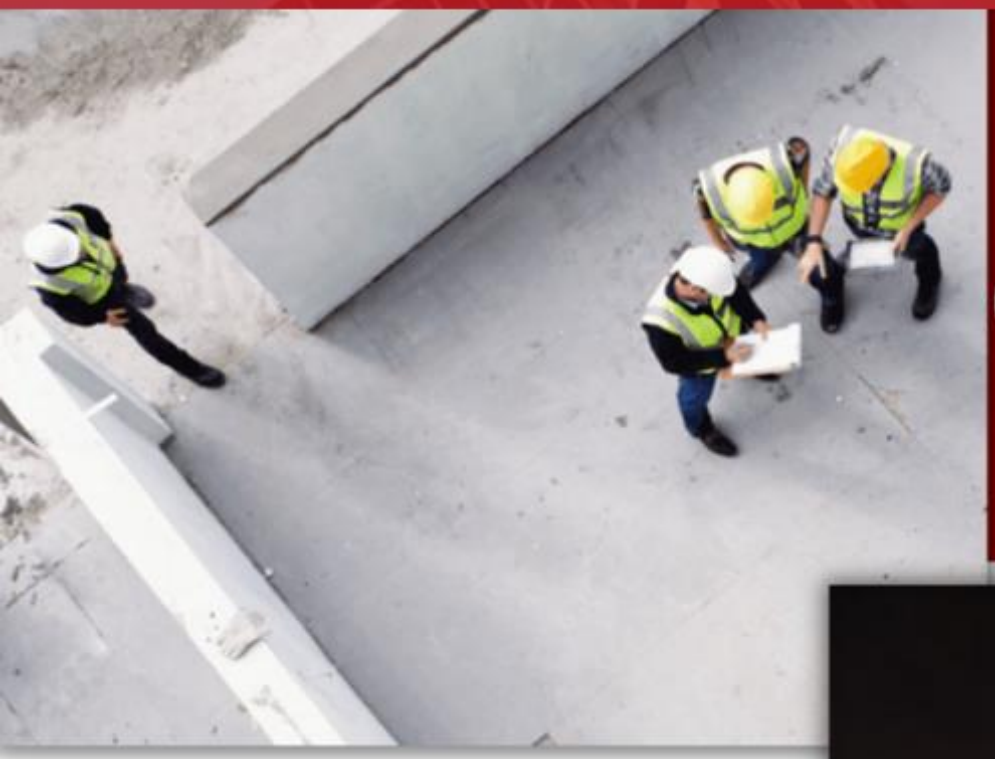
Marquee, *Megacrane*, *Total Construction*, and *Richard Crookes*: A Guide to Navigating the SOPA Act and Payment Claims



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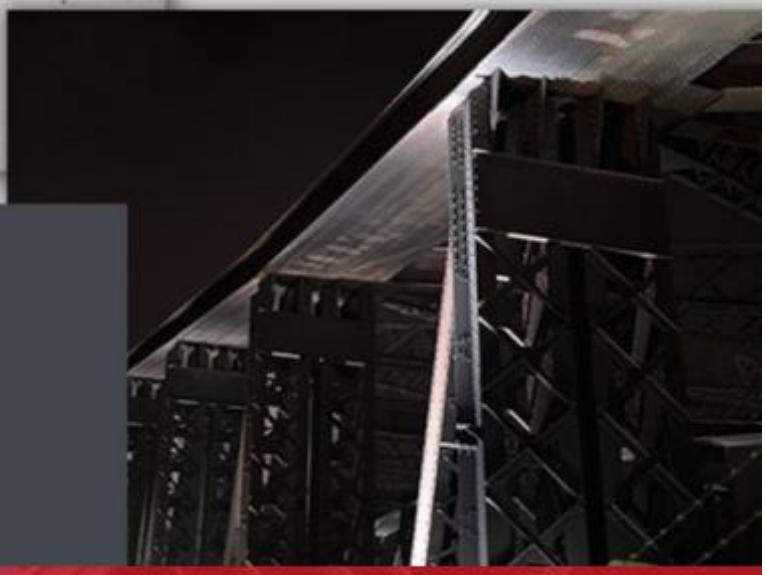

Newsletter

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In this Newsletter, we delve into the recent decisions of *Marquee*, *Megacrane*, *Total Construction*, and *Richard Crookes*. We explore the key learning lessons that arise from their judgments, with particular emphasis on the SOPA Act; the low threshold for the validity of payment claims and payment schedules; whether a letter of demand is a payment claim; how misleading and deceptive conduct in relation to a statutory declaration can bypass paying a claimed amount; and, the eligibility of a company under a DOCA to make a payment claim.

