IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

Not Restricted

SC1 9597 of 2009

GANTLEY PTY LTD (ACN 113 690 574) , RESOURCES COMBINED NO. 2 PTY LTD (ACN 108 925 999) AND JETOGLASS PTY LTD (ACN 006 256 239) — Plaintiffs

v

PHOENIX INTERNATIONAL GROUP PTY LTD (ACN 109 614 011) AND PHILIP DAVENPORT — Defendants

---

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATES OF HEARING:	15–17 MARCH 2010
DATE OF JUDGMENT:	31 MARCH 2010
	GANTLEY PTY LTD v PHOENIX INTERNATIONAL GROUP PTY LTD
MEDIUM NEUTRAL CITATION:	[2010] VSC 106

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) – Progress claim under s.14 of the Act as it was prior to the operation of Act No. 42 of 2006 – Requirement to identify work in progress claim under s.14 of the Act – Degree of specificity in identification of work required - Consequences of non-compliance with identification requirement – Severance of part of payment claim open – Considerations in applying severance – Consequences of invalidity of payment claim – Test for jurisdictional error in adjudicator's determination – Whether service of progress claim under the Act after termination of construction contract permitted – Circumstances in which progress claim may be served after construction contract terminated – Whether final payment claims permitted to be made under pre-amended Act – Whether final payment claims permitted to be made under amended Act – What constitutes "progress claim" – What constitutes "final payment claim" – Whether invalidity under s.14 of the Act by reason of more than one payment claim made.

ADMINISTRATIVE LAW – Principles of severance considered in relation to a statutory form drawn under an enactment.

STATUTORY CONSTRUCTION - Whether amending enactment can throw light on the intention of an earlier enactment.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M.A. Robins	Kliger Partners Lawyers
For the Defendants	Mr D.H. Colman	Fairweather Legal

TABLE OF CONTENTS

HIS HONOUR:

Introduction

1 These matters arise from the operation in Victoria of the *Building and Construction Industry Security of Payment Act 2002* (the "Act").[1]

2 This legislation came into operation in Victoria on 31 January 2003. It has since been amended by Act No. 42 of 2006. The first of the amendments came into operation on 26 July 2006. These were relatively minor. The second and more substantial group of amendments commenced on 30 March 2007. Accordingly, the legislation in its present amended form (the "New Act") applies to construction contracts entered into on or after 30 March 2007. For construction contracts entered into on or after 31 January 2003, but prior to 30 March 2007, the legislation in its unamended form (the "Old Act") applies, save for the minor amendments which became operative on 26 July 2006.[2]

3 The first Defendant, Phoenix International Group Pty Ltd ("Phoenix"), which is a builder, entered into a construction contracts with each of the Plaintiffs in respect of different construction projects. I shall briefly outline each of the projects by reference to the different Plaintiffs in the proceeding.

Gantley

4 Phoenix entered into a construction contract with the first Plaintiff Gantley Pty Ltd ("Gantley") on 2 October 2006 (the "Gantley Contract"). Pursuant to the contract Phoenix was to construct 20 apartments in Hawthorn, Victoria for the sum of $4.95 million. Gantley was the owner of the land. The contract was in the form of the standard AS 4000–1997 contract.

5 The Old Act applies to the Gantley Contract.

---

1 The word "Act" will be used to compendiously describe the legislation, both in its pre-amended state (the "Old Act") and as amended (the "New Act") where there are no material differences between them.

2 See the transitional provision: s. 53 *Building and Construction Industry Security of Payment Act 2002* (as amended).

6 It was common ground that the Gantley Contract was terminated on 19 February 2009 following a notice being given by Gantley which purported to terminate the contract. Thereafter no further work was done under the contract. However, there remains an issue as to which party repudiated the contract.

Resources

7 Phoenix entered into a second construction contract with the second Plaintiff Resources Combined No. 2 Pty Ltd ("Resources"), on 20 January 2006 (the "Resources Contract"). Pursuant to the contract Phoenix was to construct eight townhouses at Blackhill in Ballarat, Victoria for the sum of $1.428 million. Resources was the owner of the land. The principal of Resources was Zygmunt Zayler. The contract was in the standard form of the MBAV New Homes Contract (HC–5 Edition 3–2001).

8 The Old Act applies to the Resources Contract.

9 It was common ground that the Resources Contract was terminated on 23 February 2009 following a notice being served by Resources which purported to terminate the contract. Thereafter no further work was done under the contract. However, there remains an issue as to which party repudiated the contract.

Jetoglass

10 In this matter, Phoenix entered into a third construction contract with the third Plaintiff Jetoglass Pty Ltd ("Jetoglass") on 6 December 2005 (the "Jetoglass Contract"). Pursuant to the contract Phoenix was to construct two townhouses in Beaumaris, Victoria for the sum of $825,000. Jetoglass was the owner of the land. The contract was in the standard form of the MBAV New Homes Contract (HC–5 Edition 3–2001).

11 The Old Act also applies to the Jetoglass Contract.

12 It was common ground that the Jetoglass Contract was terminated on 24 February 2009 following a notice being given by Jetoglass which purported to terminate the

contract. Thereafter no further work was done under the contract. However, there remains an issue as to which party repudiated the contract.

The Payment Claims and Adjudications

13 In May and July 2009, Phoenix served payment claims on Gantley, Resources and Jetoglass pursuant to the Old Act in respect of construction work done under the construction contracts in all three matters (the "Gantley Payment Claim"; the "Resources Payment Claim"; and the "Jetoglass Payment Claim"). In response to the payment claims, the Plaintiffs in each case served "$NIL" payment schedules under the Old Act disputing the whole of the claims made by Phoenix. The May payment claim was served on and dated 26 May 2009 (the "May payment claim") and the July payment claim was served on and dated 14 July 2009 (the "July payment claim").

14 Pursuant to the Old Act, Philip Davenport ("Davenport") was appointed to act as the adjudicator in respect of the three disputed payment claims. Davenport is joined as the second Defendant in the proceedings. Gantley, Resources, and Jetoglass delivered submissions in the adjudications which contended that the payment claims in each case were contrary to the Old Act and invalid, and that each of the sums claimed were not due to Phoenix.

15 By adjudication determinations each dated 24 August 2009, Davenport as the adjudicator determined that the sums claimed by Phoenix pursuant to its payment claims in each matter in large part were due to it. Gantley, Resources, and Jetoglass have failed to pay the adjudicated amounts, or any part of those sums.

These Proceedings

16 By an originating motion issued 16 October 2009 the Plaintiffs issued this proceeding seeking the following principal relief:

1. A declaration that the adjudication determinations pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the

"Act") of the Second Defendant ("Davenport") dated 24 August 2009: As between the first plaintiff ("Gantley") as respondent and the first defendant ("Phoenix") as claimant (the "Gantley Adjudication"); as between the second plaintiff ("Resources") as respondent and Phoenix as claimant (the "Resources Adjudication"); and/or as between the third plaintiff ("Jetoglass") as respondent and Phoenix as claimant (the "Jetoglass Adjudication") were unlawful and void.

2. Further or alternatively, an order quashing each of the Gantley Adjudication; the Resources Adjudication; and/or the Jetoglass Adjudication.

3. A permanent injunction enjoining Phoenix from seeking to enforce or take action under the Act in respect of: the Gantley Adjudication; the Resources Adjudication; and/or the Jetoglass Adjudication.

17 In each matter there are five grounds of review in the originating motion. The fifth ground in each case contains numerous sub-grounds which allege failures by Davenport to accord procedural fairness and errors of law on the face of the record in respect of his three adjudications. By an order made 15 December 2009, I ordered that the first four grounds of the Plaintiff's originating motion in each matter be set down for trial. Accordingly, the trial before me, which is the subject of these reasons, was conducted in respect of those four grounds.

The Four Grounds of Review

18 The four grounds of review argued at the trial, which in essence were common to all three matters, were:

> **Ground 1**:
>
> Contrary to section 14(3) of the Act, it was not open to Davenport to find in accordance with law or the Act, and he erred in so finding, that the Gantley (Resources and Jetoglass) Payment Claim was valid when it failed to sufficiently identify the construction work or related goods or services to which the purported payment claim related.
>
> **Ground 2**:

Contrary to section 14(1) of the Act, it was not open to Davenport to find in accordance with law or the Act, and he erred in so finding that Phoenix had a right to a progress payment at all under the Gantley (Resources and Jetoglass) Contract in respect of which the Gantley (Resources and Jetoglass) Payment Claim could have been made as:

The progress claim was served 4 months and 2 weeks after the termination of the Gantley Contract, which termination had discharged both Gantley (Resources and Jetoglass) and Phoenix from any further performance of obligations under the Contract; and

Phoenix was not entitled to make any progress payment claim under the relevant provisions in the Gantley (Resources and Jetoglass) Contract at all and accordingly the purported Gantley (Resources and Jetoglass) Payment Claim was invalid.

Ground 3:

Contrary to section 9 of the Act, the Gantley (Resources and Jetoglass) July Payment Claim was in substance and reality a final claim.

Ground 4:

Alternatively to Ground 3 above, if Phoenix was entitled to make a progress payment claim under the Gantley (Resources and Jetoglass) Contract after it was terminated, which is expressly denied, then contrary to section 14(2) of the Act, the Gantley (Resources and Jetoglass) July Payment Claim constituted more than one Payment Claim under the Act in respect of the same progress payment.

Purpose and Object of the Act

19 As I observed in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd & Anor*[3] the Act has had a substantial effect in shifting the power balance between principals and subcontractors in construction contracts in Victoria and in other States and Territories where legislation in similar terms and with the same objects has been enacted.[4] There is also parallel legislation in place in New Zealand[5] and the United Kingdom.[6] Subcontractors are now in a position to promptly secure payments of progress claims with the aid of a statutory mechanism which compliments the provisions of the construction contract. Outstanding claims of the principal under the contract, arising for example from poor workmanship or delay, are preserved as

3 [2009] VSC 156 at [2].

4 *Building and Construction Industry Security of Payment Act 1999* (NSW); *Construction Contracts Act 2004* (WA); *Construction Contracts (Security of Payments) Act* (NT); and *Building and Construction Industry Payments Act 2004* (Qld).

5 *Construction Contracts Act 2002* (NZ).

6 *Housing Grants, Construction and Regeneration Act 1996* (UK).

future enforceable claims, but cannot stand in the way of prompt payment of a progress claim found to be due under the expeditious process provided for in the Act.

20 For completeness, and because my earlier consideration of the Act underpins these reasons, I re-state my observations made in *Hickory* as to its object and purpose.[7]

21 The Victorian Act was modeled on the provisions and processes set out in the New South Wales *Building and Construction Industry Security of Payment Act 1999* ("the NSW Act"). The Victorian Minister for Planning Ms Delahunty in her second reading speech[8] in introducing the bill which became the Victorian Act acknowledged the significance of the relationship between the NSW Act and the proposed Victorian Act saying that "this has the benefit of allowing building and construction firms with national operations to be subject to common payment requirements in both jurisdictions".

22 Section 3(1) describes the object of the Act as being

> that any person who carries out construction work or who supplies goods and services under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of that work.

23 The responsible Minister in introducing the bill stated in the second reading speech:[9]

> The main purpose of this bill is to provide for an entitlement to progress payments for persons who carry out building and construction work or who supply related goods and services under construction contracts. This bill represents a major initiative by the government to remove inequitable practices in the building and construction industry whereby small contractors are not paid on time, or at all, for their work.
>
> … quick adjudication of disputes is provided for with an obligation to pay or provide security of payment.

24 In *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*[10] Beech J described the purpose of the like Western Australian legislation in the following terms:[11]

---

7 [2009] VSC 156 at [37] – [45].

8 State Government of Victoria, *Parliamentary Debates*, Legislative Assembly, 21 March 2002, 427 (Mary Delahunty).

9 *Ibid*.

> In construing the Act it is to be borne in mind that the object of the scheme created by the Act is, as described in the explanatory memorandum and the Second Reading Speech, to "keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted disputes".

25 Campbell J in *Amflo Constructions Pty Ltd v Jefferies*[12] made observations to similar effect about the NSW Act, regarding provisions which are mirrored in the Victorian Act, saying:

> A fundamental feature of the legislation is that, apart from the fact that parties to a construction contract cannot contract out of the rights given by the legislation ... nothing ... affects any of the rights that parties to a construction contract have ... The concern of the Act is with maintaining the cash flow of claimants, by enabling them to recover quickly amounts which the adjudication process says they are entitled to. It is possible for the person who pays the amount of money which an adjudication has found due to seek to reclaim that money, in court proceedings which decide what the ultimate legal rights of the parties are. An evident purpose of the Act is that, if there is to be such litigation, it will start from a position where the claimant has been paid the amount which the adjudication process has decided should be paid. [Specific references to the sections of the NSW Act omitted]

26 Campbell J in *Amflo* also considered the contents of the second reading speech in introducing amendments to the NSW Act, the *Building and Construction Industry Security of Payment Amendment Bill 2002* (NSW).[13] Given the provenance of the Victorian Act, these observations of the New South Wales Minister provide useful insights into the operation of the Victorian Act.[14] In his speech the New South Wales Minister said:

> The main purpose of the Act is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover progress payments. The Government wanted to stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers by ignoring progress claims, raising spurious reasons for not paying, or simply delaying payment. ...

---

10 [2009] WASC 19.

11 *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [122].

12 [2003] NSWSC 856 at [25] and [27].

13 State Government of New South Wales, Parliamentary Debates, Legislative Assembly, 12 November 2002, 6541 (Maurice Iemma).

14 **See: *Interpretation of Legislation Act* 1984 (Vic) s. 35(b).**

> The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid ...
>
> Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act ...
>
> ... there will be instances when the progress payment determined by the adjudicator will be more or less than the entitlement finally determined to be due under the contract. However, it is better that progress payments be made promptly on an interim basis, assessed by an independent party, rather than they be delayed indefinitely until all issues are finally determined.
>
> Presently, when a respondent fails to pay the claimant by the due date for payment under the contract, the claimant's only recourse to enforce payment is to commence proceedings in a court. The Bill will give the claimant another option. The claimant will be able to opt to have an adjudicator determine the amount of the progress payment that is due. This is an "*optional adjudication*". The claimant will still be able to proceed to adjudication earlier if the respondent provides a payment schedule and the scheduled amount is less than the amount claimed. The benefit to the claimant of proceeding with an optional adjudication rather than commencing proceedings in a court is that the claimant will then be able to use the adjudication certificate to obtain judgment expeditiously and without a court hearing. The claimant will be able to initiate an optional adjudication when the respondent fails to provide a payment schedule within time and fails to pay the amount claimed, or the respondent provides a payment schedule but fails to pay the whole of the scheduled amount.

27 The Victorian Act also preserves a claimant's right to commence proceedings under the relevant construction contract, including proceedings in a court, and any arbitration proceedings or other dispute resolution proceedings: s.48. Further, in any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal is required to make allowance for any sum paid pursuant to the Act in any order which is made: s.48(3).

28 The principle that the respondent to a payment claim for a progress payment "should pay now and argue later" is given full effect under the Act: *Multiplex*

Constructions Pty Ltd v Luikens and Anor.[15] This regime promotes the object of the Act, being to facilitate timely payments between the parties to a construction contract and to provide for the rapid resolution of disputes arising in respect of progress claims under construction contracts.

29 As I observed in *Grocon Constructors v Planit Cocciardi Joint Venture [No 2]*:[16]

> The *Building and Construction Industry Security of Payment Act* 2002 was introduced in Victoria to allow for the rapid determination of progress claims under construction contracts or sub-contracts, and contracts for the supply of goods or services in the building industry. The process was designed to ensure cash flow to businesses in the building industry, without parties get tied up in lengthy and expensive litigation or arbitration. It was intended to establish a process for the fast recovery of progress payments payable under a construction contract. This was to be achieved by a novel procedure which provided for the rapid adjudication of payment disputes at a low cost to the parties. The amendments introduced into the Act which operate from 31 March 2007 reinforce the scheme by creating, inter alia, a fast track system for enforcing payment in the courts through an expedited process for the entry of judgment founded on a certificate evidencing the adjudication determination and an affidavit of non-payment.

These observations find support in the outline of the Act provided in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*[17] where I canvassed the purposes and objects of the Act, and the procedures designed to implement them, in some detail.

30 From this analysis, I readily accept the observation made in a number of recent authorities that the Act places the claimant in a privileged position in the sense that it acquires rights that go beyond its contractual rights: *Protectavale Pty Ltd v K2K Pty Ltd*[18] and *Jemzone Pty Ltd v Trytan Pty Ltd*[19] ("*Protectavale*").

Ground 1

31 Central to Ground 1 is the question as to the degree of specificity required under the Act in describing the work done for which payment is claimed.

---

15 [2003] NSWSC 1140 at [96].

16 [2009] VSC 426 [33-34]

17 (2009) VSC 156 at [36-65].

18 *Multiplex Constructions Pty Ltd v Luikens and Anor* [2003] NSWSC 1140 at [7].

