JUDGMENT : McDougall J : New South Wales Supreme Court : 11th March 2004

Introduction

1 On 24 December 2002 the plaintiff as builder and the defendant as proprietor entered into a "lump sum contract for simple building works" ("the contract"). The contract was a "construction contract" for the purposes of the *Building and Construction Industry Security of Payment Act* 1999 ("the Act"). The works included the construction of a building, to be used as a bar, restaurant and bottle shop, on the corner of Windsor and Merrivale Roads, Rouse Hill.

2 On 2 September 2003, the plaintiff served on the defendant a progress claim (dated 31 August 2003) described as "progress claim 8". That progress claim was for an amount of $832,726.87. It was said, in a covering letter, to be "made under the Building and Construction Industry Security of Payment Act 1999".

3 On 2 October 2003, the plaintiff served on the defendant a further progress claim (dated that day) described as "progress claim 9". Progress claim 9 was for an amount of $1,852,672.89. It included the amount claimed under progress claim 8. As at 2 October 2003, progress claim 8 had not been assessed by the superintendent under the contract; the defendant had not served on the plaintiff a "payment schedule" under s 15 of the Act; and no amount had been paid in respect of progress claim 8. Progress claim 9 was said, in a covering letter, to be "*a payment claim made under the Building and Construction Industry Security of Payment Act 1999*". The detailed breakup of the claim contained the following statement: "*THIS IS A PAYMENT CLAIM MADE UNDER THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 1999*."

4 The defendant did not serve on the plaintiff a payment schedule relating to progress claim 9.

5 The defendant has, since 2 October 2003, paid amounts totalling $516,105.41 in respect of progress claim 8 (and, therefore, in respect of progress claim 9). The plaintiff commenced these proceedings to recover the unpaid balance of $1,336,567.48. It moves for summary judgment.

The issues

6 Mr Corsaro SC, who appeared for the defendant, submitted that summary judgment should not be granted because his client had two arguable defences, namely:

(1) The Act did not apply at all, because of the provisions of s 7(2)(a); or

(2) If the Act did apply, the plaintiff had not brought itself within, in particular, s 13 because progress claims 8 and 9 did not satisfy the relevant requirements of the contract: specifically, certain statutory declarations and other matters that were, so it is said, conditions precedent to any liability on the part of the defendant to pay, had not been furnished.

First issue: s 7(2)(a)

7 Section 7 of the Act provides, relevantly, as follows:

> "***7 Application of Act***
>
> *(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.*
>
> *(2) This Act does not apply to:*
>
> *(a) a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes:*
>
> *(i) to lend money or to repay money lent, or*
>
> *(ii) to guarantee payment of money owing or repayment of money lent, or*
>
> *(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract, or …*
>
> *(3) This Act does not apply to a construction contract to the extent to which it contains: …*
>
> *(c) provisions under which a party undertakes:*
>
> *(i) to lend money or to repay money lent, or*
>
> *(ii) to guarantee payment of money owing or repayment of money lent, or*
>
> *(iii) to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract. … . "*

8 The defendant relied on the following evidence to show that the contract formed part of a loan agreement, so as to come within s 7(2)(a):

(1) The defendant negotiated with Provident Capital Ltd ("Provident") to provide finance for the construction costs of the project.

(2) On 4 November 2002, Provident gave the defendant a draft letter of offer, setting out (among other things) the conditions on which finance might be provided.

(3) On 19 November 2002, the superintendent gave the plaintiff an excerpt from the draft conditions of finance provided by Provident to the defendant. The superintendent's covering letter stated that "it would be appreciated if you could review and advise of any concerns you may have": in respect of the proposed conditions of the finance facility to be arranged by the defendant for the project.

(4) On 19 December 2002, the plaintiff advised the superintendent that the "[f]inance conditions are currently being reviewed … and a response is being formulated". (The evidence does not show that the plaintiff did thereafter provide a substantive response.)

(5) In the meantime, on 27 November 2002, Provident made a formal offer of finance to the defendant.

(6) The defendant accepted the loan offer on 11 December 2002.

