

**JUDGMENT : McDOUGALL J :** Supreme Court New South Wales, Equity Division. 19<sup>th</sup> August 2008

- 1 The plaintiff (Peter's) carries on a well known retail business at 57-69 Anzac Parade Kensington. It leases those premises from Mr Peter and Mrs Christa Satouris. Mr and Mrs Satouris also own adjacent land at 71-75 Anzac Parade Kensington and 49-59 Boronia Street Kensington. That larger holding is the subject of a development consent permitting alterations and additions to the existing retail development, including the provision of 155 parking spaces and a loading dock; and the erection of 14 two-bedroom townhouses with basement parking.
- 2 Mr Satouris says that he instructed the first defendant (Seersucker) to prepare and lodge with Randwick Council (the responsible authority in this case) an application under section 96 of the *Environmental Planning and Assessment Act 1979*. Mr Satouris wished to have the existing consent modified to reduce the number of carparking spaces for the retail development from 155 to 144 (thereby reducing the proposed carpark from five to four levels), by including a new storage section and by decreasing the proposed warehouse space.
- 3 Mr Vasiliou Tsakalos, a principal of Seersucker, says that he agreed to do this.
- 4 Mr Satouris said that the changes should reduce the costs involved, to which proposition Mr Tsakalos acceded. Mr Satouris then said: "I want a rough quote. Just remember the whole point in reducing the carpark levels to four is to keep costs down. The important thing is to get the section 96 through."
- 5 According to Mr Satouris that, with a presently irrelevant exception, was the extent of the retainer.
- 6 Seersucker claims to have carried out substantial work pursuant to the retainer. It issued a number of payment claims. Three of those payment claims, dated 30 November 2006, 31 January 2007 and 28 February 2007, were paid.
- 7 Seersucker issued further payment claims. Of particular concern for present purposes is its claim number 621/14 dated 26 May 2008. That was stated to be a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (the Act). It claimed a total of \$238,535, of which \$209,650 was said to be for design development and contract documents in relation to "Stage 2 (Warehouse/Retail/Office)" and "Stage 2 (Carpark)".
- 8 Peter's disputed liability for the claim, and provided a payment schedule which, as I understand it, asserted that nothing was payable. The dispute thereby constituted was referred to the second defendant (the adjudicator) for adjudication pursuant to the relevant provisions of the Act. The adjudicator determined that Peter's was liable to pay Seersucker the full amount of the claim, and that each party should share the costs and expenses of the adjudication in equal proportions.
- 9 Peter's claims that the determination is flawed in such a way that this Court should intervene pursuant to the principles set out in the decision of the Court of Appeal in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421.
- 10 Peter's obtained an interlocutory injunction restraining Seersucker from obtaining or registering as a judgment an adjudication certificate. The matter was set down for hearing today to decide whether the interlocutory injunction should be continued. I expressed the view to the parties that, having regard to the relatively small amount at issue, neither the parties nor the interests of justice would be well-served, in particular taking into account s 56(1) of the *Civil Procedure Act 2005*, by having a full scale interlocutory argument now and a final hearing, covering much of the same ground, at some time in the future.

**The separate questions**

- 11 Accordingly, the parties agreed on the formulation of three questions. I ordered that those questions be determined separately from and prior to the determination of any other issue in the proceedings. Those questions (with very minor amendments of style only) are as follows:
1. Whether on the evidence only of Mr Paul Satouris and Mr Peter Satouris any contract between the plaintiff and the first defendant was a construction contract within the meaning of the Building and Construction Industry Security of Payment Act 1999 (the Act);
  2. Whether the payment claim furnished by the first defendant to the plaintiff complied with the requirements of section 13(2) of the Act;
  3. Whether in circumstances that the plaintiff took no point as to parties in its payment schedule or adjudication response, it is now open to the plaintiff to argue as a ground of invalidity of the second defendant's determination that the plaintiff was not a party to the construction contract the subject of that determination.
- 12 I should note that Mr M R Aldridge SC, who appeared with Mr D W Rayment of counsel for Peter's, accepted that the third question must be answered adversely to his client: ie, no. He was correct to do so in circumstances where the point as to parties had not been taken either in the payment schedule or in the adjudication response or otherwise before the adjudicator, and where Peter's itself had paid prior tax invoices which on any view related to work allegedly performed under the retainer in question. Thus, it is necessary to deal only with the first and second questions.

