SUPREME COURT OF QUEENSLAND

CITATION:	*Austruct Qld P/L v Independent Pub Group P/L* [2009] QSC 1
PARTIES:	**AUSTRUCT QLD PTY LTD ACN 112 329 076** (applicant) **v** **INDEPENDENT PUB GROUP PTY LIMITED ACN 125 365 513** (respondent)
FILE NO/S:	S12528 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 January 2009
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24 December 2008
JUDGE:	Dutney J
ORDER:	**1. The application for summary judgment be dismissed;** **2. The payment claim dated 12 November 2008 be set aside;** **3. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.** **4. That the moneys paid into court by the respondent, together with accretions, if any, be paid out to the solicitors for the respondent.**
CATCHWORDS:	BUILDING, ENGINEERING AND RELATED CONTRACTS – statutory right of debt recovery under s 19 *Building and Construction Industry payments Act* 2004 (Qld) – where no payment schedule delivered – whether s 19(4)(b)(ii) prevents the respondent arguing that part of claim outside the scope of the contract PRACTICE AND PROCEDURE – whether a breach of s 52 of *Trade Practices Act* 1974 (Cth) can be relied on to resist summary judgment despite s 19(4)(b)(ii) of the *Building and Construction Industry Payments Act* 2004 (Qld)

Building and Construction Industry Payments Act 2004 (Qld), s 12, s 18, s 19,
Queensland Building Services Authority Act 1991, s 42
Trade Practices Act 1974 (Cth), s 52, s 87

Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2006] NSWCA 238; 67 NSWLR 9
Brodyn Pty Ltd t/a Time Cost and Quality v Davenport [2004] NSW CA 394; 61 NSWLR 421
Cant Contracting v Casella [2006] QCA 538; [2007] 2 Qd R 13
Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191
Watson v Foxman (2000) 49 NSWLR 315

COUNSEL: R N Wensley for the applicant
R Perry S C, with him R Schulte, for the respondent

SOLICITORS: Rostron Carlyle Solicitors for the applicant
Minter Ellison for the respondent

The application

[1] By an application originally made returnable on 12 December 2008, Austruct Qld Pty Ltd sought summary judgment for an amount of $683,426.71 against Independent Pub Group Pty Limited pursuant to s 19(2)(a) of the *Building and Construction Industry Payments Act* 2004 ("BCIPA").

[2] Summary judgment was sought on the basis that the respondent had failed to submit a payment schedule within the prescribed time in response to a payment of claim served on it by the applicant on 12 November 2008.

[3] Section 18 of the BCIPA relevantly provides:

"(1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.

…

(4) Subsection (5) applies if—

(a) a claimant serves a payment claim on a respondent; and

(b) the respondent does not serve a payment schedule on the claimant within the earlier of—

(i) the time required by the relevant construction contract; or

(ii) 10 business days after the payment claim is served.

(5) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates."

[4] Section 19 of the BCIPA provides for the consequences of not paying the claimant where there has been no payment schedule served. Relevantly it provides as follows:

> "(1) This section applies if the respondent—
>
> (a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section;
>
> …
>
> (2) The claimant—
>
> (a) may—
>
> (i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction;
>
> …
>
> (4) If the claimant starts proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt—
>
> (a) judgement in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and
>
> (b) the respondent is not, in those proceedings, entitled—
>
> (i) to bring any counterclaim against the claimant; or
>
> (ii) to raise any defence in relation to matters arising under the construction contract."

[5] In response to the application for summary judgment, the respondent has raised two discrete issues. The first is that the substantial part of the claims made in the payment claim fall outside the scope of the contract such that paragraph 19(4)(b)(ii) does not apply to the respondent's proposed defence. The second is that the dealings between the applicant and the respondent's architect at the time the payment claimant was served constituted misleading or deceptive conduct in contravention of the *Trade Practices Act* 1974 ("TPA") or that such dealings amounted to unconscionable conduct under the TPA. In either case, it is submitted that, in consequence, the respondent is entitled to avoid the consequences of failing to deliver a payment schedule.

