SUPREME COURT OF QUEENSLAND

CITATION:	*Neumann Contractors P/L v Peet Beachton Syndicate Limited* [2009] QSC 376
PARTIES:	**NEUMANN CONTRACTORS PTY LTD** **ACN 009 695 747** (applicant) **v** **PEET BEACHTON SYNDICATE LIMITED** **ACN 117 351 514** (respondent)
FILE NO/S:	BS 9682 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	20 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2009
JUDGE:	White J
ORDER:	**Dismiss the application.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY – where the applicant entered into a construction contract with the respondent – where the applicant made a payment claim against the respondent – where the applicant applies for judgment against the respondent pursuant to s 19(2)(a)(i) of the *Building and Construction Industry Payments Act* 2004 (Qld) – whether the payment claim was valid under the *Building and Construction Industry Payments Act* 2004 (Qld) *Building and Construction Industry Payments Act* 2004 (Qld), s 17(2)(a), s 19(2)(a)(ii) *Building and Construction Industry Security of Payment Act*, 1999 (NSW), s 13 *Building and Construction Industry Security of Payment Act* 2002 (VIC), s 14(3) *Trade Practices Act* 1974 (Cth), s 52 *Baxbex Pty Ltd v Bickle* [2009] QSC 194 *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1

Clarence Street Pty Ltd v Isis Projects Pty Ltd (2005) NSWCA 391; [2005] NSWCA 391
Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd (2005) NSWCA 229
Demagogue v Ramensky (1992) 39 FCR 31
Isis Projects v Clarence Street [2004] NSWSC 714
Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140
Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) 64 NSWLR 462; [2005] NSWCA 409
Protectavale Pty Ltd v K2K Pty Ltd [2008] FCA 1248

COUNSEL: G D Beacham for the applicant
M Drysdale for the respondent

SOLICITORS: Clayton Utz for the applicant
Hopgood Ganim Lawyers for the respondent

[1] The applicant, Neumann Contractors Pty Ltd ("Neumann"), has applied for judgment against the respondent, Peet Beachton Syndicate Limited ("Peet"), pursuant to s 19(2)(a)(i) of the *Building and Construction Industry Payments Act* 2004 (Qld) ("the *Payments Act*"), in the amount of $602,893.20 less $47,200 as certified by the superintendent of the contract, Cardno (Qld) Pty Ltd ("Cardno"), plus interest under a construction contract.

[2] Peet resists Neumann's application for judgment on two bases:

(i) The payment claim made by Neumann was not a valid payment claim under the *Payments Act* because it did not identify the "construction work or related goods and services" to which the claim related as required by s 17(2)(a) of the *Payments Act*. That is because, within the payment claim, there is an amount claimed which is described as:

"Add previously claimed & unpaid $467,775.37"

which is not otherwise explained or particularised.

(ii) Peet is excused from making any payment as claimed (if it be held to be within the *Payments Act*) because Neumann has breached s 52 of the *Trade Practices Act* 1974 (Cth). Peet contends that Mr Kendall Willsher, an engineer who is employed as project manager for Neumann, did not inform Mr Andrew Sly, employed by Peet as a project manager, that the subject payment claim was made pursuant to the *Payments Act.* In the alternative, Mr Willsher deliberately misled Mr Sly into understanding that the payment claim was made under the contract and not under the *Payments Act*.

[3] The parties have prepared a Joint Statement of Facts and Issues in which they set out the facts upon which they can agree and the facts upon which they are unable to agree. The factual controversy is in short compass. Whether the document purporting to be a payment claim under the *Payments Act* is such a claim is a question of construction against the background of the relations between Neumann and Peet. The facts in dispute about the *Trade Practices Act* defence are confined, essentially, to a brief telephone conversation between Mr Sly and Mr Willsher on

3 August 2009. Both men have sworn affidavits about this conversation and both were cross-examined.

[4] In or about June 2008 Neumann entered into a construction contract with Peet to carry out certain road works, stormwater drainage, sewerage reticulation and other works at a residential estate called Trinity Waters Estate at Beachmere. The superintendent nominated under the contract was Cardno. Over the course of the contract and in conformity with the contract, Neumann submitted progress claims to Cardno and, in due course, Cardno issued its certificates to Peet. Peet would then receive tax invoices from Neumann based on the progress certificates which had issued which were sent to Peet's head office and paid from that office. That was the procedure for progress claims 1 to 11.

