DISTRICT COURT OF QUEENSLAND

CITATION:	*Vanbeelen v Blackbird Energy Pty Ltd* [2006] QDC 285
PARTIES:	**HENDERICKUS RUTHERGUS JOHONUS VANBEELEN T/A H&K CONCRETING AND CONSTRUCTION** Applicant V **BLACKBIRD ENERGY PTY LTD** Respondent
FILE NO:	BD 1443 of 2006
PROCEEDING:	Application to recover a progress payment
DELIVERED ON:	23 June 2006
DELIVERED AT:	Brisbane
HEARING DATES:	29 May and 9 June 2006
JUDGE:	Judge Brabazon QC
ORDER:	**Judgment for the Applicant for $158,453.34**
CATCHWORDS:	BUILDING CONTRACTS – REMUNERATION - PROGRESS CLAIM – *Building and Construction Industry Payments Act 2004 ss 17,18, 80* and *100* - Whether posting to a post office box was a posting to a place of business. Statues *Building and Construction Industry Payments Act 2004* *Acts Interpretation Act 1954,* section 39 *Workplace Injury Management and Workers' Compensation Act* 1998, s 92A Cases *Nepean Engineering Pty Ltd v The Total Process Services Pty Ltd* (2005) NSWCA 409 *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* 30 January (2006) NSWSC 1 *ISIS Projects v Clarence Street* 2004 NSW SC 714 *Multiplex Constructions Pty ltd v Luikens & Anor* [2003] NSWSC 1140

Clarence Street Pty Ltd v Isis Projects Pty Ltd 2005 NSWCA 391

Brodyn Pty Ltd v Davenport 2004 61 *NSW*

Citystart Pty Ltd v Deputy Commissioner of Taxation (2006) WASC 35

Sarikaya v Victorian WorkCover Authority BC9706553

Croker v Sydney Institute of TAFE (NSW) 2003 FCA 942

Grayprop Pty Ltd v Maharaj International Pty Ltd [2001] QSC 387

Her Majesty's Theatre Pty Ltd v Starstruck Pty Ltd (1982) 6 ACLR 535

MacRae v St Margaret's Hospital BC9907034

Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87

Skalkos v TNS Recoveries Pty Ltd (2005) 213ALR311

Deputy Commissioner of Taxation v Barroleg Pty Ltd (1997) 25 ACSR. 167

Bellway Corp Ltd v Ausdrill Ltd (1995) 13 ACLC 1663

Brady v Millgate (1965) 82 WN (Pt 1) (NSW) 282

Bowman v Durham Holdings Pty Ltd (1973) 131 CLR 8

Thomas v Johnson (1979) ANZ Conv Rep 159, 163

Kemp v Wanklyn [1894] 1 QB 583

Lewis v Evans (1874) LR 10 CP 297

Re Thundercrest Ltd [1995] 1 BCLC 117

Re Amanatidis Holdings Pty Ltd (1991) 4 ACSR 253

Citystart Pty Ltd v Deputy Commissioner of Taxation (2006) WASC 35

Bowman v Diam Holdings Pty Ltd

Barclay Mowlem Construction Ltd v Estate Property Holdings Pty Ltd (2004) NSWSC 249

COUNSEL: Mr L Alford , counsel, for the Applicant

Mr P Hackett, counsel, for the Respondent

SOLICITORS: Clewett Corser & Drummond, Solicitors for the Applicant

Morgan Conley, Solicitors for the Respondent

1. THE ISSUES

[1] Mr Vanbeelen is a builder. He progressively agreed to renovate seven service station buildings owned by Blackbird Energy throughout South East Queensland. He worked from late 2004 to late 2005, and was paid around $1.1 Million. Differences then developed between himself and Blackbird Energy. He said that he was entitled to a further payment of $158,453.34. Blackbird Energy disputed that claim. It said that he actually owed some money to it, because he had overcharged. He said that the company had refused to pay, or could not pay.

[2] In early April this year Mr Vanbeelen was advised to take advantage of the *Building and Construction Industry Payments Act* 2004. Inspired by the *New South Wales Building and Construction Industry Security and Payment Act* 1999, the object of the Act is to ensure that a builder is entitled to receive, and is able to recover, progress payments under a construction contract. The idea is that progress payments should either be recovered promptly, or any dispute about them should be resolved by a system of adjudication. The prompt recovery of a progress payment is, in the usual way, without prejudice to other rights the parties may have under the construction contract. See s 100 of the Act.

[3] In this case, there were three issues to be decided. Did Mr Vanbeelen sufficiently identify the construction work to which his final progress payment related? Did Blackbird Energy respond with a "payment schedule" within the allowed 10 business days after service of the payment claim? What is the impact of a limitation period of 12 months between the carrying out of work and service of a payment claim for it?

[4] These reasons do not decide, or assume, anything about the merits of the wider dispute between the parties.

2. PROCEDURE

[5] Mr Vanbeelen's originating application for a judgment to recover the progress claim was filed on 17 May. It was necessary for this court to deal with such a claim as soon as practicable. On the first day of the hearing, there were submissions about the nature of the proceeding. In particular, should affidavits sworn on the basis of hearsay information be accepted? For example, counsel for Blackbird Energy objected to Mr Creevey's affidavit, filed on behalf of Mr Vanbeelen, which dealt with the issue of the ordinary course of post. It recounted a conversation with an employee at the Toowoomba Mail Centre, to prove that fact.

[6] At the second hearing, it was made clear to counsel that the matter would be dealt with as at a trial. Hearsay evidence would not be admissible, if objected to. The hearing was to be treated as the trial of the issues raised under the Act. Was Mr Vanbeelen entitled to an immediate judgment for the amount of the progress payment which he claimed? No other issues have been dealt with. The facts have been decided on the balance of probabilities.

[7] The parties had an opportunity to ask for disclosure of documents. Some oral evidence was given. Written submissions were supplemented by extensive oral submissions.

[8] At the end of the evidence and addresses, counsel for Blackbird Energy was allowed to make a possible request for an adjournment because one of his client's deponents, Mr Du Preez, was out of the country. That request has not been made. Counsel for

Mr Vanbeelen was minded to ask that a further affidavit be read, but did not persist in that course. Therefore, it is now appropriate that this judgment be given.

3. THE DISPUTE

[9] Mr Vanbeelen met Mr K Ainsworth, the director of Blackbird Energy, at Pittsworth in about September 2004. That meeting led to Mr Vanbeelen progressively doing work on the seven service station sites, starting with Pittsworth. It is common ground that there is no written construction agreement between them. It is also common ground that they agreed that Mr Vanbeelen would do the work at cost plus 10 per cent. The costs would be as in the suppliers' invoices.

[10] Later, in about early September 2005, Mr Vanbeelen and Mr Ainsworth agreed that the builder would be paid on a different basis. That is, Mr Vanbeelen would accept a regular retainer, which he was paid.