**First question: construction work.**

- 13 The question debated between the parties was whether the contract of retainer, on the version of it given by Mr Satouris, was a construction contract to which the Act applies. That is the first of the five "basic and essential requirements" for the existence of a valid determination under the Act. See Hodgson JA (with whom Mason P and Giles JA agreed) in *Brodyn* at 441 [53].

- 14 The question that requires resolution is, therefore, whether the work in performance of retainer, as stated by Mr Satouris, is either "construction work" or "related goods and services".

#### The legislation

- 15 "Construction work" is defined in s 5(1) of the Act as follows:

##### 5 Definition of "construction work"

(1) In this Act, construction work means any of the following work:

- (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),
- (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection,
- (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems,
- (d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension,
- (e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including:
  - (i) site clearance, earth-moving, excavation, tunnelling and boring, and
  - (ii) the laying of foundations, and
  - (iii) the erection, maintenance or dismantling of scaffolding, and
  - (iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site, and
  - (v) site restoration, landscaping and the provision of roadways and other access works,
- (f) the painting or decorating of the internal or external surfaces of any building, structure or works,
- (g) any other work of a kind prescribed by the regulations for the purposes of this subsection.

- 16 Related goods and services" are defined in s 6(1) of the Act as follows:

##### 6 Definition of "related goods and services"

(1) In this Act, **related goods and services**, in relation to construction work, means any of the following goods and services:

- (a) goods of the following kind:
  - (i) materials and components to form part of any building, structure or work arising from construction work,
  - (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,
- (b) services of the following kind:
  - (i) the provision of labour to carry out construction work,
  - (ii) architectural, design, surveying or quantity surveying services in relation to construction work,
  - (iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,
- (c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.

- 17 In each of ss 5 and 6 there is an exception for work, or goods or services, of a kind prescribed by the regulations. There is no relevant regulatory prescription.

#### The parties' submissions

- 18 Mr I G B Roberts of counsel, who appeared for Seersucker, submitted that the work performed by his client was either related services within the definition set out in s 6(1)(b)(ii) of the Act, or alternatively was itself construction work by reason of s 5(1)(e) of the Act.
- 19 Mr Aldridge submitted that the work in question was neither related services, because there was no nexus between that work and construction work, nor preparatory work within s 5(1)(e), because it was not sufficiently closely connected with any work of the kind set out in the preceding paragraphs of s 5(1).
- 20 Mr Roberts relied upon the decision of Bergin J in *Parist Holdings Pty Ltd v Thiessen Architects Pty Ltd* (30 May 2003, unreported; BC 200305695). Mr Aldridge submitted that that case on its facts was clearly distinguishable.

#### Decision

- 21 It is convenient to start with the concept of related services, and thus with s 6(1)(b)(ii). That concept requires that services of the kind prescribed, which include architectural services, must be provided or performed "in relation to construction work". Indeed, that requirement appears twice: firstly in the introductory words of s 6(1), and secondly in the words of subpara (ii) itself. Quite what was intended by this duplication I do not know.
- 22 Phrases such as "in relation to" and "in respect of" are capable of indicating a very broad or wide degree of connection between the subjects that are connected by reference to them. As the majority (Brennan, Deane and Gaudron JJ) of the High Court of Australia remarked in *Technical Products Pty Ltd v State Government Insurance Office (Queensland)* (1988) 167 CLR 45 at 47, "the words "in respect of" have a very wide meaning" and "a

*chameleon-like quality in that they commonly reflect the context in which they appear*". I see no rational distinction between the words "in respect of" on the one hand and the words "in relation to" on the other.

