

**JUDGMENT BERGIN J** : Supreme Court of New South Wales : 9<sup>th</sup> July 2001.

**Introduction**

- 1 This litigation commenced by the filing of a Summons on 23 April 2001. The plaintiff, AB & MA Chick (Vic) Pty Ltd (In Liquidation) sues the defendant, 526 Olive Street Pty Ltd, in relation to building work in Albury carried out by the plaintiff, as contractor, for the defendant, as principal.
- 2 The contract pursuant to which the building work was carried out is dated 11 January 2001 and was varied by deed in November 2000 (the Contract). It is in the form of General Conditions of Contract AS 4300-1995 with special conditions. Pursuant to the Contract, the plaintiff provided a bank guarantee issued by the National Australia Bank in the amount of \$238,707.
- 3 On 4 May 2001 Young CJ in Eq made Consent Orders transferring the matter from the general equity list to the Construction List. On 11 May 2001 the plaintiff filed a Notice of Motion. That Notice of Motion was heard on 25 May 2001 and 6 July 2001 when Mr M Christie, of counsel, appeared for the plaintiff/applicant and Mr T Davie, of counsel, appeared for the defendant/respondent. The Notice of Motion, ultimately argued, seeks the following orders:
  1. That, pursuant to Part 13 Rule 2 of the Supreme Court Rules, judgment be given for the plaintiff in accordance with paragraph 4 of the Summons.
  2. That the defendant pay the plaintiff interest on the amount referred to in paragraph 4 of the Summons.
  3. That, upon the plaintiff by its counsel giving the usual undertaking as to damages, pending the determination of these proceedings or until further order, the defendant pay to the plaintiff the sum of \$238,707 being the proceeds of the demand made upon the National Australia Bank pursuant to bank guarantee dated 30 August 2000.
  4. That upon the payment of the sum referred to in paragraph 3 above, the plaintiff provide to the defendant a bank guarantee in the same terms as the bank guarantee referred to in paragraph 3 above.
- 4 Paragraph 4 of the Summons claims: *An order that the defendant pay the plaintiff the sum of \$100,000 being the amount withheld in respect of progress claim no 15 and certified by the Superintendent as being due and payable.*
- 5 There are therefore two claims made in this Notice of Motion, the first for Summary Judgment in the amount of \$100,000 and the second a mandatory injunction in respect of the bank guarantee.

**The Facts**

- 6 The building works related to a project for the re-development of the Westend Plaza Shopping Centre in Albury, New South Wales. On 29 November 2000 the Superintendent, Restifa and Partners Ltd, issued a Certificate of Practical Completion certifying that practical completion of the project had been achieved on 26 November 2000 prior to 6.30 am. Pursuant to Clause 37 of the Contract the defects liability period of 52 weeks commenced at 4 pm on 26 November 2000.
- 7 The Superintendent issued a preliminary handwritten list of defects, omissions and incomplete works to the plaintiff on 28 November 2000 and advised on 29 November 2000 that a typed list was to be issued on 2 December 2000 "with completion dates by which defects" were to be rectified. It continued "in accordance with Cl 37 please proceed to rectify the defects or omissions as expeditiously as possible".
- 8 On 29 November 2000 the plaintiff lodged Progress Claim 15 with the Superintendent claiming the sum of \$1,090,652. On 30 November 2000 the Quantity Surveyor certified and authorised payment of the amount of \$1,035,941 in respect of Progress Claim 15. On 4 December 2000 the plaintiff issued a Tax Invoice to the Superintendent in the amount of \$1,035,941 for Progress Claim 15.
- 9 On 6 December 2000 the plaintiff provided the Superintendent with a Statutory Declaration made by David John Jenkins, the General Manager of the plaintiff. He declared:
  4. *As at the relevant date (6 December 2000) and to the best of my knowledge and belief trade Sub-contractors and Consultants engaged by the Contractor in relation to the Works have been paid all monies due and owing to them in accordance with their Sub-contract Agreements, save for unapproved variations, claims requiring further clarification and/or further back-up information, late claims, over claimed progress claims, disputed claims, claims being adjusted by the Project Quantity Surveyor and retentions in respect of work which they have carried out or services which they have rendered for or in relation to the works.*
- 10 This Statutory Declaration was purportedly in compliance with Clause 43.2 of the General Conditions which provided:

