

JUDGMENT : HH Rein AJ : Supreme Court of New South Wales. 28th April 2006.

- 1 The Plaintiff, Springs Golf Club Pty Ltd (“Springs”) entered into a construction contract dated 2 April 2004, with the First Defendant, Profile Golf Pty Ltd (“Profile”), under which Profile was to perform work in connection with the Springs Golf Club in 2004 and 2005.
- 2 In July 2005, a dispute arose between Springs and Profile as to moneys properly payable to Profile by Springs. Springs and Profile, by their representatives, attended a meeting on 14 July 2005 in an attempt to resolve the dispute. Springs offered Profile a final payment of \$30,310.00 to settle the dispute. Profile did not accept the offer but invited Springs to put an offer in writing, which Springs did not do.
- 3 On 29 July 2005, Profile, by way of a “payment claim”, sought payment of outstanding invoices for work completed under the contract totalling \$155,700.96. On 9 August 2005, Springs wrote to Profile noting Profile’s letter of 29 July 2005. Springs did not specifically refer to Profile’s letter as a payment claim nor did it specifically refer to its own reply as a “payment schedule”. The letter was in the following terms:
*“Profile Golf Pty Ltd Tuesday 9th August 2005
PO Box 5144
West End
QLD 4101
Attention: Brendan O’Connor
C.C. Don MacGregor
Dear Brendan,
Further to your letter dated Friday 29 July 2005
A letter dated 10 July 2005 was forwarded to Cordelia St Sth Brisbane but was returned to us soon after. A copy of this letter was given to you at our meeting on 14th July 2005.
Within this letter were our understandings while Profile Golf (Owen Hester) was carrying out construction with James Dalton as on-site supervisor.
A copy of this letter is enclosed.
Within the meeting of the 14th July 2005,
*Lost Revenue: 40% of lost revenue equated to \$62,400.00.
*Excess Materials: Materials not used equated to \$52,990.00.
*Surveying Work: Brendan disagreed we had discussions with James Dalton.
*Defects: Defects list given to Brendan was deemed to cost \$10,000.00
At the end of the meeting Profile Golf was offered \$30,310.00 as last and final payment.
Yours Sincerely,
John Groom
Course Superintendent
The Springs Golf Club”*
- 4 On 24 August 2005, Profile made an application for “adjudication” of its payment claim. The Second Defendant, Mr William Taylor, was appointed to determine Profile’s claim and did so by an adjudication “determination” on 14 September 2005. Mr Taylor issued a “certificate” in accordance with his determination. That certificate was filed as a judgment for a debt of \$144,704 in the District Court in proceedings no 4643 of 2005 on 28 October 2005.
- 5 It is in respect of the judgment of the District Court that Springs seeks declaratory and consequential relief by way of paragraphs 1, 2, 4 and 5 of the Summons filed in this Court on 9 March 2006. Paragraph 3 of the summons was abandoned at the commencement of the hearing of the summons.
- 6 At the hearing on 21 April 2006, Mr Rogers of counsel appeared on behalf of Springs and Mr Watson of counsel appeared on behalf of Profile. Mr Taylor had previously entered a submitting appearance on 13 April 2006 and did attend the hearing. No orders are sought against him.
- 7 At the commencement of the hearing I raised with Mr Rogers the apparent precondition to these proceedings, as set out in s 25(4) of the **Building and Construction Industry Security of Payment Act 1999 (NSW)** (“the Act”) that a party seeking to set aside a judgment made pursuant to an adjudication certificate is required to pay into court the unpaid portion of the adjudicated amount pending the final determination of these proceedings: see *Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd* (2005) 62 NSWLR 385; [2005] NSWCA 49 at [19] per Handley JA (with whom Santow JA and Peelman AJA concurred) and *Facade Innovations Pty Ltd v Timwin Constructions Pty Ltd* [2005] NSWCA 197 per Hodgson JA, sitting alone, at [7]-[8]. Mr Rogers submitted that *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 was authority for the proposition that the remedy of setting aside judgment was not available and thus payment into court was unnecessary. However, Mr Rogers requested and was granted a short adjournment to seek instructions as to whether his client was in a position to undertake to make payment into court of the unpaid portion of the adjudicated amount. Mr Rogers obtained instructions and conveyed to the court the undertaking of Mr Henry Sun Woo, a director of Springs, to make payment of \$144,704.00 (the full and unpaid adjudicated amount excluding any interest component) into the Supreme Court of NSW by no later than Thursday 27 April 2006.
- 8 Affidavits of Mr Sun Woo and Mr John Groom were read in Springs’ case. Mr Sun Woo gave short oral evidence in chief but was not cross-examined by Mr Watson. The exhibit to the affidavit of Mr Groom was relied upon by Springs and was marked as Exhibit 1. Profile did not lead any additional evidence.

