

JUDGMENT : Bergin J : Supreme Court of New South Wales : 25th September 2003.

1 The plaintiff, Paynter Dixon Constructions Pty Limited, seeks declarations in respect of the appointment of an adjudicator, Ian Hillman, the second defendant, under the *Building and Construction Industry Security of Payment Act 1999 (the Act)*. The appointment was in respect of a Payment Claim made by JF & CG Tilston Pty Limited, the defendant, in respect of electrical services work it carried out at the Ex-Services Club in Orange, New South Wales (the Club) in late 2002. The plaintiff claims that the second defendant does not have jurisdiction to determine the adjudication application and seeks a permanent injunction preventing the determination of the adjudication application.

The Facts

2 There was quite a deal of evidence in relation to the dealings between the parties, however the salient facts can be stated relatively shortly. In August 2002 the plaintiff issued an Invitation to Tender for electrical works for a proposed three level car park at the Club, the building for which it was in the process of tendering. The plaintiff claims that this Invitation was for the purpose of obtaining "indicative" prices from prospective subcontractors to assist it with its tender to the Club. The defendant responded to that Invitation by the required date, 6 September 2002, with a tender price of \$158,785.

3 The principal of the defendant, John Tilston, gave affidavit evidence that on 4 October 2002 he was present at the Bowling Club in Orange having a drink with Alan Dent, the Project Manager for the plaintiff, when Mr Dent said to him: *We have been successful in our tender with the carpark project. We want you to do the electrical work. We will start the project in late October and early November. You have been successful with your tender, and I look forward to working with you again.*

4 On 16 October 2002 the defendant received another written communication from the plaintiff in the form of a letter inviting it to tender for the electrical works for the car park and requesting that it be submitted to the plaintiff in the required form by 24 October 2002. That letter enclosed the Particulars of Engagement, including a list of 16 items in the description of works, and advised that the electrical works would commence in about December 2002. The defendant responded by letter dated 24 October 2002 in which it tendered for the works at \$161,315. The reason for the increase in the tender price seems to have been the inclusion of an additional item, "temporary services – site shed etc." costed at \$3,800 and a \$200 increase in the item "provision of general power services".

5 On 27 October 2002 the plaintiff requested the defendant to provide certain of the electrical works included in the description of works for which it had tendered. The defendant's workmen went onto the Club site and, after an induction process with the plaintiff's site manager, provided those services in October and November 2002. This work was not the subject of any formal written order or documentation between the plaintiff and the defendant, however the evidence is that it is quite common in the building industry for project managers or site foremen to ring and request early starts on sites before contract documents are signed. On 31 October 2002 the defendant received a fax from the plaintiff in the following terms: *Please find attached for your information and records, a copy of Attachment "D" (formed part of Paynter Dixon's Tender Documents). The Attachment is to be completed and returned to Paynter Dixon's Head Office by close of business on Friday 1 November 2002.*

Completion and return of Attachment "D" is required, as it is to be incorporated into the Contract Documents.

Should any further information be required, please contact me on the phone number listed below.

6 On 5 November 2002 the defendant found out that the plaintiff was apparently speaking with another electrical firm, Ifflands, and in consequence Mr Tilston telephoned the plaintiff's contracts administration manager, Gerard Siddle. Mr Tilston complained that the plaintiff was apparently negotiating with another firm after it had advised the defendant that it had been successful in its tender. Mr Tilston's secretary gave evidence that Mr Dent telephoned later that day and asked her to tell Mr Tilston "not to worry" and that "everything is alright". Mr Dent could not recall this telephone call in his evidence and denied that he had the conversation with Mr Tilston at the Bowling Club on 4 October 2002 in the terms as alleged by Mr Tilston, although he did agree that he did have a conversation with him on that date at that venue.

