

Court of Appeal New South Wales before Heydon JA : Hodgson JA : Ipp AJA : 26 July 2002

JUDGMENT: HEYDON JA

1: This is an application for leave to appeal against orders made by Gibson DCJ on 14 December 2001. She gave judgment for the plaintiff in the sum of \$77,376.05 and ordered the defendant to pay the plaintiff's costs. The court has ordered that the leave application be heard concurrently with the appeal, to the intent that if leave is granted no further hearing need take place. The oral argument was presented by counsel on both sides with great capacity - a capacity not matched by those in the defendant's camp responsible for compiling the White Book, which was in a quite unsatisfactory condition: see *MacDonald v Martin* [2002] NSWCA 178 at [38].

The grounds of appeal

2 The grounds of appeal set out in the defendant's proposed Amended Notice of Appeal fall into three groups. First, it is said that the trial judge erred in her construction of the *Building and Construction Industry Security of Payment Act 1999*. It may be accepted at the outset that, as the defendant submitted, the points raised have not been determined before, or even raised before, and are important in view of the widespread use of the legislation and of the contract used by the parties and interlinked with it, Australian Standard Subcontract AS 2545-1987. Secondly, it is said that the trial judge erred in refusing a stay. Thirdly, it is said that she gave insufficient reasons.

The background

3 On 18 July 2000 the defendant, described as the Main Contractor, entered a subcontract agreement, called the Subcontract, with the plaintiff, described as the Subcontractor, for the carrying out of plumbing, drainage and hydraulic works at Mount Annan Leisure Centre. The defendant was Main Contractor under a contract with the Principal, Camden Council.

4 On 2 May 2001 the plaintiff made a demand for \$74,423.58 for a payment period described as "February 2001, March 2001 and April 2001".

5 The document opened with the words: "This is a Payment Claim under the Building and Construction Industry Security of Payment Act 1999". It concluded with the words: "The construction work or related goods and services in respect of which this Payment Claim is made and the method of calculation of the total amount of the claim are set out in the Schedule to this Payment Claim." The document was signed by Mr Alan McLennan and directed to Mr Theo Penglis. The Schedule comprised tax invoices dated 28 February 2001, 27 March 2001, 29 April 2001 and 2 May 2001. They respectively described themselves as Progress Claims Nos 9, 10, 11 and 12. The last one, which was only for \$231.93, said that the sum of \$74,423.58 was outstanding. The first three had already been sent to the defendant on or about the dates they bear. Though they did not then bear any notation that they were Progress Claims under the Act, the defendant accepted that they were claims complying with clause 42.1 of the Subcontract.

6 Clause 42.1 of the Subcontract provided:

"Payment Claims, Payment Statements and Time for Payment.

At the times for payment claims stated in the Annexure and upon issue of a Certificate of Substantial Completion and within the time prescribed by Clause 42.7, the Subcontractor shall deliver to the Main Contractor's Representative claims for payment supported by evidence of the amount due to the Subcontractor and such information as the Main Contractor's Representative may reasonably require. Claims for payment shall include all amounts then due to the Subcontractor under the Subcontract or for breach thereof.

Within 28 days after receipt by the Main Contractor's Representative of a claim for payment, the Main Contractor shall pay to the Subcontractor the amount due to the Subcontractor and shall with the payment provide written particulars of how the payment was calculated and if the amount is more or less than the amount claimed by the Subcontractor, shall state the reasons for the difference.

Payment of moneys shall not be evidence of the value of work or an admission of liability or that work has been executed satisfactorily but shall be a payment on account only."

The Main Contractor's Representative was defined by the Annexure of Mr T Penglis. For the purposes of clause 42.1, the Annexure stated the following times for payment claims: "CLAIMS FOR PAYMENT MADE ON THE 25TH OF THE MONTH WITH PAYMENT BEING MADE AT THE END OF THE FOLLOWING MONTH".

