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

Not Restricted

No. SCI 2010 7001

SEABAY PROPERTIES PTY LTD
(ABN 43 105 314 074) — Plaintiff

v

GALVIN CONSTRUCTION PTY LTD
(ABN 82 054 156 339) — First Defendant

And

JOHN McMULLAN — Second Defendant

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	4-5 APRIL 2011
DATE OF JUDGMENT:	6 MAY 2011
	SEABAY PROPERTIES PTY LTD v GALVIN CONSTRUCTION PTY LTD & ANOR
MEDIUM NEUTRAL CITATION:	[2011] VSC 183

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic) – Adjudications conducted under Part 3 Division 2 of the Act – Whether non-claimable variations included in payment claim and adjudication determination – Whether severance of invalid part open - Whether inclusion of liquidated damages claimed by respondent in payment schedule and adjudication determination permitted - Whether inclusion of liquidated damages claimed by respondent within s. 10B(2) of the Act - Whether prematurely served payment claim and adjudication thereon valid – Whether Payment claim sufficiently identified the work done.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr J.A.H. Foxcroft SC Mr J.A.F. Twigg	Giannakopoulos Solicitors
For the First Defendant	Mr B.A. Shnookal	Logie-Smith Lanyon
For the Second Defendant	No Appearance	

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HIS HONOUR:

Background

1 This proceeding arises under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the "Act"). It raises questions at to whether there was a valid payment claim and whether there was a valid adjudication determination under the Act.

2 The First Defendant, Galvin Construction Pty Ltd, ("Galvin") was a claimant pursuant to the provisions of the Act. The Second Defendant, Mr John McMullan, (the "Adjudicator") purportedly made a determination under s.23 of the Act, dated 14 December 2010, which was amended on 20 December 2010 (the "Adjudication Determination"). The Adjudicator is a lawyer with extensive experience in the building and construction industry and the security of payment regime. The Adjudicator took no part in the present proceeding.

3 A construction contract within the meaning of s.7 of the Act (the "Contract") was entered into between the Plaintiff, Seabay Properties Pty Ltd ("Seabay") as Principal and Galvin as the Contractor on 24 July 2008. The Act therefore applies in its amended form.[1] The Contract was for the construction of 40 apartments and two retail tenancies on a property situated at 100 Western Beach Road, Geelong, Victoria. The contract sum was just shy of $20 million, being $19,957,300 inc GST. The general terms and conditions were embodied in the standard AS 4300–1995 Contract. The date of practical completion initially provided for was the last working day of 2009. Liquidated damages were prescribed at the rate of "$150 per apartment per working day applying from the date for practical completion". The time set in the Schedule under the Contact for payment claims was "30th day of each month". However this was qualified by clause 42.1.

4 Clause 42.1 of the Contract provided for the following contractual structure in respect of payment claims:

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1 As amended by the *Building and Construction Industry of Payment (Amendment) Act* 2006, see s.53 of the Act; s.42 of the Act commenced 30 March 2007.

42.1 Payment Claims, Certificates, Calculations and Time for Payment

At the times for payment claims or upon completion of the stages of the work under the Contract stated in Annexure Part A and upon the issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.5. the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then otherwise due to the Contractor arising out of the Contract.

If the time for any payment claim under the preceding paragraph falls due on a day which is Saturday, Sunday, Statutory or Public Holiday the Contractor shall submit the claim either on the day before or next following that date which itself is not a Saturday, Sunday, Statutory or Public Holiday.

If the Contractor submits a payment claim before the time for lodgement of that payment claim, such early lodgement shall not require the Superintendent to issue the payment certificate in respect of that payment claim earlier than would have been the case had the Contractor submitted the payment claim in accordance with the Contract.

Within 14 days of receipt of claim for payment, the Superintendent shall assess the claim and shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the Superintendent's opinion, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than that amount claimed by the Contractor, the reasons for the difference. The Superintendent shall also set out, as applicable, in any payment certificate issued pursuant to Clause 42, the allowances made for –

(a) the value of work carried out by the Contractor in the performance of the Contract to the date of the claim;

(b) amounts otherwise due from –

  (i) the Principal and the Contractor; and

  (ii) the Contractor to the Principal;

(c) amounts assessed under Clause 46.4 and not duly disputed;

(d) amounts paid previously under the Contract;

(e) amounts previously deducted for retention moneys pursuant to Annexure Part A; and

(f) retention moneys to be deducted pursuant to Annexure Part A,

arising out of the Contract resulting in the balance due to the Contractor or the Principal, as the case may be.

If the Contractor fails to make a claim for payment under this Clause 42.1, the Superintendent may nevertheless issue a payment certificate and the Principal

> or the Contractor, as the case may be, shall pay the amount so certified within 14 days of that Certificate.
>
> Subject to the provision of the Contract, within 28 days of receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is earlier, and within 14 days of the issue of a Final Certificate, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in such certificate as due to the Contractor or to the Principal, as the case may be, or if not payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause 42.1 shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or the Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.
>
> Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be payment on account only, except as provided under Clause 42.6.

5 The Contract provided that the Superintendent could divide the project into separable portions. Towards the end of the project it was in fact divided into separable portions and Practical Completion was certified for each separable portion by the Superintendent, as follows:

a. For the apartments on levels 1 to 5 practical completion was accepted as the work achieved on 9 July 2010;

b. For the retail tenancies practical completion was accepted as the work achieved on 12 and 17 August. (The Superintendent assessed the remaining work comprised 2.65% of the contract sum); and

c. For the apartments on Level 6, 27 October 2010.

6 Pursuant to the Schedule and clause 42.1 of the Contract, Galvin was entitled to submit progress claims on the 30th day of each month, or a day earlier if it fell on a Saturday. The 30th of October fell on a Saturday and hence Galvin was entitled under the Contract to submit a progress claim on 29 October. It was submitted by Galvin that, by application of s.9 of the Act, the reference date was to be determined by the

Contract, and by operation of clause 42.1 and therefore, for all relevant purposes, the reference date was 29 October. I accept this submission. Accordingly, the reference date under the Contract, as it applied to the progress payment in question, was 29 October 2010.

7 By clause 42.1 the Contract also contemplated that progress claims could be delivered early and, in the event that this occurred, provided for them to be treated as if they had been received on the contractual reference date.

8 Galvin submitted the payment claim which is in contention in this proceeding, namely Payment Claim 28 ("Payment Claim 28") which was purportedly made under the Contract and also under the Act. It is common ground that Payment Claim 28 was submitted by Galvin to Seabay on 28 October 2010. This was the day after Level 6 had achieved practical completion.

9 Payment Claim 28 sought payment of a total of $1,987,6761.25 plus GST. It was endorsed "*This claim is made under the Victorian Building and Construction Industry Security of Payment Act 2002*", and thus complied with s.14(2)(e) of the Act.

10 Payment Claim 28 identified its claims under the Contract on the basis of a percentage complete for each trade and each variation. For example, in respect of "Metalwork", the claim identified "$956,400" as the "Contract Amount"; "$910,608" as "Previously Certified"; "% of Work Done" as "100%"; "This Claim" as "$956,400"; and "Total This Invoice" as "$45,792", being the difference between the "Contract Amount" claimed ($956,400) and the amount "Previously Certified", and presumably previously paid, ($910,608). The amounts in Progress Claim 28 claimed that the balance of work done was $146,897.00.

11 Payment Claim 28 claimed a total of $1,151,165.46 in respect of variations. The Payment Claim included documents to support each variation.

12 Payment Claim 28 also claimed a credit in respect of $689,598.79 which had been previously deducted by the Superintendent of the Principal Seabay in respect of liquidated damages.

13 This brought the total claimed by Galvin in Payment Claim 28 to a total of $1,987,6761.25 plus GST, namely $2,186,427.38.

14 Commonly in construction projects there are two regimes for the making of payment claims for progress payments: one under the Construction Contract; and the other under the Act. Different rules may apply under each regime as to what is claimable under a Payment Claim and what may be deducted.

15 In this case, Galvin made its Payment Claim, Payment Claim 28, under the Contract, and concurrently and separately, under the Act. Galvin did not make any claim under the Act for delay costs, although it made such claims in its Payment Claim made under the Contract.

16 The Superintendent, Napier & Blakeley Pty Ltd, assessed Payment Claim 28 under the Contract and provided its Payment Certificate. It assessed the total amount due to Galvin under the Contract at $43,652, after allowing approved variations in the sum of $127,330.70 and deducting liquidated damages in the sum of $540,150.00, and undertaking other calculations under the Contract.

17 However, in responding to the Payment Claim made under the Act, the Principal did not rely on the Superintendent's Assessment. It provided a Payment Schedule, purportedly under s.15 of the Act which contained significant differences. In the Payment Schedule it assessed the Payment Claim in total as follows:

Contract Sum	- 17,843,000.00
Plus Assessed Variations (1,151,165.46 – 923,955.97)	- 227,209.48
Less:	
Provisional sum adjustment	- <183,581.43>
Adjustment Base Contract Sum – 17.886,678.00	
LESS:	
Paid to Date	- <17,337,611.00>

Deductions due to liquidated damages: - <769,350.00>

Total: **- <220,332.94>**

68. The total amount payable to Galvin under this Payment Schedule is: Nil.

18 The Payment Schedule identified some variation claims as excluded amounts under the Act and, as noted above, deducted $227,209.48 from its assessment in respect of these variations. It also deducted $769,350.00 for liquidated damages claimed to be due from Galvin to Seabay. This resulted in a deficit of $220,332.94 against Galvin with the consequence that "Nil" was assessed as the amount due to Galvin on Payment Claim 28 under the Act.

