SUPREME COURT OF QUEENSLAND

CITATION:	*Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2010] QCA 119
PARTIES:	**NEUMANN CONTRACTORS PTY LTD** ACN 009 695 747 (applicant/respondent) **v** **TRASPUNT NO 5 PTY LTD** ACN 109 874 259 (respondent/appellant)
FILE NO/S:	Appeal No 13620 of 2009 SC No 7752 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2010
JUDGES:	Holmes, Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed;** **2. The judgment and the order made on 11 November 2009 be set aside;** **3. Neumann pay Traspunt's costs of the application and of the hearing at first instance.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – respondent made a payment claim against appellant under the *Building and Construction Industry Payments Act* 2004 (Qld) (*BCIP Act*) – appellant did not deliver a payment schedule – appellant challenged validity of payment claim – respondent given summary judgment for amount claimed – whether primary judge erred in giving summary judgment CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – appellant alleged a prior payment claim existed in respect of

the same reference date – respondent argued prior claim did not meet requirements of *BCIP Act* – respondent argued prior claim not properly served – whether alleged prior claim valid – whether second claim in breach of s 17(5) *BCIP Act*

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – appellant alleged respondent had engaged in misleading and deceptive conduct – whether there was an arguable case for breach of s 52 *Trade Practices Act* 1974 (Cth) – whether primary judge erred in giving summary judgment

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – appellant argued payment claim not made in good faith – whether requirement under *BCIP Act* that payment claims be made in good faith

ESTOPPEL – ESTOPPEL IN PAIS – EQUITABLE ESTOPPEL – GENERAL PRINCIPLES – appellant alleged estoppel based on a course of conduct – whether estoppel available as a defence to an application for judgment on a payment claim

Acts Interpretation Act 1954 (Qld), s 39
Building and Construction Industry Payments Act 2004 (Qld), s 17, s 18, s 19, s 99, s 103
Trade Practices Act 1974 (Cth), s 52
Uniform Civil Procedure Rules 1999 (Qld), r 292

Australian Competition and Consumer Commission v Maritime Union of Australia (2001) 114 FCR 472; [2001] FCA 1549, cited
Beckford Nominees Pty Ltd v Shell Co of Australia Ltd (1987) 73 ALR 373, cited
Bitannia Pty Ltd v Parkline Constructions Pty Ltd (2006) 67 NSWLR 9; [2006] NSWCA 238, approved
Brodyon Pty Ltd t/as Time Cost and Quality v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394, cited
Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor [2006] NSWSC 1, cited
Commonwealth Bank of Australia v Mehta (1991) 23 NSWLR 84, cited
Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31; [1992] FCA 557, cited
Energetech Australia Pty Ltd v Sides Engineering Pty Ltd (2005) 226 ALR 362; [2005] NSWSC 1143, cited
G W Enterprises Pty Ltd v Xentex Industries Pty Ltd & Ors [2006] QSC 399, considered

Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 CLR 641; [1937] HCA 58, cited
Howship Holdings Pty Ltd v Leslie (1996) 41 NSWLR 542; [1996] NSWSC 314, cited
Keen v Holland [1984] 1 All ER 75; [1984] 1 WLR 251, cited
Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993, cited
Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd & Ors [2007] QSC 333, approved
Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) 64 NSWLR 462; [2005] NSWCA 409, cited
Northside Projects P/L v Trad & Anor [2009] QSC 264, considered
Rich v CGU Insurance Ltd (2005) 79 ALJR 856; [2005] HCA 16, cited
Rimar Pty Ltd v Pappas (1986) 160 CLR 133; [1986] HCA 9, distinguished
The Commonwealth v Verwayen (1990) 170 CLR 394; [1990] HCA 39, cited
Thompson v Groote Eylandt Mining Co Ltd (2003) 173 FLR 72; [2003] NTCA 5, cited
Thompson v Palmer (1933) 49 CLR 507; [1933] HCA 61, cited
Williams v Spautz (1992) 174 CLR 509; [1992] HCA 34, cited
Yaxley v Gotts [2000] Ch 162, cited
Zebicon Pty Ltd v Remo Constructions Pty Ltd [2008] NSWSC 1408, considered

COUNSEL:	D Cooper SC, with B Whitten, for the appellant J K Bond SC, with M D Ambrose, for the respondent
SOLICITORS:	Frews Solicitors for the appellant Clayton Utz for the respondent

[1] **HOLMES JA:** I agree with Muir JA's reasons for judgment and with the orders he proposes.

[2] **MUIR JA: Introduction**

The respondent, Neumann Contractors Pty Ltd, applied by originating application filed on 20 July 2009 for an order that the appellant, Traspunt No. 5 Pty Ltd, pay Neumann $658,307.75, being a debt owing by Traspunt pursuant to the provisions of s 19(2)(a)(ii) of the *Building and Construction Industry Payments Act* 2004 (Qld) (the Act), together with interest and costs. When the matter was brought on for hearing on 15 September 2009, Neumann sought its summary determination. Both parties treated the application as an application for summary judgment under r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) and the primary judge, on 11 November 2009, gave judgment for the respondent against Traspunt in the sum of $683,558.15 (including $25,250.40 interest) and ordered that Traspunt pay Neumann's costs of the proceeding. Traspunt appeals against the judgment and order.

The factual background

[3] Before considering the grounds of appeal and the arguments advanced on behalf of the parties in relation to them, it is desirable to identify the factual background to Neumann's claim.

[4] Neumann entered into a contract with Traspunt on about 10 January 2008 under which Neumann agreed to perform for Traspunt engineering works, including earthworks, for a development being undertaken by Traspunt at Caboolture. The works included the stripping of topsoil prior to excavation and the spreading of soil on footpaths and allotments. Bayside Consulting Pty Ltd was the superintendent for the contract. The primary judge explained the parties' practice in respect of the making and meeting of Progress Claims as follows:[1]

> "[4] Clause 42.1 of AS 2124 made provision for Neumann to deliver claims (including progress claims) to the Superintendent. The Superintendent was required to issue a payment certificate within 14 days of receipt of a claim, no doubt after consideration of the claim. Subject to the contract, Traspunt was required to pay the amount so certified within 28 days of receipt of the certificate. Under cl 42.6 of AS 2124, the issue of a certificate did not prejudice any claim which Traspunt or Neumann might have.
>
> …
>
> [6] A significant number of claims (one of the parties says 31, the other says there were in total 20 claims, but the precise number does not matter) have been made by Neumann under the procedure set out in cl 42.1. In each of those cases, the claim was first sent to the Superintendent, and not to Traspunt. I was referred to two examples of such claims, being Claims 6 and 7. Claim 6 commenced with a letter to Bayside Consulting of 2 April 2008 enclosing what is described as a progress claim. That was accompanied by a further letter to Bayside Consulting relating to extensions of time and additional works. There then followed a summary of the claim, on what appears to be a standard form. At the foot of the standard form is an endorsement stating that the claim was made pursuant to s 17(1) of the *BCIP Act*, and requiring payment by what is referred to as the 'Due Date'. That is followed by a Bill of Quantities, and other material in support of the claim.
>
> [7] For Claim 6, a certificate was issued by Bayside Consulting on 21 April 2008, which was then sent by Neumann to Traspunt, together with a tax invoice for the amount certified.
>
> [8] Claim 7 was, in material respects, the same, save that it related to further work.