19 (2002) 42 ACSR 42 at 50.

32 It was claimed by the Plaintiffs that the payment claims were deficient in each case in the following respects:

The Gantley Payment Claim was said to be deficient in the following way:

(a) It did not identify the manner in which the sum of $575,520 for "prolongation" was calculated;

(b) The Payment Claim did not identify the work previously completed and paid for and the work (apart from the alleged variations and prolongation) to which the sum of $4,500,000 was said to relate;

(c) The only information as to how the sum of $388,214 was calculated was that the amount was referrable to the "Contract Value" and "Less Payments to date".

The Resources Payment Claim was said to be deficient in the following way:

(a) It did not identify the manner in which the sum of $207,176 for "prolongation" was calculated;

(b) The Payment Claim did not identify the work previously completed and paid for and the work (apart from the alleged variations and prolongation) to which the sum of $1,408,000 was said to relate;

(c) The only information as to how the sum of $140,800 was calculated was that the amount was referrable to the "Contract Value" and "Less Payments to date".

The Jetoglass Payment Claim was said to be deficient in the following way:

(a) It did not identify the manner in which the sum of $146,300 for "prolongation" was calculated;

(b) The Payment Claim did not identify the work previously completed and paid for and the work (apart from the alleged variations and prolongation) to which the sum of $123,750 was said to relate;

(c) The only information as to how the sum of $49 was calculated was that the amount was referrable to the "Contract Value" and "Less Payments to date".

Requirement for Identification under the Old Act

33 Section 14(3)(a) of the Old Act made it a requirement of a payment claim for it to identify the construction work or related goods and services to which the progress payment relates.

34 Section 14 of the Old Act provided:

> **14. Payment claims**
>
> (1) A person who is entitled to a progress payment under a construction contract (the "claimant") may serve a payment claim on the person who under the contract is liable to make the payment.
>
> (2) A claimant may serve only one payment claim in respect of a specific progress payment.
>
> (3) 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 for the construction work done or related goods and services supplied to which the payment relates (the "claimed amount"); and
>
> (c) must state that it is made under this Act.

Requirement for Identification under the New Act

35 Section 14(2)(c) of the New Act for present purposes is not materially different to the equivalent provision in the Old Act.

36 Section 14 of the New Act, so far as it is relevant to the present issue, provides:

> (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on

the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim-

(a) must be in the relevant prescribed form (if any); and

(b) must contain the prescribed information (if any); and

(c) must identify the construction work or related goods and services to which the progress payment relates; and

(d) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount); and

(e) must state that it is made under this Act.

Analysis

37 The requirement for the description of the work done is thus to "identify the construction work … to which the progress payment relates".

38 It was submitted by the Plaintiffs in each case that the deficiencies in the description of the work done in each payment claim were such as to render the payment claim in each case invalid because the payment claims failed to satisfy one of the basic and essential elements of the Act. It followed, so it was submitted, that the adjudication in each case, which was founded upon an invalid payment claim, was itself invalid, and should be set aside.

39 The requirement to identify the relevant construction work in the payment claim takes on its meaning from the context of the Act. The payment claim is the pivotal document in the procedure established under the Act for recovering progress payments. It initiates to process under the Act: s.14; it provides a basis for the respondent to the payment claim to reply to the payment claim by providing a payment schedule to the claimant: s. 15; and, if the scheduled amount indicated by a payment schedule is less than the claimed amount indicated in the payment claim, the claimant may initiate the adjudication process provided under the Act: Division 2 of the Act.

40 In determining an adjudication application, the adjudicator is confined to considering the matters prescribed under s.23(2) of the Act, which provides:

> (2) In determining an adjudication application, the adjudicator must consider the following matters and those matters only-
>
> (a) the provisions of this Act and any regulations made under this Act;
>
> (b) subject to this Act, the provisions of the construction contract from which the application arose;
>
> (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim;
>
> (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule;
>
> (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

Thus, the payment claim to which the adjudication application relates, is one of the documents to which the adjudicator must have regard in determining the adjudication application.

41 Reasonable specificity of the work done which is the subject of the payment claim is therefore required for two principal purposes:

(a) to enable a respondent to a payment claim to consider and respond to it, either by accepting the claim in full or in part, or rejecting the claim totally; and

(b) to define the issues in dispute between the parties which the adjudicator is to resolve, and to enable an adjudicator, if appointed, to determine the adjudication application.[20]

---

20 See: *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor* [2009] VSC 156 at [56].

42 In some cases the requirement to inform the adjudicator of the work done which is the subject of the payment claim will assume greater importance than the information provided to the respondent to the claim, simply because the respondent is more than likely to be a party who is intimately familiar with the construction project, whereas an appointed adjudicator is a third person who is likely to have no knowledge of it whatsoever. In such cases, the facility to supplement the information provided in a payment claim by the provision of written submissions to an adjudicator may be availed of pursuant to s.18(2)(d) of the Old Act and s.18(3)(h) of the New Act.

43 In considering this matter I take into account the fact that the Act confers special statutory rights on claimants which places them in a position of advantage with the opposite party in the administration of a construction contract. As such, the payment claim must on its face contain all the ingredients required by the Act.[21]

44 Failure adequately to set out in a payment claim an identification of the work undertaken to which the claim relates would be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant set out the basis of the claim with a proper identification of the work to which the claim related in submissions subsequently put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material, he or she is not appropriately satisfied of the claimant's entitlement.

45 However, in my opinion, the requirement to identify the work undertaken to which the progress payment relates is tainted with a more fundamental vice. Such a payment claim will be invalid because one of the basic and essential requirements of the Act have not been met, at least insofar as the claim relates to work claimed for which is not identified for the purposes of s.14(3)(a). Any adjudication founded upon such an invalid payment claim, will iteslf be invalid, at least to that extent.

---

21 *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] ACSR 42 at 50 [41].

46 I agree with the observations of Austin J in *Jemzone Pty Ltd v Trytan Pty Ltd* [22] where his Honour said in relation to the equivalent provision to s.14(3)(a) of the Victorian Act:

> 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. The document in question refers to "motel construction for Jemzone Pty Ltd". That falls well short of satisfying the requirement of s 13(2)(a). The letter sets out a table which calculates the amount due, but the table does not identify any particular construction work other than variations. It merely begins by specifying a balance owing as at 9 February 2001, and then makes adjustments for variations and payments and other matters. At no stage is there any statement purporting to identify the work carried out since the making of the last payment claim.

47 Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd*[23] expressed a similar view in considering the requirements of s.14(2)(a) when he said:[24]

> It is necessary to decide whether the invoice meets the requirements of s 14. The test is an objective one; that is, it must be clear from the terms of the document that it contains the required information: *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [82]. But the terms must be read in context. Payment claims are usually given and received by parties experienced in the building industry who are familiar with the particular construction contract, the history of the project and any issues which may have arisen between them regarding payment. Those matters are part of the context: *Multiplex Constructions* [2003] NSWSC 1140 at [76].
>
> The manner in which compliance with s 14 is tested is not overly demanding: *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103 at [54] citing *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20] ("[The requirements for a payment claim] should not be approached in an unduly technical manner ... As the words are used in relation to events occurring in the construction industry, they should be applied in a commonsense practical manner"); *Multiplex Constructions* [2003] NSWSC 1140 at [76] ("[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"); *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd)* [2007] QSC 333 at [20] ("The Act emphasises speed and informality. Accordingly one should not approach the question whether a document satisfies the description of a

---

22 [2002] ACSR 42 at 50 [43].

23 [2008] FCA 1248; applied in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor* [2009] VSC 156 at [53] and [56 – 57].

24 *Ibid* at [10] – [12].

payment schedule (or payment claim for that matter) from an unduly critical viewpoint").

> Nonetheless a payment claim must be sufficiently detailed to enable the principal to understand the basis of the claim. If a reasonable principal is unable to ascertain with sufficient certainty the work to which the claim relates, he will not be able to provide a meaningful payment schedule. That is to say, a payment claim must put the principal in a position where he is able to decide whether to accept or reject the claim and, if the principal opts for the latter, to respond appropriately in a payment schedule: *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462, 477; *John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd* [2004] NSWSC 258 at [18]-[21]. That is not an unreasonable price to pay to obtain the benefits of the statute.

48 The same approach was adopted by White J in *Neumann Contractors P/L v Peet Beachton Syndicate Limited*[25] where his Honour concluded that the payment claim in question did not identify the construction work to which the claim related and therefore did not fulfil the requirements of the relevant section in the Queensland legislation.[26]

49 However, it needs to be said that an artificial degree of precision and particularity in the identification of the work done for which payment is claimed is not required for the purposes of s.14(3)(a) of the Old Act, or indeed its successor s.14(2)(c) of the New Act.

50 The point was emphasised by Hodgson JA in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*[27] where his Honour said:

> In my opinion, a document which purports to be a payment claim does not fail to be a payment claim, within the meaning of the Act, merely because it can be seen, after a full investigation of all the facts and circumstances, not to successfully identify all the construction work for which payment is claimed. This could be the case, for example, if there is some typographical omission or other error in relation to one of a large number of items included in the claim; and the question whether or not the other party, by reason of its knowledge of the project, would have been able to fill in or correct that error could be one depending on a great deal of evidence concerning the circumstances of the case. In my opinion, it is inconceivable that it was the intention of the legislature that the existence of a payment claim under the Act should depend on that kind of consideration.

---

25 [2009] QSC 376.
26 *Ibid* at [29].
27 [2005] NSWSC 409 at [34] – [36].

> It is true that, if a payment claim does not identify the work in a way comprehensible to the respondent to the claim, the respondent will be in difficulty in formulating a payment schedule, and this may give rise to further difficulty in any adjudication proceedings, inter alia because of the provisions to which I referred in par.[18] above. But in my opinion, if a respondent is unable to identify some of the work in respect of which a payment claim is made, it can in the payment schedule say it does not propose to make any payment in respect of that work because it cannot identify the work, and because for that reason it disputes that the work was done or done to a standard justifying payment, or was within the contract or within any variation of it, and that any pre-condition to payment was satisfied. If an adjudicator then determined that the work was not identified in the payment claim, presumably he or she would not award any payment in respect of that work; and if the adjudicator determined that it was identified, the adjudicator could address matters put in issue in that general way by the respondent.
>
> That is, I do not think a payment claim can be treated as a nullity for failure to comply with s.13(2)(a) of the Act, unless the failure is patent on its face; and this will not be the case if the claim purports in a reasonable way to identify the particular work in respect of which the claim is made.

51 What is necessary is an identification of the work which is sufficient to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is not an overly exacting exercise. It is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively, that is from the perspective of a reasonable party who is in the position of then recipient. In evaluating the sufficiency of the identification of the work, it is appropriate to take into account the background knowledge of the parties derived from their past dealings and exchanges of information.

52 In my view, the observations I have made apply with equal force to the New Act in its current form.

53 The question then becomes, did the payment claims served by Phoenix in these matters satisfy s.14 of the Act?

Gantley Payment Claim

Gantley Payment Claim

54 The Gantley Payment Claim, described as "Progress Claim No. 23" was dated 14 July 2009. The total amount of the claim was $2,373,549. The respondent, Gantley,

served a $NIL payment schedule, indicating that it proposed to pay nothing in response to the claim. The payment claim was drawn to claim four separate amounts: the first being the sum of $1,309,815 for claimed variations; the second item was for alleged prolongation in the sum of $575,520; the third item was for $100,000 being retention monies under a bank guarantee which was claimed to be due; and the fourth item was the sum of $388,214. The latter sum is not specified expressly in the payment claim. It is derived from a calculation from the figures provided, by subtracting from the sum of $4,950,000 said to be the "value of the work completed and payment due to date under the contract (contract value)", the amount of $4,561,786, being the amount said to have been paid by the respondent, Gantley, to that point.

Variation Claims in the Gantley Claim

55 The Gantley Payment Claim specified with reasonable particularity the work said to comprise the variations which were claimed for. This work was specified in a schedule attached to the payment claim. There were 38 variations which were the subject of the claim. In the schedule each variation was described in the following manner: each was assigned a variation number and the date of the variation, each contained a short description (occupying a few lines) describing the work which was the subject of the variation, each variation was given a money sum which was claimed in respect of the variation, and in each case there was a column devoted to describing what was said to be the oral or written variation instruction. In my opinion, standing on its own, if this was the only component of the progress claim, it would have satisfied the requirements of s.14(3)(a) in identifying the construction work to which the payment claim related.

Prolongation Costs in the Gantley Claim

56 The payment claim also made a claim for "prolongation costs".

57 Prolongation costs, along with other time-related costs, are now excluded from the amount of a progress payment to which a person is entitled under the New Act:

s.10B(2)(b)(ii). My observations upon the prolongation claim are therefore confined to the position as it was prior to the introduction of the New Act.

58 The sum of $575,520 was claimed for prolongation costs under the Old Act. This was identified further in the payment claim as "item 37 of the variation schedule attached". Item 37 in the variation schedule described this item in the following terms: "Liquidated Damages caused by the Owner and/or the Superintendent and/or any person Authorised by the Owner and/or Mr Zyler [who was the principal of the Owner]". The oral or written instructions giving rise to the prolongation claimed for was said to be: "Mr Zayler's oral instructions and/or written instruction on/or about the 15/01/2007 – 19/02/2009".

59 Even though a prolongation claim is not directly a claim for payment for work which has been done, in my opinion, it may be the subject of a progress payment claim which can be enforced under the Old Act if the relevant construction contract permits prolongation claims to be claimed as part of a progress claim. As was said by Hodgson JA in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*[28] "payment claims may include amounts that are not (in a narrow sense) for construction work that has actually been carried out for related goods and services that have actually been supplied".[29]

60 The analysis of Hodgson JA in an earlier case, *Coordinated Constructions Co Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd*,[30] is readily applicable to the Act in Victoria. The object of the Victorian Act is stated in s.3(1) as being "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, specified progress payments in relation to the carrying out of that work and the supplying of those goods and services". The definition of "progress payment" refers to s.9, which does not limit the payment to payment for construction work

28 [2005] NSWCA 229..
29 *Ibid* at [25].
30 [2005] NSWSC 77 at [38 – 45] per Hodgson JA.

and/or related goods and services; and the amount of the progress payment is dealt with in s.10, which also does not impose such a limit. These provisions support the position that progress payment claims under the Victorian Act are not limited to work actually done or to goods and services actually supplied, but may include progress payment claims made in relation to the carrying out of that work and the supplying of those goods and services.

61 On the other hand, telling against such an approach is s.14 which provides for payment claims. Section 14(3)(a) requires a payment claim to identify the construction work or related goods and services to which the payment claim relates, and s.14(2)(b) requires an indication to be given of the amount of the progress payment that the claimant claims to be due for the construction work done or the related goods and services supplied to which the payment claim relates. Further, pursuant to 23(2)(c), what is adjudicated, if there be an adjudication constituted under the Act, includes the payment claim.

62 However, s.14 is a procedural provision designed to implement the process for the recovery of progress payments under the Act. The section provides for service of a payment claim: ss.14(1) & (2); and what the payment claim must provide for: s.14(3).

63 The substantive provisions which define the right to a progress payment which may be enforced with the assistance of the Act are found in Part 2 of the Act. Section 10(a) defines the amount of a progress payment to which a person is entitled in respect of a construction contract to be the amount calculated in accordance with the terms of the contract. If however, the contract makes no express provision for a progress payment, s.10(b) provides for the amount of the progress payment to be calculated on the basis of the value of the construction work carried out or the value of any related goods or services provided.

64 It follows that, if the contract, either expressly or impliedly, provides for progress payments to include payments for monies due under the contract, other than payments directly for work done under the contract or for goods and services

directly supplied for this purpose, which I will call "additional expenses", a progress payment claim may be made for payment for these items under the Act, if any such sum should fall due for payment on or prior to a reference date.

65 Further, even if the relevant construction contract does not so provide, if in substance the additional expenses represent the increased cost or price of construction work actually carried out, they are for construction work carried out. Alternatively, if they represent the cost or price of goods or services actually supplied in connection with the construction work, and are provided pursuant to obligations under the relevant construction contract, they are for related goods or services supplied, even if not directly for construction work carried out.

66 If, for example, the additional expenses arise from off-site costs (such as office overheads) or other on-site costs, it will be a question of fact and degree whether the costs incurred are for construction work carried out or for related goods and services supplied. Nevertheless, such costs should, in my opinion, be properly regarded as part of the price for the totality of the construction work undertaken, and should be valued accordingly pursuant to s.10(b). Analysed in this way, the additional expenses should be regarded as included within the ambit of the Act as being referable to work that has already been carried out.

67 Following the reasoning of Hodgson JA in *Hargreaves*,[31] in my opinion, the circumstance that a particular amount may be characterised by a contract as "damages" or "interest" cannot be conclusive as to whether or not such an amount is for construction work carried out or for related goods and services supplied. Rather, as Hodgson JA said:[32]

> ... any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as "damages" or "interest"; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work.