- 23 In this case, the context in which the words appear is that of a statute clearly intended by the legislature to be remedial, and to provide benefits to those who perform construction work or who provide related goods and services. It is not necessary to go to the second reading speeches to discern that intention. It is sufficiently clear from s 3(1) of the Act.
- 24 Thus, it seems to me, the Court should not be astute to read down the words "in relation to" in the context in which they appear in s 6(1).
- 25 Having said that, it is still necessary that there be some rational and discernible connection between the two things that are said, by the use of the words "in relation to", to be connected. In *Technical Products*, the question was whether liability in damages for an injury existed "in respect of" a motor vehicle. The majority said at 47 that there must be some discernible and rational link between the basis of legal liability and the particular motor vehicle. Approving the judgment of Connolly J (with whom Andrews CJ and Thomas J agreed) in the Court below, their Honours accepted that it was not sufficient that there be no more than a connection or relation in time or sequence between the motor vehicle and the events that in law gave rise to the legal liability.
- 26 In this case, each party took me to the facts insofar as they may be gleaned from the affidavit of Mr Satouris and the documents tendered pursuant to that affidavit. As I have said, Mr Satouris and his wife were the owners of the property in question. Mr Satouris said at paragraph 13 of his affidavit that he and his wife had "always envisaged a redevelopment of the site located at Kensington, but have always been prevented from doing so due to the associated costs of the proposed development".
- 27 Mr Roberts said that I could infer from these words that there was a genuine intention or wish to carry out a redevelopment, provided that the costs could be contained. Mr Aldridge referred to the words of the oral retainer, and in particular to Mr Satouris's request for "a rough quote". He submitted that there was no present intention that any work would be carried out pursuant to the development application, either as it stood or as it might be amended pursuant to the s 96 application. Thus, he submitted, there was an insufficient connection between the performance of work by Seersucker pursuant to the retainer on the one hand and the performance, at some time in the future, of construction work on the other hand.
- 28 As Mr Roberts pointed out, it is necessary, before land can be developed or redeveloped, for the consent of the responsible authority to be retained. If that consent is not obtained then any work carried out will be illegal and is susceptible of demolition at the behest of the responsible authority. Thus, in the ordinary way, one would expect that the performance of construction work, in the context of developing or redeveloping land, would be preceded by the making of a development application and the granting of development consent. I would add that there might be other requirements, including in an appropriate case the granting of consent to the detailed building plans; but that can be put to one side.
- 29 Still remaining with s 6(1)(b)(ii), the question is there whether there is a rational and discernible link between architectural services provided in the preparation and, if I can put it this way, promulgation of a s 96 application and, at some uncertain time in the future, the performance of construction work by the execution of the development contemplated by that application.
- 30 It cannot be said that it is certain, or perhaps even likely, that the redevelopment will be carried out. However, it is certainly the case that it is the desire of Mr and Mrs Satouris to carry out that work, or some such work, if it can be done at a cost that is within their budget. One can understand why the owners of presumably valuable land would wish to turn it to account in as profitable a way as possible.
- 31 I do not think that it is necessary, for the purposes of s 6(1)(b)(ii), that the construction work to which, it is said, the provision of architectural services relate should be the subject of a fixed and certain intention as to its ultimate performance. It cannot be the case, I think, that services are related services if the person for whom they are performed has an unalterable determination to carry out the works; but are not to be regarded as related services otherwise.
- 32 Instead, I think, the question is to be answered by looking at what is within the purview of the work to which the services relate. If those services relate to the performance of work which, if performed, would be construction work then in my view the requirements of s 6(1)(b)(ii) are met even though that construction work might not ultimately be carried out. If it were otherwise, the application of the Act would depend not on some relatively objective and discernible test but on some subjective, and perhaps concealed, question of intention. If the words of the Act permitted no other construction then one might be forced to yield. But in my view they do not.
- 33 It seems to me to follow that if the work to which the services in question relate is, or if performed would be, construction work then the services become related services, and remain as related services whether or not that construction work is ultimately carried out.
- 34 It is therefore necessary to go to the next level of analysis and inquire whether it is within the purview of the s 96 application that any work done in consequence of the approval of that application would be construction work.
- 35 That question is one which can be answered by reference to the application that was prepared. It is clear that the works contemplated, both by the original application and by the modifications that were proposed, involve some degree of demolition and reconstruction, so that on any view those works, if performed, would be or would

include construction work within one or other, and probably all, of paragraphs (a), (b) and (c) of s 5(1). That is clear, I think, when one looks at the description of the works which is set out in the s 96 application and at the schematic plans which form part of it.

