

JUDGMENT Einstein J : Supreme Court of New South Wales : 19th July 2004

The notice of motion in proceedings 55042/04

- 1 By Notice of Motion dated 1 July 2004 the plaintiff seeks summary judgment against the defendant in relation to a statutory debt arising under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ["the Act"].
- 2 The debt claimed is in the amount of \$4,900,497.32 in relation to construction work carried out pursuant to a construction contract as defined by the Act.

The payment claim

- 3 On or about 15 November 2002 the plaintiff entered into a design and construct contract ("the Contract") with the defendant for the construction by the plaintiff of four residential towers located at Lot 2, John Whiteway Drive, Gosford, New South Wales.
- 4 On 28 May 2004 the plaintiff served on the defendant a Payment Claim made in accordance with section 13 of the Act which is in the following terms:

"13 Payment claims

- (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.
 - (2) A payment claim:
 - (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
 - (b) must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount), and
 - (c) must state that it is made under this Act.
 - (3) The claimed amount may include any amount:
 - (a) that the respondent is liable to pay the claimant under section 27 (2A), or
 - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
 - (4) A payment claim may be served only within:
 - (a) the period determined by or in accordance with the terms of the construction contract, or
 - (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied), whichever is the later.
 - (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
 - (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim. "
- 5 The plaintiff submits that the Payment Claim complies with the requirements of section 13 of the Act in that it:
 - (a) identifies the construction work to which the progress payment relates (section 13(2)(a) of the Act);
 - (b) indicates the amount of the progress payment that the claimant claims to be due (section 13(2)(b) of the Act);
 - (c) was delivered on and from a reference date under the contract (that is, the time under the contract for payment claims being made, in this case, the 20th day of each month.) (section 8(1) of the Act) (Clause 42.2 and Annex 27 of the Contract);
 - (d) was properly served on the person who is or may be liable to make the payment under the contract (in this case, the defendant) (section 13(1) of the Act);
 - (e) states that it is made under the Act (section 13(2)(c)). [The plaintiffs note that the reference to the Act in the Payment Claim has been incorrectly described as the "*Building and Construction Industry Security for Payment Act 1999* (NSW)" instead of the "*Building and Construction Industry Security of Payment Act 1999* (NSW)". Such a mis-description would not invalidate the claim: see *Hawkins Construction v Mac's Industrial Pipework* [2001] NSWSC 815 in which Windeyer J (at par. 8) rejected an argument that because the payment claim in that case abbreviated the name of the Act that it did not fulfil the statutory requirements of the Act. [In any event the point was not taken by the defendant on the motion before the Court]

The defendant fails to deliver a payment schedule

- 6 Following service of the Payment Claim on 28 May 2004, pursuant to section 14 of the Act, the defendant was entitled to provide a Payment Schedule. Section 14 (4) provides:
 - (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:
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served, whichever time expires earlier,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.

- 7 In relation to the time stipulation in 14(b)(i) of the Act, Clause 42.2(f) of the Contract requires that the defendant (or the plaintiff) make payment within 7 Business Days of receipt by the defendant of a tax invoice. A tax invoice was issued on 21 June 2004 by the plaintiff for the negative amount of \$4,900,497.34 certified accompanied by a letter informing the defendant that the provision of the tax invoice did not constitute an admission of liability to pay the amount the amount certified and that it was only issued in order to trigger payment under the contract. Payment of the sum of \$4,900,497.34 was due on 30 June 2004. (See DD3 annexed to the Affidavit of David Dale of 1 July 2004).
- 8 By the time the tax invoice was issued, the defendant had already failed to deliver a Payment Schedule within 10 business days of the date of service of the Payment Claim in accordance with 14(b)(ii) of the Act.

Entitlement to statutory debt

- 9 Section 14(4) of the Act provides that if a claimant serves a payment claim on a respondent, and the respondent fails to provide a payment schedule within the required 10 business days, that the respondent becomes liable to pay the claimed amount to the claimant on the due date for payment under the Contract.
- 10 Under section 15(2), the claimant may then recover the claimed amount as a debt due in any court of competent jurisdiction. Section 15 (4)(b) of the Act expressly prohibits the respondent, in those proceedings, from bringing any cross-claim or raising any defence in relation to matters arising under the construction contract.

The section 13 (4) (b) issue

- 11 The defendant was content to proceed upon the basis that only one point was taken. This related only to the inclusion of piling work within the payment claim.
- 12 The point taken related to the proper construction of section 13 (4) (b) of the Act which was the subject of recent consideration in *Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd* [2003] NSWSC 1103.

