

Judgment Mason P ; Giles JA ; Hodgson JA : New South Wales Court of Appeal : 3rd November 2004

1 **Mason P:** I agree with Hodgson JA.

2 **Giles JA:** I agree with Hodgson JA.

3 **Hodgson JA:** On 20 July 2004, Einstein J granted summary judgment to the opponent (Barclay) against the claimant (Estate) in the sum of \$4,900,497.35, and ordered Estate to pay certain interest and costs.

4 Estate sought leave to appeal from those orders. The leave application was heard on the basis that, if leave was granted, the appeal would be determined without further hearing. At the conclusion of the hearing, the Court granted leave to appeal.

CIRCUMSTANCES

5 On or about 15 November 2002, Barclay entered into a design and construction contract with Estate for the construction by Barclay of four residential towers in Gosford.

6 On 28 May 2004, Barclay served on Estate a document purporting to be a payment claim under s.13 of the Building & Construction Industry Security of Payment Act 1999 (the Act). The claim included various items, one of which was piling work, in respect of which \$1,606,561.50 was claimed, out of a total claim of \$4,900,497.34. This piling work had been completed more than twelve months before service of the payment claim, while the balance of the work referred to in the payment claim was carried out within the period of twelve months before service of the payment claim.

7 Estate did not provide a payment schedule under the Act within ten business days after the payment claim was served, and on 1 July 2004, Barclay filed in the Supreme Court a summons claiming the sum of \$4,900,497.34, interest and costs, and also filed a Notice of Motion seeking summary judgment.

8 The Notice of Motion was heard by the primary judge on 16 July 2004, reasons for judgment were given on 19 July 2004, and the resulting orders were made on 20 July 2004.

STATUTORY PROVISIONS

9 The Act gives persons who undertake to carry out construction work an entitlement to progress payments (s.8), and establishes a procedure for recovering such payments. Sections 13, 14 and 15 are in the following terms:

13 Payment claims

(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the **claimant**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim:

(a) must identify the construction work (or related goods and services) to which the progress payment relates, and

(b) must indicate the amount of the progress payment that the claimant claims to be due (the **claimed amount**), and

(c) must state that it is made under this Act.

(3) The claimed amount may include any amount:

(a) that the respondent is liable to pay the claimant under section 27 (2A), or

(b) that is held under the construction contract by the respondent and that the claimant claims is due for release.

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied), whichever is the later.

(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

14 Payment schedules

(1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule:

(a) must identify the payment claim to which it relates, and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**).

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(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.

15 Consequences of not paying claimant where no payment schedule

(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.

DECISION OF PRIMARY JUDGE

- 10 The only issue raised by Estate was a contention that the payment claim did not satisfy the requirements of s.13(4)(b), because the piling work was "last carried out" more than twelve months before service of the payment claim.
- 11 The primary judge noted three possible interpretations of s.13(4)(b): first, as requiring only that some work under the construction contract had been performed in the twelve month period; second, as requiring that some work for which payment was claimed in the payment claim had been performed in the twelve months period; and third, as requiring, in respect of each item for which payment was claimed, that some work had been performed in the twelve month period.
- 12 The primary judge accepted the first of these interpretations, as he had done in his previous decision in *Leighton Contractors Pty. Limited v. Campbelltown Catholic Club Limited* [2003] NSWSC 1103.

GROUND OFS OF APPEAL

- 13 Barclay relies on the following grounds:
- A. His Honour erred in finding that the Respondent was entitled to summary judgment in the sum of \$4,900,497.35.
 - B. His Honour should have found that the Respondent's "payment claim" had not been served in accordance with s 13(4) of the Building and Construction Industry Security of Payment Act (1999) as it included a claim for "piling work" for an amount of \$1,606,561.60 that was carried out more than 12 months before the payment claim was served.

