SUPREME COURT OF QUEENSLAND

CITATION:	*Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd* [2021] QSC 39
PARTIES:	**AUSIPILE PTY LTD (ACN 101 402 322)** (Applicant) **v** **BOTHAR BORING AND TUNNELLING (AUSTRALIA) PTY LTD (ACN 622 309 264)** (Respondent)
FILE NO/S:	8953 of 2019
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	5 March 2021
DELIVERED AT:	Brisbane
HEARING DATES:	19 October 2020 20 October 2020
JUDGES:	Wilson J
ORDERS:	[1] The application for judgment pursuant to section 78(2)(a) of the Act is dismissed. [2] The question of costs is adjourned to a date to be fixed.
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PAYMENT CLAIMS – where the respondent engaged the applicant under a subcontract agreement to construct and design a secant pile launch shaft – where the applicant applied for judgment pursuant to s 78(2)(a) of the *Building Industry (Security of Payment) Act* 2017 (Qld) to recover amounts owing under a payment claim – where the parties accept that the applicant is entitled to judgment unless the respondent can

establish a defence

CONSUMER PROTECTION – MISLEADING OR DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – CHARACTER OR ATTRIBUTES OF CONDUCT OR REPRESENTATION – SILENCE AND NON-DISCLOSURE – where the applicant's operations manager and the respondent's project manager discussed defects in the secant piles – where there was a misunderstanding about whether the parties had agreed that the respondent would withhold further payment claims – where the respondent sent the applicant a letter saying that it would withhold further payment claims "as discussed" – where the applicant's operations manager discussed the letter with its commercial manager – where the respondent had never previously provided payment schedules – where the applicant was silent in the face of the letter – whether the applicant's silence was misleading or deceptive or likely to mislead or deceive

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – OTHER MATTERS – where the respondent submits there was a variation in the payment due dates under the subcontract – where the respondent submits that, because of this variation, the applicant did not issue a warning notice within the timeframes stipulated by s 99 of the *Building Industry (Security of Payment) Act* 2017 (Qld) – where the subcontract, new supplier form, tax invoices and payment claims contained different payment due dates – where the respondent did not consistently make payments in accordance with any of these due dates – whether the payment terms under the subcontract were varied

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PAYMENT CLAIMS – where the respondent hired the applicant's crawler crane in order to complete works under the head contract – where the applicant's works under the subcontract had been completed – where the payment claim included a "variation" amount for the crawler crane hire – whether the payment claim contained claims in relation to two contracts – whether the payment claim was void

Building Industry Fairness (Security of Payment) Act 2017 (Qld) s 68, s 70, s 73, s 75, s 76, s 77, s 78, s 99, s 100

Competition and Consumer Act 2010 (Cth) Schedule 2, s 18, s 238

Queensland Building and Construction Commission Act 1991 (Qld) s 67U

Acciona Infrastructure Australia Pty Ltd v Holcim (Australia) Pty Ltd [2020] NSWSC 1330

Constructpro Pty Ltd v Maicome Pty Ltd [2014] VCC 1719

Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31

Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd [2020] VSC 570

Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd (1979) 1 BPR 9251

Gantley Pty Ltd v Phoenix International Group Pty Ltd [2010] VSC 106

Agripower Australia v J & D Rigging Pty Ltd [2013] QSC 164

Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Australia) Pty Ltd (1988) 5 BPR 11,110

Matrix Projects (Qld) Pty Ltd v Luscombe Builders [2013] QSC 4

Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd (2010) 241 CLR 357; [2010] HCA 31

TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 93

COUNSEL:	M H Hindman QC for the Applicant
	N Andreatidis QC and S McCarthy for the Respondent
SOLICITORS:	McInnes Wilson Lawyers for the Applicant
	Thompson Geer for the Respondent

Introduction

[1] This is an application for judgment pursuant to section 78(2)(a) of the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) ("the Act").

[2] The respondent engaged the applicant to design and construct a secant pile launch shaft at Biggera Waters. Over the course of their contractual relationship, the applicant issued a number of "payment claims" to the respondent. The Act establishes a system

for making and responding to payments claims, as well as for adjudicating disputed payment claims and for recovering amounts claimed.[1]

[3] Section 68 of the Act sets out the meaning of the term "payment claim":

> **68 Meaning of payment claim**
>
> (1) A payment claim, for a progress payment, is a written document that—
>
> (a) identifies the construction work or related goods and services to which the progress payment relates; and
>
> (b) states the amount (the ***claimed amount***) of the progress payment that the claimant claims is payable by the respondent; and
>
> (c) requests payment of the claimed amount; and
>
> (d) includes the other information prescribed by regulation.
>
> (2) The amount claimed in the payment claim may include an amount that—
>
> (a) the respondent is liable to pay the claimant under section 98(3); or
>
> (b) is held under the construction contract by the respondent and that the claimant claims is due for release.
>
> (3) A written document bearing the word 'invoice' is taken to satisfy subsection (1)(c).

[4] The critical payment claim in these proceedings is "Payment Claim 6", which was issued on 24 May 2019. Of the amount claimed in Payment Claim 6, $761,296.75 remains unpaid.

[5] The applicant seeks to recover the $761,296.75 of Payment Claim 6 that remains unpaid under section 78(2)(a) of the Act. Section 78 of the Act provides, relevantly:

> **78 Consequences of failing to pay claimant**
>
> (1) This section applies if a respondent given a payment claim for a progress payment does not pay the amount owed to the claimant in full on or before the due date for the progress payment.
>
> (2) The claimant may either—
>
> (a) recover the unpaid portion of the amount owed from the respondent, as a debt owing to the claimant, in a court of competent jurisdiction; or
>
> ...

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1 *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) s 3(2).

[6] Section 100 of the Act is also relevant to these proceedings. It provides:

> **100 Proceedings to recover unpaid amount as debt**
>
> (1) This section applies if a claimant starts proceedings in a court under section 78(2)(a) to recover an unpaid amount from a respondent as a debt owing to the claimant.
>
> (2) Judgment in favour of the claimant is not to be given by a court unless the court is satisfied that—
>
> (a) the respondent did not pay the amount to the claimant on or before the due date for the progress payment to which the payment claim relates; and
>
> (b) if the respondent's liability to pay the amount arises because of a failure to give a payment schedule—the respondent did not give the claimant a payment schedule within the time required to do so under this Act.
>
> (3) The respondent is not, in those proceedings, entitled—
>
> (a) to bring any counterclaim against the claimant; or
>
> (b) to raise any defence in relation to matters arising under the construction contract.

[7] The applicant bears the onus of establishing the elements of the statutory cause of action. In order to show that it is entitled to recover the unpaid sum as a debt, the applicant must prove the service of a payment claim, and that the respondent has not issued a payment schedule or payed the sum claimed. It is uncontentious that the respondent has neither paid the $761,296.75 owing under Payment Claim 6 nor issued a payment schedule.

[8] The parties agree that the applicant is entitled to judgment pursuant to section 78(2)(a) and section 100 of the Act, unless one of the defences advanced by the respondent succeeds. Those defences are that:

(a) the applicant engaged in misleading and deceptive conduct;

(b) the applicant did not give a valid warning notice; or

(c) Payment Claim 6 concerned two separate contracts and is therefore void.

[9] The critical question in this case is whether the respondent can establish any one of these three defences.

[10] For the reasons that follow, I find that, while the first and second defences fail, the respondent has established the third defence. Payment Claim 6 related to two separate contracts and is therefore void. It follows that Payment Claim 6 ought to be set aside and the application for judgement pursuant to section 78(2)(a) of the Act is dismissed.

Background

[11] On 9 September 2018, the respondent was engaged to design and install 1450 metres of concrete jacking pipe from Quota Park, Biggera Waters on the Gold Coast to South Stradbroke Island.

[12] On 14 November 2018, the respondent engaged the applicant (as a subcontractor) by a written subcontract agreement to design and construct the secant pile launch shaft at Quota Park. Secant pile walls are a type of retaining wall used to retain water and soil so that a shaft may be excavated to enable tunnelling without the area inside the secant pile wall being flooded.

[13] The written subcontract agreement stated that the subcontract price was $1,380,000.00 (plus GST) with 30 day terms, and that payment claims were to be submitted on the 22nd day of the month to which the claim related.

[14] Mr Yoon, the applicant's commercial manager, states that the usual process of issuing payment claims under the contract was for him to prepare a monthly payment tax invoice together with the payment claim report particularising the amount of each claim. He would then email these documents to Mr O'Connor, the respondent's project manager for this project, before the end of the month in which the relevant works were carried out by the applicant. The applicant's director, Mr Cawse, and, on some occasions, the respondent's generic accountant's email address were copied into these emails.

[15] The respondent, in breach of the Act, did not respond to any payment claim by giving the applicant a payment schedule.

Payment Claims 1 and 2

[16] Payment Claim 1 was issued by the applicant on 21 December 2018 for $61,380.00 (including GST) and was paid in full by the respondent on 1 February 2019.

[17] Payment Claim 2 was issued on 22 January 2019 for $32,620.50 (including GST) and paid in full by the respondent on 1 March 2019.

Payment Claim 3

[18] Payment Claim 3 was issued by the applicant on 26 February 2019 for $663,344.50 (including GST) and paid in full by the respondent over two dates. $331,672.00 was paid on 3 April 2019 and another $331,672.00 was paid on 17 April 2019.

Payment Claim 4

[19] Payment Claim 4 was issued by the applicant on 25 March 2019 for $463,936.00 (including GST). The respondent payed $25,000.00 on 17 May 2019, but the balance of $438,936.00 remained unpaid. Accordingly, Payment Claim 6 included the unpaid amount of $438,936.00 in relation to Payment Claim 4.

The 26 April 2019 conversation between Mr O'Connor and Mr Godden

[20] As the project continued, issues arose with the secant piles. Mr O'Connor states that the applicant encountered problems with the design and construction of the secant pile wall launch shaft up to 26 April 2019, and that the respondent had no confidence that the secant wall would be able to retain soil and water once excavation began. Mr O'Connor states that the respondent expected that there would be significant defects in the secant pile launch site which would require rectification once excavation started.

[21] Accordingly, Mr O'Connor wanted to hold back the final repayments to the applicant because of problems he anticipated down the track. Mr O'Connor stated he wanted to retain these payments as leverage to ensure that the applicant came back and fixed any works that needed fixing.

[22] On 26 April 2019, Mr O'Connor called the applicant's operation manager for the project, Mr Godden. Mr O'Connor states that he said words to the following effect:

(a) That the respondent urgently required a defects response plan so that any defects encountered during the excavation could be rectified as swiftly as possible; and

(b) That the respondent would hold the applicant's upcoming Progress Claim 5 and future claims pending completion of the excavation of the launch shaft due to the respondent's expectation that there would be significant and extensive defects in the secant pile launch shaft once excavation began, which would require significant remedial action. As a consequence, the respondent would not assess any claims made by the applicant or pay any claims made by the applicant until these issues were resolved.

[23] Mr O'Connor recalled that Mr Godden responded with words to the effect of, "Ok I understand, I know where you are coming from."

[24] Mr O'Connor recalls that Mr Godden did not disagree with the respondent's position in respect of holding Progress Claim 5 or any future payment claims pending excavation of the launch shaft and that Mr Godden also stated words to the effect that the applicant agreed to provide a defects response plan.

[25] Mr O'Conner understood that these exchanges meant that Mr Godden, on behalf of the applicant, had accepted the respondent's position, and that the parties had agreed that the respondent would not be required to assess or pay any payment claims. Furthermore, the applicant would not press the respondent to assess payment claims or pay payment claims until the defects situation had been resolved. Mr O'Conner took this to mean that the applicant agreed to deliver a defects response plan and that the applicant also anticipated further defects in the secant pile launch shaft.

[26] Mr O'Conner recalls that in the same conversation, he stated to Mr Godden words to the effect that Mr O'Conner would be sending Mr Godden a letter to confirm the respondent's position in respect of the defects response plan, and that the respondent

would be holding Progress Claim 5 and future payment claims pending excavation of the launch shaft.

[27] Mr O'Conner understood that there was no point in assessing Progress Claim 5 or future payment claims because of the inevitable defects in the secant pile wall.

[28] Mr O'Conner thought that if Mr Godden disagreed with the respondent's position he would tell him, or another representative of the respondent, either during their conversation or afterwards.

[29] Mr O'Conner did not speak to Mr Godden, or any other person associated with the applicant, in respect of any assessment or payment issues after this conversation with Mr Godden on 26 April 2019.

[30] Mr O'Conner states that, as far as he knew, no other person from the applicant spoke to the respondent about any claims being assessed or claims being paid until the applicant issued the letter of demand.

[31] Mr Godden agrees that he had a conversation with Mr O'Connor. However, he is adamant that no agreement had been reached between the two of them.

[32] He states that the procedure for rectification of leaks was discussed with Mr O'Conner in detail as early as January 2019. This was well prior to Mr O'Conner requesting a defects response plan as it was possible to anticipate that some of the cold joints between piles could leak more than expected and require patch and plug repairs to be undertaken, especially in highly water charges areas like the Biggera Waters site.

[33] Mr Godden recalls that no mention of any specific amount of monies or reference to any specific payment claim was made by Mr O'Conner during their conversation. Furthermore, he recalls that Mr O'Connor mentioned that the respondent felt they needed to withhold some money from the upcoming payment claims for potential rectification works if required during the excavation process. However, he states that at no time during this discussion did Mr O'Conner mention any specific amount of monies to be withheld nor was the withholding of the entire Payment Claim 5 ever

referred to. Mr Godden states that at no time during this telephone conversation, nor at any time, did Mr Godden ever accept, agree to or say anything to the effect of agreeing to the withholding of any payment from the applicant, as he was not authorised to make this decision.

[34] Mr Godden does not recall exactly what he said, but states that he said words to the effect of: "Ok. I hear what you are saying." He states that he never accepted nor agreed to what Mr O'Conner had said.

[35] Mr Godden recalls that he agreed that the applicant would provide a defects response plan as requested by Mr O'Connor, but he never accepted, nor agreed, nor said anything to the effect of agreeing to the withholding of any payment from the applicant, as he was not authorised to make this decision.

[36] Mr Godden disagrees that there was an "accepted course of action" with respect to the progress payments process resulting from his telephone conversation with Mr O'Conner. He states that he never agreed to any arrangements in that regard. He further disagrees that both the respondent and the applicant lacked confidence in the secant pile launch shaft, as the redesigns were necessary only due to complications encountered throughout the project and the parties had discussed the possibility that leaks would need to be repaired at least since January 2019.

Payment Claim 5

[37] Payment Claim 5 was issued by the applicant on 30 April 2019 for $268,972.00 (including GST). It has not been paid.

