HODGSON JA; TOBIAS JA; BASTEN JA. In the Supreme Court of New South Wales, Court of Appeal. 28 August 2006
Judgment : HODGSON JA:

1 I agree with Basten JA that the appeal should be allowed and the judgment below set aside; and subject to the following I agree substantially with his reasons.

2 On the question of good faith, I agree with Basten JA that the requirement of s.13(1)(a) of the Building Payment Act that a person "claims to be entitled" does not import a requirement of genuine belief, and in particular does not import such a requirement as to each and every item included in the payment claim.

3 If there were such a requirement, then the onus of proof of it, in court proceedings pursuant to s.15(1) of the Building Payment Act, would be on the person serving the claim; and although there would probably be an evidentiary onus on the other party to lead or point to evidence of lack of genuine belief, the availability of that kind of contest would be contrary to the objects of the Act. Consistently with those objects, all challenges to claims made in a payment claim should be made by way of the payment schedule.

4 If, through no fault of a respondent, a payment schedule is not served, the Act can work harshly; and this would be particularly so in the case of an extravagant payment claim. It is true that the payment required by the Act, for which judgment can be obtained, is only a provisional payment, which may later be adjusted through proceedings in which the final entitlements of the parties are determined; but this does not eliminate substantial detriment, particularly in cases where the claimant is impecunious and there may be a real question whether later proceedings, involving substantial expense and delay, are worthwhile pursuing.

5 Subject to what I say below about misleading conduct, it may be that in those circumstances the only remedy available is a remedy by way of stay or injunction, if the respondent can show a strong prima facie case to the effect that the result produced by the Act is unjust, that there is a substantial risk that money paid over would be irrecoverable, and that proceedings for a final resolution of the issues are being expeditiously pursued: see ***Brodyn Pty. Limited v. Davenport*** [2004] NSWCA 394, 61 NSWLR 421, at [84]-[88].

6 On the question of misleading conduct, the relevant provisions of the Trade Practices Act are s.52 (in Part V of the Act), s.80(1) and (4), s.82(1) and s.87(1), (1A), (1C) and (2). Those provisions are as follows:

52 Misleading or deceptive conduct

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

80 Injunctions

(1) Subject to subsections (1A), (1AAA) and (1B), where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:

(a) a contravention of any of the following provisions:

(i) a provision of Part IV, IVA, IVB, V or VC;

(ii) section 75AU or 75AYA;

(b) attempting to contravene such a provision;

(c) aiding, abetting, counselling or procuring a person to contravene such a provision;

(d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;

(e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) conspiring with others to contravene such a provision;

the Court may grant an injunction in such terms as the Court determines to be appropriate. …

(4) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:

(a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind;

(b) whether or not the person has previously engaged in conduct of that kind; and

(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind. …

82 Actions for damages

(1) Subject to subsection (1AAA), a person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention. …

87 Other orders

(1) Subject to subsection (1AA) but without limiting the generality of section 80, where, in a proceeding instituted under this Part, or for an offence against Part VC, the Court finds that a person who is a party to the proceeding has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in (whether before or after the commencement of this subsection) in contravention of a provision of Part IV, IVA, IVB, V or VC, the Court may, whether or not it grants an injunction under section 80 or makes an order

under section 82, 86C or 86D, make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate the first-mentioned person in whole or in part for the loss or damage or will prevent or reduce the loss or damage.

(1A) Subject to subsection (1AA) but without limiting the generality of section 80, the Court may:

(a) on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in contravention of Part IVA, IVB, V or VC; or

(b) on the application of the Commission in accordance with subsection (1B) on behalf of one or more persons who have suffered, or who are likely to suffer, loss or damage by conduct of another person that was engaged in contravention of Part IV (other than section 45D or 45E), IVA, IVB, V or VC;

make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will:

(c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or

(d) prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person. …

(1C) An application may be made under subsection (1A) in relation to a contravention of Part IV, IVA, IVB, V or VC even if a proceeding has not been instituted under another provision in relation to that contravention. …

(2) The orders referred to in subsection (1) and (1A) are:

(a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void ab initio or at all times on and after such date before the date on which the order is made as is specified in the order;

(b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;

(ba) an order refusing to enforce any or all of the provisions of such a contract;

(c) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage;

(d) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to pay to the person who suffered the loss or damage the amount of the loss or damage;

(e) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage;

(f) an order directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, at his or her own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage; and

(g) an order, in relation to an instrument creating or transferring an interest in land, directing the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct to execute an instrument that:

(i) varies, or has the effect of varying, the first-mentioned instrument; or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument. …

7 It is to be noted that s.80(1) and s.87(1A) do not require an action or proceeding, but merely an application; whereas s.82 requires an action and s.87(1) requires a proceeding. The Trade Practices Act does not exclude such an application being made by a Notice of Motion in proceedings; and indeed, s.87(2)(ba) suggests strongly that the application may be made by or pursuant to a defence. In my opinion, if a remedy under s80(1) or s.87(1A) is one appropriate to be sought by an interlocutory application or in a defence, there is no reason derived from the Trade Practices Act why the remedy cannot be sought in that way.

8 The basic complaint of the appellants is that one element of the cause of action brought against them, namely the non-service of a payment schedule, came about as a result of Parkline's breach of s.52; and that if a remedy is not provided by the Trade Practices Act, they suffer the substantial damage of having a judgment against them which is obtained by Parkline in reliance on its own misleading conduct. The Trade Practices Act discloses a legislative intention that persons should have a remedy to protect them from damage from the misleading conduct of a corporation, or to recover from the corporation compensation for such damage; and it would not be in accordance with that intention that a corporation should be permitted to obtain a judgment against a defendant on a cause of action one essential element of which has been created by that corporation's misleading conduct against that defendant. Subject to discretionary questions, it would in my opinion be appropriate for a court to give effect to that legislative intention by granting an injunction under s.80, or by making an order pursuant to

s.87 dismissing proceedings (noting that the orders made available by s.87 include orders mentioned in s.87(2), but are not restricted to those orders).

9 That kind of relief under the Trade Practices Act would not be appropriate to be sought in a cross-claim, because a cross-claim in substance accepts that the plaintiff is entitled to a judgment on its claim, and seeks something to be set against that judgment; whereas the relief I have mentioned would altogether deny the plaintiff's entitlement to a judgment, and so would be appropriate to be sought in a defence or possibly in an interlocutory application. Paragraph 13 of the appellant's proposed defence sought to rely on the misleading conduct as a defence; and this was supported by its submissions to the primary judge, albeit without reference to ss.80 and 87 or to the reasoning that I have set out above.

10 In my opinion also, there is no reason why the District Court cannot give effect to the relief of the kind I have mentioned. Even before the Judicature Act system was introduced into New South Wales, a common law court could give effect to an equitable defence if it would give rise to an unconditional and permanent injunction; and, subject to discretionary questions, the Trade Practices Act could certainly support an unconditional and permanent injunction to prevent a corporation causing damage and gaining a benefit from its own misleading conduct. The District Court can give effect to equitable defences to matters within its jurisdiction, and there is no reason why it could not give effect to defences justified by the Trade Practices Act to matters within its jurisdiction; and the District Court can give relief under the Trade Practices Act to the extent of its jurisdiction.

11 In my opinion also, s.87(2)(c) and (d) of the Trade Practices Act make it clear that a remedy in the nature of damages can be sought without commencing an action, by application in some other proceedings; so I see no reason why a set off cannot be claimed, in a defence, on the basis of misleading conduct by the plaintiff associated with the circumstances of the plaintiff's claim. However, this would be less satisfactory in this case, because the measure of damages could be merely the disadvantage of premature payment of money, and the chance of non-recovery if the ultimate balance is in the appellants' favour. On that basis, Parkline would be left with the benefit of a judgment in some amount, flowing from what, if the appellants prove their case, was its own misleading conduct.

12 I agree with Basten JA that a defence relying on misleading conduct is not prohibited by s.15(4)(b)(ii) of the Building Payment Act.

13 I agree with Basten JA that to place significant procedural obstacles in the way of obtaining relief provided by the Trade Practices Act would make s.15(4)(b) inconsistent with that Act; but on my analysis there are no such obstacles relevant to this case. However, the primary judge decided the case in a way that precluded the appellants relying on arguable Trade Practices Act remedies; and although the appellants did not put the case before her precisely in accordance with my analysis, in my opinion the primary judge was in error in the way she decided the case, in holding in effect that the appellants' attempt to rely on the Trade Practices Act was hopeless. Accordingly, the appeal should be allowed.

14 I should stress that this is a case where the alleged misleading conduct was relevant to the claimant's entitlement to a judgment pursuant to s.15. In a case where the alleged misleading conduct is not relevant to that entitlement, but only to the final entitlements of the parties, s.15(4)(b) would not in my opinion place obstacles in the way of obtaining Trade Practices Act relief, and there would be no constitutional reason why it could not operate in accordance with its terms.

15 A question arises whether the appellants' application should be sent back for the re-exercise of discretion as to whether it should be allowed, or whether this Court should determine if the appellants are to be permitted to rely on a Trade Practices Act defence. The only remaining discretionary ground against allowing the appellants' application adverted to by the primary judge was lateness, which the primary judge said was of very little weight. There is some force in the primary judge's view that the appellants should have realised sooner that the payment claim was not sent to S. & S. Quirk; but the appellants have an arguable case that it was Parkline's misleading conduct that caused them to believe it had been sent to S. & S. Quirk, and in those circumstances their own failure to double-check this should not preclude them from raising a defence based on misleading conduct.

16 For those reasons, in my opinion this Court should conclude that the appellants should be permitted to raise a defence relying on the Trade Practices Act in the way I have indicated.

17 **TOBIAS JA**: I have had the benefit of reading in draft the judgments of Hodgson JA and Basten JA. I agree with their Honours for the reasons each has given, that s15(4)(b) of the *Building Payment Act* does not prevent the appellants from raising by way of defence to the respondent's proceedings in the District Court to recover the amount of its payment claim pursuant to s15(2)(a)(i) of that Act, the contention that their failure to provide a payment schedule with respect to that claim was induced by the respondent's misleading or deceptive conduct in breach of s52 of the *Trade Practices Act*.

18 Furthermore, I agree with both Hodgson and Basten JJA that the appellants should have leave not only to raise that defence but also to re-open their case in order to prove it if they are able.

19 In the foregoing circumstances I find it unnecessary to consider the appellant's alternative argument that s15(4)(b)(i) is invalid or inoperative to the extent that it is inconsistent with ss 52, 80, 82 and/or 87 of the *Trade Practices Act*. Such an argument would only become necessary to decide if, as Basten JA observes at [105] of his judgment, the appellants' resistance to the respondent's claim can only be raised by way of cross-claim, a

proposition which has been rejected. I make the same observation with respect to the further alternative argument of the appellants based on s79 of the *Judiciary Act*.