[5] On 30 July 2009 Mr Willsher caused a payment claim for work executed to 30 July 2009, described as "Payment Claim No. 12" in the sum of $602,893.20, to be sent by ordinary pre-paid post to Peet at its Brisbane GPO box number. A copy was also sent to Cardno. The letter, under cover of which the claim and supporting documentation were sent, was written on Neumann letterhead and in the top left-hand corner indicated that it was sent to Peet at its GPO box number address in Brisbane. Immediately beneath appeared:

> "Copy to:
>
> Stacy Curtis
>
> Cardno (Qld) Pty Ltd
>
> Level 11, North Tower,
>
> 515, St.Paul's Terrace,
>
> Fortitude Valley
>
> QLD 4006"

The letter stated, in part:

> "Please find enclosed our payment claim and supporting information for work completed at the above site to the end of July 2009."

The letter continued that the payment claim included copies of certain documents and contained a request for early attention to the claim as well as an invitation to contact Mr Willsher should any further information be required.

[6] A statutory declaration as required before the superintendent was required to issue a progress certificate was also included. The payment claim, leaving out the formal parts at the top of the document, provided:

"

Contract Summary	Amount
Original Contract Sum	$ 4,250,601
Add - VARIATIONS	$ 715,660
Adjusted Contract Sum (to date) (excluding GST)	**$ 4,966,261**
Plus 10% GST	$ 496,626
Adjusted Contract Sum (including GST)	**$ 5,462,887**

Payment Claim Summary	Amount
Value of Work Completed to Date	$5,320,019.94
Less Retention	**Nil.**
Less Previous Claim (ex. GST)	$5,239,710.58
Payment Claim No. 12 Sub-Total	**$ 80,309.36**
Add previously claimed & unpaid	$ 467,775.37
AMOUNT NOW DUE (excluding GST)	**$ 548,084.73**
Plus 10% GST	$ 54,808.47
TOTAL AMOUNT THIS PAYMENT CLAIM (including GST)	**$ 602,893.20**

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

[7] Section 17(2)(c) of the *Payments Act* provides that a payment claim:

> "must state that it is made under this Act".

As is clear on the face of the document, such a statement appears at the foot of the page. It is in a font slightly smaller than the font used in the body of the claim.

[8] Mr Sly deposed that within half an hour of receiving the letter and enclosures he telephoned Mr Willsher to discuss it. Mr Willsher was then working on the construction site and Mr Sly confirmed that he could hear noise in the background. Mr Willsher said in his oral evidence that it was not the optimum situation for a telephone conversation. Mr Sly's version of the conversation is set out in para 16 of his affidavit.

> "(a) I said it was Andrew, and that I was just phoning as a courtesy because we had received PC12. I said that as there is a Superintendent under the Contract, the Applicant should have sent PC12 to the Superintendent. I told Mr Willsher that I would be sending a letter to him to this effect;

(b) I expressed that I could not understand why we received PC12 because these were previously sent directly to Cardno and suddenly we were receiving wads of documents that we had never received before. Mr Willsher didn't say much about this in response;

(c) I expressed that I was unhappy that we had been sent PC12 directly and Mr Willsher said that it was because Cardno had not been dealing with them satisfactorily. It was my understanding that some claims in the past had been rejected by Cardno;

(d) I asked Mr Willsher to send a copy of PC12 to Cardno that was addressed to Cardno. He said he thought that a copy had been sent already. I said words to the effect, "*can you send a copy of the payment claim addressed to Cardno.*" I also said to him words to the effect, that he "*needs to re-send it to Cardno as they are the ones who have to process the claim*" and he said he would;