[38] Mr O'Connor states he did not assess Payment Claim 5 because he understood that the applicant and respondent had reached an agreement that there would be no assessment of that payment claim pending excavation of the launch shaft.

Letter 1 May 2019

[39] This first defects notice summarised the issues that the applicant encountered during the design and construction of the secant pile launch shaft, which Mr O'Connor states

had caused the respondent to lose confidence in the ability of the secant pile wall to retain soil and water. This defects notice also confirmed the respondent's request for a defects response plan, which was requested by Friday 3 May 2019.

[40] Further, Mr O'Connor thought it best to put in writing his conversation with Mr Goddard, specifically his belief that the parties had agreed that Payment Claim 5 and any future payment claims would not be assessed or paid pending excavation of the launch shaft. He also wanted to formally request a defect response plan. Accordingly, his letter stated:

> As discussed between Mr Kieran O'Connor and Mr Matt Godden, Bothar will hold Ausipile's Progress Claims 5 and 6 pending the satisfactory completion of the shaft excavation.

[41] Mr O'Connor believed that this confirmed what he thought was the agreement reached with Mr Godden; that is, that the respondent was not required to respond to any payment claims by way of an assessment and the respondent was not required to pay any payment claims until the defect issues on site were resolved.

The applicant's response to the 1 May 2019 letter

[42] After receiving the 1 May 2019 letter, Mr Godden recalls having a discussion with Mr Yoon about the letter. He recalls that he told Mr Yoon that he did not recollect having such a discussion with Mr O'Connor and that he never agreed to any holding of the payment claims on behalf of the applicant.

[43] Mr Yoon states that he questioned Mr Godden about the letter and that Mr Godden denied that there was any such discussion or arrangement with Mr O'Connor.

[44] Other than the 1 May 2019 letter, the applicant never received any correspondence or other communication directly with respect to any payment arrangement, the holding of, or deductions to, the payment claims under the written subcontract.

Further issues about defects and leaks in the secant pile wall

[45] After a number of emails between the parties, the applicant sent the respondent the defects response plan on 16 May 2019.

[46] On 16 May 2019, the respondent began excavation of the launch shaft.

[47] On 22 May 2019, the respondent encountered the first leak in the secant pile wall.

[48] On 24 May 2019, the respondent encountered another leak in the secant pile wall.

Payment Claim 6

[49] Payment Claim 6 was issued by the applicant on 24 May 2019 for $786,296.75 (including GST). This payment claim includes:

(a) an unpaid amount of $438,936.00 in relation to Payment Claim 4;

(b) an unpaid amount of $268,972.00 in relation to Payment Claim 5; and

(c) an additional amount for hire by the respondent of the applicant's crawler crane.

[50] In effect, Payment Claim 6 consolidates the amounts owing under Payment Claims 4 and 5.

[51] On 3 June 2019, the respondent paid a further $25,000.00 towards Payment Claim 4. As Payment Claim 6 consolidates Payment Claims 4 and 5, this reduced the amount owing under Payment Claim 6 to $761,296.75.

More leaks and rectification works

[52] The respondent encountered further leaks in the secant pile wall and the respondent believed that the applicant's response plan was not appropriate to rectify the leaks in the pile wall. There was a particularly significant leak at pile 39. In relation to this leak, the applicant attempted to fix a steel plate over the leak. However, this failed.

[53] On 10 June 2019, Mr O'Connor issued a second defects notice, which detailed the events surrounding the leak at pile 39. The respondent indicated to the applicant that it

would apply the shotcrete layer required in order to mitigate further delay. The applicant did not respond to this defects notice. The respondent carried out the further defects rectification work on 11 June 2019.

[54] It is against this factual background that the respondent's assertion that it has three defences to the applicant's attempt to recover the unpaid $761,296.75 of Payment Claim 6 must be considered.

Defence 1 - misleading or deceptive conduct

[55] The respondent bears the onus of establishing a defence based upon misleading or deceptive conduct and an entitlement to relief under section 238 of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act* 2010 (Cth) ("the ACL").

> **238 Compensation orders etc. arising out of other proceedings**
>
> (1) If a court finds, in a proceeding instituted under a provision of Chapter 4 or this Chapter (other than this section), that a person (the *injured person*) who is a party to the proceeding has suffered, or is likely to suffer, loss or damage because of the conduct of another person that:
>
> (a) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or
>
> (b) constitutes applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under section 250 to be an unfair term;
>
> the court may make such order or orders as it thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.
>
> Note: The orders that the court may make include all or any of the orders set out in section 243.
>
> (2) The order must be an order that the court considers will:
>
> (a) compensate the injured person in whole or in part for the loss or damage; or
>
> (b) prevent or reduce the loss or damage.

[56] It is common ground that misleading or deceptive conduct (if established under the ACL) may constitute a good defence to the originating application.

[57] Section 18 of the ACL prohibits misleading or deceptive conduct:

> **18 Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).
>
> Note: For rules relating to representations as to the country of origin of goods, see Part 5-3.

[58] Silence may, assessed in the context of other relevant circumstances, constitute misleading or deceptive conduct. Where silence would be misleading or deceptive, section 18 of the ACL obliges disclosure.[2] In *Demagogue Pty Ltd v Ramensky* ("*Demagogue*"),[3] Black CJ held:

> To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of "mere silence" or of a duty of disclosure can divert attention from that primary question. Although "mere silence" is a convenient way of describing some fact situations, there is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed.

[59] Further, Gummow J (with whom Cooper J agreed) in *Demagogue* noted that, consistently with the natural meaning of section 52 of the *Trade Practices Act* 1974 (Cth) (which is in the same terms as section 18 of the ACL), the question is whether, in light of all relevant circumstances constituted by acts, omissions, statements or silence, there has been conduct which is or is likely to be misleading or deceptive.[4] His Honour Justice Gummow then referred to the limitation that:

> Unless the circumstances are such as to give rise to the reasonable expectation that if some relevant facts exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does exist.[5]

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2 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 369 [18]-[19].

3 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 32.

4 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41.

5 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 41.

[60] These accepted principles have most recently been considered by the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd*.[6] The language of a "reasonable expectation of disclosure" is not statutory, but indicates an approach which can be taken to the characterisation for the purposes of section 18 of the ACL, of conduct consisting of or including non-disclosure of information.[7] In commercial dealings, characterisation of conduct will be undertaken by reference to its circumstances and context:

> Silence may be a circumstance to be considered. The knowledge of the person to whom the conduct is directed may be relevant. Also relevant in the present case, is the existence of common assumptions and practices established between the parties or prevailing in the particular profession, trade or industry in which they carry on business. The judgment which looks to a reasonable expectation of disclosure as an aid to characterising non-disclosure as misleading or deceptive is objective. It is a practical approach to the application of the prohibition in s 52.[8]

Agreed issues between the parties

[61] The parties have agreed that, in relation to the misleading and deceptive conduct defence, the following issues are relevant:

(a) Did the applicant, by its conduct between 26 April 2019 and 14 June 2019, represent to the respondent that:

(i) the respondent was not required to deliver a payment schedule in response to Payment Claim 5 or Payment Claim 6 as required by s 76 of the Act; and

(ii) the respondent was not required to assess or pay Payment Claim 5 or Payment Claim 6 until the completion of the excavation of the shaft; and

(iii) the applicant would not enforce its rights in respect of Payment Claim 5 or Payment Claim 6 under the Act?

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6 (2010) 241 CLR 357.

7 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 369 [19].

8 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* at 369-370 [20].

(b) If yes, did the respondent rely upon that conduct in failing to deliver a payment schedule in response to Payment Claim 5 and Payment Claim 6?

[62] If I am satisfied that there was misleading and deceptive conduct by the applicant and it caused the respondent to not submit a payment schedule to Payment Claim 6, then the respondent has established this defence and the applicant is not entitled to judgment.

Relevant provisions of the Act

[63] Section 75 of the Act sets out how a payment claim must be made:

> **75 Making payment claim**
>
> (1) A person (the claimant) who is, or who claims to be, entitled to a progress payment may give a payment claim to the person (the respondent) who, under the relevant construction contract, is or may be liable to make the payment.
>
> (2) Unless the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—
>
> (a) the period, if any, worked out under the construction contract;
>
> (b) the period of 6 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.
>
> (3) If the payment claim relates to a final payment, the claim must be given before the end of whichever of the following periods is the longest—
>
> (a) the period, if any, worked out under the relevant construction contract;
>
> (b) 28 days after the end of the last defects liability period for the construction contract;
>
> (c) 6 months after the completion of all construction work to be carried out under the construction contract;
>
> (d) 6 months after the complete supply of related goods and services to be supplied under the construction contract.
>
> (4) The claimant can not make more than 1 payment claim for each reference date under the construction contract.
>
> (5) A payment claim may include an amount that was included in a previous payment claim.
>
> (6) Subsection (7) applies if—

(a) there is a subcontract under the construction contract for the progress payment; and

(b) the construction contract is not also a subcontract for another construction contract.

(7) The claimant must ensure the payment claim is accompanied with a supporting statement. Maximum penalty—100 penalty units.

(8) A failure of the claimant to comply with subsection (7) does not affect the validity of a payment claim.

(9) In this section—

final payment means a progress payment that is the final payment for construction work carried out, or for related goods and services supplied, under a construction contract.

supporting statement, for a payment claim, means a written document—

(a) declaring that all subcontractors have been paid all amounts owed to them by the claimant at the date of the payment claim; or

(b) stating—

(i) the following for each subcontractor who has not been paid the full amount owed to them by the claimant at the date of the payment claim—

(A) the subcontractor's name;

(B) the amount still unpaid;

(C) the details of the unpaid payment claim for the subcontractor;

(D) the date the subcontractor carried out the construction work or supplied the related goods and services;

(E) the reasons the amount was not paid in full; and

(ii) that all other subcontractors have been paid the full amount owed to them by the claimant.

[64] Section 76 of the Act states that the respondent must respond to the payment claim by giving a payment schedule.

76 Responding to payment claim

(1) If given a payment claim, a respondent must respond to the payment claim by giving the claimant a payment schedule within whichever of the following periods ends first—

(a) the period, if any, within which the respondent must give the payment schedule under the relevant construction contract;

(b) 15 business days after the payment claim is given to the respondent. Maximum penalty—100 penalty units. Note— A failure to give a payment schedule as required under this section is also grounds for taking disciplinary action under the Queensland Building and Construction Commission Act 1991.

(2) However, the respondent is not required to give the claimant the payment schedule if the amount claimed in the payment claim is paid in full on or before the due date for the progress payment to which the payment claim relates.

(3) If the respondent gives the claimant a payment schedule, the respondent must pay the claimant the amount proposed in the payment schedule no later than the due date for the progress payment to which the payment schedule relates. Maximum penalty—100 penalty units.

(4) Subsection (3) does not apply to an amount to the extent the respondent is required to retain the amount under chapter 3, part 4A.

[65] Section 77 sets out the consequences for failing to give a payment schedule:

77 Consequences of failing to give payment schedule

(1) This section applies if a respondent given a payment claim does not respond to the claim by giving the claimant a payment schedule as required under section 76.

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

Respondent's submissions

[66] The respondent submits that the particular conduct which had a misleading or deceptive effect, and which falls to be assessed in the context of the circumstances of this case, is the applicant's silence in the face of the 1 May 2019 letter.

[67] The respondent sets out the relevant events or circumstances leading to that silence, which colour its misleading or deceptive effect, as follows:

(a) The respondent, by Mr O'Connor in particular, had formed the opinion that the works performed by the applicant were defective and likely to require rectification, in that the secant pile wall would not adequately retain water once the excavation of the launch shaft began. The respondent's opinion that the

works were defective and would require rectification is of weight only to frame Mr O'Connor state of mind leading from about 26 April 2019.

(b) On 26 April 2019, Mr Godden and Mr O'Connor had a conversation. That much is common ground. At that point, Progress Claim 5 had not been received but shortly would be.

(c) The parties evidently had materially different recollections of the effect of the conversation. The respondent submits that it is unnecessary to resolve what in fact was said. The critical fact is that:

(i) The respondent, by Mr O'Connor, formed the view that there was an agreement that the respondent would hold Progress Claims 5 and 6 pending satisfactory completion of the works.

(ii) The applicant, by Mr Godden, had the view that no such agreement or arrangement had been entered into.

(d) The respondent's case is not that the conversation itself is the misleading and deceptive conduct. Rather, it is the silence by the applicant after receiving the Mr O'Connor's 1 May 2019 that is misleading and deceptive. The applicant's silence needs to be informed by what had occurred between the parties prior to the letter.

(e) Mr O'Connor's letter states, in the context of a discussion about defects in the works, the following:

> As discussed between Mr Kieran O'Connor and Mr Matt Godden, Bothar will hold Ausipile's Progress Claims 5 and 6 pending satisfactory completion of the shaft excavation.

(f) Mr Yoon, the applicant's commercial manager, read the 1 May 2019 letter and noted the words quoted above about holding Payment Claims 5 and 6.

(g) Mr Yoon questioned Mr Godden about the letter, who "denied that there was any such discussion or arrangement with Mr O'Connor". Mr Godden also recalls discussing the matter with Mr Yoon in early May 2019. He recalls that he told

Mr Yoon that he did not recollect having any such discussion with Mr O'Connor and "never agreed to any holding of the payment claims on behalf of Ausipile".

(h) Thus, the respondent submits, it evidently occurred to both Mr Yoon and Mr Godden that the letter reflected a misunderstanding or misapprehension of what the applicant considered was the correct view. The applicant considered there was no arrangement or agreement to hold Payment Claims 5 and 6. The respondent considered that there was. It was important enough for Mr Yoon, as a commercial manager, to question Mr Godden, who told him he had not agreed to the respondent holding the payment claims.

(i) The applicant remained silent in the face of that letter. The respondent submits that the applicant must objectively be taken to have appreciated that the respondent was, on the applicant's view of the facts, labouring under a misapprehension. The applicant did nothing to correct the position. The respondent submits that its silence was misleading or deceptive in all the circumstances.

[68] The respondent submits that the objective position is that, upon receipt of the 1 May 2019 letter and following Mr Yoon and Mr Godden's conversation about it, there arose a reasonable expectation that the applicant would speak to the respondent to correct the position.

[69] Mr Cawse, the applicant's company director, has experience of the construction industry. He was cross examined at the hearing in particular about a hypothetical scenario where, instead of receiving the 1 May 2019 letter, he had sent it.