20 Accordingly, I agree with the orders proposed by Basten JA.

21 **BASTEN JA**: Under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the *Building Payment Act*") a contractor, who claims to be entitled to a progress payment under a construction contract, may make a "payment claim" on the person liable to pay for the construction work (referred to in the Act as "the respondent"). A person on whom a payment claim is served, has two weeks (10 business days) within which to provide a "payment schedule" or be liable for the amount claimed. If no payment schedule is provided and the amount claimed is not paid, the claimant can commence proceedings to recover the unpaid amount as a debt in a court of competent jurisdiction.

22 In the present case, the Respondent, Parkline Constructions Pty Ltd ("Parkline") served a payment claim, to which the Appellants, Bitannia Pty Ltd ("Bitannia") and Rossfield Nominees Pty Ltd ("Rossfield") did not respond with a payment schedule within the prescribed period. The Appellants nevertheless resisted payment of the claim and Parkline commenced proceedings in the District Court and obtained a judgment for the amount of the claim, namely $575,702.42.

23 The Appellants had sought to resist the proceedings in the District Court on two grounds, namely that:
(a) Parkline had not made the claim believing in good faith that it was entitled to the amount claimed, and
(b) in serving the payment claim, Parkline had engaged in misleading and deceptive conduct which led the Appellants not to prepare a payment schedule, causing them to be liable to pay a significant sum for which they were not otherwise liable.

24 In relation to the second limb of the case, the Appellants sought to rely upon rights to relief said to arise under the *Trade Practices Act* 1974 (Cth). (The Appellants also sought to rely upon the equivalent provisions of the *Fair Trading Act* 1987 (NSW), but because that Act will not achieve a better result from their perspective, and will not invoke any constitutional argument, it is convenient generally to confine consideration to the provisions of the Commonwealth law.) To the extent that such relief was precluded by virtue of constraints imposed by the *Building Payment Act*, they asserted that the State Act was, to that extent, inconsistent with the *Trade Practices Act* and invalid to the extent of that inconsistency, pursuant to s 109 of the Constitution. The Attorney-General for the State of New South Wales intervened in the proceedings in the District Court and in this Court, to support the validity of the *Building Payment Act*. No other Attorney sought to intervene.

25 It will be necessary in due course to refer briefly to the facts, including a number of provisions in the "Building Works Contract" pursuant to which the construction work was undertaken. This can be done briefly because the District Court judge declined to allow the Appellants (the defendants before her Honour) to rely on the proposed pleadings, or tender relevant evidence, to establish the two grounds on which they sought to resist a judgment. Whilst not conceding that the payment claim had been made in bad faith or that its conduct was misleading or deceptive, Parkline did not dispute that the Appellants had an arguable case in respect of both matters. On the other hand, it will be necessary to give some explanation as to the course of the proceedings in the District Court. On one view, the constitutional issue was addressed in that Court (by both the parties and the trial judge) without adequately determining the precise limits of the constraints imposed by the *Building Payment Act* on a defendant resisting judgment based on a payment claim. The difficulty arises not merely because constitutional issues should be addressed last, not first (see *Newcastle* ***Wallsend Coal Co Pty Ltd v Industrial Relations Commission of NSW*** [2006] NSWCA 129 at [40]) but because it is not possible to determine whether a State law is inconsistent with a Commonwealth law without first identifying the proper construction of the relevant provisions of the State law.

26 In any event, in order to put the relevant issues in context, it is necessary to consider first the relevant provisions of the *Building Payment Act*.

Operation of *Building Payment Act*

27 The procedure for recovering progress payments under the *Building Payment Act* is set out in Part 3, of which Division 1 deals with payment claims and payment schedules. A payment claim is made pursuant to s 13 which, so far as relevant, reads:

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 & 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: …
(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 & 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.

28 Section 14 provides for the person on whom the payment claim is served to provide a payment schedule, by way of reply. If the amount the respondent proposes to pay is less than that claimed, the schedule must indicate the reason for withholding payment: s 14(3). 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.

29 Section 15 provides for the consequences of a failure to pay a claimant in circumstances where no payment schedule has been provided. The relevant provisions read as follows:

(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 allowed 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, … …

(4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the claimed amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract.

30 These are the critical provisions relied upon in the present case. However it is necessary to note the process provided under the *Building Payment Act* where a dispute is raised by the provision of a payment schedule to the claimant. Thus, where a payment schedule indicates that the respondent will pay less than the full amount claimed, the claimant is entitled to refer the payment claim for adjudication, pursuant to Part 3, Division 2. That process results in a determination that a particular amount must be paid, which, if not paid, can result in the issue of "an adjudication certificate". That certificate may be filed as a judgment for a debt in a court of competent jurisdiction: s 25(1). There are limited rights of challenge to the certificate, which reflect the restrictions on challenge to recovery of a debt under s 15(4), where the debt results from a failure to provide a payment schedule.

31 Section 34 of the *Building Payment Act* prohibits "*contracting out*" and renders void any provision in an agreement which purports to have that effect. Section 32 provides:

32 Effect of Part on civil proceedings

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have apart from this Act in respect of anything done or omitted to be done under the contract.

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:

(a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and

(b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

An exercise in federal jurisdiction

32 Although the proceedings were brought in a State Court, once the Appellants sought to rely upon rights conferred by the *Trade Practices Act*, a law of the Commonwealth, the Court was exercising federal jurisdiction within the terms of ss 76(ii) and 77(iii) of the Constitution: see, ***LNC Industries Ltd v BMW (Australia) Ltd*** (1983) 151 CLR 575, 581; ***The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*** (1945) 70 CLR 141 at 154 (Latham CJ) and 167 (Dixon J); see also ***Felton v Mulligan*** (1971) 124 CLR 367 at 387-8 (Windeyer J), 409 (Walsh J) and 415-417 (Gibbs J). The same result would follow from the invocation of s 109 of the Constitution as determinative of the rights or liabilities of the parties. The whole proceeding is then in federal jurisdiction: ***Re Wakim; Ex parte McNally*** (1999) 198 CLR 511 at [135] (Gummow and Hayne JJ).

33 Because the District Court was exercising federal jurisdiction, the source of its power must be found in federal law. The jurisdiction is conferred by s 39(2) of the *Judiciary Act* 1903 (Cth) and the applicable law is given operation by ss 79 and 80 of the *Judiciary Act*. To the extent that the applicable law is State or Territory law, it has been said to apply as "*surrogate Commonwealth law*", a label which is intended to identify the source of its operation: see ***Maguire v Simpson*** (1977) 139 CLR 362 at 408 (Murphy J); ***The Commonwealth v Mewett*** (1997) 191 CLR 471 at 514 (Toohey J), 554 (Gummow and Kirby JJ); ***Northern Territory v GPAO*** (1999) 196 CLR 553 at [28] (Gleeson CJ and Gummow J) and [203] (Kirby J), and see ***Austral Pacific Group Ltd (In liq) v Airservices Australia*** (2000) 203 CLR 136 at [15] (Gleeson CJ, Gummow and Hayne JJ) and [53] (McHugh J). It is sufficient to refer for present purposes to s 79 which is in the following terms: *"The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."*

34 It is well-established that this provision is sufficient to pick up laws conferring substantive rights or obligations, as well as those dealing with matters of procedure: see, eg, *Commissioner of Stamp Duties (NSW) v Owens [No. 2]* (1953) 88 CLR 168 at 170.

35 One might assume that the laws of a State picked up by this provision and applied in the exercise of federal jurisdiction would be limited to the valid laws of the State. Accordingly, it would be necessary to determine first whether those laws were invalid to any extent because of inconsistency with a Commonwealth law. As was explained in ***Butler v Attorney-General (Vic)*** (1961) 106 CLR 268 at 276, the order in which these questions are addressed may be important. Thus, if the first step is to treat all relevant State laws as picked up by s 79 and applied in federal jurisdiction, the question whether the Commonwealth has "otherwise provided", in the sense used in that section, will then operate in relation to the resolution of possible contradiction between two federal laws. The approach required by s 109 is different. As Fullagar J stated in ***Butler***: *"The Commonwealth Parliament is, within its sphere of power, a paramount legislature, and there can be no presumption either that it did, or that it did not, intend by its own Act to supersede or preclude from operation a State Act… ."*

36 As noted in ***University of Wollongong v Metwally*** (1984) 158 CLR 447, by Mason J at 463, the approach to conflicting statutes enacted by one legislature involves principles which have no direct application where one legislature is accorded constitutional paramountcy. A third approach may be required in a case where conflict may arise between a law enacted by the Commonwealth and a State law given effect in a particular case by a law of the Commonwealth. Such a case may also be distinguished from a fourth situation, involving delegated legislation: see ***Northern Territory v GPAO***, 196 CLR 553 at [52].

37 Thus, when the question of State laws being picked up so as to apply to the Commonwealth arose under s 64 of the *Judiciary Act*, the High Court stated, in ***Dao v Australian Postal Commission*** (1987) 162 CLR 317 at 331: *"In a case such as the present which raises issues involving both s 109 of the Constitution and s 64 of the Judiciary Act, the constitutional provision, as the basic law, must received prior consideration. To attribute to s 64 the effect for which the appellants contend would be to construe the words of that section as disclosing a general legislative intent to finesse or sidestep that prior question of constitutional invalidity by reason of inconsistency and effectively to override, for the purposes of 'any suit to which the Commonwealth ... is a party', a constitutional provision of great importance."*

Their Honours continued: *"In any event, the submission misunderstands the import of s 64. That section was intended to fill what would otherwise be lacunae or gaps in the law of the Commonwealth. It is not to be understood as intended to have the practical effect of overriding s 109 of the Constitution by indirectly applying a provision of a law of a State to circumstances to which its direct application is invalidated by reason of inconsistency with a provision of an existing law of the Commonwealth. A fortiori, s 64 should not be construed as intended to manufacture a new kind of indirect inconsistency between a provision of a State law and a provision of a law of the Commonwealth by applying a provision of a State law to a situation to which it does not purport to apply in circumstances where, if rendered directly applicable, it would be relevantly inconsistent with the direct operation of the provision of the law of the Commonwealth."*

38 Section 79 may no doubt be distinguished in that it contains an internal mechanism for resolving possible inconsistency. On the other hand, one might expect the role of s 109 as a constitutional provision conferring paramountcy on the Commonwealth legislation, to operate in a similar manner in relation to s 79. This approach was affirmed in *Northern Territory v GPAO* (1999) 196 CLR 553 at [38] as the *"threshold issue and requires detailed consideration before returning to the other issues"*: see also ***Agtrack (NT) Pty Ltd v Hatfield*** (2005) 79 ALJR 1389 at [62]-[63] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

