EFI Construction Pty Ltd v Gee Ha Pty Ltd [2007] Adj.L.R. 06/15

Judgment : Magistrate H Dillon . Local Court of New South Wales. Downing Centre Local Court. 15th June 2007

1. The plaintiff, EFI Constructions Pty Ltd, is a construction company that undertook work for the defendant company, Gee Ha Pty Ltd, on a project at Callala Beach. The parties signed a written contract in May 2004. That contract was a "construction contract" for the purposes of the *Building and Construction Industry Security of Payment Act 1999*. The Act therefore applied to the contract. Section 7. The plaintiff claims a sum of $54,447.27 in respect of a progress claim made under the Act. The primary issue in the case is whether there remains an unpaid portion of the claim.

The statutory scheme

2. Before considering the facts in the matter, it is important to understand the statutory framework within which this litigation is brought.

3. The object of the Act is "*to ensure that any person who undertakes to carry out construction work... under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services*". Section 3(1). Put another way, the purpose of the Act is to ensure that contractors and sub-contractors are given a cash flow during the course of a construction project.

4. The Act provides that the contractor is granted "*a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments*". Section 3(2).

5. Section 8 of the Act provides that on certain dates specified either in the contract or otherwise set by the statute itself, a person who has undertaken to carry out construction work under the contract is entitled to a progress payment. The amount to which the contractor is entitled is determined in accordance with the contract or, if the contract makes no express provision for the amount, "*calculated on the basis of the value of the construction work carried out… or undertaken to be carried out under the contract.*" Section 9. The payment becomes due and payable either in accordance with the terms of the contract or, if there is no provision in the contract, 10 business days after a payment claim is served on the respondent. Section 11. The Act specifically voids "*pay when paid*" contractual terms. Section 12. A developer or owner therefore cannot avoid making or defer a progress payment by making it contingent upon receipt of payment from a third party.

6. Section 13(1) is a critical section for the purposes of this claim. It provides:

   *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.*

7. The payment claim must "*identify the construction work to which the progress payment relates*", state the claimed amount and expressly claim the amount under the Act. Section 13(2).

8. Once served with a payment claim pursuant to s.13, the respondent has the option of replying with a "payment schedule" pursuant to s.14. The payment schedule may, in effect, challenge the claim by indicating the amount the respondent proposes to pay and the reasons why it does not accede to the full amount of the claim. Section 14(4) provides that if a payment schedule is not issued within the statutory period of 10 business days in response to the claim or the period agreed in the contract, as the case may be, "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."

9. Section 15 is also critical for the purposes of this litigation. It is headed "Consequences of not paying claimant where no payment schedule" and provides:

   (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, or*

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

   (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

   (3) A notice referred to in subsection (2) (b) must state that it is made under this Act.

   (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. (Emphasis added.)

10. In this case, the plaintiff brings its action pursuant to ss.8, 13, 14 and 15 of the Act. It is common ground that the contract concerned was a construction contract, that the plaintiff made a claim pursuant to s.13, that no payment schedule was issued by the defendant in response to it and that the claimed payment has not been made in its terms. The plaintiff claims that there is an "unpaid portion" of its last progress claim; the defendant disputes this.

The background

11. The evidence in the matter is largely undisputed. Before dealing with the few areas of contention I will sketch in the background to the dispute.

12. The contract signed by the two parties in May 2004 provided that the written document "constitutes the entire agreement and understanding between the parties" Paragraph [1.3] of the agreement.. It made no mention of any "retention fund" but set out times for submission of progress claims (21 days); times for payments of progress claims (seven days from submission of progress claims) and a "payment schedule". The payment schedule required a one per cent "deposit" for preliminary design and quantity survey work. It also allowed for a progress claim of 2.5 per cent of the agreed construction price of $2 million for the final design work and a further progress claim of five per cent on commencement of construction works.

13. EFI commenced its work and submitted 13 progress claims in all and a further invoice after the plaintiff's contract with the defendant was terminated. The first progress claim was made on 1 June 2004. It was common ground that in the first invoice issued by EFI, a clerical error was made resulting in Gee Ha paying $11,000 which was not re-credited to it until 15 March 2006.

14. It is also apparent that, over the course of the project, Gee Ha did not pay the plaintiff's invoices or progress claims in the amounts for which they issued but made various payments from time to time. The payments were made either by direct deposit into EFI's trading account or by cheques which were banked into the same account. It was EFI's practice to apply these payments to the oldest outstanding progress claim or invoice in the running account that EFI kept for the project. At the time that the payments were made, EFI's trading account was in overdraft. That raises an issue to which we shall come in due course.