---

31 *Ibid* at [41].

32 *Supra*.

68 Under the AS 4000–1997 contract used in this case, delay damages were payable under clause 34.9 only if an extension of time (EOT) claim is made for some "qualifying cause of delay" under clause 34.3, that is, in general, some act or omission of the Superintendent, the Principal or its agents, or other contractors. They are nevertheless, not of their nature strictly damages for breach of the contract but rather are additional amounts which may become due and payable under the contract and which, when they fall due for payment, may then be included in a progress payment. A contractual compensation claim is therefore prima facie within Part 2 of the Old Act.

69 It follows that prolongation costs claimed under the payment claim made under the Gantley contract could be claimed to be due for construction work carried out or for related goods and services supplied under the Old Act.

70 As to the specification of a prolongation claim, it might be said that the delay costs need not be itemised in the same way as work done and goods and services suppled must be identified as required by s.14(3). This is so because prolongation claims are not in a strict sense costs for construction work actually performed. Hodgson JA in speaking for the New South Wales Court of Appeal in *Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*[33] on the effect of s.13(2)(a), which is the equivalent to s.14(3)(a) of the Victorian Act, said:

> ... in the case of "delay damages" of the kind involved in this case, it is generally sufficient (assuming that the contract itself is sufficiently identified) that the basis of contractual entitlement be shown. In my opinion, that would generally be enough to ground identification, at least by way of inference, of the construction work or related goods or services to which the payment relates.

71 However, it would be, in my opinion, necessary to state the manner in which the prolongation claim made was calculated so as to enable the claim to be assessed, in the first instance by the respondent to the payment claim, and subsequently, if necessary, by an adjudicator.

---

33 [2005] NSWCA 229 at [25].

72 The manner in which the prolongation claim was drawn in this case fell short of these standards. Although the claim for prolongation costs on its face indicated its contractual basis as being for delay damages, namely clause 34.9 of the contract, namely because this was the only clause under the contract upon which the claim could possibly have been made, the manifest generality of the claim, and the breadth of the period it purported to embrace, provided no clue as to how it was calculated or made up. In my opinion, the claim for prolongation costs was not properly drawn.

73 Nevertheless, because the Act provides no statutory requirement for the specification of prolongation or delay cost claims, it could not be said that the claim, insofar as it was made, failed to satisfy a basic or essential requirement of the Act, such that the claim should be regarded as an invalid claim.

74 In any event, the adjudicator was not satisfied that, on the material before him, even as supplemented by the applicant's written submissions on the adjudication, that it was adequate to permit him to allow the claim. The adjudicator was unable to link the claim for prolongation costs to the scheduled sum in the contract for liquidated damages payable by the contractor to the principal at $1,200 per day in the event of delay. There being no other basis upon which the claim could be assessed, the claim was duly rejected in its entirety, as it should have been.

Retention Money Claim in the Gantley Claim

75 Another claim made in the Gantley Payment Claim was for the sum of $100,000 claimed in respect of the "value of bank guarantee to be returned ($100,000 plus interest capitalized from date of PC)". In my opinion, the claim was adequately specified to enable the respondent and any adjudicator to assess the claim.

76 However, the adjudicator for the reasons expressed in the adjudication determination, was satisfied that Phoenix was not entitled to call upon the bank guarantee. Accordingly, the claim was rejected.

Resources Payment Claim

77 The Resources Payment Claim, described as "Progress Claim No. 06" was dated 14 July 2009. The total amount of the claim was $739,927. The respondent, Resources, served a $NIL payment schedule, indicating that it proposed to pay nothing in response to the claim. The payment claim was drawn to claim three separate amounts: the first being the sum of $391,951 for claimed variations; the second item was for alleged prolongation in the sum of $207,176 for delays alleged to have been caused by the owner; the third item was for the sum of $140,800. The latter sum is not specified expressly in the payment claim. It is derived from a calculation from the figures provided, by subtracting from the sum of $1,408,000 said to be the "value of the work completed and payment due to date under the contract (contract value)", the amount of $1,267,200, being the amount said to have been paid by the respondent, Resources, to that point.

Variation Claims in the Resources Claim

78 Again, the Resources Payment Claim specified with reasonable particularity the work said to comprise the variations which were claimed for, amounting to $391,951. This work was specified in a schedule attached to the payment claim. There were 10 variations which were the subject of the claim. In the schedule each variation was described in the same manner as was employed in the Gantley payment claim. Again, in my opinion, standing on its own, if this was the only component of the progress claim, it would have satisfied the requirements of s.14(3)(a) in identifying the construction work to which the payment claim related.

Prolongation Costs in the Resources Claim

79 The payment claim also made a claim for "prolongation costs".

80 As I have earlier observed, prolongation costs, along with other time-related costs, are now excluded from the amount of a progress payment to which a person is entitled under the New Act: s.10B(2)(b)(ii). My observations upon the prolongation claim are therefore confined to the position as it was prior to the introduction of the New Act.

81 The sum of $207,176 was claimed for prolongation costs under the Old Act. This was identified further in the payment claim as "item 6 of the variation schedule attached". Item 6 in the variation schedule described this item in the following terms: "Liquidated Damages caused by the Owner and/or his Agents". The oral or written instructions giving rise to the prolongation claimed for was said to be: "Part oral part in writing on/or about Nov 2006 – Feb 2009". Item 6 of the schedule also referred to the "Extension of Time Claim No. 01". This was also attached the Resources payment claim. This document was a five page report of a quantity surveyor and building estimator, Mr Steve Phillips. The report included details of the events giving rise to the claims for extensions of time which were the subject of the payment claim. Further, the contract provided a contractual right, by clause 15.4 and item 17a of the contract appendix, for the costs of delays attributable to the owner to be paid to the contractor at the rate of $1600 per week.

82 In my view, there was no failure to specify the basis of the calculation of the prolongation claim and how the claim was calculated pursuant to the terms of the contract. The terms of the contract provided the clear basis for a proper assessment, both by the Plaintiffs and the adjudicator.

83 In any event, the adjudicator was not satisfied that, on the material before him, even as supplemented by the applicant's written submissions on the adjudication, that the prolongation claim could be justified beyond the sum of $101,257. The adjudicator was entitled to arrive at this determination. It was not invalid by reason of any failure to identify the basis of the claim with sufficient particularity.

Jetoglass Payment Claim

84 The Jetoglass Payment Claim, described as "Progress Claim No. 03" was dated 14 July 2009. The total amount of the claim was $179,680. The respondent, Jetoglass, served a $NIL payment schedule, indicating that it proposed to pay nothing in response to the claim.

85 In the Jetoglass Payment Claim, Phoenix made the claims under the following three heads: the sum of $33,331 for claimed variations; prolongation costs in the sum of $146,300 for delays alleged to have been caused by the owner; the third item was for the sum of $49.00. As with the payment claims previously discussed, the $49.00 sum is not specified expressly in the payment claim. It is derived from a calculation from the figures provided, by subtracting from the sum of $123,750 said to be the "value of the work completed and payment due to date under the contract (contract value)", the amount of $123,701, being the amount said to have been paid by the respondent, Jetoglass, to that point.

Variation Claims in the Jetoglass Claim

86 Again the Jetoglass Payment Claim specified with reasonable particularity the work said to comprise the variations which were claimed for, amounting to $33,331. This work was specified in a schedule attached to the payment claim. There were 12 variations which were the subject of the claim. In the schedule each variation was described in the same manner as was employed in the Gantley and Resources payment claims. Again, in my opinion, standing on its own, if this was the only component of the progress claim, it would have satisfied the requirements of s.14(3)(a) in identifying the construction work to which the payment claim related.

Prolongation Costs in the Resources Claim

87 The payment claim also made a claim for "prolongation costs".

88 I apply the same reasoning to this claim as I have in relation to the similar claims made in the Gantley and Resources matters. As I have earlier observed, prolongation costs, along with other time-related costs, are now excluded from the amount of a progress payment to which a person is entitled under the New Act: s.10B(2)(b)(ii). My observations upon the prolongation claim are therefore confined to the position as it was prior to the introduction of the New Act.

89 The sum of $146,000 was accordingly claimed for prolongation costs under the Old Act. This was identified further in the payment claim as "item 13 of the variation

schedule attached". Item 13 in the variation schedule described this item in the following terms: "Time Extension & Liquidated Damages caused by the Owner to date balance to be determined and/or quantified". The oral or written instructions giving rise to the prolongation claimed for was said to be: "Caused by the Client and/or his authorised agents all supported in writing and/or conduct 01/02/20[0]6 To 23/02/1009". Also attached the Jetoglass payment claim was a six page report of a quantity surveyor and building estimator, Mr Steve Phillips. The report included details of the events giving rise to the claims for extensions of time which were the subject of the payment claim. Further, the contract provided a contractual right, by clause 15.4 and item 17a of the contract appendix, for the costs of delays attributable to the owner to be paid to the contractor at the rate of $1000 per week.

90 In my view, and again for the reasons earlier expressed, there was no failure to specify the basis of the calculation of the prolongation claim and how the claim was calculated pursuant to the terms of the contract. The terms of the contract provided the clear basis for a proper assessment, both by Jetoglass and the adjudicator.

91 In any event, the adjudicator was not satisfied that, on the material before him, even as supplemented by the applicant's written submissions on the adjudication, that the prolongation claim could be justified beyond the sum of $51,000. The adjudicator was entitled to arrive at this determination. It was not invalid by reason of any failure to identify the basis of the claim with sufficient particularity.

Did the Payment Claims, or any Part of Them Satisfy s. 14?

92 In *Protectavale*, Finkelstein J, determined that the payment claim before him did not meet the requirement in s.14(3) (a). It followed that his Honour determined that the payment claim under consideration was not valid for the purposes of the Act.[34] As the applicant in that case was seeking summary judgment for the whole sum which was the subject of its payment claim, the application was dismissed.

---

34 *Ibid* at [30].

Is Severance of the Payment Claims Possible?

93 Like these cases, the claimant in *Protectavale* made claims in its payment claim for a substantial sum in respect of variations. This sum was calculated in accordance with a "Variation Register" which was provided with the payment claim. The register contained a short description of each item of the work which in each case comprised the variation, the identity of the subcontractor who performed the work and the amount claimed for each item. His Honour Finkelstein J concluded that "All those items are set out in sufficient detail".[35]

94 However, Finkelstein J in *Protectavale*, no doubt because the argument was not raised before him, did not take the approach of considering whether it was open to sever that part of the payment claim which was described in sufficient detail from that which was not, resulting in the payment claim being in part valid and in part invalid. Rather his Honour determined that the progress claim as a whole was invalid. I do not take this approach of Finkelstein J as having excluded the possibility of severance applying. It was simply that his Honour was not called upon to determine the issue in the case before him, which was an application for summary judgment.

95 In these matters, however, I did raise with counsel the possibility of severance, in the event that I found that part of the payment claims, being the claims for variations, were described in adequate detail such that these components of the payment claims ought to survive, even if the balance of the claim in each case was to be declared invalid on the ground of non-compliance with s.14(3)(a). Accordingly, I heard argument on the point, which I will now address.

96 Counsel did not take me to any case in which severance had been applied to a payment claim which was in part non-compliant with s.14(3)(a) and in part compliant. I accept that no such case has been reported in relation to the Victorian Act, or its counter parts in New South Wales, Western Australia, the Northern

35 *Ibid* at [13].

Territory, or Queensland.[36] I will therefore approach the question from first principles.

97 Section 6 of the *Interpretation of Legislation Act 1984* (Vic) provides for the saving of provisions of Acts to the extent that they fall within the legislative power of the State of Victoria, even if in part the enactment exceeds power, or if applied to any persons, subject matter or circumstances, would have this effect. In that event, the statute will have a valid operation to the extent that it is not in excess of the power.[37] The section provides:

> **6. Construction of Acts**
>
> (1) Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria, to the intent that where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected.
>
> (2) The provisions of this section are in addition to, and not in derogation of, any provision of any Act relating to the construction, or extent of the operation, of that Act.

98 However, s.6 is confined to the situation where a statute is in excess of power, including an excess of power which arises when an act is applied to relevant subject matter. It has nothing to do with saving from invalidity any part of a step purportedly taken pursuant to an enactment which turns out to be within the permitted regime of the statute, when another part of the step taken is not permitted. To accommodate this situation we must turn to the common law.

---

36 *Building and Construction Industry Security of Payment Act* 1999 (NSW); *Construction Contracts Act* 2004 (WA); *Construction Contracts (Security of Payments) Act* (NT); and *Building and Construction Industry Payments Act* 2004 (Qld).

37 A like provision is provided in relation to subordinate instruments. See: s.22 *Interpretation of Legislation Act 1984* (Vic.)

99 It is well accepted at common law that a step, measure or decision may be only partially valid. As is said in Lewis' "*Judicial Remedies in Public Law*":[38]

> An order or statutory instrument may not only deal with matters within the scope of the powers conferred upon the decision-maker but may impose conditions or cover geographical areas[39] or deal with matters[40] which go beyond the powers conferred by the enabling statute. A licence[41] or court order[42] or planning permission[43] may be granted but conditions attached which are unlawful. Demands for information may include requests for authorised and unauthorised information.[44]

100 The courts have accepted that in appropriate circumstances, they will give effect to the *intra vires* parts of an Act and deny validity only to those parts that are *ultra vires*. The courts may quash the invalid part only or may grant a declaration that the measure is not to take effect in so far as it is valid.

101 In the United Kingdom, the leading case on severance or partial invalidity is the decision of the House of Lords in *DPP v Hutchinson*.[45] This case was concerned with delegated legislation which went beyond the powers conferred by the enabling Act. The Secretary of State for Defence had the power to make by-laws regulating the use of land appropriated for military purposes. However, his power was limited. No by-law made for this purpose could take away the rights of commoners. Undaunted, the Minister made by-laws declaring Greenham Common a protected area and making it a criminal offence to enter the enclosed area without authority. Greenham Common was subject to rights of common enjoyed by some 62 commoners, which included the right to take gravel, to take wood for fuel and fencing and to graze 90

---

38 Clive Lewis, "Judicial Remedies in Public law", Sweet & Maxwell, 2000, 166 [5-033 – 5-034].

39 *Dunkley v Evans* [1981] 1 WLR 152. See also *R v Cornwall County Council and Secretary of State for Education and Science, ex parte Nicholls* [1989] COD 507 (a decision to reorganise schools could be quashed in relation to one school only).

40 *DPP v Hutchinson* [1990] 2 AC 783 (by-law restricting access to a military base took away rights of commoners which was not permitted by the enabling Act).

41 *R v North Hertfordshire District Council, ex parte Cobbold* [1985] 3 All ER 486; *R v Barnet London Borough Council, ex parte Johnson* (1991) 3 Admin LR 149.

42 *R v Southwark Crown Court, ex parte Customs and Excise Commissioners* [1989] 3 WLR 1054. See also *R v Inner London South Coroner, ex parte Kendall* [1989] 1 All ER 72 (verdict quashed as misdescribed cause of death; inquest itself not quashed as that had been properly conducted) and *R v South Powys Coroner's Court, ex parte Jones* [1991] COD 14.

43 *Hartnall v Minister of Housing and Local Development* [1965] AC 1134; *Mixnam's Properties Ltd v Chertsey Urban District Council* [1965] AC 735; *Kingsway v Kent County Council* [1971] AC 72.

44 *Potato Marketing Board v Merricks* [1958] 2 QB 316.

45 [1990] 2 AC 783.

animals. The by-laws failed to protect these rights. Jean Hutchinson and Georgina Smith, who were not commoners, were convicted of contravening the by-law. They contended that the by-law was *ultra vires* as the Minister had no power to make a by-law which took away the rights of commoners. The Minister contended that the by-law was only invalid as far as commoners were concerned and could be upheld and enforced against others, such as Miss Hutchinson and Miss Smith.

102 The House held that there were two aspects of the test of severance in public law, namely textual and substantial severability. A legislative instrument was textually severable if a clause, sentence, phrase or word could be disregarded and what remained was grammatical and correct. The instrument was substantially severable if what remained after severance was essentially unchanged in its legislative purpose, operation and effect. The *ultra vires* part of a measure would be severable if it was textually and substantially severable. In addition, there would be cases where the offending part of the measure was not textually severable but where the test of substantial severability was satisfied. In such cases, the court could in certain circumstances still hold the measure to be severable or partially invalid.

103 Lord Bridge, following an analysis of the authorities, including authorities from the Australian High Court, described the test of severability in the following terms:[46]

> When it is satisfied the court can readily see whether the omission from the legislative text of so much as exceeds the law-maker's power leaves in place a valid text which is capable of operating and was evidently intended to operate independently of the invalid text. But I have reached the conclusion, though not without hesitation, that a rigid insistence that the test of textual severability must always be satisfied if a provision is to be upheld and enforced as partially valid will in some cases, of which *Dunkley v Evans* and *Daymond v Plymouth City Council* are good examples, have the unreasonable consequence of defeating subordinate legislation of which the substantial purpose and effect was clearly within the law-maker's power when, by some oversight or misapprehension of the scope of that power, the text, as written, has a range of application which exceeds that scope. It is important, however, that in all cases an appropriate test of substantial severability should be applied. When textual severance is possible, the test of substantial severability will be satisfied when the valid text is unaffected by, and independent of, the invalid. The law which the court may then uphold and enforce is the very law which the legislator has enacted, not a different law. But when the court must

46 [1990] 2 AC 783 at 811.