[70] Mr Cawse's evidence was that, if he had sent a letter recording that, in his view, such an agreement or arrangement had been reached, he would want to be told by the counterparty if his view was incorrect so that his company's legal position could be protected. He also said, addressing the hypothetical scenario:

> But if a subcontractor had a meeting with any of my staff and come up with an answer like that, especially in a scenario if it was never

> discussed, then I'd certainly want to open communications to be very clear about it.

[71] In respect of the quoted section of the 1 May 2019 letter, Mr Cawse gave the following evidence:

(a) If the subcontractor disagreed with what was in the letter, "In the building industry, as a subcontractor, you'd know straight away".

(b) That was because: "You would know straight away from the subcontractor, because they would answer you immediately and disagree" and "It's the building industry".

(c) In respect of something as important as holding back the processing of payment claims, he would want to know.

(d) He would want to know that the sub-contractor had a different view of the discussion.

(e) It was important for business relationships.

(f) In the context of protecting his legal position, that depended on the value but he accepted that $700,000.00 was a lot of money and said: "Yeah, I would say you'd want to know for sure."

[72] The respondent submits that great weight should be placed on Mr Cawse's evidence in assessing whether or not there was misleading and deceptive conduct. However, I found that Mr Cawse struggled with responding to this hypothetical concept and was often confused. Accordingly, the weight of his evidence is somewhat diminished as to these issues.

[73] The respondent submits that Mr Cawse's evidence is consistent with Mr O'Connor's evidence. Mr O'Connor deposes that:

> I thought if Mr Godden disagreed with Bothar's position he would tell me, or anyone else from Bothar, either during that conversation or after.

[74] The respondent submits that should be especially so in circumstances where Mr O'Connor told Mr Godden that he would send him a letter confirming the respondent's position. The sensible purpose in doing so would be to elicit a contrary view, if one existed. The respondent submits that, in the face of the 1 May 2019 letter, silence would induce a reasonable person in the respondent's position to believe that the counterparty accepted the accuracy of the letter.

[75] Accordingly, the respondent submits that the applicant's failure to correct the respondent's view following receipt of the 1 May 2019 letter was misleading or deceptive because, objectively, there arose a reasonable expectation on the part of the respondent that the applicant would do so if it disagreed with the 1 May 2019 letter about the effect of the conversation concerning the payment schedules.

[76] The respondent submits that the misleading or deceptive conduct has caused loss because, had the applicant informed the respondent that it did not agree to Payment Claims 5 or 6 being held pending excavation of the shaft, Mr O'Connor states that he would have:

(a) Put in a payment claim in respect of (relevantly) Payment Claim 6.

(b) Immediately sought legal advice to protect its position. The respondent submits that, if legal advice had been sought, Mr O'Connor would inevitably have been given the correct advice to put in a payment schedule.

(c) Immediately engaged expert engineers to determine the likelihood and extent of leaks in the secant pile launch shaft as well as the likely extent of rectification works required.

[77] The respondent submits that it follows that the basis of the applicant's alleged entitlement to the debt sued for – the failure to submit a payment schedule – would have been avoided if the applicant had not engaged in misleading or deceptive conduct contrary to section 18 of the ACL.

The applicant's silence did not amount to misleading and deceptive conduct

[78] In my view, the applicant's conduct (including their silence in the face of the 1 May 2019 letter) did not amount to misleading and deceptive conduct.

[79] Silence is to be assessed as a circumstance like any other. The question is whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive, or that is likely to mislead or deceive.[9]

[80] In my view, having regard to all of the relevant circumstances, the applicant's silence in the face of the 1 May 2019 letter was not misleading or deceptive or likely to mislead or deceive.

[81] The applicant, by its conduct between 26 April and 14 June 2019, did not represent to the respondent that:

(a) the respondent was not required to deliver a payment schedule in response to Payment Claims 5 or 6 as required by section 76 of the Act;

(b) the respondent was not required to assess or pay Payment Claims 5 or 6 until the completion of the excavation of the shaft; or

(c) the applicant would not enforce its rights in respect of Payment Claim 5 or 6 under the Act.

[82] I have taken into account all of the relevant circumstances and, in particular, the factual matrix against which the alleged misleading and deceptive conduct needs to be assessed, which includes:

(a) that, prior to the 1 May 2019 letter, the respondent had never provided a payment schedule to any of the applicant's payment claims;

(b) the conversation between Mr O'Connor and Mr Godden on 26 April 2019;

(c) the content of the 1 May 2019 letter; and

(d) Mr Godden and Mr Yoon's response or reaction to the 1 May 2019 letter.

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9 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 32; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* at 369 [18].

[83] Each of these factors is discussed below.

The respondent never provided payment schedules

[84] The respondent did not provide a payment schedule in response to Payment Claims 5 or 6.

[85] The respondent submits that the failure to provide a payment schedule was the consequence of the applicant's silence.

[86] However, up to the 1 May 2019 letter, the applicant had issued four payment claims and the respondent had never provided a payment schedule to any of these payment claims. This was in breach of the Act.

[87] The Act requires that, if given a payment claim, and, if the payment claim is not paid in full on or before the due date, then the respondent must respond to the payment claim by giving the applicant a payment schedule in the time period as set out in the Act.[10] It is an offence under the Act, punishable by up to 100 penalty units, not to do so, and also grounds for taking disciplinary action under the *Queensland Building and Construction Commission Act* 1991 (Qld) ("QBCC Act").[11]

[88] The respondent never complied, before or after the 1 May 2019 letter, with their obligation under the Act to provide a payment schedule. This is not surprising considering that Mr O'Connor did not know that the delivery of payment schedules was compulsory under the Act, nor that it was an offence not to deliver a payment schedule.

[89] I acknowledge the unchallenged evidence that, had the applicant informed the respondent that it did not agree to hold Progress Claims 5 or 6, then it would have sought legal advice to protect its position. It is assumed that such legal advice would have been that the respondent had to comply with the Act and provide a payment schedule to the applicant's payments claims.

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10 *Building Industry Fairness (Security of Payment) Act* 2017 (Qld) s 76(1).

11 See the annotations in the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) s 76.

[90] However, the requirements of the Act are still a relevant consideration. I accept the applicant's submission that it should be presumed that the parties know their obligations under the Act and that these obligations form part of the relevant circumstances and context in which any misleading and deceptive conduct must be assessed.

The 26 April 2019 conversation between Mr O' Connor and Mr Gooden

[91] Mr Godden's position and role with the applicant needs to be appreciated.

[92] Mr Godden was the applicant's operation manager. His duties included management of the site construction works, resources and staff for the applicant. There is no evidence that he had anything to do with the accounts or payment claims or the issuing of payment claims. Mr O'Connor deposes that he had a good working relationship with Mr Godden and he believed that Mr Gooden was experienced in the foundation work industry.

[93] In relation to payment claims, Mr Yoon, sent the payment claims to Mr O'Connor. The only other recipients of these emails was Mr Cawse, the applicant's director, and the applicant's generic account's email address. Mr Godden was never included in these emails.

[94] On Mr O'Connor's version of the conversation, all that occurred was that Mr O'Connor discussed with Mr Godden that the respondent would hold Payment Claim 5 and any future claims.

[95] Even on Mr O'Connor's evidence, I am not satisfied that a response by the applicant's operations manager of, "Ok I understand, I know where you are coming from" could be seen to be accepting the respondent's position. This is especially so considering Mr Godden was the on site manager and had nothing to do with the accounts and the sending of the invoices.

The 1 May 2019 letter

[96] Mr O'Connor states that he thought it best to put his conversation with Mr Godden in writing in relation to the fact that the parties had agreed that Payment Claim 5 and future payment claims would not be assessed or paid pending excavation of the launch shaft and to formally request a defect response plan. The letter relevantly states:

> As discussed between Mr Keiran O'Connor and Mr Matt Godden, Bothar will hold Ausipile's Progress Claim 5 and 6 pending the satisfactory completion of the shaft excavation.

[97] Mr O'Connor states that this letter confirmed what he thought was the agreement reached with Mr Godden (i.e. that the respondent was not required to respond to any payment claims by way of an assessment and the respondent was not required to pay any payment claims until the defect issues on site were resolved). I note that Mr O'Connor used the terms "discussed" in 1 May 2019 letter, and not "agreed".

[98] In my view, the use of the term "discussed" rather than "agreed" appropriately reflects the conversation between Mr O'Connor and Mr Godden.

Mr Yoon and Mr Godden's response to the 1 May 2019 letter

[99] The respondent highlights Mr Yoon and Mr Gooden's conversation in response to this letter. The respondent submits that it evidently occurred to both Mr Yoon and Mr Godden that the letter reflected a misunderstanding or misapprehension of what the applicant considered was the correct view. I do not agree.

[100] Mr Yoon states that, shortly after receiving the 1 May 2019 letter, he specifically questioned Mr Godden about it. Mr Yoon states that Mr Godden denied that there was any such discussion or arrangement with Mr O'Connor.

[101] The respondent states this conversation between Mr Yoon and Godden, as recalled by Mr Yoon, reveals that he appreciated that the letter articulates an arrangement for the respondent to hold Payment Claims 5 and 6 pending satisfactory completion of the shaft excavation.

[102] Mr Godden had a similar recollection of his conversation with Mr Yoon. In relation to that conversation, he states:

> I recalled that I told Mr Yoon that I did not recollect having such discussion with Mr O'Connor and never agreed to any holding of the payment claims on behalf of Ausipile.

[103] The respondent submits that such a conversation also fairly indicates an understanding that the 1 May 2019 letter records the articulation of an agreement, albeit one which Mr Godden was telling Mr Yoon he did not make.

[104] The respondent submits that what then occurred, relevantly for the misleading and deceptive conduct case, was a silence in the face of the 1 May 2019 letter. No communication was made by Mr Yoon, Mr Godden or anybody else on behalf of the applicant articulating that what was recorded in the 1 May 2019 letter was not an agreed or accepted position by the applicant. They remained silent in the face of that letter.

[105] The respondent submits that, as a consequence, the respondent did not provide a payment schedule for Payment Claim 5. The applicant sent no warning notice under the Act. No articulation was forthcoming that judgment would be sought on Payment Claim 5. Rather, the silence was consistent with, and continued the effect of, the representation.

[106] However, in my view, the applicant's silence in the face of the 1 May 2019 letter was not misleading or deceptive or likely to misled or deceive.

[107] The use of the phrase "as discussed … Bothar will hold Ausipile's Progress Claim 5 and 6 pending the satisfactory completion of the shaft excavation" was not something that should have put the applicant on notice that the respondent was acting under some apprehension or misapprehension that there was an agreement that the respondent was not required to comply with the Act and need not put in a payment schedule.

[108] The applicant was entitled to proceed on the basis that the respondent knew it obligations under the Act. This letter, in my view, even taken at its highest, does not convey that the respondent would not be complying with the Act and not responding to payment claims with payment schedules. Rather, this letter, taken at its highest,

conveys that Mr O'Connor has *discussed* with the applicant's operation manager that the respondent was not going to pay Payment Claims 5 and 6.

[109] In the circumstances, this would not have been surprising. I note that the due date for Payment Claim 4 as set out on the invoice was 30 April 2019. At the time of the 1 May 2019 letter, the respondent had not paid Payment Claim 4. As with all the other payment claims, no payment schedule was provided in relation to Payment Claim 4. This was done, by the respondent, without any agreement, or indeed any discussion, between the parties.

[110] I note that the letter makes no mention of Payment Claim 4. Mr O'Connor was aware that, having not put in a payment schedule, the respondent was liable for the entire amount of Payment Claim 4. Yet no payment in full was forthcoming.

[111] The respondent submits that objectively, upon receipt of the 1 May 2019 letter and following Mr Yoon and Mr Godden's conversation about it, there arose a reasonable expectation that the applicant would speak to the respondent to correct the position. I do not accept this submission.

[112] The conversation between Mr Godden and Mr Yoon does not amount to either of them appreciating that that letter reflected a misunderstanding or misapprehension between the parties in which:

(a) the respondent considered that there was an arrangement or agreement to hold Progress Claims 5 and 6; but

(b) the applicant considered there was no arrangement.

[113] In my view, taken at its highest, this letter conveys that Mr O'Connor had discussed with Mr Godden that the respondent would not pay and hold the payment claims. It did not convey that the respondent believed that the parties had agreed for the respondent to not comply with their obligations under the Act.

[114] Mr O'Connor was making his position clear that the respondent would be holding Payment Claims 5 and 6, so it is not surprising that Mr Godden and Mr Yoon discussed

the contents of this letter with each other, especially given the context that, at that time, payments had been late or had not occurred.

[115] It is also not surprising, in the circumstances, that Mr Godden stated that he never agreed to any of the holding of the payment claims by the respondent.

[116] Also relevant, is the existence of common assumptions and practices established between the parties. By the time of the conversation between Mr O'Connor and Mr Godden and the 1 May 2019 letter, the respondent had established a continued practice of not providing payment schedules.

[117] The fact that the respondent continued to not put in payment schedules would not be surprising to the applicant. The respondent's practice, prior to the conversation and the 1 May 2019 letter, was to not comply with their obligations under the Act by responding to a payment claim with a payment schedule.

[118] Further, as stated previously, I don't place much weigh on Mr Cawse's evidence that he would want his misapprehension corrected in a hypothetical scenario where he had sent a letter recording that, in his view, an agreement or arrangement had been reached.

[119] Even on the most favourable view of the facts for the respondent, I am not satisfied that the applicant could objectively be taken to have appreciated that the respondent was labouring under a misapprehension.

[120] The circumstances are not such to give rise to a reasonable expectation that the applicant would inform the respondent, after receiving the 1 May 2019 letter, that the correct position was that the applicant had not agreed to the respondent holding Payment Claims 5 and 6.

Conclusion: defence 1 not made out

[121] In all of the circumstances, the applicant's silence in the face of the 1 May 2019 letter was not misleading or deceptive, or likely to mislead or deceive. The respondent's first defence fails.

Defence 2 – no valid warning notice was given

[122] The respondent submits that the application should be dismissed because the Act mandates a window within which a claimant may sue for debt, and the applicant was outside of this window due to a variation of the payment terms.

[123] This submission requires the respondent to establish a number of cascading propositions.

[124] *First*, that there was a variation to the payment terms under the subcontract, with the consequence being that the payment terms were extended beyond 25 days after the submission of a payment claim.

[125] *Second*, this variation is void pursuant section 67U of the QBCC Act, which provides:

> **67U Void payment provision in construction management trade contract or subcontract**
>
> (1) A provision in a construction management trade contract or subcontract is void to the extent it provides for payment of a progress payment by a contracting party to a contracted party later than 25 business days after submission of a payment claim.
>
> (2) In this section—
>
> ***business day*** means a day that is not—
>
> (a) a Saturday or Sunday; or
>
> (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done; or
>
> (c) a day in the period from 22 December in a particular year to 10 January in the following year, both days inclusive.