**43.2 Payment of Subcontractors**  
*Not earlier than 14 days after the Contractor has made each claim for payment under Clause 42.1, and before the Principal makes that payment to the Contractor, the Contractor shall give to the Superintendent a statutory declaration by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor, who is in a position to know the facts declared, that all subcontractors have been paid all moneys due and payable to them in respect of work under the Contract.*

**43.3 Withholding of Payment**  
*If the Contractor fails -*
  - (a) *to provide, within 5 days of the direction by the Superintendent pursuant to Clause 43.1, the statutory declaration or documentary evidence as the case may be; or*
  - (b) *to comply with Clause 43.2,*

then notwithstanding Clause 42.1, the Principal may withhold payment of moneys due to the Contractor until the statutory declaration or documentary evidence, as the case may be, is received by the Superintendent. If the Contractor provides to the Superintendent satisfactory proof the maximum amount due and payable to workers and subcontractors by the Contractor, the Principal shall not be entitled to withhold any amount in excess of the maximum amount.

#### 43.4 Direct payment

Where the Principal is entitled to or is required to make payment to a subcontractor of a sum certified by the Superintendent, as owing to the Subcontractor under the subcontract, the Principal may, on behalf of the Contractor, make the payment directly to the Subcontractor and the amount so paid shall be a debt due from the Contractor to the Principal.

At the written request of the Contractor and out of the moneys payable to the Contractor, the Principal, may on behalf of the Contractor make payments directly to any worker or subcontractor.

- 11 On 6 December 2000 the Superintendent issued an assessment of the plaintiff's Progress Claim no 15 in the amount of \$1,035,941.
- 12 On 14 December 2000 Mr Ian Patterson of a Subcontractor, Tru Floor Services Pty Ltd (Tru Floor) telephoned the Project Manager, Mark Charles Robertson employed by the Superintendent. The following conversation occurred:  
Patterson: We haven't been paid for 3 months and are owed about \$450,000.  
Robertson: What about the stat dec you gave us a few months ago saying you've been paid?  
Patterson: Well, we signed those under duress because we had to. If we didn't sign, we'd never get work from Chicks again. There are only two big builders to work for in this town, and Chicks are one of them. We think you should withhold payment from Chicks and pay us direct.  
Robertson: If what you say is true you have both falsified stat decs. We are not going to recommend payment directly to you as we have no contract with you. I'll take this up with Chicks to hear their side of the story.
- 13 The Statutory Declaration to which Mr Robertson referred which Tru Floor had provided was made on 13 October 2000 in which he stated:  
5. As at the relevant date (13 October 2000) I confirm that all moneys due and payable to Sub-contractor in relation to the works have been paid to them save for unapproved variations and retentions in respect of any work which they have carried out or materials or goods which they have supplied or services which they have rendered for or in relation to the works.
- 14 As the result of the conversation between Mr Patterson and Mr Robertson, the Superintendent advised the defendant to withhold payment in relation to Progress Claim 15 until it had contacted the plaintiff.
- 15 On 15 December 2000 Mr Robertson spoke to Mr Jenkins on the telephone. Mr Robertson claimed in his affidavit that Mr Jenkins said: *I've met with Tru Floor and I can explain the differences between us. Firstly the amount they claim - some of it's not due yet. Secondly, they've recently cashed a cheque I previously told them to hold, and thirdly, we've got a dispute over variations. I suggest the way forward is for you to withhold an amount of \$100,000, which is about the amount of the disputed variations.*
- 16 On 18 December 2000, after further discussion with the Superintendent, the plaintiff wrote to the Superintendent enclosing a further statutory declaration. It is apparent that two subcontractors had been discussed, Leffler Simes Pty Ltd and Tru Floor. The covering letter stated:  
1. My arrangements with Steve Camillo of Leffler Simes Pty Ltd on 6 December '00 were that we would give them a cheque for approximately \$10,000 immediately and upon being paid our current claim we would make up the difference to a total of \$30,000 prior to the Christmas break, with the remainder of the claims would be paid next year. That day the writer, hand delivered a cheque in the sum of \$11,000 to Trevor Patten at Westend Plaza site as agreed and upon the receipt of payment for our November claim we will forward the balance as per our agreement with Steve Camillo.  
2. In respect of Tru Floor Service, their contract sum is \$493,615.47 for which they have been paid \$449,966.24. The abovementioned contract sum is subject to a cash retention of 5% which is yet to be claimed. Tru Floor Service Invoice no.60394 for the sum of \$86,824.05 (excluding GST) fell due for payment on Friday 15th December 00. Tru Floor have claimed variations in excess of \$125,000 of which some have been approved and paid and others are yet to be resolved.  
Under the circumstances we request that you withhold \$100,000 from our current progress claim payment until we can further discuss the variations and claims with Tru Floor and arrive at a satisfactory resolution.  
We would appreciate your release and payment of our progress claim for the sum of \$935,941 with the remaining of \$100,00 prior to Christmas. We appreciate your assistance in this matter.
- 17 The statutory declaration submitted and dated 18 December 2000 stated:  
4 As at the relevant date (6.12.2000) and to the best of my knowledge and belief trade Sub-contractors and Consultants engaged by the Contractor in relation to the works have been paid all moneys due and owing to them in accordance with their Sub-contract agreements **and/or agreed financial payment arrangements**, save for unapproved variations, claims requiring further clarification and/or further back-up information, late claims, over claimed progress claims, disputed claims, claims and retentions in respect of work which they have carried out or service which they have rendered for in relation to the Works. (Emphasis added)