The defendant's breaches of contract

7 The defendant, on receipt of the tax invoice dated 28 February 2001, was thus obliged, by the end of March, to pay the amount due and supply written particulars of how the payment was calculated and a written statement of the reasons why, if the payment differed from the amount claimed, this was so. The defendant in fact did not pay and did not supply any written statement by the end of March. The tax invoices of 27 March 2001 and 29 April 2001 created similar obligations, and they were not fulfilled either. The defendant gave no explanation to the plaintiff, the trial judge or this Court for its breaches of contract. Counsel for the defendant explicitly declined to attempt to justify this behaviour. The behaviour in question is by itself a powerful discretionary factor against granting leave to appeal.

The nature of the plaintiff's contentions

8 The general outline of the plaintiff's case in justification of the Payment Claim dated 2 May 2001 as a valid document under the Act as distinct from the general law was as follows. The plaintiff contended that the effect of clause 42.1 was that on and from the 25th day of February, March and April 2001 it became entitled to a "progress payment" within the meaning of s 8 of the Act. It provided:

- "(1) On and from each reference date under a construction contract, a person:
- (a) who has undertaken to carry out construction work under the contract, or
 - (b) who has undertaken to supply related goods and services under the contract,
- is entitled to a progress payment under this Act, calculated by reference to that date.
- (2) In this section, **reference date**, in relation to a construction contract, means:
- (a) a date determined by or in accordance with the terms of the contract as:
 - (i) a date on which a claim for a progress payment may be made, or
 - (ii) a date by reference to which the amount of a progress payment is to be calculated, in relation to work carried out or to be carried out (or related goods and services supplied or to be supplied) under the contract, or
 - (b) if the contract makes no express provision with respect to the matter, the date occurring 4 weeks after the previous reference date or (in the case of the first reference date) the date occurring 4 weeks after construction work was first carried out (or related goods and services were first supplied) under the contract."

Hence the plaintiff submitted that the 25th day of February, March and April were reference dates because they were contractual dates on which a claim for a progress payment could be made within the meaning of s 8(2)(a)(i). Hence, by reason of s 8(1), on each date the plaintiff was, to use the statutory language "entitled to a progress payment under this Act", even though it was not entitled to it under the contract until the end of the following month.

9 Section 13 of the Act provided:

- "(1) A person who is entitled to a progress payment under a construction contract (the **claimant**) may serve a payment claim on the person who under the contract is 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 for the construction work done (or related goods and services supplied) to which the payment relates (the **claimed amount**), and
 - (c) must state that it is made under this Act."

Hence the plaintiff submitted that it was entitled to serve a Payment Claim: it argued that by reason of s 8(b) of the *Interpretation Act 1987*, and in the absence of any contrary intention, the singular expression in s 13(1) "a progress payment" included the plural, and hence that the plaintiff was entitled to include in its Payment Claim of 2 May 2001 entitlements under the three progress payments due on 25 February, 25 March and 25 April.

10 The plaintiff next submitted that the purported Payment Claim of 2 May 2001 was valid at least to the extent of the 25 February, 25 March and 25 April entitlements to progress payments. Section 13(2)(a) was complied with, because the Schedule to the Payment Claim set out, in the Tax Invoices dated 28 February 2001, 27 March 2001 and 29 April 2001, items of work done. Section 13(2)(b) was complied with, because the amounts claimed to be due for the construction work were set out in the February, March and April Tax Invoices comprised in the Schedule. Section 13(2)(c) was complied with because the Payment Claim stated it was made under the Act.

11 The plaintiff conceded that so far as the Payment Claim claimed \$231.93 for work done as set out in the Tax Invoice dated 2 May 2001, that sum was not validly claimed (because, pursuant to clause 42.1, the 25th day of May had not yet arrived and hence s 8(2)(a)(i) was not satisfied). But the plaintiff submitted that the Payment Claim was valid as to the balance, \$74,191.65.

