

Amflo Constructions P/L & George Khouri v Anthony Jefferies (1) Westport Plumbing P/L (2)

JUDGMENT HIS HONOUR Campbell J : Supreme Court of New South Wales : 17th September 2003

Nature of the Case

- 1 This case concerns whether a purported adjudication under the **Building and Construction Industry Security of Payment Act 1999** ("SOP Act") is valid. It turns on whether the application for adjudication was made within the time required by that Act.

Facts Giving Rise to the Dispute

- 2 The First Plaintiff ("the Builder") is carrying out construction work at 3 Railway Parade Burwood. On 9 April 2003 it entered into a construction contract as defined in the SOP Act with the Second Defendant ("the Subcontractor").
- 3 On 10 July 2003 the Subcontractor served the Builder with a progress claim for \$21,960.42. It is common ground that this was a valid progress claim within the meaning of the SOP Act. For the whole of the rest of July, the Builder did nothing in response to that progress claim.
- 4 On 31 July 2003 the Subcontractor served on the Builder a notice under section 17(2) of the SOP Act, it said:
"Notice under s.17(2) of the Building and Construction Industry Security of Payment Act 1999 NSW
In response to Westport Plumbing Pty Ltd's "WPPL" Payment Claim (Tax Invoice/Progress Claim No.1) dated the 10th July 2003 for \$21,960.42 including gst, Amflo Constructions Pty Ltd "ACPL" has failed to provide a Payment Schedule within the time allowed by the Building and Construction Industry Security of Payment Act 1999 NSW. As a consequence "ACPL" became liable to pay the whole amount of the claim on the due date. The whole amount has not been paid.
Notwithstanding the above, "WPPL" has elected to apply for Adjudication of the Payment Claim. Further to this, "ACPL" has 5 business days in which to serve a Payment Schedule or pay the amount in full whereby if, within that time "ACPL" fails to pay the whole amount, "WPPL" will reserve its rights to proceed to Adjudication. If "ACPL" also fails to serve a Payment Schedule, "ACPL" will be barred from lodging an Adjudication Response pursuant to s.20(2A) of the "Act."
- 5 The Builder served a Payment Schedule on 4 August 2003, which said that the Builder proposed to pay \$1,683.67 of the claimed progress claim, and gave reasons.
- 6 On 20 August 2003 the Subcontractor made an adjudication application. This resulted in the appointment of the First Defendant as adjudicator.
- 7 On 1 September 2003 the First Defendant issued his determination, which was that the Subcontractor was entitled to the whole of the progress payment which it claimed, and the Builder was liable to pay 100% of the fees associated with the adjudication process.
- 8 The Builder asserts that the adjudication application made by the Subcontractor on 20 August 2003 is invalid, because it was made too late. It submits that in consequence the First Defendant had no jurisdiction to determine that purported application.
- 9 On 9 September 2003 the Builder commenced proceedings seeking declarations that these contentions were correct, and an order in the nature of *certiorari* correcting the purported determination of 1 September 2003 and setting aside the award to the Subcontractor. The matter came on for argument before me in the Duty Judge List on 11 September 2003.
- 10 The First Defendant has filed an appearance in which he submitted to the orders of the Court save as to costs. He did not take part in the oral argument.

Relevant Provisions of the SOP Act

- 11 Significant amendments were made to the SOP Act by the **Building and Construction Industry Security of Payment Amendment Act 2002**. That 2002 Act commenced on 3 March 2003. The 2002 Act has itself been repealed, on 22 July 2003, by the **Statute Law (Miscellaneous Provisions) Act 2003**, Section 4 and Schedule 3. An explanatory note to that Schedule states (correctly):
"... in relation to the repeal of amending Acts, it should be noted that the Acts are repealed simply to rationalise the legislation in force and that the repeals have no substantive effect on the amendments made by the Acts or any associated provisions ...
Section 30(2) of the Interpretation Act 1987 ensures that when an Act is amended or repealed, no amendment made by the Act is affected."
- 12 All the events relevant to this dispute happened after 3 March 2003. Hence it is the SOP Act in its amended form which I shall consider.
- 13 There is a recurring pattern in provisions of the SOP Act whereby some particular step which the Act makes provision for must be taken within either the time required by the relevant construction contract, or a time laid down by the SOP Act itself. The case was argued on the basis that no relevant times were laid down by the construction contract. Hence in quoting from the Act, I shall omit all reference to times laid down by the contract.
- 14 It is also a repeated theme of the SOP Act that in certain circumstances a claimant will have a right to suspend work or suspend supplying goods and services. Another repeated theme concerns what is to happen if a claimant chooses to go to court rather than have its claim adjudicated. I also omit both of those matters from the provisions quoted.