5. As at 18 December 2000 and to the best of my knowledge and belief Chick have resolved and agreed the terms of payment with Leffler Simes Pty Ltd as per the verbal agreement as at the relevant date.
6. As at 18th December 2000, and to the best of my knowledge and belief Chick are reviewing Tru Floors Service Pty Ltd Sub-contractor/Variations and will reach agreement on quantum meruit and payment terms within the next few days. Chick furthermore agrees to \$100,000 being withheld from progress claim no 15 against Tru Floor Service Pty Ltd's pending variations until this matter is resolved.
- 18 On 19 December 2000 after receipt of these documents the Superintendent advised the defendant that the plaintiff had advised it that the plaintiff's dispute with Tru Floor regarding payment related to "unapproved variations". It recommended the withholding of \$100,000 from the claim until the variations were resolved.
- 19 On 22 December 2000 the plaintiff gave notice to the defendant pursuant to Clause 44 of the General Conditions that the defendant was in substantial breach of Clause 42.1 of the General Conditions by failing to make payment of \$935,941. It called upon the defendant to show cause by 5 pm on 29 December 2000 why the plaintiff should not exercise its right to suspend the works until the breach had been rectified.
- 20 On 22 December 2000, the Superintendent responded rejecting such notice and advising that the claim was "ready to be paid on 14.12.2000" but was "stopped" due to "your false declaration of payment of all subcontractors and consultants". The Superintendent advised that the defendant had advised it that the progress claim 15 in the amount of \$935,9541 had been paid as of 3 pm on 22 December 2000 and that it was therefore not in breach.
- 21 There was apparently a problem with the air conditioning system at the Shopping Centre with some tenants complaining that they were too cold and others that they were too hot. On 22 December 2000 the Superintendent gave notice to the plaintiff to "balance the air conditioning system" before Christmas.
- 22 On 20 December 2000 Tru Floor's solicitor James G Sloan wrote to the Superintendent (Ex. A. ann "O"). Mr Sloan confirmed that the Superintendent had advised Tru Floor that Mr Jenkins had made a statutory declaration that Tru Floor had been paid \$450,000. Mr Sloan advised that if such an assertion had been made it was false. His letter continued: *The total amount received by my client is \$299,386.90. My client has received a further for \$114,520.71 dated 17 November 2000 but that cheque was not banked on advice from David Jenkins that there was insufficient funds in the account to meet payment.*
- At present (including the \$114,520.71 cheque which has not yet been paid) the total outstanding accounts rendered to Chick in respect to Westend Plaza is \$377,870.65.*
- To date by client has not been notified of any disputes relating to its invoices. I am instructed that, notwithstanding the advice from my client that it has not been paid and the apparent inaccuracy of the affidavit or statutory declaration provided by Mr Jenkins, you still propose to release \$1.1m to Chick. This is despite the fact you are entitled to pay subcontractors direct where payment has not been made by the contractor.*
- My client has grave concerns about the solvency of Chick. Comments made by Mr Jenkins to my client indicate that even if payment is released by you, my client's accounts will not be paid.*
- 23 It is not clear whether this letter had been received by the Superintendent prior to the time at which the defendant paid the \$935,941 to the plaintiff.
- 24 On 3 January 2001 the plaintiff wrote to the Superintendent and advised as follows: *We authorise the Principal and/or their financier GE Capital Australia to pay Tru Floor Service Pty Ltd by bank cheque the sum of \$95,927.76 on our behalf in respect of contract works and approved variations assessed due and payable on 15 December 2000. ...*
- We request that the balance of the \$100,000 being \$4,072.24 be deposited in (the plaintiffs) National Australia Bank account.*
- 25 On 10 January 2001 Tru Floor's solicitor Mr Sloan wrote to Mr Jenkins. That letter includes the following: *The cheque for \$114,520.21 was dated 17th November 2000. It was handed to my client on 6th December but you requested that it not be banked until further notice. You did not give further notice although the cheque was finally deposited and cleared on 20th December 2000.*
- I note you are prepared to consent to a direct payment being made by the Principal to my client of the \$95,927.76. Could you please authorise this direct payment to be made now.*
- 26 On 11 January 2001 the Superintendent advised the plaintiff that the rectification of defects was not completed. It referred particularly to the substantial defect of the imbalance in the air conditioning and that it was causing great discomfort to the tenants and shoppers. The Superintendent advised the plaintiff that "pursuant to Clause 44 of the General Conditions of Contract" notice was given that the plaintiff was currently in substantial breach of Clause 44.2(d) by failing to follow the direction of the Superintendent in the rectification of the works pursuant to Clause 30.3 of the Contract.
- 27 The Superintendent further advised that it required the plaintiff to show cause why the Principal should not exercise its rights referred to in Clause 44.4(a) and take the whole of the outstanding works out of the plaintiff's hands. The Superintendent advised that if the plaintiff failed to show cause it would have the works completed by others and in accordance with Clause 44.6 of the General Conditions the associated costs would be deducted