39 ***Northern Territory v GPAO*** concerned a Territory law concerning community welfare, which provided protection from disclosure by way of court subpoena to information acquired in performing duties or functions under the Territory Act. The relevant judgment for present purposes is that of Gleeson CJ and Gummow J, with which Hayne J agreed. (Gaudron J was content to apply s 79 of the *Judiciary Act* and agreed with the conclusion reached by Gleeson CJ and Gummow J: at [135]. McHugh and Callinan JJ held that s 79 was not engaged: at [148]. Kirby J was in dissent. However, his Honour addressed the questions of validity resulting from inconsistency as anterior to any "*picking up*" of Territory law by s 79, a question which his Honour did not reach: at [202] and [203].) Section 109 of the Constitution did not apply in relation to Territory law, but analogous principles, derived from the constitutional structure, by which the Legislative Assembly of the Northern Territory derived its powers from a law of the Commonwealth, namely the *Northern Territory (Self-Government) Act* 1978 (Cth) were to similar effect: [54]-[61] (Gleeson CJ and Gummow J); and see ***R v Kearney; Ex parte Japanangka*** (1984) 158 CLR 395 at 422 (Brennan J) and ***Attorney-General (NT) v Hand*** (1989) 25 FCR 345 at 366-367 (Lockhhart J) and 386 (Beaumont J). Having concluded that the Territory law was not inconsistent with relevant powers conferred by the *Family Law Act* on the Family Court, their Honours then considered the operation of s 79: at [75]-[77].

40 ***Austral Pacific Group Ltd (In liq) v Airservices Australia*** (2000) 203 CLR 136 may appear to adopt a different approach. Thus, the joint judgment of Gleeson CJ, Gummow and Hayne JJ, having determined that a question arose in federal jurisdiction, proceeded directly to consider the operation of s 79 and whether the State statute was not picked up because a Commonwealth law otherwise provided. The different test contained in s 109, where a Commonwealth law might be found to cover the field, was referred to at [17]. The operation of the constitutional provision was not pursued. That may be surprising where, as noted by Callinan J at [79], "*the question which was extensively argued*" in the High Court was whether the Commonwealth Act "discloses an intention to state exhaustively the liabilities of the Commonwealth and its Authorities in a case such as the present". McHugh J expressly referred to the principle in *Dao*, that s 64 of the *Judiciary Act* "*cannot confer a right by applying a State law if that law is inconsistent with a law of the Commonwealth so that it would be rendered inoperative by s 109 of the Constitution*": at [56] (fourth point). However, his Honour also noted that the effect of s 79 was not addressed in *Dao*: he continued at [64]: "*If, as I think, s 79 is the provision that furnishes the body of law which is to be applied by a court exercising federal jurisdiction and s 64 is the provision that gives a right to proceed against the Commonwealth, then arguably in Dao the State law was not 'picked up' by s 79. That is because, within the meaning of that section, the Constitution or a Commonwealth law 'otherwise provided'. Section 64 was equally inoperative, as there was no 'picked up' law on which it could operate to expose the Commonwealth to a liability arising under a 'surrogate Commonwealth law'.*"

41 To deal with the constitutional question before dealing with the operation of s 79 may be seen as inconsistent with the general approach that constitutional questions be addressed last. Furthermore, in a practical sense, the order in which the questions are addressed is unlikely to be significant. Nevertheless, and despite the approach adopted in ***Austral Pacific***, the authorities which expressly address the issue require this Court to consider, first, the proper construction of the State law and, secondly, whether, so construed, it is inoperative because of inconsistency with a Commonwealth law. The third step is to determine whether, even if not inconsistent with a Commonwealth law, it is nevertheless not "*picked up*" by s 79, because a Commonwealth law otherwise provides.

Factual circumstances

42 The building works contract was entered into on 19 May 2003 and provided for the construction of a building known as "The Ettalong Hotel". The proprietor was a partnership comprising the two Appellants, Bitannia and Rossfield trading as "The Ettalong Hotel". The architect appointed by the proprietor was S & S Quirk Pty Ltd; the architect was given the power to act as agent of the proprietor generally for the administration of the contract, as provided in s 5 of the building works contract.

43 Pursuant to s 10.01, the builder was to submit to the architect a claim for a progress payment on the 25th day of each month. The agreement also required the builder to provide security for the due performance of the contract in an amount quantified at 5% of the sum payable under the contract or by the creation of a retention fund created by the proprietor retaining 10% of each progress payment. The latter course was adopted in the present case. The contract made provision (in s 10.24) for the release of 50% of the retention fund within 10 days of the issue of a notice of practical completion. However, pursuant to a letter dated 19 May 2003 accepting the tender from Parkline, release of the first half of the security at practical completion was made subject to additional requirements, namely that the builder supply all warranties and "as built drawings".

44 Pursuant to the contract, the date for practical completion was 24 May 2004, but that date appears to have been varied, though nothing turned on it for the purposes of the present case. On 15 December 2004, Parkline served a payment claim 20 seeking the release of the first half of the retention moneys upon reaching practical completion. Including GST, the claim amount to $174,092.05.

45 On the same day, S & S Quirk sent a facsimile to Parkline stating: "*Further to our facsimile of 12.12.2004 with regard to outstanding warranty and documentation requirements please find attached Architectural Specification extracts with regard to Warranties, Workshop drawings and Work as executed drawings. Please ensure you provide all the listed requirements by 23.12.2004 for S & S Quirk review and approval.*"

On 15 December, S & S Quirk also provided a payment schedule rejecting the payment claim for the retention fund because the documentation had not been received or approved.

46 On 25 December 2004 Parkline purported to "*resubmit*" claim 19 (which related to variations and which had been faxed on 15 December instead of the 25th, although the correct day under the contract was a business day immediately before or after a public holiday), together with the claim for retention moneys, being claim 20.

47 On 6 January 2005 S & S Quirk provided a payment schedule dealing separately with the variations in claim 19 and the claim for release of the retention funds, which was again rejected on the basis that warranties and work-as-executed drawings had not been supplied. Despite the holiday period, a letter from S & S Quirk dated 7 January 2005 referred to site inspections which had occurred on 24 December, 31 December and 6 January. The letter required the rectification of all defects which had been identified and the issue of all documentation prior to 13 January 2005.

48 The Appellants commissioned a report on the construction works from Tyrrells Building Consultants Pty Ltd ("Tyrrells"). On 25 January 2005 Tyrrells issued a "*final inspection report",* which appears to have been provided to Parkline by S & S Quirk on 4 March 2005. In the meantime, on 15 February 2005 Parkline provided a further payment claim identified as "*Final Claim + 50% Retention*", which was dated 15 January 2005. This (third) claim for release of 50% of the retention moneys differed in one respect from the earlier payment claims, in that it was sent to Mr Michael Brown who was the general manager of a company associated with the Appellants, W. Waugh Hotel Management Services Pty Ltd, which administered the contract for Bitannia and Rossfield. The evidence of Mr Brown was that prior to the claim sent to him by facsimile on 15 February 2005, Parkline had submitted all payment claims to S & S Quirk which had responded with payment schedules and had provided copies of the payment claims and the schedules to him for him to arrange the approved payments. The payment claim of 15 February, whilst directed to him, indicated that it had been copied to S & S Quirk. Indeed, a message attached to the claim said that it related to "retention release and variations as previously forwarded to S & S Quirk". It was true that an identical claim for release of retention moneys had been made to S & S Quirk, on two previous occasions. However this claim was not sent to S & S Quirk by Parkline. As a result, S & S Quirk did not provide Parkline with a payment schedule within the period required by the *Building Payment Act*, with the result that the Appellants became liable to pay the full amount of the claim.

49 The reason why the claim was sent to Mr Brown, rather than to S & S Quirk has not been fully investigated in the proceedings which followed in the District Court. However, on 28 January 2005 Mr Brown faxed a letter to S & S Quirk in the following terms: *"Following our conversation yesterday and arising out of the report from Tyrrells that I will be sending to you today, please be advised that any decisions to be made concerning the present status of the Ettalong project and the outstanding work must be referred to us for approval PRIOR TO agreement between yourselves and the builder and/or any subcontractor."*

50 On receipt of that facsimile, S & S Quirk replied to Mr Brown in the following terms: *"We will copy your correspondence to Parkline to inform them that any future approvals or agreements with regard to the Ettalong Hotel project must be directed to yourselves for determination."*

The facsimile sheet indicates that a copy of this letter was also sent to Parkline.

51 On 24 May 2005 Parkline commenced proceedings in the District Court seeking a judgment for the amount of $525,669.10, based on the failure of Bitannia and Rossfield to provide a payment schedule within 10 business days after the date of service of the payment claim.

52 In its amended notice of grounds of defence filed on 12 September 2005, Bitannia and Rossfield denied that the payment claim was a claim for payment within the meaning of the Act and particularised that denial by reference, amongst other things, to the fact that:

(a) It had not been "served by a person referred to in s 8(1) of the Act, namely, a person entitled to a progress payment on and from a reference date";

(b) it was not a payment claim because it had not been "advanced in good faith and for an amount claimed in good faith, 'good faith' meaning that the claim is reasonably arguable on the basis of the facts asserted", and

(c) that the proceedings were an abuse of process because "the plaintiff knew at all material times … that it had not … provided all warranties and as-built drawings as required by the contractual terms".

53 On 2 November 2005 the matter came before the District Court and Mr Patetsos, a director of Parkline and the person responsible for the Ettalong Hotel project at Parkline, gave evidence. In cross-examination, he agreed that a copy of the final payment claim had not been sent to S & S Quirk.

54 The primary judge then stood the hearing over to 30 November 2005 for submissions. However, the Appellants sought leave to file a cross-claim and an amended defence and to re-open their case. Relevantly, the proposed cross-claim alleged misleading conduct in contravention of s 52 of the *Trade Practices Act* inducing the Appellants' failure to serve a payment schedule and claimed damages pursuant to s 82 of the *Trade Practices Act*, an order pursuant to s 87 of the *Trade Practices Act* that Parkline indemnify the Appellants in respect of any amount that they may be ordered to pay Parkline, and such other order pursuant to s 87 of the *Trade Practices Act* as the Court might deem just. The proposed new defence was in the following terms:

13. The defendants further rely by way of defence and set off on the matters pleaded in their cross-claim.

55 The primary judge held that:

(1) there was no requirement that a payment claim be issued in good faith, and that the proceedings were not an abuse of process;

(2) section 15(4) of the *Building Payment Act* prevented the bringing of a cross-claim;
(3) there was no inconsistency between s 15(4) of the *Building Payment Act*, and ss 52, 82 and 87 of the *Trade Practices Act*, and
(4) leave to cross-claim should be refused because it was hopeless and (as an additional factor "of very little weight") because of the lateness of the application.