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Introduction

This newsletter reviews the decisions in *Kennedy Civil Contracting Pty Ltd v Total Construction Pty Ltd* [2023] NSWDC 325 ('Kennedy'), *Marques Group Pty Ltd v Parkview Constructions Pty Ltd* [2023] NSWSC 625 ('Marques'), *Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd* [2023] NSWSC 309 ('Megacrane'), and *Kennedy Civil Contracting Pty Ltd (Administrators Appointed) v Richard Crookes Construction Pty Ltd* [2023] NSWSC 99 ('Crookes').

Firstly, the decision of ***Kennedy***[1] in the Court of Appeal, emphasised that any accompanying invoices to a payment claim must clearly identify the corresponding construction work. Failure to adhere to this requirement may render a payment claim ineffective and non-compliant within the parameters delineated by section 13 of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) (SOPA). Hence, the Court in considering the validity of a payment claim will glean to reading the balance of documents objectively and as a whole.

Secondly, ***Marques***[2] argues that a payment claim can be defeated should a respondent assert that the claimant has engaged in misleading and deceptive conduct in relation to a statutory declaration. As such, statutory declarations concerning a payment claim should and must be made truthfully, with honesty and good faith.

Thirdly, in ***Megacrane***[3], the court said that a letter of demand can be a valid payment claim, and an email responding to that letter can be a valid payment schedule provided they: particularise the amounts in the payment claim, include details about construction work performed, and state it is a claim under SOPA[4] and is a single payment claim. As such, this judgment reaffirms that there is a relatively low threshold for the validity of payment claims and payment schedules.

Finally, the decision in ***Crookes***[5] suggests that construction companies when entering administration, still have a substantial opportunity to receive payments from their debtors by submitting valid payment claims under the SOP Act. Hence, Kennedy Civil Contracting's entry into a Deed of Company Arrangement (DOCA) did not mean it was barred from taking advantage of the limited operation of section 32B[6] in submitting a payment claim.

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[1] *Kennedy Civil Contracting Pty Ltd v Total Construction Pty Ltd* [2023] NSWDC 325.
[2] *Marques Group Pty Ltd v Parkview Constructions Pty Ltd* [2023] NSWSC 625.
[3] *Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd* [2023] NSWSC 309.
[4] *Building and Construction Industry Security of Payment Act* 1999 (NSW).
[5] *Kennedy Civil Contracting Pty Ltd (Administrators Appointed) v Richard Crookes Construction Pty Ltd* [2023] NSWSC 99.
[6] *Building and Construction Industry Security of Payment Act* 1999 (NSW) s32B.

Our analysis of these judgments will shed particular emphasis on the SOPA Act, the low threshold for the validity of payment claims and payment schedules, whether a letter of demand is a payment claim, how misleading and deceptive conduct in relation to a statutory declaration can bypass paying a claimed amount, and the eligibility of a company under a DOCA to make a payment claim.

To enlighten our readers, we present a summary and takeaway of these judgments below, offering a synoptic perspective into the contents of this newsletter.

Kennedy Civil Contracting Pty Ltd v Total Construction Pty Ltd [2023] NSWDC 325

Overview

Recently, the decision of *Kennedy*[7] in the District Court of NSW by Aberdeen J was overturned in the Court of Appeal (Meagher JA, Mitchelmore JA, Adamson JA). The issue on appeal concerned whether the letter and attachments that the solicitors for Kennedy's Administrators sent to Total on 25 October 2022, constituted a payment claim within the meaning of s 13(1) of SOPA[8]. It was held that the primary judge erred in concluding to the contrary, as the details of the final invoice being read with the balance of documents, including the covering letter and the other invoices, did not constitute a payment claim within section 13 of the Act.[9]