15 The following provisions of the Act are relevant:

“4 In this case: ...

adjudication application means an application referred to in section 17 ...

adjudication response means a response referred to in section 20 ...

claimant means a person by whom a payment claim is served under section 13 ...

payment claim means a claim referred to in section 13

payment schedule means a schedule referred to in section 14 ...

respondent means a person on whom a payment claim is served under section 13

Part 2 Rights to Progress Payments

8(1) On and from each reference date under a construction contract, a person:

(a) who has undertaken to carry out construction work under the contract ...

is entitled to a progress payment.

11(1) A progress payment under a construction contract becomes due and payable: ...

(b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.

Part 3 Procedure for recovering progress payments

Division 1 Payment claims and payment schedules

13(1) A person referred to in section 8(1) 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. ...

14 Payment schedules

(1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule:

(a) must identify the payment claim to which it relates, and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If:

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

(b) the respondent does not provide a payment schedule to the claimant: ...

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

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.

15 Consequences of not paying claimant where no payment schedule

(1) This section applies if the respondent:

(a) becomes liable to pay the claimed amount to the claimant under section 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allow by that section, and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may:

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17(1)(b) in relation to the payment claim, ...

16. Consequences of not paying claimant in accordance with payment schedule

(1) This section applies if:

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

(b) the respondent provides a payment schedule to the claimant: ...

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

(c) the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and

(d) the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may:

(i) recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17 (1) (a) (ii) in relation to the payment claim, ...

Division 2 Adjudication of Disputes

17. Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an "**adjudication application**") if:

(a) the respondent provides a payment schedule under Division 1 but:

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

- (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or
 - (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1) (b) applies cannot be made unless:
- (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
 - (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.
- (3) An adjudication application:
- (a) must be in writing, and
 - (b) must be made to an authorised nominating authority chosen by the claimant, and
 - (c) in the case of an application under subsection (1) (a) (i)---must be made within 10 business days after the claimant receives the payment schedule, and
 - (d) in the case of an application under subsection (1) (a) (ii)---must be made within 20 business days after the due date for payment, and
 - (e) in the case of an application under subsection (1) (b)---must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and ...

20. Adjudication responses

- (1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the "adjudication response") at any time within:
- (a) 5 business days after receiving a copy of the application, or
 - (b) 2 business days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later. ...
- (2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14 (4) or 17 (2) (b). ...

The Rival Contentions

- 16 It is common ground between the Builder and the Subcontractor that:
- (1) The progress claim served on 10 July 2003 was a valid claim within the meaning of the SOP Act;
 - (2) The notice under section 17(2) which was served on 31 July 2003, was served within the time required by section 17(2)(a),
 - (3) The payment schedule which the Builder served on 4 August 2003 was within the five business days required under section 17(2)(b), and
 - (4) The adjudication application lodged on 20 August 2003 complies with all the requirements of section 17(3) in so far as those requirements relate to the form of the application, who it must be made by, and to whom it must be made.
- 17 The difference between the Builder and Subcontractor concerns whether the adjudication application made on 20 August 2003 was made in time.
- 18 The Builder contends that the payment schedule which was served on 4 August 2003 was a "payment schedule under Division 1" in which the scheduled amount was less than the claimed amount. Hence, it says that the application for adjudication is one made under section 17(1)(a)(i). Thus, the Builder argues, section 17(3)(c) requires the application to be made within 10 business days after the Subcontractor received the payment schedule. The payment schedule was served on 4 August 2003; 10 business days after 4 August 2003 is 18 August 2003; hence the adjudication claim made on 20 August 2003 is two days too late.
- 19 The Subcontractor contends that the application for adjudication is one made under section 17(1)(b). Thus, the Subcontractor says, section 17(3)(e) applies. The "end of the 5 day period referred to in sub section (2)(b)" is arrived at by starting from 31 July 2003 (the day when the Subcontractor gave notice, under section 17(2)(a) of intention to apply for adjudication of the payment claim), adding on five business days from 31 July 2003 (which takes one to 7 August 2003), and then adding on a further 10 business days (which takes one to 21 August 2003). Thus, the Subcontractor says, the adjudication application of 20 August 2003 was made within time.