The statutory scheme

9 The terms “payment claim”, “payment schedule”, “adjudication”, “determination” and “certificate” are all part of the statutory scheme established by the Act.

10 The objects of the Act are set out in s 3 in the following terms:

“3 Object of Act

- (1) *The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*
- (2) *The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.*
- (3) *The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:*
 - (a) *the making of a payment claim by the person claiming payment, and*
 - (b) *the provision of a payment schedule by the person by whom the payment is payable, and*
 - (c) *the referral of any disputed claim to an adjudicator for determination, and*
 - (d) *the payment of the progress payment so determined.*
- (4) *It is intended that this Act does not limit:*
 - (a) *any other entitlement that a claimant may have under a construction contract, or*
 - (b) *any other remedy that a claimant may have for recovering any such other entitlement.”*

11 Of particular relevance to the present proceedings are Divisions 1 and 2 of the Act. Division 1 deals with payment claims and payment schedules. Specifically, s 13 of the Act provides that a person (“the claimant”) who claims to be entitled to a progress payment under a construction contract, may serve a payment claim upon a person liable to make the payment (“the respondent”). The section then defines the specific requirements that make up a payment claim. A respondent served with a payment claim may respond by providing to the claimant a payment schedule under s 14 of the Act. I set out the relevant sections below:

“14 Payment schedules

- (1) *A person on whom a payment claim is served (the respondent) may reply to the claim by providing a payment schedule to the claimant.*
- (2) *A payment schedule:*
 - (a) *must identify the payment claim to which it relates, and*
 - (b) *must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount).*
- (3) *If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent’s reasons for withholding payment.*
- (4) *If:*
 - (a) *a claimant serves a payment claim on a respondent, and*
 - (b) *the respondent does not provide a payment schedule to the claimant:*
 - (i) *within the time required by the relevant construction contract, or*
 - (ii) *within 10 business days after the payment claim is served,**whichever time expires earlier,*
the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.”

12 Division 2 deals with the adjudication of disputes. Specifically, s 17 provides:

“17 Adjudication applications

- (1) *A claimant may apply for adjudication of a payment claim (an adjudication application) if:*
 - (a) *the respondent provides a payment schedule under Division 1 but:*
 - (i) *the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or*
 - (ii) *the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or*
 - (b) *the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.*
- (2) *An adjudication application to which subsection (1) (b) applies cannot be made unless:*
 - (a) *the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant’s intention to apply for adjudication of the payment claim, and*
 - (b) *the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant’s notice.”*

13 Mr Rogers contends that Springs’ letter of 9 August 2005 did not constitute a valid payment schedule pursuant to s 14 of the Act. The consequences of this, he submits, are as follows:

- (a) Profile did not comply with the requirements of an adjudication application under s 17(2)(a) and (b) which deals with circumstances when a payment schedule has not been provided;

- (b) therefore an adjudication application was not made; and
(c) the adjudication determination and certificate issued pursuant to the adjudication application are void because there was no valid adjudication application.
- 14 Mr Rogers' submissions that the adjudication determination and certificate are void due to invalidity of the payment schedule and subsequent adjudication application, are predicated upon Springs' letter of 9 August 2005 not constituting a payment schedule and the Court being able to intervene in the determination of the adjudicator for Profile's subsequent non-compliance with s 17(2)(a) and (b). Profile does not dispute that s 17(2)(a) and (b) were not complied with.
- 15 Before dealing with the question of whether Springs' letter of 9 August 2005 constituted a valid payment schedule, there is a threshold question, which is whether it is appropriate for this Court to consider that question given that it is a matter which the adjudicator has considered and determined.