The background

[6] In or about March 2008 the applicant entered into a construction management contract with the Munday Group Pty Ltd ("Munday") in relation to the construction of a new outdoor deck and for the completion of existing building renovations at the Elephant and Wheelbarrow Hotel at 320 Wickham Street, Fortitude Valley ("the Hotel").

[7] The preamble to that contract provides as follows:

> "The Principal intends to have constructed the Works identified in Schedule 1 upon the Site described in Schedule 1 and in accordance

with Design Documents which have been or will be prepared by the Consultants and for that purpose intends to retain the Construction Manager to provide construction management services."

[8] Munday was the principal under that contract and the applicant was the construction manager.

[9] For present purposes the following clauses of the contract are or relevance:

"CLAUSE 2 PRIMARY OBLIGATIONS OF THE PARTIES

(a) The Construction Manager must act as the agent of the Principal in providing the construction management services stated in the Contract.

(b) The Principal must pay the Construction Manager in accordance with the Contract.

…

CLAUSE 4 PRE-ORDERING OF MATERIALS

(a) The Construction Manager may, with the Principal's approval and as agent for a disclosed Principal, enter into Trade Contracts or supply agreements for the advance supply of materials and items for the Works.

…

CLAUSE 5 CONSTRUCTION DUTIES

At an agreed time, the Construction Manager must organise commencement of the Works and, in consultation with the Principal, co-ordinate construction of the Works by the Trade Contractors and use every reasonable endeavour to achieve Final Completion in accordance with the terms of this Contract. The Construction Manager's construction duties include to:

(a) Participate in the selection of Trade Contractors by:

(i) examining and evaluating the suitability and expertise of proposed Trade Contractors;

(ii) submitting to the Principal all tenders and quotes received; and

(iii) analysing all tenders received and recommending to the Principal in writing which Trade Contractor should be awarded a Trade Contract.

(b) Unless otherwise directed by the Principal enter into a Trade Contract or supply agreement, as the case may be, with each Trade Contractor or supplier as agent for a disclosed Principal and provide the Principal with a copy of all such Trade Contracts and supply agreements.

…

(d) Arrange to have the Works set out.

(e) Co-ordinate the work of Trade Contractors with the work of the Project Team in order to have the Works carried out and completed.

…

(i) Administer the Trade Contracts on behalf of the Principal including the review and processing of all payment claims, variations, cost adjustments and applications for extensions of time made by Trade Contractors and where so authorised, assess such claims and applications and issue certificates

and assessments as required by and in accordance with the Trade Contracts.

…

(k) Arrange for the provision of work, materials and items to complete those parts of the Works not being undertaken by Trade Contractors.

…

CLAUSE 6 WORK OTHER THAN BY TRADE CONTRACTORS

Where any part of the Works cannot be undertaken by a Trade Contractor (except for Separate Contractors), the Construction Manager must, with the approval of the Principal and pursuant to Clauses 4 and 5(k) of this Contract, arrange for the carrying out and completion of that part of the Works in a proper and tradesman-like manner.

CLAUSE 9 PAYMENT OF TRADE CONTRACTORS AND SUPPLIERS

(a) The Principal must pay each Trade Contractor and supplier in accordance with the relevant Trade Contract or supply agreement, as the case may be.

(b) Nothing in this Contract is to be construed so as to impose upon the Construction Manager an obligation to pay Trade Contractors or suppliers and then to seek reimbursement from the Principal.

…

CLAUSE 11 SMALL TRADE CONTRACTS AND RELATED MATTERS

(a) The Construction Manager has the right to enter into any Trade Contract or supply agreement with any Trade Contractor or supplier, as the case may be, without the prior approval of the Principal where the value of that Trade Contract or supply agreement is less than or equal to the amount set out in Schedule 3.

(b) Whenever the Construction Manager enters into a Trade Contract or supply agreement pursuant to this Clause 11, the Construction Manager does so as agent for a disclosed Principal unless the amount of the trade Contract or supply agreement or the urgency of the situation requires otherwise.

(c) If the Construction Manager enters into a Trade Contract or supply agreement pursuant to this Clause 11 otherwise than as agent for a disclosed Principal, the Principal must pay the Trade Contractor or supplier in accordance with the terms of the relevant Trade Contract or supply agreement, as the case may be.