56 The Appellants submitted to the primary judge that the loss and damage they would suffer if judgment were given against them, would justify relying on the cross-claim by way of defence, that is, even without a defence of equitable set-off. However, the primary judge did not decide whether the proposed new defence was precluded by s 15(4) of the *Building Payment Act*.

Challenge for lack of "good faith"

57 The first proposition raised by the Appellants was that the only person who could make a payment claim pursuant to s 13(1) was the person who *"is or who claims to be entitled"* to the payment. The Appellants argued that this provision was not intended to provide a mechanism for claims which were known to be hopeless and accordingly required that the person have a bona fide belief in the substance of the claim.

58 Such an approach has an undeniable attraction. However, s 13 should not be read in isolation: rather, consideration must be given to the whole of the procedure envisaged under Part 3 of the *Building Payment Act*. Thus, a proprietor who seeks to resist a payment claim is entitled (and required) to provide a payment schedule in reply. A claimant who makes a patently unsustainable or untrue claim is thus likely to be met by a payment schedule. If the claimant wishes to pursue the claim in that event, it must be referred to and determined by an adjudicator, who is very likely to disallow so much of the claim as is patently false or unsupportable. Accordingly, as the Respondent argued, the "bona fides" of the claimant should not be treated as a separate criterion of a valid claim: rather, as with any other issue going to the merit of the claim, the scheme of the legislation was to require that an assessment be made by an adjudicator.

59 The intention that, subject to the adjudication procedure, a payment claim should give rise to an enforceable debt, without court proceedings relating to the merit of the respective positions of the proprietor and the builder, is a powerful consideration against the proposition that there is an independent jurisdictional requirement of bona fides on the part of the claimant, without which no debt will arise. On the other hand, the availability of the adjudication procedure is not a complete answer to the Appellants' case. The person liable to make such payments may provide a payment schedule objecting to the claim, have the claim referred to an adjudicator who rules in favour of the claimant, and yet seek to establish by way of defence in court proceedings that the claim which had been served was not a valid payment claim for the purposes of Part 3 of the Act and hence did not give rise to an enforceable debt. ('Validity' in this context is concerned with the essential preconditions to the making of a payment claim, but only to the extent those matters are not within the remit of the adjudicator.) Again, whilst wishing to resist the claim, the proprietor may fail to provide a payment schedule in time, so that the adjudication procedure is not engaged and it becomes liable immediately to payment of the claim, but may yet wish to resist the claim on the basis that there was no valid payment claim under the Act. That is the position which arises in the present case.

60 In answer to the first situation, where a payment schedule is served, it is clear that a debt can arise in circumstances where the proprietor may wish to argue that an adjudicator has made a wrong determination. Generally speaking, no challenge to the merits of the adjudication determination is permitted by way of defence to the liability to pay the payment claim: see ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421; ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229 and ***Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*** [2005] NSWCA 228. Accordingly, it is within the scheme of the Act to allow a judgment debt to arise in circumstances in which later court proceedings may determine that no such liability existed.

61 In relation to the second circumstance, where no payment schedule is provided, it may again be noted that the *Building Payment Act* envisages that a liability may arise even where the failure to provide a payment schedule was due to no fault on the part of the person allegedly liable to make the payment. A similar situation was referred to in ***Brodyn*** at [85]-[88] in relation to a judgment obtained pursuant to s 25, following an adjudication determination. Hodgson JA noted (in a judgment with which Mason P and Giles JA agreed) that where a judgment under the Act might be shown to create injustice, there may be grounds for a stay either of the enforcement of the judgment or of the proceedings in which the judgment is sought. Similar circumstances could arise in relation to a judgment sought under s 15 of the Act.

62 It is not difficult to envisage circumstances, close to the present, in which the rigid requirements of the Act could result in at least potential injustice. Such a case may arise where a builder twice files a payment claim which is resisted with a payment schedule in each case giving the same reason, the reason in each case being accepted by the builder in the sense that no adjudication was sought, and the builder, having taken no further steps to overcome the reason set out in consecutive schedules, then serves a third payment claim. Putting aside possible allegations of fault on the part of the claimant, the proprietor may intend to file a payment schedule on the final business day (only 10 are permitted) but fail to do so through illness, accident or other unforeseeable and unavoidable circumstances. In accordance with the right created by s 15, the builder may then commence proceedings for payment of the claim. On the Appellants' argument, the proprietor could resist a judgment on the basis that the builder can have had no bona fide belief in its entitlement to the money and hence should not be

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treated as a person making a valid claim for the purposes of s 13(1). On the other hand, in accordance with the dicta in ***Brodyn***, it is arguable that the Court would have the power to stay the proceedings, or stay the enforcement of the judgment in such circumstances.

63 It will be necessary to consider further below the scope of the defences which might be raised by a defendant in debt proceedings commenced pursuant to s 15 of the *Building Payment Act*.

64 On the second day of the hearing of the appeal, the Appellants sought to reactivate a ground of appeal which, in their written submissions, they had previously abandoned. The amended grounds, which were not objected to by the Respondent, read as follows:

"*5A The primary judge erred in not holding that it would be an abuse of process for the Respondent to commence proceedings below invoking the summary judgment mechanism of the NSW Act when the Respondent knew at the time it made the relevant payment claim and at the time it commenced those proceedings that it was not entitled to the payment claimed.*

5B The primary judge erred in holding, if she did so hold, that the District Court did not have power to control its own processes so as to prevent the abuse of process complained of by the Appellants.

5C The primary judge erred in holding that the appellants' defence based on abuse of process was 'a misconceived basis of defence, not only of this claim, but indeed, insofar as it purports to be a bona fide defence, of any claim'."

65 Although not using the language of the dicta in ***Brodyn***, the substance of the approach, characterised as "*abuse of process*", is to the same effect. To this extent, the argument presented by the Appellants did not require a conclusion that the Respondent had acted in bad faith; rather it required a finding that the Respondent had relied upon a failure to provide it with a payment schedule, in circumstances where an identical claim had twice been rejected and on a ground which, to the knowledge of Parkline, had not varied. Nor had the Appellants done anything in the interim to suggest that they no longer sought to rely upon the specified ground: indeed, there had been continuing meetings and correspondence in the course of which, at least in relation to the correspondence, it appears that the Appellants had maintained an unequivocal demand for the warranties and "as-built" drawings as a precondition to release of the 50% of the retention moneys claimed. To that extent, it could be seen as opportunistic for Parkline to take proceedings to enforce a statutory debt in circumstances where there had been a technical non-compliance with the *Building Payment Act*. The Appellants had a further consideration in their favour, namely that the failure to provide the third payment schedule had arisen because of a misleading representation on the facsimile coversheet which accompanied the third payment claim, namely that it had been sent to S & S Quirk, the appointed agent of the Appellants who had dealt with all previous claims.

66 Both parties before this Court cited authority in favour of the proposition which they sought to advance in relation to the question of bona fides as a jurisdictional requirement. Thus, the Respondent sought to draw support from the judgment of Einstein J in ***Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd*** [2003] NSWSC 1103, a decision relied on by Judge Gibson in the District Court. The defendant club in that case argued that Leighton did not have "*a genuine claim to any sum from the Club … as it well knew*": see submission set out after [78]. After noting the amendment in 2002 to include reference to a person who not only "*is*" but who "*claims to be*" entitled to a progress payment the club's submission continued: "*Nevertheless, the legislation could not contemplate a specious or spurious claim and must be taken to refer to a claim which is genuine or bona fide. The peremptory procedures available under the Act, with their potentially serious consequences for the parties, would otherwise be open to ready abuse. A contractor could serve a purported payment claim, knowing full well that there were no monies owing, in the expectation that (if the requirements for a payment schedule under the Act were overlooked or not appreciated), he might thereby acquire a right to a substantial sum without justification.*"

67 In response, Einstein J stated at [79]: "*This submission is rejected. The intention of the legislature is clear from the terms of section 13 (1). A person who has undertaken to carry out construction work …, who is or who claims to be entitled to a progress payment under the contract, may serve a payment claim on the person who is or may be liable to make a payment under the contract.*"

68 This is, in effect, the statement of a conclusion, rather than a process of reasoning. Repetition of the statutory language does not necessarily explain the conclusion reached. The dispute as to the proper construction identifies an ambiguity in the clause "*who claims to be*" entitled. Indeed, the words encompass a range of meanings across a spectrum from the holding of a certain belief based on reasonable grounds, to a genuine belief which lacks reasonable support, through various degrees of uncertainty as to whether a claim can be upheld, to the case where a person makes a "*claim*", but in the certain conviction that it is without merit.

69 In contrast to the view held by Einstein J, two members of this Court in ***Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (In liq)*** (2005) 64 NSWLR 462 expressed different conclusions, though each appears to be obiter and also without explanation. Thus, at [49] Santow J stated: "*I should note at the outset that there was no suggestion that the payment claim was not made in good faith and in purported compliance with s13(2) of the Act, both minimal requirements of the Act.*"

70 To similar effect, at [76], Ipp JA stated: "*Provided that a payment claim is made in good faith and purports to comply with s 13(2) of the Act, the merits of that claim, including the question whether the claim complies with s 13(2), is a matter for adjudication under s 17 and not a ground for resisting summary judgment in proceedings under s 15. In particular, if no adjudication is sought summary judgment cannot be resisted on grounds that could have been raised by way of a payment schedule leading to adjudication.*"

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71 This last statement invites closer attention to what is meant by a lack of good faith on the part of the claimant. At the very least it would appear to involve two elements, namely that the claim was without merit and that the claimant knew it. But the merit (or lack of merit) of a claim is, as Ipp JA expressly accepted, a matter for determination by the adjudicator. Similarly, his Honour accepted that the express elements of a valid claim set out in s 13(2) are matters for the adjudicator. As suggested in ***Coordinated Construction Pty Ltd v Climatech***, at [43]-[46] (a passage cited without disagreement by Hodgson JA in ***Nepean Engineering*** at [32]-[34]) determination of the existence of essential preconditions to a valid claim are matters for the adjudicator, not for objective determination by a Court. If the express requirements of the Act are to be so treated, it is difficult to see why some unexpressed precondition should have a different status. Even more is that the case when, as has been noted, a key element in the supposed condition of "*good faith*" is that the claim is without merit, a matter indisputably within the powers of the adjudicator to determine.