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1 *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2009] QSC 357.

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

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

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

[5] For convenience of reference, the May 2009 claim will be referred to as "the First Claim". The payment claim the subject of the originating application, which I will refer to as the "Payment Claim", was submitted to Traspunt under cover of a letter from Neumann dated 10 June 2009, which relevantly provided:

> "Neumann Contractors hereby submit a Payment Claim for the works completed to 31 May 2009 at Residential Estate, Elysian Grove Estate – Stages 1 & 2, Male Road Caboolture:
>
> Contract Number 0192
>
> This Payment Claim is submitted under the *"Building and Construction Industry Payments Act 2004 (Qld)."*
>
> I would like to draw your attention to the following points:
>
> 1. Variation 70 – This is an earthworks claim in three parts against schedule items:
>
> Stage 1 – Section A: Item 4
> Stage 1 – Section A: Item 5
> Stage 1 – Section A: Item 6
>
> 2. Variation 71 – This is a claim for the release of Payment Certificate 16 being held as a retention against Liquidated Damages:
>
> Payment Certificate 16: Issued 12/02/2009 for work completed to 31/01/2009.
> Certified amount for Payment Certificate 16: $144,354.43 excl GST."

[6] The accompanying Payment Claim, on its first page, was headed "Payment Claim For Work Excuted (sic) to 31/05/2009". It contained a "reference date" of 31 May 2009, identified Traspunt as the principal and Bayside as the superintendent, contained a Contract Summary and a Payment Claims Summary which identified the "total amount this claim (including GST)" as "$658,307.75" and concluded with the notation in bold type, "This is a payment claim made under the Building and Construction Industry Payments Act 2004 (Qld)". The primary judge explained:

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

[7] In a facsimile to Neumann dated 26 June 2009, Mr Trask, a director of Traspunt, acknowledged receipt of the "correspondence dated 10 June, 2009 and delivered to our offices at 306 Duffield Road, Clontarf at 4.27pm on that day". The facsimile referred Neumann to the requirement in cl 42.1 of the *Australian Standard General Conditions of Contract* that, "the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require". It stated that the Superintendent advised that a Payment Claim for works executed to 31 May 2009 had not been received and requested to be advised if it was Neumann's intention to serve the Superintendent with the Payment Claim in accordance with cl 42.1.

[8] Neumann, by a facsimile on the same day, replied:

> "The Payment Claim we lodged with you on the afternoon of 10 June 2009 was submitted under the *Building and Construction Industries Payment Act 2004 (Qld)* ("the Act"), and a Payment Claim under the Act is required to be served on the Principal, not on the Superintendent.
>
> As you have not lodged a Payment Schedule within the time required by s18(5) of the Act, you became liable to pay the amount of our Payment Claim."

[9] In an affidavit before the primary judge, Mr Trask, a director of Traspunt, swore that all progress claims prior to the First Claim and the Payment Claim had been served by Neumann on the Superintendent pursuant to cl 42.1 of the Contract. He stated that in the time that Trask Development Corporation Pty Ltd, the parent company of Traspunt, and Traspunt had used Neumann since 2005, Neumann has made approximately 72 progress claims to a value of $16,103,328.97. Mr Trask stated that all such claims, except for claims 1 to 5, were made under the Act "but Neumanns have never sought to pursue the claims under that Act. Rather, all claims were pursued by Neumanns in accordance with the procedure set out under clause 42.1 …".

[10] The significance of the identification of the Payment Claim as a payment claim made under the Act lies in the provisions of the Act which limit the rights of a respondent to a payment claim to resist payment of the amount of the claim, in particular, where the respondent has not duly served on the claimant a "payment

schedule" in accordance with s 18 of the Act. In such a case the claimant may recover any unpaid portion of the claimed amount from the respondent as a debt owing to the claimant. In any proceedings by the claimant to recover the debt, the respondent is not entitled to bring any counterclaim against the claimant or raise "any defence in relation to matters arising under the construction contract".[2]

[11] It is common ground that the Contract was a "construction contract" within the meaning of that term in the Act, that the subject work was "construction work" and that Traspunt failed to serve a payment schedule on Neumann within the time allowed by s 18 of the Act.

[12] It is now convenient to address the arguments advanced on behalf of Traspunt.

Was the Payment Claim ineffective by operation of s 17(5) of the Act?

[13] Section 17 of the Act provides for the content of a payment claim and for the time within which it must be served. The section relevantly provides:[3]

> "**17 Payment claims**
>
> (1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the *respondent*).
>
> (2) A payment claim—
>
> (a) must identify the construction work or related goods and services to which the progress payment relates; and
>
> (b) must state the amount of the progress payment that the claimant claims to be payable (the *claimed amount*); and
>
> (c) must state that it is made under this Act.
>
> …
>
> (5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract.
>
> (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim."

[14] "Reference date" in relation to "a construction contract" is defined in Schedule 2 of the Act as meaning, relevantly:

> "… a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out … under the contract."

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2 *Building and Construction Industry Payments Act* 2004 (Qld), s 19(4).

3 *Building and Construction Industry Payments Act* 2004 (Qld).

[15] The appellant contends that the First Claim was in respect of the same reference date as the Payment Claim and that s 17(5) renders the latter ineffective.

[16] The First Claim was, in substance, the same as the Payment Claim, except for the differences on the first page of each, which are later identified, and except that the latter excluded $7,247.99 "for uncertified amounts which deleted sediment control devices in regards to Stage 2: Section B: Item 12 and Variation 69".

[17] Neumann's civil contracting manager swore that he directed that the Payment Claim be prepared after he noticed that the First Claim did not meet the Act's requirements in that:

(a) It was not addressed to the Principal nominated in the Contract but was sent to "Trask Development Corporation";

(b) The covering letter was incorrectly addressed to 360 Duffield Road, Clontarf, instead of 306 Duffield Road, Clontarf;

(c) It was described as "progress claim and supporting documentation" rather than a "payment claim" under the Act; and

(d) It failed to contain a reference date as required by s 17(5).