15. On 10 December 2004, EFI issued an invoice (No 435) for the sum of $135,245 which was expressed to be for the "*deposit as per agreement @ 5% of contract sum $100,000*" plus a further $35,245 for various items appearing in the Bill of Quantity and GST. Gee Ha made payments of $67,622.50, $33,811.25 and $33,811.25 between 16 December 2004 and 11 February 2005, a total of $135,245. Between 21 March 2005 and 13 May 2005 it made a further three payments of, in aggregate, $100,000. In EFI's accounts they were described as "on-account payments" and were categorized as a "deposit". No invoice was issued expressly in respect of these payments. The proper characterisation of these payments is one of the keenly disputed issues in this case, one to which we will return.

16. On 31 August 2005, EFI issued progress claim No 8 (Invoice 489) in the sum of $181,905.53. On 5 October 2005, that progress claim was amended and reduced to $149,332.78.

17. In the meantime, however, in September 2005, Gee Ha and Mr William Rapicano, EFI's managing director, had come to an agreement that another company run by Mr Rapicano would lend Gee Ha $350,000. It will be necessary to return to discuss this transaction but, for the moment, suffice it to say that the loan was to be provided to finance payment of progress claims 7 and 8 made by EFI upon Gee Ha and the application of the "deposit" was part of the discussion.

18. Further progress claims were made on 14 October 2005 (PC9 $82,418.88), on and 25 November (PC 12 $154.331.24) before Progress Claim 13, the subject of these proceedings, was issued on 8 December 2005 in the sum of $150,730.33. At that stage, according to EFI's running account (the correctness of the calculation of which is disputed by Gee Ha), the defendant was in debit to EFI in the amount of $358,447.27. Between 12 December 2005 and 6 January 2006, Gee Ha made four payments to a total of $304,000. It has made no further payments to EFI.

19. To understand the plaintiff's claim more clearly, and to define those payments in dispute transparently, it is helpful at this juncture to set out the schedule to the plaintiff's statement of claim, highlighting the relevant points of contention:

Date	Inv.	Description	Amount	GST	Total	Payment	Balance	Deposit
01/06/04	***392***	***Bill of Quantiity & Document***	***10,000***	***1,000***	***11,000***		***11,000.00***	
04/06/04		Payment				5000	6,000.00	
07/06/04		Payment				1,000	5,000.00	
07/06/04		Payment Temporary Fending				5000	Nil	
29/07/04	410	ATF Payment	1,346.65	134.67	1,481.32		1481.32	
26/08/04						1481.32	Nil	
09/08/04	413	Preparation of construction documents	25,000	2500	27,500		27,500.00	

25/08/04		Payment				27,500.00	Nil	-
10/12/04	***435***	***5% Deposit & Site Establishtt***	***122,950.00***	***12,295.00***	***135,245.00***		***135,245.00***	
16/12/04		Payment				67,622.50	67.622.50	
07/12/05		Payment				33,811.25		
11/02/05		Payment				33,811.25	Nil	-
21/03/05		***On a/c Payment***					***27,000.00***	***-27,000.00***
06/05/05		***On a/c Payment***					***51,555.60***	***-51,555.60***
13/05/05		***On a/c Payment***					***21,444.40***	***-21,444.40***
13/05/05		On a/c Payment				81.873.77	-81,873.77	
31/05/05		On a/c Payment PC 05 - Works to				68,424.44	150,298.21	
30/06/05	470	30106105	264,598.02	26,459.80	291.057.82		140,759.61	
05/07/05	477	PC 06	271,664.65	27,166.47	298,831.12		439,590.73	
19/07/05		Payment				40,000.00	399,590.73	
21/07/05		Payment				60,759.61	338,831.12	
01/08/05	479	PC 07	202,036.63	20,203.66	222,240.29		561,071.41	
01/08/05		Payment				100,000.00	461,071,41	
12/08/05		Payment				50,000.00	411,071.41	
24/08/05		Payment				148,831.12	262,240.29	
31/08/05	***489***	***PC 08***	***165,368.66***	***16,536.87***	***181,905.53***		***444,145.82***	
09/09/05		Dera Loan Advancement				350.000.00	94,145.82	
14/10/05	498	PC 09 Windows to Ground Floor	74,926.25	7,492.63	82,418.88		176,564.70	
25/10/05	499		70,000.00	7,000.00	77,000,00		253,564.70	
11/11/05		Payment				96,000.00	157,564.70	
21/11/05		Payment				60,000.00	97,564.70	
10/11/05		Payment				44,179.00	53,385.70	
25/11/05	503	PC 12	140,301.13	14,030.11	154,331.24		207,716.94	
08/12/05	504	PC 13	137,027.57	13,702.76	150,730.33		358.447.27	
12/12/05		Payment				154,000.00	204,447.27	
14/12/05		Payment				50,000.00	154,447.27	
03/01/06		Payment				65.000.00	89,447.27	
06/01/05		Payment				35,000.00	54,447.27	
01/03/06	506	Works to 28/02/06	95,742.17	9,574.22	105.316.39		159,763.66	
15/03/06	***511***	***Credit Note - Re: Inv 392***	***-10,000.00***	***-1,000.00***	***-11,000.00***		***148,763.66***	
TOTALS			***1,570,961.73***	***157,096.19***	***1,728,057.92***	***1,679,294.26***	***148,763.66***	***100,000.00***