[11] Various differences between the parties emerged around November 2005. Those differences led to a meeting in Brisbane on 14 December 2005. Mr Vanbeelen attended, and brought with him a book-keeper, Ms Lorraine Robinson. She had no formal qualifications, but she had for some years run a business in which she looked after other people's business records. She had done some previous work for Mr Vanbeelen, from about mid 2004. He retained her in early 2005 to assist him with the paper work created by the service station renovation work for Blackbird Energy. She played a significant role in presenting information on his behalf to Blackbird Energy. Issues have arisen about the accuracy and methodology of Mr Vanbeelen's claims for payment.

[12] Mr Ainsworth did not attend that meeting. Blackbird Energy was represented by Mr Hendrik Du Preez, who was the financial manager for Blackbird Energy. He

was accompanied by Ms Liz McDonald, another staff member and Mr Peter Brown, a construction manager retained by Blackbird Energy.

[13] Several issues were discussed at that meeting. Was Mr Vanbeelen entitled to his 10% on the supplier's invoices, including the GST component, was he entitled to his margin after he had accepted the retainer and was Ms Robinson's book-keeping accurate? Was Blackbird Energy wrongly refusing or failing to pay them?

[14] It is clear that the meeting and events after the meeting did not result in a settlement of the differences between the parties. They continued, unresolved, into 2006.

4. THE PAYMENT CLAIM

[15] If a builder wants to take advantage of the Act, the first step is to serve a "payment claim" on the other party to the construction contract.

[16] In this case, there is no doubt that there was a construction contract (or contracts), for "the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures …" (see the definition of "construction contract" in s 10(1)(a) of the Act).

[17] According to s 17 of the Act, a payment claim must have certain essential features:-

(a) It must state that it is made under the Act,

(b) It must identify the construction work to which the progress payment relates, and

(c) It must state the amount of the progress payment that the builder claims to be payable.

[18] In this case, attention is focussed on the document Ex 7, which is dated 11 April 2006. It is from H&K Contracting, which was Mr Vanbeelen's trading name. His

address and telephone numbers are given. It is addressed to Blackbird Energy. Beyond those uncontroversial aspects, it is said on behalf of Blackbird Energy that the document fails in a number of ways to satisfy the essential requirements set out above.

[19] First, it describes itself as a "TAX INVOICE". On its first page, it says that:-

> "This payment claim is under the *Building and Construction Industry Act* 2004.

At the bottom of the second page, it says:-

> "Payment claim under the *Building and Construction Industry Payments Act* 2004"

[20] The document had a post-it note stuck to the top left hand corner, in Ms Robinson's handwriting:-

> "New invoicing system, note adjusted with what Blackbird has paid direct to creditors"

[21] Also on the front page, under the reference to the Act, is the expression below:-

> "Our terms are seven days – if you have any queries on these accounts, please contact accounts.
>
> Direct banking details …"

[22] On the body of the document, over a total of about one page of A4 paper, appears information about the work sites, and payments made. Each of the seven different service station sites is mentioned, and in addition, two other sites where, it seems, Mr Vanbeelen says he supplied some equipment. There is also a reference to himself, as the recipient of the payments made according to his retainer.

[23] The Pittsworth renovations may be taken as an example of the information in the tax invoice. This is the entry column:-

"Description	**Ex GST**	**GST**	**Total**
Pittsworth Renovations BP Service Station Pittsworth Cnr Railway Parade & Murray St, Pittsworth Invoices 000001, 000011, 000020, 000042"	$227,852,21	$22,785.22	$250,637.43

[24] After all the claims are made, credit is then given for the total previously paid, $1,108,867.50. Credit is also given for $22,258.38 being moneys paid directly to creditors by Blackbird Energy which had previously been in the builder's claims.

[25] The result is a claim for $158,453.34, including GST. It is immediately apparent that the document identifies each service station site, and some other areas of expenditure, and nominates a total cost claimed for each one. It then acknowledges the global payments received, and asks to be paid the difference.

[26] Is it a "progress payment" within the meaning of the Act? The expression "progress payment" means, according to Schedule 2 of the Act:

> "A payment to which a person is entitled under s 12, and includes, without affecting any entitlement under the section
>
> (a) the final payment for construction work carried out … under a construction contract …"

[27] With regard to the right to progress payments, s 12 of the Act says that:-

> "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 … under the contract"

So, in this case, Mr Vanbeelen was entitled to claim at the end of each month for work done, and for the final payment. The passing of time, and the writing of a letter of demand by his solicitor, and a discouraging response, (as happened in this case) would not affect the statutory right to claim payment for the work.

[28] The document was criticised as being deceptive, because of its appearance, including the hand-written note stuck on to it, and the unobtrusive and inaccurate references to the Act. No warning of its arrival was given by anyone. Neither Mr Vanbeelen nor Ms Robinson nor his solicitor said anything to anyone at Blackbird Energy, or its advisers. It was suggested that efforts had been made to catch Blackbird Energy by surprise, by distracting attention from the important nature of the document.

[29] Ms Robinson explained that the hand-written note was to alert Blackbird Energy to the fact that a different format was being used, compared to earlier progress claims. A comparison shows that to be so. Secondly, the note drew attention to the last entry in the document, which gave credit for moneys paid directly by Blackbird Energy to creditors. That was a new entry, compared to the previous documents.

[30] It is true that the correct title of the Act is not recorded on the first page of the document – the word "Payments" is missing. However, the proper title is given on the second page, in a box at the bottom of the page.

[31] The document is described as a "TAX INVOICE". That description was the same one applied to every one of the earlier monthly invoices. In following an established pattern, in which each progress claim was described that way, it was not surprising or misleading.

[32] It is necessary to consider the most substantial objection to the document. It is said that it simply does not, "identify the construction work … to which the progress claim relates". It was submitted that such a cryptic document would not allow Blackbird Energy to respond by serving a "payment schedule" on Mr Vanbeelen.

[33] Section 80 of the Act provides for the way in which Blackbird Energy was entitled to respond by serving a payment schedule. That payment schedule had to identify the payment claim to which it relates (not a difficult task) and "must state the amount of the payment, if any, that the respondent proposes to make." If the scheduled amount is less than the claimed amount, the schedule must state why the schedule amount is less and, if it is less because Blackbird Energy is withholding payment for any reason, its reasons for withholding payment (see s 18(3) of the Act).

5. THE PAYMENT SCHEDULE

[34] The solicitors for Blackbird Energy did provide a payment schedule, in the letter of 5 May 2006. This is what it said:-

> "(a) This schedule relates to the payment claim from H & R Concreting identified as invoice number 000060, dated 11 April 2006.
>
> (b) Blackbird Energy (herein referred to as the 'Respondent') does not propose to pay any of the claimed amounts.
>
> (c) The Respondent's reasons for withholding payment include but are not limited to the following:-
>
> (i) for those reasons previously raised with the Claimant personally in a meeting on 14 December 2005;
>
> (ii) for those reasons previously raised with the Claimant's solicitor, Clewett Corser & Drummond by letter from Morgan Conley solicitors dated 10 February 2006 including the:
>
> - charging of a 10% margin on building costs as well as a retainer/salary when only the former was payable;
> - double charging of GST;

- charging for telephone expenses not included in the agreement
- charging at an inflated rate for travel; and
- charging a 10% margin for non-building costs.