[126] *Third*, as the variation was voided by section 67U of the QBCC Act, section 73(1)(b) of the Act provides for the applicable payment terms. As a result, the due date for Payment Claim 6 was 7 June 2019, which was ten business days after Payment Claim 6 was provided by the applicant. Section 73(1)(b) provides:

> **73 Due date for payment**
>
> (1) A progress payment under a construction contract becomes payable—
>
> (a) if the contract provides for the matter—on the day on which the payment becomes payable under the contract; or

Notes—

1. A 'pay when paid' provision in a construction contract has no effect, see section 74.

2. A provision in a construction management trade contract or subcontract providing for payment of a progress *payment later than 25 business days is void, see the Queensland Building and Construction Commission Act 1991*, section 67U.

3. A provision in a commercial building contract providing for payment of a progress payment later than 15 business days is void, see the *Queensland Building and Construction Commission Act 1991*, section 67W.

(b) if the contract does not provide for the matter—on the day that is 10 business days after the day a payment claim for the progress payment is made under part 3.

…..

[127] *Fourth*, therefore, the applicant did not issue the warning notice within the timeframes stipulated by section 99 of the Act which provides:

99 Notice required before starting particular proceedings

(1) This section applies if—

(a) after being given a payment claim, the respondent fails to pay the amount stated in the claim on or before the due date for the progress payment to which the claim relates; and

(b) because of the failure to pay, the claimant intends to start proceedings in a court to recover the unpaid portion of the amount owed to the claimant.

Note—

See section 78 for the claimants (sic) right to recover from a respondent an amount owed to the claimant.

(2) Before taking the intended action, the claimant must give the respondent written notice (a ***warning notice***), in the approved form, of the claimant's intention to start the proceedings.

(3) The claimant must not give the respondent the warning notice later than 20 business days after the due date for the progress payment.

(4) The claimant must not take the intended action before the end of 5 business days after giving the respondent the warning notice.

(5) The giving of a warning notice does not—

(a) require the claimant to complete the action stated in the notice; or

(b) prevent the claimant from taking different action to that stated in the notice.

[128] The order sought by the applicant is under section 78(2)(a) of the Act. Part 6 of the Act concerns Court proceedings for debt recovery and section 99 mandates a window within which a claimant may sue for a debt.

[129] Pursuant to section 99(3) of the Act, the applicant was required to provide a warning notice that was 20 days after the due date for payment. The respondent submits that he due date for payment was 7 June 2019. Therefore the warning notice was required to be provided by the applicant to the respondent by 5 July 2019. The parties agree that the applicant's warning notice was provided after 5 July 2019.

[130] Under section 99(5) of the Act, the claimant must not take the step of suing for a debt until at least five business days after it has given a warning notice in the approved form. The combined effect of these sub-sections is that the Act mandates a window of at least five, but not more than 20, business days within which the claimant must sue for a debt owed under a payment claim.[12]

[131] The respondent submits that, where the warning notice is not validly given, there is a prohibition on the claimant suing for the debt. The expiration of 5 business days runs from the date of valid service of a warning notice, such that if service is not validly effected, time cannot run and section 99(4) prohibits the claiming suing for the debt.

[132] The respondent submits that the consequence of all of this is that the applicant failed to provide a warning notice in compliance with to section 99(2) of the Act, and the applicant was not entitled to commence its originating application.

[133] In order to make out this argument, the respondent bears the onus of establishing that:

(a) there was a variation to the payment terms under the subcontract;

(b) the variation is made void by section 67U of the QBCC Act;

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[12] Section 99(3) of the Act has since been amended so that the claimant must now give the respondent the warning notice no later than 30 business days after the due date for the progress payment: see *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act* 2020 (Qld) s 74.

(c) in consequence, section 73(1)(b) of the Act provides for the applicable payment terms; and

(d) in consequence, there was non-compliance with section 99(3) of the Act, which renders the applicant's proceedings to recover the debt invalid.

[134] The respondent's defence is predicated on there being a variation to the payment terms ("the threshold issue"). However, in my view, the applicant does not establish this threshold issue.

Background

[135] The subcontract states that:

> SUBCONTRACT PRICE: AUD 1,380,000 excl/ GST
>
> 30 day terms – Payment Claims shall be submitted on the 22nd day of the month to which the claim relates.

[136] On 21 December 2019, the applicant issued the first payment claim. The front page of Payment Claim 1 listed the "terms" of the invoice as "30 days – EOM".

[137] EOM is an acronym for "end of the month". The phrase meant that payment was due 30 days from the end of the month in which the payment claim was issued. The "due date" for Payment Claim 1, however, was listed as 31 January 2019, which is 31 (rather than 30) days from the end of the month.

[138] On 14 January 2019, Mr O'Connor sent Mr Yoon an email requesting him to complete a new supplier form. This form was sent to obtain the applicant's details in order to get the applicant set up in the respondent's system. The supplier form recorded the payment terms as "60 days from EOM". In his email, Mr O'Connor instructed Mr Yoon: "Ignore the section about payment terms, it will be as per your progress claim".

[139] Mr Yoon returned the supplier form with the payment terms of "60 days from EOM" crossed out.

[140] All of the following tax invoices stated "Terms – 30 days EOM". Despite this term, appearing on all of the tax invoices issued by the applicant, it appears that the practice was to list the "due date" as the last day of the month after the month of the invoice, whether or not this was exactly equal to 30 days. Payment Claim 2 was issued in January 2019, for example, but became due after just 28 days, on 28 February 2019. Payment Claim 3, on the other hand, was issued in February 2019 but became due after 31 days, on 31 March 2019.

Respondent's submissions

[141] The respondent submits that, taking into account the following circumstances, the payment terms in the subcontract were varied by conduct:

(a) The subcontract terms were originally 30 day terms.

(b) The tax invoice for Payment Claim 1 stated, on its face, "30 Days EOM". Those terms were different to the terms under the subcontract.

(c) Payment Claim 1 identified the due date for payment as being the end of the month (31 January 2019).

(d) On 14 January 2019, the applicant provided to the respondent a new supplier form. Mr O'Connor stated in cross-examination that the form was not sent for the purpose of varying the subcontract. That follows because the standard form contained 60 day terms, which on no view were applicable. However, importantly, Mr O'Connor's covering email stated that the payment terms would be, "as per [the applicant's] progress claim [1]".

(e) Later the same day, the respondent returned the completed new supplier form with the payment terms crossed out.

(f) All subsequent progress claims issued by the Applicant indicated that the payment terms under the Subcontract were the varied payment terms.

(g) The Respondent made payments on the subsequent progress claims consistent with the varied payment terms.

[142] The respondent submits that the agreement to vary the payment terms was effected by the applicant's provision of the payment claim with 30 days EOM terms, and the respondent's agreement to proceed upon those terms. When considering the entirety of the relationship between the parties as well as the correspondence between them and their conduct, the respondent submits that this constitutes an agreement between the applicant and the respondent to vary the payment terms of the subcontract to 30 days end of month. The requisite intention and certainty can be established through the correspondence and the parties' conduct.

[143] In relation to consideration, the respondent submits that there was consideration for the promise to vary the terms as:

(a) Consideration flowed from the applicant because the provision of additional time to pay is a benefit to a commercial party.

(b) Consideration flowed from the respondent in agreeing to a requested change to the payment terms, which was consideration in the sense of aligning the payment terms with the applicant's standard trading terms.

(c) An administrative benefit is capable of constituting consideration.[13]

(d) The *quid pro quo* necessary to support adequate consideration is the promise of additional time to pay, in exchange for a practical administrative benefit.

(e) Evidence of post contractual conduct is admissible to establish the existence of an agreement (as distinct from its proper interpretation).[14]

[144] The respondent submits that each of the payment claims submitted had tax invoices which, on their face, were consistent with the 30 day EOM terms. The respondent submits that this fact ought to be given more weight than the fact that payment was not in fact made on 30 days EOM terms, which merely shows that there was non-performance of the agreement as varied, and does not establish that there was never any agreement to vary the terms of the subcontract.

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13 The respondent cites *Hill v Forteng Pty Ltd* [2019] FCAFC 105 at [22].

14 The respondent cites *King Tide Co Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251 at [15].

There was no variation of the subcontract

[145] In relation to this defence, the respondent does not get past the threshold issue of establishing that there was a variation of the payment terms under the subcontract.

[146] Parties in a commercial relationship may vary or extinguish terms of an existing agreement by subsequent agreement, and new agreed terms may supersede old terms.[15]

[147] In *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd*,[16] McHugh JA observed that "a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words". His Honour went on to state that:

> In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only what was said and done when the relationship was formed.[17]

[148] *In Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd*,[18] the Court stated that:

> In determining whether the communications between the parties constitute a contract the court is not confined to a consideration of the terms or manner in which the communications were made: they must be interpreted by reference to the subject matter and the surrounding circumstances including, inter alia, the nature of, and the relationship between, the parties, and previous communications between them, as well as to standards of reasonable conduct in the known circumstances.

[149] The respondent contends that the subcontract payment terms were varied by the parties to be 30 days EOM.

[150] However, the respondent acknowledges that the invoices had due dates that did not align with 30 days EOM. Consequently, the respondent submits that the subcontract

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15 *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Australia) Pty Ltd* (1988) 5 BPR 11,110 at 11,118.

16 (1988) 5 BPR 11,110 at 11,117.

17 *Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Australia) Pty Ltd* (1988) 5 BPR 11,110 at 11,118.

18 *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR 9251 at 9255.

terms varied somewhere between the date 30 days EOM and the due date specified on payment claim. The respondent submits that the difference between these dates is immaterial and does not affect the certainty of the due date. During the oral argument, counsel for the respondent expressed this argument as follows:

> MR ANDREATIDIS: But you must acknowledge that on the face of the documents there is some difference which we've just discussed. But as I've already put to your Honour the difference is immaterial and doesn't affect the certainty of the due date. And, in our submission, when the payment was made or not made is not determinative of what was agree or not agreed. That's just the function of my client – our client, the respondent, either doing something or not doing something pursuant to the contract. And if he didn't do something than it's in breach of the contract. That's not evidence of what the contract was, in our submission...

[151] In this case the subcontract stipulated 30 days terms, not 30 days from the end of the month (or "30 days EOM").

[152] The subcontract was signed by Mr Williams, the respondent's executive manager and Mr Hoemann, the respondent's general manager. The signatories of the subcontract had nothing to do with any of the subsequent alleged varied terms.

[153] The tax invoice for the applicant's first payment claim stated on its face "30 days EOM". This is clearly different to the 30 day terms as stated in the subcontract.

[154] Mr O'Connor states that:

> The front page of the Progress Claim 1 stated the terms of the invoice were "30 Days EOM". This is ordinarily understood to mean thirty days from the end of the month. That is, payment of the amount claimed was due thirty days from the end of the month of which the progress claim was issued. So for Progress Claim 1 Payment would be due on 31 January 2019. Page 2 of Progress Claim 1 confirmed this as it indicated that the "Due Date" for Progress Claim 1 was 31 January 2019.

[155] Mr O'Connor is wrong as to the alignment of 30 Days EOM and the due date in relation to Payment Claim 1.

[156] In relation to Payment Claim 1, the relevant dates are:

(a) According to the subcontract, 30 days after the payment claim was issued, which was 20 January 2019.

(b) According to the tax invoice, "30 days EOM", which was 30 January 2019.

(c) According to the due date specified on the payment claim, which was attached to the invoice, 31 January 2019.

[157] The respondent did not pay in accordance with any of these dates. The respondent paid the invoice on 1 February 2019.

[158] On 14 January 2019, Mr O'Connor, the respondent's project manager, sent a pro forma new supplier form to Mr Yoon, the applicant's commercial manager. The new supplier form had to be filled in with the applicant's details, including bank account details. This pro forma form contained 60 day payment terms.

[159] The email attaching the new supplier form stated:

> No issues there – could you please complete the attached New Supplier Form to get you set up in our system? Ignore the section about payment terms, it will be as per your progress claim.

[160] Mr O'Connor acknowledged that the new supplier form was a standard from, so he was cognisant at the time he sent it that it was not consistent with the subcontract terms.

[161] However, Mr O'Connor acknowledges that the purpose of sending the new supplier form was to get the applicant's details. It was not sent for the purpose of altering the subcontract terms.

[162] Mr O'Connor was not aware of section 67U of the QBCC Act, and he agreed that he would not have been intending to make an amendment to the payment terms that would make them invalid.

[163] Mr Yoon returned the new supplier form with the 60 days crossed out. Mr O'Conner stated that this confirmed that the payment terms for the respondent's work was 30 days EOM.

[164] It was clear that the purpose of this new supplier form was not to vary the subcontract terms. The applicant was asked to fill out a new supply form with no indication that the return of the form would affect a change to the subcontract terms.

[165] As with the first payment claim, except for Payment Claims 4 and 6, all of the subsequent payment claims had inconsistent due dates that did not align with either 30 day terms or 30 days from the end of the month. In relation to payment claims 4 and 6 their due dates aligned with 30 days from the end of the month.

[166] The following schedule sets out a number of relevant dates for each of the payment claims.

Payment claim number and date issued (as per the invoice)	Date 30 days after payment claim issue date (as per Subcontract)	Date 30 days EOM (as per the invoice and alleged variation)	Due date specified on payment claim (attached to the invoice)	Date payment/s made
1 - 21/12/18	20/01/19	30/01/19	31/01/19	01/02/19
2 - 22/01/19	21/02/19	02/03/19	28/02/19	01/03/19
3 - 26/02/19	28/03/19	30/03/19	31/03/19	03/04/19 and 17/04/19
4 - 25/03/19	24/03/19	30/04/19	30/04/19	17/05/19 and 03/06/19 (part payments only)
5 - 30/04/19	30/05/19	30/05/19	31/04/19 (obvious error)	N/A
6 - 24/05/19	23/06/19	30/06/19	30/06/19	N/A

[167] As can be seen, despite the tax invoices stating "30 days – EOM", it appears that the practice was to list the "due date" as the last day of the month after the month of the invoice, whether or not this was exactly equal to 30 days.

[168] In my view, the sending of the first payment claim with a tax invoice stating "30 days EOM" and the subsequent exchange between Mr Yoon and Mr O'Connor did not vary the subcontract terms.

[169] The exchange between the parties does not have the character of there being an intention to create, or in this case change, the legal relationship. In particular:

(a) It did not refer to or purport to refer to the subcontract terms.

(b) It did not expressly purport to be effecting a variation of the subcontract terms.