19 Galvin commenced an adjudication under the Act by an Adjudication Application dated 25 November 2010. The Adjudication Submission filed by Galvin in support of its Adjudication Application adopted the Principal's calculations, with the exception that it claimed that the principal Seabay was not entitled to deduct the sum of $769,350.00 for liquidated damages. Galvin said in its Adjudication Submission, inter alia:

> …
>
> 6. In item 68 of the Payment of Schedule under the heading "Grand Summary" the Principal purports to deduct the amount of **$769,350** by way of Liquidated damages.
>
> 7. The Claimant disputes the wrongful application of Liquidated Damages by the Respondent under the Contract and under the Act.
>
> 8. Section 10B of the Act sets out the classes of amounts, known as **excluded amounts**, which must not be taken into account when calculating the amount of progress payments to which a person is entitled under a construction contract.
>
> 9. Section 10B(2) of the Act provides that the **excluded amounts** are:-
>
> (a) any amount that relates to a variation of the construction contract that is not a claimable variation;
>
> (b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to-
>
> (i) latent conditions; and
>
> (ii) time related costs; and
>
> (iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

(d) any amount in relation to a claim arising at law other than under the construction contract;

(e) any amount of a class prescribed by the regulations as an excluded amount.

10. Liquidated damages by their very nature fall into the category of either time related costs (s.10B(2)(b)(ii)) or a claim for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contracts (s.10B(2)(c)). As such liquidated damages are an excluded amount under the Act and cannot be taken into account when calculating the amount of a progress payment due to the Claimant.

11. In the circumstances the Respondent has wrongfully taken into account an excluded amount under the Act.

…

15. It is clear from the statements above and from the provisions of the Act, that the Respondent's proper course, if it claims an amount by way of liquidated damages, is to pursue its contractual remedies and not to deduct liquidated damages under the Act.

16. By removing the wrongful deduction of liquidated damages the Claimant is entitled, on the Respondent's calculation, to a payment of **$549, 017.06** being:

Adjusted Base Contract Sum	$17,886,628.06
Less	
Paid to date	$17,337,611.00
Total due to Claimant	**$549,017.06 plus GST.**

20 In response, Seabay delivered its Adjudication Response prepared by its solicitors. Seabay said as to its position in the adjudication, inter alia:

> The sole question for the adjudicator's determination (thus defining his jurisdiction) is whether [the] Seabay may deduct liquidated damages from the payment claim delivered under the Act.

21 Seabay's Adjudication Response also raised two jurisdictional questions:

(1) Payment Claim 28 was served before the reference date and was premature; and

(2) Payment Claim 28 did not identify "the work performed, and calculated between the two reference dates".

22 Following the delivery of a Notice under s.21(2B) of the Act and the receipt of a further submission by way of response from Galvin in relation to the jurisdictional questions, the Adjudicator delivered his adjudication determination dated 14 December 2010 (the "Adjudication Determination"). On 20 December 2010 the Adjudicator delivered an amendment to his Adjudication Determination stating:

> I determine that the Adjudicated Amount is $566,517.06 plus GST, on the basis that the claimant is to pay the Adjudicator's fees of $17,500 plus GST.
>
> [ie. the Adjudicated Amount of $549,017.06 + $17,500 for the adjudicators fees = $566,517.06].

23 For the purposes of this proceeding, there is no disagreement between the parties that:

(a) the Date for Practical Completion was extended to 1 February 2010;

(b) the Date of Practical Completion of the Works (levels 1-5 excluding the commercial tenancies and level 6) was 9 July 2010; and

(c) the Date of Practical Completion of the Works (balance of the works), was 27 October 2010.

24 Further, the following facts are also relevant to the disposition of this matter:

(a) the Contract Price exceeds $5 million; and

(b) the Contract contains a dispute resolution clause.

These matters bear on the excluded amounts which the Adjudicator is not permitted to include in his Adjudication Determination pursuant to ss.10(3) and 10A(3) of the Act.

25 In his Adjudication Determination, the Adjudicator considered the jurisdictional arguments advanced by Seabay and rejected them both. He found that Seabay's claim, that it was entitled to deduct liquidated damages from Payment Claim 28, was

ill-founded because it was an excluded amount under s.10B of the Act. He otherwise adopted Seabay's accounting set out in its Adjudication Response to find the Adjudicated Amount was $549,017.06. There was no disagreement between the parties on the accounting adopted by the Adjudicator.

26 By its originating motion Seabay seeks orders that the Adjudication Determination be declared unlawful and void alternatively that it be quashed, on grounds that:

1. It was contrary to law;

2. It demonstrated an error of law on the face of the record; and

3. It was tainted by jurisdictional error.

27 Seabay seeks its relief on four principal grounds:

1. Incorrect inclusion of non-claimable variations;

2. Incorrect exclusion of liquidated damages as an excluded amount;

3. Premature submission of Payment Claim; and

4. Failure of the Payment Claim to identify the work performed in the claim period.

28 For convenience, I have grouped each of Seabay's grounds into the four principal grounds. Each principal ground will be dealt with in turn.

Ground 1. Incorrect Inclusion of Non-claimable Variations

29 The Adjudicator determined the matter referred to him for adjudication on the basis that the only substantive issue for decision was whether it was open for Seabay to deduct a sum for liquidated damages from the amount claimed in Payment Claim 28. Accordingly, apart from determining procedural issues, he did not address any other substantive issue. In particular, he did not turn his mind as to whether Galvin

incorrectly included in its Payment Claim a claim for variations which the Act prescribes should not be taken into account as "excluded amounts".

30 Nevertheless, in this proceeding, Seabay contended that Payment Claim 28 included non-claimable variations and that the Adjudicator did not have jurisdiction to include them in the adjudicated amount and was in error in doing so.

31 The issue in question under Ground 1 is the characterisation of the variations in an amount of $227,209.00 claimed by Galvin and allowed by the Adjudicator.

32 The Act provides for "classes of amounts", called "excluded amounts" that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under the Act: s.10B(1). These provisions are unique to the Victorian Act, and do not appear in corresponding inter-state legislation. 'Excluded amounts' include any amount that relates to a variation of the relevant construction contract that is not a "claimable variation": s.10B(2)(a).

33 Further, and importantly, ss.23(2A) and (2B) provide in clear terms that an adjudicator's determination is void "if it takes into account any amount or matter", including any part of the claimed amount that is an excluded amount, "to the extent that the determination is based on that amount or matter". Subsections 23(2A) and (2B) provide:

> (2A) In determining an adjudication application, the adjudicator must not take into account-
>
> (a) any part of the claimed amount that is an excluded amount; or
>
> (b) any other matter that is prohibited by this Act from being taken into account.
>
> (2B) An adjudicator's determination is void-
>
> (a) to the extent that it has been made in contravention of subsection (2);
>
> (b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

34 The rationale behind limiting the types of claims which may be made for variations under the Act, lies in the fact that money claims for variations to construction contracts are commonly the subject of dispute. No doubt for this reason, it was considered by the Legislature to be desirable for such claims to be excluded from progress claims made under the Act. In this way, the central object of maintaining an efficient flow of funds to contractors on a project could be optimized by eliminating potential "log jams" to payment claims arising from disputes over variations. Such issues, if they arise, are intended to be deferred to later dispute resolution processes or litigation.

35 However, the Act also provides exceptions called "claimable variations" which are permitted to be claimed in a statutory payment claim. These are defined in s.10A. This section sets up a statutory scheme of some complexity. 'Claimable variations' are divided into two classes. Subsections 10A(2) and (3) provide:

> 10A(2) The first class of variation is a variation where the parties to the construction contract agree- [Emphasis added]
>
> (a) that work has been carried out or goods and services have been supplied; and
>
> (b) as to the scope of the work that has been carried out or the goods and services that have been supplied; and
>
> (c) that the doing of the work or the supply of the goods and service constitutes a variation to the contract; and
>
> (d) that the person who has undertaken to carry out the work or to supply the goods and services under the contract is entitled to a progress payment that includes an amount in respect of the variation; and
>
> (e) as to the value of that amount or the method of valuing that amount; and
>
> (f) as to the time for payment of that amount.
>
> 10A(3) The second class of variation is a variation where-
>
> (a) the work has been carried out or the goods and services have been supplied under the construction contract; and
>
> (b) the person for whom the work has been carried out or the goods and services supplied or a person acting for that person under

the construction contract requested or directed the carrying out of the work or the supply of the goods and services; and

(c) the parties to the construction contract do not agree as to one or more of the following- [Emphasis added]

(i) that the doing of the work or the supply of goods and services constitutes a variation to the contract;

(ii) that the person who has undertaken to carry out the work or to supply the goods and services under the construction contract is entitled to a progress payment that includes an amount in respect of the work or the goods and services;

(iii) the value of the amount payable in respect of the work or the goods and services;

(iv) the method of valuing the amount payable in respect of the work or the goods and services;

(v) the time for payment of the amount payable in respect of the work or the goods and services; and

(d) subject to subsection (4), the consideration under the construction contract at the time the contract is entered into-

(i) is $5 000 000 or less; or

(ii) exceeds $5 000 000 but the contract does not provide a method of resolving disputes under the contract (including disputes referred to in paragraph (c)). [Emphasis added]

(4) If at any time the total amount of claims under a construction contract for the second class of variations exceeds 10% of the consideration under the construction contract at the time the contract is entered into, subsection (3)(d) applies in relation to that construction contract as if any reference to "$5 000 000" were a reference to "$150 000".