9 The contract sum, including GST, was $5,380,650. I have no doubt that, even apart from the matters referred to in the preceding paragraph, the plaintiff must have appreciated that the defendant would be arranging finance to enable it to meet its obligations under the contract. But in any event, that must have been plain to the plaintiff after it received the draft conditions from the superintendent on 19 November 2002.

10 There is no evidence that the terms of the accepted offer of finance were disclosed to the plaintiff. However, it was not submitted that there was any material discrepancy between the draft conditions (that were provided to the plaintiff) and the conditions of the accepted offer. In any event, for the purposes of s 7(2)(a), it would not matter (on the defendant's submission) if the plaintiff were not aware of the terms of the "loan agreement"; or, for that matter, if the plaintiff were not aware that the construction contract between it and the defendant formed part of that loan agreement.

11 The question is, therefore, whether, on the evidence that I have summarised, the contract (between the plaintiff and the defendant) *"forms part of"* the loan agreement (between the defendant and Provident, apparently on the terms of the finance offer dated 27 November 2002 that was accepted on 11 December 2002). More accurately, since this is an application for summary judgment, the question is whether the defendant's argument, that the contract does form part of the loan agreement, is so clearly untenable that it cannot possibly succeed: to take, in a different context, the words of Barwick CJ in ***General Steel Industries Inc v Commissioner for Railways (NSW)*** (1964) 112 CLR 125, 130. As his Honour said, in the sentence in which the words that I have already quoted appear, *"[a]rgument, perhaps of an even extensive kind, may be necessary to demonstrate that"* the case is of that clearly untenable kind.

12 It is therefore necessary to understand what kind of connection, between a construction contract and a loan agreement, is necessary to show that the one "forms part of" the other.

"Forms part of"

13 One of the difficulties in resolving this issue is that, although the defendant contended that s 7(2)(a) had the effect that the Act did not apply to the contract, it did not state what was the construction of the words "forms part of" that led to this result. In its written submissions, the defendant submitted that "[s]ection 7(2) of the Act is grammatically capable of only one meaning", and that the Court should apply "the plain grammatical meaning". However, the submissions did not condescend to state, with reference to the words "forms part of", what was that meaning. Instead, the defendant drew attention to some ten circumstances that, it said, would be typically found "where [a] building project [involves] a financial institution making advances for construction". As I understood the submission, it was to the effect that, wherever those circumstances should be found, the construction contract would form part of the relevant loan agreement. It will be necessary to return to those submissions but, before I do, I will deal with the construction that, I think, should be given to the words "forms part of".

14 As a matter of ordinary English usage, something may be said to "form part of" another if the first thing is included or incorporated within the second. The first thing may form part of the second as a result of some natural process or as a result of some artificial process (for example, a process of manufacture). In general terms, the words "forms part of" seem to me to connote something akin to inclusion, as opposed to association. In a particular case, however, it may be difficult to discern the point at which association changes to inclusion: that is to say, the point at which one thing may be said to form part of, rather than merely to be associated with, another.

15 In legal usage, it is often asked whether certain terms form part of a contract. They may form part of it expressly: because they are expressly acknowledged by the parties to form part of the terms of their bargain. They may form part of it by incorporation: because the parties expressly, or by conduct, agree that they shall be incorporated into, and thereby form part of, their bargain. Or they may form part of it by implication: because they are implied in fact, or implied by law, or implied by statute, or implied by custom or usage. See, generally, Carter and Harland, *Contract Law in Australia* (Butterworths, 4th edition, 2002) chapter 6. But in each case, as in the world outside the area of legal usage, one thing – the term – is said to form part of the other – the contract – by, or as the outcome of, whatever is the relevant process.

16 In both ordinary English usage and legal usage, the words "forms part of" therefore seem to indicate a relationship that is more than ancillary or associative. It is not enough to say only that the two things in question are in some way connected, for example because the one bears in some way on the other. The point at which connection becomes inclusion – at which the ancillary becomes integral – may not be easy to discern, and will in any event depend upon the facts of the particular case and the terms of the particular documents.