- 36 It therefore seems to me that on the facts of this case there is a rational and discernible link between the services provided in connection with the preparation of the s 96 application, and the performance of construction work, so that the services in question are related services within the definition in s 6.
- 37 On that basis, it is unnecessary to consider whether, in addition, s 5(1)(e) applies. However, since the question was argued, and since it is possible that what I have just said may not be the last word on the subject, I will express a brief view on that question.
- 38 The starting point, I think, is that it would be unusual for there to be such a complete overlap between s 6(1)(b)(ii) on the one hand and s 5(1)(e) on the other. However, if one were to accept Mr Roberts' argument, that would be the case.
- 39 It is to be noted that s 5(1)(e) refers to "any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to" in the preceding paragraphs. To my mind, the words "forms an integral part of" and "rendering complete" indicate a degree of connection between the operation and the other works that is much closer than the degree of connection indicated, in s 6, by the words "in relation to".
- 40 Although the ejusdem generis principle of construction does not now enjoy the favour that it enjoyed in nineteenth century England, it may be noted that the works specified in sub-paragraphs (i) to (v) of paragraph (e) do not remotely resemble services of the kind referred to in s 6(1)(b). To my mind, that suggests that s 5(1)(e) is related to physical labour or physical work, and not to what one might call the intellectual or professional labour of providing architectural or other services.
- 41 Thus, were it necessary to decide the s 5(1)(e) point, I would conclude that the works in question were not what might be called preparatory works so as to fall within that paragraph.
- 42 Nonetheless, for the reasons that I have indicated, the first issue must be resolved in favour of Seersucker; i.e., "yes".

**Second question: section 13(2)(a)**

- 43 Section 13(1) of the Act says that a person who is or who claims to be entitled to a progress payment (who is called the claimant), may serve a payment claim on the person who is or may be liable to make the payment (who in due course is called the respondent). Section 13(2) prescribes, I think at a minimum level, the contents of a payment claim. It reads as follows:

(2) A payment claim:

- (a) must identify the *construction work* (or *related goods and services*) to which the progress payment relates, and
- (b) must indicate the amount of the progress payment that the *claimant* claims to be due (the "claimed amount"), and
- (c) must state that it is made under this Act.

**Description of the services**

- 44 In this case, the payment claim described the work that was the subject of the claim as follows:
- (1) it said that it was dated May 2007, and then added, somewhat mysteriously, that the work was "up to June 2007".
  - (2) it set out two "items" of work, one relating to the warehouse and associated premises and the other relating to the carpark.
  - (3) against each item, and against each specified element of the item, it specified the lump sum fee and the percentage said to be complete.
  - (4) thereby it deduced the total of the claim.
  - (5) it then gave credit for previous claims and thereby derived a sub-total. To that sub-total was added an amount for disbursements.

- 45 I set out in full, so far as it is relevant, the relevant sections of the payment claim:

Date	Item	Rate	Total
May 2007	Stage 2 (Warehouse/Retail/Office)	Lump Sum Fee \$495,000	68,000.00
up to 4 June 2007	- Schematic Design	\$0	186,400.00
	- Design Development	\$85,000 @ 80% Complete	
	- Contract Documents	\$233,000 @ 80% Complete	
	- Tender & Construction	\$177,000 @ 0% Complete	
	Stage 2 (Carpark)	Lump Sum Fee \$212,000	32,000.00
	- Schematic Design	\$0	77,600.00
	- Design Development	\$40,000 @ 80% Complete	
	- Contract Documents	\$97,000 @ 80% Complete	
	- Tender & Construction	\$75,000.00 @ 0% Complete	

	Stage 3 (Residential)	TBA	
		Amount This Claim	364,000.00
		<u>Less previous claim</u>	<u>154,350.00</u>
		<b>Subtotal this claim</b>	<b>209,650.00</b>
	Refer attached invoices from Robert Bird Group	Amount Disbursements (inc GST)	7,200.00
		<u>Less Previous Disbursements</u>	<u>0.00</u>
		<b>Subtotal of Variations</b>	<b>7,200.00</b>
		Amount Variations	0.00
		<u>Less Previous Variations</u>	<u>0.00</u>
		<b>Subtotal of Variations</b>	<b>00.00</b>
		GST on Invoice Claim amount	20,965.00
		<u>GST on Disbursement amount</u>	<u>720.00</u>
		<b>TOTAL AMOUNT DUE</b>	<b>238,535.00</b>

- 46 On the following page, the payment claim described what was meant by "Design Development" and "Contract Documents". Design Development was said to incorporate design development of the overall building design, including the accommodation of BCA requirements and a number of other specified matters. Contract Documents was said to include the incorporation of various consultants' designs (for structural, mechanical, electrical and other specialties) and the preparation and collation of information and tender documents, presumably with a view to preparing a contract that, if tendered and let, would lead to a binding contract between the principal and the successful contractor.