36 The following example is provided in the Act as to the operation of ss.10A(3) and (4):

A building contractor enters into a construction contract. The consideration (contract sum) under the contract at the time the contract is entered into is $3 million. The contract contains a dispute resolution clause. The contractor undertakes work at the direction of the other party. The contractor claims (the new claim) that the work is a variation to the contract. The other party does not agree that the work constitutes a variation to the contract (disputed variation). The contractor has already made a number of claims for disputed variations under the contract. The new claim brings the total amount of claims for disputed variations under the contract to $350,000. This amount exceeds 10% of the contract sum. As the contract sum exceeds $150,000 and the contract contains a dispute resolution clause, the disputed variation in the new claim

and all subsequent disputed variations under the contract will not be claimable variations under this Act.

37 In this case, as the contract price exceeded $5,000,000 and the Contract contained a dispute resolution clause, there could be no claimable variations within the second class of variations to which s.10A(3) applies. On this basis, the amounts claimed by Galvin as variations are excluded amounts and should not have been included in the Payment Claim under the Act.

38 However, Galvin submitted that the first class of variation in s.10A(2) applied, because there was a relevant agreement between the parties within the meaning of the subsection.

39 The text of s.10A(2) of the Act does not provide any guidance as to the mode of agreement on the listed subject which the parties must achieve before a claimed variation may fall within the first class of claimable variations. The form of the agreement, whether in writing, oral or to be implied, is left open in the provision. Further, the timing of entry into a relevant agreement is also not expressly provided for.

40 As to form, giving the word "agree" its ordinary and natural meaning in its context, in my opinion, in the absence of any limiting words in the subsection, the concept ought to be given the amplitude intended. It may apply to any agreement, whether in writing, oral or to be implied from conduct, or to any combination of these forms.

41 As to the timing of the formation of the relevant agreement between the parties to the construction contract for the purposes of s.10A(2), the following three broad possibilities are open on a construction of the text of the subsection:

(a) an agreement arrived at before serving the relevant Payment Claim in which a claim for an allegedly claimable variation is made;

(b) agreement arrived at in the course of the parties engaging in the statutory process for the recovery of the relevant progress payment (ie. after service of

the payment claim pursuant to s.14 and at the time of service of the payment schedule pursuant to s.15 or the end of the period when the respondent to the payment claim is entitled to serve a payment schedule); and

(c) agreement achieved during any adjudication process (including the adjudication review process) commenced by the parties as prescribed under Divisions 2 and 2A of Part 3 of the Act.

42 Galvin relied upon two agreements being achieved between the parties which it submitted satisfied s.10A(2).

43 It first relied upon the Payment Schedule delivered by Seabay following service of Galvin's Payment Claim 28. This included a table which described each variation the subject of the claim by a variation number; a short description of the variation claimed for; the amount claimed; the amount previously certified by Seabay's superintendent; the % of work done; and the total invoiced. The total claimed by Galvin for variations was $1,151,165.46.

44 In its Payment Schedule, Seabay analysed the variation claims made by Galvin and did not accept variation claims totalling $923,955.97. Included in this figure was a total of $403,520.07 in respect of 7 claimed variations, which Seabay said represented "an aggregate amount comprising an excluded amount identified in the Payment Claim". It said in respect of each of the 7 variations, that they were non-claimable variations pursuant to s.10A(3) of the Act, and for this reason Galvin was not entitled payment for them as part of Payment Claim 28. The result was that by the date of its Payment Schedule, being 12 November 2010, Seabay assessed variations under Payment Claim 28 in favour of Galvin, totalling $227,209.48 ($1,151,165.46 - $923,955.97).

45 Galvin said that the sum of $227,209.48 as reflected in Seabay's Payment Schedule, was therefore the subject of an agreement between the parties which satisfied each element of s.10A(2) of the Act.

46 Secondly, Galvin relied upon the position taken by Seabay during the adjudication process as constituting a relevant agreement as to variations pursuant to s.10A(2) of the Act. In this regard it referred to Seabay's Adjudication Response delivered pursuant to s.21 of the Act. Seabay's document included the following table:

Claim item	**Respondent**	**Claimant**
	$17,843,000	$17,843,000
Plus assessed variations (accepting the respondent's assessment on page 37 of the Payment Schedule not disputed by the claimant for the purpose of this adjudication)	$227,209	$227,209
Less provisional sum adjustment (accepting the respondent's assessment on page 37 of the Payment Schedule. See also the payment claim where the figure is agreed)	($183,581)	($183,581)
Less paid (agreed)	($17,337,611)	($17,337,611)
Less Liquidated damages	($770,250)	Nil
Total	**($221,282)**	**$549,017**

[Emphasis added]

47 Seabay's Adjudication Response also included the following statement:

> For the purposes of the adjudication, the claimant accepts the respondent's assessment of the claimant's entitlement to a progress payment with respect to the items for the "Contract Sum", "Variations" and "provisional allowance".

48 Galvin submitted that the combined effect of the table and Seabay's Adjudication Response, which were both provided during the adjudication process, evidenced the formation of the necessary agreement between the parties for the purposes of s.10A(2) of the Act in respect of the sum of $227,209 claimed for variations.

49 However, in my opinion, the Act contemplates that an agreement between the parties under s.10A(2) is an agreement which has been formed and is in place at the time of service of the relevant payment claim. The subsection does not apply to an agreement formed subsequent to that time. This conclusion is arrived at from an analysis of the relevant provisions of the Act.

50 The amount of a progress payment to which a person is entitled in respect of a construction contract may include a "claimable variation": s.10(2). However, if a variation is not a "claimable variation" because it does not fit within either of the categories of variation referred to in s.10A, it will be an "excluded amount" under s.10B. An "excluded amount" must not be taken into account in calculating the amount of a progress payment: ss.10(3) and 10B(1). Conversely, a "claimable variation" may be taken into account in calculating the amount of a progress payment: ss.10(2).

51 Further, s.14 of the Act sets out the statutory requirements for a payment claim. Pursuant to s.14(3)(b) the claimed amount in a payment claim "must not include any excluded amount".

52 The person on whom a payment claim is served, being the respondent, in assessing the amount to be paid (if any) is obliged to consider the position as it is reflected in the payment claim. If it fails to provide a response in the form of a payment schedule, the consequences referred to in s.15(4) of the Act will follow, and the respondent will become liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

53 In my opinion, the statutory framework contemplates that the relevant agreement as to variations between the parties for the purposes of s.10A(2) is in place by the time that the payment claim is served. If a claim in respect of variations is made by a claimant, the respondent will be obliged to consider whether the claim is for "claimable variations" under s.10A and if they are, the respondent will be obliged to pay that portion of a payment claim, provided all of the other statutory requirements are met. In making this determination, the respondent to a payment claim may be obliged to consider whether any relevant agreement for the purposes of s.10(2) has been achieved in order to determine whether the variation, which is the subject of the claim, falls within the first class of "claimable variations" permitted.

54 For these reasons, a relevant agreement as to variations for the purposes of s.10A(2) of the Act is an agreement arrived at before serving the relevant payment claim in which a claim for an allegedly claimable variation is made. It is not an agreement arrived at in the course of the parties engaging in the statutory process for the recovery of the relevant progress payment, nor is it an agreement achieved during any adjudication process (including the adjudication review process) commenced by the parties as prescribed under Divisions 2 and 2A of Part 3 of the Act.

55 The question then becomes, was there any, and if so what, agreement in place between Galvin and Seabay as to variations within the meaning of s.10A(2) at the time of service of Payment Claim 28?

56 Included in Payment Claim 28 was a table of variations for which Galvin claimed payment. A column was provided which set out the Superintendent's certifications for each claimed variation. Of the 57 variations which were the subject of the claim, nine were recorded as having been previously certified by the Superintendent for the amount claimed. The nine claimed variations in this category, which total $210,103.69, are set out in the table below:

Description		Claimed Amount $	Previously Certified $	% Work Done	Total Invoice $
Variation 879001	Asbestos removed in Sewer diversion	46,380.59	46,380.59	100%	46,380.59
Variation 879002	Latent Conditions for buried concrete	2,587.20	2,587.20	100%	2,587.20
Variation 879003	Structural changes for south creeping beam	6,063.64	6,063.64	100%	6,063.64
Variation 879006	Semi-frameless balustrade flo metal balustrade	17,330.50	17,330.50	100%	17,330.50
Variation 879008	Upgraded Miele Appliances	33,421.27	33,421.27	100%	33,421.27
Variation 879010	Plant Deck Relocation	59,904.00	59,904.00	100%	59,904.00
Variation 879036	Change of joinery cupboards	5,421.99	5,422.00	100%	5,421.99
Variation 879043	Extra bathroom furnishings	27,828.63	27,828.63	100%	27,828.63
Variation 879046	Extra timber flooring requested by the principal 101,201,402,501	11,165.87	11,165.87	100%	11,165.87
		210,103.69	210103.70		210,103.69

57 The accuracy of the record in Galvin's Payment Claim 28 as to the nine variations in the table was not challenged by Seabay, and in my opinion, evidenced an agreement between the parties as to each of the matters referred to in s.10A(2) of the Act as at the time of service of Payment Claim 28, in respect of these nine variations.

58 For these reasons, the sum of $210,103.69, being the total sum claimed by Galvin in respect of the nine variations, was properly claimed as the amount due on claimable variations within the meaning of the Act.

59 It follows that all other variations which were the subject of claims by Galvin were not the subject of any agreement under s.10A(2) and were not, therefore, claimable variations. They were "excluded amounts" within s.10B of the Act.