(iii) the Claimant has failed to provide the Respondent with details of accounts and invoices together with an explanation of how the demanded sum is calculated;
(iv) the payment claim does not identify the construction work or related goods and services which the progress payment relates as required by s 17(2) of the Act;
(v) the payment claim was not properly served on our client;
(vi) the payment claim does not comply with s17(4) of the Act for those charges claimed; and
(vii) the Claimant is indebted to the respondent in an amount of $29,999.40.

In the circumstances, we do not see how you can maintain your claim given that you have failed to provide us with the details we have previously sought."

6. THE NSW CASES

[35] The decided cases in NSW show the difficulties the courts have had in fixing the limits of the deceptively simple requirement, that a payment claim must identify the construction work to which the progress payment relates. For present purposes, the position there can be understood by looking at the decision of the Court of Appeal in *Nepean Engineering Pty Ltd v The Total Process Services Pty Ltd* (2005) NSWCA 409, and the decision of Palmer J in *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* 30 January (2006) NSWSC 1.

[36] Hodgson JA first turned to the decision of the primary judge, with regard to the degree of particularity required:-

> "…This Act was put in place for a purpose. That is, to allow parties to a contract to deal with it quickly and efficiently. It is put in, as I understand it, so sub-contractors can render accounts and have them paid with not as much problem and fuss as there was in the past and it does provide a fairly, I suppose, draconian type of section where a court can simply order that these moneys be paid.

> It seems to me that when you have a contract such as this one, which has been going on for some period of time, where there is a large amount of money involved, over $700,000, where payments of about $470,000 odd and may be even more than that have already been made, where those payments have been made in a form similar to this and where the parties had been able to work it out and understand it, this falls into no different category to those Palmer J spoke of and indeed McDougall J spoke of when you are looking up these sorts of matters. *That is, that the parties should be able to deal with these matters in the way they have previously dealt with them, without having to have every single item itemised to the degree which I think has been required here* (emphasis added) ..."

[37] In dealing with the degree of identification required, Hodgson JA was influenced by the opinion of McDougall J in *ISIS Projects v Clarence Street* 2004 NSW SC 714 (13/8/2004):-

> "36 In my judgement, the approach to be taken to this question is that described by Palmer J in *Multiplex Constructions Pty ltd v Luikens & Anor* [2003] NSWSC 1140. His Honour dealt at paras [72] and following with the question of 'what a payment schedule should show'. In my respectful opinion, His Honour's observations are (as is in any event apparent from para [76]) applicable equally to payment claims. His Honour pointed out that, in considering whether a payment claim or a payment schedule contained sufficient detail, it was necessary to bear in mind that they were given and received by people experienced in the building industry and familiar with the particular contract, the history of construction work on the project and the broad issues underlying the dispute. He said:
>
> "76 A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.
>
> 77 A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior

correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.

78 Section 14(3) of the Act, is requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than "state", "specify" or "set out", conveys an impression that some want of precision and particularity is permissible as long as the essence of "the reason" for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication."

37 In principle, I think, the requirement is s 13(2)(a) that a payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where:

(1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;

(2) That reference is supplemented by a single line item description of the work;

(3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;

(4) There is a summary that pulls all the details together and states the amount claimed.

38 Where payment claims in that format have been used, apparently without objection, on 11 previous occasions, it is very difficult to understand how the use of the same format on the 12th and 13th occasions could be said not to comply with the requirements of s 13(2)(a). If payments claims in that format had sufficiently identified the construction work to which the progress payment claimed related on 11 previous occasions, I find it hard to understand how they would lose that character on the 12th and 13th occasion."

Hodgson JA pointed out that the above decision had been upheld by the Court of Appeal – see *Clarence Street Pty Ltd v Isis Projects Pty Ltd* 2005 NSWCA 391.

[38] Santow JA went on to consider the identification requirements of the Act. He also emphasised the importance of the practical position in which the parties found themselves, in the light of their background knowledge, past dealings, and exchange of documentation. As he put it, at paragraph 48:-

> "…I consider that there must be sufficient specificity in the payment claim for its recipient actually to be able to identify a 'payment claim' for the purpose of determining whether to pay, or to respond by way of a payment schedule indicating the extent of payment, if any. Nepean needs to be in a position to determine in a meaningful fashion whether to make payment, or else dispute it with reasons so as in that case to permit adjudication of the dispute, utilising the summary procedures under the Act. Those requirements underlying s 30(2)(a) are satisfied in my view by a relatively undemanding test, though still one with some content; one which recognises the mandatory character of s 30(2)(a) signalled by the word 'must'. It is that 'the relevant construction work (or related goods and services) must be identified sufficiently to enable the Respondent to understand the basis of the claim'. This moreover is an objective not subjective test, taking into account the background knowledge each of the parties derive from their past dealings and exchange of documentation. …"

[39] He then went on, at par 61, to mention the approach of McDougall J in *Isis Projects*, quoted above. With regard to that judge's observations, he considered the minimum requirements to satisfy 13(2)(a) of the Act. He said that McDougall J

> "… was not to be understood as treating a payment claim in identical format to previous payments as a necessary condition for compliance, as to distinct from a circumstance which pointed to the payment claim being, in an objective sense, *well capable of being understood by the parties circumstanced as they were*…" (emphasis added)

He again stressed the necessity of considering the parties circumstances in paragraph 63.

[40] The decision in Nepean Engineering is important in another respect. It grappled with the consequences of a payment claim which is deficient in the particulars it gives. Putting it shortly, the conclusion was that such a notice is not necessarily a nullity for the purposes of the Act. As Hodgson JA put it paragraph 36,

> "that is, I do not think a payment claim can be treated as a nullity for failure to comply with s 30(2)(a) of the Act, unless the failure is patent on its face; and this will not be case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made."

[41] Santow JA seems to have been essentially of the same opinion – see s 72 and 73. Ipp JA contented himself with this cryptic statement:-

> "…I would construe the *Building and Construction Industry Security of Payment Act* 1999 (NSW) as follows. Provided that a payment claim is made in good faith and purports to comply with s 30(2), the merits of that claim, including the question whether the claim complies with s 30 (2), is a matter for adjudication under s 17 and not a ground for resisting some re-judgement in proceedings under s 15. In particular, if no adjudication is sought some re-judgement cannot be resisted on grounds that could have been raised by way of a payment schedule leading to adjudication"

Before leaving *Nepean Engineering*, it should be pointed out that the payment claim incorporated two outstanding progress claims, numbers 5 and 6. The invoice was also followed by four pages of spreadsheets relating to contract works performed. They contained data about the number of links of pipes supplied and the diameters of those links, etc. Progress claim no. 6 also included similar spreadsheets.

[42] In the most recent decision in New South Wales, Palmer J in *Brookhollow* set out to summarise the law as to compliance with s 30(2) as it emerged from the decisions in *Brodyn Pty Ltd v Davenport* 2004 61 *NSW OR* 421 and *Nepean*:-

> "(i)…

(ii) there are some non-compliances with the requirements of s30(2) of the Act which will result in the nullity of a payment claim for all purposes under the Act; there are other non-compliances which will not produce that result

(iii) a payment claim which does not, on its face, purport in a reasonable way to

- identify the construction work to which the claim relates; or
- indicate the amount claimed; or
- state that it is made under the Act

fails to comply with an essential and mandatory requirement of s 30(2) so that it is a nullity for the purposes of the Act.