…

CLAUSE 15 CONSTRUCTION MANAGER’S FEE FOR CONSTRUCTION MANAGEMENT DUTIES

…

(c) A fee paid on a monthly basis and based on an hourly rate for the hours (or part thereof) worked by the Construction Manager (if an individual) and employees of the Construction Manager and the classification of those

> employees and the rate per hour shall be as set out in Schedule 6. The Construction Manager must maintain suitable records of the hours worked by those employees.
>
> …
>
> CLAUSE 17 ITEMS INCLUDED IN CONSTRUCTION MANAGER'S FEE
>
> The following items are deemed to be included in the Construction Manager's fee under Clauses 14 and 15, as the case may be:
>
> (a) The remuneration of its employees at its principal or any branch office (not being a Site office), except as is provided in Schedule 9(3).
>
> (b) Other usual overhead expenses such as director's fees, rents, rates or other "off-the-job" costs.
>
> (c) The cost of making good defective work carried out pursuant to Clause 5(k) by labour directly employed by the Construction Manager."

[10] In April 2008 the Hotel was sold by Munday to the present respondent. The Construction Management Contract was assigned from Munday to the respondent and a novation agreement entered into. The effective transfer date under the novation agreement was 28 April 2008. Notice of the transfer was given to the applicant on or about that date.

[11] Prior to 26 September 2008 claims for payment by the applicant were submitted to Mr Truong. Mr Truong had been originally engaged as architect for the project by Munday and continued in that role following the novation of the agreement to the respondent.

[12] Between 26 September 2008 and 31 October 2008 the applicant submitted to Mr Truong tax invoices numbered 792, 797, 800, 803, 804 and 805.

[13] These invoices totalled $683,426.71. None of the invoices were paid.

[14] By September 2008 disputes had arisen concerning the overall cost of the project and the extent to which it exceeded the budgeted amounts.

[15] The invoices were similar in form and their content is illustrated by invoice number 792 issued on 26 September 2008 covering the week commencing 15 September 2008.

[16] The invoice amount was $142,660.17 excluding GST. That sum was made up of $4,592.50 for supervision, $2,860 for administration, $52,013.50 for labour, $33,432.79 for materials, $53,278.01 for subcontractors, $3,337.23 for margin on materials and $7,472.68 for margin on construction costs.

[17] The project was completed in late October 2008 and the last invoice was forwarded to Mr Truong on 29 October 2008.

[18] By early November 2008 an issue had arisen concerning the provision by trade contractors of the certificates which the respondent was required to provide to the Queensland Fire and Rescue Service and to the Liquor Licensing authority to show that the works had been properly undertaken. In the absence of the certificates the respondent was unable to obtain the consents necessary to open the Hotel.

[19] At about that time, Mr Ward of the applicant had informed Mr Truong that the certificates, which were then in the applicant's possession, would not be released unless the applicant's invoices were paid in full.

[20] Negotiations to obtain the certificates were not proceeding well and solicitors were engaged in early November 2008 to make an application to the court for production of the trade certificates by the applicant. In the face of this threat the applicant agreed to produce the certificates which it had in its possession and the application was withdrawn.

[21] On 13 November 2008 Mr Truong received by courier a box of documents from the applicant. The box contained a covering letter dated 12 November 2008, some trade certificates and copies of invoices and supporting documents which had been provided previously.

[22] The covering letter read in part as follows:

> "Further to our ongoing discussions we wish to confirm the following. We have been requested to submit a copy of the amounts owing to the subcontractors on this project. We have attached this summary. We have also attached the outstanding invoices."

[23] At about the same time a similar, but not identical, bundle of documents was delivered to the respondent's registered office in Sydney.

[24] The respondent does not have a working office in Sydney. Its principal place of business is in Adelaide. The Sydney address is merely an address for service.

[25] The difference between the two bundles was that the bundle of documents delivered to Sydney contained a covering document constituting the bundle the payment claim for which the applicant now seeks summary judgment.