The key takeaway drawn from this judgment stresses the importance for construction companies to exercise caution when dealing with letters of demand disguised as payment claims. Moreover, for construction contractors issuing payment claims, it is imperative that any accompanying invoices clearly identify the corresponding construction work. Failure to adhere to this requirement may render a payment claim ineffective and non-compliant within the parameters delineated by section 13 of the SOPA. [10]

[7] *Kennedy Civil Contracting Pty Ltd v Total Construction Pty Ltd* [2023] NSWDC 325.
[8] *Building and Construction Industry Security of Payment Act* 1999 (NSW) s 13(1).
[9] Ibid.
[10] Ibid.

Facts

The facts of this case are as follows:

> On 25 October 2022, Kennedy's solicitors sent a letter to Total demanding payment of $545,353.18. Total did not respond with a payment schedule within 10 business days of receiving the letter.
>
> Kennedy commenced proceedings against Total in the District Court on 23 November 2022, claiming $545,353.18.
>
> Kennedy argues that the letter of demand it served on Total Construction **(see Schedule 1)** constituted a valid payment claim under s 13 of the Security of Payment Act ('SOPA'). Kennedy also argues that the tax invoices attached with the letter of demand identified the relevant construction work.
>
> Total denied this, arguing that the statutory requirements for the payment claim were not satisfied. They argued that the alleged payment claim was not a valid payment claim because:
>
> - it failed to provide an adequate description of the works for which the amount was claimed,
> - The alleged payment claim did not adequately summarise all relevant details and clearly state the amount claimed,
> - The alleged payment claim that Kennedy sought to rely upon was not a single claim, required by s 13(1) of the SOPA.

In the District Court, Judge Aberdeen ruled for Kennedy, dismissing Total's claims. However, Aberdeen's decision has since been overturned by the Court of Appeal in favour of Total Construction. The reasons as to why it was overturned are explored below.

Issue

The issue in this appeal was whether a letter and attachments that the solicitors for Kennedy's Administrators sent to Total on 25 October 2022, in which the sum of $545,353.18 was claimed, constituted a payment claim within the meaning of s 13 of the Building and Construction Industry Security of Payment Act 1999 (NSW) (the Act).

Legal Reasoning

The Court of Appeal references the legal principle in *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1 to suggest that if a payment claim does not reasonably

appear to meet the requirements outlined in section 13(2) of the Act[11], it is considered invalid and has no legal effect for the purposes of the Act.

> [30] "In the case of a payment claim which does not purport reasonably on its face to comply with the requirements of s 13(2) of the Act, **the claim is a nullity for the purposes of the Act**."

In applying the principle to the features of the letter of demand, the Court says the following:

> "[30] Having regard to the features that I have identified above, the 25 October 2022 letter **reads objectively, and obviously, as a letter of demand for payment of an outstanding indebtedness by the stipulated deadline, failing which the solicitors would likely be instructed to commence recovery proceedings**".

As for the invoices that attached the letter of demand, the Court held that the primary judge erred in concluding to the contrary, as the details of the final invoice being read with the balance of documents, including the cover letter and the other invoices, did not constitute a payment claim within section 13 of the Act. As inherent in McDougall J's description of the approach in *Fernandes*, the approach must be fair, reading the relevant documentation, for which context cannot be a substitute.

> "[35] One may accept, as Kennedy emphasised, the need to adopt a **"fair but broad"** and not **"pedantic"** approach to compliance with the statutory requirements for a payment claim in the Act: Fernandes Constructions v Tahmoor Coal (trading as Centennial Coal) [2007] NSWSC 381 at [38] (McDougall J) ("Fernandes")."

The Court of Appeal citing *Estate Property Holdings Pty Ltd v Barclay Mowlem Construction Ltd*[12], further argues that apart from the statement asserting it was a claim under the Act on each invoice, there must be something that indicates the construction work to which it relates. Applying this to conclude that the primary judge did err, and that payment claims are to be read objectively and as a whole, the Court of Appeal states that:

> "[34] Apart from the statement asserting it was a claim under the Act, which I have addressed above, there was nothing on the face of the invoice that indicated the construction work to which it related.
>
> [37] The detail in the final invoice has to be read with the balance of the documents, including the covering letter and the other invoices, which had the features I have identified above. So read, the documents did not constitute a payment claim within s 13 of the Act. The primary judge erred in concluding to the contrary.
>
> [38] The conclusion I have reached similarly depends on a consideration of the 25 October 2022 letter and attachments, read objectively and as a whole."

