

**JUDGMENT** Sidis DCJ : New South Wales. District Court. 11<sup>th</sup> June 2008

- 1 Applications brought by the parties to these proceedings were dealt with on 29 April 2008 and judgment delivered on 16 May 2008. The proceedings were stood over 11 June 2008 to deal with questions of costs and ongoing management of the remaining part of the plaintiff's claim.
- 2 I accept the submission put to me this morning that the remainder of the plaintiff's claim may not be dealt with in the current applications and therefore that the entry of judgment for Calsun, as indicated in the reasons published on 16 May 2008, will conclude the matters currently before the court once I have determined the issues of costs.
- 3 The result of the applications was that the motion filed on behalf of the defendant was dismissed and I see no reason why the defendant should not be ordered to pay the costs of that motion.
- 4 The plaintiff succeeded partially on its application. Its claim could be divided for the purposes of the judgment into two parts: claims that were validly made under the *Building and Construction Industry Security of Payment Act 1999* and those which could not be pursued under that **Act** because they were effectively claims for damages for breach of contract.
- 5 In terms of quantum, that part of the plaintiff's application that failed involved the greater part of the monies claimed by the plaintiff against the defendant.
- 6 It was argued by the defendant that the court should either order that each party pay its own costs of the plaintiff's application or that the costs of that application should be apportioned so as to allow the plaintiff to recover only part of its costs.
- 7 In support of the application I was provided with a copy of the Court of Appeal's decision in *Elite Protective Personnel Pty Limited v Salmon (No 2)* CA 4002 of 2006.
- 8 The difficulty with the defendant's proposition was that it was not possible to separate the two issues in the way in which the Court of Appeal was able to separate issues of primary liability and contributory negligence in the *Elite Protective Personnel* decision.
- 9 In those circumstances, the plaintiff having succeeded at least as to part of the amounts claimed was entitled to have its costs of the application.
- 10 The orders which I make are as follows:
  - 1 The application filed on behalf of Lovton is dismissed.
  - 2 Lovton is to pay Calsun's costs of that application.
  - 3 On the application filed by Calsun, there will be verdict and judgment for Calsun in the sum of \$97,883.58 comprising the amounts claimed of \$93,896.21 and interest in the agreed sum of \$3,987.37.
  - 4 Lovton is to pay the plaintiff's costs of the application on an ordinary basis.
  - 5 The exhibits are to be returned.

Turnbull Hill Lawyers (Plaintiff)

Whiteley Ironside & Shillington (Defendant)