[26] Shortly after receiving the documents, Mr Truong says that he received a telephone call from Mr Hyde, a director of the applicant. According to Mr Truong, the conversation proceeded along the following lines:

> "Hyde: Have you received the box of documents?
>
> Truong: Yes, I am surprised you sent them to me. Usually you notify me by email first before you send anything. Have you sent a copy to IPG?
>
> Hyde: Yes, I sent a copy of the documents to the registered office in Sydney.
>
> Truong: I didn't know they had a Sydney office.
>
> Hyde: I did a company search and the Sydney address is IPG's registered address. The lawyers advised me to send a copy of the documents there.
>
> Truong: Do you have a list of which trade contractors hold certificates?
>
> Hyde: No, I am only giving you these documents based on advice from our lawyers."

[27] Mr Hyde's recollection of the conversation differs slightly. According to Mr Hyde, the conversation went along these lines:

> "Hyde: Have you received the box of documents?

Truong: Yes, I am surprised you sent them to me. Usually you notify me by email first before you send anything.
Hyde: I have sent a folder of information to IPG as well.
[Mr Hyde has no recollection of whether there was a discussion concerning a Sydney office.]
Truong: Which other trade contractors hold outstanding certificates which are required to open the pub?
Hyde: I am advised by my solicitors only to discuss with you the documents that I have provided to you."

[28] Under cross-examination Mr Hyde gave the following responses:

"Q. You knew when you were speaking to Truong the system that operated under the Act, didn't you?
A. Yes.
Q. That is, if there was no response within 10 days Austruct would be entitled to bring a claim for the full amount?
A. Yes
…
Q. You understood the position to be that if IPG missed the 10 day period, what was in essence progress claims 22 and 23 would have to be paid by IPG because of the way the Act operated?
A. Yes.
Q. That is, you knew that if the 10 day period were missed, all of the complaints about progress claims 22 and 23, that to your knowledge Truong had been raising, would count for nothing because the Act may well compel IPG to pay the full amount?
A. Yes.
…
Q. That is, as at the time you were having this discussion with Truong, it was your hope that IPG would miss the deadline, wasn't it?
A. Yes.
Q. And it was that hope that IPG would miss the deadline that prompted you not to tell Truong about the existence of the payment claim?
A. Yes.
Q. Because you believed that if you were silent about it and IPG didn't become aware of it, Austruct would be entitled to claim the full amount?
A. Yes.
Q. And because of that hope and expectation, you decided not to tell Truong about the fact of the payment claim?
A. Yes.
…
Q. You quite deliberately decided in this conversation with Truong to describe what had been sent to IPG as simply 'a folder of information' rather than add, as was the fact, that what had been sent to IPG also contained a payment claim which had the 10 day trigger?
A. Yes.

Q. And the reason you decided to simply describe it as a 'folder of information' was so as not to alert Truong that what had also been sent was a payment claim under the Act?
A. Yes.
…
Q. You deliberately set out to conceal from Truong the fact that IPG had also been sent a payment claim by simply describing it to Truong as 'a folder of information'.
A. Yes.
Q. And in deliberately deciding to do that, you hoped that he would not become aware of the payment claim made by Austruct?
A. Yes.
Q. Because you knew that if he did become aware of it, he would take steps, in your mind, to repeat the complaints he had made about progress claims 22 and 23 under a response to that payment claim?
A. Yes.
Q. So the way to stop IPG from being able to take any step at all in response to this payment claim that you made was to deliberately conceal from him the fact that a payment claim had been sent to IPG?
A. Yes.
Q. And in deliberately concealing that, you intended to mislead him as to what had in fact happened with respect to the documents sent to IPG, didn't you?
A. No.
Q. Now, you agree of course that throughout the whole project all progress claims went through Truong?
A. Yes.
…
Q. Hence you chose quite deliberately not to raise the fact of a payment claim with Mr Truong?
A. Yes."

[29] The documents delivered to the registered office of the company in Sydney were forwarded to the respondent in Adelaide. The evidence does not disclose when those documents were received and whether or not it was within the 10 day period permitted under the BCIPA. It seems unlikely, however, that the documents could have been received in Adelaide, identified and referred to the relevant company personnel in Brisbane in time to deliver a payment schedule within 10 days unless it was known or suspected that the documents contained the payment claim.