#### **The parties' submissions**

- 47 Mr Aldridge submitted that the description of the work did not identify the construction work or related goods and services to which the claim related. That followed, he said, because the payment claim did not enable his client to understand what work had been done to bring the claim to the stage where (for example) it was 80 per cent complete in respect of design development, as compared to the percentage of 70 per cent completion shown on a previous payment claim dated 30 April 2007 and bearing number 621/09.
- 48 Mr Roberts submitted that the description did contain sufficient information to enable Peter's to know what the claim was and to respond. In addition, he submitted, the claim was in the same form as previous claims had been and that three of those previous claims had been paid. He said that one could infer from this that Peter's well understood what the work was and was well able to assess its liability. In answer to this last point, Mr Aldridge submitted that there was an explanation for the payment given by Mr Satouris: namely, that he had not checked the invoices before he paid them. I interpose to note that the adjudicator found that explanation somewhat surprising, and so do I.
- 49 Finally, Mr Roberts submitted, the question of the sufficiency of the description was a matter for the adjudicator and not a matter of invalidity. He relied on a number of decisions to which it will be necessary to turn. Mr Aldridge submitted that, properly understood, those decisions did no more than indicate that it was a matter for the adjudicator where on the face of the claim it was not patently insufficient; this, he said, was a patently insufficient description of the work involved.

#### **Decision**

- 50 If I may be permitted to be a little immodest, I think that the starting point can be taken from my decision in *Isis Projects v Clarence Street* [2004] NSWSC 714 at [37]. Having referred to the decision of Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [76] to [78], I said:
37. *In principle, I think, the requirement in 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.*
- 51 I then observed at [38] that: "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 twelfth and thirteenth occasions could be said not to comply with the requirements of s 13(2)(a)."

- 52 What I sought to indicate was that where the information given was in a form that was meaningful to the parties (the test suggested by Palmer J in *Luikens* at [76], and where one could deduce from it, in its factual context, what was the work said to have been done, then that could be sufficient for the purposes of s 13(2)(a).
- 53 What I said on this topic was approved on appeal: *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448. See Mason P (with whom Giles and Santow JJA agreed) at 455 [33], 456 [34].
- 54 I did not intend to suggest, and I do not know of any decided case that does suggest, that it is necessary for the work to be broken down into the nuts and bolts of the performance of each individual aspect. In the present case, I think, it is open to infer that the parties well understood what was involved in design development and the preparation of contract documents. In any event, the particular payment claim with which we are concerned clarified that by the means that I have described.
- 55 There are then a number of decisions of the Court of Appeal which debated, in substance, whether s 13(2)(a) was a basic and essential requirement for validity of an adjudicator's determination.
- 56 I have already referred to *Brodyn* at 441 [53], Hodgson JA there set out what he considered to be among the basic and essential requirements. He said:
- 53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:
1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
  2. The service by the claimant on the respondent of a payment claim (s.13).
  3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
  4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
  5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).
- 57 At [54], his Honour noted that the sections to which he had referred contained "more detailed requirements". He instanced s 13(2) "as to the content of payment claims". He said that the question arises "whether any noncompliance with any of these requirements has the effect that a purported determination is void."
- 58 At [55] his Honour said that "the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of" a valid determination. He concluded:
- 59 *If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance".*
- 60 I interpose to note that in this case the adjudicator did address the requirements of s 13(2)(a), and no suggestion was made that his decision on the point (which was adverse to Peter's) did not amount to a bona fide attempt to exercise the relevant power.
- 61 In *Co-Ordinated Construction Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385, Basten JA considered, but in my view did not then decide, whether compliance with s 13(2) was one of the basic requirements, or was a matter that could be left to depend on the opinion of the adjudicator: see his Honour's reasons at 404 [73] and 405 [77].
- 62 The Court of Appeal returned to the question in *Co-Ordinated Construction Co Pty Ltd v Climatch (Canberra) Pty Ltd* [2005] NSWCA 229. Their Honours' consideration of the point appears to me not to form part of the ratio of the case which, as Ipp JA pointed out at [34] (in the course of concurring with Hodgson JA), was a very narrow one.
- 63 However, their Honours did look at s 13(2)(a). Hodgson JA said at [26] that the failure to set out adequately in a payment claim the basis of the claim could be a ground on which the adjudicator could exclude a relevant amount from the determination. However, his Honour said, it was generally for the adjudicator to decide if the payment claim did state adequately the basis on which the claim was made.
- 64 Basten JA also looked at the question. His Honour said at [45] that there were three reasons why s 13(2) was "properly dependent on the satisfaction or opinion of the adjudicator". Thus, his Honour said at [46], the omission of s 13(2) from "the list of mandatory requirements identified in *Brodyn* should be understood as giving effect to" the factors to which his Honour had referred.
- 65 In *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd*, (2005) 64 NSWLR 462, the question was examined yet again. It is very difficult to find a statement of principle in that case which, in relation to whether s 13(2) is a basic and essential requirement, forms part of the ratio. I think it is correct to say that the views of Hodgson and Basten JJA, although differently expressed, lead to the same result. However, it is certainly open to argue, based on what Hodgson JA said at 475 [36], that a payment claim may be treated as a nullity because of patent failure to satisfy the requirements of s 13(2)(a). On the other hand, Ipp JA said at 484 [76] that if a payment claim "is made in good faith and purports to comply with s 13(2) of the Act, the merits of that claim, including the