- from the Contract. The Superintendent advised that pursuant to Clause 44.4 the defendant had suspended any further payments to the plaintiff.
- 28 On 16 December 2000 the Superintendent advised that it had received notice that the plaintiff had appointed an interim administrator and that pursuant to Clause 44.11(d)(iii) of the Contract the defendant exercised its right pursuant to Clause 44.4(a) and had taken the remaining works out of the plaintiff's hands.
- 29 On 7 February 2001 the Administrator was appointed as liquidator of the plaintiff.
- 30 During January, February and March 2001 the liquidator's solicitors sought undertakings from the defendant that it would not call upon the bank guarantee without five day's notice to the liquidator. The defendant refused to give such an undertaking however on 2 March 2001 it did undertake that it would act in accordance with its obligations and entitlement under the Contract. It complained further at that time that the air conditioning was only operating at 50% of specified output, that the Centre had been flooded twice, apparently because of leaks and drainage design problems and that there was substantial incomplete and faulty works throughout the Centre. It warned that the extent of the loss may exceed the balance retained under the Contract and the bank guarantee.
- 31 On 18 April 2001 the defendant advised the plaintiff that it was evident the company would be required to call on the bank guarantee and that there were "substantial incomplete and defective works". It stated: *The company has been invoiced for a substantial number of these items and details may be obtained by you from Restifa and Partners, the project managers.*
- To meet these requests, the company will call upon the bank guarantee and its proceeds will be paid to a separate bank account. The company will advise of claims against the guarantee during the course of the period.*
- The bank guarantee was called upon on 18 April 2001 and was paid by the National Australia Bank to the defendant.*
- 32 Tru Floor has made a claim upon the Superintendent for \$95,927.76 on 15 February 2001. The Superintendent has advised Tru Floor that the defendant's claims against the plaintiff for defective works may exceed the balance of the moneys retained.
- 33 The Superintendent has made an assessment of the costs of the rectification and completion of the works as being in the order of \$1,330,000 which far exceeds the combined amount of the moneys retained and the bank guarantee. Mr Robertson has assessed the amounts payable in respect of the air conditioning at \$750,000.