72 The Appellants then observe, no doubt correctly, that the question whether the claimant knew or believed that the claim was without merit would be a matter beyond either the special expertise, or the procedural powers of the adjudicator to determine with any degree of reliability. However, unlike the well-known example of civil proceedings in a court, the *Building Payment Act* contains no requirement that a claimant must verify by affidavit that the claim has reasonable prospects of success. Nor is there any requirement, as appears in some standard forms of building contract, for an affidavit verifying that sub-contractors have been paid amounts claimed in relation to their work: see, eg, ***FPM Constructions Pty Ltd v Council of the City of Blue Mountains*** [2005] NSWCA 340.

73 In these circumstances, I would not imply an additional requirement for a valid payment claim, namely that the claimant had an actual bona fide belief in the truth of the facts asserted, or at least did not believe that the claims were entirely meritless.

74 One may add that the language of a "*bona fide*" claim is slightly curious. Apart from modern requirements as to verification of factual assertions in pleadings, the beliefs or motivations of the plaintiff in proceedings have generally been treated as irrelevant, unless they reach the stage of an improper purpose. Thus, in ***Williams v Spautz*** (1992) 174 CLR 509, the High Court held that proceedings would constitute an abuse of process, where brought, not to prosecute them to a conclusion, but to use them as a means of obtaining some advantage extraneous to the legal process: see ***Williams v Spautz*** at 526-527. Nor is such a claim of abuse, in bringing proceedings for an improper purpose, dependent upon a finding that the claims were themselves without merit: ibid at 522. However, that was not the form of abuse relied upon in the present case and has no direct bearing on the argument that a claimant should have a bona fide belief in the soundness of the claim.

75 By contrast, there is good reason to suppose that the powers conferred on an adjudicator must be exercised in good faith and for the purposes for which they are conferred. The case law in favour of that proposition is discussed in the decisions of this Court referred to above and with expansive treatment by Brereton J in ***Holmwood Holdings Pty Ltd v Halkat Electrical Contractors Pty Ltd*** [2005] NSWSC 1129 at [63]-[117]. It is possible that the language of "*good faith*" has been imported from this separate situation to that of the essential preconditions to a valid claim. However, and with respect to the views of Santow and Ipp JJA (to the extent that they are to the contrary) there is, in my view, no separate precondition to the making of a valid payment claim under s 13 of the *Building Payment Act*, requiring, as a precondition to enforcement action under s 15, proof that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed.

Misleading or deceptive conduct

(i) the issues raised

76 On the basis that there was a valid payment claim made by Parkline, the Appellants sought to resist a judgment based upon it on the ground that their failure to provide a payment schedule had been caused by the misleading and deceptive conduct of Parkline. Although that might have been understood to be a basis of defence, permitted by s 15(4)(b)(ii), the Appellants accepted that, at least at trial, they were bound to bring their claim by way of cross-claim, rather than defence, because of the judgments in this Court in ***Bank of New Zealand v Spedley Securities Ltd (In liq)*** (1992) 27 NSWLR 91. They further accepted that if they were required to proceed by way of cross-claim, that was prohibited by s 15(4)(b)(i), if valid, because it precluded them bringing "*any cross-claim against the claimant*" in the judgment debt proceedings instituted by the claimant. Accordingly, they sought to argue that s 15(4) was invalid to the extent of any inconsistency with the *Trade Practices Act*. The cross-claim sought damages, pursuant to s 82 of the *Trade Practices Act* or, in the alternative, an order pursuant to s 87 of the *Trade Practices Act* requiring Parkline to indemnify the Appellants in respect of any amount they might be liable to pay by way of judgment debt. Thirdly, and without specification, there was a claim for such other relief, pursuant to s 87, as the Court might deem just.

77 It is necessary to consider first the nature and scope of the prohibition contained in the State law: see [41] above.

(ii) defence or cross-claim

78 Section 15(4) of the *Building Payment Act* precludes a respondent in summary judgment proceedings bringing any cross-claim or raising any defence. However, the prohibition in relation to a cross-claim is, in terms, absolute, whereas the prohibition in relation to raising a defence is restricted to matters "*arising under the construction contract*". The scope and purpose of the restriction is unclear. In the Second Reading Speech on the Bill, the Minister stated, more by way of description than explanation (Legislative Assembly, Hansard, 8 September 1999,

p 105): *"The respondent cannot raise defences of defective work or cross-claims in order to delay judgment in these proceedings, therefore ensuring a prompt decision by the court.*

79 On one view, and consistently with paragraph (a) of subsection (4), the respondent could have been limited to defences based on any failure to comply with the preconditions to the statutory entitlement; but that is not the language of sub-par (b)(ii). Thus, where the respondent seeks to rely upon conduct accompanying the service of the payment claim, that would appear not to be a matter "*arising under the construction contract*" and, if it can be pleaded by way of defence, would not be precluded by sub-par (b)(ii).

80 A claim for relief under the *Trade Practices Act* could undoubtedly be raised in separate proceedings and, because it seeks to impeach the basis on which the statutory entitlement is said to arise, is so closely related to the statutory claim as to be properly brought by way of cross-claim, were that course not precluded by sub-par (b)(i). Accordingly, the question is whether, for any reason, it is not possible to raise the same material by way of defence.

81 On one view, this may be an arid debate. Thus, as the Minister also noted in the same passage of the Second Reading Speech, dealing with s 15(4): "*This does not prevent either party from arguing in other legal proceedings or by any dispute resolution process detailed in their contract that the final amount payable is more or less. …*

Adjudication under the Bill provides a much faster process by giving an interim decision on disputes over progress payments, and fixing the amount of the debt. When a claim is for a debt as distinct from a claim for damages, the courts have rules to enable the obtaining of judgment swiftly."

82 The Respondent in the present case was happy to concede that the *Trade Practices Act* claim could be raised in separate proceedings. That concession invited a question as to whether the commencement of such proceedings, where the matter would otherwise clearly have been raised by way of cross-claim, might not permit an application for stay of the summary judgment proceeding brought under s 15(4). The possibility of such a course was foreshadowed in *Brodyn*, as noted at [61] above. However, reliance on separate proceedings in this way is so clearly inconsistent with the purpose and intention of the legislation that, even if the power to stay the summary proceedings existed, it is doubtful whether the grant of the stay in such circumstances would be the proper exercise of the discretionary power.

(iii) equitable set-off

83 The Appellants formulated their relevant ground of appeal by seeking to rely upon the *Trade Practices Act* arguments as a "*defence and equitable set-off*". To that end, they argued that the judgment in debt would cause them loss for which they could recover damages under s 82 of the *Trade Practices Act*.

84 There is a difficulty with the proposition that there can be a cause of action, however formulated, for compensation arising out of an unconditional judgment of a court of record, including the District Court: *District Court Act* 1973 (NSW), s 8(2). This is not a case in which damages are sought pursuant to an undertaking provided as a condition of obtaining relief by way of interlocutory injunction. Nor is it a case where some further relief is sought by way of final settlement of outstanding liabilities, pursuant to s 32 of the *Building Payment Act*.

85 Given that they retained a cause of action under s 32 with respect to a final determination of their rights under the construction contract, the Appellants were pressed to explain what loss they sought to recover by reliance on the *Trade Practices Act*. In substance, the answer was the additional costs which might be unrecoverable in final proceedings under the *Building Payment Act*, and interest on the debt payable immediately which exceeded the final liability under the construction contract. Those moneys, it was contended, might not be recoverable if there were an order for restitution pursuant to s 32(3)(b). They also complained of having a judgment entered against them for an amount for which they asserted they were not liable in law.

86 The argument based upon unrecoverable costs is at best doubtful. It has long been established that, although a successful party may be out of pocket with respect to some of its costs, the balance cannot be recovered in separate proceedings, even though they may be reasonably characterised as a loss flowing from the conduct of the unsuccessful party: see ***Berry v British Transport Commission*** [1961] 3 All ER 65 (Devlin LJ at 71). More broadly, there can be no liability arising from the enforcement of a lawful judgment, unless and until the judgment has been set aside on appeal, or by another form of review permitted by law.

87 In so far as the cross-claim sought damages, it was in effect a device which demonstrated the inconsistency between the rights conferred on the Appellants by the *Trade Practices Act* and the entitlement relied upon by Parkline under the *Building Payment Act*. But once that inconsistency was established, Parkline would not be entitled to its judgment because there would be no valid law granting that entitlement. Accordingly, that part of the Appellants' case involved in reality a defence by which they asserted the constitutional invalidity of the State law. Such a defence would not (as a matter of construction) and could not (by virtue of s 109 itself) be ousted by s 15(4)(b)(ii).

88 However, it is not clear that a defence by way of equitable set-off was limited to establishing the existence of a monetary liability of the plaintiff in favour of the defendant. In equity, it would be sufficient to plead a matter which impeached the legal basis of the plaintiff's claim. Support for that proposition, based upon a complaint of misleading and deceptive conduct under the *Trade Practices Act*, may be found in ***Murphy v Zamonex Pty Ltd*** (1993) 31 NSWLR 439. The case arose out of a dispute concerning the Estate Mortgage Trusts, of which Burns Philp Trustee Co Ltd was the former trustee. The trustee sought a judgment debt against the defendants for the

amount advanced under a loan facility. The defendants pleaded a defence of set-off based in part upon a contravention by Burns Philp of s 52 of the *Trade Practices Act*. At 462E-F, Giles J noted: *"I am satisfied, therefore, that there was conduct of Burns Philp in contravention of the Trade Practices Act … entitling the defendants to recover the amounts of the loss or damage suffered by that conduct. The plaintiffs did not contend that action to recover that loss and damage was brought out of time. … But simply an entitlement to damages as against Burns Philp, which was not a party and was in liquidation, would not assist the defendants in these proceedings. It was necessary for the defendants to set off their damages against the claims of the plaintiffs, Burn Philp's successors as trustees."*

At p 465B, his Honour continued: *"Equitable set-off is available where the defendant establishes an equitable ground for being protected from the plaintiff's claim. That has been expressed in language to the effect that the defendants' set-off goes to the route of or impeaches the title of the plaintiff's claim … . Accordingly, if a Court of equity will restrain A in his capacity as trustee from recovering his claim against B without allowing for B's counter-claim against A in A's capacity as trustee there will be set-off in equity."*