(iv) A payment claim which, on its face, purports reasonably to comply with the requirements of s 30(2) will not be a nullity for the purposes of engaging the adjudication and enforcement procedures of Part 3 of the Act.

(v) In the case of payment claim which purports reasonably on its face to comply with s 30(2)

- If the Respondent wishes to object that it does not in fact comply so that it is a nullity for the purposes of the Act, the Respondent must serve a payment schedule under s 14(4) and an adjudication response under s 20, in which that objection is taken;

- if the Respondent does not serve a payment schedule within the time limit under the Act and the Claimant ultimately seeks the entry of judgement under s 15(4), the Respondent may not resist some re-judgement on the ground that the payment claim was not a valid payment claim by reason non-compliance with the requirements of s 13; the Respondent has only once chance to take that objection, namely, in a timeously served payment schedule;

(vi) in the case of a payment claim … which does not purport reasonably on its face to comply with the requirements of s 30 (2)

- the payment claim is a nullity for the purposes of the Act

- …

- an application under s 15(4) for the statutory debt created by s 40(4) may be defeated on the ground that there was no payment claim in existence for the purposes of s 50(1)(b).”

7. THE INFORMATION

[43] After Mr Vanbeelen started work, he sent out some handwritten invoices. They were not very informative. He had been a bricklayer and had become a registered builder. He realised that he would have difficulty in keeping track of the paperwork. That is why he retained Ms Robinson as a bookkeeper. In early 2005, she set out to impose order on the documents he gave her. She did that up to the end of May 2005, and then sent invoices to Blackbird Energy. The invoices and the supporting documents were job specific – that is, they were separated according to the site of each job. Exhibit LRA-1 shows the documents she sent about the Pittsworth job. Tax invoice No. 1 recorded the work done to date, the payments to date, and the balance owing. In that case the value of the work done, including GST, was said to be $140,303.27. Progressive payments had been $125,450.80, leaving a claim of $14,852.47. It is obvious that the tax invoice included all the work and payments going back to the beginning of the Pittsworth job. There was included a schedule which she called the Monthly Current Position Schedule. It set out the invoices sent in by various suppliers and contractors. Generally, the document describes the work done or the goods supplied. In a few cases, it is true, the descriptions are not helpful. For example – a payee called "la Fage Plasta Masta" has no effective description of the reason for the expense. That was on 31 October 2004. Then, on 31/12/04 Pittsworth Hardware is followed by a simple reference to "invoices". Those documents were accompanied by a schedule of progressive drawdown payments, relating to the various jobs, and a document entitled Current Position. That paid attention to the separate jobs, in each case recording the total claims, and the amount outstanding.

[44] It is true, as Blackbird Energy complains, that those documents only showed the amount payable to each payee, rather than the amounts before and after the addition of GST. Ms Robinson did create such a document: see Ex LR-1 to her first affidavit. However, that document was not sent to Blackbird Energy.

[45] Her affidavits say that that pattern was followed up to the end of October 2005, when the documents Ex LR-5 were sent. They related to the September accounts.

[46] In court, Ms Robinson gave evidence about the documents she sent with respect to October 2005. They are contained in Ex 4. They follow the same pattern. They take the claims up to tax invoice No. 39. Work seems to have effectively stopped by November 2005. Invoice No 42 and a current position schedule were sent in February 2006 – see Ex 5 and 5A.

[47] In February 2006 Ms Robinson created a list of invoices which, she said, had been paid directly by Blackbird Energy. See Ex 6. They are the source of the deduction of $22,258.34 in the Tax Invoice of 11 April. She did not give that document to Blackbird Energy.

[48] The foundation of all Mr Vanbeelen's claims for payments were the supplier invoices. It is common ground that not all of these invoices were given to Blackbird Energy. When Ms Robinson became involved, she had a conversation about the invoices around May 2005 with Mr Peter Brown, the project manager retained by Blackbird Energy. He asked that invoices be sent. It seems that some were sent at that time, but that the supply of all the invoices did not continue. Rather, payments were made on the basis of the schedules prepared by Ms Robinson. Complaints were made at the trial, that all invoices had still not been received.

[49] The meeting of 14 December 2005 was significant. It forms part of the background against which the final progress claim was made. A record of the discussions prepared by Mr Brown can be seen at Ex LR-12. It seems that most of the meeting concentrated on the complaint by Blackbird Energy, that Mr Vanbeelen had improperly taken into account the 10% GST on supplier invoices when charging his 10% margin. There was also concern about the alleged "doubling up", of his margin and the retainer, after September 2005.

[50] There is no mention in that note of any concern about the missing invoices. There is no mention of such a concern in Mr Ainsworth's affidavit. It seems that Blackbird Energy was content enough to rely upon the summary of those invoices in Ms Robinson's spreadsheets. A complaint appears in the payment schedule of 5 May 2006.

[51] All these facts have to be taken into account, in making an assessment of the sufficiency of the progress claim dated 11 April 2006.

[52] The solicitors for Blackbird Energy responded to the letter of demand on 10 February 2006. See Ex HVB-56. The matters of concern at the meeting are listed. There is no complaint about the absence of invoices. The letter then concluded:

> "If your client believes he has a basis to make a claim against our client we look forward to receiving a detailed schedule of accounts and invoices together with details of how the demanded sum is calculated. ..."

The emphasis appears to be on a detailed schedule, rather than any request for the invoices themselves.

[53] It seems clear enough that, while Blackbird Energy did not hold a complete collection of the supplier invoices in April 2006, that fact was of no importance to

them at that time in understanding the demands for payment made by Mr Vanbeelen. Otherwise, all the necessary information was in its hands. That has to be taken into account in considering the adequacy of the demand in the tax invoice of 11 April. If something is missing, it will not necessarily be fatal. The notice may still substantially comply with the Act and, in any case, the respondent to the claim can raise the missing information on the payment schedule as a reason for refusing to pay the claim.

[54] It is submitted that the NSW decisions all depend on notices which contained a good deal of information, such as attached spreadsheets, etc. It is true that the Tax Invoice of 11 April did not enclose those details. However, the above references to earlier information shared by both sides are within the approach in principle of the NSW decisions.

[55] Bearing in mind the approach set out in the New South Wales cases, in my opinion the tax invoice of 11 April satisfied the requirements of s 17(2)(a) of the Act.

8. SERVICE OF THE NOTICE

[56] Blackbird Energy had 10 business days after the service of the payment claim to respond by serving a payment schedule on Mr Vanbeelen. That time limit was vital. If it was exceeded, then Blackbird Energy became liable to pay the amount claimed, on the due date for the progress of payment to which the payment claim relates. See s 18(5) of the Act. The payment schedule was served on 5 May 2006. It was out of time if it had been served before 21 April.