7 I am satisfied that Mr Dent did have the conversation with Mr Tilston on 4 October 2002 at the Bowling Club in the terms alleged by Mr Tilston. That satisfaction stems in part from a file note made by Mr Siddle on 5 November 2002 in the following terms: *Electrical Services – spoke to John Tilston – Concerns over package being re-tendered – informed of position and PDC's procedures on tendering - spoke to A.D. about it - contacted Tilston to allay concerns.*

8 The allaying of the concerns was the telephone call made by Mr Dent to Mr Tilston's secretary in which he advised that "everything is alright". If Mr Tilston had not been informed that the defendant was the successful tenderer there would have been no occasion or necessity for the plaintiff to "allay" his concerns. That finding does not mean that there was a concluded binding contract between the parties. Consideration of many other matters would be necessary before that could be decided.

9 In any event, the defendant continued to provide the electrical services at the Club in November 2002. However on 5 December 2002 when Mr Tilston attended the site Mr Dent informed him that the defendant was not successful with its tender. Mr Tilston immediately informed Mr Dent that he was going to take action against the plaintiff. In a letter bearing the date 25 November 2002 but posted on 5 December 2002, the plaintiff wrote to

the defendant in the following terms: "We thank you for your tender and we advise that you have been unsuccessful on this occasion. We look forward to the opportunity of inviting you to tender on future projects".

- 10 The contract for the electrical services, excluding that part of the works that the defendant had already completed, was issued to Ifflands. Mr Dent agreed that the works carried out by the defendant were "part of the very contract" upon which the electrical contractors had tendered (tr. 5).

The Payment Claim/Appointment of Adjudicator

- 11 The evidence does not disclose what, if anything, occurred between the parties from late 2002 to 30 May 2003, however, on 30 May 2003 the defendant issued to the plaintiff a Payment Claim consisting of four documents. The contents of these documents have been the subject of detailed submissions and it is important to set them out in full. The first document in the series is headed "Payment Claim" and included the following:

Tender Price 13th September 2002 \$158,785
 Price Including Variation E1 submitted 24th October 2002 \$161,315
 Less Credit Payment Claim Schedule B \$130,790
 \$ 30,525
 Plus Payment Claim covers work carried out as per Attachment "A" \$ 3,938
TOTAL CLAIM \$ 34,463

This claim is made under the terms of the N.S.W. Building and Construction Industry Security of Payment Act 1999.

- 12 The second document was a tax invoice in the following terms:

Description Amount
 Tendered price 13th Sept 2002 \$158,785
 Price including Variation E1 submitted 24th Oct. 2002 \$161,315
 Less credit for work not required \$130,790
 Amount now due \$ 30,525 \$27,750
 Plus Payment Claim covers work Carried out as per Attachment "A" \$ 3,580
This claim is made under the terms of the NSW Building and Construction Industry Security of Payment Act 1999.
 GST \$ 3,133
 Invoice Total: \$34,463

- 13 The \$27,750 amount in the tax invoice is curious. It is not clear on the evidence why the reduction of \$2,775 was made to the amount of \$30,525 alleged to have been "now due". The third document was Attachment "A" which was in the following terms:

This attachment is the supporting document to our payment 30/5/03. Claim No. 1 attached.

It covers all work under the contract.

28.10.02-29.10.02

Disconnections to make ready:

Wiring and connections of final sub-circuit to:

Builders Supply Boards

Site Office – Store Room – Lunch Room – Toilet Block

Installed double W.P. power point for water cooler

Tagged and tested all circuits

Labour 18 man hours @ \$40.00 = \$ 720

8.11.02

Tested and tagged worksheds and tools.

Labour 3 man hours @ \$40.00 = \$ 120

13.11.02 to 29.10.02

Disconnected and removed flood lights and poles from carpark to make way for new carpark project.

Labour 9 man hours @ \$40.00 = \$ 360

Total Labour \$1,200

Contracting Materials \$2,260

Scissor Lift Hire \$ 120

\$3,580

G.S.T. \$ 358

TOTAL \$3,938

This claim is made under the terms of the N.S.W. Building and Construction Security of Payment Act 1999.