12 Section 4 defined "progress payment" as meaning "a payment to which a person is entitled under section 8". Section 11 provided:

"A progress payment under a construction contract becomes due and payable:

- (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or
- (b) if the contract makes no express provision with respect to the matter, on the date occurring 2 weeks after a payment claim is made under Part 3 in relation to the payment."

13 The plaintiff submitted: "In the circumstances of this case s 11(a) of the Act did not apply to determine the due date for the payment of the Payment Claim. The word 'progress payment' in s 11 is defined as a payment to which a person is entitled under s 8 of the Act: s 4, definition of 'progress payment'. As the Subcontract does not specify the date upon which a payment claim under the Act becomes due and payable (as opposed to the date upon which a progress claim under the Subcontract becomes due and payable in clause 42.1 ... and the Annexure ..., then s 11(b) applies. By reason of s 11(b) of the Act the Payment Claim became due and payable on 16 May 2001."

14 The plaintiff made that last submission in reliance on s 14(4). Section 14 provided:

- "(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 It was common ground that the defendant did not provide the plaintiff with a payment schedule within ten business days after the Payment Claim was served. Accordingly the plaintiff submitted that the defendant became liable to pay the validly claimed amount of \$74,191.65 to the plaintiff on 16 May 2002. This Court was not taken to the initiating process, but the proceedings were apparently brought pursuant to s 15(2)(b) of the Act. Section 15 provided:
"(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 recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, 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) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in subsection (1)."
- 16 The above submissions were those put to this Court and, but for the concession about the \$231.93, appear broadly to have been those put to the trial judge.

The defendant's written submissions

- 17 The specific submissions which the defendant put to this Court were as follows. In paragraph 20 of a document entitled "Applicant's Submissions on Appeal" it submitted:
"There are three reasons why the purported claims are not payment claims under the Act. These are:
(i) the due date upon which the builder could become liable for two of those claims of February and March had expired: s 14(4).
(ii) the document at page 42 is dated 2 May 2001 and purports to apply to three payment claims for the periods February, March and April 2001. That is not a claim within s 8 of the Act which has to be 'on and from each reference date.' The claim at page 42 is in respect of claims from three reference dates; and
(iii) the letter at page 42 is not itself a payment claim. S 13 requires each payment claim to (b) 'indicate the amount of the progress payment that the claimant claims'. The letter at page 42 claims \$74,423.58 but none of the individual payments claims annexed to the letter are for that amount. The four payment claims excluding GST, have to be added up to get to the amount in page 42. That is clearly not within s 13 of the Act."
- 18 In paragraph 21 it submitted: "Progress claim no. 11 is dated 29 April 2001. It does not bear on its face the requirements of s 13. The letter at page 42 does not specifically refer to that claim nor to its amount of \$22,197.48. The progress claim no. 11 for this reason, additional to the reasons in paragraph 20 above, is not a payment claim under the Act."
- 19 In paragraph 22 it submitted: "The invoice dated 2 May 2001 (page 46) cannot possibly be a payment claim because as progress claim no. 11 must relate to the reference date 25 April 2001 the plaintiff is not entitled to make a further claim under the contract until on and from 25 May 2001. It is also not a payment claim for the reasons set out in paragraphs 20 and 21 above."
- 20 The reference to page 42 is a reference to the purported Payment Claim and the reference to page 46 is a reference to the Tax Invoice of 2 May 2001 claiming \$231.93.
- 21 Since the plaintiff concedes that so far as the 2 May 2001 letter claimed the \$231.93 claimed in the 2 May 2001 invoice it was not a valid Payment Claim, and that the 2 May 2001 invoice is not itself a valid Payment Claim, paragraph 22 need not be considered further. It is to be noted that the defendant expressly abstained from any submission that if all other arguments failed, the conceded flaw in the 2 May 2001 Payment Claim arising by reason of the \$241.93 error invalidated the whole Payment Claim. Opinions may differ on the justice and correctness of that submission if it had been put.
- 22 The defendant made the following points in support of the specific submissions.
- 23 First, in its written argument it said: "The Claimant says that on a proper construction of the Act each claim has to be made separately and in accordance with the provisions of the construction contract in order to allow the Claimant to assess the claim at the time the work is being undertaken and in order to allow the Claimant to make payment within the times specified by the construction contract between the Claimant and the Opponent."