Judicial intervention in adjudication determinations

- 16 The decisions of the Court of Appeal in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 and *Transgrid v Siemens Ltd* (2004) 61 NSWLR 521; [2004] NSWCA 395 provide authority for the bases upon which a Court can intervene in the determination of an adjudicator. In *Rothmere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151 at [10] per McDougall J, these were summarised as including:
- "(1) That the adjudicator has failed to comply with the **basic and essential requirements** laid down in the Act for there to be a valid determination.
(2) That the adjudicator has denied natural justice to a party (the content and operation of this depending, of course, upon the relatively limited scheme put forward by the Act for the provision of natural justice).
(3) That the adjudication determination is procured by fraud in which the adjudicator is complicit." [emphasis added]
- 17 Springs relies only on (1) for intervention, contending that s 17(2)(a) and (b) are part of the basic and essential requirements laid down in the Act. Springs does not contend that the adjudicator took into account irrelevant consideration or misconstrued the terms of the relevant legislation, or that there was a lack of good faith.
- 18 In *Brodyn*, Hodgson JA (with whom Mason P and Ipp JA agreed) limited the basic and essential elements of the Act as being those requirements that enliven the adjudicator's power to perform the functions under the Act: see [55].
- 19 His Honour listed those provisions that appeared to be the basic and essential requirements:
- "[53] ... 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 (s 7 and s 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 (s 18 and s 19).
 5. The determination by the adjudicator of this application (s 19(2) and s 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 (s 22(1)) and the issue of a determination in writing (s 22(3)(a)).
- [54] The relevant sections contain more detailed requirements: for example, s 13(2) as to the content of payment claims; s 17 as to the time when an adjudication application can be made and as to its contents; s 21 as to the time when an adjudication application may be determined; and s 22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or nonjurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.
- [55] In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390–391.
- What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. 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.

[56] It was said in the passage in **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 147, quoted by McDougall J, that a decision may be a nullity if a tribunal has refused to take into account something it was required to take into account, or based its decision on something it had no right to take into account. However, in **Craig v South Australia** (at 177) the High Court said that this would involve jurisdictional error if compliance with the requirement in question was made a pre-condition of the existence of any authority to make the decision. I do not think that compliance with the requirements of s 22(2) are made such pre-conditions, for the same reasons as I considered the determination not to be subject to challenge for mere error of law on the face of the record. The matters in s 22(2), especially in pars (b), (c) and (d), could involve extremely doubtful questions of fact or law: for example, whether a particular provision, say an alleged variation, is or is not a provision of the construction contract; or whether a submission is "duly made" by a claimant, if not contained in the adjudication application (s 17(3)(b)), or by a respondent, if there is a dispute as to the time when a relevant document was received (s 20(1) and s 22(2)). In my opinion, it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered. To that extent, I disagree with the views expressed by Palmer J in **Multiplex Constructions Pty Ltd v Luikens**." [emphasis added]

