

***Consolidated Constructions Pty Ltd v Ettamogah Pub [2004] NSWSC 110
(11 March 2004): McDougall J***

“13 Payment Claims”

At para [60]: “The changes to s 13(1) that I have just described, together with the change to the definition of “progress payment” in s 4, mean that the reasoning of Austin J in *Jemzone* is no longer applicable.

At para [61]: “Even if, because of the matters upon which the defendant relied, the plaintiff is not “a person referred to in s 8(1) who is ... entitled to a progress payment”, it is undoubtedly “a person ... who claims to be entitled to a progress payment”. The ability to serve a valid payment claim depends on either actual or claimed entitlement, so that a payment claim served by a person who claims to be (but who in law may not be) entitled to a progress payment is sufficient to trigger the mechanism of sections 14 and following. It must follow that failure to serve a payment schedule in accordance with s 14 will lead to the consequences described in s 14(4) notwithstanding that, as a matter of fact or law, the claimant may not have been entitled to the progress payment that was the subject of the payment claim.”

At para [62]: “A number of consequences follow from the changes to the statutory scheme. In relation to the present dispute, those consequences include that the defence that is now alleged should have been raised by way of payment schedule. If the matter went to adjudication under s 17, then the matter could have been relied upon in the adjudication response and would then have been the subject of adjudication. To put it another way: there may well have been ... a triable issue of fact as to whether the progress claims under the contract were properly made. However, having regard to the amendments to s 13(1), that triable issue was one that should have been raised, in the first instance, by way of payment schedule.”

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