(e) We did not discuss the content of PC12 and as stated above, this was normal practice for all Progress Claims. There was never any discussion by either myself or Mr Willsher that PC12 was a claim made under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the *BCIPA*"). At the time, and at all times prior to receiving the letter of demand dated 21 August 2009, I was unaware that it was a claim made under the Act; and

(f) Our phone conversation then drifted into general matters regarding the Project that were not specific to PC12. We spoke for approximately 5 minutes and the call ended amicably."[1]

[9] In his affidavit in support of the application for judgment, that is, before receiving the above affidavit by Mr Sly, Mr Willsher deposed that on 3 August 2009 he received a telephone call from Mr Sly and during that conversation Mr Sly said words to the effect that "he had received Neumann's Payment Claim dated 30 July 2009".[2] After the receipt of Mr Sly's affidavit Mr Willsher swore a second affidavit confirming that he did receive a telephone call from Mr Sly on 3 August 2009 as he had previously indicated, adding:

"(b) Andrew [Sly] did say to me that he thought the claim should have been sent to Cardno. I told him words to the effect of a copy had already been sent to Cardno at the same time as it was sent to Peet. I did not tell Andrew [Sly] that I would send another copy to Cardno (because one had already been sent to it);

(c) I told Andrew that we were sending the claim because we were having difficulties with the certification of payment

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1 Affidavit of Andrew James Sly filed 9 October 2009, para 16.

2 Affidavit of Kendall John Willsher filed 2 September 2009, para 14.

> claims (by which I intended to refer to the difficulties raised during previous discussions)."

Mr Willsher exhibited his contemporaneous diary note of that conversation.

[10] Both men explained that they had a good working relationship and had discussed matters to do with the contract amicably in the past.

[11] In cross-examination Mr Willsher said that the reason for bringing the claim under the *Payments Act*:

> "… was to endeavour to get a payment schedule out of Peet that explained what had been certified and what hadn't been certified."[3]

As Mr Willsher had explained in his second affidavit, towards the end of the project he and Mr Sly had discussed difficulties that Neumann had with Cardno's certification of payment claims. A main problem, according to Mr Willsher, was that there was no clarity in the certificates about what work was being certified and what work was not certified and that that issue had been discussed at a meeting in mid-December 2008 at Peet's offices. Parts of the claims had been rejected by the superintendent over a number of months without, according to Mr Willsher, adequate, or any, reasons.

[12] Mr Willsher said that Mr Sly was disappointed that he had received a payment claim for $600,000 "without so much as a courtesy phone call first".[4] Mr Sly reminded him that the claim should have been sent to Cardno as superintendent. Mr Willsher agreed with Mr Drysdale, counsel for Peet, that he did not explain to Mr Sly that the claim was sent to Peet because it was not a claim under the contract but a claim under the *Payments Act*. He also agreed that he did not say expressly that the reason it was sent to Peet was so that Peet would have to provide a payment schedule. When Mr Sly said that he was disappointed that the payment claim had been sent to Peet and could not understand why it had been sent to Peet, Mr Willsher said he told him:

> "… the reason we sent it to him was because we were not getting anywhere in negotiations with Cardno."[5]

[13] Mr Willsher said that when Mr Sly asserted that the claim had to go to Cardno he told him that a copy had gone to Cardno. He could not recall Mr Sly saying that he needed to "resend" it to Cardno because Cardno had to process the claim under the contract. He denied that he had deliberately intended that Mr Sly would not understand that the payment claim was made pursuant to the *Payments Act* and that it was an opportunity "to slip in the back door":

> "No, not at all. I was out on site. It was busy, noisy, it wasn't the ideal location to be having a long conversation with somebody and to be quite honest, the thought never came into my head."[6]

[14] Mr Willsher received a letter by email from Mr Sly shortly afterwards on the same day to which he did not reply. He thought that the subject matter had been dealt with in the telephone conversation. In that letter, Mr Sly referred to the

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3 Transcript 1-6 ll 11-15.
4 Transcript 1-7 ll 52-53.
5 Transcript 1-8 ll 28-30.
6 Transcript 1-11 ll 39-42.

