has no prospect of success. I have noted the differences between the June 2009 claim and claims made prior to May 2009. The June 2009 claim quite clearly indicates an intention to rely on the *BCIP Act*. The conduct of Neumann in making that claim was materially different to its conduct in respect of the claims made prior to May 2009, and clearly did not suggest that Neumann was in June 2009 relying solely on its rights under the contract, as distinct from its rights under the Act. In particular, it had not in fact submitted a claim to the Superintendent; and the June 2009 claim did not suggest that that had occurred. A right to payment of a claim under the contract depended on its having done so, under clause 42.1 of AS 2124.

[56] It will be apparent from what has been set out above that I do not accept the submission made on behalf of Traspunt that "the way the subject claim was brought was tricky and deceptive, given the prior course of conduct between the parties". Nor do I accept, in view of the differences I have identified between the June 2009 claim and previous claims, and the conduct of Neumann in relation to it, that Neumann's conduct "in seeking to utilise its rights under the *Act* without prior notice to [Traspunt] is misleading and deceptive conduct having regard to all the circumstances". For the reasons already stated, I consider that the June 2009 claim made it abundantly clear that Neumann then intended to rely on its rights under the *BCIP Act*. Neumann conducted itself in making the payment claim in a way that was materially different from the way in which it had made previous claims.

Estoppel and waiver

[57] Neumann's course of conduct to which I have referred in discussing misleading conduct was also relied upon as amounting to a representation giving rise to an estoppel.

[58] In *Moorgate Mercantile Co Ltd v Twitchings*[27] Lord Wilberforce said:[28]

> "To constitute an estoppel a representation must be clear and must unambiguously state the fact which, ultimately, the maker is to be prevented from denying."

[59] To rather similar effect is the joint judgment of Mason and Deane JJ in *Legione & Anor v Hateley*.[29] Handley states that where a representation is said to have been conveyed by words and conduct, the requirement for it to be unambiguous applies with special force.[30]

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27 [1977] AC 890; this and other authorities including *Legione & Anor v Hateley* (1983) 152 CLR 406, are discussed in Handley, *Estoppel by Conduct and Election*, pp 68-70.

28 At 182.

29 At 435.

30 At p 69.

[60] It will be apparent from my discussion of Neumann's conduct that I do not consider that it amounts to a representation which would found an estoppel preventing Neumann from seeking to exercise its rights under the *BCIP Act*.

[61] If I had come to a different conclusion, a question would arise whether an estoppel could be raised to defeat a claim made under the *BCIP Act*. In *Kell & Rigby Pty Ltd v Flurrie Pty Ltd*[31] Brereton J had to consider the question whether an estoppel might be raised to prevent a party relying on what would otherwise be the effect of a statute. His Honour stated that that could not happen "where it would deprive the party said to be estopped of rights or protection of which the law, as a matter of public policy, will not allow him or her to be deprived".[32] His Honour made reference to *Kok Hoong v Leong Cheong Kweng Mines Ltd*,[33] where the following appears:

> "A more direct test to apply in any case such as the present, where the laws of moneylending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise. Thus the laws of gaming or usury ... override an estoppel ... so do the provisions of the Rent Restriction Acts ...
>
> General social policy does from time to time require the denial of legal validity to certain transactions by certain persons ... In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms. Nor is it open to the court to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands."

[62] Another approach to the question might be to ask whether, as a matter of construction, the statute evinces an intention that a party's conduct should not, except to the extent apparent from the statute, disentitle that party to a remedy which the statute provides.

[63] I note that under s 99 of the *BCIP Act*, the parties may not contract out of the provisions of that Act, and that a provision of a contract, to the extent to which it is contrary to the Act, is void. That seems to me to evince the intention to which I have referred. This also indicates a "social policy" underlying the Act which would prevent the creation of an estoppel, on the basis set out in *Kok Hoong*.

[64] Although Traspunt's submissions make some reference to the doctrine of waiver, the substantive argument is couched in terms of the doctrine of estoppel. In

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31 [2006] NSWSC 906.

32 At para 57.

33 [1964] AC 993 at 1016-1017.

principle I see no reason why the making of progress claims under the contract amounts to a waiver of the right to make a subsequent claim under the *BCIP Act*, particularly when, under cl 42.6 of AS 2124, the issue of a certificate did not prejudice any claim which Neumann might otherwise have.

[65] It follows that in my opinion, Traspunt has no real prospects of success at a trial, on the basis of an estoppel or a waiver.

Second claim?