- 14 The fourth document was Attachment "B" which was in the following terms:

This attachment is the supporting document to our Payment Claim dated 30/5/2003.

It covers all work under the contract less credit for work not performed.

The credit has been calculated as follows:

(1) Estimated saving in labour not required. Hours 1135 @ \$40.00 per hour \$45,400

(2) Estimated savings in materials not required. \$64,500

Contracting Materials – Switchboard – Sub-mains Light Fittings etc.

(3) Estimated savings in overheads on work not required \$9,000

Credit \$118,900

G.S.T. \$ 11,890

TOTAL CREDIT \$130,790

This claim is made under the terms of the N.S.W. Building and Construction Industry Security of Payment Act 1999.

- 15 On 2 June 2003 the plaintiff wrote to the defendant in the following terms:

Paynter Dixon acknowledges receipt of your Company's Claim (Attachment "A") dated 30 May 2003, relating to temporary works undertaken on the above mentioned Project.

Please find attached for your information and records, a copy of Paynter Dixon's Statutory Declaration Form. This form is to be completed and submitted with each Progress Claim in relation to works on the above mentioned Project. Please complete the form in relation to your Company's recently submitted Progress Claim No. 1 dated 30/5/03 – received 30/5/03. The form is to be completed and returned to Paynter Dixon's Head Office by close of business on Tuesday 3 June 2003.

It is to be noted that original claims/invoices are to be submitted to Paynter Dixon's Head Office by no later than the 28th day of each month.

In addition to the above, please provide copies of signed off day labour dockets for the temporary works being claimed. Substantiation of material costs is also required. Relevant details are to be submitted with the completed Statutory Declaration Form.

Should any further information be required, please contact me on the phone number listed below.

- 16 On 5 June 2003 the plaintiff wrote to the defendant in the following terms:
Further to our fax dated 2 June 2003, relating to temporary works undertaken on the above mentioned Project, Paynter Dixon is still awaiting submission of the following:
- Completion and return of the Statutory Declaration Form to cover the claim for temporary works;
 - Copies of signed off day labour dockets for the temporary works being claimed;
 - Details to substantiate material costs associated with the works.
- To assist with the processing of the claim relating to the temporary works, please submit the relevant details to the Paynter Dixon's Head Office (Fax 9716 6870) by close of business today.
Should any further information be required, please contact me on the phone number listed below.
- 17 On 5 June 2003 the plaintiff forwarded to the defendant a document entitled "Progress Claim Reduction Advice (Payment Schedule)" in the following terms:
This is a payment schedule under the building and construction industry security of payment act 1999
Please be advised that your Progress Claim has been rejected/reduced as follows:
Total Value Claimed as Complete \$34,463.00 incl. GST
(Payment Claim)
Total Value of Work Approved as \$ 2027.30 incl. GST
Complete
Value Current Claim Reduced by: \$32,435.70
The amount of the payment (if any) that the Respondent proposes to make is \$2027.30 incl. GST.
This amount is less than the claimed amount for the reasons set out in the Schedule. The Respondent is withholding payment for the reasons set out in the Schedule.
- 18 In the Schedule was written: "Refer to attached letter to claimant dated 5/6/03". That letter was in the following terms:
Reference is made to a document received from you on 30/5/03 headed "Payment Claim" for an amount of \$34,463.00 with reference to the "N.S.W. Building and Construction Industry Security of Payment Act 1999".
We acknowledge that you were engaged to complete some temporary electrical works to sheds in late October and early November 2002 some seven months ago. This was the full extent of your engagement on the project and you have completed no work on the site since. Your offer for the construction electrical works was not accepted and such works were awarded to others. Hence no construction contract between us exists beyond that covering the temporary electrical work.
Our assessment of your claim is:-
In respect to Attachment A to your claim
- labour as claimed 1200.00
 - scissor lift hire 120.00
 - materials (you did not respond to our requests of 2nd and 5th /6/03 for a breakup so we have assessed a value of \$523.00 being 120 lm of cable @ 2.00, 1 no waterproof GPO @ 35.00, 4 no circuit breakers @ 12.00 and 200.00 for sundries) 523.00
 - GST 184.30
- 2027.30
In respect to the rest of your claim
As no construction contract exists and as no construction work has been completed nil
- 19 On 10 June 2003 the defendant responded to the plaintiff's letter of 2 June 2003 and submitted a list of the materials and prices as requested for a total price of \$2,260. The defendant also submitted a Statutory Declaration.
- 20 On 19 June 2003 the defendant completed a form entitled "Adjudication Application" on the letterhead of the company The Australian Solutions Centre Pty Limited. That Application included the following: I/we the Claimant make application under Section 17 of the Building and Construction Industry Security of Payment Act NSW 1999, for the nomination of an adjudicator to determine a disputed payment claim.
- 21 The Application was served on the plaintiff and referred to the defendant as claimant and to the plaintiff as respondent. It also referred to the total Payment Claim amount as "\$31,330 + GST (\$34,463)" and the plaintiff's Payment Schedule dated 5 June 2003 in the amount of \$2,027.30.
- 22 By letter dated 19 June 2003 the plaintiff wrote to the defendant in the following terms:

Thankyou for the faxed break up received on 11/6/03 which you forwarded for the material component of your invoice dated 30/5/03 following our two requests for same.

We have checked the rates for the materials provided and found that you have elected not to pass on the benefit of the customary trade discount which you would have received.

In regard to the quantities we note that we are at a disadvantage in assessing your claim as you have only invoiced for the work some seven months after it was completed by you. As the works were of a temporary nature and as considerable activity has taken place since they were completed we have no way at this late stage of checking your quantities.

In view of the above and of your past dealings with our company we can only assume the claimed quantities to be correct and accept the rates which you have chosen to apply to them.

Accordingly on the basis of information which was not available to us at the time of our issue of the payment schedule on 5th June 2003 we now confirm that the amount which we propose to pay should be increased to \$3,938.00 including GST.

- 23 On 20 June 2003 the plaintiff wrote to the manager of The Australian Solutions Centre Pty Limited advising it had received what purported to be an Adjudication Application on 19 June 2003. The letter then stated: *Tilston purport to make an application under Section 17 of the Building and Construction Industry Security of Payment Act NSW 1999 (Act) for the nomination of an adjudicator to determine what is alleged to be a payment claim.*

Put shortly, Paynter Dixon Constructions Pty Limited (PDC) say that:

- No valid claim has been made by Tilston; and
- You have no jurisdiction to appoint an adjudicator.

Part 1 – PDC agree to pay Tilston the entire amount claimed

The first part of Tilston's claim seeks payment of \$3,938 in relation to certain electrical works carried out under an oral arrangement with PDC. While we do not concede that Tilston has provided everything necessary for PDC to properly assess that claim PDC has agreed that it will pay \$3,938 to Tilston (the entire amount claimed) and payment in that amount will be dispatched by PDC on Monday 23 June 2003. We enclose a copy of our letter to Tilston in that regard.

In these circumstances there is no longer any issue for you to determine if indeed there was ever any jurisdiction.

Part 2 – No Construction Contract and No Construction Work

In relation to the second part of the claim made by Tilston, PDC say that there is no proper claim under the Act. The Act applies (at Section 7) to any 'Construction Contract'. PDC say that there is no construction contract within the meaning of the Act between itself and Tilston. PDC and Tilston did not ever enter into a contractual relationship for the amounts claimed by Tilston. Tilston tendered for work and were unsuccessful. The Act does not provide for claims for an expectation loss. Secondly, PD say that no payment schedule within the meaning of the Act has been served on it because pursuant to Section 13(2) Tilston has not carried out any 'construction work'.

