

Casenotes

Requirements of a valid payment claim under the Act

**FERNANDES
CONSTRUCTIONS PTY LTD
v TAHMOOR COAL PTY LTD
(T/AS CENTENNIAL COAL)
[2007] NSWSC 381; BC200702972**

This decision set out the test to be applied in determining whether a payment claim complied with s 13(2)(c) of the *Building and Construction Industry Security of Payment Act 1999* (NSW).

Facts

The parties entered into a contract under which Fernandes Constructions Pty Ltd (Fernandes) agreed to carry out construction work for Tahmoor Coal Pty Ltd (t/as Centennial Coal) (Centennial).

On 4 December 2006, a document described as ‘tax invoice 05’, claiming payment of \$919,427.52 (inclusive of GST) and attaching a schedule identifying the construction work the subject of the claim, was sent by Fernandes to Centennial. There was a statement on the tax invoice which said:

This invoice is prepared under the *Building and Construction Industry security of payments Act 1999* [sic].

Centennial failed to provide a payment schedule in response to this document and Fernandes sought judgment in the NSW Supreme Court for the outstanding amount.

Issue

The sole issue for consideration by the court was whether the tax invoice complied with s 13(2)(c) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) — that is, whether it was a payment claim that stated it was made under the Act.

Relevant principles

McDougall J considered the following cases that had previously addressed the requirements of s 13(2)(c).

In *Jemzone Pty Ltd v Trytan Pty Ltd*

(2002) 42 ACSR 42 at [41], Austin J said that:

... while the court should not take an unduly strict approach to the construction of the claim, it ought not cure defects in the claim document by reference to extraneous circumstances or previous communications ...

In that case, the document stated it was an ‘invoice ... subject to’ the Act. In holding that the document was not a payment claim made under the Act, his Honour applied an objective test and said that ‘it must be clear on the face of the document that it purports to be a payment claim made under the Act’ (at [46]).

McDougall J was critical of an approach adopted by counsel for Centennial which compared the tax invoice with the invoice which was the subject of argument in *Jemzone*, holding (at [26]) that ‘an objective analysis of the document in context, not on a comparison of the precise wording of the document with the wording of another document considered in other proceedings’ is the required approach.

In *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266; BC200301676, Nicholas J also applied an objective test and said (at [82]) that the court must enquire ‘whether a reasonable person who had considered the notice as a whole and given it fair and proper consideration would be left in any doubt as to its meaning’. His Honour repeated this test in *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365; BC200302280 at [28].

In *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103; BC200307500, Einstein J referred to the analysis of Nicholas J and said (at [58]) that:

... there is no room for ambiguity of any type and it is critical that the recipient of a payment claim be made aware *by the terms of that claim* that the provisions of the Act have been engaged.

In *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1; BC200600155, Palmer J considered the authorities and said (at [41]) that:

... a payment claim which does not, on its face, purport in a reasonable way to ... state that it is made under the Act fails to comply with an essential and mandatory requirement of s 13(2) so that it is a nullity for the purposes of the Act ...

McDougall J concluded that the principle enunciated in each of these cases was essentially the same and summarised the approach to be taken as follows.

- A document must indicate that it is made under the Act and be a ‘payment claim’ in order to be a valid payment claim under the Act.
- The test is objective.
- The document should be considered as a whole and in context, which may include not only all the terms of the document but also the contents of any communication ancillary to the document.
- The context of a document might extend to its ‘factual matrix’ so long as that matrix is (or ought to be) known to both parties.

Applying the above test, his Honour found that the tax invoice was a claim for payment for construction work carried out by it for Centennial pursuant to a construction contract and that as the construction contract probably provided for progress payments, this alone did not mean that the document must be a payment claim. The objective test also required consideration of the assertion that the invoice was ‘prepared under’ the Act and that the word ‘prepare’ necessarily expressed Fernandes’ intention to engage the operation of the Act.

Further, his Honour held that an objective analysis of the tax invoice required an analysis of the intention of the sentence appearing at the foot of the invoice. The placement of those words must have had some object and in particular, given the circumstances, those words cannot have been intended to be mere embroidery or decoration.

Finally, McDougall J very briefly reviewed the approach required to be taken in relation to the construction of commercial contracts and held (at [38])



that the question to be answered was 'whether, taking a fair but broad approach, without being pedantic or astute to find defects, the document in question would convey to its recipient that the claimant intended by the document to engage the operation of the Act'.

As the elements of the test set out above were made out, his Honour held that the tax invoice complied sufficiently with the requirements of s 13(2)(c) and was therefore a valid payment claim.

Implications

The decision of McDougall J sets out the test for compliance with s 13(2)(c) of the Act and is a reminder to contractors that precision is important when preparing documents under the Act and further that contractors should generally seek to observe the wording of the Act. ●

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Validity of a Notice of Charge

ED AHERN PLUMBING (GOLD COAST) PTY LTD v JM KELLY (PROJECT BUILDERS) PTY LTD & ANOR

[2007] QSC 99; BC200703229

JM Kelly (Project Builders) Pty Ltd (JM Kelly), a building contractor, entered into a contract with the second defendant as principal (the Principal), for the construction of apartments at Burleigh Heads. JM Kelly entered into a subcontract with the plaintiff, Ed Ahern Plumbing (Gold Coast) Pty Ltd (Ahern), on or about 1 July 2004 for the performance of hydraulic services at the subject site.

In Queensland Supreme Court proceedings, Ahern claimed the sum of \$1,435,234.30 from JM Kelly as moneys due under the subcontract. Ahern also sought to enforce a charge under the *Subcontractors' Charges Act*

1974 (Qld) (the Act) over this amount, which had been paid by the Principal into court pursuant to the Act. In deciding whether a valid charge existed under the Act, it was necessary for the court to consider the validity of the Notice of Charge given by Ahern to the Principal.

This case is somewhat unusual because the subcontractor, Ahern, argued that its initial notice claiming the charge was invalid, with the contractor JM Kelly arguing that it was valid.

Issues

Mullins J had to consider three key issues.

- Was the notice served on the Principal on 19 May 2006 a valid notice under s 10(1)(a) of the Act?
- If not, was there a valid charge in any event?
- If there was no valid charge, should the moneys paid into court by the Principal be paid out to JM Kelly?

Notice as served

On 18 May 2006, Ahern's solicitors sent the Principal a document entitled 'Notice of Claim of Charge'. This notice was received on 19 May. The amount claimed was shown in the notice as:

\$1,435,237.30 (incl GST) calculated in accordance with the statement of account annexed and marked 'A'.

However, the statement of account was not in fact annexed. On 19 May, Ahern's solicitors sent a letter to JM Kelly enclosing a 'Notice to contractor of claim of charge being given'. Ahern again set out:

\$1,435,237.30 (incl GST) calculated in accordance with the statement of account annexed and marked 'A'.

On this occasion the statement of account was included as Annexure 'A' to the notice. This notice was received on 22 May.

On 24 May 2006, the Principal's solicitors informed Ahern's solicitors that Annexure 'A' had not been attached and asserted therefore that the notice as given was invalid. By letter dated 25 May sent by fax, Ahern's solicitors responded by stating that they disagreed with this assertion and