[66] Neumann has made it clear that it relies only on the June 2009 claim. Traspunt contends that it is of no effect, being a second claim for the same reference date and accordingly contrary to s 17(5) of the *BCIP Act*. It is therefore necessary to consider whether the documents which Neumann sent in May 2009 are a payment claim, and whether they were served under s 17(1) of the *BCIP Act*.

[67] The term payment claim is defined[34] to mean a claim referred to in s 17.

[68] Neither party has contended that the May 2009 documents do not identify the construction work which was the subject of the claim, nor that they do not adequately state the amount claimed by Neumann. There is a debate about whether they stated that the claim was made under the Act.

[69] The only indication that the claim might have been made under the *BCIP Act* is the standard form endorsement to which I have previously referred. It appears on only one sheet of the claim documentation, which in total takes up some 116 pages.

[70] None of the May 2009 documents identifies the claim as a payment claim. Indeed, there is no reference to that expression in the documents. The covering letter, dated 13 May 2009, identifies the claim as a "progress claim", an expression used in respect of previous claims which were plainly made under the contract, both by Neumann and by the Superintendent.

[71] The May 2009 documents do not identify a reference date. Section 17(2) does not require the identification of a reference date in a payment claim. However, s 17(5) provides that a claimant cannot serve more than one payment claim in relation to each reference date. While the contrary view is arguable, I do not think that this provision, read alone or with s 12, amounts to a statutory requirement to identify the relevant reference date in each payment claim. Nevertheless, the absence of any mention of a reference date is of some relevance in determining whether the May 2009 documentation should be characterised as a payment claim under the *BCIP Act*.

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[34] In schedule 2 of the *BCIP Act*.

[72] There are, then, a number of features which favour the view that the May 2009 documents were not a payment claim under the *BCIP Act*. In isolation, the endorsement on the summary sheet identifying this as a progress claim pursuant to s 17(1) of the *BCIP Act*, which was found on summary sheets in previous claims, which were plainly made under the contract, is not compelling. However, the fact that the May 2009 documents were not sent to the Superintendent, creates some ambiguity. While there may be a preponderance of considerations which would rather strongly favour characterising the May 2009 documents as being something other than a claim under the *BCIP Act*, I do not think it is clear that Traspunt would fail on that issue.

[73] However, the May 2009 documents were addressed to Trask Development Corporation. The street number to which the documents were addressed was similar to, but not the same as, that for Traspunt. However, I note that Trask Development Corporation Pty Ltd is described by Mr Trask as "the parent development company of Traspunt"; and he states that Traspunt is a special purpose vehicle that was established for the sole purpose of the development at Caboolture. It seems to me likely that Trask Development Corporation and Traspunt have the same address. The difference in the street number does not seem to me to be of any real significance. It appears to be a typographical error, and the material creates the impression that the documents were in fact delivered to the correct address for Trask Development Corporation.

[74] In my view, the fact that in May 2009 documents were directed to Trask Development Corporation, and not Traspunt, means that these documents were not served on Traspunt.

[75] Section 103 of the *BCIP Act* provides that a notice of a document that is to be served on a person under the *BCIP Act* may be served on the person in the way provided under the construction contract. The effect of the construction contract was that Traspunt's address for service was at a post office box at Kippa-Ring. There is no suggestion that the May 2009 documents were sent to that post office box.

[76] Section 103 is expressly stated not to limit the application of s 39 of the *Acts Interpretations Act 1954*. Under that section, a document may be served on a body corporate by sending it by post to the head office, a registered office or a principal office of the body corporate. There is no evidence to show that the address which the documents reached satisfied this provision. However, even if it were to be assumed that the address was an address referred to in s 39, that would not show that service had been effected on Traspunt. It seems to me that where documents are addressed to a corporation, and sent to an office of that corporation of the kind described as s 39, the fact that the office is also an office of the kind described in s 39 for another corporation does not have the effect that the documents are taken to be served on that other corporation. I note that in some of the May 2009 documents, the principal is identified as Traspunt. However, it is clear from the covering letter that the material was sent to Trask Development Corporation.

[77] In my view, it is clear that at a trial, Traspunt would fail on the question whether the June 2009 payment claim was of no effect because service of it was contrary to s 17(5) of the *BCIP Act*.

[78] It is submitted on behalf of Neumann that even if service of the June 2009 claim was contrary to s 17(5), that is not a matter on which Traspunt can rely in these proceedings. The statutory basis for that submission is s 19(4)(b) which would prevent Traspunt from raising any defence in these proceedings "in relation to matters arising under the construction contract". Neumann submits that an allegation that the payment claim is unenforceable by reason of the fact that it was served in contravention in s 17(5) is such a defence.