#### **The Plaintiff's Motion**

- 34 The affidavits relied upon by the plaintiff were those of Christopher Mel Chamberlain sworn 15 May 2001 and 4 July 2001, Brian Robert Curphey sworn 24 May 2001 and David John Jenkins sworn 29 May 2001, 13 June 2001 and 28 June 2001. The affidavits relied upon by the defendant were those of Mark Charles Robertson sworn 24 May 2001 and 18 June 2001 and Michael Flemming sworn 24 May 2001.

#### **Summary Judgment for \$100,000**

- 35 Mr Jenkins' affidavits disclose that on 17 October 2000 the Superintendent wrote to the plaintiff in the following terms: *We thank you for issuing Statutory Declarations on the 13th October 2000 from some of your major Subcontractors in respect that they have been monies due on the project and they have paid their workers and subcontractors on the project. We however still require a blanket Statutory Declaration from AB and MA Chick Pty Ltd in respect of payment of all your Subcontractors and employees to date on the project.*

*This Statutory Declaration was required prior to our payment of Progress Claim no 13 which has now been paid. Please provide the above statutory declarations as soon as possible. If the above is not provided your next Progress Claim will be held pursuant to Clause 43.3 until such time as the above statutory declaration is received.*

- 36 On 2 November 2000 the Superintendent wrote further to Mr Jenkins as follows: *We refer to your advice of 2/11/00 that you are unable to provide a blanket statutory declaration that all your workers and subcontractors on the Westend Plaza Redevelopment Project, Albury have been paid as at this date as required by Clauses 43.1 and 43.2 of the contract. Therefore pursuant to Clause 43.3(b) we request that you submit a statutory declaration of the outstanding payments that are currently due to your workers and subcontractors.*

*In accordance with Clause 43.4 it is proposed that the Principal will make payment, on your behalf, directly to the above subcontractors from this month's progress claim. Please submit the above as soon as possible so that your current progress claim can be approved.*

It is apparent that this was not done.

- 37 Mr Jenkins denied in cross examination that he had told Tru Floor not to bank the cheque because there were insufficient funds. His affidavit evidence was: *All of the Subcontractors that were owed money by the Plaintiff at the time of making by statutory declaration of 6 December 2000, including Tru Floor Service Pty Ltd, had received cheques prior to that time in respect of claims that were due and owing in accordance with their relevant subcontract agreement and clause 4 of my statutory declaration. The cheques were delivered to the subcontractors with the request that they not bank the cheques until after the weekend. This request was made on the basis that I have been told by Sam Restifa that payment of Progress Claim 15 would be made on Friday or Monday of next week. All cheques delivered by the plaintiff to the various subcontractors were subsequently paid by the plaintiff's bank on presentation. (par. 38 affd. 25.5.2000)*