(c) It occured in the context of an exchange that was taking place for the purpose of merely completing a new supply form to set up the applicant in the respondent's electronic system.

(d) It occurred between the respondent's project manager and the applicant's commercial manager, neither of whom were the persons who signed the subcontract. The subcontract was signed by the executive manager and general manager of the respondent and applicant respectively.

[170] Evidence of post contractual conduct is admissible to establish the existence of an agreement (as distinct from its proper interpretation).[19] The respondent submits that there is post-variation evidence from which the Court may infer the existence of the variation to the payment terms. In particular, the respondent submits that the most telling post-contractual circumstance is that each of the payment claims submitted had tax invoices which, on their face, were consistent with the 30 Days EOM term. However, I do not find that the subsequent payment claims and their tax invoices supported the variation argued for by the respondent.

[171] The alleged variation is uncertain in its terms because, on four out of six of the payment claims, the "30 days EOM" payment terms recorded on the invoices do not correlate with the due date provided in the payment claim attached to the invoice.

[172] In addition, the alleged variation cannot be implied from the conduct of the parties. Except in relation to Payment Claim 2, the respondent did not pay in accordance with the alleged variation.

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19 *King Tide Company Pty Ltd v Arawak Holdings Pty Ltd* [2017] QCA 251 at [15].

[173] The subcontract terms bind the parties unless the parties agree to something else. In my view, I am not satisfied that the parties, by their conduct, agreed to vary the due date for payment claims to 30 days from the end of the month.

[174] This respondent does not get over the threshold issue of establishing that the payment terms were varied. Consequently, the respondent has not established its second defence.

Defence 3 – two contracts in the one payment claim

[175] The applicant used a crawler crane to lift the steel reinforcing cages off of the piles, as well as to service other equipment.

[176] On 30 April 2019, the applicant started to demobilise its equipment on site as the principal work under the subcontract had been completed.

[177] By the end of April 2019, the crawler crane had completed its task of lifting the steel reinforcing of the cages off the piles and was no longer needed for the subcontract works. It was to be demobilised by the applicant and removed from the site.

[178] However, the respondent still required a crawler crane for the excavation of the launch shaft. This was work required to be performed by the respondent under its head contract with John Holland. Mr O'Conner contacted Mr Godden to see whether the applicant would agree to hire the crawler crane to the respondent as the crawler crane was already on site.

[179] Mr O'Conner recalls that, sometime just prior to 30 April 2019, he called Mr Godden about the hire of the applicant's crawler crane. He does not recall exactly what he said to Mr Godden during their call. However, he does recall the effect of the conversation as follows:

(a) Mr O'Connor asked whether the respondent would be able to hire a crawler crane from the applicant to use for works that they needed to do for John Holland.

(b) Mr Godden said that the applicant would be able to do this.

(c) Mr O'Connor asked if Mr Godden could send to him the hire rates for the crawler crane.

[180] On 30 April 2019, Mr O'Conner received an email from Mr Godden providing hire rates for a "crawler crane". Mr Godden's email to Mr O'Conner dated 30 April 2019 stated:

> Kieran,
> Hire rate for the Crawler Crane as follows.
> $4800 pw for Dry Hire.
> $2150 per day wet hire with Operator.
> Any queries please give me a call.

[181] "Dry hire" refers to the hire of the machinery only and "wet hire" includes the machinery plus the cost of the labour of someone who operates the machinery.

[182] Mr O'Connor cannot find an email response to Mr Godden by himself, so he assumes that he must have called Mr Godden. He cannot now recall what was said in the conversation but believes it is most likely that, after he received the email, he called Mr Godden and confirmed that the responded agreed to hire the crawler crane at a wet hire rate of $2,150.00 per day.

[183] Payment Claim 6 contained an item for a purported variation of $21,500.00 for the wet hire of a crawler crane.

[184] The respondent submits that Payment Claim 6 made a claim for works under two separate contracts:

(a) the first was the subcontract; and

(b) the second was the crawler crane hire agreement in relation to head contract works.

[185] Under the Act, the respondent submits that a payment claim can only be made for work performed under one construction contract. The respondent submits that, if Payment Claim 6 contains two contracts, then it is void and ought to be set aside

Agreed issues

[186] The parties have set out the issues that need to be determined in relation to this defence. They are:

(a) Does Payment Claim 6 contain claims relating to two different construction contracts?

(b) If yes, does that render Payment Claim 6 void?

(c) If it can be concluded that Payment Claim 6 contained claims relating to two different construction contracts, can the payment claim be severed to remove the claim relating to wet hire of the crawler crane and judgment entered for the balance?

[187] In respect of the wet hire of the crawler crane, the respondent bears the onus of proving that the arrangement was a second contract.

Payment Claim 6 contains claims relating to two different construction contracts

[188] In relation to this issue, the applicant submits that the wet hire arrangement was simply a variation to the subcontract and there was no new contract.

[189] The applicant emphasises that the crawler crane was only on site because it had been used by the applicant in the performance of the original subcontract works. Whilst all of the applicant's other equipment was demobilised, the crane remained on site pursuant to an arrangement with the respondent. The crane was used for the same project to which the subcontract relates.

[190] The subcontract provides for variations:

> 3.1 The subcontractor shall vary the Work as required by the Contractor but shall not be entitled to claim extra payment for any Variation not authorised in writing.

> 3.2 The price for a Variation shall, whenever possible, be agreed prior to the execution of the Variation. All prices for Variations shall be forwarded to the Contractor no later than fourteen (14) days after receipt of written instruction.
>
> Where applicable, and in the absence of rates agreed elsewhere in the Subcontract Agreement, the valuation of Variations shall be on the basis of actual invoiced costs (where services are supplied by others or for materials purchased) plus ten percent (10%). Otherwise on dayworks rates at $1,500/hr (or part thereof) / crew, plus consumables at cost plus 10%.
>
> 3.3 Only written Variation Orders duly authorised by the Project Manager will be accepted for payment. The Price of such Variation Orders shall be added to or deducted from the Subcontract Sum as applicable.
>
> 3.4 Dayworks sheets shall be prepared and forwarded to the Contractor for signature on a daily basis, whether or not agreement has been reached as to responsibility for payment for the subject works.
>
> 3.5 A Variation rate of $1,500 per hour forms the basis of all equipment and personnel resources allowed in any lump sum items or variations. The rate will apply for a maximum of 8 hours per day, Monday to Friday.
>
> The rate is an all include rate including but not limited to insurances, loadings, shift loading, allowances, margin, and shall be used to value works where the Subcontractor is entitled to agreed damages.

[191] The subcontract provides at clause 3.1 that the subcontractor shall vary the work as required by the contractor. The applicant notes that the content of the variations as set out in the subcontract is at large. The applicant emphasised that there was no express limitation in the subcontract that the work performed under the variations must be the same type or nature of the work as set out in the subcontract.

[192] Claude 3.2 of the subcontract contemplates a price for a variation being agreed if possible prior to the execution of the variation. The applicant submits this occurred.

[193] Clauses 3.1 and 3.3 of subcontract sets out that variations evidenced by some writing are contemplated. The applicant submits that the hire of the crane was in part in writing and in part an oral agreement, with such an arrangement being sufficient to satisfy the requirement in the subcontract that there is some writing evidencing the variation.

[194] The applicant accepts that, at the time of this agreement, all of the applicant's other equipment had been demobilised, that the work performed in the hire of the crane was

not the same work that the applicant was required to carry out under the subcontract in terms of scope of work, and that the applicant did not direct the operation of the crane. However, the applicant stresses that the crane was used for the Quota Park project and that the crawler crane could not be demobilised until the respondent had finished using it. There was no separate formal contract entered into in respect of the crawler crane and no request was made to enter into such a contract. In addition, the respondent made no complaint about the claim for the wet hire of the crawler crane being included in Payment Claim 6 or the fact that it was described as a "variation" in the payment claim.

[195] The applicant's ultimate submissions is that the crawler crane wet hire agreement was a variation of the subcontract rather than a separate contract.

[196] However, in my view, in substance, there were two separate contracts.

[197] The first contract was the original subcontract, which had its existing scope and the second was a separate wet hire agreement for a crane and operator. The subcontract was for the construction of a secant pile launch shaft. The subcontract sets out the scope of work:

> SUBCONTRACT SCOPE OF WORK: Design and Construction of Secant Pile Launch Shaft at Quota Park, Biggera Waters.
>
> The secant pile shaft will be constructed as a hard-soft secant pile wall, 'hard' reinforced piles and 'soft' unreinforced piles.
>
> The secant piles will be installed by the Double Rotary (DR) Cased CFA method with a Wolton 90DR rig (refer Clause 15).
>
> The 12m internal diameter, shaft will consist of a total of 70 piles to a depth of 25.55m with a pile diameter of 813mm.
>
> Construction Tolerance:
>
> Positional at Ground Level – 25mm
>
> Verticality – 1:200 (0.5%)
>
> Displacement during excavation – 50-70mm

[198] The second contract was the contract for the wet hire of the crawler crane. The hire of the crawler crane was for a purpose anterior to any design, construction or installation work required of the applicant under the subcontract. The scope of works under the

subcontract did not include bulk excavation of the launch shaft. That was the purpose for which the respondent hired the crawler crane from the applicant.

[199] Mr Godden confirmed in cross examination that the applicant left the crawler crane on site so that the respondent could use it to perform the respondent's obligations under the head contract. He also confirmed that excavation of the launch shaft was bulk excavation works. That work was work to be performed by the respondent, not the applicant.

[200] I note that Mr O'Connor said under cross examination that there was no different subcontract. Further, Mr O'Connor accepted that, at the time the respondent asked to hire the crane, no formal subcontract was provided and there was no indication that there would be a separate contract.

[201] It may be accepted that the parties did not in fact indicate that there would be a separate contract. However, in my view, the correct approach is to consider the nature of the work to be performed and whether the agreement constituted a separate agreement or a variation.

[202] The nature of the agreement as a hire agreement (as distinct from an agreement to vary the scope of works) in respect of a piece of equipment which was to be used for work to be carried out by the respondent in relation to separate and independent works under a head contract is telling in that regard.

[203] Further, the crane remained on site from 22 May 2019 to 21 June 2019. The subcontract works were completed on or around late April 2019 and the applicant demobilised from site around this time. The applicant's Payment Claim 6 is its substantial completion claim for the entirety of its subcontract works. However, the crane remained on hire and on site performing works for another 5 weeks.

[204] The respondent has satisfied me that, taking into account all of the circumstances, the arrangement with the crane hire was a second contract and not a variation of the subcontract.

[205] Consequently, Payment Claim 6 contained a claim for payment in relation to two contracts. The first part of the claim was for work done under the subcontract to design and install secant piling works. The second part of the claim was for a separate and distinct contract for the wet hire of the crawler crane for separate works that the respondent was performing under its head contract with John Holland.

The effect of Payment Claim 6 including two contracts

The respondent's submissions

[206] The respondent submits that the effect of Payment Claim 6 containing two contracts is that it is not a payment claim under the Act and, therefore, the Act is not engaged. Accordingly, Payment Claim 6 could not give rise to the statutory right for summary judgment under section 78(2)(1) of the Act.

[207] The respondent states that the authorities are consistent to the effect that a payment claim cannot deal with more than one construction contract. The respondent relies on Douglas J's decision in *Matrix Projects (Qld) Pty Ltd v Luscombe Builders* ("*Matrix Projects*").[20] It submits that if a payment claim, as a matter of fact, relates to more than one contract, then it is void.

[208] The material facts in *Matrix Projects* are as follows:

(a) The parties signed a document called a "Period Subcontract" by which builders agreed "to perform and complete …. Works yet be agreed" for a period of twelve months from the date of the contract.

(b) It was a lump sum agreement for repair works to be performed on building damaged by the 2011 floods in Brisbane.

(c) It also provided that a work order signed by the contractor for each project should be issued from time to time during the term of the contract and should be read in conjunction with the contract and that the work order issued from time to time

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[20] [2013] QSC 4 at [17]-[18]. See also *Trinco (NSW) Pty Ltd v Alpha A Group* [2018] NSWSC 239 at [55]-[61]; *Acconia Infrastructure Australia Pty Ltd v Holcim (Australia) Pty Ltd* [2020] NSWSC 1330 at [32]-[42].

should include project specific details. The Period Subcontract also provided for when payment claims could be made by the builder and the time for payment.

(d) The builder undertook work on a number of properties as instructed by Matrix Homes.

(e) For at least nine of the properties, individual purchase orders were issued in writing by Matrix Homes where an entire house required flood rectification work. The purchase order would describe the work that would be undertaken and the builder would receive a rough sketch or architectural plans and verbal directions about what to do on the property.

(f) Another five properties were ones where representatives of Matrix Homes verbally directed the builder to do work on the understanding that he would issue an invoice and be paid for the work. He described that as "do and charge" rectification work.

(g) Matrix Homes alleged that it was always understood between the parties that the works for any specific project would be the subject of separate negotiations in respect of scope and price before any agreement was reached for that specific project, and that the Period Subcontract was not intended to apply to the "do and charge" rectification work. Work orders as defined in the Period Subcontract (which were called purchase orders) were issued to the builders, which they was entitled to accept or refuse.

(h) Purchase orders were not issued for the "do and charge" jobs.

(i) The adjudicator decided that the Period Subcontract and related work orders. The instructions to carry out work on a "do and charge" basis and variations could not be considered as one arrangement (i.e. one construction contract).[21]

[209] In determining this matter, Douglas J agreed with the following submission:

> [17] ...She submitted that the conjunction of s 12 and s 17 had the effect that a payment claim must relate to only one construction contract in reliance on a decision of McDougall J in *Rail Corporation of NSW v Nebax Constructions*. His Honour's conclusion is as follows:

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21 See generally, *Matrix Projects (Qld) Pty Ltd v Luscombe Builders* [2013] QSC 4 at [4]-[10].

> It seems to me that, because s 13(5) prevents (with a presently irrelevant exception for which subs (6) provides) the service of more than one payment claim per reference date per construction contract, and because the right to adjudication "of a payment claim" is clearly referable to a payment claim that complies with the various requirements of s 13, there can only be one adjudication application for any particular payment claim for any particular contract.
>
> [18] That reasoning is persuasive and the conclusion is one with which I agree.

[210] In *Matrix Projects*, Douglas J was considering sections 12 and 17 of the *Building and Construction Industry Payment Act* 2004 (Qld) ("the Old Act"), which has now been repealed. His Honour Justice Douglas accepted that the effect of the relevant provisions of the Old Act was that a payment must relate to only one construction contract

[211] Broadly equivalent sections have been imported into the Act. The definition of construction contract was in Schedule 2 of the Old Act, but is now in section 64 of the Act, which provides definitions for Chapter 3 of the Act.