[79] The submission relies on the judgment of Palmer J in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor*.[35] The New South Wales equivalent of s 17(5) of the *BCIP Act* is found in s 13(5) of the New South Wales statute. Of it, Palmer J said:[36]

> "46 An assertion that service of a payment claim is prohibited under s.13(4) or (5) is like a defence in bar. For example, in the case of an action at law or in equity founded upon an oral contract for an interest in land it is open to a defendant to elect whether to raise a defence in bar founded on the Statute of Frauds. Similarly, it would be open to a respondent served with a payment claim under the Act to elect whether to raise a defence in bar that service of the claim is prohibited by s. 13(4) or (5). A respondent to a payment claim may have a reason for electing not to raise such a defence: the payment claim may raise for determination an issue which will inevitably have to be determined in subsequent payment claims and the respondent may wish the issue to be resolved sooner rather than later.
>
> 47 However, if the respondent does elect to raise a defence in bar founded on s. 13 (4) or (5), adjudication of that defence will require examination of the relevant terms of the contract, possibly the facts relating to the work performed and the time of performance and possibly also the content of previous payment claims. That examination may well be contentious and may involve issues of fact and law upon which minds may legitimately differ.
>
> 48 In my opinion, the scheme of the Act in general and of s. 13 and s. 14 in particular requires that a defence in bar to a payment claim founded on s. 13(4) or (5), like any other defence said to defeat or reduce the claim, must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or restrain enforcement of the adjudication determination as a nullity, nor may it be relied upon as a defence to entry of judgment under s. 15(4) of the Act (the New South Wales equivalent s 19(4) of the *BCIP Act*) ."

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35 [2006] NSWSC 1.

36 At [48] to paras [46]-[48].

[80] On his Honour's approach, Traspunt is not entitled in these proceedings to rely on an allegation that the June 2009 payment claim was served in breach of s 17(5) of the *BCIP Act*.

[81] His Honour's approach has been adopted (though without specific reference to s 19(4) of the *BCIP Act*) in *Northside Projects P/L v Trad & Anor*[37] and in *G W Enterprises Pty Ltd v Xentex Industries Pty Ltd & Ors*.[38] His Honour's approach to the New South Wales statutory provision which is equivalent to s 19(4) of the *BCIP Act* was adopted in *Zebicon Pty Ltd v Remo Constructions Pty Ltd*.[39] It is an approach which I would also adopt.

[82] In the result, the view to which I have come is that Traspunt has no realistic prospect of defending Neumann's claim on the basis that it is a second claim and therefore contrary to s 17(5) of the *BCIP Act.*

Fraud allegations

[83] The first fraud allegation is that the way the claim was served was "tricky and deceptive", in light of the prior course of conduct between the parties. It follows from what I have previously stated that I do not accept this submission.

[84] The next allegation is that Neumann has previously claimed for the same work, and the June 2009 claim is nothing more than an unjustifiable re-calculation of what has previously been claimed and paid for. It is also said that the re-calculation involves the use of a different method of measuring quantities than that used for the earlier contractual claims. It is also said that the method of measuring on which the June 2009 claim is based is one which Neumann knew not to be authorised by the contract.

[85] It goes without saying that, if it is shown a claim is unlikely to succeed, that alone does not establish that the claim is fraudulent, or made fraudulently. Subjective dishonesty must be shown, and proof of it must be clear and cogent, the degree of satisfaction required being a reflection of the gravity of the allegation.[40]

[86] On Neumann's behalf, an affidavit has been filed by Mr Maccheroni, who is its civil contracting manager. He has been involved in the project since about August 2007. It is plain that he has had a significant involvement in the project. He directed another employee of Neumann, a Mr Peters, to prepare the June 2009 claim. He swears that the work which is the subject of Variation 70 is in addition to, and not a duplication of, claims previously made. As previously noted, an examination of the calculations in the June 2009 claim confirms that credit is given for quantities which have been claimed previously. He also acknowledges that Variation 70 includes a

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37 [2009] QSC 264.
38 [2006] QSC 399.
39 [2008] NSWSC 1408.
40 *Rejfek & Anor v McElroy & Anor* (1965) 112 CLR 517, 521.

re-calculation of quantities. It is obvious from his affidavit that that is because of recent survey work which forms the basis of the re-calculation.

[87] Mr Maccheroni also swears, on information and belief, that the method for calculating quantities relied on for the June 2009 claim is not different from that used for earlier claims under the contract. The information is supplied by Mr Peters, who was in New Zealand when the application was heard. Mr Maccheroni exhibits a survey plan showing the quantity of soil stripped and stockpiled, which was relied on for the June 2009 claim. He also exhibits copies of plans submitted with Claim 6 and Claim 7, where previous claims were made for this work.