[30] Following his conversation with Mr Hyde on 13 November 2008 Mr Truong believed that the documents he received were identical with the documents sent to the registered office of the company in Sydney. He believed that the documents sent to him were part of the ongoing negotiations between the parties over the unpaid invoices and the outstanding trade certificates.

[31] After speaking with Mr Hyde Mr Truong telephoned Mr Graeme Cunningham and told him that he had received the documents, what they contained and that a copy of the documents he had received had been sent to Sydney.

[32] Mr Cunningham who was, for present purposes, the controlling mind of the respondent deposed that but for his having been told by Mr Truong that the documents in Sydney were the same as the documents Mr Truong had received he would have arranged for the documents to be immediately sent to him and he would have passed them onto his solicitors for advice. In cross-examination he said that as a result of his conversation with Mr Truong he believed the documents in Sydney did not contain a payment claim.

[33] Mr Cunningham gave evidence that he was alert to the risk of a payment claim being served pursuant to the provisions of the BCIPA at the time Mr Truong received the documents. Instructions had already been given to the respondent's solicitors in relation to a payment schedule.

Is the payment claim a claim to which the BCIPA applies?

[34] The first basis on which the respondent seeks to avoid summary judgment is that the BCIPA does not apply to this payment claim. The respondent submits that the contract entered into with the applicant was a contract for management of the construction project in circumstances where the applicant would not become personally liable to pay any of the trade contractors.

[35] Section 12 of the BCIPA provides:

> "From each reference date under a construction contract, a person is entitled to a progress payment if the person has undertaken to carry out construction work, or supply related goods and services, under the contract."

[36] The respondent submits that the construction contract upon which the applicant relies is the construction management agreement. While accepting that insofar as the payment claim is a claim for the applicant's own fee, the applicant is the person who has undertaken to carry out construction work, where the payment claim concerns construction work undertaken to be carried out by a trade contractor, the applicant is not the relevant person because the relevant person is the trade contractor.

[37] Further, the respondent relies on s 17 of the BCIPA which provides:

> "(1) A person mentioned in section 12 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 (the ***respondent***).
>
> (2) A payment claim—
>
> (a) must identify the construction work or related goods and services to which the progress payment relates; and
>
> (b) must state the amount of the progress payment that the claimant claims to be payable (the ***claimed amount***); and
>
> (c) must state that it is made under this Act."

[38] Not being the relevant person for the purposes of s 12 of the BCIPA, it was submitted that the applicant had no legal entitlement to serve a payment claim under the construction contract concerned. The contract to which s 12 refers is the relevant trade contract and not the construction management agreement.

[39] Further, it was submitted that on its proper construction, s 17(2) of the BCIPA required the purported payment claim to identify that part of the claim that related to construction work and that part which related to goods and services and that no such identification was present here.

[40] The second aspect of the submission can be dealt with quickly. The payment claim lists invoices 792, 797, 800, 803, 804, 805 and the amount referable to each of those invoices. It then provides a total amount outstanding of $683,426.71.

[41] The invoices are attached to the payment claim. Each invoice identifies that part of the claim relating to labour, materials, supervision, administration and the other items to which I earlier referred in reference to invoice 792. The relevant supporting documents are attached to the invoices.

[42] I am satisfied that the payment claim, including the attached invoices and supporting documentation, identifies sufficiently for the purposes of s 17 the nature of each item claimed. In arriving at that conclusion I make no comment on whether or not on its proper construction it is necessary to separately identify construction work and related goods and services or whether that the terminology merely picks up the words used in s 12 of the BCIPA.

[43] The more substantial part of the argument requires the construction management agreement to be considered.

[44] The essence of the submission is that under the construction management agreement the works undertaken by the applicant were purely supervisory. The applicant did not become liable to any of the contractors physically performing the construction work because such contracts were only entered into as agent for the respondent as a disclosed principal. Any claims made for the actual construction work as opposed to the supervisory work must, necessarily, be claims made under a contract entered into by the applicant. There was no such contract.

[45] Since it is accepted that there is a contract under which the applicant is entitled to some payment in the circumstances covered by that contract, the issue as to what payment the applicant is entitled to depends upon the proper construction of the contract, the legal entitlement of the parties under it, and the resolution of the factual question of whether or not particular items claimed fall within the permitted heads of claim.