17 Counsel did not refer me to any decision on the meaning of "forms part of". My own researches showed only one decision where the phrase had been considered – and in a radically different statutory environment, namely the *Moratorium Act* 1930 (NSW). In ***City Mutual Life Assurance Society Ltd v Smith*** (1932) 48 CLR 532, the High Court considered s 25(8) of the *Moratorium Act,* which was to the following effect:

> *"(8) For the purposes of this section the expression "a mortgage of real property" includes any mortgage where land forms part of the security."*

18 Starke J, who with Evatt J constituted the majority, did not find it necessary to consider s 25(8) except to say, at 540, that it did not *"enlarge the content of the expression 'any mortgage of real property'." Dixon J, who dissented in the result, said, at 542, "that sub-sec. 8 should be interpreted as doing no more than so defining mortgage of real property that mortgages over that and other security would be included."*

19 Evatt J, at 545, construed sub s (8) as meaning that "*if land forms any part of the security, the mortgage is dealt with by sec. 25.*" His Honour added, at 546, that the subsection "*makes it clear that the possession of a right of recourse against the land in the event of default is, of itself, sufficient to disqualify the mortgagee from having recourse to the personal covenant of the mortgagor.*"

20 It appears that Dixon and Evatt JJ took the words "forms part of" at their ordinary English meaning. Although, as I have noted, the statutory context that their Honours were required to consider was radically different to that which I am required to consider, their Honours' approach does suggest that, unless the context requires otherwise, the words "forms part of" should be construed in accordance with what I have said in paras [14] to [16] above.

21 These considerations suggest to me that, for the purposes of s 7(2)(a) of the Act, a construction contract will not form part of a loan agreement unless, in some way, the former is included in, or incorporated into, the latter.

The legislative purpose

22 This tentative view makes it necessary to consider the legislative purpose. The Second Reading Speech has cast no light on this. Section 7 was not affected by the substantial amendments to the Act made by the *Building and Construction Industry Security of Payment Amendment Act* 2002 ("the Amendment Act"). No doubt for that reason, it was not referred to in the Second Reading Speech on the Bill for the Amendment Act.

23 In the Second Reading Speech for the 1999 Bill (Hansard, Legislative Assembly, 8 September 1999) s 7 was referred to, expressly or by implication, twice. At 104, the Minister said: "*Particular types of contracts are excluded from the operation of the legislation. The main exclusions are: contracts for residential building work with the person who resides in or proposes to reside in the premises on which the work is carried out; contracts of insurance or loans or guarantees with recognised financial institutions; contracts where the payment is not made in monetary terms, for example, a contract where in return for carrying out construction work, the contractor is to receive the right to lease or operate the building or structure; and contracts for construction work carried out outside New South Wales.*"

24 With one exception, the Second Reading Speech does not indicate why it was that these exclusions were thought to be desirable. The exception relates to s 7(2)(b), which the Minister referred to at Hansard 103. What he there said sheds no light on s 7(2)(a). Nor, I think, is there some common thread between those exclusions, that might enable an underlying purpose to be discerned.

25 However, I think, some understanding of the purpose sought to be served by s 7(2)(a) can be gleaned from the structure of the Act as a whole.

26 The object of the Act, very broadly stated, is to ensure that a person who carries out work under a construction contract is entitled to, and recovers, progress payments for that work (s 3(a)). That object is achieved by creating a statutory right to progress payments, to the extent that the construction contract does not do so (s 8), and by providing for valuation of progress payments (ss 9 and 10).

27 The focus of entitlement and obligation, in respect of progress claims, is on the person who is entitled and the person who is liable under the contract (s 13(1)). In the ordinary way, that would encompass contractor and principal under a head contract, and subcontractor and contractor under a subcontract (and this is not intended to be an exhaustive description of the relationships to which the Act will apply). The structure of the provisions relating to payment claims and payment schedules (ss 13 to 16) and adjudication applications and responses (and the determination thereof) (ss 17 to 26) focus on those who do the work and those who receive the benefit of the work, in each case under the contract.

28 The Act recognises that, in at least some cases, there will be financial arrangements associated with construction contracts. Those financial arrangements include, explicitly, loan agreements (s 7(2)(a)). The reference to "a loan agreement" in s 7(2)(a) is not expressly limited to a loan agreement between a principal and an external financier.