60 The next question for determination is that, given Galvin's Payment Claim 28 included "excluded amounts", did this result in the whole of the payment claim being rendered invalid, or simply invalid to the extent that it included "excluded amounts"?

61 Seabay submits that Payment Claim 28 was void as a whole because it included "excluded amounts" which included claims for variations which were not "claimable variations". Further, that the Adjudication Determination was void because the Adjudicator took these sums into account in arriving at his determination. Alternatively, it was put that the Adjudication Determination was void because it was founded upon a void payment claim, and hence the Adjudicator did not have any jurisdiction under the Act conferred upon him.

62 In my opinion, neither of these submissions of Seabay can be accepted.

63 Subsections 23(2A)(a) and (2B)(b) of the Act puts to rest the first argument. The subsections read:

> (2A) In determining an adjudication application, the adjudicator must not take into account-
>
> (a) any part of the claimed amount that is an excluded amount; or
>
> (b) any other matter that is prohibited by this Act from being taken into account.

(2B) An adjudicator's determination is void-

(a) to the extent that it has been made in contravention of subsection (2);

(b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

64 The purpose and effect of these subsections, as they apply to the facts of the present case, are clear from the text. An adjudicator's determination is void if the adjudicator takes into account any part of the claimed amount that is an excluded amount, but only *to the extent that the determination is based on that amount*. In other words, ss.23(2A)(a) and (2B)(b) of the Act formulates a statutory scheme of severance whereby that part of the adjudication which includes an "excluded amount" is void, leaving the which does not, unaffected.

65 As to the consequences of including an "excluded amount" in the payment claim, and the severance of such a claim from the balance of the payment claim, reference is made to *Gantley Pty Ltd and Ors v Phoenix International Group and Ors*,[2] where the Court determined that the common law doctrine of severance could be applied to a Payment Claim where part of the claim was valid and part was not. When the principle is applied to the Act, the practical effect is that, provided the invalid portion of a payment claim can be "blue-pencilled" out so that the valid portion can operate independently from the invalid portion resulting in no material change of substance to the valid portion, severance is open.

66 As observed in *Gantley*:[3]

> 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.
>
> 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

2 [2010] VSC 106 at [93]–[120].
3 Supra at [115]–[116].

> 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.

67 Non-compliance with an essential precondition for the existence of a valid adjudication determination renders the determination void.[4] For example, affording natural justice, to the extent that the Act requires it to be given, is one of the essential conditions for the existence of a valid determination. In this area there can be little room for the concept of partial invalidity in relation to determinations arrived at in breach of its requirements. Indeed, it would be rarely safe to introduce such a concept. As McDougall J said in *Watpac Constructions v Austin Group*:[5]

> … it may not always be obvious to see how a denial of natural justice has affected the outcome: for example, where the omitted or irrelevant matter had the capacity to assess an adjudicator's overall view of the "credibility" or substance of a party's case.

68 However, s.23(2B)(b) of the Victorian Act, places the conduct of an adjudicator taking into account "excluded amounts" into a different class. This provision has no counterpart in interstate legislation. As provided for in the statute, the determination is void only to the extent that the determination is based on the "excluded amount". Compliance with the statutory directions found in s.14(3)(b) and s.10B(1) of the Act is not an essential matter for the existence of a valid determination. Non-compliance with these provisions will not result in the adjudication determination becoming void in its entirety.

69 As to the validity of a payment claim, directions such as those found in s.14(3)(b) and s.10B(1) of the Act, which are designed to remove from consideration any excluded amount from the calculation of a progress payment, do not in my opinion, give rise to an invalidity in a payment claim which fails to comply with these requirements. An adjudicator, in determining an adjudication application must consider, amongst other things, the payment claim to which the application relates: s.23(2)(c). This is the document which, in most cases, is likely to be the source of a claim for an "excluded

---

4 See: *Transgrid v Siemens Ltd* [2004] NSWCA 395; (2004) 61 NSWLR 521 per Hodgson JA at 539 [29].

5 *Watpac Constructions v Austin Group* [2010] NSWSC 347 (16 April 2010), at [29].

amount", including a non-claimable variation. However, if the adjudicator wrongly takes such a claim into account in the determination, pursuant to s.23(2B)(b), the determination will only be void to the extent that the determination is based on such an "excluded amount". It would defeat the purpose and effect of s.23(2B)(b) to declare the adjudicator's determination *wholly void* on the ground that the jurisdiction of the adjudicator was founded upon a void payment claim.

70 Further, s.15 of the Act, which sets out the requirements for a payment schedule by which a respondent to a payment claim may respond to a payment claim served by a claimant, points against a payment claim being invalid as a whole, simply by reason of it including an "excluded amount". Pursuant to s.15(1)(c), one of the requirements for a payment schedule is that it "must identify any amount of the claim that the respondent alleges is an excluded amount". On a proper construction of s.15 of the Act, and consistently with its purpose, this provision is in aid of another obligation of the respondent found in s.15(1)(b) to "indicate the amount of the payment (if any) that the respondent proposes to make".

71 Pursuant to s.17, the respondent is obliged to pay to the claimant the amount it proposes to pay as set out in the payment schedule. Although the respondent in the payment schedule may deduct from the payment claim any sum in respect of a claimed 'excluded amount', nowhere in the Act is there any express statutory relief given to a respondent to avoid payment of the amount of the payment claim as a whole, because part of the claim comprises an "excluded amount". If such an outcome was to be implied into the Act, unintended consequences could arise which, in some cases, could work to undermine its central purpose. For example, if the position were otherwise, and if a relatively modest sum comprising an alleged 'excluded amount' was claimed in a payment claim, the respondent could, with impunity, avoid liability to make any payment at all to a claimant on the payment claim. If this was to occur, the claimant would be denied the benefits of the Act in respect of the large portion of his claim which, absent the relatively small 'excluded

amount', he would otherwise have been entitled to. In my opinion, the Act was not intended to operate in this way.

72 Accordingly, having found that variations totalling the sum of $210,103.69 are claimable variations within s.10A of the Act it follows that this portion of Payment Claim 28 is valid. Further, that Galvin's claim to variations in excess of this sum was invalid.

73 Further, by reason of the Adjudicator taking into account a total sum of $227,209.48 for variations in his Adjudication Determination, which was evidenced by the adjudicated amount and Seabay's Adjudication Response pursuant to s.21 of the Act, to the extent that the determination was based on a sum in excess of $210,103.69, it is invalid.

74 The difference between the total sum of $227,209.48 for variations included in the Adjudication Determination, and the amount validly claimed in Progress Payment 28 for claimable variations totalling $210,103.69, is $17,105.79. This sum may be cleanly excised from the adjudicated amount without doing any violence to what remains.

Ground 2. Incorrect Exclusion of Liquidated Damages as an Excluded Amount

The Issue – Whether Liquidated Damages Claimed by a Respondent are an "Excluded Amount"

75 The sum of $540,150.00 was certified by the Superintendent for liquidated damages due to Seabay under the Contract. Galvin did not serve any notice of dispute pursuant to clause 47 of the Contract challenging the Superintendent's disallowance of extensions of time claimed by Galvin or the Superintendent's certification of the liquidated damages as due and owing.

76 However, the central substantive question put to the Adjudicator as formulated by the parties was whether Seabay's claim for liquidated damages against Galvin should have been excluded from the calculation as to what was due and payable to Galvin pursuant to its Payment Claim 28 made under the Act.

77 Seabay contended that liquidated damages which flow in its favour may be taken into account in relation to the calculation of an amount of a progress payment claimed, not only under the Contract, but also under the Act. Seabay submitted that upon the proper construction of s.10B of the Act it was entitled to deduct liquidated damages from the Payment Claim delivered under the Act, and the Adjudicator incorrectly determined that liquidated damages were an excluded amount under that provision.

78 Galvin, on the other hand, submitted that such liquidated damages, although they may be taken into account in the calculation of a progress payment made under the Contract, could not be taken into account in relation to a claim made under the Act. Galvin contended that liquidated damages fell under ss.10B(2)(b) and (c) of the Act and were excluded from the calculation of the progress payment purportedly undertaken by the Adjudicator.

Subsidiary Question as to Jurisdiction of an Adjudicator to Proceed on an Agreed Basis

79 A subsidiary question, which arose in this proceeding, was whether the Adjudicator had jurisdiction to entertain the substantive question put to him for adjudication.

80 As to the subsidiary question, Seabay submitted that the only statutory power conferred on an adjudicator under the Act was to value the work done or the services provided as set out in the payment claim pursuant to s.11 of the Act and deliver his or her determination founded on that assessment of value. It was submitted that the Act did not permit the parties to approach an adjudicator to in effect seek declaratory relief as they sought to do in this case, by placing before the Adjudicator the sole question as to whether Seabay's claim for liquidated damages against Galvin should have been treated as an "excluded amount". It was submitted that, in the event that an adjudicator purported to rule on such a question, this would amount to a departure from the statutory power conferred on the adjudicator, resulting in an *ultra vires* and invalid adjudication determination.