- 20 It would appear that s 17(2) is to be included in those basic and essential conditions that must be met to ensure the validity of an adjudicator's determination. Einstein J took this view in **Schokman v Xception Construction Pty Ltd** [2005] NSWSC 297 where a payment schedule had not been served within time and the claimant had served the relevant notice under s 17(2) some 20 days outside the 20 business day period provided for service in that section. His Honour found the adjudication application had been served out of time and thus the subsequent determination made by the adjudicator was void.
- 21 In the present circumstances there was no attempt to comply with s 17(2) by service of notice following absence of a payment schedule. This is because, as shown on the face of the adjudicator's confirmation of application dated 1 September 2005, Springs' letter of 9 August 2005 was deemed by the adjudicator to be a valid payment schedule. Springs submits this was done in error and consequentially the determination is void, as the basic and essential requirement of s 17 was not complied with. On this view, requirements of a payment schedule as set out in s 14 of the Act must also become basic and necessary requirements of the Act as they are vital to the operation of s 17.
- 22 It can be seen that s 14 is not included in Hodgson JA's list of basic and necessary requirements as outlined in **Brodyn**. However, as his Honour stated at [55], the list "may not be exhaustive".
- 23 In **Brodyn** at [66] Hodgson JA commented on documents that purported to be a payment claim: "If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful questions of fact and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. However, I do not need to express a final view on this."
- 24 While his Honour was referring to documents purporting to be payment claims, I can see no reason in principle why that approach should not be taken to a document purporting to be a payment schedule or documents received in response to a payment claim. Whatever may be the effect of the absence of any response to a payment claim, different considerations apply, I think, where a document has been provided by the recipient of the claim in apparent response to the payment claim and the adjudicator is called upon to determine, and does determine, that it is a payment claim.
- 25 In **Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd** (2005) 21 BCL 364; [2005] NSWCA 229, Basten JA indicated that even where the Court was of the view that a claim did not satisfy mandatory requirements or where the determination went beyond the parameters of the claim, that would not of itself justify intervention, saying at [44]: "Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine."
- 26 His Honour agreed that the decision of the adjudicator that a document complied with the requirements of a payment claim under the Act (s 13(2)) could not be reviewed for the following reasons:
"[45] In the present case, three factors militate in favour of treating elements identified in s 13(2) as properly dependent upon the satisfaction or opinion of the adjudicator. First, what is or may be a sufficient identification of matters for the purposes of a claim falls within the special experience which a qualified adjudicator is intended to bring to the task and is one which may well require evaluative judgment. Secondly, the requirement relates to a procedural step in the claim process, rather than some external criterion. Thirdly, the overall purpose of the Act, as reflected in its objects and procedures, is to provide a speedy and effective means of ensuring that progress payments are made during the course of the administration of a construction contract, without undue formality or resort to the law."
- 27 However, his Honour also pointed out that there may be circumstances where an opinion of an adjudicator would be open to review, such as if the opinion was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation. As I have noted, in **Brodyn**, Hodgson JA at [57]

referred to the need for the formulation of such an opinion to be undertaken in good faith, even though it is not a sufficient condition of validity.

- 28 Mr Rogers submitted that if a document which might appear to be a payment schedule, but was on proper analysis not a payment schedule, the adjudicator could not be validly appointed and therefore the adjudicator could not consider whether it was a payment schedule, and if he determined wrongly that it was a payment schedule he could not by that process cure a defect in his own authority. Mr Rogers seemed to concede that there were practical problems in such an approach but he said the result was that the adjudication was void. I think it is this kind of conceptual argument that was addressed in *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 and *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55; [1999] NSWCA 8 per Spigelman CJ, and referred to in the context of this Act by Basten JA at [44].
- 29 I think that in considering this aspect weight needs to be given to the third element in Basten JA's analysis – which is reflected in the approach of Hodgson JA in *Climatech* at [30] and *Brodyn* at [51] and [58]. The Act does not impose any binding and final determination on the proprietor but rather puts in place a speedy and hopefully cheap means of dealing with the position pending final determination. It would be inimical to that speedy and cheap determination process if an adjudicator were not able to himself determine whether a document did or did not comply with the description “payment schedule”.
- 30 In my view, the adjudication is not liable to be declared, or treated, as void.

Validity of payment schedule

- 31 If I am wrong in this conclusion and it is open to me to review the determination of the adjudicator, I would reach the same conclusion for the following reasons.
- 32 A payment schedule must comply with the mandatory provisions under s 14 of the Act, particularly s 14(2)(a), (b) and (3). There are therefore three questions:
(1) Did Springs' letter of 9 August 2005 sufficiently identify the payment claim to which it related?
(2) Did Springs' letter indicate an amount of payment that Profile proposed to make? (That is, the scheduled amount.)
(3) If Springs' letter did indicate a proposed payment amount, and that amount was less than the claimed amount, did the letter give reasons why payment was being withheld?
- 33 The approach that should be taken in considering whether documents purporting to be payment claims or payment schedules comply with the relevant mandatory requirements of the Act was set out by Palmer J in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 (approved in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391, specifically considering the validity of payment schedules). His Honour said (emphasis added):
- [76] A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.*
- [77] A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.*
- [78] Section 14(3) of the Act, in requiring a respondent to “indicate” its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word “indicate” rather than “state”, “specify” or “set out”, conveys an impression that some want of precision and particularity is permissible as long as the essence of “the reason” for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.”*
- 34 Dealing first with the requirement for Springs' letter of 9 August 2005 to sufficiently identify the payment claim to which it related, it was conceded by Mr Rogers that the letter did sufficiently satisfy s 14(2)(a) of the Act.
- 35 Second, to be a payment schedule Springs' letter of 9 August 2005 must have indicated the amount of the payment (if any) that Springs proposed to make (that is, the scheduled amount). In Springs' letter of 9 August 2005, Mr Groom refers to the amount of \$30,310.00 as being the amount offered as “last and final payment” during the meeting of 14 July 2005. Mr Rogers submits the amount referred to is merely the reiteration of a