29 In this context, the purpose of s 7, stated broadly, may be seen to be to ensure that the rights and liabilities created by the Act, and the enforcement mechanisms that it provides, are confined to and operate only between the parties to the construction contract – as I have put it before, those who do the work and those who receive the benefit of it; and, further, to restrict the operation of the Act so that it does not affect construction contracts in so far as they may deal with financial arrangements.

30 In at least some cases, a construction contract may "form part of" a loan agreement (in the sense that it is included, or its terms are incorporated, in the loan agreement). This may happen where the principal assigns the benefit of the construction contract to an external financier, or where the benefit of the construction contract is the subject of a charge in favour of the financier over the principal's property. (I state these by way of example only, and at a level of extreme generality. Whether or not it can be said, in a particular case, that a construction contract "forms part of" a loan agreement will depend upon a close analysis of the relevant contractual provisions. It is not, in my view, a question that can be answered in the abstract.)

31 On this analysis, sub ss 2(a) and 3(c) of s 7 work together. Sub section 2(a) excludes the operation of the Act where, by some process, it may be said that the construction contract forms part of the loan agreement. Where that happens, the object intended to be achieved, and that in my view is achieved, is that the person who performs work under the construction contract cannot look to the financier simply because, in the events that have happened, the construction contract forms part of the loan agreement.

32 The converse situation is dealt with by sub s 3(c). In that case, in effect, what might be described as a loan agreement forms part of the construction contract. Where that happens, the Act continues to apply to the construction contract but not to those provisions of it that fall within para (c).

33 The achievement of the legislative purpose, as I understand it, therefore requires that the words "forms part of" in s 7(2)(a) be read, essentially, in accordance with their ordinary English meaning, and in a way that recognises their well understood meaning in the discourse of contracts: see paras [14] to [16] above. In other words, I think, there must be some process of inclusion or incorporation so that, absent s 7(2)(a), there would be a real argument that the person entitled to the progress claim might be able to recover it from a third party financier.

The defendant's submissions as to purpose

34 The defendant submitted that the legislature wished "to avoid a dual system of progress claim entitlements in the case of a principal who depends on loan funds in order to complete a project". On this analysis (which may not be too far removed from what I have said in paras [29] to [31] above), it was submitted that s 7(2)(a) "is a clear recognition of the significant problems which the adjudication process would cause where the financial institution is advancing funds for the construction".

35 The defendant submitted that building projects involving a financial institution would, typically, exhibit the following characteristics:

(1) They are for substantial building works, where the lender makes advances for construction relating to progress payments as assessed and valued by an independent certifier.

(2) The contractor is aware that the principal is undertaking the project based on the lender's assumption of obligations to the principal under a loan agreement.

(3) "The arrangement between the principal and the main contractor has the lender's approval."

(4) Normally, the contractors will be major construction companies with substantial assets and significant financial resources "which do not place the contractor in jeopardy"; nonetheless, subcontractors would be able to rely on the Act because their subcontracts would not form part of any loan agreement.

(5) There is, almost invariably, independent certification of claims by the contractor and direct payment from the lender to the contractor on that certification, so that "the lending authority's obligations to the principal and the principal's expectation of finance will require the contractor to abide by that interim certification".

(6) The contractor is made aware of the principal's funding arrangements, including that the contractor would need to satisfy the lender's requirements before payment can be made.

(7) The lender and the principal undertake the project on the basis that funding arrangements and contributions towards construction costs are based on the express provisions of the contract; the contractor receives payments "as the contract expressly provides and as the loan agreement at least implicitly assumes".

(8) The lender's rights depend upon the contract operating "as it has assumed" and in the expectation that the funding arrangements will be sufficient to complete the project.

(9) The parties understand that the project depends on advances from a lender, whose own interests are advanced by ensuring that the contractor is paid, and protected by the provision for independent certification.

(10) The parties understand that any variation to the arrangements for progress payments is likely to require a variation to the understood funding arrangements.

36 This submission raises a number of difficulties.

37 Firstly, as I have noted in para [28] above, s 7(2)(a) is not in terms limited to a loan agreement between a principal and an external financier. So the submission requires that some such limitation be read in.