81 In my opinion, Seabay's submission on the subsidiary question must fail.

82 Pursuant to s.23(1)(a) of the Act, a principal matter for an adjudicator to determine is "the amount of the progress payment (if any) to be paid by the respondent to the claimant (the *adjudicated amount*)". In undertaking this task an adjudicator is confined to considering the matters referred to in s.23(2). Included in those matters are all submissions duly made by the claimant in support of the claim (s.23(2)(c)) and all submissions duly made by the respondent in support of the schedule (s.23(2)(d)). In my opinion, there is no reason why the parties should not, as they did in this case for the purposes of the adjudication, agree on certain factual matters (or even mixed questions of fact and law) in their submissions provided to an adjudicator, leaving open a rump of matters for adjudication. In considering the material which is properly before him or her by way of submissions, an adjudicator is perfectly entitled to accept the matters which are agreed as admissions made by the respective parties, upon which he or she as the appointed adjudicator can legitimately proceed. In approaching an adjudication in this manner, an adjudicator would not be failing in his or her duty statutory duty to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant. In fact the adjudicator would be properly undertaking the duty by taking into account the evidence before him or her, which includes any admissions made by the parties, in arriving at the determination required by the statute.

83 Indeed, such an approach is to be encouraged in order to advance a central objective of the statutory adjudication process, that is, to provide a speedy resolution of the matters presented for determination. The strict time limits for the delivery of an adjudication determination provided by s.22(4) of the Act lends support to this objective. Further, as was observed in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor*:[6]

> The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality.

[6] [2009] VSC 156 at [46].

84 Seabay's submission on the subsidiary question must therefore be rejected.

Seabay's Claim for Liquidated Damages

85 Seabay's claim for liquidated damages was founded upon clause 35.6 of the Contract, which relevantly provided:

> If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages at the rate stated in Annexure Part A for every day after the Date for Practical Completion to and including the Date for Practical Completion or the date that the Contract is terminated pursuant to clause 44, whichever first occurs.

86 The factual basis for Seabay's claim for liquidated damages was set out in its Payment Schedule in the following terms:

> **67. Liquidated damages**
>
> The current approved date for Practical Completion is 1 February 2010.
>
> The date of Practical Completion of levels 1-5, excluding tenancies and level 6 was 9 July 2010.
>
> The effective date of Practical Completion for the balance of the works was 28 October 2010.
>
> The agreement provides that "*liquidated damages will apply after the date for practical completion on a unit by unit basis where the subject units do not have a certificate of occupancy or are otherwise not able to be settled*".
>
> Settlement of all units was not possible due to the failure of Galvin in bringing the works to a standard where settlement could occur.
>
> From December 2009 until 19 August 2010, a defect existed in the works which required a revision to the plan of subdivision and in turn prevented registration of the plan of subdivision, which prevented titles being issued so that settlements could take place.
>
> The point was reached on 19 August when the plan of subdivision was able to be certified by Council, after Galvin had completed the outstanding works preventing the certification and the certified plan of subdivision could then be registered. It is only after the plan of subdivision is registered, that titles will be issued by the Titles Office and the process of settlement can begin.
>
> This delay in reaching the stage where the works were complete and the plan of subdivision could be registered, affected every unit in the development and the delay ceased on 19 August 2010 for all but the level 6 apartments.
>
> The rate of liquidated damages is set out in item 39 of Annexure A of the general Conditions of Contract and provides:

Rate of Liquidated Damages (Clause 35.6)	*$150 per apartment per working day applying from the date for practical completion*

Excluding Sundays, non working Saturdays and industry shut downs, the total working days from the date of Practical Completion is 125 days, being:

February:		18 days
March:		21 days
April:		15 days
May:		19 days
June:		19 days
July:		21 days
August:		12 days
Total	**=**	**125 days**

The project value of liquidated damages is 40 apartments x 150 = 6000/day.

The liquidated damages claimed to the date of certification is 125 x 6000 = 750,000.

Post 14 August, units 601, 602 and 603 are incomplete.

Provisionally, the rate of liquidated damages is 3 x 150 = 450.00/day.

August:		6 days
September:		20 days
October:		19 days
Total	**=**	**45 days**

Liquidated damages on units on level 6 = 45 x 450 = 20,250.00.

Total liquidated damages = 770,250.00.

87 Galvin disagreed with the certification of liquidated damages undertaken by the Superintendent and with Seabay's claim for liquidated damages made in the Payment Schedule. In essence, Galvin claimed to be entitled to a substantial extension of time in respect of the date for practical completion. Galvin not only denied the entitlement to the deduction claimed by Seabay under the Contract, but also its claimed right to make such a deduction from the amount claimed in Payment Claim 28 under the Act.

88 A liquidated damages clause provides an ascertainable sum payable by one party to another as compensation for the loss which the latter will sustain as a consequence of its breach.

89 The benefits for parties in making provision in their contract for liquidated damages were described by Diplock LJ in *Robophone Facilities Ltd v Blank*[7] in the following passage:

> Nevertheless the courts would be doing an ill turn to those to whom the rule about 'penalty clauses' is designed to protect if they were to apply it so as to make it impracticable for parties to agree at the time when they enter into a contract upon a fair and easily ascertainable sum to become payable by one party to another as compensation for the loss which the latter will sustain as a consequence of its breach. It is good business sense that parties to a contract should know what will be the financial consequences to them of a breach on their part, for circumstances may arise when further performance of the contract may involve them in loss. And the more difficult it is likely to be to prove and assess the loss which a party will suffer in the event of a breach, the greater the advantages to both parties of fixing by the terms of the contract itself an easily ascertainable sum to be paid in that event. Not only does it enable the parties to know in advance what their position will be if a breach occurs and so avoid litigation at all, but if litigation cannot be avoided, it eliminates what may be the very heavy legal costs of proving the loss actually sustained which would have to be paid by the unsuccessful party. The court should not be astute to descry a 'penalty clause' in every provision of a contract which stipulates a sum to be payable by one party to the other in the event of a breach by the former. [8]

90 The benefits of liquidated damages clauses in contracts are recognised as justifying a relatively narrow basis for determining that a stipulated contractual sum is unenforceable as a penalty rather than enforceable as liquidated damages. This is illustrated by the test which is now applied: See *Ringrow Pty Ltd v BP Australia Pty Ltd*.[9]

Key Statutory Provisions

91 The provisions of the Act which are central to this question are set out below, with emphasis added by underlining for convenience.

92 Section 9 of the Act provides, so far as is relevant:

> **9 Rights to progress payments**
>
> (1) On and from each reference date under a construction contract, a person—

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7 [1966] 1 WLR 1428.

8 Supra at 1447.

9 See: the joint judgment, Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ in *Ringrow Pty Ltd v BP Australia Pty Ltd* [2005] HCA 71 at [12], and the Full Court of the Supreme Court of Tasmania in *State of Tasmania v Leighton Contractors Pty Ltd* [2005] TASSC 133 at [21]-[27].

(a) who has undertaken to carry out construction work under the contract; or

…

is entitled to a progress payment under this Act, calculated by reference to that date.

93 Section 10 provides, so far as is relevant:

10 Amount of progress payment

(1) The amount of a progress payment to which a person is entitled in respect of a construction contract is to be—

(a) the amount calculated in accordance with the terms of the contract; or

(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of—

(i) construction work carried out or undertaken to be carried out by the person under the contract; or

…

as the case requires.

…

(3) Despite subsection (1) and anything to the contrary in the construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of that construction contract.

(Emphasis added)

94 Section 10B provides, so far as is relevant:

10B Excluded amounts

(1) This section sets out the classes of amounts (***excluded amounts***) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.

(2) The excluded amounts are—

…

(b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to—

(i) latent conditions; and

(ii) time-related costs; and

(iii) changes in regulatory requirements;

(c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

(Emphasis added)

95 Section 14 provides, so far as is relevant:

14 Payment claims

(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.

(3) The claimed amount—

(a) may include any amount that the respondent is liable to pay the claimant under section 29(4);

(b) must not include any excluded amount.

…

(Emphasis added)

96 Section 15 provides, so far as is relevant:

15 Payment schedules

(1) A person on whom a payment claim is served (the ***respondent***) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule—

(a) must identify the payment claim to which it relates; and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the ***scheduled amount***); and

(c) must identify any amount of the claim that the respondent alleges is an excluded amount; and

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

(e) must contain the prescribed information (if any).

…

97 Section 23 provides, so far as is relevant:

23 Adjudicator's determination

(1) An adjudicator is to determine—

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the ***adjudicated amount***); and

(b) the date on which that amount became or becomes payable; and

(c) the rate of interest payable on that amount in accordance with section 12(2).

(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.

(2A) In determining an adjudication application, the adjudicator must not take into account—

(a) any part of the claimed amount that is an excluded amount; or

(b) any other matter that is prohibited by this Act from being taken into account.

(2B) An adjudicator's determination is void—

(a) to the extent that it has been made in contravention of subsection (2);

(b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

(3) The adjudicator's determination must be in writing and must include —

(a) the reasons for the determination; and

(b) the basis on which any amount or date has been decided.

…

(Emphasis added)

98 Section 28B provides, so far as is relevant:

28B Application for review by respondent

(1) Subject to this section, a respondent may apply for a review of an adjudication determination (an ***adjudication review***).

(2) An application under this section may only be made if the respondent provided a payment schedule to the claimant within the time specified in section 15(4) or 18(2).

(3) An application under this section may only be made on the ground that the adjudicated amount included an excluded amount.

(4) An application under this section may only be made if the respondent has identified that amount as an excluded amount in the payment schedule or the adjudication response.

(5) An application under this section may only be made if the respondent has paid to the claimant the adjudicated amount other than the amounts alleged to be excluded amounts.

…

99 Section 28C provides, so far as is relevant:

28C Application for review by claimant

(1) Subject to this section, a claimant may apply for a review of an adjudication determination (an ***adjudication review***).

(2) An application under this section may only be made on the ground that the adjudicator failed to take into account a relevant amount in making an adjudication determination because it was wrongly determined to be an excluded amount.