[18] The First Claim was headed "Progress Claim for Work Executed to …" and its front page had the same format as the front page of the Payment Claim. The date of the last of the work undertaken which was covered by the claim was not inserted. The document gave the same project number and identified the same Principal and Superintendent as the Payment Claim. In one of two rectangles near the top of the first page it, unlike the Payment Claim, had inserted "Claim No. 19" and in the rectangle in which the words and figures "Reference Date: 31-May-09" appeared in the Payment Claim, the words and figures, "April 09 Claim Date: 30 April 2009" appeared. The following was at the foot of the front page:

> "The Claimant hereby claims the Progress Claim under the Construction Contract pursuant to Section 17(1) of the Building and Construction Industry Payment Act 2004 (Qld) and requires the Progress Claim to be paid to the Claimant on or before the Due Date to the Payment Address."

[19] In the same location in the Payment Claim, this notation appeared:

> "This is a payment claim made under the Building and Construction Industry Payments Act 2004 (Qld)"

[20] Counsel for Neumann argued that the result of the deficiencies identified by Mr Maccheroni and, in particular, the addressing of the documents to a company other than the entity responsible for payment under the Contract and the forwarding of the documents to an address other than the address for service of notices under the Contract, lead to the conclusion that the First Claim was not a payment claim under s 17 of the Act.

[21] The First Claim satisfies each of the requirements of s 17(2). It does not state that it is a "payment claim" but it is apparent from the words at the foot of its front page that this is what it purported to be, namely, a claim under s 17(1) of the Act.

[22] In *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd & Ors*,[4] Chesterman J observed:

> "The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a payment schedule (or payment claim for that matter) from an unduly critical viewpoint. No particular form is required. One is concerned only with whether the content of the document in question satisfies the statutory description."

[23] His Honour then set out the requirements of the Act in respect of a payment schedule and said:[5]

> "If these three criteria are satisfied the document will be a payment schedule. How they are expressed, with what formality or lack of it, and with what felicity or awkwardness, will not matter".

[24] This approach to the construction of provisions of the nature of those under consideration, which in my respectful opinion is correct, is consistent with that taken in other jurisdictions in relation to similar statutory provisions.[6]

[25] The letter enclosing the First Claim was addressed to Traspunt's parent company, but the claim itself correctly identified Traspunt as the Principal. That the document was in fact received by Traspunt in the ordinary course of the post on about 14 May 2009 was deposed to by Mr Trask. The fact that the covering letter was addressed to Traspunt's parent company which, on the face of it, shared the same offices as Traspunt, does not, in my view, merit the conclusion that service on Traspunt was not effected. Mr Trask swears that it was.

[26] Section 103 of the Act provides:

> "**103 Service of notices**
>
> (1) A notice or other document that under this Act is authorised or required to be served on a person may be served on the person in the way, if any, provided under the construction contract concerned.
>
> (2) Subsection (1) is in addition to, and does not limit or exclude, the *Acts Interpretation Act 1954*, section 39 or the provisions of any other law about the service of notices."

[27] Section 39(1) of the *Acts Interpretation Act* 1954 (Qld) relevantly provides:

> "**39 Service of documents**
>
> (1) If an Act requires or permits a document to be served on a person, the document may be served—
>
> …
>
> (b) on a body corporate—by leaving it at, or sending it by post, telex, facsimile or similar facility to, the

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4 [2007] QSC 333 at [20].

5 At paragraph [21].

6 *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 at [54]; *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at para [76]; and *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at [10] - [15].

> head office, a registered office or a principal office of the body corporate."

[28] Section 103 appears to be facultative rather than mandatory in nature but even if service of the First Claim could only be effected properly if served as provided for in the Contract, it was so served.

[29] An annexure to Part A to the *General Conditions of Contract* identified the "Principal" as Traspunt No. 5 Pty Ltd and its address as PO Box 506, Caboolture, Qld, 4021. Clause 7 of the General Conditions provided:

> "*A notice shall be deemed to have been given when it is received by the person to whom it is addressed* or is delivered to the address of that person stated in the Contract or last communicated in writing by that person to the person giving the notice, whichever is the earlier." (emphasis added)

[30] The First Claim was received by Traspunt and was thus deemed to have been given. The document would also appear to have been left at a "principal office" of Traspunt, satisfying the requirements of s 39(1) of the *Acts Interpretation Act*.

[31] For the purposes of ss 17 and 18 of the Act, service of a payment claim, at least generally, will be taken to have been effected when the payment claim is received by the respondent to it. As Young J said in *Howship Holdings Pty Ltd v Leslie*[7] in relation to an application to set aside a statutory demand, "The means by which that person [the intended recipient of the document] obtains the document are usually immaterial".

[32] Neumann also argued that Traspunt is prevented from taking the point now under consideration by operation of s 19(4) of the Act.

[33] Section 19 of the Act applies, relevantly for present purposes, where a respondent to a payment claim has failed to serve a payment schedule on the claimant within the time allowed by s 18.[8] In those circumstances, the claimant may recover the unpaid portion of the claimed amount from the respondent as a debt owing to the claimant.[9]

[34] Section 19(4) provides:

> "(4) If the claimant starts proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—
>
> (a) judgement in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and
>
> (b) the respondent is not, in those proceedings, entitled—
>
> (i) to bring any counterclaim against the claimant; or
> (ii) to raise any defence in relation to matters arising under the construction contract."

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7 (1996) 41 NSWLR 542; see also *Pino v Prosser* [1967] VR 835 and *Parklands Blue Metal Pty Ltd v Kowari Motors Pty Ltd* [2003] QSC 98.

8 *Building and Construction Industry Payments Act* 2004 (Qld), s 19(1).

9 *Building and Construction Industry Payments Act* 2004 (Qld), s 19(2)(a)(i).