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[11] *Building and Construction Industry Security of Payment Act* 1999 (NSW) s13(2).
[12] [2004] NSWCA 393.

Held

The Court of Appeal held the following:

(1) Appeal allowed with costs.

(2) The parties are to file short minutes of order on or before 2 February 2024 for the making of any further orders necessary to give effect to the result on the appeal.

Key Takeaways

In summation, the details of the final invoice being read with the balance of documents, including the covering letter and the other invoices, did not constitute a payment claim within section 13 of the Act. As such, the key takeaway drawn from this judgment places emphasis on the importance for construction companies to exercise caution when dealing with letters of demands disguised as payment claims. Moreover, for construction contractors issuing payment claims, it is imperative that any accompanying invoices clearly identify the corresponding construction work. Failure to adhere to this requirement may render a payment claim ineffective and non-compliant within the parameters delineated by section 13 of the SOPA[13].

***Marques Group Pty Ltd v Parkview Constructions Pty Ltd* [2023] NSWSC 625**

Overview

The case of *Marques* concerns two unpaid payment schedules in relation to a payment claim and whether there is potential to raise a defence of misleading and deceptive conduct to bypass paying the claimed amount.

Facts

The facts of *Marques* read as follows:

> The subcontractor (Marques) had two construction contracts with the contractor (Parkview), providing formwork on projects in Woolooware and Parramatta for $22.7 million and $14.665 million, respectively. The subcontractor was entitled to submit a payment claim on and from the 25th day of each month, as per clause 10.

[13] *Building and Construction Industry Security of Payment Act* 1999 (NSW) s13.

> Clause 11 was a precondition to an entitlement of Marques to submit a payment claim per Clause 10. It required Marques to submit a statutory declaration stating that all employees, workers, suppliers, manufacturers, and secondary subcontractors have been paid in full for their work **(see Schedule 2)**.
>
> On 25 October 2022, Marques's representative, Alan Masterson, completed a Subcontractor's statutory declaration relating to Clause 11, stating that all remuneration for work done in October 2022 under each project contract had been paid **(see Schedule 2)**. The statutory declaration said that the contractor was not insolvent and that all subcontractors had been paid.
>
> On 9 November 2022, Marques served two payment claims (marked **"DRAFT"**), one for the Woolooware project being $1,610,212.26 and another for the Parramatta project for $647,048.42. By operation of section 14 SOPA (NSW), the contractor became liable to pay the amounts. The failure by Parkview to pay the payment schedules in the prescribed time, allowed the subcontractor to seek a summary order pursuant to section 16(2)(a)(i) of the (NSW) SOPA.
>
> However, Parkview contends that the subcontractor had not paid its workers' superannuation contributions and Australian Construction Industry Redundancy Trust contributions. Parkview contends that some subcontractors had not been paid and that these non-payments indicate that the subcontractor cannot pay its debts as and when they fall due.

Parkview's defence to bypass paying the summary order relied on misleading and deceptive conduct per the Australian Consumer Law. Parkview argued that the defence under the ACL trumped the subcontractor's rights under SOPA, given Commonwealth legislation prevails in the event of inconsistency of state law. As such, they contended that **but for** Marques's misleading statutory declaration, Parkview would not have scheduled $1,785,492.84 as payable, but rather put "nil".

Ultimately, Rees J, followed and cited the reasoning of *Bitannia v Parkline Constructions and Winslow Constructors Pty Ltd v John Holland Rail Pty Ltd & MVM Rail Pty Ltd*[14] in reaching her conclusion - to dismiss Marquee's summary order as follows:

> **[18]** Breaches of the Australian Consumer Law may be pleaded by way of defence to a claim for judgment under section 15 without bringing a crossclaim or substantive proceedings.