Assistance from a Purposive Construction?

- 20 Section 3 of the SOP Act says;

"3. Object of Act

- (1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
 - (a) the making of a payment claim by the person claiming payment, and
 - (b) the provision of a payment schedule by the person by whom the payment is payable, and

- (c) the referral of any disputed claim to an adjudicator for determination, and
(d) the payment of the progress payment so determined.
- (4) It is intended that this Act does not limit:
(a) any other entitlement that a claimant may have under a construction contract, or
(b) any other remedy that a claimant may have for recovering any such other entitlement.”
- 21 Part 2 of the SOP Act ensures that, even if a construction contract does not make provision for the making of progress payments, a person who has undertaken to carry out construction work under the contract, or who has undertaken to supply related goods and services under the contract, is entitled to periodical progress payments, to interest on unpaid progress payments, and to some rights of security concerning unpaid progress payments. Further, the right to a progress payment exists even if the person who is obliged to make the progress payment has not itself been paid money by some third party.
- 22 Part 3 of the SOP Act sets out a procedure for recovering progress payments, whereby payment claims can be made periodically, and the person on whom the payment claim is made has the opportunity to reply to that claim with a payment schedule under section 14. There is no obligation for a person on whom a payment claim is served to reply with a payment schedule. If no payment schedule is served, however, section 15 provides for the person on whom the payment claim was served to be liable to pay the amount of that payment claim. That liability is one which the claimant can enforce as a debt in a court, or through the making of an adjudication application.
- 23 If a respondent chooses to provide a payment schedule which acknowledges that some money is owed to the claimant, and the respondent does not pay the amount of money it acknowledges is owed, the claimant has the same sort of rights, concerning the amount which was acknowledged but not paid, as it would have had concerning the amount claimed if no payment schedule has been served at all.
- 24 If a payment schedule is served, which disputes all or part of the claimed amount, the claimant can also apply for adjudication concerning the disputed amount. Adjudication is required, under section 21(3) to be determined as expeditiously as possible, and in any case within 10 business days after the date on which the adjudicator notified the claimant and respondent of his or her acceptance of the application, or such further time as the claimant and the respondent might agree. Once an adjudicator’s determination has been served, if the determination is that the respondent is required to pay an adjudicated amount, the respondent must pay that amount within five business days of the determination being served, or such later date as the adjudicator has determined. If payment is not made within that time, the claimant can request an adjudication certificate (section 24(1)) which may then be filed as a judgment for debt in a court (section 25(1)).
- 25 A fundamental feature of the legislation is that, apart from the fact that parties to a construction contract cannot contract out of the rights given by the legislation (section 34) nothing in Part 3 of the Act (section 13-32 inclusive) affects any of the rights that parties to a construction contract have (section 32(1)). The concern of the Act is with maintaining the cash flow of claimants, by enabling them to recover quickly amounts which the adjudication process says they are entitled to. It is possible for the person who pays the amount of money which an adjudication has found due to seek to reclaim that money, in court proceedings which decide what the ultimate legal rights of the parties are. An evident purpose of the Act is that, if there is to be such litigation, it will start from a position where the claimant has been paid the amount which the adjudication process has decided should be paid.
- 26 The purposes which can be ascertained from considering the Act as a whole would be equally well advanced by the contention of the Builder as by the contention of the Subcontractor.

Assistance from Extrinsic Aids to Construction? – Second Reading Speech

- 27 Section 17 of the SOP Act was completely replaced by the amendment which came into effect on 3 March 2003. The second reading speech for the **Building and Construction Industry Security of Payment Amendment Bill 2002** was given in the Legislative Assembly on 12 November 2002 (Hansard page 6541). In his speech the Minister said: *“The main purpose of the Act is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover progress payments. The Government wanted to stamp out the practice of developers and contractors delaying payment to subcontractors and suppliers by ignoring progress claims, raising spurious reasons for not paying, or simply delaying payment. ... The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed dispute resolution procedure. But meanwhile the claimant’s entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid ... Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act there will be instances when the progress payment determined by the adjudicator will be more or less than the entitlement finally determined to be due under the contract. However, it is better that progress payments be made promptly on an interim basis, assessed by an independent party, rather than they be delayed indefinitely until all issues are finally determined.*