[35] Neumann's contention in this regard found favour with the primary judge, who applied the reasoning of Palmer J in *Brookhollow*,[10] which his Honour noted had been adopted in *Northside Projects P/L v Trad & Anor*,[11] *G W Enterprises Pty Ltd v Xentex Industries Pty Ltd & Ors*[12] and *Zebicon Pty Ltd v Remo Constructions Pty Ltd.*[13]

[36] Referring to the submission under consideration, the primary judge said:

> "[79] The submission relies on the judgment of Palmer J in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor*. The New South Wales equivalent of s 17(5) of the *BCIP Act* is found in s 13(5) of the New South Wales statute. Of it, Palmer J said:
>
> > 46 An assertion that service of a payment claim is prohibited under s.13(4) or (5) is like a defence in bar. For example, in the case of an action at law or in equity founded upon an oral contract for an interest in land it is open to a defendant to elect whether to raise a defence in bar founded on the Statute of Frauds. Similarly, it would be open to a respondent served with a payment claim under the Act to elect whether to raise a defence in bar that service of the claim is prohibited by s. 13(4) or (5). A respondent to a payment claim may have a reason for electing not to raise such a defence: the payment claim may raise for determination an issue which will inevitably have to be determined in subsequent payment claims and the respondent may wish the issue to be resolved sooner rather than later.
> >
> > 47 However, if the respondent does elect to raise a defence in bar founded on s. 13 (4) or (5), adjudication of that defence will require examination of the relevant terms of the contract, possibly the facts relating to the work performed and the time of performance and possibly also the content of previous payment claims. That examination may well be contentious and may involve issues of fact and law upon which minds may legitimately differ.
> >
> > 48 In my opinion, the scheme of the Act in general and of s. 13 and s. 14 in particular requires that a defence in bar to a payment claim founded on s. 13(4) or (5), like any other defence said to defeat or reduce the claim, must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or restrain enforcement of the adjudication determination as a nullity, nor may it be relied upon as a defence to entry of judgment under s. 15(4) of the Act

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10 *Brookhollow Pty Ltd v R & R Consultants Pty Ltd & Anor* [2006] NSWSC 1.
11 [2009] QSC 264.
12 [2006] QSC 399.
13 [2008] NSWSC 1408.

> (the New South Wales equivalent s 19(4) of the *BCIP Act*)." (footnotes omitted)

[37] It is useful to add to that passage, paragraph [49] of Palmer J's reasons:[14]

> "In my opinion, these conclusions are consistent with, and are inherent in, the reasoning in *Brodyn* and they are not contrary to the majority decision in *Nepean*. They are also in conformity with the general approach to the determination of invalidity of a payment claim under s. 13(4) and (5) taken by McDougall J in *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 801, at para 25, by Campbell J in *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd* [2005] NSWSC 705, at para 19, and by Campbell J in *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd* [2005] NSWSC 1143, at paras 87–90."

[38] Palmer J thus appears to have concluded, on the facts before him, that a defence founded on s 13(4) or (5) would have involved matters arising under the Contract.

[39] In *Zebicon*, one of the issues was whether the Payment Claim had been served in accordance with the requirements of s 13 of the applicable legislation.[15] The judge, McDougall J, in his ex tempore reasons, said: [16]

> "… I accept also that it is at least arguable from s 13(4)(a) that a payment claim must be served in accordance with the relevant provisions of the applicable construction contract. However, s 13 itself applies not only to someone who is entitled to a progress payment, but also to someone who claims to be so entitled. Thus, premature service may have afforded a good answer to payment claim 11. But that point was not taken by any (or any valid) payment schedule. It cannot be relied upon now by way of defence. See s 15(4)(b)(ii) of the Act, and note the observations of Palmer J in *Brookhollow Pty Ltd v R and R Consultants Pty Ltd* [2006] NSWSC 1 at [48], [51]."

[40] *Northside Projects P/L v Trad & Anor*[17] was a case in which the applicant respondent to a payment claim served on it by the respondent, sought a declaration that an adjudication decision was void on grounds, inter alia, that the Payment Claim served by the respondent was void, as it was identical to a previous payment claim served on the applicant by the respondent. It was held, consistently with *Brookhollow*, that invalidity of the Payment Claim, having been raised in the applicant's payment schedule and adjudication response, the adjudicator should have addressed it. The case was not one in which it was necessary for the judge to decide whether the respondent to a payment claim who failed to serve a payment schedule, was thereby disentitled by operation of s 19(4) from relying on the invalidity of the Payment Claim.[18] *G W Enterprises Pty Ltd v Zentex Industries Pty Ltd & Ors* was also concerned with a challenge to a decision made by an adjudicator. It did not concern an allegation of breach of the requirements of s 17(5).

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14 *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 at [49].
15 The *Building and Construction Industry Security of Payment Act* 1999 (NSW).
16 *Zebicon Pty Ltd v Remo Constructions Pty* Ltd [2008] NSWSC 1408 at [33].
17 [2009] QSC 264.
18 *G W Enterprises Pty Ltd v Zentex Industries Pty Ltd & Ors* [2006] QSC 399.

[41] *Brodyn Pty Ltd v Davenport*[19] was an appeal from a decision of a judge of the Supreme Court refusing to make an order in the nature of Certiorari quashing an adjudicator's determination. Before the primary judge the appellant principal asserted that the payment claim the subject of adjudication proceedings was not a valid payment claim under the *Building and Construction Industry Security of Payment Act* 1999 (NSW). The primary judge accepted the correctness of the contention but refused the relief sought on the basis that s 25 of the Act under consideration prevented any challenge to the adjudicator's determination.

[42] Hodgson JA, Mason P and Giles JA agreeing, in addressing the contention that the subject payment claim was not a valid payment claim under the Act because the termination of the Contract and cessation of the work under it meant that there was thereafter only one reference date, in respect of which only one final payment claim could be made, said:[20]

> "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 involve doubtful questions of fact and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this."

[43] *Lifestyle Retirement Projects No 2 Pty Ltd v Parisi Homes Pty Ltd*[21] and *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*[22] were also cases concerning adjudicators' determinations.

[44] In *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*[23], Campbell J declined to answer a preliminary question referred to the Court of whether service of a second payment claim gave rise to no entitlement on the part of the defendant to apply for adjudication of that claim pursuant to s 17 of the NSW Act. Campbell J declined to answer the question on discretionary grounds.

[45] The above review of the authorities provides some support for the primary judge's approach but its vice in my opinion is that it fails to consider sufficiently the statutory prescription. It is essential, in my respectful opinion, to have regard to the words of s 19(4) in determining whether or not it prevents a defence being raised. It prohibits a respondent to a payment claim, who has failed to duly serve a payment schedule, from bringing a counterclaim against the claimant, or from raising "any defence in relation to matters arising under the construction contract". The prohibition is not against the raising of any defence whatsoever.

[46] The following discussion of the meaning of "in relation to" by Hill J in *Australian Competition and Consumer Commission v Maritime Union of Australia* is apposite:[24]

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19 [2004] NSWCA 394.
20 *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394 at [66].
21 [2005] NSWSC 705.
22 [2005] NSWSC 801.
23 [2005] NSWSC 1143.
24 (2001) 114 FCR 472 at 487, 488.