correspondence of 30 July 2009 "purporting to be payment claim number 12 …" and continued:

> "As you are aware, Cardno (Qld) Pty Ltd are the superintendent under the contract and we therefore assume that your correspondence has been addressed and forwarded to us in error.
>
> To this end, we suggest that you forward your correspondence directly to Cardno (Qld) Pty Ltd who we expect will assess the same in due course."[7]

[15] Mr Sly was in his office in the city when he telephone Mr Willsher on 3 August 2009. He agreed that when he received the progress claim under cover of the letter of 30 July 2009 he looked at the payment claim, noted the amount and then "shut it up and rang Ken".[8] It was drawn to Mr Sly's attention that about a centimetre below the figure of $602,893.20 was the statement:

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

Mr Sly said that he did not look at that line but only at the amount.

[16] It became apparent when Mr Sly's attention was drawn to the wording of cl 42 of the contract that he had laboured under a misunderstanding as to what was required for notification of claimsclaims. Clause 42.1 provides, relevantly:

> "At the times for payment claims stated in the Annexure … the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor …"

Mr Sly conceded that he had understood that a payment claim from the contractor had to be "addressed to" Cardno as opposed to "delivery to" and his misunderstanding was carried forward into the letter of 3 August 2009. It was not suggested that Mr Willsher had that misunderstanding.

[17] Mr Sly conceded that Mr Willsher told him that he had forwarded the payment claim directly to Peet "for a reason". He was emphatic that he had asked Mr Willsher to "readdress and resend" the payment claim to Cardno. Mr Sly agreed that he had noted that the claim had been "copied to" Cardno as was indicated on the covering letter, and that Mr Willsher had told him that it had been sent to Cardno when he raised the topic. Mr Sly sent his copy of the claim to Cardno. He said he did not tell Mr Willsher that he was planning to do so but Mr Willsher said he did tell him.[9] To a large extent this exchange was due to Mr Sly's misunderstanding that the contract required a payment claim from Neumann to be "addressed to" rather than "delivered to" Cardno. Mr Sly said that by sending Peet's payment claim to Cardno he hoped to expedite the claim being dealt with in a timely fashion.

[18] Peet made no response to the payment claim by way of serving a payment schedule pursuant to s 18(1) of the *Payments Act* and, on Neumann's case, after the expiration of 10 days, Peet became liable to pay the claimed amount. Peet did not

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7 Affidavit of Kendall John Willsher filed 2 September 2009, Exhibit 4.

8 Transcript 1-14 ll 57-59.

9 Mr Sly's evidence at transcript 1-20 ll 9-10; Mr Willsher's evidence transcript 1-9 ll 17-18.

do so and thereby became liable pursuant to s 19(2)(a)(i) to judgment being entered against it.

Did the payment claim identify the construction work to which it relates?

[19] The object of the *Payments Act* is to ensure that a person who undertakes to carry out construction work under a construction contract is entitled to receive and is able to recover progress payments.[10] That object is achieved, *inter alia*, by establishing a procedure which involves the making of a payment claim by the person claiming the payment; the provision of a payment schedule by the person by whom the payment is payable; and the referral of a disputed claim or a claim that is not paid to an adjudicator for decision.[11]

[20] By s 17 a person entitled to a progress payment may serve a payment claim on the person who, under the construction contract, is or may be liable to make the payment. By s 17(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; … and
>
> (c) must state that it is made under this Act."

[21] It is common ground that the contract is a construction contract and that the claim states that it was made under the Act. Peet denies that the payment claim identified the construction work to which it relates. Payment claim 12, as set out above,[12] is for $80,309.36. After that line appears "Add previously claimed & unpaid" and the amount of $467,775.37. When GST is added, as Mr Drysdale explained, that sum constitutes approximately five-sixths of the total amount of that payment claim. Accordingly, this is not the kind of payment claim where one item amongst others creates some difficulty for a respondent so that the appropriate response in the schedule would be to decline payment for it and mention the reason. Mr Beacham, for Neumann, submitted that Peet can look at the supporting documents accompanying the claim to ascertain the work previously claimed for but which Peet had not paid and then respond. It is conceded by Mr Beacham that Peet would be unable to identify what it had paid and for what work or goods from that documentation but should be able to work it out from Peet's own records.