24 Secondly, the defendant submitted: *"The Applicant submits that the Act does not contemplate numerous payment claims being made at the end of a building job. On its proper construction the Act makes provision for the making of payment claims in a manner that progress claims can be made under the contract between the parties."*

25 That submission was supported by the following reasoning: *"There are numerous references throughout the Act which, it is submitted, clearly indicates that a payment claim under the Act is to be made progressively throughout the course of the work in the same way as progress claims are to be made progressively under the contract. There are other references in the Act which point towards payment claims being made progressively in accordance with the provisions made for making progress claims under the contract so that disputes are dealt with progressively as they arise so that payments can be made quickly upon disputes being settled and so that the contractor can suspend works in order to preserve his cash flow where payments are not made in accordance with the Act or in accordance with the determinations made by adjudicators appointed under the Act."*

Before going to specific references in the Act the second reading [speech] points to the object of the Act is to safeguard subcontractors by ensuring:

- (i) that their cash flow is not stopped by spurious disputes by contractors;
- (ii) that disputes are dealt with as they arise and not at the end of the job;
- (iii) that money is put aside for payment to the contractor should the dispute be decided in his favour;
- (iv) the subcontractor's monies are preserved by allowing him to suspend works without penalty in the event that the contractor fails to make a payment as the work progresses or fails to make a payment in accordance with an adjudication of any dispute that has arisen between the subcontractor and the contractor.

The essence of the Act's protection for subcontractors is that the mechanisms under the Act apply to payment claims made as the work progresses and in accordance with the times provided for in the contract to ensure that payments are made regularly and disputes settled quickly as they arise.

The Applicant submits that passages in the second reading speech clearly indicates that the Act does not apply to numerous progress claims bundled up at the end of a job and served on the contractor long after any work that may have been disputed is covered up or completed."

26 The defendant then quoted the following remarks of the responsible Minister: *"Hundreds of subcontractors in New South Wales struggle to survive when they do not receive money owed to them for work undertaken. They do not have the cash-flow allowing them to keep on working while waiting for payment. ...*

This is a critical component of the Bill as it provides a statutory early warning to claimants that the respondent does not propose to pay their claim in full. ...

A construction contract will now have to include provision for making progress payments and for determining the amount of each progress payment otherwise these matters will be covered by the default provisions in the Bill."

27 The defendant then submitted: *"Section 3 sets out the object of the Act. Subsection (1) refers to 'specified progress payments'. Subsection (3) refers to 'a progress payment' not multiple progress payments.*

Sections 8 and 13 refer to a progress payment and a progress claim in respect of that progress payment by reference to dates for making claims in the contract or in the absence of such provision at full weekly intervals.

By section 14 a contractor must respond to a payment claim by serving a payment schedule within 10 business days after the payment claim is served on the contractor. The payment schedule must identify the payment claim and indicate any areas of dispute with the payment claim. Sections 17 and following then provide for adjudication on those disputes within very tight timetables.

If the payment schedule is not served then the contractor must pay the amount claimed on the due date under the contract for paying the progress claim.

If the contractor does not serve a payment schedule within the 10 days then the amount of the payment claim becomes a debt which the subcontractor can recover in any Court of competent jurisdiction (s 15(2)(a)) and to preserve its cash flow the subcontractor can suspend further work until payment is made.