- 38 Mr Jenkins was cross examined during the hearing of the Motion. He denied that he had told Mr Patterson there were insufficient funds. He said that he was motivated to save interest between the time that he had provided the cheque to the subcontractors and the time that the progress payment would be banked. It is apparent that the bank overdraft limit was \$1.5m at least at some stage in the year 2000. However Mr Jenkins was unable to say what the permitted overdraft limit was in December 2000.
- 39 Mr Jenkins admitted that there was a chance that the bank might dishonour the cheque but he said that he was of the view that it was a "remote" chance. The words that Mr Jenkins claims he used to the subcontractors, including Tru Floor, were "do me a favour put it in after the weekend". If that is what was said, one would have expected Tru Floor to bank the cheque somewhere around the 12th December 2000. The evidence disclosed that Tru Floor's cheque was not banked until 20th December 2000.
- 40 Whenever the cheques were banked by the Subcontractor, interest would have been charged because at the relevant times the overdraft was at least \$1.1 million as at 6 December 2000 and as at 18 December, \$1.2 million. Mr Patterson was not called to give evidence, however his claims that he was informed not to bank the cheques because there were insufficient funds are contained in the letters tendered by the plaintiff (Ex. A) to which I have already referred.
- 41 There is no evidence before me that Mr Jenkins responded to the claims made in Tru Floor's solicitor's letter in December 2000 or January 2001 claiming that it had been informed not to bank the cheque because there were insufficient funds. These denials only surfaced during the course of the hearing of this Motion.
- 42 If Mr Jenkins had informed Tru Floor not to bank the cheque because of insufficient funds the veracity of the claims made in the Statutory Declarations of 6 December 2000 and 18 December 2000 are affected. In any event the detail provided in the Statutory Declaration of 18 December 2000 makes no reference to the provision of cheques with a request to withhold payment. Mr Jenkins must have known as at 18 December 2000 when he made the Statutory Declaration that Tru Floor's cheque had not been banked. This seems inconsistent with a view that such a cheque was to be banked after the weekend immediately after Wednesday 6 December 2000.
- 43 It seems to me that issues which arise for decision include whether the cheque provided to Tru Floor was "a payment" of the accounts of the subcontractors; whether the terms of the statutory declaration were false; whether the Statutory Declaration complied with Clause 43.2 of the Contract; whether the defendant was entitled to withhold the whole of Progress Claim 15; whether the plaintiff is entitled to retain the \$935,941 it has already been paid and whether the payment of \$935,941 by the defendant estops it from denying that \$100,000 is now due and payable to the plaintiff. These are just some of the issues that arise in respect of the claim for \$100,000 which the plaintiff agreed could be withheld until the Tru Floor dispute could be resolved and of which the plaintiff authorised the defendant to pay \$95,927.76 direct to Tru Floor.
- 44 The plaintiff submitted that the defendant is not entitled to set off any amount due to the defendant by the plaintiff against any Progress Claim due and payable and in event there is no such amount owed; **Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd** (1997) 14 BCL 215.
- 45 The defendant submitted that the statutory declaration of 18 December 2000 together with a covering letter represented that the plaintiff had paid all moneys to the subcontractors "and/or agreed financial payment arrangements" with subcontractors. It is submitted that the statutory declaration of 18 December 2000 was misleading and that if the defendant had been aware of the true position it would not have been obliged to pay and would not have paid the progress claim no 15.
- 46 Alternatively the defendant submitted that there is an implied condition in the Contract that if the Statutory Declaration required to be provided pursuant to the Contract is false, the Principal is not required to make the payment. It was submitted that the Statutory Declaration was either false and/or not a statutory declaration required by the Contract. The defendant also makes claims pursuant to s 52 of **Trade Practices Act**.
- 47 **Algons Engineering**, relied upon by the plaintiff, was a case in which the issues in relation to the Statutory Declaration were not raised. In **Algons Engineering** no requests were made of the claimants for evidence or particulars in respect of the Progress Claims. The issues in that case centred upon the claim for the progress payment and the counter claim that the defendant did not have to make the progress payment without taking into account a pleaded equitable set off.
- 48 Thus the position is quite different in this case. It seems to me that there are serious issues to be tried in respect of the statutory declaration issue and that it is not appropriate to enter summary judgment in this case. This is certainly far from a very clear case in which such a judgment may be entered: **Dey v Victorian Railways Commissioners** (1949) 78 CLR 62; **General Steel Industries Incorporated v Commissioner for Railways (NSW) & Ors** (1964) 112 CLR 125; **Fancourt v Mercantile Credits Ltd** (1983-1984) 154 CLR 87 and **Webster & Anor v Lampard** (1993) 177 CLR 598.