[212] Section 12 of Old Act provided:

> **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.

[213] Section 12 of the Old Act has its broad equivalent in section 70 of the Act, which provides:

> **70 Right to progress payments**
>
> (1) From each reference date under a construction contract, a person is entitled to a progress payment if the person has carried out construction work, or supplied related goods and services, under the contract.

[214] Section 17(2) and (3) of the Old Act provided:

> **17 Payment claims**
>
> (1) ...
>
> (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.

...

[215] Sections 17(2) and (3) of the Old Act have their broad equivalents in sections 68(1) and (2) of the Act. Section 68 of the Act provides:

68 Meaning of payment claim

(1) A payment claim, for a progress payment, is a written document that—

(a) identifies the construction work or related goods and services to which the progress payment relates; and

(b) states the amount (the ***claimed amount***) of the progress payment that the claimant claims is payable by the respondent; and

(c) requests payment of the claimed amount; and

(d) includes the other information prescribed by regulation.

(2) The amount claimed in the payment claim may include an amount that—

(a) the respondent is liable to pay the claimant under section 98(3); or

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

...

[216] Section 17(1) of the Old Act provided:

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***).

[217] Section 17(1) of the Old Act has its broad equivalent in section 75(1) of the Act. Section 75(1) of the Act provides:

75 Making payment claim

(1) A person (the ***claimant***) who is, or who claims to be, entitled to a progress payment may give a payment claim to the person (the ***respondent***) who, under the relevant construction contract, is or may be liable to make the payment.

[218] Whilst the equivalent sections are not in all respects identical to the Old Act, to the extent that there were differences, they do not alter the underlying reasons of Douglas J in *Matrix Projects*.

[219] In *Matrix Projects,* as a matter of fact, Douglas J found that the payment claim, relevantly, comprised two distinct claims based on two different contracts:

> [19] It was argued for the first respondent that the view adopted by the adjudicator was correct and that the word "arrangement" was sufficient to cover both work under the lump sum Period Subcontract and the "do and charge" rectification work. The submission was that the evidence showed that there was an arrangement between Matrix and Luscombe Builders in which it undertook to do construction work as directed either by way of a work order or purchase order or in some less formal manner such as by an oral direction by one of the staff members of Matrix Homes. It seems to me, however, that the work done was divisible into work done pursuant to the Period Subcontract and the "do and charge" work done pursuant to another regime where Luscombe Builders retained the right to decide whether to perform that work when it was offered. In respect of that work there would also have been differing reference dates between the two different types of arrangement, either the 15th or 30th of the month under the Period Subcontract or the end of the month as the default reference date under the Act for the "do and charge" work.[22]

[220] His Honour accepted that the relevant provisions of the Old Act had the effect that a payment must relate to only one construction contract:

> [20] Accordingly the payment claim made cannot be described as one being made under a single construction contract whether the relationship be described more generally as an arrangement or not. Therefore the variety of different types of contract for construction work relied upon in the payment claim is fatal to its validity.[23]

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22 *Matrix Projects (Qld) Pty Ltd v Luscombe Builders* [2013] QSC 4 at [19].
23 *Matrix Projects (Qld) Pty Ltd v Luscombe Builders* [2013] QSC 4 at [20].

[221] The effect of the payment claim covering more than one contract was that the decision of the adjudicator in *Matrix Projects* was void.[24]

[222] The respondent submits that, as under the Old Act, if the payment claim under the Act concerns more than one contract, that fact was fatal to its validity.

[223] The construction adopted in *Matrix Projects* was followed in New South Wales in the later decisions of *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd,*[25] *Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd*,[26] and, more recently, *Acciona Infrastructure Australia Pty Ltd v Holcim (Australia) Pty Ltd* ("*Holcim*").[27] In *Holcim,* Hammerschlag J stated:

> [32] Ground 1 is that the Adjudicator had no jurisdiction because there was not a valid payment claim or valid adjudication application, in that the Payment Claim impermissibly claimed for work done under two or more contracts.
>
> [33] I uphold Ground 1.
>
> [34] In paragraphs 12 to 14 of the Determination, the Adjudicator said (footnotes omitted):
>
> > [12] In the adjudication response, the respondent submits for the first time that the payment claim is invalid because it relates to more than one construction contract and, further and in the alternative, that the adjudication application is invalid because it relates to more than one payment claim.
> >
> > [13] The first submission is predicated on the notion that the various amounts claimed are not payable under the Agreement, but are instead payable under:
> >
> > (a) one of the 12,500 or so separate contracts said to arise by virtue of the Agreement and, in particular, by virtue of cl 2(c), which relevantly provides that "[u]pon the issue of a Purchase Order a separate contract will come into existence"; or
> >
> > (b) "an earlier agreement or earlier agreements".
> >
> > As such, the first submission is made in support of a reason or reasons not included in the payment schedule. Quite apart from the

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24 *Matrix Projects (Qld) Pty Ltd v Luscombe Builders* [2013] QSC 4 at [37].
25 [2013] NSWSC 363 at [6]-[7].
26 [2018] NSWSC 239 at [55]-[60].
27 [2020] NSWSC 1330 at [35]-[37].

fact that the respondent is precluded from including reasons in its adjudication response that it did not include in its payment schedule – see s 20(2B) of the Act, it follows that the first submission is not duly made in support of the payment schedule and cannot be considered by me – see s 22(2) of the Act.

[14] The respondent's second submission simply mischaracterises the claimant's submissions in respect of amounts in the payment claim that were also the subject of earlier claims as the claimant making an application in respect of multiple payment claims. However, the claimant was entitled to include amounts that had been the subject of previous claims in the subject payment claim – see s 13(6) of the Act, and to make submissions in support of same, and those things does not make the application one that concerns multiple payment claims.

[35] In *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 at [44]- [46] (*Nebax*), McDougall J held that s 13(5) prevents the service of more than one payment claim per reference date per construction contract, so that there can only be one adjudication application for any particular payment claim for any particular contract. His Honour observed that s 17(1) does not authorise the lodging of multiple adjudication applications in respect of the one claim. In *Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4 at [17] (*Matrix*), Douglas J agreed with McDougall J's reasoning and conclusion.

[36] In *Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd* [2018] NSWSC 239 at [55]- [61] (*Trinco*), McDougall J applied this reasoning to hold that a single progress claim cannot validly claim for work done under more than one contract. In *Matrix* at [20], Douglas J articulated this as, "…the variety of different types of contract for construction work relied upon in the payment claim is fatal to its validity.": see too *SHA Premier Constructions Pty Ltd v Lanskey Constructions* [2019] QSC 81 at [16]-[17], [21].

[37] It was not suggested that any of *Nebax*, *Matrix*, or *Trinco* were wrongly decided.

[38] In *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd* [2011] NSWSC 165 at [11], Ball J held that s 20(2B) did not prevent the respondent from raising grounds, not put in its payment schedule, on which it was asserted that the adjudicator did not have jurisdiction to make a determination. In *Nebax* at [34]-[39], McDougall J agreed: see too *National Management Group Pty Ltd v Biriel Industries Pty Ltd* [2019] QSC 219 at [200].

[39] In *John Holland Pty Limited v Roads & Traffic Authority of New South Wales & Ors* [2007] NSWCA 19 at [47]-[50], Giles JA considered that a decision by an adjudicator should not ignore something which he or she is aware of and is also relevant to real issues arising under s 20(2B) simply because the matte was not raised in submissions duly raised by the respondent.

> [40] The Adjudicator had no jurisdiction because the Payment Claim was invalid and ineffective to engage the operation of the Act. By the parties' express agreement in cl 2 of the Agreed Terms, each time a purchase order was issued, a separate contract came into existence between Acciona and Holcim on the terms set out in the GSA. Each such contract was governed by terms contained in the overarching GSA instrument, which terms became incorporate in every subsequent separate contract, but each time Acciona placed a purchase order, a separate contract for discrete work with a separate payment date came into existence.
>
> [41] Applying *Trinco*, the Payment Claim, which straddled numerous purchase orders (and therefore numerous contracts) with separate payment dates, did not constitute a valid payment claim.
>
> [42] It follows that the Determination is void and will be quashed.[28]

[224] The respondent submits that, if there is more than one contract that is the subject of a purported payment claim, then that is not a payment claim within the meaning of the Act. As a consequence, the Act is not engaged in respect of it.

[225] In this case, the respondent submits that Payment Claim 6 is not a payment claim within the meaning of the Act because it contains claims for amounts owed under both the subcontract and the separate crane hire agreement. For this reason, the respondent submits that Payment Claim 6 does not give rise to a statutory right for summary judgment under section 78(2)(a) of the Act.

Applicant's submissions

[226] The applicant submits that the facts of *Matrix Projects* (and the subsequent cases referred to by the respondent) are distinguishable from this present case.

[227] The applicant submits that *Matrix Projects* was a case where the fact that the payment claim related to more than one construction contract was evident on the face of the payment claim. This, the applicant submits, is a different case.

[228] The applicant submits that Payment Claim 6 was a claim under the subcontract for original works and variation works. Thus, the applicant submits that Payment Claim 6, on its face, was a claim to be entitled to payment pursuant to one construction contract. During oral argument, this submission was put as follows:

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28 *Acciona Infrastructure Australia Pty Ltd v Holcim (Australia) Pty Ltd* [2020] NSWSC 1330 at [32]-[42].

> MS HINDMAN: [...] But assuming for the moment that the contra conclusion is reached by the court and it's found that there was the subcontract and a second contract relating to the wet hire of the crane, on the face of the payment claim, it related to one contract. It didn't say there's two separate contracts and we're making claims. There was a claim under the subcontract for original works and variations works. So the claim on the face is a claim to be entitled to payment pursuant to one construction contract.
>
> Noting that I emphasised when we were going through the Act, in section 75(1), that it's a person who is entitled to claim, or, sorry, entitled to claims to be entitled to payment. So if Bothar wished to contend that there were two contracts, it was required to do that in a payment schedule. It didn't do that. It was for an adjudicator to determine any dispute as to whether he or she did or did not have jurisdiction on the basis of the payment claim relating to more than one contract. And absent it being evident on the face of the payment claim that it related to more than one contract, we say that the court shouldn't intervene, and that that analysis gained support from a series of recent decisions, including the *TPM Epping* decision from the New South Wales Court of Appeal.

[229] As already outlined, section 75(1) of the Act provides:

> A person (the ***claimant***) who is, or who claims to be, entitled to a progress payment may give a payment claim to the person (the ***respondent***) who, under the relevant construction contract, is or may be liable to make the payment.

[230] The applicant submits that Payment Claim 6, on its face, is a claim to be entitled to payment pursuant to one construction contract.

[231] Section 76(1) of the Act states that, if given a payment claim, a respondent must respond to the payment claim by giving the claimant a payment schedule. If the respondent wished to contend that there were two contracts, then the applicant submits that it was required to do so in a payment schedule. It did not do so.

[232] Had the respondent filed a payment schedule (which it failed to do), the applicant submits that it would have been a matter for an adjudicator to determine whether the amounts claimed were payable under the contract.

[233] The applicant contends that, absent it being evident on the face of the payment claim that the claim related to more than one contract, then the Court should not intervene. That is so even if, as I have found, the payment claim in substance relates to two contracts.

[234] Such an analysis, the applicant submits, gains support from the recent decision of *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* ("*TFM Epping*").[29]

[235] *TFM Epping* is a case where it was arguable that, as a matter of construction, the amounts claimed for variations were not available pursuant to the contract. In that case, Basten JA (with whom Meagher JA agreed) wrote:

> [18] The appellants' claim may be briefly stated. It relied upon the proposition that a claim for an amount payable for work done pursuant to a variation of a construction contract may be a claim under the contract, or it may be a claim on a quantum meruit, as noted by the High Court in *Southern Han Breakfast Point Pty Ltd (In liq) v Lewence Construction Pty Ltd*. The Security of Payment Act, s 8, confers an entitlement to progress payments for work done "under a construction contract". That language does not permit a claim by way of quantum meruit, being a claim for reasonable remuneration not provided for under the contract, nor a claim for damages for breach of contract. The principals conceded that claims for variation might be brought under a contract, or might not. They submitted that it was arguable that, as a matter of construction of the payment claim, the amounts claimed for variations were not available pursuant to the contract; accordingly, the payment claim was arguably invalid.
>
> [19] The submission should not be accepted. First, the claim stated that it was a claim for "works completed in the Project performed in accordance with the building and construction contract". The amount claimed was broken down into a "Contract Sum" and an amount for "Variations", the latter being set out in Table 2. It was thus in its terms a claim for works completed under the contract. The contract itself being a standard form contract AS 4902-2000 included provision for variations in cl 36. Pricing was dealt with in cl 36.4.[30]

[236] His Honour's view was that a payment claim cannot be treated as a nullity for failure to comply with section 13(2)(a) of the *Building and Construction Industry Security of*

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29 [2020] NSWCA 93.

30 *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93 at [18]-[19] (citations omitted).