If a dispute identified by the payment claim and the payment schedule goes to an adjudicator then both parties have the right to make submissions to the adjudicator on the dispute then existing (ss 17 and 20). By s 21(4)(d) the adjudicator may carry out an inspection of any matter to which the claim relates. By s 22(2)(e) the adjudicator is to consider the results of any inspection carried out by him of any matter to which the claim relates. It is submitted that this is a very clear indication that the Act operates on a payment claim by payment claim basis so that the adjudicator can see as the work progresses any defects or other matters that an inspection would reveal. If the work is allowed to progress to completion, as was the case in this particular instance, then the ability of the adjudicator to inspect the work in progress would be impossible as it would be covered up or otherwise made impossible to inspect. It is further submitted that the tight timetables in s 20 and s 21 shows that the dispute has to be settled quickly so that the job can be got on with without undue delay. The shortness of the dispute resolution time preserves the subcontractors cash flow and the requirement [in] s 23 that any amount determined by an adjudicator to be paid to the subcontractor must be either paid or paid into a trust account ensures that the subcontractor is paid promptly.

There are many other provisions to like effect in the Act particularly ss 22, 25 and 27."

The statutory provisions referred to provide as follows.

28 Section 17 provides:

- "(1) If the scheduled amount indicated by a payment schedule is less than the claimed amount indicated in the payment claim, the claimant may apply for adjudication of the progress payment to be made (an **adjudication application**).
- (2) An adjudication application:
- (a) must be in writing, and
 - (b) must identify the payment claim and the payment schedule to which it relates, and
 - (c) may contain such submissions relevant to the application as the claimant chooses to include.
- (3) An adjudication application:
- (a) must be made:
 - (i) to an adjudicator chosen by agreement between the claimant and the respondent (being a person who is eligible to be an adjudicator as referred to in section 18), or
 - (ii) if no adjudicator is agreed on, to an authorised nominating authority chosen by agreement between the claimant and the respondent, or
 - (iii) if no nominating authority is agreed on, to an authorised nominating authority chosen by the claimant, and
 - (b) must be made within 5 business days after the claimant receives the payment schedule.
- (4) No agreement between the claimant and the respondent that was made before the claimant received the payment schedule has any effect in relation to the choice of an adjudicator under subsection (3) (a) (i).
- (5) A copy of the adjudication application must be served on the respondent.
- (6) This section does not limit the operation of any provision of the construction contract in relation to the resolution of disputes between the claimant and the respondent.
- (7) It is the duty of an authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable."
- 29 Section 20 provides:
- "(1) The respondent may lodge with the adjudicator a response to the claimant's adjudication application (the **adjudication response**) at any time within:
- (a) 5 business days after receiving a copy of the application, or
 - (b) 2 business days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later.
- (2) The adjudication response:
- (a) must be in writing, and
 - (b) must identify the adjudication application to which it relates, and
 - (c) may contain such submissions relevant to the response as the respondent chooses to include.
- (3) A copy of the adjudication response must be served on the claimant."
- 30 Section 21 provides:
- "(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.
- (2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response.
- (3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:
- (a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or
 - (b) within such further time as the claimant and the respondent may agree.
- (4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:
- (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and
 - (b) may set deadlines for further submissions and comments by the parties, and
 - (c) may call a conference of the parties, and
 - (d) may carry out an inspection of any matter to which the claim relates.
- (5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties."
- 31 Section 22 provides:
- "(1) An adjudicator is to determine:
- (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the **adjudicated amount**), and
 - (b) the date on which any such amount became or becomes payable.
- (2) In determining an adjudication application, the adjudicator is to consider the following matters only:
- (a) the provisions of this Act,
 - (b) the provisions of the construction contract from which the application arose,
 - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
 - (d) the payment schedule to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