Tilston were an unsuccessful tenderer, the work was carried out by another contractor and in these circumstances Tilston is not entitled to make any claim under the Act. Accordingly, you have no jurisdiction to appoint an adjudicator under Section 17. Respectfully, we put you on notice that should you ignore this letter and attempt to proceed to appoint an adjudicator to determine the claim that has been sent to you by Tilston we put you on notice that we will instruct our solicitors to take immediate Court action to prevent any nomination or adjudication taking place.

- 24 On 25 June 2003 the second defendant notified the plaintiff and the defendant that he had accepted the appointment as adjudicator. The plaintiff commenced these proceedings on 27 June 2003. On 2 July 2003 I granted an interim injunction restraining the second defendant from proceeding with the adjudication and staying the adjudication for the reasons set out in my judgment of that date.

The Act

- 25 The Act came into force on 26 March 2000 and was amended by the *Building and Construction Industry Security of Payment Amendment Act 2002 (the amending Act)*, which commenced on 3 March 2003. The Act deals with transitional provisions the effect of which is that the Act, as amended, is applicable in this case because the Payment Claim was served after the commencement of the *amending Act*.

- 26 The object of the Act is to provide a means by which any person who has undertaken to carry out "construction work" (a term defined in the Act) under a "construction contract" may recover a "progress payment" (terms also defined in the Act) without limiting other entitlements under such a contract (s. 3). The statutory process for recovery is as follows:

1. A person (the claimant) who undertakes to carry out construction work under a construction contract or to supply "related goods and services" (a term defined in the Act) is entitled to a "progress payment" on each "reference date" (terms that are also defined in the Act) (ss. 6 & 8).
2. The claimant may serve a payment claim on the person who is or may be liable to make the payment. Such payment claim must identify the construction work or related goods and services to which the payment relates and the amount due and must state that the claim is made under the Act (s. 8).

3. The recipient of the payment claim (the respondent) **may** reply to the claim by providing a payment schedule to the claimant which must identify the claim to which it relates and the amount of the payment, if any, that the respondent proposes to make. If the amount to be paid is less than that claimed, the schedule must indicate why the amount is less (s. 14). If the respondent does not provide a payment schedule to the claimant within a certain time frame, the respondent becomes liable to pay the progress payment to which the payment claim relates (s. 14(4)).
4. If the respondent provides a payment schedule and the scheduled amount is less than that in the payment claim, the claimant is entitled to apply to an authorised nominating authority for adjudication of the payment claim. Other circumstances in which such an entitlement arises are set out in *the Act*. There are prerequisites in relation to notification to the respondent and specific requirements in relation to the content of the application and service on the respondent (s. 17).
5. An authorised nominating authority that receives an adjudication application is obliged to refer the application to an adjudicator as soon as practicable (s. 17(6)). The adjudicator may accept the application by causing notice of acceptance to be served on the claimant and the respondent and is thereby taken to have been appointed to determine the application (s. 19).
6. There is a regime for the filing of a response and submissions with the adjudicator who is obliged to determine the application “as expeditiously as possible” and, in any event, within a specified time frame (s. 20-21). The adjudicator is obliged to determine the amount, if any, to be paid by the respondent, the date on which the amount became or becomes due and the rate of interest on the amount (s. 22(1)). In determining the application the adjudicator is permitted to consider only those matters set out in s. 22(2). The determination must be in writing and include reasons unless both parties have requested the adjudicator not to include reasons in the determination (s. 22(3)).
7. The respondent is required to pay the adjudicated amount and if it is not paid, the claimant may request the authorised nominating authority to issue an adjudication certificate which may be filed as a judgment for a debt in any court of competent jurisdiction and enforced accordingly (ss. 23-25).
8. The claims, responses and adjudication process under *the Act* do not affect any rights that a party to a construction contract may have under the contract and do not affect any civil proceedings arising under such a contract; except that a court or tribunal must allow for any amount paid pursuant to a claim or an adjudication determination under *the Act* and may make orders for restitution of any amount so paid or any other orders considered to be appropriate (s. 32).