[14] 2008 VCC 1491.

> **[19]** "Had the plaintiff known that bank guarantee … had been cancelled or that sub-sub-contractors had not been paid, it is inconceivable, in my view, that the defendants would have issued the same Payment Schedules.

Rees J, although agreeing with Marques that the defence of misleading and deceptive conduct appears to run contrary to the SOPA 'pay now, argue later' scheme said that:

> **[20]** As inherently unattractive as that defence of misleading and deceptive conduct is, I cannot say that it is so clearly untenable that it cannot possibly succeed.

Ultimately, Rees J ruled in favour of Parkview Constructions and their ACL defence to bypass paying the claimed amount.

***Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd* [2023] NSWSC 309**

Facts

The facts of *Megacrane*[15] are as follows:

> Piety entered a contract with Megacrane for the supply of tower cranes and associated labour.
>
> In March 2022, an administrator was appointed to Megacrane. The administrator advised Piety that he was considering engaging a third party to provide labour services so that Megacrane was able to complete its obligations under the Contract. Piety subsequently issued a notice under the contract which advised Megacrane that it would take the remaining works out of Megacrane's hands.
>
> On 11 May 2022, the administrator sent Piety an email that attached a document described as a "letter of demand" and various invoices. The letter of demand stated that Piety was indebted to Megacrane in the sum of $258,976.18 and directed Piety make payment for two invoices which comprised the sum. Each invoice was attached to the email and contained the statement:
>
> > "This is a payment claim issued pursuant to the Building and Construction Industry Security of Payment Act NSW 1999."

[15] *Piety Constructions Pty Ltd v Megacrane Holdings Pty Ltd* [2023] NSWSC 309.

Piety responded by denying that it was indebted to Megacrane as Piety had taken the remaining works out of Megacrane's hands and, as a result, payment was suspended.

On 3 June 2022, Megacrane lodged an adjudication application for its payment claim (being, its letter of demand).

Piety argued that the adjudication determination was void because:

- the letter of demand was not a valid payment claim; and
- If there was no valid payment schedule, Megacrane was required to serve a section 17(2) notice on Piety prior to commencing the adjudication; and
- in the event it was a valid payment claim, Piety did not issue a payment schedule.

The adjudicator determined the adjudicated amount to be $108,828.05 and concluded that the administrator's correspondence did meet the requirements of a payment claim in accordance with the SOPA.

Richmond J upholding the administrator's determination, that the letter of demand did constitute a payment claim, said that:

[43] In my view, the Administrator's letter of 11 May 2022 needs to be considered as a whole.

On fair reading the letter, read as a whole, it is a claim for $258,976.18 in respect of amounts which are particularised in invoice MH0004, which identifies the construction work to which it relates in sufficient detail to enable Piety to understand the basis of the claim and whether to dispute it, and states that it is a claim issued under the Act.

The letter is a single payment claim for $258,976.18 which satisfies the requirements of s 13(2) and while it includes an amount of $184,207.62 which had been the subject of previous payment claims, that is permitted under s 13(6)(b).

There is no reason why a payment claim cannot also be stated to be a letter of demand.

Richmond J in then addressing Piety's contention that its email response to the letter of demand was not a valid payment schedule said:

[45] In my view, Piety's email of 20 May 2022 is a payment schedule, because:

(a) it identifies the payment claim to which it relates by the reference in the first sentence to the Administrator's letter dated 11 May 2022,

(b) it indicates that no amount is proposed to be paid, by the denial of any liability to Megacrane in the third paragraph, and

(c) it states the reasons for that contention in the fourth paragraph, being that Piety had elected to give a notice under cl 39.4(a) to take out of Megacrane's hands the work remaining to be completed and thereby suspending its payment obligation under cl 39.6.

***Kennedy Civil Contracting Pty Ltd (Admins Apptd) v Richard Crookes Construction Pty Ltd* [2023] NSWSC 99**

Facts

Kennedy seeks to recover amounts said to be due to it from Crookes under the SOP Act on the basis that the amounts claimed were the subject of valid payment claims served under the SOP Act and Crookes has, failed to pay the "scheduled amount" in payment schedules and, failed to comply with the time bars of serving a payment schedule per s 14(4)(b)(ii) of the SOPA[16].