[46] In the context of an appeal against the refusal of certiorari to quash an adjudicator's determination under the New South Wales equivalent of the BCIPA in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport* [2004] NSW CA 394; 61 NSWLR 421, Hodgson JA, at [51], said:

> "…the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: s 3(4) and s 32. The procedure contemplates a minimum of opportunity for court involvement: s 3(3) and s 25(4). The remedy provided by s 27 can only work if a claimant can be confident of the protection given

> by s 27(3): if the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under s 27 would be prohibitive, and s 27 could operate as a trap."

[47] To similar effect was the decision of the Court of Appeal in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238; 67 NSWLR 9 where, at [60], Basten JA, with whose reasons the other members of the Court agreed, said:

> "…where a payment schedule is served, it is clear that a debt can arise in circumstances where the proprietor may wish to argue that an adjudicator has made a wrong determination. Generally speaking, no challenge to the merits of the adjudication determination is permitted by way of defence to the liability to pay the payment claim: … Accordingly, it is within the scheme of the Act to allow a judgment debt to arise in circumstances in which later court proceedings may determine that no such liability existed."

[48] Against this restrictive approach to the court's intervention in BCIPA matters, the respondent relies on the decision of the Court of Appeal in *Cant Contracting v Casella* [2006] QCA 538; [2007] 2 Qd R 13, where at [61] McMurdo J said:

> "… It is unlikely the Act was intended to benefit builders who cannot enforce the payment provisions of their contracts ... In my view, the Payments Act operates only when there is a construction contract of which the terms as to payment are enforceable by the builder."

[49] In my view, this decision has no bearing on the present case.

[50] McMurdo J was dealing with a situation concerning an unregistered builder. The submission overlooks the opening sentences of the paragraph which read as follows:

> "The purpose of a scheme of progress payments is to permit a builder to be paid the agreed consideration for the works progressively, by a part payment which is commensurate with that part of the works performed to that point. This scheme for progress claims and their recovery is evidently unsuitable for the case of unregistered builders, because it operates from a premise of the builder's entitlement being according to its contract."

[51] In *Cant* the prohibition in s 42 of the *Queensland Building Services Authority Act* 1991 which disentitles an unregistered builder to "any monetary or other consideration" overrides the operation of the BCIPA because it disentitles the builder to make any monetary claim at all under the contract the builder has entered into. By way of contrast, in this case the applicant has a contract which it is entitled to enforce. The issue raised by the respondent is whether all of the claims made by the applicant fall within the terms of that contract. Whether they do so or not is, in my opinion, properly a matter for an adjudication under the BCIPA and not for this court at this time.

[52] In those circumstances, the first line of argument advanced on behalf of the respondent fails.

The *Trade Practices Act*

[53] The second line of argument concerned contraventions of the TPA which prohibits the making of misleading or deceptive statements. The unconscionable conduct argument is related.

[54] In my view, had Mr Hyde not telephoned Mr Truong but merely sent him the bundle of documents and sent the payment claim with the identical documents attached to the registered office in Sydney, the consequences of any misapprehension as to the true nature of those documents would fall on the respondent. In other words, I do not consider silence would have been misleading. The question is therefore whether the telephone conversation between Mr Hyde and Mr Truong has resulted in any change in that position.

[55] As is clear from those passages of the cross-examination of Mr Hyde set out above, Mr Hyde's expressed intention in telephoning Mr Truong was to engineer a situation where no payment schedule was delivered. This was to be achieved by misleading Mr Truong as to the nature of the documents sent to Sydney. This is not determinative of the issue because there is no mental element involved in any contravention of s 52 of the TPA. Nonetheless, in circumstances where there is argument as to the precise words used in the course of the conversation and where it is unlikely that either party would have a verbatim recollection of those words, the fact that one party set out to achieve a particular result is, in my view, material.

[56] The argument turns upon whether Mr Hyde told Mr Truong that what he had received was materially duplicated by what had been sent to Sydney or not.