89 As p 467E his Honour continued further, after a review of a number of authorities: *"In the present case the defendants' claim against Burns Philp would have been closely connected with Burns Philp's claim against the defendants. The misleading conduct caused the defendants to enter the transaction on the terms they did, as is now established without any obligation on Burn Philp to make the further advances. In* ***Sun Candies Pty Ltd v Polites*** *[1939] VLR 132, the defendant was allowed to plead an equitable set-off where a business had been purchased as a result of the plaintiff's fraudulent misrepresentations and the defendant claimed damages for breach of warranty, all in answer to a claim for the purchase price of the business; in* ***Australian Mutual Provident Society v Specialist Funding Consultants Pty Ltd*** *[(1991) 24 NSWLR 326], the defendants said that they had been induced to enter into the agreement sued upon by statements which constituted misleading conduct and fraudulent representations, and it was said that the connection between the claims was 'close and inextricable'. In* ***Popular Homes Ltd v Circuit Developments Ltd*** *[1979] 2 NZLR 642, there was an equitable set-off of a builder's claim for damages for failing to provide finance promised for building work against the proprietor's claim for failing to complete the building work. … In this case I consider that if there had been no question of trusteeship the defendants would have been entitled to set their claims against Burns Philp off against Burns Philp's claims against them. If Burns Philp was claiming as trustee and liable in its capacity as trustee, I consider the same set-off would be available."*

90 ***Carlton and United Breweries Ltd v Castlemaine Tooheys Ltd*** (1986) 161 CLR 543 was concerned with a contractual claim said, by way of defence, to be in breach of ss 45 and 45D of the *Trade Practices Act*. At that time, s 86 of the *Trade Practices Act* conferred exclusive jurisdiction on the Federal Court *"to hear and determine actions, prosecutions and other proceedings under this Part"*. That conferral of exclusive jurisdiction extended to actions for injunctions or damages under s 82. By contrast, the issue raised in the proceedings in the State Supreme Court was identified by the High Court in its joint judgment at p 550 in the following terms: *"By par 9(c) of the amended defence it was pleaded that if the sale of shares agreement contained implied terms as alleged in par 11 of the amended statement of claim the agreement 'would be in restraint of trade and void, and further, the entry into of an agreement containing those implied terms or any of them, and the giving effect to of those implied terms or any of them was and would be in contravention of the law'. … The particulars of par 9 contained in the amended defence show that it is alleged that the sale of shares agreement is in breach of ss 45 and 45D of the Trade Practices Act. …*

The appellants by their reply raised the question whether the Supreme Court had jurisdiction to determine the defences raised by par 9 of the amended defence in so far as those defences arose under any of the provisions of the Trade Practices Act."

91 The High Court held that the Supreme Court had such power, because the determination of the defences did not fall within the scope of the exclusive jurisdiction conferred on the Federal Court under s 86, the matters not being raised by way of a separate action, prosecution or other proceeding. In so concluding, their Honours considered a passage in the judgment of Wilson J in ***Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*** (1981) 148 CLR 457 at 543 that: *"The Act provides a code which neither requires nor permits resort to any other law in the determination of the rights, duties and liabilities which it creates."*

The Court continued: *"His remarks do not support the view that a Supreme Court which is exercising its ordinary jurisdiction to give relief for a breach of a contract loses that jurisdiction once it is alleged that the making or the performance of the contract is prohibited by the Trade Practices Act. It is most unlikely that Parliament intended so inconvenient a result. Moreover, the Act itself provides no support for such a view. A number of sections clearly contemplate that the contravention of a provision of the Act may have legal consequences other than those provided by Pt VI, which might affect the grant of remedies by courts other than the Federal Court; those sections show that it was not intended the Pt VI should state exhaustively the consequences attaching to a contravention of a provision of Pt IV or Pt V."*

92 In ***Westpac Banking Corp v Eltran Pty Ltd*** (1987) 14 FCR 541, claims of misleading and deceptive conduct under s52 of the *Trade Practices Act* were raised by way of equitable set-off in answer to proceedings filed by the applicant, Westpac, for repayment of certain foreign currency loans. Northrop J (in dissent) referred to the decision in *Carlton and United Breweries* as support for the proposition that the Supreme Court had jurisdiction to determine defences based on the *Trade Practices Act*: 14 FCR at 559. His Honour continued: *"There the plaintiffs had commenced an action in the Supreme Court. The defendants alleged that to allow the plaintiffs to succeed in the action would involve enforcement of an agreement which was in breach of the Trade Practices Act or implying in to*

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the agreement a term which contravened that Act. The plaintiff raised the question whether the Supreme Court had jurisdiction to determine the defences based on s86 of the Act. The High Court, Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ, held that the Supreme Court was competent to determine the defences, as s86 conferred exclusive jurisdiction on the Federal Court only in those matters which answered the description contained in that section, namely, 'actions, prosecutions and other proceedings' under Pt VI. Therefore, the jurisdiction exercised by the Supreme Court was not that jurisdiction conferred exclusively on the Federal Court by s86.

In my opinion, these cases are authority for the proposition that the Supreme Court is capable of considering matters which arise under the Trade Practices Act, notwithstanding that proceedings have already been commenced in this Court, and notwithstanding that the Supreme Court cannot award damages under s82 … ."

93 At [548]-[549] the majority in the Full Court (Fox and Burchett JJ) stated: *"In the present case the claims made under s52, which are the subject of one version of the set-off propounded, though other versions rely on principles of contract and negligence, are claims for relief for which Pt VI provides. Accordingly this Court has exclusive jurisdiction in respect of those claims … . Equity permits certain privileged cross-claims to put on the armour of a set-off, but they do not therefore lose the character of cross-claims. They operate to extinguish the debt, not by ceasing to be cross-claims, but by virtue of being cross-claims which possess additional features. …*

Though a cross-claim relying on s52 of the Trade Practices Act would be outside the jurisdiction of the Supreme Court, the bank contended a set-off could be asserted which depended on s52, and therefore the whole matter could and should properly be determined in that Court. Because this contention fails to take account of the nature of such a set-off, as an emanation of the cross-claim the Supreme Court cannot entertain, it must be rejected."

94 To reach this conclusion, the majority relied significantly upon a statement by Hutley JA in ***Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd*** [1980] 2 NSWLR 514 at 521(35) where his Honour held that a set-off is *"one of the means of bringing conflicting claims to a single adjudication"* so that *"claiming to set-off a sum of money is commencing a proceeding against the company"*, which was prohibited. His Honour continued: *"The fact that it is done by way of defence is immaterial."*

95 With respect to the views of Fox and Burchett JJ, to speak of *"armour"* and *"emanations"* fails to recognise the need to accommodate the judgment of the High Court in ***Carlton and United Breweries***. At the very least, the reasoning of the majority is unpersuasive in relation to the statutory context of present concern. It should also be noted, as the majority in the Full Court did not, that Hutley JA in ***Stehar*** commenced his discussion with the comment that *"no question of equitable set-off is involved"*: at p 516E.

96 The next question is whether the *Building Payment Act* sought to preclude such a defence. Section 15(4)(b)(ii) precludes a respondent from raising *"any defence in relation to matters arising under the construction contract"*. But in truth, the defence raised did not arise under the contract, nor was it in relation to a matter arising under the contract: rather it was in relation to misleading or deceptive conduct on the part of the claimant which could lead to injunctive relief under s 87 of the *Trade Practices Act*. While it is true that the phrase *"in relation to"* may identify any rational connection between the prohibited defence and a matter arising under the construction contract, and while the entitlement to a progress payment depends in part upon the construction contract and conduct in execution thereof, this language should not be construed so broadly as to prohibit a defence based upon conduct undertaken in service of a payment claim for the purpose of creating a statutory right.

97 It remains to consider whether the decision of this Court in ***Bank of New Zealand v Spedley Securities*** (above at [76]) requires that a claim of conduct in contravention of s 52 of the *Trade Practices Act* can be pleaded only by way of cross-claim rather than as a defence. The case involved a claim that the Bank of New Zealand was the constructive trustee of a large sum of money, said to be held by it for the benefit of Spedley Securities. The fact that officers of Spedley Securities had engaged in misleading and deceptive conduct was pleaded by way of defence by the Bank of New Zealand.

98 Kirby P noted that there had for some time *"been a controversy as to whether s 52 of the Trade Practices Act … gives rise, by its own force, to a duty which is enforceable at law"*: p 98G. If it did, presumably an applicant would not need to rely upon the cause of action given under s 82, which was subject to a three year limitation period. After noting the terms of that provision, his Honour continued (at p 99E): *"The scheme of the legislation therefore appears to contemplate, for breach of s 52, an action under s 82. The problem for BNZ is that the words of that section are not apt to support a defence. Furthermore, if it is in s 82 that the sanction for breaches of s 52 must be found … subs (2) imposes a time limit commencing when the cause of action accrued. I would therefore conclude that Cole J was right to strike out the defences invoking s 52 of the Act."*

99 The gist of the construction argument is that the *Trade Practices Act* has three elements: first it contains prohibitions; secondly it provides remedies for contraventions and, thirdly, it confers jurisdiction to grant relief for contraventions: see ***SST Consulting Services Pty Ltd v Rieson*** (2006) 80 ALJR 1190 at [29]. The remedy is made available to persons aggrieved, on *"application to a court"*. The next step in the argument is that an applicant must be a moving party, not a defendant. But the last step does not necessarily follow: an *"application"* need not be an initiating process in a court and a defendant can *"apply"* to have a claim dismissed.

100 The approach of other members of the Court is noted by Mahoney JA at 106A-B (with whom Hope AJA agreed at 108B): *"But it is accepted that the statement of defence as drawn did not claim that, by reason of the fact that Spedley and/or the directors knew what they knew about the conduct of Mr Yuill or by reason of the fact that they*

were under an obligation to reveal to BNZ at the relevant time what they knew in that regard, the constructive trust which otherwise would have arisen did not arise. …

The learned judge held that the statement of defence so understood could not constitute a defence to the relevant part of the statement of claim and therefore dismissed those defences."

101 These latter statements in ***Bank of New Zealand v Spedley Securities*** should not be seen as points of pleading: rather, they were concerned with the substantive effects of the prohibition contained in s52 of the *Trade Practices Act*. They did not deny that s52 can be raised by way of defence, but rather that the prohibition contained in s52 cannot be raised unless it gives rise to a timely claim for relief of a kind envisaged by the *Trade Practices Act*, for example under ss 80, 82 or 87. But relief may be available to prevent further conduct where a person "*is likely to suffer, loss or damage*" even though no cause of action for loss has yet arisen: see s 87(1) and (1A) and see ***Wardley Australia Ltd v State of Western Australia*** (1992) 175 CLR 514 at 551 (Toohey J).

102 It would thus appear that it is only the remarks of Kirby P which are broad enough to preclude reliance on the *Trade Practices Act* by way of a defence. So far as they go beyond the circumstance arising where the relief permitted under Part VI of the Act is precluded by the expiration of a limitation period, they expressly rely upon the language of s 82 as "*not apt to support a defence*". However, his Honour was not considering the possibility of a claim being raised by way of equitable set-off, nor was he considering the language of s 87. Furthermore, the Court's attention does not appear to have been drawn to the decision of the High Court in ***Carlton and United Breweries***, noted above, which is arguably inconsistent with the potential breadth of the dictum in *Spedley* ***Securities***. Clearly the comments of the President in that case cannot be given an operation which would be inconsistent with ***Carlton and United Breweries***: see [91] above.