100 Section 28I provides, so far as is relevant:

28I Adjudication review determination

…

(2) In determining an adjudication review application, the review adjudicator must consider the following matters and those matters only—

(a) the provisions of this Act and any regulations made under this Act; and

(b) the provisions of the construction contract from which the application arose; and

(c) the information provided by the authorised nominating authority under section 28H.

(3) In determining an adjudication review application, the review adjudicator must not take into account—

(a) any excluded amount; or

(b) any other matter that is prohibited by this Act from being taken into account.

(4) A review adjudicator's determination is void—

(a) to the extent that it has been made in contravention of subsection (2); or

(b) if it takes into account any amount or matter referred to in subsection (3), to the extent that the determination is based on that amount or matter.

…

Galvin's Submissions

101 Galvin submitted that Seabay wrongly purported to deduct liquidated damages from the Payment Schedule and accordingly was entitled to a further payment of $549,017.06 plus GST.

102 In particular, Galvin advanced the following principal contentions:

1. Section 10B of the Act sets out the classes of amounts, known as excluded amounts, which must not be taken into account when calculating the amount of a progress payment to which a person is entitled under a construction contract.

3. Liquidated damages by their very nature fall into the category of either time related costs (s.10B(2)(b)(ii)) or a claim for damages for breach of the construction contracts (s.10B(2)(c)). As such liquidated damages are an

excluded amount under the Act and cannot be taken into account when calculating the amount of a progress payment due to the claimant.

3. In the circumstances Seabay wrongfully took into account an excluded amount under the Act.

4. The authorities suggest that Seabay's proper course, if it claims an amount by way of liquidated damages, is to pursue its contractual remedies and not to deduct liquidated damages from a payment claim made under the Act.

5. By removing the wrongful deduction of liquidated damages Galvin is entitled, on Seabay's calculation, to a payment of $549,017.06 plus GST.

103 Galvin says, therefore, that it is entitled to a payment of $549,017.06 plus GST.

Seabay's Submissions

104 Seabay, on the other hand, relied on the following principal matters in support of its position:

1. Galvin wrongly construed s.10B(2)(b). The claims to which the Act refers in s.10B(2) are confined to the claimant's claims.

2. Galvin misconstrued s.10B(2) by ignoring the operation of the Act and considering the definition section in isolation. As a definition section, s.10B has no operation on its own. It only has effect when applied to other sections of the Act, namely ss.14, 15, 16, 23 and 28R. These sections make plain that the operation of s.10B concerns only the calculation of the *claimed amount*, which is confined to the amount claimed by a claimant. It has no application to any amount which may be claimed under the relevant contract by a respondent, by way of set-of to a claimant's claim, or otherwise.

3. There is no prohibition in the Act which denies to a respondent a right to set-of amounts due under the contract or to adjust the contract sum to take into

account amounts due under the contract (whether for liquidated damages or otherwise).

4. Properly construed, ss.10B(2)(a)(i)-(iii) of the Act exclude amounts claimed by the claimant under the contract, such as claims for compensation made in respect of latent conditions or arising from regulatory changes.

5. The ordinary and natural meaning of compensation for *time related costs* concerns a claim by a [builder] claimant for the payment of costs incurred over time. A principal does not make a claim under the contract for compensation. If Parliament intended the section apply to liquidated damages or time related damages imposed by the principal under a construction contract, it would have clearly stated so.

6. The Act operates in such a manner that the "excluded amounts" referred to in s.10B(2) apply only with respect to the amount claimed by the claimant. In this regard, Seabay submitted:

   a. The starting point for the operation of the Act is s.9.

   b. Under s.9(1) of the Act, on and from each reference date under a construction contract, a person [the claimant] who has undertaken construction work under the contract is entitled to a *progress payment* under the Act, calculated from the reference date.

   c. Sections 10, 10A and 10B of the Act concern the calculation of the *progress payment* to which the person [the claimant] is entitled under the Act.

   d. Section 10 of the Act prescribes the manner of calculation of the amount of the progress payment to which the person [the claimant] is entitled under the Act.

e. In calculating the amount of the progress payment to which the person [the claimant] is entitled, s.10B(1) precludes [the claimant] from taking into account an excluded amount, which are set out in s.10B(2)(a) to (e).

f. In accordance with s.14(2)(d) of the Act, a payment claim (served by the claimant) must indicate the amount of the progress payment ("*claimed amount*"), which is the amount, calculated by the claimant under ss.10, 10A and 10B of the Act.

g. Thus, it is the *claimed amount*, which is the sum calculated by the claimant, that is circumscribed by the operation of ss.10, 10A and 10B of the Act. A respondent has no part to play in making a payment claim.

h. The fact that it is the claimant alone that undertakes this task is reinforced under s.14(3)(b) of the Act, which directs that a *claimed amount* [in the payment claim] must not include any *excluded amount*.

i. Under s.15 of the Act, the respondent may serve a payment schedule, which, pursuant to s.15(2)(b) and (c), must indicate the amount of the payment (if any) that it proposes to make (the *scheduled amount*) and must *identify any amount of the claim* that the respondent alleges is an excluded amount.

j. The only obligation of the respondent under the Act with respect to s.10B of the Act is to identify which part of the *claimed amount* is an excluded amount.

k. Where the *scheduled amount* is less than the claimed amount, pursuant to s.15(3) of the Act, the respondent is to indicate why it is less and give reasons for withholding payment. There is nothing in the Act to limit the right of a respondent to set-of or deduct amounts owing under the contract from the claimed amount which then determines the *scheduled amount*. The law is clear, so it was put: common law rights must be

expressly excluded if that is Parliament's intention. Such rights are not expressly excluded under s.15 or anywhere else in the Act.

l. In other words, during the "*dispute defining process*" (of payment claim and schedule), the Act's operation is expressly confined to prohibiting the claimant from including excluded amounts in the claimed amount.

m. Sections 10A and 10B again become relevant during the "*dispute resolution phase*", for the very limited purposes set out in s.23(2A) where the Act imposes an obligation on the adjudicator to exclude excluded amounts from the claimed amounts.

n. Under s.23(1) of the Act the adjudicator is required to determine the amount of the progress payment.

o. In doing so, the adjudicator must consider the matters in s.23(2) and (2A) of the Act.

p. Under s.23(2A) of the Act:

> (2A) In determining an adjudication application, the adjudicator must not take into account –
>
> (a) any part of the claimed amount that is an excluded amount; or

q. Thus, the only prohibition on the adjudicator is with respect to taking into account an excluded amount in the *claimed amount* [not the scheduled amount].

r. There is nothing in s.23(2) of the Act or anywhere else in the Act that directs the adjudicator to take into account ss.10A and 10B for any purpose other than assessing the *claimed amount*. It most certainly is not directed to any entitlement or right of set-off of the respondent.

s. The adjudicator must however take into account the Contract and the payment schedule. In doing so, when calculating the progress payment

> the adjudicator must take into account the liquidated damages as a debt due by the contractor Galvin to the principal Seabay in this case pursuant to the Contract (clauses 35.6 and 42.8). If the adjudicator does not do so he will fall into error, as he will not follow the direction in s.23(2) of the Act to take into account the Contract and the payment schedule. Further, the adjudicator will not comply with s.11, requiring him to calculate the payment in accordance with the Contract.

105 Seabay submitted that Galvin, in its payment claim did not dispute that liquidated damages were payable to Seabay. It was put that Galvin had referred in its payment claim to the sum of $761,700.00 as being certified for liquidated damages under the Contract. On this basis, Seabay contended that it would be a fundamental injustice to allow a payment to Galvin in circumstances where it did not dispute its obligation to pay liquidated damages and there was no dispute as to the legal right of Seabay to the claimed set-off.

106 It was put further that Galvin was pressing a "technical argument" as to the construction of s.10B of the Act that would work to defeat its purpose.

Whether Seabay's Deduction Fell Within s.10B(2)(b)

107 The text of s.10B(2)(b) of the Act calls for close attention. It is of wide ambit. The subsection provides:

> (2) The excluded amounts are-
>
> (a) …
>
> (b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event ***including*** any amount relating to-
>
> (i) latent conditions; and
>
> (ii) time-related costs; and
>
> (iii) changes in regulatory requirements;
>
> [Emphasis added]

108 Subsection 10B(2)(b) focuses on defining an "excluded amount" by reference to "any amount … claimed under the construction contract for compensation due to the happening of an event". Then follows a list of three "events" which are said to be included as "events" for the purposes of the subsection. On its face, the subsection does not confine the "events" to the three events listed and is not intended to be exhaustive. The list is drafted to be inclusive rather than exclusive.

109 In this case the alleged "event" relied upon by Seabay pursuant to which it claimed compensation under the Contract was the fact that the Contractor, Galvin, failed to reach Practical Completion by the Date for Practical Completion.

110 In my opinion, the amount sought to be deducted by Seabay for liquidated damages fell squarely within the concept of "any amount … claimed under the construction contract for compensation due to the happening of an event".

111 Further, the particular "event" in this case fell within the statutory concept of "time-related costs" as defined in s.10B(2)(b)(ii).

112 The term "time-related costs" is not defined in the Act. It does not have any well accepted meaning in trade usage.

113 However, in my opinion, the ordinary and natural meaning of "time-related costs" in its statutory context, includes the compensation claimed by Seabay against Galvin in this case.

Whether Seabay's Deduction Fell Within s.10B(2)(c)

114 The text of s.10B(2)(c) is also of wide ambit. It defines an "excluded amount" not only to include "any amount claimed for damages for breach of the construction contract" but also "for any other claim for damages arising under or in connection with the contract".