> "It may be accepted that there will always be a question of degree involved where the issue is the relationship between two subject matters. The words 'in relation to' are wide words which do no more, at least without reference to context, than signify the need for there to be some relationship or connection between two subject matters: see *Smith v Commissioner of Taxation (Cth)* (1987) 164 CLR 513 at 533 per Toohey J and *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 328 per Toohey and Gummow JJ. But the phrase is both 'vague and indefinite': see per Taylor J in *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620. Like the phrase 'in respect of', the phrase 'in relation to' will not, at least normally, apply to any connection or relationship no matter how remote: see *Technical Products Pty Ltd v State Government Insurance Office (Qld)* (1989) 167 CLR 45 at 51 per Dawson J. The extent of the relationship required will depend upon the context in which the words are used.
>
> As Beaumont and Lehane JJ said in *Joye v Beach Petroleum NL* (1996) 67 FCR 275 at 285 in discussing a number of the cases dealing with 'relates to':
>
> > "… it will depend upon context whether it is necessary that the relationship be direct or substantial, or whether an indirect or less than substantial connection will suffice.' (References omitted.)"

[47] In my view, s 19(4)(b)(ii) prohibits the raising of a defence only if it can fairly be described as one which relates to matters arising under the relevant construction contract. Counsel for Neumann argue, partly in reliance on observations in *Brookhollow*, that having regard to the width of the expression "in relation to", there is a sufficient connection between Traspunt's defence and matters arising under the contract. To my mind the connection is tenuous. I do not consider that a defence that the payment claim relied on by the claimant is virtually identical in all relevant respects to a previous one made by the claimant meets the description in s 19(4)(b)(ii), at least, where, as is the case here, the merits of the defence stand to be determined essentially by the comparison of one document with another.

[48] Had the provision been intended to catch all defences having a connection with the construction contract, however remote, all words in s 19(4)(b)(ii) after "to raise any defence" would have been otiose: all payment claims are necessarily concerned with "matters arising under the construction contract". The aim of the provision would appear to be to prevent respondents to claims relying on allegations that the moneys claimed are not owing for reasons referable to the terms of the construction contract and/or to the parties' performance or failure to perform thereunder. If such matters are to be relied on as a defence to a payment claim, they must be included in a payment schedule. This approach to the construction of s 19(4)(b)(ii) is consistent with that taken by Basten JA in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd*.[25]

[49] In my view Traspunt has "a real prospect of successfully defending all or a part of [Neumann's] claim"[26] on the grounds that the Payment Claim was a second payment

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25 (2006) 67 NSWLR 9 at 36.

26 *Uniform Civil Procedure Rules* 1999 (Qld), r 292.

claim served in relation to the same reference date and was thus unable to be relied on by Neumann. In my respectful opinion the primary judge erred in concluding to the contrary.

Did Traspunt make out an arguable case of misleading and deceptive conduct on the part of Neumann?

[50] The matters relied on by Traspunt to establish breach of s 52 of the *Trade Practices Act* 1974 (Cth) in its counsel's outline of submissions were as follows:

(a) The relevant provisions of the Act took effect on 1 October 2004;

(b) Since 2005, Traspunt and its parent company have had contracts with Neumann under which the latter has submitted approximately 72 progress claims totalling in excess of $16 million in value to "the Superintendent for assessment under the relevant contracts";

(c) Traspunt had in place in its office a procedure to deal with claims submitted to the Superintendent by Neumann for assessment;

(d) All claims under the Contract from the commencement of works in January 2008 up to May and June 2009 were submitted by Neumann to the Superintendent and assessed by the Superintendent under Clause 42.1 of the Contract, notwithstanding that all but a small number of them bore a notation to the effect that they were claims under s 17 of the Act;

(e) The First Claim, which also bore such endorsement, was unilaterally withdrawn by Neumann without any explanation to Traspunt;

(f) Traspunt's delayed payment in 2008 was resolved under the contract regime; not the regime provided for by the Act.

In oral submissions, counsel for Traspunt referred to the evidence of Mr Maccheroni, in which he deposed that throughout the course of the project, Traspunt had been consistently late in paying certified claims and that he was unhappy about it. In about March 2009, Neumann and Traspunt entered into a deed under which Neumann agreed to extend the time for payment of three invoices totalling $598,979 in value. The Deed provided, inter alia, that, "All future invoices to be issued are payable on the contractual due date".

[51] Counsel for Traspunt submitted that in these circumstances, Traspunt was justified in assuming that Neumann did not require Traspunt to comply with the strict requirements of the Act in respect of its claims and that Neumann was relying only on its contractual rights. It is further submitted that when Neumann decided to change the basis for submitting claims for payment, it should have first notified Traspunt of its intention in this regard so as to prevent Traspunt being led into error and thus failing to protect itself against the consequences of the statutory regime.

[52] The primary judge concluded that there was nothing in Neumann's conduct prior to May 2009 which represented that Neumann would continue to rely solely on its contractual rights and not on its rights under the Act. The primary judge pointed out that the Payment Claim was accompanied by a letter expressly stating that the Payment Claim was submitted under the Act. He also noted the following: the letter identified a "reference date", the prior claims did not. The letter described the claim as a "Payment Claim" rather than a "Progress Claim", the description used in the earlier claims. Those earlier claims had been submitted to the Superintendent. That fact, and the terms of the documents were regarded by him as providing strong indications that the prior claims were made under and in accordance with the procedure set out in the Contract.

[53] Counsel for Neumann also placed heavy reliance on those matters. He submitted that the evidence did not disclose that officers of Traspunt had actually seen the earlier progress claims with the notation to the effect that they were made under the Act. Counsel for Traspunt submitted that the evidence supported an inference that these progress claims, or copies of them, had been seen by officers of Traspunt, and he relied in particular on the fact that copies had been exhibited to Mr Trask's affidavit. In my view, although the evidence in this regard was slender, it was sufficient when considered in the context of the other evidence relied on by Traspunt and, in particular, to Mr Trask's evidence, to support Traspunt's arguments on resisting summary judgment.

[54] In my view, the primary judge's assessment of the nature of the change between the First Claim and the Payment Claim on the one hand and the earlier claims on the other, gave no or insufficient weight to the evidence of Mr Trask that "all prior claims (save for claims 1 to 5) were made under" the Act. That was a shorthand way of stating that such claims had the same notation as the one at the foot of the first page of the First Claim which identified them as having been made pursuant to s 17(1) of the Act. Arguably, the lengthy and numerous dealings between the parties had given rise to a reasonable expectation on the part of Traspunt that, in respect of claims for payment of moneys under the Contract, in the absence of due notice by Neumann, the rights of the parties would be determined pursuant to the terms of the Contract and not by reference to the provisions of the Act. I accept Traspunt's submission that the fact that there was no recourse by Neumann to the provisions of the Act when Transpunt was late in paying in 2008 is relevant in this regard. Not only did Neumann continue to rely only on contractual rights despite Traspunt's frequent defaults, it made no intimation that it might rely in future on its rights under the Act.