Payment Act 1999 (NSW) ("the NSW Act"), which is broadly equivalent to s 68(1)(a) of the Act , unless the failure is patent on its face:

> [20] It is possible that the amounts claimed for variations did not properly arise under the contract because, for example, relevant procedural steps had not been followed. However, to pursue that issue would involve raising a defence in relation to matters arising under the construction contract, a course prohibited by s 15(4) of the Security of Payment Act. Had the principals wished to challenge the claim on that basis, they could have done so by way of a payment schedule provided pursuant to s 14, indicating the claimed items intended to be paid and the reason for non-payment of any item not accepted. Such an issue would then have been addressed by the adjudicator appointed to determine any dispute thus arising. However, that course was not taken.
>
> [21] As the primary judge noted, this has long been the accepted understanding of the operation of the Security of Payment Act. In addressing an issue as to the sufficiency of the description of "the construction work … to which the progress payment relates" under to s 13(2)(a), Hodgson JA stated in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In liq)*.
>
> "[35] It is true that, if a payment claim does not identify the work in a way comprehensible to the respondent to the claim, the respondent will be in difficulty in formulating a payment schedule, and this may give rise to further difficulty in any adjudication proceedings …. But in my opinion, if a respondent is unable to identify some of the work in respect of which a payment claim is made, it can in the payment schedule say it does not propose to make any payment in respect of that work because it cannot identify the work, and because for that reason it disputes that the work was done or done to a standard justifying payment, or was within the contract or within any variation of it, and that any pre-condition to payment was satisfied. If an adjudicator then determined that the work was not identified in the payment claim, presumably he or she would not award any payment in respect of that work; and if the adjudicator determined that it was identified, the adjudicator could address matters put in issue in that general way by the respondent.
>
> [36] That is, I do not think a payment claim can be treated as a nullity for failure to comply with s 13(2)(a) of the Act, unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made."
>
> [22] To similar effect, Ipp JA stated at [76]:
>
> "… Provided that a payment claim is made in good faith and purports to comply with s 13(2) of the Act, the merits of that claim, including the question whether the claim complies with s

> 13(2), is a matter for adjudication under s 17 and not a ground for resisting summary judgment in proceedings under s 15. In particular, if no adjudication is sought summary judgment cannot be resisted on grounds that could have been raised by way of a payment schedule leading to adjudication."
>
> [23] The principals acknowledged that the payments claimed for variations may have arisen under the contract, but asserted that there was "a triable issue" as to whether they were in fact claims for quantum meruit payments. On the face of the claim, the payments were sought under the contract. If they were not available under the contract, it might have been open to an adjudicator to reject those elements of the claimed amount. It was not open to the principals to resist judgment for the full amount of the payment claim on this basis. The trial judge was correct to reject this contention.[31]

[237] In a separate judgment in *TFM Epping,* Emmett AJA emphasised that, in the circumstances, it would have been a matter for the adjudicator to determine whether the amounts claimed were payable under the contract:

> [90] The second ground of appeal sought to be raised by the Principal concerns the claim in the Progress Claim in relation to the "variations". The Progress Claim included a breakdown of the amount claimed between the "contract sum" for $28,215,000 and "variations" for $1,375,024. The Progress Claim stated that it was made for works completed in the project performed in accordance with the Contract. A schedule specified six separate amounts for variations totalling $1,375,024.
>
> [91] The Principal contends that the word "variation" can be understood as relating to extra work recoverable to a *quantum meruit* claim. They assert that a *quantum meruit* claim is not recoverable under the Payment Act.
>
> [92] There is nothing in the Progress Claim to suggest that the claim for variations was made otherwise than under the Contract. Indeed, the Progress Claim states specifically that they are made under the Contract. Had the Principal filed a payment schedule, which it failed to do, it would have been a matter for an adjudicator to determine whether the amounts claimed were payable under the Contract. There is no evidence to suggest that the claims for "variations" were in respect of work done otherwise than pursuant to the Contract.[32]

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31 *TFM Epping Land Pty v Decon Australia Pty Ltd* [2020] NSWCA 93 at [18] – [23] per Basten JA (footnotes omitted).

32 *TFM Epping Land Pty v Decon Australia Pty Ltd* [2020] NSWCA 93 at [90] – [92] per Emmett AJA (citations omitted).

[238] The approach in *TFM Epping* was recently adopted by the Victorian Supreme Court in *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* ("*Façade Designs*").[33] That case also involved an application for judgment in default of a payment schedule being delivered.

[239] In *Façade Designs* it was argued that the applicant was not entitled to judgment because the payment claim was invalid as it failed to comply with the requirement to sufficiently identify the construction work to which the payment claim related.[34] His Honour Justice Riordan held that a failure to comply with this requirement would render a purported claim invalid.[35]

[240] In *Façade Designs*, Rirodan J considered whether the Court should have regard to extrinsic evidence of the surrounding circumstances to determine whether a payment claim meets the requirement of sufficiently identifying the construction work to which the claim relates. In determining that the Court should not have regard to the extrinsic evidence, Riordan J referred to the proposition that the validity of the payment claim should be determined by reference to the face of the payment claim:

> [36] In my opinion, in determining whether a payment claim complies with s 14(2)(c) of the Act, the Court should not have regard to extrinsic evidence of "surrounding circumstances" for the following reasons:
>
> (a) ...
>
> (b) The proposition that the validity of payment claims under s 14 of the Act should be determined by reference to the face of the payment claim is supported by the weight of authority, including the following:
>
> (i) In *Jemzone Pty Ltd v Trytan Pty Ltd*, Austin J held that the claimant was obliged to ensure that the payment claim complied 'on its face' with s 13(2) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the NSW Act'), being the equivalent of s 14(2) of the Act. He observed that extraneous circumstances and previous communications should not be considered, stating:
>
> [T]he payment claim must on its face contain all the ingredients required by the Act. While the court should

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33 [2020] VSC 570.

34 *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 570 at [11], discussing s 14(2)(c) of the *Building and Construction Industry Security of Payment Act* 2002 (Vic), which is equivalent to s 68(1)(a) of the Act.

35 *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 570 at [33].

not take an unduly strict approach to the construction of the claim, it ought not to cure defects in the claim document by reference to extraneous circumstances or previous communications.

(ii) In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*, Hodgson JA said that a payment claim would not be a nullity unless its failure to comply with s 13(2) of the NSW Act was 'patent on its face'. His Honour held that the test of validity was whether the payment claim '*purports* in a reasonable way to identify the particular work in respect of which the claim is made'.

(iii) Ipp JA agreed with the reasons of Hodgson JA and formulated the test of validity as being whether the payment claim 'is made in good faith and *purports* to comply with s 13(2) of the [NSW] Act'.

(iv) In *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd*, the New South Wales Court of Appeal held that, for the purposes of the New South Wales equivalent of s 16 of the Act, the question of whether a claim was made for a variation under the NSW Act was resolved by reference to the face of the claim.

In my opinion, the admission of extrinsic evidence of surrounding circumstances would be inconsistent with the assessment of compliance on the basis of the purport of the payment claim document.

(c) To the extent that guidance can be gained by reference to another area of the law which requires an objective assessment, the exclusion of extrinsic evidence of surrounding circumstances is consistent with the 'true rule' as applied by Mason J in objectively interpreting contracts. The principal reasons for excluding evidence of surrounding circumstances under the true rule are as follows.

(i) Admission of such evidence would undermine the Court's ability to avoid 'difficult, time-consuming, expensive and problematic' consideration of extraneous material.

(ii) The parties should be held to their written words, which appear plain on their face.

(d) Similar considerations are particularly applicable to interpreting the requirements of a payment claim under the Act for the following reasons.

(i) If, as in this case, the validity of a payment claim under the Act could be challenged by reference to extrinsic evidence of surrounding circumstances, it could cause long delays and very substantial costs to be incurred in making claims under the Act. It is not consistent with the purpose of the Act for the

assessment of whether a payment claim successfully identified the construction work for which payment is claimed, to be undertaken 'in hindsight', or 'after a full investigation of all the facts and circumstances'.

(ii) The admission of evidence of dealings and communications between parties to a project, which may extend over years, on the basis of relevance to an extended view of 'context' or otherwise, 'would drive a horse and cart (or perhaps a B-double) through the legislative scheme'. As Vickery J explained in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*:

> The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality. The *Building and Construction Industry Security of Payment Act 1999* (NSW) has led to a spate of litigation in its relatively short life. If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.

(e) If the Court applies an objective test to assessing the validity of a payment claim and its supporting documents, such documents should be readily available for the Court's assessment. Accordingly, determination of whether a payment claim has satisfied the requirement of s 14(2)(c) should be relatively straightforward. As was observed by Leeming JA in *Style Timber Floor Pty Ltd v Krivosudsky*:

> Whether or not a document is a payment schedule must be something which is capable of ascertainment readily, and (at least ordinarily) without the assistance of a lawyer.
>
> ...

[39] A possible consequence of finding a payment claim to be valid simply by examining the claim document 'on its face', may be that the respondent is unable in fact to identify the work to which the claim related. However, this issue is remedied by the adjudication process set out in pt 3, div 2 of the Act. A respondent in such a case is entitled to serve a payment schedule refusing to make payment on the basis that it cannot identify the work. The dispute would then be referred to and settled by an adjudicator, who would determine whether or not the work was adequately identified in the payment claim under s 23 of the Act.[36]

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[36] *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 570 at [36] and [39].

[241] The applicant submits that the approaches taken in *TFM Epping* and *Façade Designs* accords with the obiter comments of Margaret Wilson J in *Agripower Australia v J & D Rigging Pty Ltd* ("*Airpower Australia*").[37]

[242] Her Honour Justice Margaret Wilson referred to *Matrix Projects* in the following way:

> 97 In *Matrix Projects (Qld) Pty Ltd v Luscombe*, Douglas J considered that a "payment claim" must relate to only one "construction contract". His Honour concluded that the payment claim in question related to more than one construction contract, and so could not be the foundation for a valid adjudication. How his Honour came to the conclusion that the payment claim related to more than one contract is not clear from his reasons: his Honour may have gone behind the payment claim to the underlying facts to determine whether there was one contract or more than one, or alternatively this may have been patent on the payment claim itself.
>
> 98 As Douglas J said in *Matrix Projects* –
>
> > … it should be possible to treat the inclusion of such an obviously erroneous item in a payment claim as not depriving an adjudicator of jurisdiction. The jurisdiction is to determine the extent and value of construction work under s 26 and the inclusion of a claim for an obviously irrelevant item for what is not construction work does not deprive the adjudicator of that jurisdiction.
>
> 99 I am also inclined to think that if a payment claim is *ex facie* made under one construction contract, the adjudicator's jurisdiction is enlivened. If the adjudicator finds that some of the construction work was performed pursuant to some other contract (whether or not a "construction contract"), he or she is not deprived of jurisdiction to determine the extent and value of the construction work performed under the construction contract. Any error in the determination of the extent or value of the construction work would be an error of fact and not of jurisdiction.
>
> 100 However, without first determining what constituted the contract, I cannot determine whether the payment claim related to more than one construction contract. Thus, the second jurisdictional question cannot be decided on this application.[38]

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37 [2013] QSC 164. *Agripower Australia* was overturned on appeal. However, her Honour's decision on this point was not the subject of the appeal: see *J & D Rigging Pty Ltd v Airpower Australia Ltd* [2013] QCA 406.

38 *Agripower Australia Ltd v J & D Rigging Pty Ltd* [2013] QSC 164 at [95]-[100] (citations omitted).

[243] The applicant refers to *Johnston v Lianda Constructions Pty Ltd*,[39] which reiterates that one of the principal underlying philosophies of the statutory scheme is to provide a swift remedy to a claimant who invokes it. It would be inimical to this philosophy, and out of step with the express wording of section 13 of the NSW Act, for the Court to be required, at this stage, to become enmeshed in a determination of the contractual efficacy of the plaintiff's claim (or the defendant's response to it).[40]

[244] The applicant submits that their approach gives effect to the purpose of the Act. Unless the noncompliance is patent on the face of the document, the issue should be left to be raised in a payment schedule and dealt with by the adjudicator, because otherwise the floodgates open and the purpose of the Act would be defeated.

[245] The applicant submits that the Legislature could not have intended that, every time a principal contended that some variation was not a variation under the contract (because it did not in some way comply with the contractual provisions for a variation), the Court would determine whether there was one contract or two. As the applicant submits, there could be tens or hundreds of variations depending on the project.

[246] The applicant submits that, unless the fact of more than one contract is patent on the face of the payment claim, the issue should be left to adjudicators to determine. Otherwise, a floodgate-type concern, which was identified by Woodward J in *Top Cat Installations Pty Ltd v Southstar Homes Pty Ltd*,[41] could eventuate:

> [25] If the position were otherwise, even a minor departure from procedure in respect of a variation under a contract, could lead to the invalidation of any payment claim that included that variation as part of the claim. Mr Mason was unable to locate any authority that supported the conclusion that a variation that failed to comply with contractual requirements gave rise to a separate contract. That is not surprising. Indeed, the Contract itself contemplates non-conforming variations being undertaken under the Contract, providing in clause 27.3 that additional works performed in breach of the Variations clause "will be at the Subcontractor's own cost and expense".

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39 *Johnston v Lianda Constructions Pty Ltd* [2014] NSWSC 1178 at [43], quoting *Ampcontrol SWG Pty Ltd v Gujarat NRE Wonga Pty Ltd* [2013] NSWSC 707 at [19]-[25].

40 Ibid at 17-8 [43]. See also *Top Cat Installations Pty Ltd v Southstar Homes Pty Ltd* [2019] VCC 1878.

41 *Top Cat Installations Pty Ltd v Southstar Homes Pty Ltd* [2019] VCC 1878 at [25]-[26].

> [26] Thus, in my view, while the sum claimed in claim 5 for the Oral Variations may not be recoverable under the terms of the Contract, it does not invalidate the payment claim by giving rise to a separate construction contract.

[247] His Honour Justice Vickery in *Gantley Pty Ltd v Phoenix International Group Pty Ltd* ("*Gantley*")[42] states that, where the validity of a payment claim is brought under challenge and the questions turn upon questions of fact, or mixed fact and law, generally that will be for an adjudicator to decide.

> [129] A failure to comply with a requirement of the Act will not necessarily result in a noncomplying payment claim being invalid. It is a question of the character of the legislative requirement and the degree of non-compliance. A failure to satisfy a basic and essential requirement of the legislation in a substantial and material way will usually result in the invalidity of the errant payment claim. However, payment claims which, in spite of a technical defect being exposed, fall short of meeting this test, will not usually be considered as invalid.
>
> [130] Further, whether a court is in a position to determine the question of invalidity will depend upon whether the payment claim, on its face, satisfies the test to which I have referred. Where the validity of a payment claim is brought under challenge and the question turns upon questions of fact, or mixed fact and law, generally that will be for an adjudicator to decide, in keeping with the intent of the legislation. As Hodgson JA observed in *Brodyn*:
>
> > There is also a question whether this point could in any event lead to a conclusion that the determination was void. If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can insert para involve doubtful questions of fact and law;...
>
> [131] However, in this case I am satisfied that the payment claims, to the extent that I have found them to be invalid, failed to satisfy a basic and essential requirement of the legislation in a substantial and material way, and further that the failures were manifest on the face of the documents.
>
> [132] To the extent that the payment claims were invalid, the adjudicator had no power to determine the adjudication applications. There was therefore jurisdictional error to the extent which I have found.[43]

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42 *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106.

43 *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 at [129]-[132] (citations omitted).

[248] The applicant submits that, in this case, the payment claim *ex facie* meets the requirement of a payment claim. The inclusion of the variation for the crane hire as being under a separate contract was not manifest on the face of the documents. Accordingly, the applicant submits that *Matrix Projects* (and the cases that followed) can be distinguished and therefore Payment Claim 6 is not void.

[249] Further, the applicant submits that the inclusion of the crane hire can be severed and judgment entered for the balance of the claim:

> MS HINDMAN: But if it be concluded that there are two contracts - - -
>
> HER HONOUR: Yes.
>
> MS HINDMAN: - - - and that was either apparent on the face of the payment claim or it's irrelevant whether it was apparent on the face of the payment claim - - -
>
> HER HONOUR: Yes.
>
> MS HINDMAN: - - - then Ausipile contends that the payment claim should be severed so as to remove the claim relating to wet pile, allowing judgment to be entered for the balance of the claim, because the payment claim, I submit, on its face, is one made pursuant to the contract, and if the inclusion of a claim in relation to the wet hire is wrongly included, then it can be severed.