The issues

20. The primary issue in the case is whether EFI has correctly calculated the progress claim upon which it relies. That, in turn, raises other issues of fact and law.

21. The defendant has set out what is proposes are the proper calculations in its own schedule, modelled on that of the plaintiff. It is useful, as a summary of the issues raised by the defendant, to set it out here:

Date	Inv.	Description	Amount	GST	Total	Payment	Balance
01/06/04	***392***	***Bill of Quantity & Documentn***	***10,000***	***1,000***	***11,000***		***11,000.00***
01/06/04		Credit Note	-10,000	-1000	-11,000		Nil
04/06/04		Payment				5000	-5,000.00
07/06//04		Payment				1,000	-6,000.00

07/06/04		Payment Temporary Fending				5000	-11,000
29/07/12004	410	ATF Payment	1,346.65	134.67	1,481.32	0	-9518.32
26/08/04						1481.32	-11,000
09/08/04	413	Preparation of construction documents	25,000	2500	27,500	0	16,500.00
25/08/04		Payment				27,500.00	-11,000
10/12/04	***435***	***5% Deposit & Site Establishment***	***122,950.00***	***12,295.00***	***135,245.00***	***0***	***124,245.00***
16/12/04		Payment				67,622.50	56,622.50
07/12/05		Payment				33,811.25	22,811.25
11/02/05		Payment				33,811.25	-11,000
21/03/05		***On a/c Payment***				***27,000.00***	***-38,000.00***
08/04/05		***Credit for design work***	***-20,000***	***-2000***	***-22,000***	***0***	***-60,000***
06/05/05		***On a/c Payment***				***51,555.60***	***-111,555.00***
13/05/05		***On a/c Payment***				***21,444.40***	***-133,000.00***
13/05/05		On a/c Payment				81.873.77	-214,873.77
31/05/05		On a/c Payment PC 05 - Works to				68,424.44	-283,298.21
30/06/05	470		264,598.02	26,459.80	291.057.82	0	7759.61
05/07/05	477	PC 06	271,664.65	27,166.47	298,831.12	0	306,590.73
19/07/05		Payment				40,000.00	266,590.73
21/07/05		Payment				60,759.61	205,831.12
01/08/05	479	PC 07	202,036.63	20,203.66	222,240.29	0	428,071.41
01/08/05		Payment				100,000.00	328,071,41
12/08/05		Payment				50,000.00	278,071.41
24/08/05		Payment				148,831.12	129,240.29
31/08/05	***489***	***PC 08 Amended***	***149,332.78***	***14,933.28***	***164,266.06***	***0***	***293,506.35***
09/09/005		Dera Loan Advancement				350.000.00	-56,493.65
14/10/05	498	PC 09 Windows to Ground Floor	74,926.25	7,492.63	82,418.88	0	25,925.23
25/10/05	499		70,000.00	7,000.00	77,000,00	0	102,925.03
11/11/05		Payment				96,000.00	6925.03
21/11/05		Payment				60,000.00	-53,074.77
10/11/05		Payment				44,179.00	-97,253.77
25/11/05	503	PC 12	140,301.13	14,030.11	154,331.24	0	57,077.47
08/12/05	504	PC 13	137,027.57	13,702.76	150,730.33	0	207,807.80
08/12/05		***Credit per letter dated 21/03/06***	***-10,904.72***	***-1094.47***	***11,995.19***		***195,812.61***
12/12/05		Payment				154,000.00	41,812.61
14/12/05		Payment				50,000.00	-8187.39
03/01/06		Payment				65.000.00	73,187.39
06/01/05		Payment				35,000.00	-108,187.39
01/03/06	506	Works to 28/02/06	95,742.17	9,574.22	105.316.39		-2871.00
TOTAL			***1,570,961.73***	***157,096.19***	***1,728,057.92***	***1,679,294.26***	***-2871.00***