> modify the text in order to achieve severance, this can only be done when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision.

104 The approach of Lord Bridge is analogous to the principle of severance which applies in other areas of the common law. For example, under a contract where a term or part of a contract is uncertain, severance may be ordered if it does not result in materially altering the nature of the bargain which the parties have struck.[47] Further, in relation to a will, part of which has been induced by undue influence, the offending part may be severed from the remainder if it does not materially alter the meaning of what remains.[48]

105 It was held in *DPP v Hutchinson*, that the by-law was neither textually nor substantially severable and could not be cured by severance. The whole of the by-law was therefore invalid and Miss Hutchinson and Miss Smith were held to be wrongly convicted.

106 The decision in *DPP v Hutchinson* was concerned with delegated legislation. A similar test of severability has been used in determining the validity of other steps taken pursuant to a statute. For example, the test has been applied to determine whether invalid conditions attached to licences or planning permits can be severed, leaving the licence or permit intact insofar as it is able to operate with the offending condition removed. In such cases, the question for the courts has been whether the *ultra vires* condition can be struck out without altering the character of the licence or permit, or whether what remains would be fundamentally different without the condition, in which case the whole licence or permit must be quashed.[49]

107 The issue of severability was touched upon by the High Court in *Coco v R*.[50] In that case the Court was called upon to determine the validity of the approval granted by

---

47 See: *State of New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503 at 517 – 518 [32] – [36]; *Macdonald Holdings (Qld) Pty Ltd v Nikolas* [2007] NSWSC 552 at [69].

48 See: *Nicholson v Knaggs* (No. 3) [2009] VSC 328.

49 See: Clive Lewis, "*Judicial Remedies in Public law*", Sweet & Maxwell, 2000, 170, 5-043; and *R v North Hertfordshire District Council, ex parte Cobbold* [1985] 3 All ER 486; *Hall v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 and *R v Hillingdon London Borough Council, ex parte Royco Homes* [1974] 2 QB 720. See also *Kingsway v Kent County Council* [1971] AC 72.

50 (1994) 120 ALR 415.

a Judge for the use of a listening device to be installed in private premises to assist in a police investigation purportedly granted under the *Invasion of Privacy Act 1971* (Qld). The question was whether the giving of the approval involved a jurisdictional error. The approval granted by the Judge not only permitted the use of a listening device, which was clearly within the ambit of the legislation, but also permitted its installation on private premises, which, in the absence of clear words, was held not to be permitted by the relevant statutory provision. The question of severance was therefore whether the approval, insofar as it purported to authorise entry onto the premises to install the listening device, could be disregarded, so as to leave on foot a valid approval for the use of the device, insofar as this did not otherwise involve an unlawful entry onto premises. The High Court[51] considered that the Judge misapprehended the nature and the scope of his power under the legislation. By doing so, he misconceived the statute which gave him jurisdiction, addressed an irrelevant consideration and exceeded his jurisdiction.[52] Indeed, it was held that the decision to improperly approve entry onto the premises contributed to the making of the decision to approve the use of the listening device. It was concluded by the Court that in the circumstances, severance was not possible, reasoning that: "The fact that what is bad is an integral and essential element of what is good, leads to the conclusion that the approval is wholly void".[53] Nevertheless, the Court recognised that: "No doubt in some circumstances it is possible to disregard that part of the decision that goes beyond power and treat as valid that part of the decision which is within power".[54]

108 In *Harrington v Lowe*[55] the High Court re-visited the position as to severance at common law in the context of considering whether the impugned *Rules of the Family Court* fell within the powers conferred by the *Family Law Act 1975*. Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ made a considered statement

51 Mason CJ, Brennan, Gaudron and McHugh JJ.
52 *Ibid* at 424.
53 *Ibid* at 425.
54 *Ibid* at 425.
55 (1996) 190 CLR 311.

in obiter as to the common law on severance as established by earlier decisions of the High Court. The Court said:[56]

> [A] valid operation of the sub-rules might be preserved after textual surgery by operation of the 'blue pencil' rule so that the valid portion could operate independently of the invalid portion, or, failing that, by treating the text as modified so as to achieve severance. But this latter step may be taken only where in so doing there is effected no change to the substantial purpose and effect of the impugned provision, and, in particular, there is not left substantially a different law as to the subject-matter dealt with from what it would otherwise be.

109 In *R v Ng*,[57] the Court of Appeal of Victoria[58] took that statement as representing the common law of Australia. The Court was called upon to consider, amongst other things, the validity of a warrant which was said to be in excess of the power conferred by the relevant legislation upon the judge granting it. In considering the common law doctrine of severance, the Court of Appeal said:

> But, whatever may once have been the position, in *Harrington v Lowe* six justices made the following considered, albeit strictly obiter, statement, which we take to represent the law of Australia:
>
> > "As to the common law in Australia, the position, as established by the earlier decisions of this Court to which we have referred appears to be that a valid operation of the sub-rules might be preserved after textual surgery by operation of the `blue pencil' rule so that the valid portion could operate independently of the invalid portion, or, failing that, by treating the text as modified so as to achieve severance. But this latter step may be taken only where in so doing there is effected no change to the substantial purpose and effect of the impugned provision, and, in particular, there is not left substantially a different law as to the subject-matter dealt with from what it would otherwise be".

110 In a further passage, the Court of Appeal in *R v Ng* expressly accepted the dual approach of the House of Lords in *Director of Public Prosecutions v Hutchinson*. The Court of Appeal said:[59]

> Amongst the authorities cited by their Honours [in *Harrington v Lowe*] in support of the proposition quoted above was the speech of Lord Bridge of Harwich (agreed in by three others of their Lordships) in *Director of Public*

---

56 Ibid at 328.

57 [2002] VSCA 108.

58 Winneke P, Batt and Eames JJA.

59 *Ibid* at [58].

> *Prosecutions v Hutchinson*[60] and the speech of Lord Goff of Chieveley giving the judgment of the Privy Council in *Commissioner of Police v Davis*[61], where Lord Bridge's test of "substantial severability" was applied, and held to be satisfied, in a case where it was necessary to modify the text in order to achieve severance. The passage from *Hutchinson* referred to in *Harrington v Lowe* and in *Commissioner of Police v Davis* includes Lord Bridge's expression of opinion that a rigid insistence that the test of textual severability must always be satisfied if a provision is to be upheld and enforced as partially valid will in some cases have the unreasonable consequence of defeating subordinate legislation of which the substantial purpose and effect was clearly within the law-maker's power when, by some oversight or misapprehension of the scope of that power, the text, as written, has a range of application which exceeds that scope.

111 The same approach was adopted in *Messages On Hold Australia Pty Ltd v City of Perth*[62] where Beech J applied the common law test of severance to a signs law enacted pursuant to the *Local Government Act 1995* (WA), in determining that any invalidity in respect of one clause in the law would not affect the validity of the balance, such that the invalid part "could be struck out from the Signs Local Law, leaving the balance of the Signs Local Law to operate in accordance with its terms and independently of the invalid provision".[63]

112 The present case is quite unlike that of *Coco v The Queen* where what was bad was an integral and essential element of what was good, so that the approval granted was wholly void and severance was impossible.

113 Here, that part of the payment claims, namely the claims for payment for variations, clearly provides a sufficient description of each item of the work for which payment is sought, such as to comply with s.14(3)(a). Further, that part of the claims which does not in each case properly identify the work for which payment is claimed is able to be separated from the balance of each claim which is properly described, and in doing so, no material alteration to what remains is introduced.

114 It was submitted by Mr Robins, who appeared for the respondent, that severance should not be permitted because the Act did not permit this to occur. Either the

---

60 [1990] 2 A.C. 783 at 811.
61 [1994] 1 A.C. 283 at 298-299.
62 [2007] WASC 226.
63 *Ibid* at [97]

progress claim was fully compliant in all of its facets, or it was not, it was argued. If one part of the progress claim did not satisfy the requirements of s.14(3)(a) the whole of the progress payment would therefore fail and should be set aside as being invalid.

115 I do not accept this submission. The question should be whether the Act, either expressly or impliedly, operates to exclude the common law doctrine of severance. I find that it does not. Indeed, the purposes and objects of the Act earlier described are best served by processes which, so far as possible, ought to accommodate reasonable flexibility and avoid unnecessary technicality.

116 Severance in this case would operate to achieve the purpose and objects of the Act and would not operate to diminish the attainment of these goals. A respondent to a payment claim and an adjudicator, if appointed, should be able to assess the valid part of this progress claim which sufficiently describes the work for which payment is claimed, and provide a rational response or adjudication determination in respect of that part of the claim, and exclude from consideration that part of the claim which does not comply.

Conclusion as to the Specificity of the Gantley Payment Claim

117 In my opinion, the Gantley Payment Claim did not identify the work to which the claim for $388,214 was said to relate for the purposes of s.14(3)(a). This claim did not satisfy the statutory requirement to identify the construction work to which the particular payment claim related. There is no breakdown or explanation of the work apart from a calculation which is referable to the "contract value" and "payments to date" and the other items claimed. It was thus impossible to determine the basis of the claim for $388,214, and any reasonable party in the position of Gantley could not determine the composition of the claim. The claim lacked the necessary content to identify the work to which the progress payment related, indeed, in this respect, it lacked content completely.

118 To satisfy s.14, it was incumbent upon Phoenix to either identify the particular construction work the subject of the claim (if that was the position) or to state that the claim did not relate to construction work but was simply a contractual entitlement akin to a milestone payment. The omitted information was critical. Without it, Gantley could not value the work (if any) to which the claim related, make its own assessment of the amount payable and provide a payment schedule which, if the matter were to be disputed, would enable the dispute to be properly resolved by an adjudicator. In my view the Gantley payment claim did not meet the requirement in s.14(3)(a).

119 The adjudicator did not accept the cumulative value of the construction work as claimed by Phoenix at $4,950,000. He allowed to the respondent Gantley a significant sum by way of a reduction on this sum. Of the total adjudicated amount of $1,263,804, the sum of $1,008,285 was allowed for variations. This sum was the subject of a valid payment claim within the meaning of s.14(3)(a). The balance of the adjudicated amount found by the adjudicator however, being the sum of $255,519, was not the subject of a valid payment claim under the Act.

120 Having found that the Gantley Payment Claim complied with s.14(3)(a) to the extent that it made a claim for the variations, and applying the principles of severance to which I have referred, it follows that, if this was the only ground of invalidity, I would make a declaration accordingly, with the result that the Gantley adjudication determination founded upon it would be declared valid to the extent that it allowed the sum of $1,008,285 for variations, but not otherwise.

Conclusion as to the Specificity of the Resources Payment Claim

121 As with the Gantley Payment Claim, the Resources Payment Claim did not identify the work to which the claim for $140,800 was said to relate for the purposes of s.14(3)(a). This claim did not satisfy the statutory requirement to identify the construction work to which the particular payment claim related. There is no breakdown or explanation of the work apart from a calculation which is referable to

the "contract value" and "payments to date" and the other items claimed. It was thus impossible to determine the basis of the claim for $140,800.

122 To satisfy s.14, it was incumbent upon Phoenix to either identify the particular construction work the subject of the claim (if that was the position) or to state that the claim did not relate to construction work but was simply a contractual entitlement akin to a milestone payment. The omitted information was critical. Without it, Gantley could not value the work (if any) to which the claim related, make its own assessment of the amount payable and provide a payment schedule which, if the matter were to be disputed, would enable the dispute to be properly resolved by an adjudicator. In my view the Gantley payment claim did not meet the requirement in s.14(3)(a).

123 The adjudicator, as he was entitled to do, accepted that the sum of $101,257 should be paid for prolongation costs, and the sum of $340,838 should be paid for variations. Of the total adjudicated amount of $582,895, the sum of $101,257 was determined to be payable for prolongation costs, and the sum of $340,838 was allowed for variations. These sums, totalling $442,095 were the subject of valid payment claims within the meaning of s.14(3)(a) of the Act. The balance of the adjudicated amount, being $140,800 was not the subject of a valid payment claim under the Act.

124 Having found that the Resources Payment Claim complied with s.14(3)(a) to the extent that it made a claim for prolongation costs and variations, and applying the principles of severance to which I have referred, it follows that, if this was the only ground of invalidity, I would make a declaration accordingly, with the result that the Resources adjudication determination founded upon it would be declared valid to the extent that it allowed the sum of $442,095 for prolongation costs and variations, but not otherwise.

Conclusion as to the Specificity of the Jetoglass Payment Claim

125 As in the cases of the Gantley Payment Claim and the Resources Payment Claim, the Jetoglass Payment Claim did not identify the work to which the claim for $49.00 was

said to relate for the purposes of s.14(3)(a). For the reasons already provided in relation to the other two claims, the claim for the sum of $49.00 was therefore technically invalid.

126 However, being a relatively paltry sum, I would not regard it as being other than *de minimus* in the context of the claim overall. In the exercise of my discretion to grant a declaration or an injunction founded upon the alleged invalidity of the Jetoglass Payment Claim based on lack of particulars in relation to the $49.00 claim, I would not order any relief in respect of it by reason of the size of the claim, and this would be the case even if severance was not available to me.

127 The adjudicator, as he was entitled to do, accepted that the sum of $51,000 should be paid for prolongation costs, and the sum of $8,927 should be paid for variations. These sums, totalling $59,927 were the subject of valid payment claims within the meaning of s.14(3)(a) of the Act.

128 Having found that the Jetoglass Payment Claim complied with s.14(3)(a) to the extent that it made a claim for prolongation costs and variations, and applying the principles of severance to which I have referred, it follows that, if this was the only ground of invalidity, I would make a declaration accordingly, with the result that the Jetoglass adjudication determination founded upon it would be declared valid to the extent that it allowed the sum of $59,927 for prolongation costs and variations, but not otherwise.

Invalidity of the Payment Claims

129 A failure to comply with a requirement of the Act will not necessarily result in a non-complying payment claim being invalid. It is a question of the character of the legislative requirement and the degree of non-compliance. A failure to satisfy a basic and essential requirement of the legislation in a substantial and material way will usually result in the invalidity of the errant payment claim. However, payment claims which, in spite of a technical defect being exposed, fall short of meeting this test, will not usually be considered as invalid.

130 Further, whether a court is in a position to determine the question of invalidity will depend upon whether the payment claim, on its face, satisfies the test to which I have referred. Where the validity of a payment claim is brought under challenge and the question turns upon questions of fact, or mixed fact and law, generally that will be for an adjudicator to decide, in keeping with the intent of the legislation. As Hodgson JA observed in *Brodyn*:[64]

> There is also a question whether this point could in any event lead to a conclusion that the determination was void. 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; ....

131 However, in this case I am satisfied that the payment claims, to the extent that I have found them to be invalid, failed to satisfy a basic and essential requirement of the legislation in a substantial and material way, and further that the failures were manifest on the face of the documents.

132 To the extent that the payment claims were invalid, the adjudicator had no power to determine the adjudication applications. There was therefore jurisdictional error to the extent which I have found.

Form of Payment Claim Which may Comply with S. 14

133 Both s.14(3)(a) of the Old Act, and s.14 (2)(c) of the New Act require that a payment claim must identify the construction work or related goods and services to which the progress payment relates.

134 Further, sub-paragraphs (a) and (b) of s.14(2) of the New Act provide a facility for a standard form for the payment claim and the provision of minimum information in a payment claim. The sub-paragraphs provide:

> (2) A payment claim-
>
> (a) must be in the relevant prescribed form (if any); and

64 *Ibid* at [66].

(b) must contain the prescribed information (if any); and …

To date, these provisions have not been availed of. There is no prescribed form and no prescribed information required under the Act.

135 Both counsel agreed that much of the difficulty presented for resolution under Ground 1 of these proceedings would have been averted if there had been in place a facility of the type provided under sub-paragraphs (a) and (b) of s.14(2) of the New Act.

136 The Civil Contractors Federation (CCF) has developed a payment claim form for use in Victoria. Attached as Schedule A to these reasons is a "Payment Claim" form produced by the CCF for the benefit of its members.

137 New Zealand also has in operation *The Construction Contracts Act 2002*, which is similar to the Victorian Act. Section 20 of the New Zealand Act is the equivalent of s.14 of the Victorian Act. Section 20(2)(c) provides that a payment claim must, *inter alia*, "identify the construction work and the relevant period to which the progress claim relates".