[250] The issue of severance was discussed in *Constructpro Pty Ltd v Maicome Pty Ltd* [2014] VCC 1719, which referred to *Gantley:*

> 55 Although it is not necessary to consider the matter further, I did hear argument on the question whether, if I had determined that the claim for variations had been wrongly included in the progress claim, this would have prevented me from severing that amount and entering judgment for the balance. I will consider the matter briefly.
>
> 56 Section 16(4)(a)(ii) of the Act provides that, in proceedings to recover the unpaid portion of a progress claim, "judgment in favour of the claimant is not to be given unless the court is satisfied…that the claimed amount does not include any excluded amount".
>
> 57 In *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106, Vickery J specifically considered whether he could sever part of the payment claim which related to claims which did not satisfy the requirements of the Act to sufficiently identify the work performed. At paragraph 114, Vickery J rejected the argument that "*severance should not be permitted because the Act did not permit this to occur [and that] if one part of the progress claim did not satisfy the requirements of s.*

> *14(3)(a) the whole of the progress payment would therefore fail and should be set aside as being invalid*".
>
> 58 At paragraphs 115 and 116, Vickery J stated:
>
> > "I do not accept this submission. The question should be whether the Act, either expressly or impliedly, operates to exclude the common law doctrine of severance. I find that it does not. Indeed, the purposes and objects of the Act earlier described are best served by processes which, so far as possible, ought to accommodate reasonable flexibility and avoid unnecessary technicality.
> >
> > Severance in this case would operate to achieve the purpose and objects of the Act and would not operate to diminish the attainment of these goals. A respondent to a payment claim and an adjudicator, if appointed, should be able to assess the valid part of this progress claim which sufficiently describes the work for which payment is claimed, and provide a rational response or adjudication determination in respect of that part of the claim, and exclude from consideration that part of the claim which does not comply".
>
> 59 Although it is not necessary for me to sever the sum of $51,374.86 claimed as "*contract variations*", because of the construction I have given to s.10A(3)(c)(ii), if I had concluded that the variations were not claimable as part of the progress claim, I would have severed that sum and entered judgment for those sums which were properly claimable.

[251] In relation to the issue of severance, the only Queensland cases that the applicant could refer to were in relation to adjudication decisions.[44] *Hansen Yuncken Pty Ltd v Ian James Ericson*[45] involved part of an adjudication decision that was infected by fraud where it was decided that part infected by fraud could be severed.[46] *James Trowse Construction Pty Ltd v ASAP Plasterers Pty Ltd* involved an application to set aside an adjudication decision on the basis that the adjudicator fell into jurisdictional error.[47]

Conclusion: defence 3 is established

[252] The right to a progress payment is predicated on it being under a construction contract:[48]

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44 The applicant referred to *Hansen Yuncken Pty Ltd v Ian James Ericson* [2011] QSC 327 and *James Trowse Construction Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 145.

45 [2011] QSC 327.

46 *Hansen Yuncken Pty Ltd v Ian James Ericson* [2011] QSC 327 at [146]-[156] and *James Trowse Construction Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 145 at [52]-[56].

47 [2011] QSC 145.

48 See also the definition of "construction contract" as set out in section 64 of the Act and the meaning of a "payment claim" as set out in section 68 of the Act

> **70 Right to progress payments**
>
> (1) From each reference date under a construction contract, a person is entitled to a progress payment if the person has carried out construction work, or supplied related goods and services, under the contract.

[253] The right to make a payment claim for a progress payment is grounded on the payment claim only relating to one construction contract.

[254] His Honour Justice Bond in *Acciona Agua Austraia Pty Ltd v Monadelphous Engineering Pty Ltd*,[49] sets out the foundation for jurisdictional error in the context of the Act:

> 32 The cases which have considered the nature of jurisdictional error in the Payment Act context have emphasised the need to discern, as a matter of statutory construction, whether the legislature intended that the valid exercise of power was conditioned in a particular way, such that failure to comply with the condition would invalidate the purported exercise of power. The approach taken is that set out in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

[255] The engagement of the Act in relation to making a payment claim is conditioned on the payment claim relating to only one construction contract. The failure to comply with this condition would invalidate any purported exercise of power.

[256] As previously stated, in my view, Payment Claim 6 involved two contracts. The first was for work done under the subcontract, which was a contract to design and install secant piling works. The second was a separate and distinct contract for the wet hire of the crawler crane for separate works the respondent was performing under its head contract with John Holland.

[257] In this cases, the parties each refer to a line of authority to support their position.

[258] The respondent refers to *Matrix Projects*, which directly deals with a situation where a payment claim contains two contracts. *Matrix Projects*, by reference to section 12 and section 17 of the Old Act, which has broadly equivalent provisions in the Act, decided that a payment claim must relate to only one construction contract.

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[49] [2020] QSC 133 at [32].

[259] The applicant accepts the reasoning of *Matrix Projects* but seeks to carve out a qualification. The applicant submits that, absent it being evident on the face of the payment claim that it relates to more than one contract, then the court should not intervene. Unless the fact of more than one contract is patent on the face of the payment claim, then the applicant submits that the issue should be left to adjudicators to determine.

[260] The applicant refers to section 75(1) of the Act, which provides:

> A person (the ***claimant***) who is, or who claims to be, entitled to a progress payment may give a payment claim to the person (the ***respondent***) who, under the relevant construction contract, is or may be liable to make the payment.

[261] The applicant submits that Payment Claim 6 was a claim *ex facie* under the subcontract for original works and variation works. Therefore, section 75(1) was engaged as the applicant was claiming to be entitled to a progress payment.

[262] I note that the applicant's position would, in effect, result in a payment claim not being void, despite in substance relating to more than one contract, if the claimant did not make this fact patent on the face of the payment claim.

[263] In my view, the applicant's approach does not give effect to the purpose of the Act. It was the Legislature's intention that a payment claim must only relate to one contract. If a payment claim in substance concerns more than one contract, that fact is fatal to its validity under the Act, whether or not the claimant makes this patent on the face of the payment claim.

[264] *Matrix Projects* and the cases that follow are clear that where a payment claim, as a matter of fact, relates to more than one contract, then the payment claim is void. In my view this is the correct approach.

[265] The applicant seeks to distinguish *Matrix Projects* by stating that *Matrix Projects* considered a payment claim that, on its face, related to more than one construction contract. The applicant refers to a number of cases to support their submission that if a

payment claim is *ex facie* made under one construction contract, then the Court should not intervene.

[266] However, in my view, the cases referred to by the applicant are not applicable to the facts of this case. By and large, these cases relate to one contract or variations within the one contract and do not consider payment claims that relate to two contracts. Further, they do not seek to distinguish *Matrix Projects* on the basis sought by the applicant.

[267] *Constructpro* involved one contract and the issue was whether or not variations claimed were claimable under the contract. In that case, *Matrix Projects* was referred to in the following way:

> 17 In *Matrix Projects (Qld) Pty Ltd v Luscomb* [2013] QSC 4, Douglas J considered a "period sub-contract" by which the claimant agreed to perform unspecified rectification works to buildings for a lump sum where the respondent issued "written work orders for certain projects" which the claimant was entitled to accept or refuse. The claimant was issued nine work orders and was directed to undertake rectification works on five further buildings on a "do and charge" basis. Douglas J held that the claim in respect of this work was not made under a single contract or arrangement because the work was divisible into the work done pursuant to the subcontract and the do and charge work pursuant to a different regime.
>
> 18 However, in the present case, I consider that the contractual provisions make it clear that the parties intended that the whole of the construction work to be performed by Constructpro would be carried out pursuant to the building contract. Accordingly, I do not consider that either s. 10(1) operates to exclude the claim, or that s.10B(2)(d) has any relevance.[50]

[268] *Constructpro* distinguished *Matrix Projects* on the basis that it was clear that the provisions of the contract made it clear that the whole of the construction work performed was under one building contract.

[269] *Façade Designs* considered whether or not a payment claim compiled with the requirement to identify the construction work or related goods and services to which the progress claim relates.[51] This decision is distinguishable because it was not a case

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50 *Constructpro Pty Ltd v Maicome Pty Ltd* [2014] VCC 1719 at [17]-[18].

51 *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 570.

about two contracts. *Façade Designs* considered whether or not the particular payment claim complied with the provisions of section 41(2) of the Victorian Act, which is a very different question than the issue under consideration in this case. *Façade Designs* did not refer to *Matrix Projects*.

[270] *Gantley* turned on whether or not the work had been sufficiently described in the variations.[52] *Gantley*, was not a two contracts case, and did not refer to *Matrix Projects*.

[271] In *TFM Epping,* submissions were made that it was "arguable" that the amounts claimed for variations did not properly arise under the contract.[53] On the basis of that possibility, it was contended that the payment claim ought to be set aside. However, in the present case, it is not just arguable that the payment claim concerned two contracts. I have found, as a matter of fact, that Payment Claim 6 concerned two contracts.

[272] *Matrix Projects* held that if the payment claim concerns more than one payment claim, that fact is fatal to its validity. However, *TFM Epping* did not refer to *Matrix Projects*.

[273] In *Agripower Australia,* it was argued that a payment claim that related to construction work done (or related goods and services supplied) under more than one construction contract was not a valid payment claim within the meaning of the Old Act. However, Margaret Wilson J noted that this issue raised a hypothetical jurisdictional issue:

> 92 Logically, it is not possible to construe the payment claim to determine whether it purported to relate to more than one contract without first identifying the contract and what it comprised. As I have related, there is dispute between the applicant and the first respondent as to the terms, nature and extent of the primary contract, but I have not been asked to resolve that dispute for the purposes of this application. In these circumstances, the second jurisdictional question is hypothetical.[54]

[274] Her Honour J stated that whether a payment claim concerns a "construction contract" is a jurisdictional fact:

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52 *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106.
53 *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93 at [18].
54 *Agripower Australia v J & D Rigging Pty Ltd* [2013] QSC 164 at [92].

> 93 A payment claim must identify the construction work (or related goods and services) in respect of which it is made. In *T&M Buckley Pty Ltd v 57 Moss Rd Pty Ltd* the Court of Appeal considered the degree of specificity required for a valid payment claim. Philippides J (with whom the other members of the Court agreed) reviewed relevant New South Wales authorities and concluded that all that is required is that the payment claim reasonably identify the construction work to which it relates such that the basis of the claim is reasonably comprehensible to the respondent to the claim
>
> 94 Whether a payment claim concerns a construction contract is a jurisdictional fact. A contract or arrangement is a construction contract if it requires a party to undertake some construction work notwithstanding that it contains other undertakings or imposes other obligations not within the definition of construction work. Where there is no error in an adjudicator's determination that a contract is a construction contract, an error in determining the extent and quantum of the work that comprised construction work is an error of fact and not a jurisdictional error.[55]

[275] Her Honour expressed "tentative" views that, if a payment claim is *ex facie* made under one contract, then the adjudicator's jurisdiction would be enlivened.[56] However, the jurisdictional question was not decided, as it could not be determined whether the payment claim related to more than one construction contract.[57] It is noted that Margaret Wilson J introduced her views in this way:

> 95 Out of deference to counsel's submissions, I express the following tentative views, without purporting to decide the second jurisdictional question.
>
> 96 I am inclined to think that where a "construction contract" requires a party to perform some "construction work" but also contains other undertakings or imposes obligations not within the definition of "construction work", a "payment claim" is not invalid because it includes a claim for something that is required by the contract but which is not "construction work".[58]

[276] I note that Payment Claim 6 did not involve a claim for something that was required by the contract but was not "construction work". Payment Claim 6 involved a payment claim for two contracts.

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55 *Agripower Australia v J & D Rigging Pty Ltd* [2013] QSC 164 at [93]-[94] (citations omitted).
56 *Agripower Australia v J & D Rigging Pty Ltd* [2013] QSC 164 at [99].
57 *Agripower Australia v J & D Rigging Pty Ltd* [2013] QSC 164 at [100].
58 *Agripower Australia v J & D Rigging Pty Ltd* [2013] QSC 164 at [95]-[96].

[277] Further, in *Agripower Australia*, Margaret Wilson J noted the hypothetical nature of the jurisdictional question she was considering. Without first determining what constituted the contract it could not be determined whether the payment claim related to more than one construction contract. In this case, I have undertaken such an exercise and determined that the payment claim related to more than one contract.

[278] In all of the circumstances, I do not place weight upon the tentative views expressed in *Agripower Australia*.

[279] *Matrix Projects* and the authorities that followed are consistently to the effect that a payment claim cannot deal with more than one construction contract. If more than one contract is the subject of a single payment claim, then that is not a payment claim within the meaning of the Act. Consequently, the Act will not been engaged. If a payment claim concerns more than one contract, the fact is fatal to its validity under the Act.

[280] In this case, the respondent failed to provide a payment schedule. The applicant submits that if the respondent wished to contend that that there were two contracts, it was required to do so before the adjudicator. It was for an adjudicator to determine any dispute as to whether he or she did or did not have jurisdiction on the basis of the payment claim relating to more than one contract.

[281] However, if the payment claim is invalid, it is a nullity and there would have been no occasion for an adjudicator to enter into a determination of entitlement. The adjudicator would have had no jurisdiction because the payment claim was invalid and ineffective in engaging the operation of the Act.

[282] In this case, Payment Claim 6 was not a payment claim under the Act capable of giving rise to the statutory right for summary judgment because it included a claim under both the subcontract and the separate crane hire agreement.

[283] As Payment Claim 6 contains claims under two contracts, it is void and the payment claim ought to be set aside. Severance for partial invalidity does not apply where, as

per the authorities such as *Matrix Projects*, the whole payment claim is invalid by reason of dealing with two distinct contracts.

[284] The respondent has therefore established the third defence.

[285] Accordingly, the application for summary judgment ought to be dismissed on this ground.

Submissions as to Costs

[286] I will give the parties an opportunity to consider these reasons and, if the issue of costs cannot be resolved, then the parties should file and serve short written submissions on the question of costs.

[287] I encourage the parties to agree on a timetable for the exchange of written submissions and, if it is appropriate, then I will deal with the question of costs on the papers, unless either party requests a hearing.

[288] In order to facilitate that process, I will adjourn the question of costs to a date to be fixed.

Orders:

1. The application for judgment pursuant to section 78(2)(a) of the Act is dismissed.
2. The question of costs is adjourned to a date to be fixed.