question whether the claim complied with s 13(2), is a matter for adjudication under the Act and not a ground for resisting summary judgment in proceedings under s 15".

- 66 The third member of the Court, Santow JA, at 477 [47] agreed with Hodgson JA that compliance with s 13(2)(a) should not "be made so demanding as to preclude summary judgment in an appropriate case". However, his Honour thought that the test of "patent failure" set the bar high. His Honour said at 477 [48] that the appropriate test was whether "the relevant construction work (or related goods and services) [are] identified sufficiently to enable the respondent to understand the basis of the claim".
- 67 In a somewhat different context - namely, compliance with s 22(2) - the Court of Appeal said in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* (2007) 23 BCL 205, that the question of compliance was not a matter to be determined objectively by the Court but was a matter for the determination of the adjudicator. Thus, if the adjudicator made an attempt in good faith to consider and deal with the question, the determination would not be invalidated because, viewed objectively, it was wrong. See Hodgson JA (with whom Beazley JA agreed) at 219 [55] and Basten JA at 221 [71].
- 68 There are thus at least three views available. One, which commands the support of Ipp JA and Basten JA, is that the question, whether there has been a compliance with s 13(2)(a), is a question for the adjudicator. It follows from this view that if the adjudicator addresses the question in good faith then the determination is not liable to be set aside on the ground that the Court, were it to reconsider the matter objectively might think that it was wrong. That view derives some, although limited, support by analogy from what was said in *John Holland* as to s22(2).
- 69 The second view, commanding the support of Santow JA, is that it is mandatory, within s 13(2)(a), to identify the subject matter of the claim in a way that is sufficient to enable the respondent to understand the basis of the claim. That requires a factual investigation. However, it says nothing as to the identity of the person or body who is to carry out the investigation. It is in my view consistent with what his Honour said that it might be a question for the adjudicator. If it is, then again assuming there is an attempt in good faith to deal with the question, the Court would not intervene.
- 70 The third view is that a payment claim will not be a nullity unless there is a patent failure, on the face of the document, to comply with section 13(2)(a). That view commands the support of Hodgson JA. It is clear on that view that if there were a patent failure then the document is a nullity and the court may intervene. However, in any case falling short of patent failure, the question is one for the adjudicator: again, with the consequences to which I have referred.
- 71 If the matter is looked at either on the test propounded by Santow JA or on the test propounded by Hodgson JA, then all the Court is required to be satisfied of is that the payment claim on its face conveyed information which could be said, in the relevant factual context, to identify the construction work or related goods and services to which the claimed payment relates. Of course, if one takes the first view, then the Court is not required to consider even that.
- 72 If one is considering the question of fact then, regardless of the precise test that is to be applied, it is in my view relevant to take into account not only the full terms of the particular document but also any relevant prior course of dealing between the parties. In this context, I adhere to what Palmer J said in *Luikens* and to what I said in *Isis*.
- 73 If one applies those principles in the present case, then in my view it is not possible to conclude that the payment claim is patently bad on its face, or that it was not capable of conveying to Peter's sufficient information to enable Peter's to understand and respond. That is because the payment claim addresses the work done, and the way in which the claim is calculated, in a rational way that is capable of being understood by parties who were familiar with the project. When regard is had to the prior course of dealings, in which payment claims in relevantly indistinguishable form have been approved and paid, that conclusion seems to me to be even clearer.
- 74 I am conscious that the use of the word "approved" may be seen to cut across Mr Satouris' evidence of mistake. However, if the question is to be looked at objectively (and on either view - that is, Hodgson JA or of Santow JA - that is what is to be done) then the fact of payment could be taken to support an inference of approval of a claim that is paid.
- 75 Thus, whichever test is to be applied, I conclude that the second issue must be answered adversely to Peters: i.e., "no".