[57] Therefore, it is important to establish when the claimant's claim was served. Section 103 of the Act deals with the 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."

[58] Here, the party's contract said nothing about the service of notices. It was common ground that the *Acts Interpretation Act* provisions applied. Section 39 of that Act, relevantly, says this:

> "39 Service of Documents
> (1) If an Act requires or permits a document to be served on a person, the document may be served –
> (a) ...
> (b) on a body corporate – by leaving it at, or sending it by post, telex, facsimile or similar facility to, the head office, a registered office or a principal office of the body corporate.
>
> 39A Meaning of Service by Post etc.
> (1) If an Act requires or permits a document to be served by post, service –
> (a) may be effected by properly addressing, pre-paying and posting the document as a letter; and
> (b) is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved."

[59] In an affidavit filed on 17 May 2006, Ms Robinson says that she placed the tax invoice of 11 April in an envelope, affixed a 50 cent postage stamp and delivered it to the Toowoomba Mail Centre at 330 Stenner Street at 5 p.m. She handed the letter to a worker in the mail sorting room.

[60] There were suggestions at the hearing that Ms Robinson's evidence about the posting was inaccurate, because it was actually posted on a later day. She was subpoenaed to produce her electronic records, but did not have them when she gave evidence. Much complaint was made about that failure on her part. However, it has

not been persisted with since 9 June. It was made clear to Ms Robinson that she was obliged to produce the records.

[61] 11 April was the day on which she was in touch with the solicitor for Mr Vanbeelen. She was requested to correct the name of the Act, on the first page of the tax invoice, but she said that the advice to her arrived after the letter had been posted.

[62] Having heard Ms Robinson's evidence, including her evidence about the involvement of Mr Vanbeelen's counsel and solicitor in settling the form of the notice, there is no reason to doubt her evidence.

[63] It is necessary to observe the name and address on the tax invoice. It was

> Blackbird Energy
> 29 Mein Street
> PO Box 730
> SPRING HILL QLD 4004

Ms Robinson always addressed her correspondence to Blackbird Energy in that fashion.

[64] Attention needs to be paid to that form of address. Indeed, the issue of service by mail depends upon an understanding of several different names and addresses.

(a) An ASIC search shows that Blackbird Energy Pty Ltd had its registered office at 29 Mein Street, Spring Hill Qld 4000. That was also its principal place of business. Mr K Ainsworth was its only director, and all its shares were owned by the ultimate holding company, Blackbird Equity Pty Ltd.

(b) Blackbird Energy had a post office box in its name. That was PO Box 492 at Spring Hill QLD 4004. Blackbird Equity held a separate box, which was PO Box 730 at Spring Hill 4004.

(c) While its registered office and principal place of business was at 29 Mein Street, Blackbird Energy had a business office, in fact, at Suite 9 290 Boundary Street, Spring Hill.

[65] It is necessary to understand the position which presented itself to Mr Vanbeelen, and his advisers. That began at the first meeting between himself and Mr Ainsworth, at Pittsworth. Mr Ainsworth handed him some engineer's plans. See Ex HVB-3. On the front page of the plans was a compliance certificate, signed by the engineers. The proprietor was described as:

> Blackbird Energy Pty Ltd
> PO Box 730
> Spring Hill
> Queensland 4004

[66] When he retained Ms Robinson, it is probable that he referred to Mr Du Preez, at 29 Mein Street. That seems to have been Mr Du Preez's usual office. Ms Robinson was uncertain about the correct address, so she spoke to a woman called Liz. She was in the accounts department of Blackbird Equity. Liz told her that the correct postal address was PO Box 730, Spring Hill 4004. Perhaps they were at cross-purposes, and spoke about different companies. She also said that mail was to be sent to the attention of Mr Du Preez. That was accurate. Apart from Mr Ainsworth, he became the principal contact for Mr Vanbeelen. She had some understanding that it was a legal requirement that such a document required a "full address". That explains her adoption of the combined street and post office address on each of the tax invoices she sent. Ms Robinson says that the address caused no difficulty, as no mail was returned, and nothing was raised with her about the address. She sent no mail to Box 492, and seems not to have known about that address.

[67] The engineering drawings for the Yarraman site showed the proprietor as Blackbird Energy of 29 Mein Street, Spring Hill, Brisbane 4004 (a mistaken postcode). See Ex HVB-21.

[68] In April 2005 Mr Ainsworth went overseas. He left his contact addresses with Mr Vanbeelen. Apparently he was also interested in a company called Hastings Holdings which had offices in Australia and England. Its address in Queensland was PO Box 730, Qld 4004.

[69] There seems to be one e-mail message between Mr Ainsworth and Mr Vanbeelen that shows the address of Blackbird Energy being both 290 Boundary Street, Spring Hill, Queensland 4000 and PO Box 492, Spring Hill, Queensland 4004. That is the e-mail of 25 January 2006, (Ex HVB-54a). That may explain why Mr Vanbeelen's solicitor, writing a letter of demand on 3 February 2006, addressed it to Blackbird Energy at Boundary Street, Spring Hill, 4004. See Ex HVB-55.

[70] Those two documents aside, there were numerous e-mails from Mr Du Preez to Mr Vanbeelen to a different effect. See, for example, Ex HVB-58, showing an e-mail of 4 April 2006. It is from Mr Du Preez to Mr Vanbeelen. He describes himself as "financial controller". The e-mail referred to Blackbird Equity with addresses in Melbourne and at 29 Mein Street, Spring Hill, Queensland 4000. An alternative address is given, that being PO Box 730, Spring Hill, Queensland 4004. The e-mail address was h@blackbirdequity.com.

[71] Curiously, the only other reference to Blackbird Energy's office at 290 Boundary Street, Spring Hill, and address of PO Box 492, Spring Hill 4004, appears on Ex EMM-2. That is an internal communication between Mr Du Preez and another staff member, Ms Liz McDonald.

[72] The significant meeting of 14 December 2005 took place in Mr Du Preez's office at 29 Mein Street.

[73] Because of the engineer's certificate, Mr Ainsworth's reference to Box 730, the role played by Mr Du Preez at 29 Mein Street as financial controller of Blackbird Energy, the posting of documents to him, his frequent references to Box 730, and Ms Robinson's practice of sending mail to that address since June 2005, the conclusion is that Blackbird Energy invited Mr Vanbeelen's to send correspondence to that address. That was where Mr Du Preez was to be found. It can be seen that Box 730 was the effective address for Blackbird Energy. By April 2006 that was the position. The distinct impression is that Blackbird Energy was quite content with receiving correspondence to Box 730. In 2006, that was certainly the case, for the good reason that Mr Du Preez was concerned to deal with correspondence from Mr Vanbeelen. The available evidence does not suggest that he ever went to the Boundary Street offices, in connection with Mr Vanbeelen's work or claims.

9. THE ORDINARY COURSE OF POST

[74] There being no admissible evidence as to the ordinary course of post between Toowoomba and Spring Hill, attention can properly be paid to the Australian Postal Corporation (Performance Standards) Regulations 1998.