[55] In *Demagogue Pty Ltd v Ramensky*,[27] Gummow J, with whose reasons the other members of the Court agreed, cited the following passage from the reasons of Samuels JA in *Commonwealth Bank of Australia v Mehta*, with approval:[28]

> "(S)ilence is not misleading only where there is a duty to disclose at common law or in equity. It may simply be the element in all the circumstances of a case which renders the conduct in question misleading or deceptive …"

[56] Later in his reasons, Gummow J noted that:[29]

> "… the large number of cases brought under the Act in respect of conduct analogous to passing-off has encouraged the notion that some representation must be demonstrated as an element of conduct in contravention of s 52. But, consistently with regard to the natural meaning of the terms of s 52, the question is whether in the 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. Conduct answering that description may not always involve misrepresentation: … I agree also with the remarks by French J in *Kimberley NZI Finance Ltd v Torero Pty Ltd* [1989] ATPR (Digest) 53,193 at 53,195 where, after referring to various authorities, his Honour said:

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27 (1992) 39 FCR 31 at [40].

28 (1991) 23 NSWLR 84 at 88.

29 At pp 40, 41.

> 'If in a particular case silence would, as a matter of fact, constitute misleading or deceptive conduct, s 52 by virtue of its prohibition of such conduct imposes its own statutory duty to make disclosure.
>
> The cases in which silence may be so characterised are no doubt many and various and it would be dangerous to essay any principle by which they might be exhaustively defined. However, unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist.'"

[57] In my view, the circumstances identified by counsel for Traspunt give rise to an arguable case that the conduct of Neumann in changing the basis of its claims without first alerting Traspunt to the change was in breach of s 52. The fact that the First Claim was not proceeded with but was not formally withdrawn or even adverted to at the time of the making of the Payment Claim, arguably provides some support for the view that Neumann did not wish to ensure that the changed basis on which the Payment Claim was made was brought to Traspunt's attention. The First Claim was served under cover of a letter of 13 May. The Payment Claim was served on 10 June after Neumann became aware that there had been no response to the First Claim within the 10 business days prescribed in s 18 of the Act. Neumann was also aware, or ought reasonably to have been aware, that in order to deal properly with the claims, Traspunt would have needed to obtain the Superintendent's assessment: yet the Superintendent was not provided with a copy of either claim, despite Traspunt's history of slow payment. Another matter which may well be relevant but about which there would appear to be no evidence, is whether Neumann knew, or ought reasonably to have known, of the existence of an appreciable risk that the systems Traspunt had in place to deal with progress claims under the Contract would not have been sufficient to bring the changed basis of claim to Traspunt's attention without a more express warning.

[58] Although the 10 June covering letter contained the notation, "This payment claim is submitted under the *'Building and Construction Industry Payments Act 2004 (Qld)*'" most of the claims submitted under the Contract in the past included a statement to like effect, although describing the claim as a "Progress Claim" rather than a "Payment Claim". After the sentence just quoted, the letter stated, "I would like to draw your attention to the following points: …", thereby emphasising the matters which followed, rather than the quoted sentence.

[59] If officers of Traspunt had been alert or wary, or both alert and wary, it is likely that they would have understood from the Payment Claim and the covering letter, at least after ascertaining that the Payment Claim had not been submitted to the Superintendent, that Neumann was intending to rely on the provisions of the Act. The evidence, however, does not suggest that anything had occurred to put Traspunt on notice that Neumann was contemplating changing existing claim procedures and that, in consequence, claims had to be scrutinised with particular care. There was thus no compelling reason why Traspunt should have appreciated that the Payment Claim and the accompanying letter signalled a very substantial change to the basis on which claims for payment of moneys due under the contract were to be made and dealt with. The evidence suggests that the administrative procedures in place,

designed to deal with progress claims under the contract, proved insufficient to alert Traspunt to the changed nature of the Payment Claim.

[60] The matter, in my view, was one which was not suitable for summary determination. It necessitated, amongst other things, the forming of an impression of the reasonable expectations of Traspunt in the light of its contractual dealings with Neumann: something which could be undertaken only imperfectly without the judge seeing and assessing the witnesses and forming a true appreciation of the relevant protracted dealings between the parties.

[61] Counsel for Neumann properly accepted that s 19(4) does not deny a respondent to a payment claim a remedy available to it by operation of ss 52, 80 and 87 of the *Trade Practices Act* 1974 (Cth).[30] Consequently, in my respectful opinion, the primary judge erred in finding, by necessary implication, that Traspunt had "no real prospect of successfully defending all or a part of [Neumann's] claim"[31] on this basis.

Was Neumann estopped by its conduct from relying on its rights under the Act?

[62] The precise nature of the estoppel relied on does not appear to have been identified to the primary judge beyond it being asserted that the alleged misleading conduct discussed earlier amounted to a representation giving rise to an estoppel.

[63] In counsel for Traspunt's written outline of submissions, it was asserted that "… it is trite that a departure from an assumption induced in a party by the conduct of another party may give rise to an estoppel against that other party if the former party has acted upon the assumption and will suffer a detriment if the assumption is deserted". The "assumption" was not identified in the outline of submissions but would appear to be that Neumann would continue to claim under the Contract, at least until notifying any contrary intention. In *Grundt v Great Boulder Pty Gold Mines Ltd*, to which counsel referred, Latham CJ said:[32]

> "So, in *Thompson v. Palmer*, the general principle upon which estoppel *in pais* is based was expressed by *Dixon* J. in the following words:- 'The object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct.'" (footnotes deleted)

[64] The principle is explored more fully in the following passage from Dixon J's reasons in the same case:[33]

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30 *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] 67 NSWLR 9.
31 *Uniform Civil Procedure Rules* 1999 (Qld), r 292.
32 (1937) 59 CLR 641 at 657.
33 *Grundt v Great Boulder Pty Gold Mines Ltd (supra)* at 675, 676.