- (3) The adjudicator's determination must be in writing and must include:
- (a) the reasons for the determination, and
 - (b) the basis on which any amount or date has been decided,
- if, before the making of the determination, either the claimant or the respondent requests the adjudicator to include those matters in the determination."
- 32 Section 23 provides:
- "(1) If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent:
- (a) must pay that amount to the claimant, or
 - (b) must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them.
- (2) The security given by a respondent may be in any of the following forms:
- (a) an unconditional promise by a recognised financial institution to pay to the claimant, on demand, the adjudicated amount, or
 - (b) payment of the adjudicated amount into a designated trust account, or
 - (c) such other form as may be agreed between the claimant and the respondent.
- (3) If the respondent is a public authority, the security may be in the form of a certificate by the authority to the effect that sufficient money will be legally available for payment of any amount up to the adjudicated amount if and when any such amount becomes payable.
- (4) Except with the consent of the parties, it is unlawful for the claimant to enforce any security given under this section until at least 2 business days after any matters in dispute between them in connection with the progress payment to which the security relates have been finally determined.
- (5) For the purposes of subsection (4), a determination becomes final:
- (a) in the case of a determination from which there is no right of appeal or review, when the determination is made, or
 - (b) in the case of a determination from which there is a right of appeal or review, when the right of appeal or review expires or (if the determination becomes subject to appeal or review proceedings) when those proceedings have been finally disposed of."

33 Section 25 provides:

"(1) This section applies if, on or before the relevant date, a respondent fails to do one or other of the following:

 - (a) to pay the whole or any part of the adjudicated amount to a claimant,
 - (b) to give security for payment of the whole or any part of the adjudicated amount to a claimant.

(2) In those circumstances, the claimant:

 - (a) may recover the unpaid, or unsecured, portion of the adjudicated amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, 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) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in subsection (1).

(5) In this section, **relevant date** means:

 - (a) the date occurring 2 business days after the date on which the relevant determination is made under section 22, or
 - (b) if the adjudicator determines a later date under section 22 (1) (b), that later date."

34 Section 27 provides:

"(1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 25.

(2) The right conferred by subsection (1) exists only for so long as the respondent fails to comply with the requirements referred to in section 15 (1), 16 (1) or 25 (1), as the case may be.

(3) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension."

The defendant's oral submissions

- 35 Mr McVay, who appeared for the defendant, made extensive oral submissions to the same general effect as the written submissions.
- 36 In outline his case was that the 2 May 2001 "Payment Claim under the Building and Construction Industry Security of Payment Act 1999" was not a valid s 13 payment claim. The defendant accepted that the plaintiff was entitled to issue each of the first three tax invoices, if issued as a separate "Payment Claim", shortly after the 25th day of the month to which it related. But the defendant submitted that the 2 May 2001 "Payment Claim" was invalid because it relied on "multiple progress claims", not "individual progress claims" - on three contractual payment claims, not one, and because it was made too late. It was made too late because s 14(4) suggests that no statutory claim may be made later than ten business days before the contractual date for payment: if the duty

to pay only arose on the due date for the progress payment to which the payment claim related, the statutory right to ten business days was not to be cut down, which meant that the payment claim had to be served sufficiently early to permit its preservation. If it were served later, it could not be characterised as a valid statutory "payment claim". It was contended that this construction was supported by the tense of the verb "becomes" at the end of s 14(4), on the ground that that contemplated a future date, and if the payment claim were served less than ten business days before that date, it could not be said that the "respondent", as defined in s 14(1), "becomes" liable to pay if the relevant date had already passed after ten business days. It was contended that the preferred construction was also supported by the need for speedy adjudication, pursuant to s 21, on the satisfactoriness of building work before the strict payment regime compelled by s 14(4) clamped down on the "respondent", with the consequence of summary judgment under ss 15 and 16 becoming available notwithstanding the existence of possible cross claims. A construction of the Act which permitted delayed payment claims should be rejected because it would be unjustly damaging to the interests of "respondents": the work about which they might be able to make legitimate complaints if inspection took place pursuant to s 21(4)(d) and s 22(2)(e) might become covered up as building activity went on. The implication from s 14 that payment claims must be served as fast as the defendant submitted was said to be supported by the tight time schedules in ss 15, 20, 21, 23 and 27. The Act gave subcontractors considerable rights to payment, ultimately enforced by summary judgment applications under s 15(2)(a) and s 16(2)(a), without the ability to raise a blocking cross claim, and the suspension of construction work under ss 16(2)(b) and 27. The price for those statutory rights was speedy action.