Matters which were common ground

- 13 Before turning to the precise issue it is convenient to note that the motion presently under consideration was argued against a background of the following matters being common ground:
- that certain piling work having a value of \$1,606,561.60 was carried out more than 12 months before the service of the payment claim;
 - that no other piling work was carried out within the 12 month period prior to the service of the payment claim;
 - that the balance of the work referred to in the payment claim was carried out within a period of 12 months prior to the service of the payment claim.

- 14 Section 13(4)(b) is in the following terms:

"A payment claim may be served only within....

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related good and services to which the claim relates were last supplied)..."

- 15 The submission which was rejected in *Leighton* had contended that the payment claim there under consideration was infected by invalidity for the reason that it had included a substantial sum for rock excavation which had been carried out more than 12 months before the date of the payment claim.

- 16 The matter was dealt with in *Leighton* as follows at [83]-[101]: *"It is appropriate as a general matter to note the holdings (at [67] and [68]) by Nicholas J in Walter Construction:*

- *that to demonstrate compliance with section 13 (2) (a) it is irrelevant that an item which is a component of a payment claim may be disputed, albeit on the ground that such item cannot be categorised as either work or goods and services within the meaning of section 5 or section 6 respectively; and*
- *that in a challenge which raises the question of compliance with section 13 (2) (a), the question is not whether an item of the payment claim relates to construction work or related goods and services within section 5 and section 6 respectively, but whether the payment claim adequately identified such work will goods and services [68].*

As is accepted by the Club that line of reasoning was expressly followed by Bergin J in Paynter. In my view that line of reasoning was correct. The matter is clearly relevant to the proper approach to be taken to the similar but by no means identical question albeit now raised in the context of the prohibition to be found in section 13 (4) (b).

No previous decision appears to have dealt with the requirements of section 13 (4) (b).

It seems necessary to stand back from the issue and to seek to place it into context.

Construction work involves as the norm, work which may be expected to be carried out over a period of time. The laying of foundations is an example. This is unlikely to take one hour and may take days or weeks or even longer.

Presumably the same may be said in relation to the provision of related goods and services.

The legislature appears to have had to cope with these realities in determining how to describe the period of time within which a payment claim could be served.

By definition or real world practice it would be likely that a payment claim would disparate forms of construction work carried out over the same or different periods/brackets of time and would similarly likely cover the provision of related goods and services over the same or different periods/brackets of time.

It would seem unlikely that the legislature would have intended that a payment claim in respect of any particular item of construction work [as for example the laying of a particular brick] could only be served within the period of 12 months after completion of the work comprising that particular item.

Possibly the same may also be said in relation to it being unlikely that the legislature would have intended that a payment claim in respect of a particular unit of construction work [as for example the laying of a brick course or concourse] could only be served within the period of 12 months after completion of the work comprising that unit of construction work. On the other hand perhaps it is arguable that the legislature may have so intended.

The legislature in fact enacted section 13 (4) in the following terms:

"A payment claim may be served only within....

(b) the period of 12 months after the construction work to which the claim relates was **last** carried out (or the related good and services to which the claim relates were last supplied)..."

To my mind properly construed the subsection in its reference to "the construction work to which the claim relates" should be regarded as referring in a general way to the construction work or to the related goods and services. Hence as long as any item of construction work to which the claim relates [in that general sense], was carried on during the 12 month period prior to the service of a payment claim, that payment claim could also, unexceptionally, include items of construction work carried on prior to that 12 month period.

The same proposition would hold good in terms of the supply of related goods and services.

This construction is in effect that contended for by Leighton which submitted that:

- necessarily the phrase "the construction work to which the claim relates" is the entirety of the works the subject of the claim;
- it is then necessary to determine when that work "was last carried out; and
- if any work has been carried out within 12 months of the date of the payment claim, the payment claim would have been served within the required period.

The Club submitted that this construction would necessarily involve a rewriting of the subsection by shifting the word "last" so that the subsection would in effect read as follows:

"A payment claim may be served only within.... the period of 12 months after the **last** construction work to which the claim relates was carried out (or the related good and services to which the claim relates were last supplied)"

Whether this submission of the Club be correct or incorrect, to my mind the construction to which I have referred is the correct construction. It is consistent with the Minister's second reading speech for the Amendment Act:

"There will also be a limit upon how long after construction work is **completed** that a claimant can continue to make payment claims under the Act. The period will be 12 months after the last work was carried out or the goods or services were last provided, or a later date if provided for under the contract." (emphasis added).