22. The defendant contends that there are, essentially, three questions for determination. First, whether the sum of $100,000 paid by Gee Ha in the period 21 March to 13 May 2005 was a "deposit". Second, whether, having regard to the status of the running account at the time Progress Claim 13 issued, EFI was entitled to any unpaid amount. Third, whether there was any agreement reached by the parties in September 2005 that a sum of $100,000 would be set aside as a "deposit".

23. In considering whether, at the time Progress Claim 13 issued, or as at 6 January 2006 when the last payment was made by Gee Ha to EFI, there was an unpaid portion of the claim, it also necessary to determine whether EFI gave credit, or ought to have given credit, to Gee Ha for two sums, one of $22,000 and another of $11,000.

24. A further question raised by the defendant is whether, as a result of the payments by Gee Ha being paid into a trading account that was in overdraft, the "deposit" which is said to remain extant in the books of EFI, was dissipated by EFI and therefore ought have been credited to Gee Ha.

25. Allied to this question is the characterisation of the "deposit". Gee Ha denies that the sum of $100,000 is a "deposit" and contends that it ought be regarded as some sort of "float" provided by Gee Ha and available to be used by EFI for an unspecified purpose.

26. Finally, it is common ground that Progress Claim 8 was amended and the sum claimed reduced. The effect of that amendment is disputed by the parties.

27. The most important question, as it involves the largest amount of money, is do with the "deposit" and that makes a convenient starting point for a consideration of the issues.

Should Gee Ha be credited with the "deposit"?

28. As can be seen from the plaintiff's schedule to its statement of claim, $100,000 was not credited to Gee Ha's running account by EFI but was notionally set aside. The moneys were, it is agreed, deposited into EFI's ordinary trading account rather than being placed in a separate trust account. They were mixed with other moneys. Nevertheless, at least within EFI's own books, they were notionally kept apart.

29. It is clear that, whatever the terms of the contract, Mr Rapicano believed that he was entitled to request a "deposit" to be paid to EFI at about the time of the commencement of the works. Tax invoice No. 435 makes the claim to a five per cent "deposit *as per agreement*" (emphasis added) plus the further sum of $35,245 for "site establishment". That sum was paid by Gee Ha on 10 December 2004. To what, precisely, it was applied is unclear from the records tendered.

30. Ordinarily, it appears, when a progress claim was served by EFI on Gee Ha it came with a schedule describing in specific terms the details of the claim and the costs. For example, in relation to Progress Claim 8, a schedule setting out about 30 items claimed and the sums claimed in respect of them was served on Gee Ha. No such document has been tendered in relation to Tax Invoice No. 435.

31. It appears to be common ground between the parties that a sum of $100,000 was provided to EFI by Gee Ha as a "deposit" (however that sum is properly characterised). This is plain from uncontradicted evidence from Mr Rapicano that in September 2005 the parties discussed EFI or a related company lending Gee Ha a sum of $350,000 to enable it to meet Progress Claims 7 and 8. According to Mr Rapicano, at that meeting a representative of Gee Ha requested that the "deposit" be applied to the loan to reduce the debt to $250,000 and he had refused the request.

32. Mr Rapicano also gave evidence that three "on-account" payments made by Gee Ha on 21 March, 6 May and 13 May 2004, to a total of $100,000, were set aside as the "deposit", notwithstanding the fact that Gee Ha had paid Tax Invoice No. 435 in full by 11 February 2004. In cross-examination Mr Rapicano disputed that the sum paid pursuant to Tax Invoice No. 435 was referable to Item 3.0 in the agreement entered by the parties. (That item provided that five per cent of the contract price was to be the subject of a progress claim at the commencement of the works.)