[75] It has long been appropriate to take into account such regulations – see *Citystart Pty Ltd v Deputy Commissioner of Taxation* (2006) WASC 35 at pars 4 and 24.

[76] In rejecting the admissibility of hearsay evidence, especially the information given by a Toowoomba postal employee, I suggested to counsel that the performance standards meant that there was some evidence that two days was the time for delivery in the ordinary course of post. No objection was taken to that view. They provide, as between Toowoomba and Brisbane, that the letter would ordinarily be received within two business days after the day of posting. That was 13 April. If

the posting was too late on 11 April, then that ordinary delivery date was after Easter, on 18 April.

[77] The Regulations refer to delivery either to a street address or to a private post office box.

[78] It was submitted for Blackbird Energy that the *Acts Interpretation Act* did not allow for service by post to a post office box. That is, only a delivery to a street address would be sufficient.

[79] A document can be served by leaving it at the appropriate office of a body corporate. So, where rules of court require an address for service, at which documents in a proceedings may be left, it is not sufficient to nominate a post office box as the address. See *Sarikaya v Victorian WorkCover Authority* BC9706553 (Federal Court – Black CJ), *Croker v Sydney Institute of TAFE* (NSW) 2003 FCA 942, and *Grayprop Pty Ltd v Maharaj International Pty Ltd* [2001] QSC 387.

[80] The other permitted form of service is to send the document by post, telex, fax or similar facility to the appropriate office of the body corporate. Does that necessarily require delivery to a street address, or will delivery to a private post office box be sufficient? For a long time now, a request or invitation to send mail to a post office box of a corporation has been an everyday feature of Australian life. If that is the way a corporation wishes to receive its post, why should it not be a way of sending letters to it, within the meaning of s 39 of the *A.I. Act*?

[81] The question is not without authority. In *Her Majesty's Theatre Pty Ltd v Starstruck Pty Ltd* (1982) 6 ACLR 535, Master Lee of the Supreme Court of Queensland (as he then was) considered a letter that had been sent to a post office box. It was sent to the principal office of the company. The only address given for

the company was the post office box. That was the address in fact used for its business purposes. Service had to be effected according to O39 R52 of the Rules of the Supreme Court. That rule then provided that the document could be sent by post to the registered office, or the principal office, of the company. Master Lee said:

> "... I have considered all of the evidence and material in this case, and it seems in the particular circumstances of this case, there is some merit in the submission of counsel for the plaintiff that the 'principal office' of the defendant company in fact includes that post office box. As this might be thought to be placing an extended meaning on the term 'principal office' I do not need to rule in the plaintiff's favour based on this submission alone. ... Order 39 Rule 52(2) then deals with the situation where a party against whom a judgment is given has no address for service. In such a case a notice under the rules shall be deemed to be properly served on him if left or sent by post ... to the principal office, and if served by post, to have been served at the time at which it would have been delivered in the ordinary course of post. ... It seems to me that on all of the evidence in this case before me, including past communications between the parties and between the defendant and the solicitor for the plaintiff, by correspondence, notice of today's hearing has in fact been served on the defendant within the meaning of Order 39 Rule 52(1)."

[82] In *MacRae v St Margaret's Hospital* BC9907034 (NSW Court of Appeal 18 October 1999) the court was concerned with s 92A of the *Workplace Injury Management and Workers' Compensation Act* 1998. That section said that:

> "… a claim for compensation is served on a person if ;
>
> (a) it is given personally to the person, or
>
> (b) it is delivered or sent by post to the residence or any place of business of the person …"

[83] The hospital's letterhead stated "please address all correspondence to PO Box 381 Darlinghurst NSW 2010". The workman did that. In fact, the correspondence was received. The Court took the view that, in effect, the letter had been sent to the hospital.

[84] Meagher JA so held, saying that service by posting a claim to a post box in such circumstances was at the hospital's "place of business", the post office box being either part of its place of business or a means of access to that place of business.

[85] The majority, Priestley JA and Davies AJA found for the workmen on a different ground. They found that posting to the post office box would be sufficient substantial compliance with the Act. It was accepted that a post office box is not a place of business. As Davies AJA said:

> "20. In my opinion, the sending of a document by post to a business person's post office box is an appropriate and possibly the most appropriate way of sending the document by post to the person's place of business. That is because post office boxes are used by businesses to achieve greater reliability in the delivery of postal articles. … In my opinion, the sending of mail to a nominated post office box is the appropriate and efficient means of sending mail to a business person and it is common practice for businesses to have a post office box and for their customers and other persons dealing with them to use it.
>
> 21. The point I am making is, as it happens, reflected in the letterhead of St Margaret's Hospital which has been tendered in the appeal without objection. That letterhead, after setting out the name of the hospital in large letters, then sets out in small letters the correct name of the employer, and its address. The letterhead then states:-
>
> > 'Please address all correspondence to PO Box 381 Darlinghurst, NSW, 2010.'
>
> …
> Had the trial Judge heard evidence that the employer had nominated the post office box for the receipt of mail, and had she received evidence that the claim form had been sent by registered mail to that address on 23 December 1996, it seems to me inevitable that Her Honour would have concluded that there had been substantial compliance with s 92A. …"

[86] In *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, the High Court was concerned with mail sent to addresses. However, the practical approach to that issue, if applied here, would seem to lead to the same conclusion as the NSW Court of Appeal.

[87] Therefore, the ordinary course of post means that delivery to Box 730 took place on Thursday, 13 April or Tuesday, 18 April. However, it is submitted for Blackbird Energy that the contrary has been proved – see s 39A(1)(b) of the *AI Act*.

10. PROVING THE CONTRARY

[88] The burden of proving delivery otherwise than in the ordinary course of post is on Blackbird Energy. It must be proved that a letter was not delivered at all, or was delivered late. It is not sufficient if it is merely proved that the addressee did not receive a delivered letter. Proof of non-receipt, as opposed to non-delivery, is not permitted. See *Fancourt v Mercantile Credit Ltd*; *Skalkos v TNS Recoveries Pty Ltd* (2005) 213ALR311; (2004) FCAFC 321.

[89] Surprisingly, no staff member of Australia Post was called to give evidence. No one said that the ordinary course of post from Toowoomba to Spring Hill Qld 4004 was otherwise than in accordance with the performance standards. No one said that there had been any difficulties, on this or any other occasion. There is an example in the papers of one of Ms Robinson's letters being received on the next day - see Exs LRA-4 and EMM-4.

[90] The inference is that Australia Post had nothing to say to the advantage of Blackbird Energy.

[91] There is affidavit evidence from employees of Blackbird Energy. Mr Du Preez, the financial manager, said that:

> Blackbird Energy did not receive mail at its registered office, 29 Mein Street, Spring Hill. Blackbird Energy's post box is number 492, not 730.
>
> Box 730 is for other entities related to Blackbird Energy.