Presently, when a respondent fails to pay the claimant by the due date for payment under the contract, the claimant's only recourse to enforce payment is to commence proceedings in a court. The Bill will give the claimant another option. The claimant will be able to opt to have an adjudicator determine the amount of the progress payment that is due. This is an "optional adjudication". The claimant will still be able to proceed to adjudication earlier if the respondent provides a payment schedule and the scheduled amount is less than the amount claimed. The benefit to the claimant of proceeding with an optional adjudication rather than commencing proceedings in a court is that the claimant will then be able to use the adjudication certificate to obtain judgment expeditiously and without a court hearing. The claimant will be able to initiate an optional adjudication when the respondent fails to provide a payment schedule within time and fails to pay the amount claimed, or the respondent provides a payment schedule but fails to pay the whole of the scheduled amount."

- 28 While the Minister's statement in the second reading speech clearly states the general purposes which the Bill was seeking to achieve, those statements of general purpose do not assist in resolving the point of fine detail upon which this case turns.

Assistance from Extrinsic Aids to Construction? - The Departmental Booklet

- 29 The Builder tendered a booklet entitled "Government Information Kit" published in March 2003 as a guide to the Act. It includes an "adjudication application checklist" which says: "In accordance with section 17 of the Act, the time for lodging an adjudication application is: ...
- c. where the claimant did not receive an initial payment schedule within 10 business days and the full amount of the payment claim was not paid on the due date for payment - .
- i. the claimant has 20 business days from the due date for payment to notify the respondent of the claimant's intention to apply for adjudication; and
- ii. the respondent has 5 business days to provide a payment schedule; and
- iii. the claimant has 10 business days after receipt of the payment schedule to make the application. If the respondent does not provide a payment schedule, the application must be made within 10 business days of the expiry of the 5 business days period provided to the respondent."

- 30 The Builder says that this is something I should take into account as an aid to construction.

- 31 The *Interpretation Act 1987* section 34(1) says:

"34. Use of extrinsic material in the interpretation of Acts and statutory rules

(1) In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or
- (b) to determine the meaning of the provision:
- (i) if the provision is ambiguous or obscure, or
- (ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable."

- 32 Section 34(2) goes on to give a list of material that may be considered in interpretation of a provision of an Act. A booklet like the Government Information Kit does not fall within the list in section 34(2). Neither do I regard it as falling within section 34(1). There is no reason to believe that the contents of the Kit have at any time come to the attention of Parliament, let alone been taken into consideration by Parliament in deciding what to include in the SOP Act.

- 33 The portion I have quoted from the Kit is, in any event, inconsistent with another extract from the Kit (information sheet 2, page 4) which says: "If you did not receive a payment schedule and decide to make an adjudication application, you must give the respondent an opportunity to provide a payment schedule.

In such circumstances you must, within 20 business days after the due date for payment, give the respondent notice that the respondent has 5 business days to serve you with a payment schedule. You then have another 10 business days to make an adjudication application after the end of the 5 business days period provided to the respondent to serve the payment schedule."

- 34 It is the extract from the Kit which I have just quoted which gives the correct construction of the legislation, not the extract which I have first quoted.

The Correct Construction

- 35 The Subcontractor is correct in the construction of the Act for which it contends.

- 36 The question of construction hinges on what is meant by the expressions "provides a payment schedule under Division 1" in section 17(1)(a), and "fails to provide a payment schedule to the claimant under Division 1" in section 17(1)(b). Each of those expressions contains a syntactic ambiguity. The ambiguity concerns whether "under Division 1" is an adjectival phrase describing "payment schedule", or an adverbial phrase qualifying "provides" or "fails to provide".