#### **Mandatory Injunction - Bank Guarantee**

- 49 During submissions I asked Mr Christie whether the "usual undertaking as to damages" forming part of Order 3 sought in the Notice of Motion was still proffered. Mr Christie frankly conceded it could not be and withdrew those parts of the Order. There is no undertaking offered in respect of the mandatory injunction sought.
- 50 This factor weighs against the plaintiff in the application particularly having regard to the approach to be adopted in applications for interlocutory mandatory injunctions: **CS Phillips Pty Ltd v Baulderstone Hornibrook Pty**

*Ltd* NSWSC Giles J, unreported 26 October 1994. Although the absence of an undertaking does not, of itself, immediately defeat such an application it is in this instance a significant matter.

- 51 The liquidator was appointed to the plaintiff in early February this year. The bank guarantee was not called upon until the latter part of April this year. The second Order sought in the Notice of Motion in respect of this aspect of the application is that, on the payment of the money to the plaintiff, it would provide to the defendant a bank guarantee in the same terms. In the circumstances of this case, on the evidence before me, I am not satisfied that such a guarantee could be provided. Certainly if an undertaking as to damages can not be provided it would be very difficult to see how a bank guarantee could be provided.
- 52 Mr Christie has helpfully referred me to Hunter J's judgment in **Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd**, NSWSC, unreported 2 December 1999. In that case a bank guarantee was called upon in respect of a contract in which a claim was made that the party calling upon the guarantee had become entitled to exercise a right under the contract in respect of the security. The Clauses in the contract in the case before Hunter J are similar to those in this case, with one significant difference. Clause 42.10 in the contract before Hunter J in **Abigroup** was as follows:  
**42.10 Set Offs by the Principal**  
*The Principal may deduct from moneys due to the Contractor any money due from the Contractor to the Principal otherwise than under the Contract and if those moneys are insufficient, the Principal may, subject to clause 5.5, have recourse to retention moneys and, if they are insufficient, then to security under the Contract.*
- 53 42.8 of the Contract in this case is as follows:  
**42.8 Set Offs by the Principal**  
*The Principal may deduct from moneys due to the Contractor any moneys due from the Contractor to the Principal under the Contract or otherwise and if those moneys are insufficient, the Principal may, subject to clause 5.6 have recourse to retention moneys and, if they are insufficient, then to securities under the Contract. (Emphasis added)*
- 54 The difference between the case before Hunter J and this one is that, in this case, the set off able to be claimed by the Principal relates to moneys due both under the Contract or otherwise. Before Hunter J the contract limited the Principal's capacity to deduct from moneys due to the Contractor moneys due "otherwise than under the contract".
- 55 The defendant claims that there is an issue to be tried in respect of the direction given to the plaintiff by the Superintendent to rectify works pursuant to Clause 37 and the entitlement in the circumstances for the defendant to call upon the guarantee. There is no issue that the Contract provides that the period in which a party must provide a notice in writing is "nil".
- 56 The defendant submitted that the balance of convenience is in the defendant's favour and that there is no evidence or suggestion that the making of a demand upon the guarantee has caused the plaintiff harm that cannot be compensated in damages. Certainly there is evidence before me that third parties, they being Mr and Mrs Jenkins, provided security to the bank in respect of the provision of the guarantee to the defendant.
- 57 If the payment was made to the plaintiff there is absolutely no evidence to suggest that there would be any capacity in the defendant to recover such money at the end of a hearing on the merits if such an amount is found to be due to the defendant. It must be also be remembered that it is not alleged on the pleadings that the defendant acted wrongfully in taking the works out of the hands of the plaintiff.
- 58 I am satisfied that there is a serious issue to be tried in respect of the defendant's entitlement to call on the bank guarantee and that the balance of convenience favours not making an order of the kind sought by the plaintiff, particularly having regard to the fact that no undertaking as to damages has been proffered and that it is most unlikely that the plaintiff could comply with order 4 that it seeks in its Notice of Motion.

#### Orders

- 59 The plaintiff's Notice of Motion is dismissed. The matter is listed for further directions on Friday 13 July 2001 at which time I will hear the parties in respect of an order as to costs in respect of this Motion should they not be able to agree on such an order.

Mr M Christie (Plaintiff/Respondent) instructed by Kell Moore Solicitors  
Mr T Davie (Defendant/Applicant) instructed by Blake Dawson Waldron