previous “global amount” as an offer to settle the matter between Springs and Profile. He submits that the letter does not serve as an acknowledgement of debt but rather merely notes the details of the meeting of 14 July 2005 and offers to pay \$30,310.00 contingent upon settlement. Additionally, in para 5 of Mr Sun Woo’s affidavit and para 6 of Mr Groom’s affidavit, evidence was led of Mr Sun Woo offering Profile \$30,310.00 to “resolve the matter”.

- 36 Mr Watson submits that on any objective construction, the letter does not convey the impression of the sum referred to being a settlement offer. He contends that the letter provides an arithmetical checklist and encloses the letter of 10 July 2005, which effectively “ticks off” the work for which Springs considered itself liable. Mr Watson further submits that the letter is not marked with any “without prejudice” caveat, a caveat usually expected in settlement offers.
- 37 The letter is not explicitly expressed as an offer, nor does it state that the amount previously offered was an offer that went beyond what was accepted by Springs as payable by it. What is important, I think, is that it was a response to a formal payment claim that had been made. A claim having been made pursuant to the Act and expressed to be so made, the letter ought be construed liberally as a response with significance under the Act. The fact that an offer had been made of the same amount previously (whether or not expressed previously to be without prejudice and whether or not expressed previously to be an amount greater than the amount said by Springs to be owing, neither of which appears to be the case) does not preclude the letter meeting the requirements of s 14. The letter considered as a response to the payment claim, which its heading expressed it to be, states the total amount that Springs was, and inferentially, continues to be, prepared to pay. If there is a qualification, it is that the stated amount is all that it is prepared to pay. In my view, the amount that Springs proposes to pay (“the scheduled amount”) is thereby indicated.
- 38 This leads on to the consideration of s 14(3) and whether the letter indicated why the scheduled amount was less than the claimed amount and the reasons Springs was not prepared to pay more than the figure of \$30,310 or in the language of the Act, “withholding payment” of the full claimed amount. Mr Rogers submits that the letter simply provides a summary of the matters discussed during the meeting on 14 July 2005 and does not seek to explain why the figure referred to in the letter is less than the claimed amount. I do not accept this submission. Springs’ letter of 9 August 2005 is in direct response to Profile’s letter of 29 July 2005. It includes the headings “Lost Revenue”, “Excess Materials” and “Defects” and details the quantum of the loss under each of these headings. It encloses a letter of 10 July 2005, which contains further details: see p 2 of Exhibit “A”. Furthermore, the letter effectively subtracts from the claimed amount the amounts listed beside these headings. The combined total of the amounts listed beside the headings is \$125,390.00. When this figure is subtracted from the claimed amount (\$155,700.96) the remaining total is \$30,310.96. This total differs from the scheduled amount by 96 cents. The one item in the letter of 9 August 2005 for which no amount is given is “surveying”, but it appears to have had no monetary effect given the calculation to which I have just referred.
- 39 In my view, the letter provides the necessary particularity to sufficiently make Springs’ reasons for withholding payment of some of the claimed amount known to Profile and to enable Profile to make a decision about whether or not to pursue the claim and to understand the nature of the case it would have had to meet in an adjudication.
- 40 Accordingly, I find Springs’ letter of 9 August 2005 was a payment schedule and thus s 17(2)(a) and (b) were not enlivened.

Conclusion

- 41 The parties agreed that if, contrary to Springs’ contentions, the letter of 9 August 2005 did constitute a payment schedule, then the consequence would be that the Summons would be dismissed. Alternative arguments were advanced by Profile on the basis of delay on the part of Springs and lack of any real prejudice to it, but I do not in the circumstances need to consider these further issues.
- 42 I dismiss the Summons.
- 43 I will hear the parties on costs.

A Rogers (Plaintiff) instructed by Brennan Tipple Partners
J Watson (First Defendant) instructed by Brown Wright Stein

Gadens Lawyers (Second Defendant)