33. The defendant makes a number of points about this. First, it argues that scrutiny of the documentary evidence shows that Gee Ha paid a "deposit" to EFI pursuant to Tax Invoice No. 435 and that the plaintiff's own schedule to its statement of claim demonstrates the appropriation of those moneys. That, it says, is the end of the plaintiff's case in respect of the "deposit".

34. Second, it submits that, however the plaintiff chooses to categorise the "on-account" payments for the purposes of its records, from an objective point of view they cannot be a "deposit", which is to say, a retention fund to cover variations and other matters at the end of the project. The defendant suggests that they should be regarded as some sort of "float" proffered to EFI to be used to reduce Gee Ha's running account with EFI, rather than as a "deposit". It notes that it was the practice of Gee Ha to make payments in various sums without specifying the particular invoice or progress claim to which they were to be applied. It argues that, as no correspondence referring to the moneys as a "deposit" was tendered by the plaintiff, they should be regarded as ordinary payments and should have been applied to the oldest debts by EFI. See *Airservices Australia v Ferrier* (1996) 137 ALR 609.

35. Third, the defendant also obtained the concession in cross-examination of Mr Rapicano that EFI banked the various cheques and direct deposits made by Gee Ha directly into its trading account. The bank statements for that account show that the account was in overdraft when all the relevant payments were made and that the deposits were applied by the bank to reducing the overdraft. No separate trust account was set up, nor was

some sort of sub-account set up for the retention of the "deposit". The defendant's argument is that the "deposit" existed, if it existed anywhere, only notionally in the books of EFI because once the moneys were paid into an overdrawn account and applied to the reduction of the overdraft they were dissipated and no longer had a separate existence. Gee Ha therefore submits that, whatever Mr Rapicano's subjective belief or intentions may have been concerning the "deposit", by using those moneys to reduce EFI's overdraft it had appropriated the moneys and that Gee Ha ought have that sum credited to it.

36. Fourth, it submits that, irrespective of these points, EFI made clear to Gee Ha on 21 March 2006 by solicitor's letter that EFI had appropriated the "deposit" in any case, and that therefore it ought now receive credit for those moneys. In that letter, EFI's solicitors wrote to Mr Mark Marando, a director of Gee Ha and a solicitor himself, concerning the dispute between the parties. Ex 6. The letter discussed various matters of contention among which was the "status of progress claims and payments". In paragraph [12] of the letter EFI's solicitors stated:

> As at 1 March [2006] no credit of the $100,000 security deposit paid on commencement of the Agreement against the Progress Claims total had been allowed, however, by reason of your client's repudiation of the Agreement as further detailed below, this credit has now been applied by our client to bring the total payments received by [EFI] to $1,679,294.26…
>
> Further now allowing the application of the $100,000 deposit amount off your client's account with [EFI], the amended balance of our client's statement of accounts of 1 March 2006 presently due and owing is $48,763.66.

37. In cross-examination, Mr Rapicano disputed any appropriation or application of the "deposit". He stated that the letter of 21 March 2006 had been a negotiating tactic only, a means of settling the dispute without litigation. He, in effect, denied the plain words of the letter. He said that the deposit moneys were still held by EFI pending the resolution of the dispute and that, if EFI was ultimately adjudged to be liable for the deposit to Gee Ha, it would be returned.

38. The plaintiff argues that as at 1 March 2006 the "deposit" had not been appropriated by EFI. It relies on the letter of 21 March 2006 and Mr Rapicano's evidence for that proposition. It argues that in September 2005, Gee Ha accepted that the "deposit" had not been appropriated and that it must be bound by its own conduct in that regard. Indeed, in September 2005 Gee Ha expressly requested that the "deposit" be applied and was rebuffed by EFI, lending further support to the argument that it should be bound by its acceptance of the existence of the "deposit". It also argues that Gee Ha never disputed the appropriation set out in the amended schedule of invoices and payments and that evidence should have been tendered to demonstrate any appropriation by EFI contrary to its own schedule. It argues that this has not been done and that an inference should be drawn against Gee Ha accordingly.

39. EFI contends also that the mere fact that payments from Gee Ha were deposited in its trading account does not affect the status of the "deposit" because EFI did not appropriate any of the payments to any debts incurred by Gee Ha but rather set the moneys aside (at least in its own accounts). Moreover, it did not elect to appropriate the moneys to reduce its debt to the bank.