[22] Mr Beacham submitted that the authorities support such a description as contained in progress claim 12 as falling within the requirement to "identify the construction work … to which the progress payment relates". New South Wales has comparable legislation and a provision materially identical to s 17 of the *Payments Act*.[13] Of that provision Hodgson JA said in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*:[14]

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10 *Building and Construction Industry Payments Act* 2004 (Qld), s 7.

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

12 At [6]. Previous claims may be included: *Building and Construction Industry Payments Act* 2004 (Qld), s 17(6).

13 *Building and Construction Industry Security of Payment Act*, 1999 (NSW), s 13.

14 (2005) NSWCA 229 at [25].

> "In my opinion, the relevant construction work … must be identified sufficiently to enable the respondent to understand the basis of the claim:"

[23] Basten JA, generally agreeing with Hodgson JA, said[15] that the expression "identify":

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

[24] Mr Beacham referred to *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*[16] to establish that the test of identification is not an exacting one. Hodgson JA said:[17]

> "In my opinion, a document which purports to be a payment claim does not fail to be a payment claim, within the meaning of the Act, merely because it can be seen, after a full investigation of all the facts and circumstances, not to successfully identify all the construction work for which payment is claimed. This could be the case, for example, if there is some typographical omission or other error in relation to one of the large number of items included in the claim: and the question whether or not the other party, by reason of its knowledge of the project, would have been able to fill in or correct that error could be one depending on a great deal of evidence concerning the circumstances of the case. In my opinion, it is inconceivable that it was the intention of the legislature that the existence of a payment claim under the Act should depend on that kind of consideration.
>
> It is true that, if a payment claim does not identify the work in a way comprehensible to the respondent to the claim, the respondent will be in difficulty in formulating a payment schedule, and this may give rise to further difficulty in any adjudication proceedings … But in my opinion, if a respondent is unable to identify some of the work in respect of which a payment claim is made, it can in the payment schedule say it does not propose to make any payment in respect of that work because it cannot identify the work, and because for that reason it disputes that the work was done or done to a standard justifying payment, or was within the contract or within any variation of it, …
>
> That is, I do not think a payment claim can be treated as a nullity for failure to comply with section 13(2)(a) of the Act, unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made."

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15 (2005) NSWCA 229 at [42].
16 [2005] NSWCA 409.
17 [2005] NSWCA 409 at [34].

[25] Similarly Santow JA observed[18] that the requirements underlying s 13(2)(a) are satisfied by "a relatively undemanding test" although, as his Honour added, "still one with some content" and that it is an objective and not subjective test as to whether the payment claim sufficiently identifies the construction work the subject of the claim. The evaluation of the sufficiency of the identification takes into account the background knowledge of each of the parties derived from their past dealings and exchanges of documentation.

[26] In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd*[19] Palmer J summarised how a claimant might comply with the New South Wales equivalent of s 17 of the *Payments Act.* His Honour said, relevantly, that:[20]

> "... a payment claim which does not, on its face, purport in a reasonable way to:
>
> - identify the construction work to which the claim relates; or
> - indicate the amount claimed; or
> - state that it is made under the Act
>
> fails to comply with an essential and mandatory requirement [of the Act] so that it is a nullity for the purposes of the Act".