115 In my opinion, Seabay's claim for liquidated damages in this case fell within both limbs of s.10B(2)(c) of the Act.

Whether Seabay's Liquidated Damages Properly Deducted

116 Even though Seabay's claim for liquidated damages fell within the definition of an "excluded amount" for the purposes of s.10B of the Act, was Seabay nevertheless entitled to deduct its claim from the sum otherwise due and payable under Payment Claim 28?

117 I accept that a number of provisions of the Act, upon which Seabay relied, point in favour of its contention that it operates so that the "excluded amounts" referred to in s.10B(2) apply only to the amount claimed by a claimant and not to any amount claimed by a Respondent.

118 However, s.10B(2) must also be considered in the context of the overall purpose of the Act and the manner in which that purpose is put into effect by the legislative machinery.

119 In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor*[10] an analysis of the Act and its central purposes was undertaken. Set out below are the principal elements of that analysis:

(a) The Act first came into operation in Victoria on 31 January 2003. It has since been amended on two occasions; the first of the amendments came into operation on 26 July 2006 (Act No. 42 of 2006) and the second group of amendments commenced on 30 March 2007 (Act No. 15 of 2002);

(b) 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");

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

> that any person who carries out construction work ... 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.

10 [2009] VSC 156 at [36]-[49].

(d) The responsible Minister in introducing the Bill stated in the second reading speech:[11]

> 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.

(e) In *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd*[12] Beech J described the purpose of similar Western Australian legislation in the following terms:[13]

> 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".

(f) Campbell J in *Amflo Constructions Pty Ltd v Jefferies*[14] 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

11 Ibid.
12 [2009] WASC 19.
13 *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd* [2009] WASC 19 at [122].
14 [2003] NSWSC 856 at [25] and [27].

has decided should be paid. [Specific references to the sections of the NSW Act omitted]

(g) Campbell J 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).[15] 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.[16] 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. ...
>
> 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

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15 New South Wales, Parliamentary Debates, Legislative Assembly, 12 November 2002, 6541 (Maurice Iemma).

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

> 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.

(h) 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);

(i) 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.*[17] This regime promotes the object of the Act, that is, 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;

(j) Division 2 of the Act is devoted to the adjudication of disputes. Section 22(4) requires an adjudicator to determine an adjudication application as expeditiously as possible and in any case within a short specified time frame. The subsection provides:

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17 [2003] NSWSC 1140 at [96].

> (4) Subject to subsections (1) and (3), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case-
>
> (a) within 10 business days after the date on which the acceptance by the adjudicator of the application takes effect in accordance with section 20(2); or
>
> (b) within any further time, not exceeding 15 business days after that date, to which the claimant agrees.

120 In this context, the purpose behind excluding such matters defined by s.10B becomes clear. Matters such as: claims for non-claimable variations; compensation claimed for events such as latent conditions; time-related costs; changes in regulatory requirements; damages for breaches of the relevant construction contract; or any other claim for damages or claims arising other than under the construction contract, are all "excluded amounts". Experience points to these classes of issues regularly arising in construction disputes. They are often attended with considerable complexity and speedy resolution can be an elusive goal.

121 Under the scheme of the Act such issues are removed from the interim payment regime provided for in the legislation. If such matters arise for determination in the course of a construction project to which the Act applies, they are not to be dealt with under the statutory scheme established for the provision of progress payments to the party entitled. Rather, they remain to be resolved under the general law, supported by court or arbitral proceedings. In this way the concept "pay now and argue later" is given full effect.

122 If it was that "excluded amounts" as defined in s.10B of the Act were only to apply to claims made by a claimant and not to any set-off or counterclaim raised by a respondent to a payment claim, the operation of the Act in numbers of cases could be seriously compromised. Contentious matters such as claims for damages arising from the construction contract could be raised by a respondent with the result that a claimant could be denied the cash flow which the Act is designed to protect.

123 Further, the Act is not designed to accommodate such claims. In the event of a dispute arising between a claimant and a respondent in relation to an entitlement to a progress payment under the Act, the statutory adjudication process may be invoked.

Section 22(4) provides for a speedy resolution of an adjudication application. An adjudicator, who must conduct adjudication proceedings armed only with limited statutory powers, and who is directed to complete the adjudication process within an extremely narrow time frame, would be ill-equipped to deal with many of the claims defined as "excluded amounts" if raised by a respondent.

124 In my opinion, a proper construction of s.10B of the Act renders the defined "excluded amounts" applicable, not only to the statutory payment claim served by a claimant, but also to amounts claimed by a respondent. Such a construction serves to advance the purposes of the Act. The contrary construction tends to work contrary to those purposes. The construction which I favour, will better promote the operation of the object of the Act to provide a facility for prompt interim payment on account in favour of contractors and subcontractors, pending final determination of any disputes arising under a construction contract. These considerations, in my view, override all of the textual arguments advanced by Seabay which point in the opposite direction.

125 Nevertheless, the text of the Act is well able to bear the construction which I prefer. Section 10 of the Act defines the amount of a progress payment to which a person is entitled under a construction contract. Section 10(3) provides that: "Despite subsection (1) and anything to the contrary in a construction contract, an excluded amount must not be taken into account in calculating the amount of a progress payment to which a person is entitled in respect of a construction contract". The terms of the Act, therefore, expressly override the operation of the relevant construction contract in relation to "excluded amounts" as those amounts are defined in s.10B.

126 Furthermore, pursuant to s.23(1)(a) an adjudicator is directed to determine the amount of the progress payment (if any) to be paid by a respondent to the claimant. This subsection, directs the adjudicator back to s.10(3), and thereby requires an adjudicator to not take into account an excluded amount in calculating the amount of a progress payment.

127 Reference is made to s.23(2A)(a) which directs that, in determining an adjudication application, the adjudicator must not take into account any part of the *claimed amount* that is an excluded amount. In my opinion, this particular subsection is not intended to confine the excluded amounts, which an adjudicator is directed to ignore, to excluded amounts which are claimed by a claimant in a payment claim. If the subsection was to operate in this way it would bring itself into conflict with ss.23(1)(a) and 10(3).

128 Accordingly, in my opinion, the Adjudicator was correct in determining that Seabay's claim for liquidated damages against Galvin should have been treated as an "excluded amount" and excluded from the adjudication determination made in relation to Galvin's Payment Claim 28 claimed under the Act.

129 Ground 2 must be dismissed.

Ground 3. Premature Submission of Payment Claim

130 In this case the payment claim was served on 28 October 2010. The contractual service date was 29 October 2010, allowing for the one day permitted by the Contract for the service of a payment claim prior to the contractual reference date which was specified as the 30th of each month.

131 However, as I held in *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd,*[18] service of a premature payment claim does not necessarily render the payment claim invalid. It will only have this consequence if early service is such as to justify a finding that the payment claim was not made *bona fide* under the Act. In arriving at this conclusion in *Metacorp*, some weight was attached to the text of s.14(1) of the Act which 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.
>
> [Emphasis added]

[18] [2010] VSC 199 at [109 – 114]

132 The reasoning in *Metacorp* proceeded as follows:[19]

> … under the legislation as it now stands, the class of persons who may serve a payment claim has been extended to include persons 'who claim to be entitled' to a progress payment, in addition to those who may actually be so entitled. In my view, provided that a person makes a claim to be entitled to a progress payment, and that claim is made bona fide, the claimant is permitted to serve its payment claim pursuant to s.14(1) of the Victorian Act, and this is so, whether or not there existed an actual entitlement to payment at the time when the payment claim was served.
>
> A payment claim which is delivered shortly prior to its reference date, even a few days before, would not, in the usual case, evidence lack of bona fides on the part of the person making the claim because the work carried out in respect of which the claim is made in all likelihood would have been done, or substantially completed.

133 As further observed in *Metacorp*:[20]

> In my opinion, time does not begin to run against a respondent for the purposes of s.15(4) from the date when a payment claim is physically delivered to it, if this occurs prior to the relevant reference date. This is so because the entitlement to payment, which is conferred by s.9 upon a claimant, only arises 'on and from each reference date under a construction contract'. In the case of the premature delivery of a payment claim prior to the reference date to which the claim relates, rights under the Act only become enlivened upon the arrival of the relevant reference date. Until then, although delivery of the relevant document may have been undertaken in a physical sense, the service of the document is incapable of having any legal effect under the Act until the occurrence of the reference date. The payment claim at the time of service is not strictly a payment claim. It is a prospective claim for payment. It does not become a payment claim for the purposes of s.15(4) until the arrival of the reference date. On that date the earlier physical delivery of the document will result in the document becoming a valid payment [claim] on the reference date. In this event, time will commence to run under the Act from the reference date.

134 In arriving at this conclusion in *Metacorp*, an important difference was noted between the text of s.13(1) *Building and Construction Industry Security of Payment Act 1999* (NSW) (the "NSW Act") and its counterpart in the Victorian Act, s.14(1).[21] On this basis, the observations made by Nicholas J in *Walter Construction Group Pty Ltd v CPL (Surrey*

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[19] *Supra* at [101 – 102]
[20] Ibid at [107].
[21] Ibid at [97]-[101].

Hills) Pty Ltd[22] to the effect that a payment claim which is served before time is invalid, [23] were able to be distinguished.