138 The New Zealand Subcontractors Federation Inc has also developed a "Payment Claim" form which is said to comply with s.20 of the New Zealand Act.[65] The form is in the public domain and is said to have received "general approval from all participants in the building industry".[66] Attached as Schedule B to these reasons is a "Payment Claim" form produced by the Federation, completed as a simulation to illustrate how the form is intended to be used.

139 The payment claim form produced by the CCF and the form in use in New Zealand (with appropriate adaptations, for example the substitution of "claimable variations" which may be claimed under the New Act in place of "variations"[67]), have much to commend them. If one or other or a combination of these forms, or an appropriate

---

65 See: Hon. Robert Smellie QC, "*Progress Payments and Adjudication*", Wellington Lexis Nexis, 2003 at page 32.

66 *Ibid*.

67 See: s. 10A of the New Act.

adaptation thereof, had been used by the claimant in this case, it may well have averted the cost, expense and delay associated with the prosecution of Ground 1 and the claimant's exposure to the allegation of invalidity of its payment claims and the subsequent adjudications upon them, at least on this ground.

GROUND 2

140 The Plaintiffs contended that, contrary to s.14(1) of the Act, it was not open to Davenport to find in accordance with law or the Act, and he erred in so finding that Phoenix had a right to a progress payment at all under any of the Gantley, Resources and Jetoglass Contracts, because the relevant progress claim in each case was served after the termination of each of the contract. The termination had the effect in law of discharging Gantley, Resources, Jetoglass and Phoenix from any further performance of obligations under the contracts which came to an end. Accordingly, it was submitted, the Act had no application to the discharged contracts in each case, and the purported Gantley, Resources and Jetoglass Payment Claims were invalid.

141 Counsel for the Plaintiffs submitted in effect that periodic payment claims could only be made during the currency of the contract. It followed, according to this submission, that payment claims could only be submitted whilst work was being performed.

142 It was common ground that the Gantley Contract was terminated on 19 February 2009, the Resources Contract was terminated on 23 February 2009 and the Jetoglass Contract was terminated on 24 February 2009. There is dispute as to which party repudiated the contract in each case. On 2 March 2009 Phoenix issued three separate writs in the County Court of Victoria against each of Gantley, Resources and Jetoglass, in which Phoenix in each case alleges wrongful repudiation of each contract by the relevant owner. In the Gantley matter Phoenix claims the sum of $1,941,412.49 as damages assessed upon a *quantum meruit*. In the Resources matter the sum of $721,811.51 is claimed, and in the Jetoglass matter the sum of $505,588.38 is claimed, both on the same basis as in the Gantley claim. Further, in the Jetoglass

matter, Phoenix claims damages in respect of variations alleged to have been performed pursuant to s.82 of the *Trade Practices Act 1974*.

143 The question raised under Ground 2 is whether the termination which occurred in each case had the effect of precluding the operation of the Act in relation to the payment claims which were made after the termination.

Effect of Termination at Common Law

144 It is well accepted that when a contract is terminated at common law by the acceptance of a repudiation, both parties are discharged from the further performance of the contract, but rights which have already been unconditionally acquired are not divested or discharged unless the contract provides to the contrary. This has been uncontroversial since *McDonald v Dennys Lascelles Limited*[68] ("*McDonald*") where it was stated by Dixon J in an oft quoted passage:[69]

> When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.

145 As has been observed more recently by the Court of appeal in Victoria in *Sopov & Anor v Kane Constructions Pty Ltd (No 2)*,[70] the notion that the acceptance of a repudiation has the effect of rescinding a contract *ab initio* has been regarded as a "rescission fallacy" which was dispelled by the High Court in *McDonald*. Accordingly, the remedy of contractual damages is available to the wronged party

---

68 (1933) 48 CLR 457.

69 *Ibid* at 476-7.

70 [2009] VSCA 141 per Maxwell P, Kellam JA and Whelan AJA at [10].

where a repudiation has been accepted.[71] The Court of Appeal also accepted that the remedy of *quantum meruit* was available as an alternative.

146 On this analysis, the first question becomes: do the rights to make progress claims under each of the relevant contracts up to the date of termination accrue such that they are not rights which are divested or discharged on termination but rather are rights which are "unconditionally acquired" and thereby survive termination? If this is the case, the Act will apply. If not, it won't.

147 The case of *Ettridge v Vermin Board of the District of Murat Bay*[72] was decided by the Full Court of the Supreme Court of South Australia[73] prior to *McDonald*, but upon the same principles. The case arose out of a contract by the contractor to erect for the defendant about 44 miles of vermin-proof fencing. The agreement included a term that the contractor was to be paid for the work at the rate of £37 per mile and a further term that the contractor was to receive progress payments of 75 per cent upon each five miles of fence being completed, subject to a certificate being provided by an inspector appointed under the contract. However, there was no express provision for payment of the balance of the price. The work was to be completed within twelve months. About 11 miles of the fence had been completed when disputes arose as to the line it was to follow from that point. The contractor refused to follow the directions of the defendant and abandoned the work. The contractor sued the defendant for the balance due under the contract in respect of the length of fence which had been erected. It was held that the contractor was entitled to be paid for 75 per cent of the work done pursuant to the contract, provided he had a certificate from the inspector appointed under the contract certifying that the work had been completed to the extent claimed for. In delivering judgment for the Full Court, Napier J said:[74]

> There seems to be no authority directly in point, but we think that the law is correctly stated in Salmond and Winfield on the Law of Contracts, at p.286,

---

71 See: *Sopov & Anor v Kane Constructions Pty Ltd (No 2)* [2009] VSCA 141.

72 [1928] SASR 124.

73 Murray CJ, Napier and Richards JJ.

74 *Ibid* at 128.

> where Sir John Salmond deals with the dissolution of a contract by breach. He points out that the breach of any essential term gives another party a right to rescind the contract, the effect of rescission being thus stated: - "every obligation which has accrued due between the parties before the rescission of the contract, and which so creates a then existing cause of action, remains unaffected by the rescission, and can still be enforced. It makes no difference in this respect whether such accrued obligation and existing cause of action is one in favour of the party rescinding the contract or is one in favour of the other party".

148 *Ettridge* was followed soon after by the Supreme Court of South Australia in *McLachlan v Nourse*[75] ("*McLachlan*"), a case cited in Dorter & Sharkey, "*Building and Construction Contracts* 1990"[76] for the proposition that the contractor will still be entitled to recover the amount which accrued due to the contractor under the contract prior to discharge even though it is the defaulting party.

149 The contractors in *McLachlan* were engaged by the principal (the "employer") pursuant to a contract in writing to construct a dam on a rural property. The contract made provision for the payment of progress payments in the following term: "Time payments for whole contract to be paid by employer to contractors not oftener than once each month, and not to exceed 75 per cent of the value of the work done until completion of the work". During the course of the contract, the contractors abandoned the project. To that point they had been paid a total of £343 0s. 4d. In the proceedings at first instance in the Local Court at Peterborough, judgment was entered for the contractors in the sum of £128, being 75 per cent of the contract price for the work done prior to them abandoning the contract. Angas Parsons J on appeal from the judgment of the Local Court found that the judgment at first instance was correct. After referring to the Full Court decision of *Ettridge*,[77] his Honour proceeded:[78]

> As the judgment of the Full Court shews, however, notwithstanding the respondent's default, and, as stated in a passage from Salmond & Winfield on the Law of Contracts, at p.286, and quoted in the judgments with approval, "every obligation which has accrued due between the parties before the rescission of the contract, and which so creates a then existing cause of action,

---

75 [1928] SASR 230.
76 *Building and Construction Contracts* 1990, Law Book Co. at [1.783] p. 698.
77 [1928] SASR 124.
78 *Ibid* at 233 – 234.

> remains unaffected by the rescission and can still be enforced. It makes no difference in this respect whether such accrued obligation and existing cause of action is one in favour of the party rescinding the contract or is one in favour of the other party." In the case at bar, the respondents, immediately before rescission, had a cause of action to recover 75 per cent of the price for the work done in respect of which nothing had been paid. This cause of action remains, notwithstanding their default, that amount therefore was recoverable, and the verdict of the Local Court for that sum was correct. What the respondents have lost as the result of abandoning the contract is right, which they would have had, to the additional 25 per cent of the contract price, upon completion of the contract.

150 If there were to be no further payment to the contractor for past work under a contract which has been terminated, a contractor who was left with part of the work remaining to be completed would be deprived of past progress payments earned while he was still engaged on the project up to the time of termination. Such a result would be at odds with a rationale for a progress payment regime in a building contract, namely that the progress payments are critical to the financial survival of the contractor and the employment of the workforce the contractor engages.

What Claims Accrued Beyond Termination?

151 In the present case, Phoenix, under each of the contracts as they were immediately before termination, had a cause of action to recover any progress payments for the work done in respect of which nothing had been paid. These causes of action remained after termination, even if it was the case that Phoenix was in default under any of the contracts.

152 I conclude that the amount of any such progress payments are therefore recoverable pursuant to an accrued right which was not divested or discharged on termination, there being no provision in any of the contracts which provided to the contrary.

153 However, if the July payment claims in this case were not in fact "progress payments" within the meaning of the Act, they could not be the subject of a valid payment claim. This matter will be considered under Ground 3.

Did the Act Operate Beyond Termination?

154 The second question is whether the provisions of the Act operate in relation progress claims made under a construction contract following its termination?

155 It was submitted by the Plaintiffs that ss.9 and 14 of the Act on their proper construction presuppose and require the existence of a binding operative construction contract in order for a payment claim to be validly served under the Act. First, it was said that s.9(1) speaks in terms of the entitlement to progress payments arising: "On and from each reference date under a construction contract …" [Underlining added]. Second, reference was made to s.14(1) which provides:

> A person referred to in section 9(1)[79] who is or who claims to be entitled to a progress payment (the *claimant*) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

It was submitted that if there is no construction contract in existence at the time a payment claim is made, the Act simply has no operation in relation to it.

156 However, case law developed in New South Wales on the legislation upon which the Victorian Act was founded,[80] points against the submissions of the Plaintiffs.

157 In *Holdmark Developers Pty Ltd v GJ Formwork Pty Ltd*[81] ("*Holdmark*"), McDougall J considered the effect of termination upon a payment claim made under the Act. In that case, the sub-contract between the parties was made on 19 February 2003. The provisions of the New South Wales Act applied to the contract. The sub-contract came to an end on 12 March 2004 no work was done pursuant to it after that date. On 13 March 2004, the day after the contract came to an end, the contractor served what purported to be a payment claim made pursuant to the New South Wales Act. That document claimed for formwork of various kinds, allowed for amounts paid

---

79 Section 9(1): On and from each reference date under a construction contract, a person - (a) who has undertaken to carry out construction work under the contract; or (b) who has undertaken to supply related goods and services under the contract— is entitled to a progress payment under this Act, calculated by reference to that date.

80 See: Second Reading speech of the responsible Minister in introducing the *Building and Construction Industry Security of Payment Bill* to the Legislative Assembly, 21 March 2002, Vichansard, page 427.

81 [2004] NSWSC 905.

and retention, and claimed a balance of $1,430,047.78. Thereafter the contractor made three further claims purporting to be payment claims made under the Act. The second was made on 3 April 2004 and claimed $424,283.14. The third was made on 28 May 2004 and claimed $1,355,960.50. The fourth, which ultimately became the subject of the challenged adjudication, was made on 27 July 2004 and claimed $6,870,981.09. As found by McDougall J, each of the payment claims related, of necessity, to the same work. That is because no further work was done under the subcontract after 12 March 2004.

158 It is important to note that when *Holdmark* was decided, the New South Wales Act was the subject of amendment which took effect on 3 March 2003. Of relevance to the present matter, the definition of a "progress payment" contained in the definition section, being s.4 of the New South Wales Act in its original form, was amended from - " 'progress payment' means a payment to which a person is entitled under section 8" - to its current form which now provides:

> **"progress payment"** means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):
>
> (a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or
>
> (b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or
>
> (c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").
>
> [Underlining added for emphasis]

159 The Act in Victoria was not amended in this way until the introduction of the amendments which operated from 30 March 2007.[82] These amendments to the Victorian Act brought it into line with the New South Wales Act so as to include an extended definition of "progress payment" in s.4 of the New Act to include a final payment for construction work carried out or related goods and services supplied under the contract. However, under the Old Act in its pre-amended form, which

82 See: s. 4 of the New Act in Victoria which mirrors s. 4 of the New South Wales Act in relation to the definition of "progress payment".

applies to the facts of this case, there was no facility for a final payment to be treated as a progress payment for the purposes of the Act.

160 In *Holdmark*, in the course of considering a submission that a payment claim could not be made under the New South Wales Act following termination of the subcontract, McDougall J started by determining the reference date. He considered that on its proper construction, the subcontract made the end of each month a reference date, that is to say, the last day of each month. Alternatively, if the contract did not so provide, his Honour held that the provisions of the New South Wales Act would apply with the same effect.

161 McDougall J then proceeded to consider the effect of the termination or cessation of work. His Honour observed that in some cases a construction contract will make provision for the occurrence of reference dates after termination or cessation of work. His Honour's reasoning continued:[83]

> Where there is no provision, then, in my view, there is but one more reference date.[84] That is the reference date that, according to either the contractual or statutory scheme, occurs (or would have occurred) next after termination or cessation of the work. The builder, in my judgment, may make a final payment claim by reference to that date. It may do so within 12 months after cessation of work.

162 The reference by McDougall J to the contractor being in a position to make a final payment claim within 12 months after cessation of work, relates to a provision in the New South Wales Act which finds no equivalent in the Victorian Old Act in its pre-amended form. Section 13(4)of the New South Wales Act provides:

> (4) A payment claim may be served only within:
>
> (a) the period determined by or in accordance with the terms of the construction contract, or
>
> (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied), whichever is the later.

---

83 *Ibid* at [25 – 27].

84 Notably the form of the New South Wales Act before McDougall J was the amended act which permitted final claims to be the subject of a payment claim.

McDougall J rejected the notion that successive payment claims could be made following a termination of the construction contract or the cessation of work under it.

163 Thus, on the approach of McDougall J in *Holdmark*, following a termination of the contract, a contractor could still make a payment claim under the Act in respect of a progress payment due under the contract, however, the contractor would be limited to making only a claim for a final payment for construction work carried court under a construction contract and making only one such payment claim, by reference to the reference date which, according to either the contractual or statutory scheme, occurs (or would have occurred) next after termination or cessation of the work.

164 The New South Wales Court of Appeal took a different approach in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*[85] ("*Brodyn*"), where it was determined that *Holdmark* was wrongly decided. In that case, Brodyn as principal, entered into a construction contract with Dasein as contractor. The *Building & Construction Industry Security of Payment Act 1999* ("the New South Wales Act") applied. On 13 June, Brodyn gave notice to Dasein alleging repudiation of the contract by Dasein, and purporting to accept that repudiation. On 27 June 2003, Dasein served Broydn with a document stated to be a payment claim under the New South Wales Act. Brodyn responded by serving a payment schedule in accordance with s.14 of the Act.

165 Hodgson JA in delivering the judgment of the Court of Appeal (NSW) said:[86]

> Brodyn's submission was that the payment claim served on 28 September 2003 was not a valid payment claim under the Act, because the termination of the contract and cessation of the work under it meant that there was thereafter only one reference date, in respect of which only one final payment claim could be made. This submission was supported by the decision of McDougall J in *Holdmark Developers Pty Limited v G.J. Formwork Pty Limited* [2004] NSWSC 905.
>
> However, s.8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s.8(2)(a) if the contract so provides but not otherwise; while s.8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in

85 (2004) 61 NSWLR 421.
86 *Ibid* at [62 – 64].

> effect flows from the limits in s.13(4): reference dates cannot support the serving of any payment claims outside these limits.
>
> In my opinion, as submitted by Mr Fisher for Dasein, this view is supported by s.13(6), which indicates that successive payment claims do not necessarily have to be in respect of additional work; and especially by s.13(3)(a), which provides for inclusion in payment claims of amounts for which the respondent is liable under s.27(2A). Losses and expenses arising from suspension of work could arise progressively for a substantial time after work has ceased on a project, and s.13(3)(a) expressly contemplates that further payment claims for these losses and expenses may be made progressively.

166 There are, however, points of distinction between the New South Wales Act and the Victorian Act in its unamended form which, in my opinion, justify departing from the approach taken by the New South Wales Court of Appeal in *Brodyn* to which I have referred.

167 In the first place, under the Victorian legislation as it was before the amendments which commenced on 30 March 2007, unlike s.13(4) of the New South Wales Act, s.14 of the Old Act imposed no time limit for the serving of a payment claim.

168 It was submitted by Mr Robins, who appeared as counsel for the Plaintiffs, that if in fact the contractor is permitted under the Old Act in Victoria to make successive claims in respect of different specific progress payments for an indefinite period of time after termination of the relevant construction contract, a mischief would arise which was not intended by the legislation. Reliance was placed on following the words of McDougall J in *Holdmark*:[87]

> I do not think there is a successive reference date monthly (or at any other intervals fixed by the contract) thereafter. If there were, the builder could harass the proprietor with a series of claims for the same work, or parts of the same work. It is obvious that, in many cases, payment claims are complex and detailed. It is obvious that a proper response may often require a very great amount of work. If the response is inadequate, or if the proprietor for whatever reason omits to respond, then the mechanisms of the Act are engaged. That may have at least potentially very serious consequences for the proprietor.