38 Secondly, the criterion of "substantial building works", or the corresponding criterion of "major construction companies with substantial assets and with significant financial resources", is so vague and subjective as to be incapable of practical application. In truth, the result of the defendant's submission is that, contrary to the plain wording of the Act, head contractors under "substantial construction contracts" (whatever they may be), whose principals are dependent upon third party finance, and where the construction contract "almost invariably" involves independent certification of progress claims, are excluded from the Act.

39 Thirdly, the submission does not show, or provide any guidance in ascertaining, the construction of the words "forms part of" that would ensure that they apply in the circumstances described but not in other circumstances.

40 Fourthly, the submission depends upon the unstated premise that the legislature only intended the Act to operate for the benefit of small subcontractors (and, perhaps, principals undertaking "non substantial" building works). But there is no such limitation in the Act. There are numerous cases in this Court that show that it applies to very large construction contracts involving multi million dollar progress payments (see, by way of example only, *TransGrid v Walter Construction Group Ltd* [2004] NSWSC 21).

41 There is another, and I think powerful, consideration that supports this conclusion. On the defendant's argument, s 7(2)(a) is activated wherever a proprietor or a head contractor obtains finance to enable it to perform its obligations under a construction contract. The defendant submitted that this was "*typical of large development projects*". However, common experience suggests that it is not only proprietors who carry out large developments, or those with whom they contract to said contractors, who require funding. It is certainly correct to say that the language of the Second Reading Speeches, both in 1999 and in 2002, focussed on the position of the small subcontractor who was, in essence, victimised either by unscrupulous head contractors or through the application of

"pay when paid" clauses in subcontracts. As I have just shown, the legislation is not restricted to such cases. But the real vice of the defendant's approach to s 7(2)(a) is that a contractor or subcontractor might never know whether or not it had the protection of the Act. As I have noted in para [10] above, the defendant's submissions embraced the proposition that it would not matter if the plaintiff were not aware that, for reasons outside its knowledge, the construction contract to which it was a party formed part of a loan agreement to which it was not a party.

42 Nor do I accept that the legislature intended, as the defendant submitted, to restrict significantly the operation of the adjudication process in any case where the ability of a party to a construction contract to meet its obligations under that contract depends on the making of advances by a third party financier. In such a case, it is, in my view, up to the party to seek to protect itself by the insertion of appropriate provisions in the construction contract. As the matter was not argued before me, I express no view as to whether such provisions would be part of the contractual process for assessment of a progress payment, and therefore protected under s 9, or whether they would be an attempt to contract out of the operation of the Act, and therefore struck down under s 34. Clearly enough, there are arguments in principle either way; and the resolution of those arguments would inevitably depend on the precise terms of the relevant contractual provisions read in their particular contractual context.

43 If "substantial contracts" are to be removed from the operation of the Act, that, in my view, is a matter for the legislature. I do not think that it can be done by giving to s 7(2)(a) the construction for which the defendant contends.

44 In any event, even if it be correct to characterise the purpose as the defendant did (see para [34] above), the result of following that through (or, more accurately, of following through the defendant's submissions based on that premise) is that, where "a principal … depends on loan funds in order to complete a project", or where "a financial institution is advancing funds for the construction", is that the contractor – the entity that has done the work and is entitled to payment – loses its statutory entitlements and must depend on such rights as it has flowing from the circumstance that its construction contract forms part of the relevant loan agreement. To my mind, that consequence would in any event indicate that, as I have said in para [33] above, the words "forms part of" should be read essentially in accordance with their ordinary English meaning. If a contractor in this position is to lose the benefit of the entitlements and protections that the legislature has sought to provide, one would expect this to be on the basis that it obtains some clearly defined rights and entitlements in substitution. If the words "forms part of" were construed so broadly as to have the effect for which the defendant contends in this case, then the inevitable result is that the contractor would not have the benefit of the statutory regime, and would be left in the position that its contractual entitlements would be subject to all the hazards that were recognised in both Second Reading Speeches; and, in addition, would be put at risk by any dispute between the principal and its financier. I cannot accept that a construction of the words "forms part of" that is so broad as to accommodate this result is what the legislature intended to achieve when it enacted s 7(2)(a).

45 In the present case, the evidence relied upon by the defendant to show that the construction contract between it and the plaintiff forms part of the loan agreement between it and Provident is summarised in para [8] above. It falls far short of demonstrating the relationship that, in my judgment, is necessary to satisfy the words "forms part of" on their proper construction.