40. EFI concedes that there is nothing to contradict the contents of the letter of 21 March 2006 except Mr Rapicano's own evidence of his understanding of the letter. If that is rejected, EFI submits that the finding ought by made that Gee Ha nevertheless owes EFI $48,763.66 under Progress Claim 13.

41. The plaintiff bears the onus, on the balance of probabilities, of proving its entitlement under s.15 of the Act to the sum it claims under the progress claim. The defendant may not raise any cross-claim or defence otherwise available at common law. It is has the right, however, to dispute the plaintiff's entitlement to the sum claimed and the court, before giving judgment for the plaintiff, must be satisfied that the plaintiff has claimed an *unpaid portion* of the progress claim (all other circumstances required by s.15(1) also having been satisfied).

42. Although the specific issue was not addressed by the parties, and I have been referred to no authority on the question, it seems to me that, for the purposes the current proceedings, the relevant time for deciding whether there remains an unpaid portion of the progress claim is either as at the date of the filing of a defence or the date of judgment. It makes no difference in this case as the parties have remained in their relative positions since early 2006.

43. The other alternative would be the date specified by contract for the payment of progress claims. In this case, EFI clearly took a flexible approach to that term of the contract and allowed progress claims to be paid by instalments over several weeks. The plaintiff has not sought to argue that the relevant date was seven days after the progress claim issued and I will proceed on the basis that it does not suggest that to be so.

44. The general principles concerning appropriation are not in contest. If a payment was made by Gee Ha, it had the option, at the time, of appropriating the payment to a specific debt. If it did not do so, EFI had the option of applying the payment in the manner it chose. See ***Healey v Commonwealth Bank of Australia*** (1998) NSWSC 678 per Giles JA. In the case of a running account, if neither party elects, the effect is not to discharge a particular debt but to reduce the account balance only to the extent of the payment by applying it to the oldest debt. See ***Airservices Australia v Ferrier*** (1996) 137 ALR 609. (Of course, if a particular transaction is not a payment these principles do not apply.) There is no evidence that Gee Ha ever made an express appropriation of payments to particular debts owed by it to EFI.

45. One of the semantic difficulties that arose in the evidence and was never satisfactorily clarified by either party was the meaning of the word "deposit" in Tax Invoice No. 435, in EFI's accounts and in the discussions between the parties in relation to the "deposit".

46. At first blush, the sum claimed for a "deposit" in Tax Invoice No. 435 appears to relate to the sum of five per cent of the contract price. Although it is not expressed to be a "progress claim", that tax invoice was issued at about time works appear to have commenced, refers to a sum "as per Agreement" and also refers to site establishment and the Bill of Quantity. It is common knowledge that at the commencement of building contracts is customary for builders to claim a certain amount to enable them to purchase materials and to pay their workers and sub-contractors to commence the works. Those indicia all suggest that the five per cent "deposit" (a term of art not found in the contract itself) referred to in the tax invoice was, despite Mr Rapicano's evidence to the contrary, a sum to be applied by the builder to commencing the works.

47. This is consistent with the evidence that he gave of three "on-account" payments being made and set aside as the "deposit".

48. How it came about that the "deposit" was paid by Gee Ha was another matter not satisfactorily explained. No contemporaneous correspondence concerning the three payments was tendered by either party. The written agreement made no provision for it. The written agreement anticipated that the parties would ultimately enter a BC3 contract. That form of contract, however, gives the *owner* or developer the right to *retain* a percentage of progress claims in trust for the builder and does not oblige the owner to offer the builder anything by way of a security deposit. In his evidence, Mr Rapicano gave a short account of what the "deposit" was intended for. It was clear from his description that he equated it with the retention fund referred to in the BC3 contract but he seemed oblivious of the fact that the retention fund is held by the owner, not the builder.

49. The defendant makes the argument that the "deposit" moneys were used up by EFI in two ways: reduction of its overdraft and also, because the moneys in its trading account were mixed, were applied to its ordinary business expenses. It referred to a number of authorities from the WA Supreme Court for the proposition that once this had occurred, the moneys disappeared or were dissipated and had no separate existence and therefore could not have been set aside as a "deposit" even if that had been EFI's intention.