The plaintiff's oral argument

- 37 The plaintiff contended that nothing in s 13 required a payment claim to be limited to the work carried out within the period which would be encompassed by a single progress claim, and that various other parts of the legislation negated any such requirement.
- 38 The plaintiff began by referring to s 3(1)-(3), which provided:
- "(1) The object of this Act is to ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services.*
- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment in circumstances where the relevant construction contract fails to do so.*
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:*
- (a) the making of a payment claim by the person claiming payment, and*
- (b) the provision of a payment schedule by the person by whom the payment is payable, and*
- (c) the referral of any disputed claim to an adjudicator for determination, and*
- (d) the setting aside of money as security for payment of the progress payment so determined."*
- 39 Section 13(1) could be relied on by a person entitled to a "progress payment", or, there being nothing to prevent the operation of s 8(b) of the *Interpretation Act 1987*, "progress payments".
- 40 Further, s 13 did not contain any express provision restricting the time within which payment claims were to be served.
- 41 The plaintiff submitted that the defendant's construction was "strange", because the Act, though designed to help subcontractors, as s 3(1)-(3) indicated, required subcontractors to approach its machinery and rely on it in the expectation that contractual recovery might fail or be obstructed even before that possibility came to light, particularly since s 32 provided that nothing in Part 3 (ss 13-32) was to affect any right that a party to a construction contract might have under it. In effect the plaintiff submitted that it was open to subcontractors to do what it had done - make a series of contractual claims, and only when they failed by reason of the defendant's breaches of contract, move to the statutory methods of enforcement.
- 42 The plaintiff argued that a payment claim could be made for a three month period where no claims for progress payments for each of the individual months had been made. This went beyond the particular circumstances of this case, since the factual assumptions underlying the argument do not correspond with what the plaintiff actually did here. However, the plaintiff submitted that if a payment claim could be made after three months in circumstances where no progress claim had been made at the end of each month, then there was no validity in the defendant's contention that three separate monthly progress claims could not be bundled into one s 13 payment claim.
- 43 The plaintiff drew attention to clause 42.2 of the Subcontract which provided: *"The amount due to the Subcontractor at the time for a claim for payment shall be the value of the work carried out by the Subcontractor in performance of the Subcontract to that time together with any moneys due to the Subcontractor under any other provision of the Subcontract or for breach of contract less:*
- (a) amounts already paid under the Subcontract;*
- (b) amounts which the Main Contractor is entitled to deduct under Clause 42.3 or 42.10."*

The plaintiff submitted that a Clause 42.1 claim for payment could therefore include a claim for more than the value of the work done in the particular month at the end of which the claim was made. That this accorded with common practice was said to be supported by a quotation from I N Duncan Wallace (ed) *Hudson's Building and Engineering Contracts* (11th ed, 1995), para 8-105: *"As pointed out in Chapter 6, while payment by means of suitably calculated fixed instalments of the contract price due on completion of identified stages of the work offers valuable advantages to owners, particularly in encouraging expeditious progress, reducing administrative and*

professional valuation outlays, and avoiding 'front-loading' pricing techniques by contractors, and while there is no reason why such a basis for interim payment should not be used equally in measured contracts as well as in the lump sum fixed price contracts with which it is usually associated, it remains the case that the great majority of English standard forms nevertheless use periodical valuation, usually monthly, of the work done to date as the basis of interim payment. For entirely valid practical reasons, these valuations usually represent successive retrospective valuations of the whole of the work done to date, and not of the work done in the preceding month, since many items, due to differences in measurement or the subsequent discovery of defective work or the replacement of 'materials on site' valuations with valuations of work done subsequent to their incorporation, may require revision in later certificates."

The plaintiff relied particularly on the last sentence.