> "The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied. A brief statement of the recognized grounds of preclusion is contained in the reasons I gave in *Thompson v. Palmer*, and it is convenient to repeat it:- 'Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct, as in *Yorkshire Insurance Co. v Craine*; cp. *Cave v. Mills*; *Smith v. Baker*; *Verschures Creameries Ltd. v Hull and Netherlands Steamship Co.*; and *Ambu Nair v. Kelu Nair*; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption.'
>
> It is important to notice that belief in the correctness of the facts or state of affairs assumed is not always necessary. Parties may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs." (footnotes deleted)

[65] The primary judge did not consider that Neumann's conduct amounted to "a representation which would found an estoppel preventing Neumann from seeking to exercise its right under the Act". In my view, the facts discussed earlier raise an arguable case that it was unjust for Neumann to depart without proper notice from an assumption adopted by Traspunt that Neumann's progress claims would continue to be made under the Contract unless Neumann advised to the contrary, as arguably, Neumann's conduct was "a proximate cause of [Traspunt's] adopting and acting upon the faith of the assumption".

[66] In reaching these conclusions and the ones expressed in relation to the possible operation of s 52, I am not purporting to determine the merits of any such arguments: it is sufficient for Traspunt's purposes to establish an arguable case.

[67] The primary judge concluded that s 99 of the Act, which prevented parties from contracting out of the Act's provisions and made void contractual provisions to the

extent to which they were contrary to the Act's provisions, indicated the existence of a social policy underlying the Act which would prevent the creation of an estoppel. In this regard, the primary judge relied on a passage from the reasons in *Kok Hoong v Leong Cheong Kweng Mines Ltd*[34] which was included in the following:

> "It has been said that the question whether an estoppel is to be allowed or not depends on whether the enactment or rule of law relied upon is imposed in the public interest or 'on grounds of general public policy' (see *In re A Bankruptcy Notice, per* Atkin LJ.). But a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statute, for which this claim might not be made. In their Lordships' opinion a more direct test to apply in any case such as the present, where the laws of moneylending or monetary security are involved, is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise. Thus the laws of gaming or usury *(Carter v James)* override an estoppel: so do the provisions of the Rent Restriction Acts with regard to orders for possession of controlled tenancies *(Welch v Nagy).*
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> General social policy does from time to time require the denial of legal validity to certain transactions by certain persons. This may be for their own protection, as in the case of the infant or other category of person enjoying what is to some extent a protected status, or for the protection of others who may come to be engaged in dealings with them, as, for instance, the creditors of a bankrupt. In all such cases there is no room for the application of another general and familiar principle of the law that a man may, if he wishes, disclaim a statutory provision enacted for his benefit, for what is for a man's benefit and what is for his protection are not synonymous terms. Nor is it open to the court to give its sanction to departures from any law that reflects such a policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands. See *In re Stapleford Colliery Co., per* Bacon, V.-C.
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> These principles, as their Lordships understand them, would point very directly to the conclusion that there can be no estoppel in face of the Moneylenders Ordinance, since the provisions on which the respondent seeks to rely render him a 'protected person' for this purpose, nor any estoppel in the face of the Bills of Sale Ordinance, the provisions of which, whatever other purposes they may serve, are at least intended for the protection of other creditors who may have dealings with the borrower. The analogy between the latter Ordinance and the Deeds of Arrangement Act 1914, which was the subject of decision *In re a Bankruptcy Notice,* is very close." (footnotes omitted)

[68] It is, in my view, unclear whether the provisions of Division 1 of Part 3 of the Act confer public rights or rights which it is in the public interest to maintain and thus

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34 [1964] AC 993 at 1016-1017.

cannot be eroded by estoppel,[35] or whether they are to be seen as having been enacted for the benefit (rather than the protection) of potential claimants and/or are of a private or personal nature and can be waived, abandoned or subject to estoppel.[36]

[69] I accept that s 99 of the Act, which prohibits contracting out, provides a strong indication that the subject provisions come within the former category rather than the latter.[37] In view of my conclusions in respect of other grounds relied on by Traspunt, however, it is unnecessary to express a concluded view on these matters or on the related question of whether an estoppel which had the effect of requiring Neumann to notify Traspunt of its change of policy in relation to claims would "… annul, exclude, modify, restrict or otherwise change the effect of a provision of [the] Act …".[38]

Must a payment claim be made in good faith?

[70] Counsel for Traspunt argued that a claim which did not comply with s 17(2) could not take effect as a payment claim. "Good faith" in this context was said to require that the claimant act "honestly and fairly".[39] In support of the argument that good faith was required, reliance was placed on the observation of Ipp JA in *Nepean Engineering Pty Ltd v Total Process Services (In Liq.)*[40] that, "(p)rovided that a payment claim is made in good faith and purports to comply with [s 17(2)] of the Act, the merits of that claim, including the question whether the claim complies with [s 17(2)], is a matter for adjudication …". The Payment Claim is alleged to have been made fraudulently as it sought payment "either for work [Neumann] had not done or for which it had previously claimed and been paid in conformity with the terms of the construction contract".

[71] In *Bitannia*, Basten JA, with whose reasons on the question of whether there existed an obligation to make a payment claim in good faith Hodgson JA agreed, pointed out that Ipp JA's observation was obiter. He referred also to the observation of Santow J in the same case that:[41]

> "… I should note at the outset that there was no suggestion that the payment claim was not made in good faith and in purported compliance with s 13(2) of the Act, both minimal requirements of the Act."

Basten JA found that it was not a requirement of a valid payment claim that the claimant had an actual bona fide belief in the truth of the facts asserted.

[72] There being no material differences in the wording of the relevant statutory provisions, this Court should follow the decision in *Bitannia* unless persuaded that it was plainly wrong. In my respectful opinion, Basten JA's relevant conclusions are not wrong, let alone plainly so. The importing into the Act of an implied obligation to make payment claims in good faith would detract materially from the simple

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35 *Kok Hoong (supra)* at 1016; *Yaxley v Gotts* [2000] Ch 162, 191.
36 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 491-497.
37 *Keen v Holland* [1984] 1 WLR 251; *Beckford Nominees Pty Ltd v Shell Co of Australia Ltd* (1987) 73 ALR 373.
38 *Building and Construction Industry Payments Act* 2004 (Qld), s 99(2).
39 c.f. *Rimar Pty Ltd v Pappas* (1988) 160 CLR 133.
40 (2005) 64 NSWLR 462 at [76].
41 *Nepean Engineering Pty Ltd v Total Process Services (In Liq.)* (2005) 64 NSWLR 462 at [49].

robust mechanism provided by the Act to achieve a speedy interim resolution of payment claims to promote early recovery of progress claims. In keeping with the Act's purpose, s 17 sets out the requirements for a valid payment claim.

