



# Payment Claims – a QLD Case Study

*MWB Everton Park Pty Ltd v Devcon Building Co Pty Ltd [2024] QCA 94*

In Queensland a Payment Claim must:

- identify the construction work or related goods and services to which they relate;
- state the amount of the progress payment that the claimant claims is payable by the respondent; and
- request payment of the claimed amount.[1]

In the recent case of *MWB v Devcon*, the Contractor (Devcon) was engaged to construct 56 townhouses. They sent what they said was a payment claim to the Principal which purportedly claimed payment of \$149,485.60 by reference to a table listing 42 trades and showing a 'contract value', 'amount previously claimed', '% complete', and 'remaining balance' for each trade.

The Court of Appeal found that the purported payment claim was not a payment claim under s68 of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (BIF Act) because it failed to comply with s68(1)(a), (b) or (c).

**Issue 1 – s68(1)(a) – failed to sufficiently identify the construction work to which it related**

The Court found that the purported payment claim did not sufficiently identify the construction work or related goods and services to which it related. The Court reaffirmed the decision in *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd* [2019] QSC 178 that a trade summary like the one submitted in this case was not sufficient. Devcon's payment claim therefore did not meet the requirements of section 68(1)(a) and so was not a payment claim under the BIF Act.

The fix:

We see trade summaries like the table referred to in *MWB v Devcon* used as the basis for payment claims all the time – do they need to be completely abolished? Not necessarily.

In *MWB v Devcon*, the Court helpfully suggested that 'Hypothetically, if the contract was to build a single domestic dwelling and the only concreting was to the driveway, a description that 50% of the concreting had been achieved would allow the party receiving the claim to understand what work the builder said had been done'.[2]

That suggestion helps for smaller claims, and potentially suggests that Devcon could have rectified its payment claim by providing a similar assessment in relation to each individual townhouse. But what about for bigger claims/bigger projects, where splitting up the pieces might not be so easy?

The Court in *KDV v Muggeridge* maintained the existing position from *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391, which said, in summary, that a payment claim satisfies the requirement to identify the relevant work if:

- it gives an item reference which refers to the contractual or other identification of the work (we recommend that this reference should match any item numbers or references in the contractual scope of works as closely as possible);
- that reference is supplemented by a single line item description of the work;
- particulars are given of the amount previously completed and claimed and the amount now said to be complete; and
- there is a summary that pulls all the details together and states the amount claimed.[3]

The Court has made clear the above list is not exhaustive (so you need to consider in each circumstance whether any additional details should be included), but it serves as an instructive guide. The claimants in *KDV v Muggeridge* and in *MWB v Devcon* may have complied with items 3 and 4, but not with items 1 and 2.

We strongly recommend that contractors amend their payment claim templates to ensure that they prompt whoever is preparing and submitting your claims to ensure they comply with the four criteria from *Clarence Street v Isis Projects* above.

Remember also that it may not matter that the other party has not taken issue with previous payment claims in the same form if that form is deficient.

### **Issue 2 – s68(1)(b) – failed to state the amount of the progress payment that the claimant claimed was payable by the respondent**

In *MWB v Devcon* the claimant's purported payment claim included the abovementioned table showing amounts and percentages against 42 trades, and then on separate pages a table titled 'Civil Works' which showed an amount due for this claim (inc GST) of \$190,957.62 and another table titled 'Stage 1' which showed an amount due for this claim (inc GST) of \$36,651.71.

The claimant argued that the claim of \$149,485.60 at the bottom of the first table was the only relevant figure, such that it was the amount of the progress payment that the claimant claimed was payable.

The Court found that it could not see that the documents forming the purported payment claim (including the email attaching the documents and the documents themselves) stated one amount which was the claimed amount of the progress payment. It was not clear how each of the amounts listed in each of the three tables related to each other (if they did at all). It therefore was not apparent what the amount being claimed was, so the payment claim did not meet the requirements of section 68(1)(b) and was not a payment claim under the BIF Act.

### The fix:

The solution here is much simpler than it was for the first issue. It's fine to use multiple sections of a payment claim for different parts of the works as long as it's clear how those sections relate. Don't include surplus information about the project, and make sure you have a very clear summary section stating the exact amount claimed for payment in that particular payment claim.

### **Issue 3 – s68(1)(c) – failed to request payment of the claimed amount**

In *MWB v Devcon* the purported payment claim referred to the amount claimed as the 'amount due this claim', but that was the furthest it went in requesting payment.

The Court considered the position set out in *Iris Broadbeach Business Pty Ltd v Descon Group Australia Pty Ltd* [2024] QSC 16 which was that even though a document did not expressly request payment of an identified amount, it met the requirement of this s68(1)(c) because: it was headed 'Progress Claim', gave a figure for a 'Total Progress Claim Value for the Month (Incl GST)', was annotated to the effect that it was submitted under the BIF Act and was accompanied by the statutory declaration required by s75(7) of the BIF Act.

The Court of Appeal in *MWB v Devcon* (whose decision overrules the lower Court's decision in *Iris*) appear to have expressly overturned the position on this issue from *Iris*, by saying that they could not see any relevant distinction between the facts of *Iris* and *MWB v Devcon*, but still 'were not persuaded by the analysis in [*Iris*]'.

Given that, the Court found that Devcon's purported payment claim did not meet the requirement of s68(1)(c), so was not a payment claim under the BIF Act.

### The fix:

This new legal position makes it harder to argue that an implied request for payment satisfies the requirement of s68(1)(c) of the BIF Act.

To avoid that issue, we recommend that payment claims either:

- explicitly say '[Name of claimant] requests payment of [amount claimed]'; or
- are titled 'Invoice' so that they are taken to satisfy this requirement, per s 68(3); or
- both.

## Summary of key takeaways for claimants

Ensure that your payment claims meet the requirements of s 68 of the BIF Act by:

- **Item 1** – amending your payment claim templates to ensure that the construction work claimed for is adequately identified by:
  - using item references which are clear and ideally which refer to the item numbers or references used in the Contract/Scope of Works;
  - supplementing each item reference with a single line item description of the work, rather than relying solely on the item or trade name and a claim amount and/or percentage;
  - giving particulars of the amount previously completed and claimed and the amount now said to be complete; and
  - summarising all the details together and clearly stating the amount claimed;

- **Item 2** – making sure that your payment claim summary clearly states the amount being claimed in that particular claim, and that if there are multiple sections of your payment claim, it is obvious how those sections relate and feed into the summary; and
- **Item 3** – explicitly requesting payment of the claimed amount and/or titling your payment claim with the word 'invoice'.

If you think a payment claim you intend to submit is likely going to require adjudication, we recommend seeking legal advice at the claim stage rather than solely for the adjudication application. This can help ensure your payment claim is compliant and that your adjudication arguments are clearly set up in the payment claim – often saving you money in the long run.

The Muscat Tanzer team has extensive experience assisting both public and private clients with making and responding to payment claims as effectively as possible. We are very happy to discuss these kinds of issues via phone or email at any time without obligation to continue with obtaining substantive legal advice. Please feel free to reach out to us with any queries you may have.

## References:

- [1] per s 68 of the Building Industry Fairness (Security of Payment) Act 2017 (Qld) (**BIF Act**).
- [2] see footnote 5 of *MWB v Devcon*, in [25] of that case.
- [3] *Clarence Street Pty Ltd v Isis Projects Pty Ltd* [2005] NSWCA 391, [33].



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