169 It was submitted that, if this could occur under the New South Wales legislation, which provides for a 12 month period within which to serve a payment claim from

---

87 *Ibid* at [27].

the time of the reference date, the burden imposed on a proprietor would be compounded under the Old Act in Victoria in its unamended form, where there was no time limit at all. In other words, the situation posited by McDougall J in *Holdmark* to which I have referred, could go on indefinitely.

170 There is, in my opinion, some force in this submission. This is so, in spite of the potential for harm to a principal or head contractor being significantly contained by s.14 (2) of the Old Act which provides:

> (2) A claimant may serve only one payment claim in respect of a specific progress payment.

Accordingly, under the Old Act, the serving of multiple successive payment claims in relation to a specific progress payment calculated by reference to a particular reference date, is not countenanced. However, claims made by reference to different reference dates could, theoretically at least, continue indefinitely.

171 Secondly, and more importantly in my opinion, the Old Act in Victoria does not contemplate new and successive reference dates arising and continuing to arise following termination of the construction contract. The right to a progress payment under s.9(1) the Old Act arises "on and from each reference date under a construction contract …" [Underlining for emphasis]. Under s.9(2)(a) a reference date is determined by or in accordance with the terms of the contract, and under s.9(2)(b), if the contract makes no express provision with respect to a reference date, a reference date may be calculated in accordance with the statutory formula which provides:

> (2)(b) if the contract makes no express provision with respect to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after-
>
> (i) construction work was first carried out under the contract; or
>
> (ii) related goods and services were first supplied under the contract.

In the absence of any express term in the construction contract, a statutory reference date is therefore created by s.9(2)(b) of the Old Act which arises periodically every 20 business days from the time work was first carried out under the contract or goods and services were first supplied. The application of this sub-section, in my opinion, hinges on work continuing to be performed under an operative construction contract. This is reinforced by a number of indicia in the Old Act: the opening words of s.9(1) ("on and from each reference date under a construction contract …" [Underlining for emphasis]); the method of calculation of the progress payment referred to in s.10 which is to be (a) calculated in accordance with the terms of the contract, or (b) calculated on the "value of work carried out" or "related goods and services suppled", in the event that there is no express provision in the contract covering the matter; the mandatory requirement in s.14(3)(a) for a payment claim to identify the construction work or related goods and services to which the progress payment relates; and the object of the Act found in s.3(1), which provides:

> (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. [Underlining added for emphasis]

172 Thirdly, in its pre-amendment form, the Old Act in Victoria only conferred an entitlement to recover for a "progress payment".[88] Section 4 rather unhelpfully defined "progress payment" to mean "a payment to which a person is entitled under section 9". Section 9 creates the right to progress payments but does not provide a definition of the expression. There being no definition provided by the Old Act, the construction of "progress payment" in the first instance is to be derived from the ordinary and natural meaning of the words as used in the context of the text of the legislation. "Progress payments" in a construction contract are payments made by

88 See: *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR at 49; *De Martin & Gasparini Pty Ltd v Energy Australia* (2002) 55 NSWLR at 590-591.

providing instalments of part of the agreed contract price sequentially and progressively over the life of a contract. As Finkelstein J said in *Protectavale*:[89]

> Progress payments are effectively payments by instalments or periodic payments made over the life of the contract for construction work already completed.

In my opinion, it would be straining the language to suggest that a "progress payment" can be made following either the completion of the contract or its termination.

173 Fourthly, the Old Act did not provide the necessary legislative mechanism to enable a final payment claim to be made. Under the Old Act, s.9(2)(a) cannot operate to recognise a reference date that is expressly provided for in the contract, which has ceased to exist from the date of its termination. However, under the Old Act, if the construction contract has terminated, following that event, work will have ceased under the contract and no further goods and services will have been supplied. It follows that, between the date of termination and the next theoretical reference date, and indeed thereafter, there will have been no work performed or goods and services supplied under the construction contract. It follows that under the Old Act, in these circumstances, a reference date will cease to arise beyond termination under s.9(2)(b), simply because it will not attach to any work done, or any goods and services supplied. The player will be no new reference date beyond termination.

174 Nevertheless, in my opinion, the Old Act in Victoria, as the legislation stood prior to 30 March 2007, did provide for a payment claim to be served following termination of the construction contract in the following limited circumstances:

(a) where the construction contract expressly or impliedly provides for a payment claim to be served following termination of the construction contract, or the cessation of work under it, or makes provision for further reference dates within the meaning of the Act beyond the date of termination; or

---

89 *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at[17].

(b) where, immediately prior to the termination of the construction contract a claimant has an entitlement under the Act to a progress payment pursuant to s.9 for work done or goods and materials supplied prior to the termination, where the relevant reference date has arisen prior to the termination, the claimant retains its right to a progress payment. This is so, because the claimant has an accrued right "on and from each reference date" which continues beyond the termination or cessation of work, and is unconstrained by any statutory time limit. Such a claim is, however, subject to the limit imposed by s.14(2), which permits the service of only one payment claim in respect of a specific progress payment. A further limitation, which will be considered under Ground 3, is that a progress payment claim, if served after a contract termination or indeed at any other time, must be just that, namely a "progress claim" within the meaning of the Act. If the claim which is made in fact assumes a character which is not a progress claim, for example a claim for a final payment, or which for some other reason cannot be properly characterised as a progress payment under the relevant construction contract, it will be invalid.

175 Otherwise, and beyond these exceptions, following termination, there is no right under the Old Act to claim a progress payment after termination.

176 The construction that I favour is supported by the structure of the Old Act, and in particular s.9(1) and the object of the Act found in s.3(1). A right to a progress payment is given to someone who has undertaken to carry out construction work, or supply related goods and services under a construction contract. It is a right that arises on and from each reference date. Once the statutory pre-conditions have been met, the right to payment under the Act arises. It is not a right which the legislation says is lost on the occurrence of any event, including the termination of the construction contract or the cessation of work under it. The extinguishment of a statutory right, once granted, would require clear words to implement the process. There are no such words in the Act, either in its old form or in the new.

Position Under the New Act

177 For completeness, I set out the position which now exists under the New Act in Victoria, which operates in respect of construction contracts entered into on or after 30 March 2007.

178 Following the amendments brought about by the New Act (No. 42 of 2006), which apply to construction contracts made on or after 30 March 2007, the definition of "progress payment" was extended to include a "final payment", a "single or one-off payment" and a "milestone payment".

179 The definition of "progress claim" found in s.4 of the New Act in Victoria provides:

> ***progress payment*** means a payment to which a person is entitled under section 9, and includes (without affecting that entitlement)-
>
> (a) the final payment for-
>
> (i) construction work carried out under a construction contract; or
>
> (ii) related goods and services supplied under the contract; or
>
> (b) a single or one-off payment for-
>
> (i) construction work carried out under a construction contract; or
>
> (ii) related goods and services supplied under the contract; or
>
> (c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").

180 Finkelstein J described a "final payment claim" in the following terms in *Protectavale*,[90] which I accept:

> A final payment claim may be defined as a "final balancing of account between the contracting parties" (*Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR at 49) or "simply the last of the payment claims" (*Southern Region Pty Ltd v State of Victoria (No 3)* [2001] VSC 436 at [32]). In substance it is a claim for a payment which, when made, will discharge the principal from further obligations to pay money under the construction contract.

181 It follows that, in circumstances where a construction contract has been terminated, or otherwise work has ceased under it, a final payment claim may be made within

---

90 *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at[17].

the terms of the New Act so as to provide a "final balancing of account" between the contracting parties.

182 The final payment claim may be served within the time referred to in s.14(5) of the New Act, which provides:

> (5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within-
>
> (a) the period determined by or in accordance with the terms of the construction contract; or
>
> (b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

183 Sub-sections 9(2)(c) and (d) of the New Act, in turn provide for the reference date to be used for the purposes of the service of a final progress payment claim. Sub-sections 9(2)(c) and (d) provide:

> (c) in the case of a single or one-off payment, if the contract makes no express provision with respect to the matter, the date immediately following the day that-
>
> (i) construction work was last carried out under the contract; or
>
> (ii) related goods and services were last supplied under the contract; or
>
> (d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following-
>
> (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
>
> (ii) the issue under the contract of a certificate specifying the final amount payable under the contract a final certificate; or
>
> (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that-
>
> (A) construction work was last carried out under the contract; or
>
> (B) related goods and services were last supplied under the contract.

In the case of a termination, it may be taken that s.9(d)(iii) applies to set a notional reference date for the purposes of serving a final payment claim pursuant to the time limit provided in s.14(5)(b).

184 Further, an important limitation is imposed by s.14(6) once a final payment claim has been made. In those circumstances, and subject to s.14(7), no further payment claim can be served under the New Act. In other words, a final payment claim can be made but there cannot not be more than one, save for the circumstance where ss.(7) applies. Sub-sections 14(6) and (7) provide:

> (6) Subject to subsection (7), once a payment claim for a claimed amount in respect of a final, single or one-off payment has been served under this Act, no further payment claim can be served under this Act in respect of the construction contract to which the payment claim relates.
>
> (7) Nothing in subsection (6) prevents a payment claim for a claimed amount in respect of a final, single or one-off payment being served under this Act in respect of a construction contract if-
>
> (a) a claim for the payment of that amount has been made in respect of that payment under the contract; and
>
> (b) that amount was not paid by the due date under the contract for the payment to which the claim relates.

185 Given the statutory constraints to which I have referred, in my opinion, there would be little room for the concerns expressed by McDougall J in *Holdmark*[91] to arise in relation to a final payment claim made under the New Act in Victoria.

186 Given that generally a final payment claim will be permitted to be made only once, subject to s.14(7), it behoves a claimant builder to take a little time and care to provide a claim that is complete and detailed and accurate once the contract has come to an end. As McDougall J observed in *Holdmark,* "If the builder chooses to fire off an unconsidered or incomplete claim, it brings upon itself the consequences".[92]

187 Further, being a final payment claim, which has as its object the final balancing of the account between the contracting parties, there is no reason why it cannot include at

91 *Ibid* at [27].
92 *Ibid* at [28].

least some claims for payment in addition to payment directly for work done under the construction contract or for goods and materials supplied under it, provided such claims are not "excluded amounts" under s.10B. Such claims may include, for example, payment of retention monies due under the security arrangements provided for under the contract and variations which are "claimable variations" under s.10A. A payment claim, including a final payment claim, pursuant to s.14(3)(a), may also include any amount the respondent is liable to pay the claimant under s.29(4), which may become payable upon the claimant exercising a right to suspend the works if the respondent removes any part of the work or supply from the contract and the claimant suffers any loss or damage thereby.

188 However, excluded amounts which may not be included in a progress claim, including a final progress claim made under the New Act, are: variations which are not claimable variations: s.10B(2)(a); delay or prolongation claims: s.10B(2)(b); any claim for damages for breach of the construction contract or any other claim for damages arising under or in connection with the contract: s.10B(2)(c); and any amount in relation to a claim arising at law other than under the construction contract: s.10B(2)(d).[93]

189 In substance, the scheme as it now stands is that periodic payment claims may be made while the contract is current and work is being carried out, by reference to the reference dates defined in the New Act, and a final payment may be made at, or within three months after, the cessation of work under the construction contract.

Conclusion in Relation to the Gantley, Resources and Jetoglass Contracts Under the Old Act

190 These are not cases where the construction contracts expressly or impliedly provided for a payment claim to be served following termination of the construction contract, or the cessation of work under it. Nor did the contracts make provision for further reference dates within the meaning of the Act beyond the date of termination.

---

93 And, any amount of a class prescribed by the regulations as an excluded amount: s. 10B(2)(e).

191 Putting s.14(2) of the Old Act to one side for the moment,[94] if it was the case that Phoenix, immediately prior to the termination of the relevant construction contract, had an entitlement under the Act to make a progress payment pursuant to s.9 for work done or goods and materials supplied prior to the termination, it retains that right to make a progress payment post termination as an accrued right. Further, it is unconstrained by any statutory time limit in doing so.

192 The Gantley Contract was terminated on 19 February 2009. Thereafter no further work was done under the contract. The adjudicator found that the construction contract provided for progress claims to be made on the 30th day of each month and that this was the reference date for the purposes of the Act. I accept that this finding was correct.

193 The relevant payment claim relied upon by Phoenix was dated 14 July 2009. The payment claim did not state the reference date for the claim, nor did the Act require the claimant to state the reference date. All that s.9(1)(a) of the Old Act relevantly required was that "on and from" each reference date, a person who has undertaken to carry out construction work under the contract is entitled to a progress payment under the act, calculated by reference to the reference date.

194 The payment claim dated 14 July 2009 purported on its face to be a payment claim for work done under the Gantley Contract, which was described as "Value of work completed" and included "Plus variations to date". A claim was also made for "Prolongation costs" and the repayment of $100,000 of a bank guarantee. All these items were claimed to arise and be payable under the construction contract during its operation prior to the termination.

195 In my opinion, the Gantley Contract, which was terminated on 19 February 2009 did not have the effect of barring the statutory right of Phoenix to make its payment claim. It had rights to payment which had accrued prior to the termination which it was entitled to enforce under the statutory mechanism.

---

94 S. 14(2) permits the service of only one payment claim in respect of a specific progress payment.

196 The Resources Contract was terminated on 23 February 2009 and the Jetoglass Contract was terminated on 24 February 2009. Thereafter no further work was done under the contracts. The construction contract in both cases provided for progress payments to be made on the completion of defined stages of the works to be undertaken pursuant to the contracts. The dates for the completion of the stages in each case were the reference dates for the purposes of the Act.

197 The July payment claims purported on its face to be payment claims for work done under the Resources Contract in one case, and under the Jetoglass Contract in the other case. In both cases the payment claims described the items claimed for as "Value of work completed" and included "Plus variations to date". A claim was also made for "Prolongation costs". Each of these items were claimed to arise and were payable under the relevant construction contract prior to the termination.

198 Again, the fact that the Resources Contract was terminated on 23 February 2009 and the fact that the Jetoglass Contract was terminated on 24 February 2009 did not have the effect of barring the statutory right of Phoenix to make its payment claim. It had rights to payment which had accrued prior to the termination which it was entitled to enforce under the statutory mechanism.

199 The exercise of calculating the amounts due under the payment claims by reference to the respective reference dates may have posed a challenge for the respondent and the adjudicator, nevertheless, in my opinion the statutory entitlement for Phoenix to make the payment claims remained and was not extinguished by termination of the contract in each case.

200 Accordingly, there was no invalidity in any of the progress payment claims under Ground 2 by reason of the termination of the construction contracts.

Ground 3

201 Ground 3 was that, contrary to s.9 of the Act, the Gantley, Resources and Jetoglass July Payment Claims were, in substance and reality, final claims.

202 As has been earlier observed, final payment claims were not introduced into the Act so as to be expressly included in the definition of "progress payment" in s.4, until the New Act came into operation on 30 March 2007.

203 The submission on this ground centred on the proposition that final payment claims were not included as progress claims under the Old Act, and that any final payment claim purported to be made under the Old Act was invalid.

204 The second aspect of the submission was that the July payment claims in each case were in fact final payment claims, and for this reason they were invalid.

205 However, in my opinion, the central question under Ground 3 is whether or not the July payment claims in each case were in respect of "progress payments" within the meaning of the Old Act.

Progress Payment under the Old Act – Not Expressly Include a Final Payment

206 The Old Act, in its pre-amendment form, only conferred an entitlement to recover for a progress payment.[95] Section 4 defined "progress payment" to mean "a payment to which a person is entitled under section 9". Section 9 created the right to progress payments at particular points in time but did not provide a definition of the expression.

207 Further, and importantly, neither s.9 or any other provision of the Old Act made express provision for a final payment to be included in a progress payment. It quite simply did not provide for the necessary machinery. The Old Act made no provision for the determination of a reference date in respect of a final payment claim. Nor did the Old Act make any provision for the period within which a final payment claim may be served.

---

95 *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR at 49; *De Martin & Gasparini Pty Ltd v Energy Australia* (2002) 55 NSWLR at 590-591.

Progress Payment under the New Act - Expressly Includes a Final Payment

208 Following the amendments brought about by New Act, which apply to contracts made on or after 30 March 2007, the definition of "progress payment" was extended to include a "final payment", a "single or one-off payment" and a "milestone payment".

209 Section 4 of the new Act now provides:

> progress payment means a payment to which a person is entitled under section 9, and includes (without affecting that entitlement)-
>
> (a) the final payment for-
>
> (i) construction work carried out under a construction contract; or
>
> (ii) related goods and services supplied under the contract; or
>
> (b) a single or one-off payment for-
>
> (i) construction work carried out under a construction contract; or
>
> (ii) related goods and services supplied under the contract; or
>
> (c) payment that is based on an event or date (known in the building and construction industry as a "milestone payment").