Likewise this construction seems to be consistent with the amendment to the definition in section 4 of "**progress payment**" to include "**final payment**". A final payment typically involves a final accounting for the entire project, a significant portion of which will have been carried out in many cases more than 12 months before any claim for a final payment may be made.

Any other construction would it seems to me, as a matter of the practicable working of the section, pose real difficulties of application. The construction avoids a limitation period seen to run on a daily basis. Further it would seem to avoid an otherwise necessary vouching of the particular items or units of work in terms of the precise dates when such work was carried out which would seem to raise particular difficulties.

Ultimately the matter is one of impression aided it seems to me, with some legitimacy, by reference to the Minister's second reading speech for the Amendment Act.

It follows that the challenge to the validity of the payment claim based upon section 13 (4) (b) and other items raising the same issue fails."

The defendants submissions

17 Mr Ashurst who appeared for the defendant submitted that the decision in Leighton was incorrect.

18 Mr Ashurst submitted that there were three possible approaches to the proper construction of the critical words in the subsection. Naturally the whole of the sub-section requires to be construed, but the central focus was put upon the words "after the construction work". In that regard the three possible approaches were put as follows:

Construction 1

The subsection should be read as follows:

"A payment claim may be served only within....

(b) the period of 12 months after any [] construction work under the contract to which the claim relates was **last** carried out ..."

This reading would mean that the payment claim would be valid as long as any work had been performed under the contract within 12 months prior to the payment claim being made [and as long as the claim otherwise accorded with the legislation] . During argument construction 1 was referred to as "the one nail" construction: that is to say, the payment claim would be valid if it otherwise accorded with the legislation, as long as the last moment [as for example the hammering in of the last nail] of any work carried out under the contract took place within 12 months prior to the payment claim being made.

Construction 2

This reading would mean that the payment claim would be valid as long as any amount forming part of the payment claim related to work performed within 12 months prior to the payment claim being made [and as long as the claim otherwise accorded with the legislation]. This reading differs from the one nail construction because it would focus upon the period when the last work in respect of any specific item in the payment claim was carried out. This reading would analyse the holding in *Leighton* as having depended upon the fact that *part* of the rock excavation had in that case occurred more than 12 months before the date of the payment claim, whereas *other parts* of the rock excavation had taken place within the period of 12 months before the payment claim. The distinction is between (1) a reference to the last work in respect of *any* specific item in the payment claim and (2) a reference to last work in respect of every *item* in the payment claim.

Construction 3

This reading would mean that a payment claim would only be valid insofar as the items in it were for construction work which had been carried out within the last 12 months

- 19 Mr Ashurst accepted that the plaintiff would presently succeed whether or not constructions 1 or 2 were correct. He submitted that the *Leighton* judgment might be read as comprehending either construction 1 or alternatively construction 2.
- 20 I note that my judgment in *Leighton* properly construed was intended to uphold construction 1.
- 21 Mr Ashurst made the point that construction 1 tended to direct one's mind to *when* work under the contract was last performed, whereas construction 2 tended to direct one's mind to whether any of the work the subject of the payment claim had been performed *within the last 12 months*.
- 22 Mr Ashurst's submissions included:
- *the issue is does this section mean that the payment claim to be valid has to have just one item of work that was completed within the last 12 months, or does it mean that to be valid, all items of work under the payment claim were completed within the last 12 months.*
 - *what is intended by the words in the section is that a valid claim can only be made when it is in respect of work carried out within the 12-month period prior to the making of the payment claim - that is, all of the payments claimed must be in respect of the work carried out during that 12 month.*
- 23 Having given careful consideration to Mr Ashurst's submissions I see no reason to depart from the analysis given in *Leighton*. As stated at [91]: "*It would seem unlikely that the legislature would have intended that a payment claim in respect of any particular item of construction work [as for example the laying of a particular brick] could only be served within the period of 12 months after completion of the work comprising that particular item.*"
- 24 When the Minister referred [in the second reading speech for the Amendment Act] to the fact that there would be a limit upon how long after construction work was completed a claimant could continue to make payment claims under the Act, the Minister was not referring to any segmented element of construction work, [as in brick by brick]; he was referring to completion of *the construction work*.
- 25 For those reasons the plaintiff is entitled to an order in terms of paragraph 1 of the notice of motion.
- 26 The plaintiffs 'fall back' claim seeking, if section 13(4)(b) was not engaged, to rely upon section 13(4)(a), falls away.

Mr M Rudge SC, Mr D Meltz (Plaintiff) instructed by Baker & McKenzie
Mr M Ashurst (Defendant) instructed by Church & Grace