50. In ***Conlan (Liquidator of Oakleigh Acquisitions Pty Ltd) v Registrar of Titles*** [2001] WASC 201, Owen J said (at [273]):

Once, as happened here, the trust account became overdrawn it became impossible to identify the separate moneys advanced by individual investors. This is because the trust bank account (once overdrawn) constituted a debt due by GGFB to the bank, rather than moneys of the persons who had entrusted it to the broker. Equitable tracing, though devised for the protection of trust moneys misapplied, cannot be pursued through an overdrawn and therefore non-existent fund: ***Re Goldcorp Exchange Ltd*** *[1995] 1 AC 74 at 104-05;* ***Bishopsgate Investment Management Ltd v (in Liquidation) v Homan*** *[1995] Ch 211 at 220.*

51. In ***Re Global Finance Group Pty Ltd; ex p. Read*** [2002] WASC 63, McClure J also arrived at a similar conclusion. See also ***Re Rowena Nominees Pty Ltd; ex p. Conlan*** [2006] WASC 69. He said (at [129-130, 135]):

The overwhelming balance of authority is to the effect that a proprietary claim to the traceable product will fail if trust money is paid into an overdrawn account: ***Re Diplock*** *(supra) at 521;* ***James Roscoe (Bolton) Ltd v Winder*** *(supra);* ***Bishopsgate Investment Management Ltd (in liq) v Homan*** *(supra);* ***Re Goldcorp Exchange Ltd*** *(supra); cf* ***Hagan v Waterhouse*** *(1992) 34 NSWLR 308 at 358 (where the fact that a bank account used by trustees to purchase property was temporarily in overdraft was not allowed to prevent tracing into the purchased property).*

The basis of the rule was stated by the Court of Appeal in ***Re Diplock*** [1948] Ch 465 as follows (at p 521):

"The equitable remedies pre-suppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself"…

The rationale for the rule which prevents equitable tracing into an overdrawn bank account is that the property being traced must continue to exist in some form up to the time of, and through to, the traceable product. An overdrawn bank account is a debt owing by the trustee to the bank. The effect of a payment into an overdrawn account is to reduce or cancel the trustee's indebtedness to the bank. Tracing is a factual process and a trust fund or part of it which is dissipated cannot be traced. The extinguishment or reduction of the trustee's indebtedness is regarded in effect as the disappearance of the property.

52. On this analysis it appears that, when the deposits were paid into EFI's overdrawn account, they disappeared and reduced its debt to the bank, whether or not EFI intended to appropriate those moneys to Gee Ha's running account. In short, it involuntarily and unwittingly applied those moneys to its own purposes and, of course, received the benefit of them by reducing the interest it was required to pay to the bank on its overdraft. Thus, in my view, the running account ought to have credited the "deposit" payments to Gee Ha or a separate trust account ought to have been set up to hold those moneys. I do not doubt that Gee Ha held the belief that it had paid a deposit that was being held on trust by EFI but, of course, what EFI actually did with the moneys was not, on the evidence before me, within Gee Ha's knowledge. It cannot be held to have accepted the existence of a deposit if that deposit had been dissipated by EFI's use of it to reduce its overdraft; that was a matter peculiarly within EFI's knowledge, not Gee Ha's.

53. If I am incorrect in coming to that view, the answer, nevertheless, remains the same. By its letter of 21 March 2006, EFI asserted that it had applied the "deposit" to reduce Gee Ha's debt on its running account. Notwithstanding his oral evidence on that topic, Mr Rapicano does not pretend to legal expertise. His understanding of the contractual situation and the objective reality are two separate things. This is not to suggest any dishonesty on his part when giving his evidence but I cannot accept his evidence is reliable on this point. EFI's assertion that it had applied the "deposit" could not have been more plain. One way or the other, the "deposit" was applied by EFI to the reduction of Gee Ha's debit balance in the running account.

The credit note issue

54. A much lesser, but nonetheless important issue, concerns the credit note issued by EFI in Gee Ha's favour on 15 March 2006. It is common ground that the plaintiff made an accounting error in charging $11,000 to Gee Ha's balance by invoice No. 392 on 1 June 2004. Mr Rapicano's evidence was to that effect.

55. The plaintiff argues that it should not be taken into account in these proceedings. It says that a credit note may issue for any number of reasons: it may relate to another transaction; it may have been issued gratuitously. It contends that payments made in construction cases are frequently "on-account" payments which do not refer to specific invoices but are adjustments of the running account. Errors may arise from progress claim to progress claim and accumulate but be reversed, amended or adjusted over time. Therefore, it submits, it not possible, absent evidence, to conclude that invoice No. 392 was void *ab initio* or that the credit note extinguishes that debt from the outset.