Consideration

- 27 There were submissions made by the parties as to whether there was an agreement between the plaintiff and the defendant for the whole of the electrical works at the Club. The defendant submitted there was such an agreement evidenced by the conversation of 4 October 2002 and the conduct of the parties, including the request for the defendant to commence the work early in October 2002, the performance of the work in October and November 2002 and the communication with the defendant on 12 November 2002, in which it was asked to complete Attachment “D” so that it could be included in the contract documents. The defendant claims that the plaintiff wrongfully repudiated that contract and that it is entitled to the damages it has identified in Attachment “B” to the Payment Claim. The plaintiff submitted that there was no concluded agreement in this regard.
- 28 However, importantly the parties have agreed that there was a construction contract within the meaning of that term in *the Act* and that construction work within the meaning of that term in *the Act* was done pursuant to that contract for the work as detailed in Attachment “A” to the Payment Claim.
- 29 The real issue in this case is whether the appointment of the adjudicator was a valid appointment and whether there are grounds upon which the plaintiff is entitled to a final injunction restraining the adjudication process. It seems to me that it is not necessary and, in the circumstances of this case, not appropriate for me to decide whether the whole of the electrical works were awarded to the defendant to decide the real issue in this case. In those circumstances I do not intend to do so.
- 30 The plaintiff claims that irrespective of whether or not there was an agreement for the whole of the works, the Payment Claim does not comply with *the Act* because it includes a claim for monies by way of damages or loss of profits, rather than a claim for work done. In this regard, the plaintiff relied upon what Austin J said in **Jemzone Pty Limited Trytan Pty Limited** (2002) 42 ACSR 42 as follows:
[43] Section 13(2)(a) requires the payment claim to identify the construction work to which the progress payment relates. In my opinion, this requires the claimant to identify the particular work that is the subject of the progress payment, rather than simply to identify in general terms the work that is the subject of the construction contract as a whole. ...
[44] Section 13(2)(b) requires that the progress claim must indicate the amount of the progress payment that the claimant claims to be due for the construction work done. This requirement is also not satisfied by the document in question. Since the document fails to identify the construction work to which the progress payment relates, it cannot, and does not, indicate the amount of the progress payment said to be due for the construction work. It merely identifies an overall balance owing and makes some adjustments to that balance.