135 In further support of the approach I have taken to the issue of a payment claim served before the due reference date, it needs to be born in mind that the Act is designed to buttress the cash flow of all contractors who become entitled to make payment claims and receive progress payments under its provisions. Contractors working under construction contracts who may have recourse to the Act will range from the most sophisticated professionals with elaborate business infrastructures and ready access to legal advice, to the relatively inexperienced operator working with rudimentary day to day administrative support, if any. It would better promote the main purpose of the Act, "to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts",[24] to avoid any excessive degree of technicality in the operation of its provisions, unless it is clearly necessary to resort to such an approach in order to make the provisions work as a whole, as they were intended.

136 Reference was made to *F.K. Gardner & Sons Pty Ltd v Dimin Pty Ltd*.[25] In this case, Lyons J considered the *Queensland Building and Construction Industry Payments Act 2004* (Qld.) in the context of the service of a payment claim before the applicable reference date. The relevant legislation was in the same form as it is in Victoria, however, his Honour came to a different conclusion. With great respect to the reasoning in *Gardner*, I am unable to arrive at the same result.

137 In this case I find that the payment claim was made by Galvin in *good faith*. The payment claim was served on the day prior to the contractual date permitted for its service. It was served at a time when all of the work which was the subject of the claim had been completed. This further factor, although not essential to a finding of bona fides, was a matter which supported the conclusion in this case.

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22 [2003] NSWSC 266.
23 Supra at [56]–[60].
24 See: s.1 of the Act.
25 [2007] 1 Qd. R 10.

138 Service of the payment claim on Seabay on 28 October 2010 did not render the payment claim invalid, and this ground must be dismissed.

Ground 4. Failure of the Payment Claim to Identify the Work Performed in the Claim Period.

139 Seabay submitted that Galvin's Payment Claim 28 was invalid because it did not adequately identify the construction work to which the claim for the sum of $1,987,61.25 related. In particular it said that the payment claim did not comply with s.14(2)(c) and (d) of the Act because it failed to identify the work performed between the two relevant reference dates to which the payment claim related. Indeed, the payment claim, it was said, was in a form identical to that considered by Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd*,[26] where his Honour found the payment claim to be invalid because of a failure to describe the work the subject of the claim. On this basis it was submitted that, as Payment Claim 28 did not comply with the Act and was invalid, the Adjudicator had no jurisdiction to determine the matter.

140 The Adjudicator considered these arguments but rejected them.

141 In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd and Anor*[27] and *Gantley Pty Ltd v Phoenix International Group Pty Ltd*[28] this Court considered the requirements of a payment claim under the Act in relation to describing the work the subject of the particular payment claim. The following is a summary of the relevant factors derived from these cases pursuant to which a question of invalidity of a payment claim founded upon an inadequate description of the work done may be determined:

(a) The requirement for the description of the work done is to identify the construction work to which the progress payment relates.

(b) Reasonable specificity of the work done which is the subject of the payment claim is required for two principal purposes: to enable a respondent to a

26 [2008] FCA 1248.
27 [2009] VSC 156.
28 [2010] VSC 106.

payment claim to consider and respond to it, and to define the issues in dispute between the parties, if any, which an adjudicator is to resolve.

(c) Where a payment claim fails the requirement to identify the work undertaken to which the progress payment relates, the payment claim will be invalid because one of the basic and essential requirements of the Act has 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, or an invalid part of such a claim, will itself be invalid, at least to that extent.

(d) However, an artificial degree of precision and particularity in the identification of the work done for which payment is claimed is not required.

(e) A payment claim will not be a nullity for failure to comply with s.14(2)(c), unless the failure is patent on its face, and this will not be the case if the claim, in a reasonable way, identifies the particular work in respect of which the claim is made.

(f) The payment claim must identify the work sufficiently to enable a respondent to understand the basis of the claim and provide a considered response to it. The test of identification is to be tempered by what is reasonably necessary to be comprehensible to the recipient party when considered objectively. 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.

(g) In the case of an adjudicator appointed under the Act, who is necessarily a person independent of the parties to the payment claim, and will not be possessed of the knowledge of the parties in relation to the construction project and is not likely to be appraised of their past dealings and exchanges of information, it is always open to the adjudicator to seek and obtain further information from the parties pursuant to s.22(5) of the Act in the nature of

further written submissions from either party and comments on those submissions by the other party: s.22(5)(a); oral submissions arising from a conference of the parties which may be called: s.22(5)(c); and the carrying out of an inspection of "any matter to which the claim relates": s.22(5)(d).

140 The principles stated in *Protectavale* are to the same effect. However, the outcome in that case in respect of the payment claim in question, namely a finding as to its invalidity, was governed by the facts before the Court, which are readily distinguishable from the present case.

141 In that case, Protectavale Pty Ltd (the first applicant) and K2K Pty Ltd (the first respondent) were joint venturers in a residential and retail development known as "Chadstone Gate" at 50 Poath Rd, Hughesdale. In April 2006 they engaged Lorne Bay Pty Ltd (the Second Respondent) to carry out the construction work. Protectavale was not satisfied with how the work has been performed. It commenced the action claiming damages from both K2K and Lorne Bay. In the meantime Lorne Bay sent an invoice to Protectavale and K2K for $635,448.06, which it said represented the amount due to it under the construction contract. It brought a cross-claim to recover that amount. It sought summary judgment on the cross-claim before Finkelstein J. The basis of the claim for summary judgment was that the invoice was a valid payment claim under the Act as it was in force before the amendments made by Act No 42 of 2006.

142 Finkelstein J determined that the respondents to Lorne Bay's Payment Claim, namely Protectavale and K2K, did not serve any payment schedule upon Lorne Bay. In particular, His Honour found that an aggregate of communications passing between the parties and their solicitors did not constitute a payment schedule, reasoning that:[29]

> One purpose of a payment schedule is to articulate the reasons for withholding payment or offering to pay less than the claimed amount with a degree of precision and particularity to apprise the contractor of the case it will have to meet if it decides to pursue an adjudication: *Multiplex Constructions* [2003] NSWSC 1140 at [69]-[70]. Another purpose is to set the limits for an adjudicator if there is to be a dispute about the

[29] Ibid at [29].

> claim. In my view a payment schedule cannot artificially be constructed out of a series of documents by showing that those documents in combination contain all the necessary information required of a payment schedule. It also should be evident that, viewing the matter objectively, it was intended that the documents constitute a payment schedule. That is not the position here.

143 In the absence of a payment schedule, the Court in *Protectavale* was denied the advantage that such a document can provide to evidence the capacity of the recipient of a payment claim to understand the basis upon which it was made and the work intended to be the subject of the claim.

144 Further, the payment claim in *Protectavale* failed to provide any description whatsoever in relation to the work done which was the subject of a significant component of the sum claimed. At best, the information provided in the payment claim amounted to no more than an arithmetical calculation of the sum claimed to be due. Finkelstein J described the position as follows:

> … what is noticeably absent from the invoice [constituting the payment claim] is any identification of the work previously completed and paid for and the work (apart from the variations) to which the invoice relates. The invoice effectively claims three separate amounts. One amount is claimed by taking the contract sum, $6,295,000, and deducting from that sum the amount received from the principals, $6,000,400, and the amount that represents half of the retention moneys, $78,750, payable on the expiration of the defects liability period (12 months after practical completion), leaving a balance of $215,850. This amount, $215,850, is then added to the variation claim, $232,772.45, and the prolongation claim, $129,058, to arrive at the pre-GST total of $577,680.45. But, there is no breakdown or explanation of the work to which the claimed amount of $215,850 relates (although $78,750 of that amount presumably represents half the retention moneys, an amount which became payable on practical completion). The only information provided is that the amount is referable to the "Contract Sum" and "Payments Received".
>
> It is impossible to determine the basis of the claim for $215,850 …

145 The present case is quite different in two critical respects.

146 In the first place, the respondent to the payment claim, Seabay, was able to and did provide a payment schedule. Seabay raised the issue for the first time before the Adjudicator in its Adjudication Response in which it submitted that Payment Claim

28 did not identify "the work performed, and calculated between the two reference dates". In considering the issue, the Adjudicator noted that Seabay provided a payment schedule of 37 pages, and that it did not say that it was unable to make a decision as to whether to accept or reject Payment Claim 28 or to respond to the payment claim because it was unable to identify the work carried out which was the subject of the claim. As the Adjudicator also noted, this form of payment claim had been adopted in relation to 27 previous claims for progress payments submitted by Galvin to Seabay in the course of the project.

147 In the second place, the payment claim did identify the categories of work undertaken and the percentage claimed to be complete in respect of each of those categories. Payment Claim 28 set out a description of the category of work undertaken, the Contract amount applicable to that work, the amount previously certified in respect of that work, the percentage of the work claimed to have been done, the value of the claim for the category of work, and the total of the invoice. Payment Claim 28 also included a list of variations and deducted a sum for liquidated damages claimed by Seabay, which were not admitted but denied, and were not taken into account in the total claim.

148 In this case the Adjudicator, if he had been required to value the work, and if he found that the description of the work provided was inadequate for the task, he was in a position to exercise his statutory powers under s.25(5) and:

(a) seek and obtain further information from the parties;

(b) hear oral submissions from the parties; and

(c) carry out any necessary inspection;

He did not need to do so, because the parties in effect had agreed on the value of the work for the purposes of the Adjudication, and the Adjudicator was entitled to act on their admissions in this regard.

149 For these reasons Payment Claim 28 was not invalid by reason of it failing to adequately describe the work which was the subject of the claim. It follows that, on this ground, the Adjudicator was not denied jurisdiction to determine the matter before him.

Conclusion

150 Save for that part of the payment claim found to be invalid under Ground 1 comprising the sum of $17,105.79, the determination of the Adjudicator was valid.

142 I will hear from the parties on costs and the form of the judgment.