[88] In view of the contentions made on behalf of Traspunt, it is necessary to consider more carefully the material relied on for calculating quantities in the June 2009 claim, and in earlier claims.

[89] As previously mentioned, the June 2009 claim was based on survey information shown on a plan which accompanied that claim. That information related to surface levels on the site, before and after stripping of surface material had been carried out. Quantities were calculated by reference to these surface levels.

[90] Earlier claims for this work were made in Claim 6 and Claim 7. Each included a survey plan. On the survey plan for Claim 7 the following printed words appeared:-

> "Contours show extent of topsoil stripped and stockpiled to date.
> Cut qty calc'd from prestart surface 24106 m3. (interim qty only)
>
> For post strip details see layers ps *.*"

[91] That survey plan also included, handwritten, the following:-

> "TOPSOIL STRIP includes the extra 'soft material' (sandy loam) over the site."

[92] The same printed endorsement appeared on the plan for Claim 6, but with a smaller quantity, and the addition of the following (printed):-

> "For topsoil stockpile details see layers ts *.*"

[93] In each claim, the material included a letter to Bayside Consulting, which in part stated:

> "The topsoil stripping quantity is based on survey pick up as shown on the enclosed survey data sheet."

[94] The statement on the plans that the cut quantity was calculated from the prestart surface, and the reference to "post strip details", are only explicable on the basis that the quantity stripped had been determined by reference to surface levels across the site, before and after the stripping work was carried out. The statement that the contours which appeared on the plan shows the extent of topsoil which had been stripped and stockpiled to date supports that view. The plan for Claim 7 contains no reference to details for stockpiles. While the plan for Claim 6 does make some

reference to stockpile details, the balance of the notation does not indicate that these have been used to calculate the quantity of material stripped from the site. The documents therefore show that in these claims, quantities have been calculated by the same method as for the June 2009 claim. Moreover, the notation on each plan that the quantity was an interim quantity only pointed to the prospect of a re-measurement.

[95] For stripping topsoil, the contract specified that quantities would be determined by stockpile measurement. For the other items included in Variation 70, no method of measurement was specified. However, stockpile measurements were not used in the June 2009 claim, nor in the earlier claims. In my view, none of this suggests fraud by Neumann in making the June 2009 claim. The method used in that claim was made plain by the accompanying documents. Traspunt was free to contest the appropriateness of the method used to calculate quantities, if it chose to do so. Moreover, I do not think it possible to describe as fraudulent the use by Neumann of a method of measurement which, though not specified by the contract, had been used on previous occasions and accepted.

[96] There is an obvious difficulty in relying on evidence from the employee, Mr Peters, reported through Mr Maccheroni. However, it is necessary to bear in mind the question which I have to determine. It is whether there is a real prospect that Traspunt will establish the claim is fraudulent. The onus will be on Traspunt, and as I have mentioned, it would bear a heavy onus to demonstrate fraud. There is no direct evidence demonstrating that the claim is fraudulently made. That, in itself, is sufficient to demonstrate there is no realistic prospect that Traspunt will succeed on its allegations that the claim is fraudulently made. Moreover, the documents placed in evidence are consistent with the hearsay evidence. However, I consider the hearsay evidence originating with Mr Peters can be relied upon as providing additional support, were that necessary, for the conclusion that there is no real prospect that Traspunt will establish that the June 2009 claim was fraudulently made. I am conscious that Traspunt contended that judgment should not be given without a trial, which would enable Mr Peters to be cross-examined. It would have been possible, however, for Traspunt to insist on his presence for cross-examination at this hearing, and, if it were necessary to enable that to happen, to seek an adjournment of the hearing. It did not do so.

[97] Part 3 of Variation 70 included a claim for the removal of unsuitable material, at the rate specified in the contract for the removal and replacement of such material. This is alleged to be fraudulent, because replacement did not occur for much of the material, in particular, where a detention basin was constructed.

[98] It is apparent from the description in the June 2009 claim that this part of the claim took into account all material stripped from the site, beneath the provisionally identified depth of stripping at 100 millimetres, and firm material. An adjustment was then made for the fact that the quantity of that material had been the subject of a claim at a lower rate. Another adjustment was made for a number of items where previous claims had been for quantities anticipated, which were in excess of quantities actually encountered. Other adjustments were made for reasons stated in the June 2009 claim. An examination of the claim shows that Neumann was now

claiming for all of this material at the rate applicable for the removal and replacement of unsuitable material. Mr Maccheroni acknowledges that part of the claim relates to the removal of unsuitable material from the detention basin and expresses the view that the rate which was applied was the correct and the only appropriate rate under the contract. His view may be wrong, but that is not sufficient to establish fraud. No attempt was made to cross-examine Mr Maccheroni.