[57] It is worthwhile recalling the remarks of McLelland CJ in Eq in *Watson v Foxman* (2000) 49 NSWLR 315 at 318-319:

> “"Where the conduct is the speaking of words in the course of a conversation, it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances. In many cases (but not all) the question whether spoken words were misleading may depend upon what, if examined at the time, may be seen to be relatively subtle nuances flowing from the use of one word, phrase or grammatical construction rather than another, or the presence or absence of some qualifying word or phrase, or condition. Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.”

[58] In *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198-9, Gibbs CJ spoke of the meaning of s 52 of the TPA as follows:

> "The words of s. 52 require the Court to consider the nature of the conduct of the corporation against which proceedings are brought and to decide whether that conduct was, within the meaning of that section, misleading or deceptive or likely to mislead or deceive. Those words are on any view tautologous. One meaning which the words 'mislead' and 'deceive' share in common is 'to lead into error'. If the word 'deceptive' in s. 52 stood alone, it would be a question whether it was used in a bad sense, with a connotation of craft or overreaching, but 'misleading' carries no such flavour, and the use of that word appears to render 'deceptive' redundant. … In *McWilliam's Wines Pty. Ltd. v. McDonalds System of Australia Pty. Ltd* (1980) 49 FLR 455; it was rightly held by Smithers J. and by Fisher J. that to prove a breach of s. 52 it is not enough to establish that the conduct complained of was confusing or caused people to wonder whether two products may have come from the same source, …"

And at p 199:

> "The conduct of a defendant must be viewed as a whole. It would be wrong to select some words or act, which, alone, would be likely to mislead if those words or acts, when viewed in their context, were not capable of misleading. It is obvious that where the conduct complained of consists of words it would not be right to select some words only and to ignore others which provided the context which gave meaning to the particular words."

[59] In this particular case, the starting proposition is that Mr Hyde intended that his conversation leave Mr Truong with the impression that the documents sent to Sydney were identical with the documents he had received from the applicant directly. The accomplishment of this aim was made easier by the fact that all previous documents had been served directly upon Mr Truong and he had a reasonable expectation that if a payment claim were to be served he would receive either the claim or a copy of it from the applicant.

[60] The version of the conversation recounted by Mr Hyde in his affidavit is less likely than that given by Mr Truong. If, without qualification, Mr Hyde had told Mr Truong that he had sent a folder of information to the respondent, Mr Truong's natural response would have been to enquire "what information?" It seems to me more likely in that context that the reference to the documents sent to Sydney arose in response to Mr Truong's question which he affirmed in cross-examination, "Have you sent a copy to IPG?" If Mr Hyde was responding to this question, then it seems to me to make little difference whether his answer was as Mr Truong recollects or as he recollects. The clear impression conveyed would be that the documents in Sydney were materially identical with the documents Mr Truong had received when in fact there was a fundamental difference between them. As far as Mr Hyde's reference to the documents sent to Sydney as "a folder of information" is concerned, that also seems to me to misdescribe the documents and to be misleading. The documents sent to Mr Truong could fairly be described as "a folder of information". The documents sent to Sydney were something different. What was sent to Sydney was a payment claim under the BCIPA. The documents collectively were a payment claim having serious legal consequences. It was not mere information.

[61] In all the circumstances, I am satisfied that whatever precise words were used by Mr Hyde they were intended to, and did in fact, convey to Mr Truong the meaning that the documents sent to Sydney were materially the same as the documents he had received. In those circumstances, Mr Hyde's conduct was misleading and Austruct Queensland Pty Ltd was in contravention of s 52 of the TPA. I am satisfied that Mr Truong passed on the misleading information he had received to Mr Cunningham. I am further satisfied that Mr Cunningham relied on this information by not following up the documents in Sydney. Had he done so a payment schedule would have been delivered within the statutory time frame.

[62] My finding as to the effect of the conversation between Mr Hyde and Mr Truong accords closely with the version originally given by Mr Hyde in his affidavit filed by leave on 12 December 2008 in paragraph 3 of which he states:

> "(a) I recall the conversation with Steve Van Troung (sic) on 13 November 2008;
>
> (b) I advised him that copies of the invoices sent to Mr Van Troung (sic) were also sent to the Respondent;
>
> (c) At no stage did I say that the documents sent to Mr Van Troung (sic) were the exact same documents that were sent to the Respondent as I knew that they were not the same."