Richard Crookes contends the claim on two grounds.

1. Firstly, it argues that a deed of company arrangement (DOCA) established by KCC's creditors can be terminated for false or misleading information about the company's business under section 445D (1) Corporations Act 2001 (Cth). As such Crookes contends that KCC entered the DOCA for a wrongful purpose — to circumvent the operation of s 32B of the SOP Act.
2. Secondly, Crookes argues that KCC's actions amount to an abuse of process.

The Court in construing the provision of Section 32B referred to Recommendation 10 of the Murray Report, where it was said:

> [19] "[t]he legislation should **not** apply to a claimant corporation in liquidation".

Justice Ball in determining that entering the DOCA to capitalise on the scope of 32B did not constitute an improper purpose said the following:

[16] *Building and Construction Industry Security of Payment Act* 1999 (NSW) s 4(4)(b)(ii).

> **[35]** "… it is difficult to see how it could be said that the DOCA was designed to avoid the operation of the SOP Act. It would be more accurate to say that it was designed to take advantage of the limited operation of s 32B.
>
> The evident purpose of s 32B is to prevent a situation from arising where an interim payment made under the Act becomes permanent because, on liquidation, the payment is no longer available to be returned to the payer if the payer is successful in its claim under the construction contract. But the DOCA in this case specifically preserves Richard Crookes's rights to recover the amount it pays under the construction contract."

Regarding the issue of whether it was an abuse of process, Justice Ball said Kennedy's arrangement of its affairs to fall outside the purview of section 32B of the SOPA, did not constitute an abuse of process for the following reason:

> **[42]** … it is not correct to characterise KCC's claim as an attempt to avoid the operation of s 32B. Rather, it has organised its affairs so that it falls outside the scope of s 32B. That does not involve an abuse of process. Moreover, again for the reasons already given, it could not be said that the DOCA undermines any policy of the SOP Act. The evident policy of the Act is to permit the payer to recover the amount of any judgment by a claim under the relevant **construction contract**. That right is preserved by the DOCA in this case. It was not suggested that the rights under the DOCA in that respect were substantially different from the right to pursue a claim through the normal processes of the Court.

Conclusion

In summation, the judgments we have explored, effectively reveal the multifaceted nature of the SOPA Act, ranging from contextual validity to truthfulness in claims, clarity requirements, and the applicability of SOPA provisions even in cases of administration.

- In ***Kennedy***, the Court of Appeal emphasised that any accompanying invoices to a payment claim must clearly identify the corresponding construction work. Failure to adhere to this requirement may render a payment claim ineffective and non-compliant within the parameters delineated by section 13 of the SOPA. Hence, the Court in considering the validity of a payment claim will glean to reading the balance of documents objectively and as a whole.

- While ***Marques***, emphasizes that a payment claim can be contested if the respondent alleges misleading and deceptive conduct regarding a statutory declaration.
- In ***Megacrane***, the Court illustrates the low threshold for the validity of payment claims and payment schedules. It was said that a letter of demand can be qualified as a valid payment claim if it particularises the amounts, details the construction work, explicitly states it is made under the and is presented as a single payment claim.
- Lastly, the ***Crookes*** decision clarifies that entry into a Deed of Company Arrangement does not restrict a company from submitting payment claims.

Schedule 1: Letter of Demand in *Total v Kennedy*

"(15)
Attached to this email was a letter, on the letterhead of Kennedy's lawyers, addressed to Total. Its content was material as follows:

` …

> 1. We act for the Administrators Trent Andrew Devine and Bradd William Morrelli, who were appointed as Joint and Several Administrators of the company on 1 August 2022.
>
> 2. The books and recovers of the Company indicate that you are indebted to the Company in the amount of $545,353.18. A copy of the relevant documents are *attached*.
>
> 3. Acordingly, we demand that you forward to our office the sum of $545,353.18 being the total outstanding amount owing to the Company, by *5:00PM* on *1 November 2022 (Deadline).*
>
> 4. Payment can be made into our trust account, details are as follows:
>
> [REDACTED]
>
> 5. Please note the above outstanding amount is required to be paid to the Company only and may be utilised to pay any third-party debt(s) previously outstanding and/or to be incurred in the future.