103 Two other authorities should be referred to, although they do not affect the conclusions reached above. The first, ***Drabsch v Switzerland General Insurance Co Ltd*** (1996) 130 FLR 127, involved proceedings brought by the plaintiff alleging wrongful dismissal by the defendant. The defendant cross-claimed and the plaintiff sought to raise issues under the *Trade Practices Act* by way of a defence to the cross-claim. While Santow J considered himself bound to conclude "*that s 52 may not be pleaded as a defence*" (at p 155) he also noted that *Spedley Securities* involved no claim for relief under ss 82 or 87. *Drabsch* did raise such claims and his Honour treated the claims for relief as irregularly included in a "*defence*" but capable of inclusion, with leave, in the statement of claim: pp 157-158. That conclusion appears to have been apt in terms of the pleading in question: see p 153. The second case is a decision of McDougall J under the *Building Payments Act*, ***Barclay Mowlem Construction Ltd v Tesrol Walsh Bay Pty Ltd*** [2004] NSWSC 716. McDougall J held that the defendant was entitled to raise an arguable defence that it had provided a payment schedule, with the result that it did not need to rely on the claims under the *Trade Practices Act*. Without identifying what the matters were which were said to give rise to a claim under s 52 (although they may well have been representations which were referred to as relied on by way of estoppel) his Honour held they "*could not give rise to a defence*": at [23]. The nature of the claim as raised, was quite limited, as appears from his Honour's further remarks at [24]: "*It is not said that some form of ancillary relief should be granted under s 87 of the TP Act so as (for example) to restrain Barclay Mowlem from relying on its right at law. Nor it is said that any damages recoverable by reason of any breach of s 52 are capable of giving rise to a defence by way of setoff. Indeed, no damages are alleged; and no relevant effect (that is, relevant to Barclay Mowlem's claim) is attributed to the s 52 case.*"

In those circumstances, his Honour was undoubtedly correct in concluding that the s 52 allegations "*would not themselves have justified the withholding of summary judgment":* at [25].

104 Although the exclusive jurisdiction of the Federal Court has been consigned to history (see *Jurisdiction of Courts (Miscellaneous Amendments) Act* 1987 (Cth), s 3 and Schedule) it remains common practice to plead a prohibition contained in the *Trade Practices Act* both as a defence to a proceeding to enforce a contractual right and by way of a cross-claim for a declaration. A pleading in this form was considered by fourteen judges, culminating in the High Court in ***SST Consulting Services Pty Ltd v Rieson*** (2006) 80 ALJR 1190, without the reliance by way of defence being challenged. The case involved a question as to the enforcement of a loan agreement which contained a provision in breach of the prohibition on exclusive dealing in s 47(1) of the *Trade Practices Act*. The defence failed, as did the cross-claim, because of the operation given to s 4L of the *Trade Practices Act*, but not on any ground as to the form of the pleading: see [2006] HCA 31 at [14] and [24]-[29]; see also Kirby J (dissenting) at [102].

Section 109: inconsistency

105 If the foregoing analysis is wrong and there is no right to proceed by way of defence, the Appellants can only succeed if they are entitled to raise the matters of misleading and deceptive conduct by way of a cross-claim brought against the Respondent. As any form of cross-claim is precluded by s 15(4)(b)(i), that argument must depend upon inconsistency between the Commonwealth and State laws, so as to render the State law inoperative to the extent of the inconsistency: Constitution, s 109. If the terms of the *Building Payment Act* would, in the oft-quoted words of Dixon J in ***Victoria v The Commonwealth (The Kakariki)*** (1937) 58 CLR 618 at 630, "*alter, impair or detract from*" the regulation of conduct in trade or commerce under the Commonwealth Act, there will be inconsistency.

106 The first way in which the Appellants put their inconsistency argument, albeit in relation to the *Trade Practices Act*, was that that Act "*forbade*" the service of the third payment claim if, as the Appellants allege, it was done in a misleading or deceptive manner. With respect, it is not correct to say that the Commonwealth law forbad the

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service of a payment claim if done in a misleading or deceptive manner. Rather, being an act undertaken in the course of trade or commerce, the Commonwealth Act conferred on the Appellants a right to seek relief by way of compensation (where loss had been caused) or by way of injunction (where loss was anticipated) in order to undo or prevent the effect of conduct falling within the prohibition. Misleading or deceptive conduct is not unlawful in the abstract: it will not, for example, give rise to any right to relief unless some loss or damage is suffered or likely to be suffered *"by"* conduct in breach of the Act, a term which incorporates concepts of causation: see ***Wardley Australia Ltd v Western Australia*** (1992) 175 CLR 514 at 525 (Mason CJ); see also ***I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*** (2002) 210 CLR 109 at [16]-[32] (Gleeson CJ) and [62] (Gaudron, Gummow and Hayne JJ).

107 The other way in which the Appellants put their inconsistency argument focused on the constraint imposed on the bringing of a cross-claim, by s 15(4) of the *Building Payment Act*, as an impairment of a right arising under the *Trade Practices Act* to resist a judgment for the amount of the payment claim.

108 The Respondent, and the Attorney for the State of New South Wales intervening, argued that there was no inconsistency. Counsel for the Attorney (whose submissions were adopted on behalf of Parkline) argued that s15(4) was no more than a procedural rule, which permitted the Appellants to bring their claim under the *Trade Practices Act* in a separate action at any time they wished. He suggested that the closest analogy to the present case might be found in ***Stock Motor Ploughs v Forsyth*** (1932) 48 CLR 128. The Commonwealth law in issue in that case included certain provisions of the *Bills of Exchange Act* 1909-1912 (Cth), including s 43 which entitled the holder in due course to enforce payment against all parties liable on the bill. Pursuant to the *Moratorium Act* 1930-1931 (NSW), a person entitled to rent under the terms of a hire purchase agreement was prohibited from suing to recover the rent, without obtaining leave of the District Court or a Court of Petty Sessions. Mr Forsyth had given two promissory notes as collateral security for two instalments due under a hire purchase agreement. The High Court held that both Acts operated in relation to the promissory notes. Four members of the Court (Gavan Duffy CJ, Starke, Evatt and McTiernan JJ), in separate judgments, concluded that there was no inconsistency; Dixon J, in dissent, held that there was.

109 Although the reasoning of some members of the majority (particularly the view of Evatt J, partly based on the limited nature of most Commonwealth powers) may not be entirely consistent with more recent authority, it is clear that the reasoning of the members of the majority, taken broadly, was based upon two considerations. First, while the Commonwealth Act was designed to deal with bills of exchange, it did so against the background of the common law, which it did not seek to codify. Thus, Starke J stated (p 135): *"The effect of these provisions is that the maker of a promissory note engages that he will pay it according to its tenor, and that the holder may sue on the note in his own name and recover the amount thereof and interest thereon. The sections set forth the obligations arising ex contractu on the making of an instrument within the definition of a promissory note (sec. 89). But the statement and enactment of those obligations does not prescribe, define, or deal with the time within which they may be exercised, or how and in what manner they may be suspended. Such matters rest upon the agreement of the parties or the action of a competent legislature. Where the Federal power has not acted, the competent legislatures are necessarily the States, within their territorial limits."*

110 Secondly, and by contrast, the State law was not directed to promissory notes or bills of exchange as such, but to security transactions, namely mortgages and hire purchase agreements. Thus, McTiernan J (p 155) stated: *"The provisions of the Moratorium Act, which are in question in this case, do not, in my opinion, assume to enact any rule with respect to the operation of a promissory note as a negotiable instrument. If these provisions are effective, failure to observe them is of course a good ground of defence to the maker of a promissory note in an action brought by the payee to recover moneys due on a note which evidences the debt which has its origin in the hire-purchase agreement, to which the maker and payee are parties. This defence is additional to other defences which he may have under rules of law not defined by the Bills of Exchange Act. It is true that the right of the maker to sue is thereby restricted. But the Bills of Exchange Act expressly recognizes that there may be personal defences to the action, and it neither defines nor limits the number of such defences."*

111 Nevertheless, McTiernan J found that the case raised *"a question of considerable difficulty"* (p 151). Noting the requirement of leave before proceeding to enforce the payment of an instalment under a hire purchase agreement his Honour continued:

> *"Should he apply for leave the Act authorizes the Court to refuse the application. If the application be refused, the right of the payee to recover the debt may be indefinitely postponed. … In **Gould v. Robson** (1807) 8 East 576; 103 E.R. 463, which was a case in which time was given by the holder to the acceptor of a bill of exchange, Lord Ellenborough said (8 East at p. 579; 103 E.R. at p. 465): '**How can a man be said not to be injured if his means of suing be abridged by the act of another?**' It is obvious that these sections of the Moratorium Act restrict the right of a person to recover money expressed to be due by the terms of a promissory note, which is given as security for an instalment due in the manner mentioned in sec. 20."*

112 The *Building Payment Act* prevents the respondent to a payment claim raising, by way of cross-claim, a complaint about the conduct of the claimant in serving the payment claim. The effect is to preclude the respondent from relying upon a complaint which might otherwise have been available in resistance to a claim, even though, if the claim were not payable, the payment may be recoverable in separate proceedings. If that analysis of the effect of the *Building Payment Act* is correct, one may ask, adopting the language from ***Gould v Robson***, how can the respondent be said not to be injured, by this abridgment of its rights? Nor is it clear that the separate

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characterisation of the State and Commonwealth laws, which underlay the reasoning of the majority in ***Forsyth***, would operate in the same way in the present case. The *Trade Practices Act* is a law which applies generally (regardless of its extended operation) to the conduct, in trade and commerce, of constitutional corporations. While it does not provide a code in relation to such conduct, it prescribes broad standards and confers entitlements on those who may suffer from a breach of its proscriptions. The State *Building Payment Act* also operates in relation to trade and commerce, but in a particular area. Nevertheless, it could not validly exempt the operation of corporations who are parties to construction contracts from their obligations under Commonwealth law.