[63] Whether or not the word "exact" was used, this reflects Mr Truong's version of the conversation in all material respects. I thus have no difficulty accepting Mr Truong's version of the conversation. Mr Hyde's intention in making the statement is strictly irrelevant, but the fact that Mr Hyde intended to convey what I find he did convey is corroborative of that finding.

[64] The impact of this conclusion on a payment claim was discussed by the Court of Appeal in *Bitannia Pty Ltd & Anor v Parkline Constructions Pty Ltd* [2006] NSWCA 238; 67 NSWLR 9. One of the issues in that case was whether a claim under the TPA could be raised to defeat an applicant's claim to summary judgment under the NSW equivalent of s 19 of the BCIPA. At [8], Hodgson JA remarked:

> "The basic complaint of the appellants is that one element of the cause of action brought against them, namely the non-service of a payment schedule, came about as a result of Parkline's breach of s.52; and that if a remedy is not provided by the *Trade Practices Act*, they suffer the substantial damage of having a judgment against them which is obtained by Parkline in reliance on its own misleading conduct. The *Trade Practices Act* discloses a legislative intention that persons should have a remedy to protect them from damage from the misleading conduct of a corporation, or to recover from the corporation compensation for such damage; and it would not be in accordance with that intention that a corporation should be permitted to obtain a judgment against a defendant on a cause of action one essential element of which has been created by that corporation's misleading conduct against that defendant. Subject to discretionary questions, it would in my opinion be appropriate for a court to give effect to that legislative intention by granting an injunction under s.80, or by making an order pursuant to s.87 dismissing proceedings (noting that the orders made available by s.87 include orders mentioned in s.87(2), but are not restricted to those orders)."

And at [17], Tobias JA said:

> "I have had the benefit of reading in draft the judgments of Hodgson JA and Basten JA. I agree with their Honours for the reasons each has given, that s15(4)(b) of the *Building Payment Act* does not prevent the appellants from raising by way of defence to the respondent's proceedings in the District Court to recover the amount of its payment claim pursuant to s15(2)(a)(i) of that Act, the contention that their failure to provide a payment schedule with respect to that claim was induced by the respondent's misleading or deceptive conduct in breach of s52 of the *Trade Practices Act*."

[65] It seems to me to be now established that s 19(4)(b)(ii) of the BCIPA does not preclude reliance on s 52 of the TPA to prevent the entry of summary judgment where a payment schedule is not delivered. I am satisfied that it would be improper to permit the applicant to take advantage of the respondent's failure to deliver a payment schedule in circumstances where that failure was brought about by the applicant's misleading conduct.

[66] It is not necessary to go further to consider whether the applicant's conduct fell within the scope of s 51AC of the TPA. It is also unnecessary to determine the respondent's argument that the applicant was in breach of its fiduciary duty to the respondent in serving the payment claim. I do, however, have some difficulty in seeing how the applicant could be acting in a fiduciary capacity in seeking payment for its own services. The fiduciary relationship is said to arise form the contractual agency created by the construction manager contract.

Conclusion

[67] Having regard to my findings in relation to the applicant's misleading or deceptive conduct in the course of the conversation with Mr Truong, it seems to me the appropriate remedy, pursuant to s 87 of the TPA, is to set aside the payment claim. Merely to dismiss the application for summary judgment would leave the applicant in the unfortunate position that it would be unable to enforce payment of whatever amount an adjudicator might determine was due to it. On the other hand, if the payment claim is set aside a fresh payment claim can immediately be served and in accordance with the legislation an adjudication on that claim can be obtained within 35 days. Having seen both Mr Hyde and Mr Truong in the witness box and having preferred Mr Truong's version of the critical conversation, I am satisfied that it is appropriate to finally resolve this issue without the need for any further trial.

[68] For the reasons I have set out, therefore, I order that:

1. The application for summary judgment be dismissed;
2. The payment claim dated 12 November 2008 be set aside;
3. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.

[69] Pursuant to an order of Byrne SJA made 12 December 2008, the respondent was required to pay into court the amount of the payment claim. That order has been complied with and I further order that the moneys paid into court by the respondent, together with accretions, if any, be paid out to the solicitors for the respondent.