210 Section 9(2)(d) of the New Act also made provision for the determination of the reference date in relation to a final payment claim in the following terms:

> (d) in the case of a final payment, if the contract makes no express provision with respect to the matter, the date immediately following-
>
> (i) the expiry of any period provided in the contract for the rectification of defects or omissions in the construction work carried out under the contract or in related goods and services supplied under the contract, unless subparagraph (ii) applies; or
>
> (ii) he issue under the contract of a certificate specifying the final amount payable under the contract a final certificate; or
>
> (iii) if neither subparagraph (i) nor subparagraph (ii) applies, the day that-
>
> (A) construction work was last carried out under the contract; or
>
> (B) related goods and services were last supplied under the contract.

211 Section 14(5) of the New Act also made provision for the service of a final payment claim in the following terms:

> (5) A payment claim in respect of a progress payment that is a final, single or one-off payment may be served only within-
>
> (a) the period determined by or in accordance with the terms of the construction contract; or
>
> (b) if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment.

Use of Amending Act in Construction of Earlier Enactment

212 As I observed in *Martino Developments v Doughty,*[96] there is high authority for the proposition that the terms of an amending enactment can throw light on the intention of an earlier enactment.[97]

213 The generally accepted foundation for the learning in Australia is the judgment of Dixon J in *Grain Elevators Board (Vic) v Dunmunkle Corp*.[98] In 1942 the *Grain Elevators Act 1942* (Vic) was enacted as an Act to amend the *Grain Elevators Act 1934*. This was only three weeks after the striking of the municipal rate which was in issue in the proceeding. The amending Act provided a specific exemption from the liability to pay certain rates. The question was whether the exemption already existed under the earlier legislation which operated prior to the introduction of the amending Act. His Honour said:[99]

> Although the provision was passed too late to apply to the present case, I think that it may be considered on the question of interpretation. It would be a strange result if we were to interpret the prior legislation as giving a wider exemption than that conferred by the provision so that the express exemption it makes would prove unnecessary and the qualifications it places upon that exemption would be futile.

---

96 [2008] VSC 517 at [34].

97 [23] *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 539 per McHugh J citing *Grain Elevators Board (Vic) v Dunmunkle Corp* [1946] HCA 13; (1946) 73 CLR 70 and the earlier English case of *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403 at 414.

98 (1946) 73 CLR 70.

99 *Ibid* at 86.

214 In *Hunter Resources Ltd v Melville*[100] Dawson J expanded upon the approach in *Grain Elevators* with the following observations:

> In *Grain Elevators Board (Vict.) v Dunmunkle Corporation* [1946] HCA 13; (1946) 73 CLR 70, at p 86 Dixon J expressed the view that an amending Act might be taken into account in the interpretation of the prior legislation, at least to avoid a result that would render the amending legislation unnecessary or futile. I would add that it is but a short step to take, having regard to the expanded scope of the materials which now may be considered, to adopt the same approach in order to avoid rendering the amending legislation deficient. After all, what lies behind the observation of Dixon J in *Dunmunkle* is that it is permissible to ascertain the intention of the legislature with regard to prior legislation by reference to amending legislation. No doubt there are limits to this approach for as the House of Lords said in *Ormond Investment Co v Betts* (1928) AC 143, at p 154 it is not permissible to construe an unambiguous phrase in an earlier Act by an erroneous assumption of its effect contained in a later Act which did not purport to amend or alter the earlier Act.

215 In *Commissioner of State Revenue v Pioneer Concrete (Vic) Pty Ltd*[101] Callinan J, in citing both Dixon J in *Grain Elevators* and Dawson J in *Hunter Resources*, said:

> That a legislature has subsequently made particular provision to cover relevant events or circumstances may provide an indication that the legislation as earlier enacted was not intended to cover those events or circumstances at an earlier time.

216 Kirby J (in dissent) in *Cook v Benson & Ors*[102] adopted a similar approach in expressing the following view on the issue:

> Although subsequent amendments to legislation do not necessarily control the construction of statutory language as it existed prior to the amendment, in some cases the perceived need for a specific exemption may reinforce an impression, derived from the pre-amendment statutory provisions, that they did not go so far as the later amending provisions did.[103]

217 Accordingly, and consistently with the prevailing authority in Australia, I accept that an amending Act might be taken into account in the interpretation of the prior legislation in the manner described in the authorities to which I have referred.

---

100 (1988) 164 CLR 234 at 254 – 255.

101 (2002) 209 CLR 651 at 670.

102 (2003) 214 CLR 370 at 394.

103 Kirby J in this passage cited the following supporting authority: *Grain Elevators Board (Vict) v Dunmunkle Corporation* [1946] HCA 13; (1946) 73 CLR 70 at 85-86; *R v Reynhoudt* [1962] HCA 23; (1962) 107 CLR 381 at 388; *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; (1996) 187 CLR 310 at 351.*Taikato v The Queen* [1996] HCA 28; (1996) 186 CLR 454 at 471-472; *Trust Company of Australia* [2003] HCA 23 at [89]- [91]; but compare [87], [92].

Analysis

218 The question then becomes, given that final payment claims were specifically included in the definition of "progress payment" in s.4 of the New Act, which came into operation on 30 March 2007, did the terms of s.9 of the Old Act, in the absence of the expanded definition, include final payment claims in any event?

219 I do not think that s.9 of the Old Act had this effect.

220 The extended definition of "progress payment" found in the New Act would have been unnecessary, at least insofar as the introduction of the concept of a "final payment" claim is concerned, if in fact a final payment claim was already included within the scope of a "progress payment" as used in s.9 of the Old Act. The fact that the legislature has subsequently made particular provision to include final payments within the purview of progress payments under the Act, provides a good indication that the legislation as earlier enacted was not intended to provide for this.

221 Finkelstein J in *Protectavale*[104] was of the same view, which his Honour expressed in carefully considered *obiter dicta*. His Honour reasoned first from the position, which I accept, that progress payments are a different species of payment from final payments, principally because different consequences flow from each. As his Honour observed:[105]

> By s 9(2) progress payments are payable on and from the date, according to the terms of the contract, on which a claim for a progress payment may be made or the date by which the amount of the claim is to be calculated under the construction contract. Progress payments are effectively payments by instalments or periodic payments made over the life of the contract for construction work already completed. A final payment claim may be defined as a "final balancing of account between the contracting parties" (*Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR at 49) or "simply the last of the payment claims" (*Southern Region Pty Ltd v State of Victoria (No 3)* [2001] VSC 436 at [32]). In substance it is a claim for a payment which, when made, will discharge the principal from further obligations to pay money under the construction contract.

222 I am fortified in arriving at this conclusion because the necessary legislative mechanisms for the making of a final payment claim, consistently with the scheme of

104 *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at[17] – [24].
105 *Ibid* at [17].

the Act, were absent in the Old Act. There was no provision for the determination of a reference date in relation to a final payment claim and there was no provision for the service of such a claim.

223 Further, as is made clear from the object of the Act in s.3(1), it is to protect "specified progress payments" in relation to the carrying out of relevant work. The drafter of the statement of the object of the Act did not express the claimant's entitlement to receive "all payments under the construction contract" in question, including final payments.

Were the July Payment Claims Final Payment Claims?

224 Recourse may be had to the construction contract for purposes of determining whether what is claimed to be a progress payment is in fact a progress payment under the Act and whether the principal is liable to pay it.[106]

225 In the present case, each of the relevant construction contracts drew a clear distinction between a progress payment and what may be described as a final payment.

226 The Gantley Contract provided for the payment of progress claims. Clause 37.1 provided that "The Contractor shall claim payment progressively in accordance with Item 28". Item 28 was contained in the Part A annexure to the Gantley Contract. Item 28 provided:

> **28 Progress Claims**
>
> (subclause 37.1)
>
> (a) Times for progress claims 30th day of each month for WUC (defined by clause 1 as "work under the contract")[107] done to the 30th day of that month.

106 *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 at[18]; *Jemzone* (2002) 42 ACSR at 49; *De Martin & Gasparini Pty Ltd v Energy Australia* (2002) 55 NSWLR 577, 590-591.

107 The full definition under Clause 1 of 'WUC' was: "(from 'work under the Contract') means the work which the Contractor is or may be required to carry out and complete under the Contract and includes variations, remedial work, construction plant and temporary works."

Clause 37.1 provides that the contractor shall deliver to the superintendent claims for payment supported by evidence. Under clause 37.2 the superintendent must assess the claim within 14 days of receipt and issue a "progress certificate" that sets out the payment to be made by the principal to the contractor.

227 The Gantley Contract also provided for the making of a final payment claim. Clause 37.4 provided:

> **37.4 Final payment claim and certificate**
>
> Within 28 days after the expiry of the last *defects liability period*, the *Contractor* shall give the *Superintendent* a written *final payment claim* endorsed "Final Payment Claim" being a progress claim together with all other claims whatsoever in connection with the subject matter of the *Contract.*
>
> Within 42 days after the expiry of the last *defects liability period*, the *Superintendent* shall issue to both the *Contractor* and the *Principal* a *final certificate* evidencing the moneys finally due and payable between the *Contractor* and the *Principal* on any account whatsoever in connection with the subject matter of the *Contract*.
>
> Those moneys certified as due and payable shall be paid by the *Principal* or the *Contractor,* as the case may be, within 7 days after the debtor receives the *final certificate*.
>
> The *final certificate* shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the *Contract* except for:
>
> a) fraud or dishonesty relating to WUC or any part thereof or to any matter dealt with in the *final certificate*;
>
> b) any *defect* or omission in *the Works* or any part thereof which was not apparent at the end of the last *defects liability period*, or which would not have been disclosed upon reasonable inspection at the time of the issue of the *final certificate*;
>
> c) any accidental or erroneous inclusion or exclusion of any *work* or figures in any computation or an arithmetical error in any computation; and
>
> d) unresolved issues the subject of any notice of *dispute* pursuant to clause 42, served before the 7th day after the issue of the *final certificate*.

228 As is clear, clause 37.4 of the Gantley Contract, in dealing with a "final payment claim", has both formal and substantive requirements that distinguish final claims from other progress claims. First, the formal requirements are that a final payment

claim may only be provided to the superintendent "[w]ithin 28 days of the expiry of the Defects Liability Period" and must be endorsed "Final Payment Claim". The defects liability period is defined in clause 35 to mean the period commencing on the date of practical completion and extending (by Item 27 in the Part A annexure) for a period of 12 months thereafter. Second, there is a substantive requirement that a final payment claim include "the moneys finally due and payable between the contractor and the Principal on any account whatsoever in connection with the subject matter of the Contract". Also by clause 37.4 the superintendent must, within 42 days after the expiry of the last defects liability period issue to both the Contractor and the Principal a "final certificate". A final certificate must certify the amount which "is finally due" from the contractor to the principal or from the principal to the contractor arising out of the contract "on any account whatsoever in connection with the subject matter of the contract". There is an obligation imposed on the parties to pay the sum determined to be due under the final certificate within 7 days of its receipt.

229 Importantly, clause 37.4 provides that the final certificate shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the contract, except for items such as fraud, hidden defects, accidental omission and the like.

230 The Resources and Jetoglass Contracts also provided for the payment of progress claims. The contracts imposed obligations on the builder to build to all stages. The stages of the building contraction were defined detail in clause 1. "Progress Claim" was defined in clause 1 to mean: "… each claim made by the Builder to the Owner for each of the Stages". "Progress Payment" was defined to mean: " ... all monies due and payable by the owner to the Builder during the carrying out of the Works at the completion of each Stage". A "Progress Payment Table" was provided as Item 23 of the appendix to the Resources and Jetoglass Contracts. The table provided for the percentage of the contract price to be completed at each stage, and a precise money

sum payable on the completion of each stage. The table in the Resources Contract, for example, was in the following form:

	$ 64,000	Deposit
(10%)	$128,000	Base Stage
(15%)	$192,000	Frame Stage
(35%)	$448,000	Lock up Stage
(25%)	$326,000	Fixing Stage
	$128,000	Final Payment Upon Completion
= 100%	$1,280,000	Total 1,280,000 excl GST.

231 A regime for the payment of final claims and final payments was also provided for in the Resources and Jetoglass Contracts. Clause 1 defined "Final Claim" to mean

> ... the Builder's claim upon completion of the works for the balance of the Contract Price together with any other monies payable by the Owner (including any interest) under the contract. The final claim is GST inclusive.

Also defined was "Final Payment", which meant:

> ... the amount in the Final Claim to be paid by the Owner to the Builder upon completion of the Works. The final payment claim is GST inclusive.

Clause 17 of the contracts provided a detailed scheme in respect of the obligations of both parties to the contract upon completion. The principal clauses were clauses 17.1 and 17.4 which provided:

> ***17.1 Submission of final claim and notice of completion by builder***
>
> On **Completion**, the **Builder** will give to the **Owner**:
>
> - The **Final Claim**; AND
> - If a building permit was issued for the **Works** a copy of the **Occupancy Permit**, if required, or in any other case a copy of the certificate of final inspection, if required, AND
> - A written notice:
>   (a) stating that the **Works** are complete and the date on which the **Works** reached **Completion**; AND
>   (b) requesting a final inspection of the **Works** with the **Owner** or the **Owner's Agent** at a date and time specified in the notice.
>
> ***17.4 If owner agrees works are complete final claim becomes due and payable***
>
> If at the final inspection of the **Works** the **Owner** agrees that no defects exist and the **Works** have reached **Completion**, then the **Owner** must:
>
> - Sign a notice to that effect; AND

- Pay the **Final Claim** to the Builder in accordance with Item 13 of the **Appendix** (which provided 14 days after completion for payment).

In addition, clause 17 provided for a number of default positions which can trigger the obligation to make payment in certain events where the steps provided for are not undertaken by one party or the other.

232 Again the provisions of the Resources and Jetoglass Contracts which dealt with a "final payment claim" have both formal and substantive requirements that distinguish final claims from progress claims. The formal requirements define the steps to be taken to initiate the making of the claim and the steps to be taken to secure payment. The substantive requirements define the contents of the documents which are to be exchanged during the process.

233 What is clear from an examination of the contracts in all three cases is that there are a number of features which set progress claims apart from final payment claims. The most critical point of distinction between the two types of claims is the most obvious, and is in common with most construction contracts: once the final payment is made pursuant to a final payment claim, the rights and claims of the parties under the contracts are settled through an express (in the case of the Gantley Contract) and an implied (in the case of the Resources and Jetoglass Contracts) accord, and satisfaction with the result that each party's obligations in connection with the subject matter of the contracts are discharged. A progress claim made under the contracts, however, does not have this effect. In the usual case, payment of a progress payment pursuant to a progress claim under the contracts which turns out to be wrong, would not preclude a later adjustment to correct the error.

234 In the present case, however, the contractual process for the making of a final payment claim was not initiated and complied with, not could it have been. The early termination of the contracts resulted in the contractual mechanism for the making of a final payment claim being extinguished. In the case of the Gantley Contract the termination meant that the work never got to the defects liability period, the essential trigger for the making of a final payment claim under that

contract. In the case of the Resources and Jetoglass Contracts, a final payment could only be claimed following completion of the works. There was therefore no capacity under any of the contracts for the making of a final payment claim. For this reason the July payment claims were not final payment claims under the construction contracts.

235 However, it was contended further by the Plaintiff that even if the contractual mechanism was not complied with for a final payment claim, and plainly it wasn't, the July payment claims were in substance final payment claims and were not progress payment claims. This was the case, so it was submitted, in spite of the endorsement on each of the claims that they were served in each case as a "progress claim in respect of the above project, made under the *Building and Construction Industry Security of Payment Act 2002*", a point pressed by the Defendants.

236 Although the July payment claims were not endorsed "Final Payment Claim" or with words to like effect, and indeed were endorsed with words which claimed they were progress claims made under the Act, the Gantley and Resources payment claims at least were described in terms which had the character of a final payment claim. The stage of work in respect of which the claim was made in the Gantley Payment Claim was described as: "Practical completion", and the description in the Resources claim was: "Certificate of occupancy issued 03/02/2009". However, the description in the Jetoglass Payment Claim was: "Basement & Base stage, Suspended Slab plus Ground Floor Framing".

237 In determining whether the July payment claims were final payment claims or not, I am guided principally by the substance of the claims, rather than their form.

238 There were compelling indicia relied upon by Phoenix in support of the submission that the July payment claims were final payment claims. The most critical factor, in my view was the timing of the making of the claims. In each case, the claims were prepared and served well after the terminations in February 2009 had occurred, following which no further work was carried out under any of the contracts. By the

time that the July payment claims were served, in each case on 14 July 2009, no work had been done under any of the contracts for nearly five months.