"Recognised financial institution"

46 There is another issue as to the application of s 7(2)(a): namely, whether Provident is, or has been shown to be, a "*recognised financial institution*". That expression is defined in s 4 of the Act to mean "a bank or any other person or body prescribed by the regulations for the purposes of this definition".

47 Clause 3 of the *Building and Construction Industry Security of Payment Regulation* 1999 deals with this as follows: *"Each person or body that is a "body regulated by APRA" within the meaning of the Australian Prudential Regulation Authority Act 1988 of the Commonwealth, is prescribed for the purposes of the definition of "recognised financial institution" in s. 4 of the Building and Construction Industry Security of Payment Act 1999."*

48 It does not appear that Provident is a bank. Nor is there evidence that it is a "body regulated by APRA". Although, again, it is necessary to bear in mind that this is an application for summary judgment, it is nonetheless the case that the material advanced in opposition to the application must show grounds of defence that are not so clearly untenable that they cannot possibly succeed. But there is no evidentiary basis that would enable me to conclude that there is an argument, of at least the requisite degree of strength, that Provident is a recognised financial institution.

Conclusion on first issue

49 For these reasons, I conclude that the suggested defence based on s 7(2)(a) of the Act could not succeed, and does not justify the withholding of summary judgment.

Second issue: section 13(1)

50 As I have mentioned, the plaintiff's claim is based upon the fact that it served a payment claim under the Act, and that the defendant failed to serve a payment schedule in response. As s 14(4) makes plain, a respondent to a payment claim who does not provide a payment schedule within the relevant time limit "becomes liable to pay the claimed amount to the claimant on the due date for the progress claim to which the payment claim relates". Section 15 reinforces this where an amount becomes due and is not paid: the claimant may recover the unpaid amount as a debt: s 15(2)(a)(i) – the "optional adjudication" provisions contained in s 15(2)(a)(ii) may be ignored for present purposes.

51 It is correct to say, as Mr Corsaro submitted, that there must, therefore, be as a starting point a payment claim within s 13. As I understand the defendant's argument, it was conceded (and if it were not conceded I would in any event find) that progress claim 9 met the requirements of s 13(2). There was no suggestion that it was not served within the relevant time period permitted by s 13(4).

52 The defendant's submission was, in essence, that the plaintiff was not entitled to a progress payment under the contract because, it was said, the plaintiff had not complied with the preconditions set out in clause 10 of the contract. This followed, it was submitted, because the expression "progress payment" used in the Act has the same meaning as it does under the construction contract. This was said to be consistent with the structure of the Act "which generally leaves it to the construction contract to define the rights of the parties" but makes "default provisions in the event that the contract does not define those rights".

53 In s 4 of the Act as originally enacted, the expression "progress payment" was defined to mean "a payment to which a person is entitled under section 8". The Amendment Act added to this the proposition that a progress payment includes, without affecting the entitlements under s 8, three specified kinds of payment: final payments, one-off payments and "milestone" payments.

54 Section 8 gives a statutory entitlement to progress payments to a person who has undertaken to carry out construction work under a construction contract. That entitlement arises "[o]n and from each reference date": an expression defined in s 8(2).

55 Mr Corsaro relied upon the judgment of Austin J in *Jemzone v Trytan* [2002] NSWSC 395. His Honour considered the Act (prior to the amendments effected by the Amendment Act) in the context of an application to set aside a statutory demand.

56 The payment that was in suit before his Honour was a final payment. His Honour held that the contract drew a distinction between a progress payment, on the one hand, and the final payment, on the other. (It will be observed that the amendment to the definition of "progress payment" effected by the Amendment Act means that a progress payment will now include a final payment.)