- 37 The definition of “*payment schedule*” in section 4 requires one to identify what is “*a schedule referred to in section 14*”. The sub sections in section 14 have differing functions. Section 14 (1) is in part a facultative provision – it creates the possibility of an action being taken in the law, namely “*providing a payment schedule to the claimant*” which will have legal consequences under the new structure for creating legal rights which the Act brings into existence. Section 14(1) also by implication states two characteristics of a “*payment schedule*”, namely that it is something which is provided by a respondent to a claimant, and that it is provided after a payment claim is served. Section 14(2) and (3) set out other characteristics which a payment schedule must have. Section 14(4) states a legal consequence of a respondent failing to provide a payment schedule.
- 38 It is only section 14(1)(2) and (3), out of all the provisions in the Act, which state characteristics which a payment schedule needs to have. Section 14 is in Division 1 of Part 3 of the Act. If the words “*under Division 1*” in section 17(1)(a) and section 17(1)(b) were an adjectival phrase describing “*payment schedule*”, the words “*under Division 1*” would be accurate (in that it is Division 1 which sets out the characteristics of the payment schedule), but redundant - section 17(1)(a) and (b) would mean exactly the same even if the words “*under Division 1*” did not appear in them.
- 39 If “*under Division 1*” is an adverbial phrase qualifying “*provides*” or “*fails to provide*” then it looks to whether a payment schedule has been provided in the circumstances in which Division 1 contemplates provision of a payment schedule. Division 1 sets out, in section 14(4) and 15(1) and (2) the consequences of a payment schedule *not* being provided within 10 business days after the payment claim is served those subsections could not state what counts as the payment schedule being provided under Division 1. I do not regard sections 14(1), 15(1) or 15(2) as stating what is meant if a payment schedule is provided “*under Division 1*”. However section 16 sets out the consequences which flow if a payment schedule is provided within 10 business days after the claim is served. If a payment schedule is provided within 10 business days after the payment claim is served, that payment schedule is one which is provided “*under Division 1*”.
- 40 There is provision in the Act, outside Division 1, for a payment schedule to be provided in circumstances other than within 10 business days after a payment claim is served. Section 17(2) sets out those other circumstances. Thus, if “*under Division 1*” is treated as an adverbial phrase which qualifies “*provides*” or “*fails to provide*” it is capable of making a real distinction – namely that it is section 17(1)(a) which is attracted if the respondent has provided a payment schedule with 10 business days after the payment claim is served, and section 17(1)(b) which is attracted if the respondent does not provide a payment schedule within those 10 business days. A construction of the Act which gives the words “*under Division 1*” work to do is to be preferred to a construction which gives them no work to do. And there is no strained or artificial use of language if “*under Division 1*” is construed as an adverbial phrase.
- 41 This construction fits with other provisions of the Act. Section 15(2)(a)(ii) contemplates that if no payment schedule has been provided within 10 business days after a payment claim is served, and in consequence the respondent has become liable to pay the claimed amount under section 14(4), and has not paid all of it, the claimant may make an adjudication application under section 17(1)(b). Section 17(2) says that, as a precondition to making an application under section 17(1)(b) the respondent must be specifically notified of the claimant’s intention to apply for adjudication of the payment claim, and given an opportunity (which, in the circumstances, must be a further opportunity, beyond the 10 business days after the payment claim was served) to provide a payment schedule within five business days of receiving the claimant’s notice. If the contention of the Builder were right, then, if that opportunity were availed of, and a payment schedule was served, the adjudication which resulted would be one under section 17(1)(a). Yet that result is inconsistent with what section 15(2)(a)(ii) expressly provides, namely that the adjudication application will be one under section 17(1)(b).
- 42 The construction which seems to me to be the correct one is also consistent with section 17(3). Section 17(3)(c), (d) and (e) set out three different circumstances in which an adjudication application may be made, and sets out the time for making of each such type of application. It gives a coherent reading of these provisions if, every time a respondent has not provided a payment schedule within 10 business days after the payment claim is served, but has been given the opportunity, under section 17(2) to provide a payment schedule at a later date, the application for adjudication is made within 10 business days after the end of the five day period.
- 43 For all these reasons, I conclude that, in the present case, the application was commenced within time.
- 44 The Subcontractor submitted that, if I was against its construction of the legislation, this was still not an appropriate case in which to make an order in the nature of *certiorari*. In light of the conclusion I have come to, I need not consider that submission.

Orders

- (1) Summons dismissed.
- (2) Plaintiffs to pay costs of Second Defendant.

M Sahade – Plaintiffs instructed by M Sahade, counsel – Plaintiffs
No appearance - First Defendant instructed by A Jefferies - First Defendant
DD Feller - Second Defendant Defendant instructed by Mallesons - Second Defendant