### Third question: parties

- 76 As I have said, Peters accepts that this issue must be answered adversely to it.

### Conclusion

- 77 I direct that the answers that I have given to the preliminary questions be recorded in accordance with UCPR rule 28.3.
- 78 The question arises as to what should be done in consequence of the reasons I have just given.
- 79 It is necessary to note that there is in place an injunction restraining Seersucker from obtaining an adjudication certificate or registering that certificate with a court of competent jurisdiction so as to recover a judgment, or otherwise to seek to enforce the determination.
- 80 Mr Aldridge submits that those orders should not be discharged. He says that there is still a dispute as to the terms of the contract. He says that even if the contract on Mr Satouris's evidence is a construction contract, it is plain on

the face of the payment claim that it relates to a different contract, or to work outside the putative construction contract. Thus, he submits, there is an ongoing dispute as to which his client has a serious question to be tried.

81 Mr Aldridge submits also that the Seersucker is insolvent and that a related company to which it has transferred its assets and undertaking is in no better position.

82 As yet, no judgment has been recovered. At this stage I do not see why the consequences that follow from my decision should not be given effect. The effect of what I have decided is that there was a construction contract, and that the relevant essential requirements for validity had been met.

83 That question was decided on the basis of limited evidence. However, the wider question - whether the payment claim corresponds to that or another contract - can be considered on the evidence at large. In this context, the evidence of the three invoices that were paid is capable of founding a conclusion that the contract did indeed go beyond what was alleged by Mr Satouris to be the relevant retainer. See the judgment of Gibbs CJ in *Associated Midland Corporation Limited v Bank of New South Wales* (1984) 51 ALR 641 at 642.

84 In circumstances where Seersucker has not recovered a judgment, and where the case is clearly one that is within the jurisdiction of the District Court, and where there are already existing substantive proceedings in the District Court, I think that the appropriate course is to discharge the existing injunctions and to transfer the proceedings to the District Court proceedings.

85 Mr Roberts submitted that these proceedings served no further utility and that I should dismiss the summons. He submitted that the remaining substantive questions could be dealt with in the District Court. I am, however, reluctant to dismiss the summons in circumstances where that may give rise to an argument of estoppel in the District Court.

86 I do not know (because the evidence has not been put before me) whether or not there is substance to the claim that Seersucker is insolvent. I am prepared to assume that it may be. However, dissolving the existing injunction will do no more than permit Seersucker to take steps to recover a judgment. Whether or not any judgment so recovered should be stayed is a question for the court in which the judgment is recovered. It is not, I think, a question to be considered hypothetically by me, not having heard the relevant evidence and (by reason of the hour) not having any real prospect of doing so.

87 There is also the question of costs. Mr Aldridge accepted that he can say nothing about that. It is plain that costs to date must follow the event.

88 I make the following orders:

1. Order that the injunction granted on 7 August 2008 be dissolved.
2. Order the plaintiff to pay the first defendant's costs to date of the proceedings.
3. Order that the proceedings be transferred to the District Court of New South Wales and that, subject to any further order of that Court, they be heard together with the existing proceedings 4142 of 2007 in that Court and with any proceedings based upon the filing in that Court of an adjudication certificate relating to the adjudicator's determination.

M R Aldridge SC / D W Rayment (Plaintiff) instructed by McLachlan Chilton  
I G B Roberts (First Defendant) instructed by Maddocks Lawyers (First Defendant) : Gadens Lawyers (Second Defendant)