> All correspondence (to Blackbird Energy) is deposited at PO Box 492.
>
> It was the practice of Blackbird Energy to clear its box once or twice a week.
>
> If a document was deposited into PO Box 492 it would have been collected and taken to the Boundary Street offices, and not Mein Street.
>
> In the period immediately after 11 April 2006 there were several public holidays and he was uncertain how often Blackbird Energy's box was cleared, if at all.
>
> Blackbird Energy's records show that on 24 April 2006 he wrote to its solicitors enclosing a copy of (the tax invoice of 11 April 2006)
>
> He was unable to determine whether that document was received at the Mein Street offices of Blackbird Energy prior to that date.
>
> Blackbird Energy only accepts that the tax invoice came to its attention on 24 April 2006.

[92] Mr Du Preez was responding to Ms Robinson's affidavit, where she spoke of posting the tax invoice on 11 April to Box 730. Mr Du Preez says that the tax invoice came to his attention on 24 April.

[93] The delivery of mail, and its distribution to Mr Du Preez, is dealt with in the affidavits of Ms E M McDonald and Ms K L Livingstone-Ward. The effect of what they say can be summarised this way:

> (a) Mail to Blackbird Energy and Blackbird Equity is not delivered by the Post Office to their street addresses. Rather, it is delivered to their post office boxes at Spring Hill 4004 – Box 492 and Box 730, respectively.
>
> (b) In fact, the tax invoice was not delivered to Box 730. That is because Mr Du Preez holds the key to Box 730, collects the mail almost every business day, and meets each morning with Ms McDonald. He then hands her documents such as this tax invoice. That is a daily meeting. She did not receive the document in that way.
>
> (c) Non-delivery to Box 730 is explained by Ms McDonald. She says that "the practice of Australia Post is that mail for Blackbird Energy is always sent to PO Box 492 Spring

Hill." In this context, she is to be taken as saying that letters addressed to Box 730 Spring Hill would be delivered to Box 492 Spring Hill, because of Australia Post's practice.

(d) That being so, there are arrangements in place for dealing with documents such as this tax invoice, delivered to Box 492. It was a document that had to be "actioned by Mein Street personnel". In this case, Ms Livingstone-Ward, (described as an administration officer at 290 Boundary Street), had the responsibility of collecting Blackbird Energy's mail from Box 492 each business day. She says that on her return to Boundary Street she sorted the mail and separated any tax invoices relating to capital works and placed them in a tray for collection by Ms McDonald. If she had to go to Mein Street, she would take the mail there that would otherwise be collected.

(e) Ms McDonald's evidence is different. She says that Ms Livingstone-Ward sorted the mail at Boundary Street, and that she, Ms McDonald, would collect mail of this kind once or twice a week. She would then immediately bring it to the attention of Mr Du Preez. Given the dispute with Mr Vanbeelen, she would have done so in this case.

(f) To the extent that Mr Du Preez's affidavit literally said that "it is the practice of Blackbird Energy to clear its box once or twice a week". She takes that as a reference to her practice in collecting the mail from the Boundary Street office.

(g) She recalls that she first discussed this tax invoice with Mr Du Preez on 24 April. It first came to her attention on that day.

(h) She recalls that she had to attend to the collection of GST reports from the Boundary Street offices after Easter, so that she could complete the BAS return for Blackbird Energy. That was due on 28 April. Therefore, she recalls going to the Boundary Street offices on 18, 19 and 20 April. She says that she did not collect the tax invoice on either of those days.

(i) She says that Ms Livingstone-Ward did not deliver Friday's mail on that day. Rather, she would deliver it on the Monday to Mein Street – or on the next business day when Monday was a public holiday. Therefore, she assumes that Ms Livingstone-Ward delivered this tax invoice to the Mein Street offices on 24 April, when she came to process the weekly pays. She therefore believes that the tax invoice was not received at Box 492 before Friday, 21 April.

[94] Neither of those two deponents were cross-examined. It should be accepted that the letter did not go to Box 730. It went to Box 492.

[95] What is meant by the expression "in the ordinary course of post"? A helpful exposition of established principle is given in *Deputy Commissioner of Taxation v Barroleg Pty Ltd* (1997) 25 ACSR. 167 at pp 170-171. See also the decision in *Bellway Corporation Pty Ltd v Ausdrill Ltd*, referred to below:

> "Returning to the main point, what is meant by the ordinary course of post in s 109Y?
>
> This type of phrase has been construed by the courts on occasions in the past. In *Brady v Millgate* (1965) 82 WN (Pt 1) (NSW) 282, the question was whether a notice to quit under the Agricultural Holdings Act 1941 (NSW) which was served by post had been served on the appropriate day. There was extensive evidence as to the postal regulations and what happened when a letter was sent by post to a country address out of Orange. Isaacs J held that the question was a question of fact, but the relevant time is when the postman calls at the address with the letter even though no one may happen to be home on that occasion: at 291.
>
> The High Court had to consider the matter in *Bowman v Durham Holdings Pty Ltd* (1973) 131 CLR 8 ; 2 ALR 193, which concerned when a letter extending an option would have been received in the ordinary course of post. Stephen J, with whom Barwick CJ and Menzies J agreed, said at CLR 14, that 'The ordinary course of post' is 'not, I think, concerned with the particular idiosyncrasies of a particular addressee but rather with the general delivery practices of the postal service. It does not concern itself with particular circumstances of an addressee which may, if known to the postman on his round, deter him from attempting to effect delivery to a particular addressee; for instance the fact that the postman is aware in advance that the addressee's premises will be closed so that he will be unable to effect delivery of a registered letter in accordance with appropriate regulations.' See also *Thomas v Johnson* (1979) ANZ Conv Rep 159, 163, where Roden J said that in the case of a registered letter to a country area outside Gilgandra, where the addressee had to call at the post office to collect his mail, when considering the ordinary course of post of a registered letter, one had to look at the question of fact as to when 'the non-existent but ubiquitous "ordinary reasonable man", this time not in his Clapham omnibus but on his Gilgandra farm' would call at the Post Office: see also *Kemp v Wanklyn* [1894] 1 QB 583.

There have been some cases where it has been held that a provision in a contract or a statute such as s 109Y(b) does not apply where the document has not in fact been delivered, particularly if that fact is known to the person relying on the presumption. See *Lewis v Evans* (1874) LR 10 CP 297, where there was no postal service to the place where the respondent was living and *Re Thundercrest Ltd* [1995] 1 BCLC 117, where the evidence was accepted that the letter had never been received. However, neither of these cases is a problem with s 109Y(b) because the presumption set out in the paragraph yields to the contrary facts being proved. Here, not only is there no contrary evidence, but the evidence is that the notice certainly was received no later than 11.30 am on 23 June 1997.

…

The next matter is the significance of the company's mail being redirected as a matter of ordinary routine to post office boxes. In a case decided under the Companies (Vic) Code, Senior Master Mahony held in *Re Amanatidis Holdings Pty Ltd* (1991) 4 ACSR 253; 9 ACLC 507, that where a statutory demand was allegedly served by security post but the postman left a card at the registered office for the letter to be collected at the post office, there had not been service at the registered office. It may be that that case has no relevance under s 109Y in any event. However, Owen J in the Supreme Court of Western Australia distinguished that case in *Bellway Corp Ltd v Ausdrill Ltd* (1995) 13 ACLC 1663, which, with respect, is a well reasoned and authoritative decision on the present section. His Honour there held in conformity with authority that where the company has an arrangement with the Post Office under which mail is dealt with in a particular way, a statutory demand sent by mail is still properly served. His Honour held that the ordinary course of post ought to include a methodological as well as a temporal application and should relate to the ordinary course of post as it affected the company to which the letter was addressed.