113 In ***Stock Motor Ploughs v Forsyth***, Dixon J stated at p 136: *"The question is whether a State law operating to prevent recovery upon a promissory note, which, at the time of its enactment, was valid and subsisting, is inconsistent with the Commonwealth statute. A provision which prevents or suspends the enforcement of an accrued right cannot do otherwise than impair the enjoyment of that right. In this Court an interpretation of sec. 109 of the Constitution has been adopted which invalidates a law of a State in so far as it would vary, detract from, or impair the operation of a law of the Commonwealth."*

114 Although Dixon J was in dissent as to the outcome of ***Stock Motor Ploughs***, his statement of the underlying principle is well-accepted: see, eg, ***Australian Mutual Provident Society v Goulden*** (1986) 160 CLR 330 at 337 and ***APLA Limited v Legal Services Commissioner*** *(NSW)* (2005) 79 ALJR 1620 at [205]-[209] (Gummow J).

115 That approach focuses on the existence of a right arising under a Commonwealth law and the direct impairment of its enjoyment, as a result of the operation of a State law: see ***Forsyth*** at p 137. As Gummow J noted in ***APLA Ltd*** at [201], it may be necessary to look at the "*practical effect*" of the State law in relation to the Commonwealth right, so that it is not sufficient to look purely at the legal operation of the Federal and State laws in question. That comment was of particular concern in the circumstances of that case, which involved a contention that a State law preventing lawyers making known the existence of their services might impact on the ability of members of the community to seek redress available under Commonwealth laws. Any compromise of the operation of Commonwealth laws in those circumstances was indirect and could only be demonstrated by reference to practical effects. A similar approach was required in relation to a State levy on hospital benefit funds discussed in ***New South Wales v The Commonwealth and Carlton*** (1983) 151 CLR 302. In the present case, however, the impact of the State law on rights conferred under the *Trade Practices Act* is direct and significant, in the sense explained by Dixon J in ***Forsyth***.

116 Similarly, a Commonwealth law and a State laws may operate in one circumstance, an example being concurrent legislation providing for the removal of wrecks from navigable waters. There would be no practical conflict unless both Commonwealth and State authorities sought to exercise their powers in relation to the same wreck. It was at that point that inconsistency would arise, of a kind commonly described as "*operational inconsistency*": see ***Victoria v The Commonwealth (The Kakariki)*** (1937) 58 CLR 618. It is not uncommon for the Commonwealth to enact provisions invoking the same doctrine. Thus in s 6(2) of the *Racial Discrimination Act* 1975 (Cth) where a person could make a claim under either the Commonwealth Act or a State law, and in fact takes proceedings under the State law, the right under the Commonwealth Act is withdrawn: see also the *Sex Discrimination Act* 1984 (Cth), s 10(4); cf the *Corporations Act* 2001 (Cth), ss 5E-5G. But there is no provision which limits or regulates the operation of the relevant provisions of Part V of the *Trade Practices Act* in a similar way. While s 75 of the *Trade Practices Act* (which appears in Part V) states that *"this Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory"*, that expression of intention must be understood as saving the operation of State laws having a similar effect to the *Trade Practices Act* and not State laws which are in conflict with it. Accordingly s 75 provides little assistance in answering the present question.

117 One answer to this challenge to the State law, being an answer accepted by the primary judge in the present matter, is that the State law does nothing to prevent rights being pursued in separate proceedings. In that sense, the only constraint imposed by s 15(4) is a procedural constraint. As explained by Callinan J in ***APLA Ltd***, "*in an action in a State court exercising federal jurisdiction, the rules of court may impose more onerous procedural obligations on plaintiffs than in a federal court*": at [477]. Such matters of procedural regulation, his Honour noted, were legitimate and did not give rise to inconsistency.

118 However, the suggestion that an injured party could bring separate proceedings in relation to misleading or deceptive conduct is to disregard an important practical consequence of the State law. The loss which the Appellants seek to prevent is one which will occur, in a summary way, in the s 15 proceedings. The institution of separate proceedings will not avail them in that respect, unless they can obtain a stay of the s 15 proceedings to allow the separate *Trade Practices Act* proceedings to be completed. At best that involves a claim for a stay, on discretionary grounds, of the s 15 proceedings. Although dicta in ***Brodyn*** suggests that such a stay may be appropriate in some circumstances, there must be real doubt as to whether a stay would be appropriate if its purpose were to allow the respondent to the proceedings to raise a matter (albeit elsewhere) which could not, on the present hypothesis, be raised directly in the s 15 proceedings by way of cross-claim or defence. The very purpose of the prohibition is to prevent a right to judgment on a payment claim being delayed by a cross-claim. It is quite likely that a Court would refuse a discretionary stay in those circumstances, on the basis that the Respondent was trying to achieve indirectly the very result which the Parliament had prohibited it from obtaining directly. That could be seen as an abuse of process, rather than a legitimate basis for a stay.

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119 In these circumstances, and assuming the complaint under the *Trade Practices Act* cannot be raised by way of defence, there is, in my view, inconsistency between the State law and the *Trade Practices Act* in the manner for which the Appellants contend. Accordingly, the State law will be *"inoperative"* to the extent of the inconsistency: see ***Carter v Egg and Egg Pulp Marketing Board (Vic)*** (1942) 66 CLR 557 at 573 (Latham CJ).

***Judiciary Act*, s 79**

120 If the foregoing conclusions are wrong as to the availability of a defence and as to the operation of s 109, it would be necessary to consider the operation of s 79 of the *Judiciary Act*. In the present case, whether the *Trade Practices Act* can be invoked in a State court will depend not on s 39(2) of the *Judiciary Act*, but on Part VI of the *Trade Practices Act*. There is no dispute that, the *Building Payment Act* aside, the District Court would have jurisdiction to consider the Appellants' contentions: *Trade Practices Act*, ss 86(2). No doubt the application of the *Trade Practices Act* will depend on the operation of, amongst other provisions, the Uniform Civil Procedure Rules (NSW). A procedural rule which regulates generally the manner in which proceedings are conducted will not usually "*otherwise provide*" for the purposes of s 79. As Callinan J noted in ***APLA Ltd***, it is beside the point that rules applicable in a State court differ from those applicable in an equivalent federal court: see [117] above. However, as his Honour stated in ***Agtrack (NT) Pty Ltd v Hatfield*** (2005) 79 ALJR 1389 at [108], rules of court which conflict with a Commonwealth law will not be picked up by s 79: see also ***Air Link Pty Ltd v Paterson*** (2005) 79 ALJR 1407 at [128]. A State law which sought to withdraw from a State court the power to deal with matters in federal jurisdiction would be invalid because it would be inconsistent with the federal law, vesting jurisdiction in the State court, for the reasons noted above. By parity of reasoning it could also be said that the limitation contained in the State law would not be applicable in federal jurisdiction because a Commonwealth law otherwise provides.

121 The Attorney submitted that s 79 required an application of the approach to conflicting statutes enacted by one legislature, as the proper basis for deciding whether the Commonwealth law otherwise provided. This test was in contra-distinction to the test under s 109: see [35] above. That approach is supported by the judgment of Gleeson CJ and Gummow J in *Northern Territory v GPAO*, 196 CLR 553 at [80] and by the joint judgment of Gleeson CJ and Gummow and Hayne JJ in ***Austral Pacific***, 203 CLR 136 at [17]. According to that approach, one asks "*whether the operation of the [Commonwealth law] so reduces the ambit of the [State law] that the provisions of the [Commonwealth law] are irreconcilable with those of the [State law]*": ***Northern Territory v GPAO*** at [81].

122 The Attorney submitted that the Commonwealth law was not, in the present circumstances, irreconcilable with the State law, but he did so in circumstances where he had already concluded that there was no inconsistency for the purposes of s 109. There was no attempt to assess whether, if there were s 109 inconsistency, a different conclusion would result by applying s 79. The lack of submissions in that respect militates against undertaking an exercise on the basis that the conclusion set out above with respect to inconsistency is wrong.

123 Furthermore, there is a level of artificiality in the test to be applied. The reconciliation of two conflicting laws of the one legislature may well be achieved by treating a later and specific law as imposing an implied limitation on an earlier and more general provision. As ***Austral Pacific*** demonstrates in a different statutory context, the resolution of these difficulties may require close attention to the language of the relevant provisions. Thus, in the present case, attention should be paid to the language used in s 86(2) and (3), as to the scope of the investiture of jurisdiction in the State courts "*within the limits of their several jurisdictions, whether those limits are as to locality, subject matter or otherwise*". These questions were not adequately addressed in argument.

Conclusions – *Trade Practices Act*

124 The result is that s 15(4)(b)(ii) does not preclude the Appellants raising, by way of a defence to a claim based on a failure to provide a payment schedule, a contention that the service was not effective because it involved misleading or deceptive conduct.

125 Alternatively, if that contention can only be raised by cross-claim, s15(4)(b)(i), to the extent that it prevents the taking of that course in reliance on a complaint of misleading and deceptive conduct in breach of s 52 of the *Trade Practices Act*, is invalid.

126 In rejecting the Appellants' application to re-open their case, the primary judge noted that there was an additional factor which weighed against reopening, namely the lateness of the application: Judgment at [111]. That would, in effect, have been a discretionary consideration had her Honour considered that the proposed cross-claim or defence had merit, which she did not. As noted by McHugh J in ***Russo v Aiello*** (2003) 215 CLR 643 at [29], referring to ***Wade v Burns*** (1966) 115 CLR 537 at 555 (Barwick CJ), "*a statement as to how a judge would exercise a discretion, that the judge holds that he or she does not have, has no weight in determining whether an appeal from a discretionary judgment should be upheld*". *In any event, her Honour described the additional factor as one "**of very little weight**".*

127 The appeal should be upheld and the judgment below set aside. The matter should be remitted to the District Court to allow the Appellants to defend the proceedings on the basis that misleading and deceptive conduct of Parkline had caused them to fail to provide a payment schedule within the period allowed by the *Building Payment Act*. Whether such a defence, if made out factually, should result in the avoidance of a judgment, will depend upon whether such relief is appropriate in the circumstances.

128 Accordingly, I propose the following orders:
(1) Appeal allowed.

(2) Orders made by the District Court on 3 March 2006 in matter 1998 of 2005 be set aside.
(3) In lieu thereof, grant leave to the Appellants in the proceedings in the District Court:
(a) to file a defence formulated in accordance with the reasons of this Court within 14 days; and
(b) to reopen their case.
(4) Remit the matter to the District Court for determination in accordance with the judgment of this Court.
(5) The Respondent pay the Appellants' costs of the appeal.
(6) The Intervenor is to bear its own costs.
(7) The costs of the hearing to date in the District Court to be determined by the judge on remittal.
(8) The Respondent is to have a certificate under the *Suitors' Fund Act* 1951 (NSW) if not disqualified under s 6(7).

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Mr M. Rudge SC/Mr D.R. Sibtain – Respondent instructed by Gadens Lawyers, Sydney
Mr I. Mescher – Intervenor for Attorney-General of NSW, instructed by Crown Solicitor's Office, Sydney - Intervenor