6. If we do not receive payment before the Deadline, we anticipate being instructed to commence proceedings without further notice to recover the outstanding as well as seek costs and interest, by way of statutory debt pursuant to section 15 or 16 of the Building and Construction Security of Payment ACT 1999 (NSW) and an application for summary judgment.

7. It is our client's goal to obtain a commercial resolution in the matter for the benefit of the creditors of the Company. Our client accordingly urges you to consider the benefits of any early resolution of the matter without the need for any further recovery action.

8. Should you require any further information in this regard, please contact our office directly.

…

Attached to this covering letter were:

(a) Tax invoice (Exhibit A, 1 CB 106). On its face, the invoice was dated 25 February 2022 and a due date of 28 March 2022 was stipulated. The description was 'February Claim 001- Contract Civil Works Package'. The invoice made allowance for a sum that Total had paid to Kennedy ($167,946.14) and what was claimed in this invoice was the sum of $18,660.69.

(b) Tax invoice (Exhibit A, 1 CB 107): On its face, the invoice was dated 31 March 2022 and a due date of 30 April 2022 was stipulated. The description was 'Works for March - Payapps'. The invoice made allowance for a sum that Total had paid Kennedy ($26,732.40) and what was claimed in this invoice was the sum of $2,973.24.

(c) Tax invoice (Exhibit A, 1 CB 108): On its face, the invoice was dated 29 April 2022 and a due date of 27 May 2022 was stipulated. The description was 'Preliminaries'. The invoice made allowance for a sum that Total had paid Kennedy ($75,687.21) and what was claimed in this invoice was the sum of $8,409.69

(d) Tax Invoice (Exhibit A, 1 CB 109): On its face, the invoice was dated 28 June 2022 and a due date of 28 July 2022 was stipulated. The description was 'Contract Works carried out to Date'. The amount claimed in this invoice was the sum of $621,371.93. I interpolate that unlike the earlier three invoices, there was no reference in this particular invoice to any payment by Total. Mr Devine was cross-examined on this document and acknowledged that he could not work out, by

reference to the invoice alone, what work had previously been completed or previously the subject of a claim;

(e) Tax Invoice (Exhibit A, 1 CB 110-121): there were multiple documents attached in relation to this claim. The first was a tax invoice dated 4 August 2022 and a due date of 3 September 2022 was stipulated. The amount claimed in this invoice was the sum of $147,644.73. Underneath the invoice was a detailed (10 page) document, apparently replicating what was evident in Payapps about this claim.

It may be observed that each tax invoice bore the notation 'This is a payment claim made under the Building and Construction Industry Security of Payment Act 1999 (NSW)'.

Schedule 2: Clause 11 Statutory Declaration in *Marques v Parkview*

Clause 11 provided:
"… The preconditions to an entitlement of the Subcontractor to submit a payment claim to Parkview are that the Subcontractor has strictly complied with the terms of this agreement and including without limitation having submitted to Parkview:

> (a) Statutory Declaration … signed by a director for by the Subcontractor that all employees, workers, suppliers, manufacturers, and Secondary Subcontractors who are or have been engaged in relation to the Works have been paid in full all amounts payable to them by virtue of their engagement, employment, or Secondary Subcontract or by any statute, legislation, order or award …"

MR MASTERSON'S STATUTORY DECLARATION

Mr Masterson stated:

"3.

> All workmen who are or at any time have been engaged on the work under the Contract have been lawfully employed and have been paid in full all wages and allowances which have become payable to them by virtue of their employment on the Work under the Contract.

4. All subcontractors who are or at any time have been engaged on the Work under the Contract have been paid in full all amounts which have become payable to them by virtue of their subcontracts with the Contractor.

…

6. I personally know the truth of the matters which are contained in this declaration and the attached Subcontractor's Statement.

…

9. I am not aware of anything that would contradict the statements made in the statutory declarations and Subcontractor's Statements provided to the Contractor by its Subcontractors.

…

11. The Contractor is not, under any law, insolvent or unable to pay its debts as and when they fall due."