This latter matter may need to be explored further on some subsequent occasion. For instance, if one sends mail to a Cabinet Minister or a judge, where it is commonly known that all mail passes through a security process which causes some delay, it may be that the ordinary course of post qua that person is a day or so longer than with other people. However, to say that, while involving an element of common sense, is contrary to the general principle that ordinary course of post refers to the post service and to how letters generally are received by the hypothetical occupier of the premises concerned.

However, returning to the facts of the instant case, the authorities clearly show that it is up to the person who relies on a provision such as s 109Y(b) to show, on the balance of probabilities, that on the facts the ordinary course of post means that the document concerned was deemed to be delivered on or by a certain day. In the instant case, apart from the two skimpy pieces of evidence to which I have

> already referred, there has been no attempt to establish the question of fact at all. Under the old tests, there would be a scintilla of evidence, but as a question of fact I am not prepared to hold on that evidence, on the balance of probabilities, that the notice was received at a time before the company says it was received, namely 11.30 am on 23 June 1997.

[96] The decision in *Citystart Pty Ltd v Deputy Commissioner of Taxation* (2006) WASC 35 is instructive. There, a statutory demand was addressed to a company's registered office. However, the demand was diverted by Australia Post and put in the company's post office box instead. Master Newnes came to this conclusion:

> "… the deeming provision of s 29(1) of the *Acts Interpretation Act* applies, although the statutory demand was in fact delivered, not to the registered office of the plaintiff, but to its post office box. When delivery would have been effected in the 'ordinary course of posting' is to be determined by when the demand would have been delivered if no special arrangements had existed in respect of mail addressed to the plaintiff; that is, if the letter had no been diverted to its post office box. The date of delivery does not depend upon special arrangements that exist in relation to the delivery of mail to the plaintiff.
>
> Whether the position would be different if the arrangements in question reflected the general delivery practice of Australia Post where an address has a post office box or, even if they did not, where the arrangments were known to the defendant, does not arise in this case as on the evidence neither of those circumstances were the case. I am satisfied on the evidence that in the ordinary course of post the demand would have been delivered on 22 June 2005 and that is therefore the date of service for the purposes of s 459G."

[97] In coming to that conclusion, reference was made to a passage to be found in the judgment of Stephen J in *Bowman v Diam Holdings Pty Ltd:*

> "The post office is the authority which, under a statutory power, determines the ordinary course of post, that is to say, how the letter shall be carried and at what time they shall as a general rule be delivered within any particular district to the persons taken as a body who reside in that district. It appears to me that all the objector has to do under s 100 is look at the Post Office Regulations and to see whether a letter posted at the place, from which he proposed to send the notice, would, according to the ordinary course of post, be delivered to any person resident within the district to which he is posting the notice, as to whom there is no exceptional mode of delivering letters, on or before August 20. He is not bound to inquire whether within the district there may be some people who, by some special arrangement with the post office officials there, made either

> with or without the authority of the post office, had their letters delivered in an exceptional manner. Such a special arrangement would be, not the ordinary, but an extraordinary, course of post."

[98] In this case, the address included a reference to 29 Mein Street, as well as to Box 730. The ordinary course of post would have seen the letter delivered to Box 730, not to Box 492.

[99] We do not know why the post office delivered the letter to Box 492, rather than Box 730. Was the special arrangement made with the Blackbird companies? Was it attempting to be helpful? Did the post office carefully read the correct name of each addressee on the envelopes? Did the post office not take note of the additional street address? Can it be assumed that delivery to a different post office box, but at the same post office, would take the same time? Does its diversion from Box 730 to Box 492 require some additional handling, and take some further time or not? What members of staff were involved in that process? Was that the reason for any delay? There is no evidence about such issues.

[100] The evidence of Ms McDonald and Ms Livingstone-Ward is largely beside the point. The focus should be on Box 730. Blackbird Engery has not proved non-delivery to Box 730. Mr Vanbeelen is entitled to rely upon a deemed delivery in the ordinary course of post, to Box 730. That would have been no later than Tuesday, 18 April. It follows that the response, delivered on 5 May, is out of time.

11. A TIME LIMIT

[101] Section 17(4)(b) imposes a time limit on the making of a progress claim:

> "A payment claim may be served only within … the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied."

[102] Mr Ainsworth's affidavit says that the work at the Pittsworth site was completed in December 2004, while the Inglewood work was completed about March 2005. The accuracy of those assertions was not contested. Therefore, the actual work at those two sites was completed more than 12 months before the payment claim was made.

[103] It was submitted for Blackbird Energy that there were separate contracts for each service station site, for the supply of goods. Therefore, it was submitted, the claims with respect to Pittsworth and Inglewood cannot be maintained.

[104] The contractual arrangements between Mr Vanbeelen and Mr Ainsworth were informal and casual in the extreme. Their business relationship started at Pittsworth, and developed progressively to cover all the sites. Mr Vanbeelen seems to have worked continuously for Mr Ainsworth. It is true that Mr Vanbeelen's accounts, particularly after the arrival of Ms Robinson, were based on a site by site approach. Each was regarded as a different cost centre. His claims for payment were made separately in respect of each site.

[105] On the other hand, especially towards the end of the work, Blackbird Energy made some global payments, not earmarked for any particular site. Most important was the agreement to have Mr Vanbeelen work on a retainer. The work he did for that retainer covered all the sites – or at least, those sites on which work was still being done. The retainer did not discriminate between the sites in any way. On balance, on the information available here, it looks as if there was one contract between them, to do a variety of work which kept expanding.

[106] It may be that, one contract or not, the different job sites means that there was more than one lot of construction work to be done. See the definition of "construction" in s 10(1) of the Act. If there was one contract, but several lots of construction work,

then there could be different periods of time taken to complete each lot of construction work. If that were so, claims with respect to the first two jobs would not be maintainable.

[107] It is necessary to keep in mind the proper meaning to be given to s 17(4)(b). Does it refer to the time when a particular piece of work was done, or to the completion of all work performed under the contract? This issue was dealt with in New South Wales in *Barclay Mowlem Construction Ltd v Estate Property Holdings Pty Ltd* (2004) NSWSC 249. Justice Einstein said that a similar provision in that state meant that the payment claim would be valid as long as any work had been performed under the contract within 12 months prior to the payment claim being made -:

> "It would seem unlikely that the legislature would have intended that a payment claim in respect of any particular item of construction work (as for example the laying of a particular brick) could only be served within the period of 12 months after completion of the work comprising that particular item."

Therefore, in this case, since it seems likely that there was only one contract, it is appropriate to allow the claims based on the Pittsworth and Inglewood work to be maintained.

12. CONCLUSION

[108] It follows that Mr Vanbeelen is entitled to have judgment for the claimed sum of $158,453.34. Counsel may make submissions about the form of order, and costs.