239 Further, all three of the July payment claims, had a common and telling characteristic. In each case, as I have found, there was a failure to identify the basis of the claim for $388,214 in the Gantley Payment Claim, $140,800 in the Resources Payment Claim, and $49 in the Jetoglass Payment Claim. Indeed there was a failure to expressly specify those sums at all in the payment claims. However, it is clear in each case that they were sums derived from a calculation by subtracting in each case from the sum said to be the "value of the work completed and payment due to date under the contract (contract value)", the amount said to have been paid by the relevant respondent to the claim to that point. In other words, these sums appear to on their face to comprise a balancing figure for what is due under the contract. The provision of a final balancing of account between the contracting parties is a hallmark of a final payment claim. The July payment claims, in my opinion, very clearly exhibited this quality.

240 Further the inclusion of the prolongation claims in each of the payment claims, when these did not appear in the earlier payment claims sent on 26 May 2009 in each case, point toward the July payment claims as being final rather than being progress claims.

241 It was contended by the Defendants, however, that the claim made for repayment of the retention monies in the Gantley matter pointed against this claim being final payment claim. In the Gantley Payment Claim, a claim was made in the following terms:

> Plus value of bank guarantee to be returned ($100,000 plus interest capitalized from date of PC) $100,000.

242 It was submitted that the bank guarantee was in fact $200,000. The Gantley Payment Claim was therefore on account only and was an interim claim with a further claim contemplated.

243 There was no evidence advanced, however, as to why the claim was made by Phoenix for the return of the bank guarantee limited to the sum of $100,000 plus interest. If in fact the claim was short of the entitlement of Phoenix to the monies secured as part of the bank guarantee, there is no explanation as to why the claim should have been made in this way, some five months after the Gantley Contract had been terminated and when there was no possibility of further work being undertaken pursuant to it. Perhaps the claim was made in error? However, I am unable to conclude from the claim for the value of bank guarantee in the sum of $100,000 plus interest, that the Gantley Payment Claim was not, in substance, a final payment claim.

244 A further small point was the absence of any reference date in the July payment claims. Although this was not required to be provided by the legislation, nevertheless its absence did point away from the claims being progress payments which are to be "calculated by reference to that date" as provided for in s.9(1). Rather, the absence of any reference date pointed in the direction of the July payment claims being claims for final payment, or at least were consistent with that being the case.

Conclusion on Ground 3

245 I have found that the July payment claims, on their face, had the characteristics of a final payment claim and if they were in fact final payment claims, they were not permitted to be made under the Old Act.

246 However, I have also found that the July payment claims in each case were not in fact final payment claims under each of the construction contracts because the contractual mechanism for the making of a final payment claim in each case was not engaged.

247 The ultimate question, however, is not whether the July payment claims were final payment claims, but whether they were "progress claims" within the meaning of the Old Act. In my opinion, they were not. They were not claims for any instalment of

part of the agreed contract price made during the life of the contract. The claims did not comply with the contractual description of a progress claim in each of the construction contracts. In the Gantley Contract a progress claim was described as a claim for payment which is made "progressively" for work done under the contract as accounted for to the end of each month. In the Resources and Jetoglass Contracts a progress claim was described as a claim for payment due to the builder at the completion of each defined stage of the building project. In the case of the July payment claims however, they were in each case claims in the nature of a final accounting for what was then presently claimed to be due following termination of the contract. The claims were comprised of outstanding monies accumulated over the life of the construction contract. For this type of claim, other remedies at common law were available to the claimant.

248 The conclusions that I have come to in relation to the final payment claim Ground 3, are:

(a) The Old Act did not permit the making of a final payment claim under s.9 of the Act;

(b) The facility to make a final payment claim and treat it as a progress claim only applies under the New Act, and applies to construction contracts entered into on and after 30 March 2007, when the New Act came into operation;

(c) The July payment claims were neither final payment claims nor were they "progress claims" under the relevant construction contracts. Not being "progress claims" they fall outside the operation of the Old Act.

If the Payment Claims Were 'Final Payment Claims', Were They for this Reason Invalid?

249 The core purpose of the Act is to provide a statutory right to payment of progress payments under a construction contract and to provide a mechanism to enable the party so entitled to recover those payments. The framework under the Old Act was confined to providing this facility in respect of "progress payments".

250 Having made the finding that the July payment claims were not progress claims under the Old Act, it inevitably follows, in my view, that the July payment claims in each case were invalid. They did not satisfy a basic and essential requirement of the legislation, namely they were not made in respect of a progress payment within the meaning of the Old Act.

251 Under this ground, I am satisfied that the payment claims were invalid. They failed to satisfy a basic and essential requirement of the legislation in a substantial and material way, and further that the failures were manifest on the face of the documents. There was therefore jurisdictional error.

Claimant's Rights are not Extinguished

252 If final payment claims are to be made in respect of construction contracts to which the Old Act applies, the contractual mechanism, if there be one, should be engaged. If there be a failure on the part of a respondent to such a claim to make payment, when pursuant to the contract it is required to do so, litigation and not the Act, is the last resort for enforcement. Likewise, in cases such as the present, if the construction contract to which the Old Act applies has been terminated prior to the time when the contract permits a final payment claim to be made, and the contractual mechanism for the making of a final payment claim is not, or cannot be engaged, in circumstances where a principal or head contractor refuses payment of what is due, litigation and not the Act, is again the last resort for enforcement of what may be due to a contractor.

253 In the present matters, as it so happens, the Phoenix has issued proceedings in each matter in the Building Cases Division of the County Court of Victoria seeking damages assessed upon a *quantum meruit* in respect of all sums which it claims are due to it under each of the Gantley, Resources and Jetoglass Contracts. In proceeding 8833 of 2009 it claims against Gantley the sum of $1,941,412.49; in proceeding 8731 of 2009 it claims against Resources the sum of $721,811.51; and in proceeding 00782 of 2009 it claims against Jetoglass the sum of $505,588.38. These proceedings were all issued on 2 March 2009.

254 Accordingly, Phoenix is in a position to prosecute its rights under each of the contracts outside the Act in an appropriate forum, a course which it pursued almost immediately after termination of the contracts, and well prior to service of the purported payment claims under the Old Act. It has not been denied a remedy by reason of my finding of invalidity in relation to the July payment claims.

Ground 4

255 Finally, it was contended that the July payment claims in each case were invalid because, contrary to s.14(2) of the Old Act, the payment claim in each case constituted more than one payment claim in respect of the same progress payment.

256 It was common ground that in each case, a payment claim was made by each of Gantley, Resources and Jetoglass directed to Phoenix on 26 May 2009. Each of the May payment claims were purportedly made under the Old Act. Each was endorsed as follows:

> **We hereby submit our further progress claim in respect of the above project, made under the** *Building and Construction Industry Security of Payment Act 2002*.

257 Each of Gantley, Resources and Jetoglass served payment schedules to the May payment claims.

The May and July Payment Claims

258 In the Gantley matter the May payment claim served by Phoenix noted a total of $4,950,000 (inclusive of GST) in respect of "Value of work completed and payment due to date under the contract (contract value)"; and sought payment of $1,302,169 for variations. It allowed a deduction of $4,561,786 for payments made to that date, leaving a total of $1,690,383 claimed as a progress payment. In the July payment claim it noted the same total of $4,950,000 (inclusive of GST) in respect of "Value of work completed and payment due to date under the contract (contract value)"; and sought payment of a slightly higher figure of $1,309,815 for variations. The additional item was the sum of $7,646.00 for "Land surveyors to establish foot print and Strata Subdivision points on upper levels". In all other respects the variation

schedule was identical to that in the May payment claim. In the July payment claim it also sought payment for the additional items of $575,520 for prolongation costs and $100,000 for the value of a bank guarantee. These items did not appear in the May payment claim. It allowed a deduction of $4,561,786 for payments made to that date, which was the same as that allowed in the July payment claim, leaving a total of $2,373,549 claimed as the progress payment.

259 In the Resources matter the May payment claim served by Phoenix noted a total of $1,408,000 (inclusive of GST) in respect of "Value of work completed and payment due to date under the contract (contract value)"; and sought payment of $291,237 for variations. It allowed a deduction of $1,267,200 for payments made to that date, leaving a total of $432,037 claimed as a progress payment. In the July payment claim it noted the same total of $1,408,000 (inclusive of GST) in respect of "Value of work completed and payment due to date under the contract (contract value)"; and sought payment of a higher figure of $391,951 for variations. The first five items in the variation schedule were identical to the variation schedule supplied with the July Payment claim. However another five additional items was were added to the variation schedule, totalling $100,714.00. In the July payment claim it also sought payment for the additional item of $207,176 for prolongation costs. This item did not appear in the May payment claim. It allowed a deduction of $1,267,200 for payments made to that date, which was the same as that allowed in the July payment claim, leaving a total of $739,927 claimed as the progress payment.

260 In the Jetoglass matter, the May payment claim served by Phoenix noted a total of $123,750 (inclusive of GST) in respect of "Value of work completed and payment due to date under the contract"; and sought payment of $29,419 for variations. It allowed a deduction of $123,701 for payments made to that date, leaving a total of $29,457 claimed as a progress payment. In the July payment claim it noted the same total of $123,750 (inclusive of GST) in respect of "Value of work completed and payment due to date under the contract"; and sought payment of a slightly higher figure of $33,331 for variations. The first eight items in the variation schedule were

identical to the variation schedule supplied with the July Payment claim. However another two additional items was were added to the variation schedule, totalling $3,913.00. In the July payment claim it also sought payment for the additional item of $146,300 for prolongation costs. This item did not appear in the May payment claim. It allowed a deduction of $123,701 for payments made to that date, which was the same as that allowed in the July payment claim, leaving a total of $179,680 claimed as the progress payment.

261 Thus, save for the additional items which were identified, the May payment claims were identical to the July payment claims.

Progress Payment under the Old Act – One Only Permitted

262 The Old Act, in its pre-amendment form, provided by s.14(2) that only one progress payment claim could be served in respect of a specific progress payment. The sub-section was enacted in the following terms:

> (2) A claimant may serve only one payment claim in respect of a specific progress payment.

Progress Payment under the New Act – One Only Permitted with a Single Exception

263 Following the amendments brought about by New Act, which apply to contracts made on or after 30 March 2007, an equivalent provision to s.14(2) was incorporated into the New Act, but in a slightly different form. Sub-section (8) is drafted differently in the form of a prohibition, compared with the permissive approach under s.14(2) and sub-section (9) now provides for an exception which was not present previously. The sub-sections in the New Act are in the following terms:

> (8) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
>
> (9) However, subsection (8) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

Purpose of Section 14(2)

264 In my view, the purpose of s.14(2) was to protect a principal or head contractor being hounded, for whatever reason, by contractor pressing for payment on multiple payment claims and using the Act as the sledgehammer. The Act provides for drastic consequences if a payment claim is ignored, including a facility for the entry of judgment for the claimed amount and the right conferred on a claimant to suspend the works. It is incumbent upon a principal or head contractor, in order to avoid such consequences, to apply adequate resources to deal with a claim once it is made. This could result in a considerable burden if multiple payment claims were to be permitted.

Case-law and Analysis

265 In *Holdmark Developers v GJ Formwork*[108] ("*Holdmark*"), McDougall J considered the effect of s.13(5) of the New South Wales Act which, along with its companion s.13(6), was in the same terms as s.14(8) and (9) of the New Act in Victoria. The equivalent sections of the New South Wales Act provided:

> (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
>
> (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

266 His Honour said in *Holdmark:*[109]

> In my judgment, GJ was not entitled to serve the fourth payment claim. That is because s 13(5) prevents a claimant from serving more than one payment claim in respect of any one reference date under the contract. I therefore conclude that the adjudicator had no power to determine the application. The existence of a reference date in relation to which a payment claim is made there is a jurisdictional matter: *Isis Projects v Clarence Street Limited* [2004] NSWSC 222 at [33]. Alternatively, the adjudicator had no power because of the provisions of s 13(5). On either basis, therefore, there is jurisdictional error.

267 I agree with the analysis of McDougall J in *Holdmark.*

---

108 [2004] NSWSC 905.

109 *Ibid* at [40].

Conclusion as to Ground 4

268 In my opinion, to the extent that the July payment claims in each case added further items of claim beyond that which appeared in the May payment claims I am not satisfied that they were invalid.

269 However, to the extent that the July payment claims in each case replicated the items found in the May payment claims I am satisfied that they were invalid. They failed to satisfy a basic and essential requirement of the legislation in a substantial and material way, and further that the failures were manifest on the face of the documents. There was therefore jurisdictional error.

270 Applying the principles of severance to which I have referred, the replicated items in the July payment claims can be extracted from the claim without doing any violence to what remains. Severance of the invalid portion of the July payment claims would therefore be open. Severance of the associated parts of the adjudication determinations, for the same reasons, would also be open.

271 It follows that, if this was the only ground of invalidity, I would make a declaration accordingly, with the result that the adjudication determinations would be declared valid to the extent that they made determinations relating to the additional sums claimed in the July payment claims, but not otherwise.

Relief and Orders

272 Because the payment claims were invalid, the adjudicator had no power to determine each of the adjudication applications before him in each matter.

273 It is appropriate to make declarations and grant the necessary injunctive relief which will reflect these findings and set aside the adjudication determinations in each case.

274 I will make the following orders:

1. It is declared that the adjudication determinations purportedly made pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the "Act") by the second Defendant ("Davenport") dated 24 August

2009 as between the first Plaintiff ("Gantley") as respondent and the first Defendant ("Phoenix") as claimant (the "Gantley Adjudication"), as between the second Plaintiff ("Resources") as respondent and Phoenix as claimant (the "Resources Adjudication"), and as between the third plaintiff ("Jetoglass") as respondent and Phoenix as claimant (the "Jetoglass Adjudication"), are void.

2. The Gantley Adjudication determination, the Resources Adjudication determination and the Jetoglass Adjudication determination are quashed.

3. Phoenix is permanently restrained from seeking to enforce or take action under the Act in respect of the Gantley Adjudication determination, the Resources Adjudication determination and the Jetoglass Adjudication determination.

275 I will hear the parties on the question of costs.

SCHEDULE A

PAYMENT CLAIM (CCF)

PAYMENT CLAIM

TO: ***[Insert full name of CCF customer(the party responsible to make payment) as appears on the construction contract]***

[address of CCF Customer]

This payment claim relates to ***[insert description of construction contract]*** dated ***[insert date of construction contract]*** for ***[insert description of project]*** (the "Construction Contract")

The total amount claimed under this payment claim is $ ***[insert amount]***

The construction work or related goods and services in respect of which this payment claim is made and the amount claimed for the construction work or related goods and services are:

1.	***[insert a description of the construction work or related goods and services claimed under this Payment Claim]***	**Amount Claimed $**
2.		
3.		

[Note: Include attachments if required and list them here as attachments]

Signed:

For and on behalf of the ***[insert full name of CCF Member]***

Dated:

This is a payment claim made under the Building and Construction Industry Security of Payment Act 2002 (Vic)

SCHEDULE B

PAYMENT CLAIM (NZ)

From: Payee Name	*HVAC Constructors Ltd*			Date	*20 February 2002*
Postal Address	*PO Box 12345, Penrose, Auckland*				
To: Payer	*A Builder Ltd*			Account Ref	*Job 123*
Postal Address	*PO Box 54321, Ellerslie, Auckland*				
Project Name & trade	*Kiwibank - Mechanical services*			Location	*50 Queen St, Auckland*
Project Claim No	*2*	Period from	*1 Feb 2002*	Period to	*28 Feb 2002*
Due Date for Payment					*20 March 2002*
THIS IS A PAYMENT CLAIM UNDER THE CONSTRUCTION CONTRACTS ACT 2002					

	Value	Claim to Date
Original Contract: As attached details	***$7,700.00***	***$5,300.00***
Approved Variations as attached details	*1,055.00*	
Submitted Variations as attached details	*500.00*	
TOTAL VARIATIONS	***$1,555.00***	***$200.00***
TOTAL	***$9,255.00***	***$5,500.00***
LESS PREVIOUSLY CLAIMED		***3,500.00***
THIS CLAIM (exc GST)		***$2,000.00***

DETAILS FOR PAYMENT CLAIM No 2

ORIGINAL CONTRACT						
Item	Description	Qty	Rate	Amount	Claim to Date	
					%	$
1	*Plant & Equipment*			*5,000.00*	*100*	*5,000.00*
2	*Pipework*			*200.00*	*50*	*100.00*
3	*Fittings*			*2,000.00*	*10*	*200.00*
4	*Commissioning*			*500.00*		
TOTAL				***$7,700.00***		***$5,300.00***

VARIATIONS										
Ref	Var. No.	Description	Submitted		Approved			Claim to Date	
			Date	$	Date	Ref	$	%	$
1	*VO 1*	*Extra Pipework*	*1/12/01*	*App*	*20/1/02*	*VO1 2*	*1,000.00*	*10*	*100.00*
2	*SI 10*	*Paint plant*	*10/1/02*	*200.00*				*50*	*100.00*

New Zealand Building Subcontractors Federation Inc, Form for payment claim