[99] Traspunt also relies upon the fact that the claims have been previously considered, and decided by Bayside Consulting. That does not, in my view, provide any evidence that the June 2009 claim was made fraudulently. It is by no means uncommon for a contractor to consider quite genuinely that a determination made by a superintendent is wrong, particularly when the contractor has obtained further information which is relevant to its claim.

[100] The material from Neumann indicates that it contests Traspunt's claim for liquidated damages, on the basis that it was entitled to extensions of time for weather conditions. Traspunt submits that Neumann proceeded on a "false premise" relating to the location of the closest weather station. Mr Morris, of Bayside Consulting, states that Neumann had relied upon information from the Caboolture Weather Station. Mr Trask's affidavit includes a plan intended to show that the Beerburrum Weather Station is closer than Caboolture. In my view, none of this demonstrates that Neumann did not make its claim honestly.

[101] Criticism is also made in Traspunt's submissions about the quality of the evidence relied upon for that part of the claim relating to the removal of unsuitable material. It is said that there is no chain of evidence to prove that the source samples which were the subject of comment by a geotechnical consultant were taken from areas said to be unsuitable. None of that provides a basis for an allegation of fraud.

[102] The submissions also allege that there is a failure to address a point raised on behalf of Traspunt that Neumann is claiming for work which was not "as directed" by the superintendent, when such a direction is required to enable a claim at the rate claimed. While the point may have given rise to a valid defence in respect of some of the moneys claimed, it does not provide a satisfactory basis for an allegation of fraud.

[103] The submissions on behalf of Traspunt then refer to the fact that in a number of locations, stormwater connection had not been installed; but in fact claims had been made for them, and paid. Traspunt's own evidence demonstrates that Neumann is in the course of rectifying this difficulty. Having been paid, it is obviously work which is not included in the June 2009 claim. This is no evidence that the June 2009 claim was made fraudulently. There are similar submissions made in respect of the construction of sewers. Again, the evidence is to similar effect, that is to say, claims have been made and paid; and Neumann is in the course of rectifying the defect. There is also an allegation that the footpaths have not been constructed correctly. Payment has been made for this construction. There is no suggestion that

the matter has been raised with Neumann. Again, it is unrelated to the June 2009 claim. It provides no basis for an allegation of fraud against Neumann.

[104] In my view, Traspunt has not demonstrated that its allegations of fraud have any real prospect of success.

Absence of good faith and abuse of process

[105] Oral submissions were made on behalf of Traspunt about these matters. They seemed to be founded on Neumann's previous conduct in making claims under the contract, and, perhaps, some of the matters relied upon for the fraud allegations.

[106] In *Williams v Spautz*,[41] the joint judgment of Mason CJ and Dawson, Toohey and McHugh JJ concluded that the criterion for determining whether proceedings are an abuse of process is whether the predominant purpose of the proceedings is improper. Their Honours also noted that a heavy onus lies on a party alleging an abuse of process.

[107] In my view, there is no basis for considering that Neumann's actions in making the June 2009 claim, or in bringing the current proceedings, involves an abuse of process. In neither case is there any evidence that Neumann's purpose is other than the enforcement of a right to which it claims to be entitled under the *BCIP Act*.

[108] It is doubtful that absence of good faith in making the claim would invalidate a payment claim under the *BCIP Act*. Of s 13(1) of the New South Wales legislation, which is the equivalent to s 17(1) of the *BCIP Act*, Hodgson JA said in *Bitannia*:[42]

> "On the question of good faith, I agree with Basten JA that the requirement of s 13(1)(a) of the Building Payment Act that a person 'claims to be entitled' does not import a requirement of genuine belief, and in particular does not import such a requirement as to each and every item included in the payment claim."

[109] Basten JA had found that good faith in making the claim may be put in issue in the adjudication procedure, but not by way of challenge to the validity of the payment claim.[43]

[110] Beyond that, the evidence does not demonstrate that Traspunt has a real prospect of successfully establishing that the June 2009 claim was not made in good faith.

Conclusion

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41 (1992) 174 CLR 509, 529.

42 At [2].

43 *Bitannia* at [58]-[59]; see also [73] and [75].

[111] None of the matters raised by Traspunt is sufficient to warrant refusal of Neumann's application for judgment at this time. I shall hear further submissions as to the form of order, and as to costs.