[73] That the claim must be made bona fide is not included in those requirements and I have difficulty in seeing how it could be implied. The Act enables the respondent to a payment claim to serve a payment schedule and for the payment claim and payment schedule to go to adjudication. The adjudicator addresses and determines the merits of the parties' dispute as articulated in the payment claim and payment schedule. No enquiry into the claimant's bona fides is mentioned and it is difficult to see why a claimant's bona fides should be any more fundamental to a valid payment claim than a plaintiff's bona fides would be in relation to a valid writ, claim, or statement of claim.

[74] In *Bitannia*, Basten JA,[42] noted that, "… the beliefs or motivations of the plaintiff in proceedings have generally been treated as irrelevant, unless they reach the stage of an improper purpose" which would constitute an abuse of process. An abuse of process arises where proceedings are brought, not for the purpose of prosecuting them to a conclusion, but to use them as a means of obtaining some advantage for which they are not designed, or some collateral advantage beyond that offered by the law.[43] The "improper purpose" must be the predominant purpose.[44]

[75] Counsel for Traspunt placed reliance on *Thompson v Groote Eylandt Mining Co Ltd*.[45] The decision in that case turned on the construction of s 3(1) of the *Work Health Act*,[46] which defined "worker" as a "natural person":

> "(a) who, under a contract or agreement of any kind … performs work or a service of any kind for another person and who is a PAYE taxpayer."

[76] PAYE taxpayer was defined:[47]

> "… in relation to a worker, [as meaning] that his employer makes deductions from money paid to the worker for work performed or services provided to the employer … and includes a worker in respect of whom such deductions are not made by his employer but only because –
> (a) of the shortness of time during which the worker has been in the employment of his employer; or
> (b) having regard to the amount of money paid to the worker, his employer is not required to make such deductions under that Division."

[77] The appellant was employed as a labourer by a contractor carrying out work for the respondent. It had no insurance to cover claims for workmen's compensation payments and made no PAYE deductions from the payments made to the appellant. The Work Health Court held that despite no deductions having been made in respect

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42 At para [74].
43 *Williams v Spautz* (1992) 174 CLR 509 at 526, 527.
44 *Williams v Spautz (supra)* at 529.
45 [2003] NTCA 5 at [8].
46 (1986) (NT).
47 [2003] NTCA 5 at [9].

of moneys paid to the appellant by the contractor, he was a "worker" within the meaning of s 3(1)(a) of the subject Act. That decision was reversed on appeal to a single judge and restored by the Court of Appeal. In the Court of Appeal, Mildren J, with whose reasons Martin CJ generally agreed, and Thomas J agreed, discussed the principles of such a principle of construction at some length, including: the circumstances in which beneficial or remedial legislation should be "beneficially construed so as to provide the most complete remedy of the situation with which they are intended to deal and which are consistent with the actual language employed and to which its words are fairly open"; the purposive approach to construction and construction so as to avoid an unjust or capricious result. His Honour then referred to cases which avoided a construction of a statute or regulation which would have permitted a person to take advantage of his or her own wrongdoing.

[78] It is difficult to see how the application of the last mentioned approach to construction would require the implication of a duty of good faith on the part of a claimant under s 17. Apart from the considerations already discussed, the Act provides an opportunity for a respondent to deliver what are, in effect, grounds of defence addressing the merits of the claim and the dispute then goes to an adjudicator to make a determination on the merits. If the claim is soundly based the claimant should be entitled to an adjudication in its favour irrespective of the claimant's motives or purposes in bringing the claim. If the claimant is seen to be engaging in an abuse of process, which one would think would be exceedingly rare, the respondent has the normal remedies in that regard. The adjudicator's determination does not affect the right of the respondent to a payment claim to have the issues finally determined on the merits by a court and any moneys ordered by an adjudicator to be paid may be ordered by a court to be repaid.[48]

Conclusion

[79] Because of the conclusion I have reached on the good faith point, it is unnecessary to address the question of whether the evidence in relation to Traspunt's fraud claim was such as to afford it a real prospect of mounting a successful defence on that ground. Nor is it necessary to determine the merits of Traspunt's claim, which I did not find particularly compelling, that the primary judge erred in finding that the Payment Claim sufficiently identified the work as required by s 17(2)(a).

[80] The utilisation of rules such as r 292 is to be encouraged, but their application must conform with "… the general principle … that issues raised in proceedings are to be determined in a summary way only in the clearest of cases".[49]

[81] In *Rich v CGU Insurance Ltd*,[50] Gleeson CJ, McHugh and Gummow CJ cited with approval the following passage from the reasons of Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde*:[51]

> "Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has

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48 *Building and Construction Industry Payments Act* 2004, s 100.

49 *Rich v CGU Insurance Ltd* (2005) 79 ALJR 856 at 859 per Gleeson CJ, McHugh and Gummow JJ.

50 *Rich v CGU Insurance Ltd (supra)* at 859.

51 (2000) 201 CLR 552 at 575-576.

> been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.'" (footnote deleted)

[82] In this case, whilst the primary judge dealt with the matter carefully and skilfully, if I may respectfully say so, the range and complexity of the issues before him and the existence of factual disputes rendered the granting of summary judgment overly bold.

[83] For the above reasons, I would allow the appeal and order that the judgment and order made on 11 November 2009 be set aside and that Neumann pay Traspunt's costs of the application and hearing at first instance.

[84] **CHESTERMAN JA:** I agree with the orders proposed by Muir JA. I also agree with his Honour's reasons for making those orders.

[85] The primary judge approached the application for summary judgment by reference to what had been said in *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232:

> "r 292 should be applied using [its] clear and unambiguous language …".

Accordingly the primary judge applied himself manfully to the task of determining whether the voluminous material supplied by the parties showed that the appellant had "a real prospect of successfully defending … the (respondent's) claim."

[86] I respectfully agree with Muir JA that the issues raised by the pleadings and affidavits, particularly the possibility that the appellant might have a defence under s 52 of the *Trade Practices Act* (Cth) 1974, was not suitable for summary determination.

[87] It is worth observing that had the primary judge applied the test I expressed in *Bolton Properties Pty Ltd v J K Investments (Australia) Pty Ltd* [2009] 2 Qd R 202, and earlier in *Gray v Morris* [2004] 2 Qd R 118, the application for summary judgment would have been dismissed. The saving in time, inconvenience and money would have been considerable.

[88] The case was unsuitable for any summary assessment of whether there were real, as opposed to fanciful, prospects of a successful defence. I maintain the opinion that "the only safe principle to apply when dealing with applications … for summary judgment is that … a claim which has 'no real prospects of succeeding' is one which is 'hopeless' or one which is 'bound to fail'."