57 Having referred to ss 8 and 13 of the Act, and to the definition of progress payment in s 4 of the Act (in each case, of course, as the Act then stood) his Honour said:

> "***[37]*** *The definition of "progress payment" is unhelpful, because s8 confers an entitlement to payment only for a "progress payment", without further defining or explaining those words. In my opinion the words "progress payment" when used in s8 and other parts of the Act should therefore be given the meaning that they have under the construction contract. That accords with the structure of the Act itself, which generally leaves it to the construction contract to define the rights of the parties but makes "default provisions" to fill in the contractual gaps (see Second Reading Speech, at 1013). It also accords with the stated object of the Act. If the Act was intended to apply in the case of the final payment on practical completion, it would have been a simple matter for the drafter of the statement of the object of the Act in s3(1) to refer to the entitlement to receive all payments due under the construction contract, rather than only "specified progress payments". The Minister's concern with the cash-flow of subcontractors (Second Reading Speech, at 1012 and 1013) also suggests that attention was focused on progress payments rather than the final balancing of account between the contracting parties.*
>
> ***[38]*** *S13(1) confers the right to serve a payment claim on "a person who is entitled to a progress payment under a construction contract". In view of my construction of the words "progress payment", the defendant did not have the statutory right to serve a payment claim under s13 in this case. Consequently, the provisions of the Act for the plaintiff to reply by providing a payment schedule (s14(1)) and for the amount of the claim to be recoverable as a debt due by the plaintiff if, as in fact happened, no payment schedule was provided (s14(4) and s 15), have no application to the present case.*
>
> ***[39]*** *It follows that, in my view, the Act does not give the defendant the entitlement to recover the amount demanded in the "Final Account" of 14 March 2001 regardless of any genuine dispute or offsetting claim. …"*

58 It is unnecessary for me to consider whether, having regard to the amendments made to the Act by Act No 133 of 2002, it is still appropriate to say (as his Honour did in para [37]), that the words "*progress payment*" when used in the Act "*should therefore be given the meaning that they have under the construction contract*". That is because s 13(1) has now been amended so as to make that question irrelevant. The effect of the amendments may be illustrated as follows:

> "**13 Payment Claims**
>
> *(1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment under a construction contract **(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."*

59 The words (and commas) that I have underlined were inserted into the subsection by the Amendment Act. The words that I have shaded were deleted from the subsection by the same Act.

60 The changes to s 13(1) that I have just described, together with the change to the definition of "progress payment" in s 4 (see para [53] above), mean that the reasoning of Austin J in *Jemzone* is no longer applicable. If it were applicable then, as Mr Corsaro submitted, a defence based on it would clearly be a sufficient answer to a claim for summary judgment.

61 Even if, because of the matters upon which the defendant relied, the plaintiff is not "a person referred to in s 8(1) who is … entitled to a progress payment", it is undoubtedly "a person … who claims to be entitled to a progress payment". The ability to serve a valid payment claim depends on either actual or claimed entitlement, so that a payment claim served by a person who claims to be (but who in law may not be) entitled to a progress payment is sufficient to trigger the mechanism of sections 14 and following. It must follow that failure to serve a payment schedule in accordance with s 14 will lead to the consequences described in s 14(4) notwithstanding that, as a matter of fact or law, the claimant may not have been entitled to the progress payment that was the subject of the payment claim.

62 A number of consequences follow from the changes to the statutory scheme. In relation to the present dispute, those consequences include that the defence that is now alleged should have been raised by way of payment schedule. If the matter went to adjudication under s 17, then the matter could have been relied upon in the adjudication response and would then have been the subject of adjudication. To put it another way: there may well have been, as Mr Corsaro submitted, a triable issue of fact as to whether the progress claims under the contract were properly made. However, having regard to the amendments to s 13(1), that triable issue was one that should have been raised, in the first instance, by way of payment schedule.

63 I therefore conclude that the plaintiff's payment claim was valid, in accordance with s 13, and that the defendant, having failed to serve a payment schedule in response, became liable to pay the claimed amount to the plaintiff on the due date for the progress payment to which the progress claim relates.

Conclusion and orders

64 Neither of the suggested defences has merit. The plaintiff is therefore entitled to the relief that it seeks.

65 The evidence does not disclose the amount of interest to which the plaintiff is entitled or the daily rate at which interest runs. I therefore direct the parties, within 7 days, to bring in agreed minutes of order quantifying the judgment to which the plaintiff is entitled and providing for costs.

S A Kerr (Plaintiff) instructed by Gadens Lawyers
F C Corsaro SC (Defendant) instructed by Colin Biggers & Paisley