56. Neither party referred me to authority on this question. How a credit note should be interpreted and applied to a running account appears to me to be a question of circumstances. In this case, the plaintiff's own schedule to its statement of claim constitutes an admission that the credit note of 15 March 2006 was an adjustment of a debt that was never owed by Gee Ha to EFI. Mr Rapicano did not dispute that the debt was never owed nor that it ought have been corrected when the error was made. His evidence was, simply, that an error had been made and had not been picked up in the nearly two years that had passed between 1 June 2004 and 15 March 2006.

57. The plaintiff makes the argument that, notwithstanding any such considerations, its claim is brought pursuant to statute. Section 11 of the Act provides that, following service of a progress claim, a payment becomes due and payable either in accordance with the terms of the contract or, if there is no provision in the contract, 10 business days after a payment claim is served on the respondent.

58. In my view, however, s.15 qualifies s.11 significantly. A claimant is only entitled to the *unpaid portion* of the progress claim. That, in my view, implies that there must be a proper basis for the claim. The object of the Act makes Parliament's intentions in that regard clear: builders and sub-contractors are "entitled to receive, and … to recover, progress payments in relation to the carrying out of … work and the supplying of … goods and services" pursuant to a construction contract. They are not entitled to claim for work, goods and services they have not provided or undertaken to provide.

59. By its credit note, EFI admitted lack of entitlement to make a claim for that sum upon Gee Ha. Mr Rapicano made no suggestion that the credit note had issued to correct any other error, was an rectification of an accumulation of errors, a gratuity, a gift or anything other than an adjustment of an accounting error made in June 2004. Therefore, the sum of $11,000 ought to have been applied in the manner proposed by the defendant and the running account adjusted accordingly. That being done, the court could not be satisfied on the balance of probabilities that there was an unpaid portion of Progress Claim 13 in respect of that amount.

Was credit given by EFI for design work?

60. One of the defendant's contentions in this matter is that EFI failed to credit to its account a sum of $22,000 for design work. In my view, that is incorrect.

61. The plaintiff's evidence is that it credited the sum of $20,000 to the running account in its variations to Progress Claim 5 dated 30 June 2005. Ex 4. No evidence to the contrary was put. What does not appear to have been adjusted, however, was any GST component. It is not clear why not and no evidence was given about that.

62. The plaintiff repeated its submission concerning the credit note of 15 March 2006 in relation to this issue and I would make the same response in this regard. On the face of it, the adjustment ought to have been in the sum of $22,000 and a further $2000 here allowed to the defendant. The one difference between the March 2006 credit and this one is that the adjustment, although incomplete, was made before Progress Claim 13 issued.

Does the amendment of PC 8 affect the ultimate issue?

63. During the course of the trial some consideration was given by both parties to an amendment of Progress Claim 8. It is common ground that EFI issued an amended and reduced Progress Claim 8. The original claim, issued on 31 August 2005, had been in the sum of almost $182,000. The amended progress claim, issued on 4 October 2005, was to the sum of $149, 332.78.

64. According to Mr Rapicano, there was no double-dipping but, rather, the subsequent progress claims had been issued on the basis of the adjustment made to Progress Claim 8. There does not appear to be evidence to contradict that of Mr Rapicano and I accept it.

Conclusions

65. The plaintiff's claim is to a sum of $54,447.27. The plaintiff argued that even if the court found that Gee Ha ought be credited with the "deposit", Gee Ha would, nevertheless, still owe EFI a sum of about $48,000

outstanding in the running account. In my view, that submission is misconceived. This is not a common law action for general damages. It is an action peculiar to the *Building and Construction Industry Security of Payments Act*. It is brought only in relation to Progress Claim 13 and nothing else. Whether Gee Ha is indebted in some other fashion to EFI is not a matter for determination in this case. It is obvious that if that if the "deposit" of $100,000 and the other two sums of $11,000 and $2000 are taken into account when assessing whether there is an "unpaid portion" of Progress Claim 13 the plaintiff has not succeeded.

66. There will be a verdict for the defendant and judgment accordingly.

67. I propose an order that the plaintiff pay the defendant's costs in a sum agreed or assessed but will give the parties liberty to apply on the question.

Mr T.J. Davie (Counsel for Plaintiff) instructed by The Law Partnership (Solicitors for Plaintiff)
Mr S. Jacobs (Counsel for Defendant) instructed by Gadens (Solicitors for Defendant)