- 31 It is submitted that contrary to the principle referred to in *Jemzone* and contrary to the requirements of the Act, Attachment "B" does not describe any work performed. It is also submitted that there is no indication on the face of Attachment "B" that any work had been performed. Indeed, there is no issue between the parties that such is the case. It is rather a claim in which there is identified a saving of \$130,790 to be passed onto the plaintiff with the balance of the tender price claimed to be owing to the defendant.
- 32 The defendant claims that since the adjudicator was properly seized of jurisdiction in respect of the contract relating to the \$3,938 amount in the Payment Claim, the plaintiff should have made the submission to the adjudicator that he could/should not determine that any part of the damages claimed in Attachment "B" to the Payment Claim should be paid by the plaintiff.
- 33 In support of these submissions the defendant relied upon two recent decisions of Nicholas J. The first is **Walter Construction Group Limited v CPL (Surry Hills) Pty Limited** [2003] NSWSC 266 in which Nicholas J considered a Payment Claim which included an amount of some \$3 million for extension of time for the works. It was submitted in that case that the extension of time claim could not be considered to relate to construction work as it was not physical work. Nicholas J rejected this contention and found that the Payment Claim merely had to identify the construction work to which the progress claim related. His Honour said:
- [63] *S 13(2)(a) requires the payment claim to identify the construction work to which the progress claim relates. In Jemzone Pty Ltd v Trytan Pty Ltd at para 43, Austin J stated his opinion that this requires the claimant to identify the particular work that is the subject of the progress payment, rather than simply to identify in general terms the work that is the subject of the construction contract as a whole.*
- [64] *Further, in Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd [2002] NSWCA 136 Davies AJA at para 20 said: "(20) However, subs (2) of s13 of the Act should not be approached in an unduly technical manner keeping in mind the considerations to which counsel pointed. The terms used by subs (2) of s13 are well understood words of the English language. They should be given their normal and natural meaning. As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner."*
- [65] *Doubtless it is a purpose of the requirement that a respondent served with a payment claim is provided with adequate information to enable it to provide a payment schedule under s14.*
- [66] *The payment claim of 20 December 2002 adequately identifies the work (or related goods and services) to which the progress payment relates, and that is sufficient to meet the requirement of s 13(2)(a). The requirement is that the construction work (and/or related goods and services) to which the progress payment relates be identified. It is clear to me from the contents of the payment claim that they were, being the work and related goods and services provided under the contract in respect of the project at Nos. 461-465 Glebe Point Road, Glebe, New South Wales.*
- [67] *To demonstrate compliance with s 13(2)(a) it is irrelevant, in my opinion, that an item which is a component of a payment claim may be disputed, albeit on the ground that such item cannot be categorised as either work or goods and services within the meaning of s5 or s6 respectively. Inclusion of a disputed item does not render a payment claim invalid. The statutory requirement for provision of payment schedules and the scheme for adjudication allow for the ventilation and determination of disputes following service of a payment claim under s13. The Minister made this clear in his second reading speech when he said: "Under Pt3, when a payment claim is made, and the other party, called the respondent, does not intend to pay the full amount of the payment claim, it must issue a payment schedule stating the amount, if any, of the payment claim which will be paid and the reasons for not paying the amount claimed. The time for issue of the payment schedule is 10 business days after receipt of the payment claim. The payment schedule alerts the claimant to the existence of a dispute over payment and allows the claimant to immediately commence the adjudication process available under the legislation. This is a critical element of the bill as it provides a statutory early warning to claimants that the respondent does not propose to pay their claim in full."*
- [68] *In a challenge which raises the question of compliance with s13(2)(a) the question is not whether an item of the payment claim relates to construction work or related goods and services within s5 and s6 respectively, but whether the payment claim adequately identifies such work or goods and services. In this case the payment claim of 20 December 2002 clearly did so.*
- [69] *For these reasons the challenge to the validity of the payment claim on the ground of non-compliance with s 13(2)(a) must fail.*
- 34 Certainly Nicholas J did find that the inclusion of a disputed claim for delay or disruption costs which was the subject of argument as to whether it could be categorized as "construction work" or "related goods and services" did not render the Payment Claim invalid. I respectfully agree with his Honour's approach and am of the view that the inclusion of the contentious matter of the claim for damages in the Payments Claim does not render it invalid in circumstances where the parties have agreed that part of the Claim was for construction work under a construction contract.
- 35 I am not satisfied that Nicholas J's judgment is authority for the proposition for which the defendant also contends that the claim for damages for wrongful repudiation of the contract is a matter that the adjudicator can determine. His Honour was considering a claim in respect of services provided under a construction contract that

specifically dealt with an entitlement in the subcontractor to an amount for such costs. That is a very different matter to a claim for damages for wrongful repudiation of a contract. The adjudicator will decide what amount, if any, the plaintiff is to pay the defendant having regard to the matters he is obliged to consider pursuant to s. 22 of the Act.

- 36 The second decision of Nicholas J's relied upon by the defendant is **Parist Holdings Pty Limited v WT Partnership Australia Pty Limited** [2003] NSWSC 365 and is in my view of more significance to the issue for decision in this case. The plaintiff in that case, as has the plaintiff in this case, submitted that the Payment Claim is the foundation of the jurisdiction of the adjudicator. Justice Nicholas dealt with this submission as follows:

[31] *Although it may be said that, by service of a payment claim under s13 on the person who under the contract is liable to make the payment, the claimant has set in train the procedure for recovery of payment established under Pt3 of the Act, it is not correct to say that the payment claim is the foundation of the jurisdiction of the Adjudicator. By s 19(2), upon acceptance of a claimant's adjudication application under s17, the Adjudicator is taken to have been appointed to determine the application. The Adjudicator's powers and functions in respect of the adjudication procedures and determination are prescribed in s 21 and s 22. These provisions of the Act are the source of jurisdiction. In my opinion, the Plaintiff's submissions on this issue were misconceived.*