SUBMISSIONS

- 14 Mr. Coles QC for Barclay submitted that the third of the interpretations referred to by the primary judge was correct. He accepted that, where construction work for which a payment is claimed is a continuous process, it is sufficient that some of it is carried out in the twelve month period: he accepted that this is indicated by the words "last carried out" in s.13(4)(b). However, he submitted that those words are not sufficient to authorise the inclusion in a payment claim of discrete items of construction work wholly completed more than twelve months before service of the claim. He submitted that this would be contrary to the intention of the Act, which was to give substantial rights to prompt recovery of progress payments, in return for prompt action.
- 15 Mr. Coles referred to s.5(1)(e) of the Act, which includes, in the definition of "construction work", operations preparatory to other kinds of construction work, including such things as site clearance and laying of foundations, indicating that such operations were treated as discrete parts of construction work.
- 16 Mr. Coles submitted that the effect of an inclusion in a payment claim of discrete items of construction work wholly completed more than twelve months before service invalidated the claim, or at least invalidated it to the extent of that item. He submitted that entitlement to bring proceedings depended on service of a valid payment claim: see ss.15(4)(a), 15(1) and 14(4)(a).

DECISION

- 17 In my opinion, s.13(2)(a) of the Act requires that a payment claim identify the construction work for which payment is claimed in the claim, not merely the construction work as a whole that is being carried out under the relevant

construction contract. I think this is indicated by the words “*construction work ... to which the progress payment relates*”; and strongly confirmed by the consideration that, unless a progress claim identified the particular work for which payment was claimed, it would be impossible for a respondent to provide a meaningful payment schedule supported by reasons. This in turn would make wholly unreasonable s.20(2B) of the Act, which prevents a respondent relying, in an adjudication of a payment claim, on reasons not included in the payment schedule.

- 18 Consistently with this, in my opinion “construction work ... to which the claim relates” in s.13(4)(b) is also the construction work for which payment is claimed in the claim; and accordingly, the requirement of s.13(4)(b) is that some of that construction work be carried out in the relevant twelve month period. Accordingly, in my opinion, the primary judge’s acceptance of the first of the three interpretations of s.13(4)(b) which he identified, both in this case and in *Leighton*, was incorrect.
- 19 However, in my opinion ss.13-15 of the Act do not provide any basis for dividing up the construction work to which the claim relates into items which may be considered discrete, and asking in respect of each such item whether some work was carried out in the twelve month period. Section 13(2)(b) refers to “the amount” of the progress payment, s.14(4) refers to liability to pay “the claimed amount”, and s.15(4) refers to “the unpaid portion of the claimed amount”: these provisions weigh against the idea that separate consideration should be given to individual items that make up the claimed amount.
- 20 Further, the distinction between discrete items of construction work and continuous processes of construction is not clear-cut. The piling work in this case could be considered clearly distinct from other items of construction work; but many other examples can be given where this would be far from clear. For example, is brickwork a distinct item, or part of a continuous process that extends to completing the external fabric of a building? In my opinion, there is no good reason to introduce an unclear distinction of this kind into the operation of the Act.
- 21 Accordingly, in my opinion the third of the three interpretations referred to by the primary judge is incorrect, and the second is correct. This is further confirmed by s.13(6), which suggests that items more than twelve months old may be included in a payment claim, when they have been included in previous claims, so long as the payment claim does relate to some work carried out within the twelve month period.

CONCLUSION

- 22 Accordingly, the payment claim in this case did comply with s.13(4)(b) of the Act, and the appeal should be dismissed with costs.
- 23 At the conclusion of the hearing of the appeal, there was mention of a Notice of Motion brought when Estate did not comply with some requirement for payment pending the determination of the appeal, which was not pursued when the payment was made. In my opinion, the costs of this Notice of Motion, and of the application for leave, should be included in the costs of the appeal to be paid by Estate.

Mr. B. Coles QC with Mr. M. Ashurst for appellant instructed by Church & Grace, Sydney
Mr. M. Rudge SC with D. Meltz for respondent instructed by Baker & McKenzie, Sydney