His Honour observed:[21]

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

[27] Mr Drysdale referred to *Clarence Street Pty Ltd v Isis Projects Pty Ltd*[22] where Mason P set out a passage from the trial judge:[23]

> "[37] In principle, I think, the requirement in section 13(2)(a) that the payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where,
>
> (1) the payment claim gives an item reference which, in the absence of evidence to the contrary, is to be

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18 [2005] NSWCA 409 at [48].
19 [2006] NSWSC 1.
20 [2006] NSWSC 1 at [41].
21 [2006] NSWSC 1 at [44] – [45].
22 [2005] NSWCA 391.
23 McDougall J at [33].

taken as referring to the contractual or other identification of the work;

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

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

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

[28] In *Protectavale Pty Ltd v K2K Pty Ltd,*[24] a decision under the *Building and Construction Industry Security of Payment Act* 2002 (VIC), s 14(3) of which is the same as s 17, Finkelstein J observed:[25]

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

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

> "… any identification of the work previously completely and paid for and the work (apart from the variations) to which the invoice relates.
>
> … The only information provided is that the amount is referable to the "Contract Sum" and "Payments Received"".[26]

[29] A similar observation might be made of this payment claim. Because the past payments by Peet have been made on the certificate of the superintendent on receipt of each invoice, Peet would have had to go to considerable effort to reconstruct the previous 11 claims so as to prepare a responsive payment schedule. As Daubney J observed in *Baxbex Pty Ltd v Bickle*[27] applying the approach of McDougall J in *Isis Projects v Clarence Street*[28] and Palmer J in *Multiplex Constructions Pty Ltd v Luikens*:[29]

> "Precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute."

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24 [2008] FCA 1248.
25 [2008] FCA 1248 at [12].
26 [2008] FCA 1248 at [14].
27 [2009] QSC 194.
28 [2004] NSWSC 714.
29 [2003] NSWSC 1140 at [76].

Mr Beacham argues, however, that the *basis* of the claim is evident on the face of the document, that is, it is a claim for all work for which Neumann has previously claimed save for the work for which it has been paid. In order for Peet to decide whether it should respond it would need to engage in a careful analysis of the schedules exhibited to the summary set out the work which was undertaken under the contract over some 25 pages and marry the work with the amounts paid on the progress certificates and arrive at the outstanding items. Requiring a respondent to a payment claim to undertake that kind of research which would be subject to error and within the time constraint of 10 days under the *Payments Act*[30] leads me to conclude that the payment claim does not identify the construction work to which that claim relates and does not fulfil the requirements of s 17(2) of the *Payments Act*.

The *Trade Practices Act* defence

[30] Although the finding that the payment claim does not comply with s 17 of the *Payments Act* makes it unnecessary, it is appropriate to say something about the *Trade Practices Act* defence. There is no dispute about the principle to be applied. In *Demagogue v Ramensky*[31] Black CJ said:

> "Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of "mere silence" or of a duty of disclosure can divert attention from that primary question. Although "mere silence" is a convenient way of describing some fact situations, there is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed."[32]

[31] There was no fiduciary relationship between the parties. Their representatives were men who had a good working relationship and who were responsibly dealing with an issue which had arisen in the course of the contract. Their conversation took place against the background that concern had been expressed by Neumann about Cardno's handling of its superintendent role dealing with its claims. The complaint is that Mr Willsher did not emphasise to Mr Sly that payment claim 12 was a payment claim under the *Payments Act* and not under (or merely under) the contract. Mr Willsher was on the construction site. He knew that the claim had stated at its foot that it was brought pursuant to the *Payments Act*. That regime was familiar to them both. There was no suggestion that Mr Willsher laboured under the same misunderstanding as Mr Sly about cl 42 of the contract and knew that there was no need for a payment claim to be "addressed" to Cardno to constitute a contractual claim. He was, therefore, unlikely to have responded to Mr Sly that he would readdress it to Cardno as Mr Sly now seems to think he did. I am not persuaded Peet has discharged its onus on the *Trade Practices Act* issue.

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30 *Building and Construction Industry Payments Act* 2004 (Qld), s 18(4)(ii).

31 (1992) 39 FCR 31.

32 (1992) 39 FCR 31 at 32.

Conclusion

[32] Since Neumann has not succeeded in proving that payment claim 12 identified the construction work to which it related within the meaning of s 17 of the *Payments Act* , Neumann's application for judgment is dismissed.

[33] Neumann should pay Peet's costs unless it successfully argues for some other order.