- 37 The plaintiff's submission in this case on that matter must be rejected but for reasons that are pertinent only to this case. Attachment "A" to the Payment Claim refers to the specific construction work that was carried out. That part of the Claim is uncontroversial and the plaintiff has already paid the defendant that amount. The plaintiff submitted that in those circumstances the adjudicator does not have any jurisdiction because there is no dispute about the amount. However that is not the end of the matter because the adjudicator is obliged to determine the date on which any amount became or becomes payable and the rate of interest payable on any such amount. In any event, I am satisfied that the adjudicator was already appointed at the time the plaintiff decided to pay the defendant the full amount claimed in Attachment "A" to the Payment Claim.
- 38 One basis upon which the defendant was entitled to apply for adjudication was if the plaintiff had provided a payment schedule under the Act and the scheduled amount was less than the amount in the Payment Claim (s. 17). That is what happened here. There was no requirement on the plaintiff to provide a payment schedule. That is a matter of discretion as can be seen from the use of the word "may" in s. 14(1). If the plaintiff was of the view that the defendant's Payment Claim was not a valid Payment Claim under the Act, then it was not required to respond to it with a payment schedule under the Act. Once it did so, however, and the application was made and the adjudicator notified the parties of his acceptance of that application, he was validly appointed. It is a matter for the adjudicator to decide by the statutory process and within the limits set out in s. 22 of the Act what amount, if any, is to be paid by the plaintiff to the defendant.
- 39 The relevant Parliamentary debate from which there might be gleaned the underlying legislative intention of the Act, referred to by Nicholas J in **Parist** at par [19], referred to a "prompt interim decision on a disputed payment" as a "benefit" provided by adjudication. It is understandable that the term "interim" was used because the adjudication process does not affect rights to bring civil proceedings and the Act contemplates that orders for restitution of the adjudicated amount may be made (s. 32). The whole process is one that has to be attended to expeditiously with quite tight timeframes fixed by the Act. It may well be that a payment claim might include amounts for services or other matters that do not fall within the definition of construction work or related goods and services. But that does not mean that a payment claim that also has within it claims for construction work is invalid. The adjudicator was validly appointed and it is the adjudicator who decides what is to be paid by having regard to the matters in s. 22, the first of which is the provisions of the Act.
- 40 Having reached the conclusion that the adjudicator was validly appointed and having regard to the purpose of the Act, and in particular to s 32, I am of the view that it is not appropriate to effectively give judicial advice as to how the adjudication should proceed or make declarations as sought by the plaintiff in its Amended Summons as to the limits within which the adjudication may proceed. The Act governs those matters.
- 41 The parties put competing arguments in relation to whether there was a contract in respect of the totality of the electrical works at the Club, which I have concluded raise issues not necessary or appropriate for decision in respect of the real issue in this matter. This is so notwithstanding the leave granted to the defendant to file a Cross-Claim in Court seeking declarations consistent with its arguments. So that the parties' rights remain unaffected to pursue those matters, I do not intend to make any orders in respect of the Cross-Claim.
- 42 The interim injunction was granted after the defendant sought time to put on evidence and conceded that there was a serious issue to be tried. I am satisfied that the adjudicator has been validly appointed and should not be restrained from proceeding with the adjudication.

Orders

- 43 The interlocutory injunction is discharged. The stay on the adjudication process is lifted as and from midnight on 25 September 2003. The Amended Summons is dismissed. If the parties are unable to agree upon a costs order I will hear argument on a date to be fixed by the parties making contact with my associate no later than 3 October 2003.

M. Christie (Plaintiff) instructed by Phillips Fox
K. Tapsell (Solicitor) (First Defendant) instructed by Watkins Tapsell
Second Defendant In Person instructed by Second Defendant In Person