- 44 The plaintiff submitted that the defendant's construction failed to deal with the existence of s 8(2)(a)(ii) and clause 42.2. The defendant's construction, taken with clause 42.1, accommodated s 8(2)(a)(i), because in the events which happened the plaintiff made claims for progress payments on appropriate dates as envisaged by clause 42.1. Hence the plaintiff was a person who was entitled to a progress payment on each of the dates in late February, late March and late April on which it served tax invoices for the work done in those months. On each of those dates the defendant was entitled to a progress payment, and each of them was a "reference date" for s 8(2)(a)(i) purposes. But s 8(2)(a)(ii) contemplated an entirely different reference date - not a date on which a claim for a progress payment might be made, but a date by reference to which the amount of the progress payment is to be calculated. That latter language corresponded closely with the language of clause 42.2. The plaintiff submitted that pursuant to clause 42.2, the "amount due" could include amounts unpaid for months earlier than the immediately passed month, and since clause 42.1 permits claims for payment of "the amount due", the monthly claim was not limited to the work done in that month, but the totality of work done up to the end of that month (including work done in earlier months for which payment had not been received). Hence the Subcontract permitted cumulative claims, and s8(2)(a)(ii) recognised that a reference date could be a date by reference to which the amount of the progress payment is to be calculated. While s 8(2)(a)(i) concentrated on the date for the making of the claim for a progress payment, and was linked to clause 42.1, s 8(2)(a)(ii) concentrated on the date by reference to which the amount of the progress payment is to be calculated, and looked to clause 42.2. If work done in months earlier than the month of claim could be taken into account, that pointed against a construction of s 13 as being limited to payment claims relating to work done in the immediately preceding month.

- 45 The plaintiff submitted that the defendant's argument based on the risk of bad work being covered up and inspection which might detect it being thwarted if claims later than those which the defendant's construction permitted were made failed. It failed partly because that could happen even in relation to claims made in accordance with the defendant's submissions to the statutory timetable. It also failed because of clause 31.1 and clause 31.2, which provided:

"31.1 Main Contractor's Representative

In Clause 31 'test' includes examine and measure.

At any time prior to the making of a Final Payment by the Main Contractor to the Subcontractor, the Main Contractor's Representative may direct that any materials or work under the Subcontract be tested. The Subcontractor shall provide such assistance and samples and make accessible such parts of the work under the Subcontract as may be required. On completion of the tests the Subcontractor shall make good the work under the Subcontract so that it fully complies with the contract.

31.2 Covering Up of Work

The Main Contractor's Representative may direct that any part of the work under the Subcontract shall not be covered up or made inaccessible without the Main Contractor's Representative's prior approval."

That is, the plaintiff submitted, the Subcontract gave a "clear mechanism whereby the contractor" could protect itself and ensure that testing be done prior to Final Payment.

- 46 Finally, the plaintiff relied on *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113 per McHugh J. The plaintiff submitted that even if the defendant's construction was not a strained construction, the court was entitled to treat s 14(4) as containing additional words to negate the construction urged by the defendant. The plaintiff submitted, using the words of McHugh J, that even if Parliament had overlooked "an eventuality which must be dealt with if the purpose of the legislation is to be achieved", namely, the making of a payment claim for entitlements to progress payments over more than one month, the following words should be inserted into s 14(4) at the end after "progress payment": "or the last of the progress payments". That construction avoided the defendant's argument preventing the bundling of progress claims.

The arguments considered

- 47 The construction advanced on behalf of the defendant is unsound.

- 48 First, even if a "claimant", as defined by s 13(1), delays in serving a payment claim beyond a time which is ten business days before the contractual due date in which the "respondent" becomes liable to pay the claimed amount, as a matter of language there is no strain in concluding that, if no payment schedule is provided by the respondent in time, the respondent "becomes" liable to pay at a passed date. If strictness of construction, which the defendant's approach calls for, is to be applied, that approach is not strict enough. It fastens on the contrast between the present tense of "becomes" and the occurrence of liability to pay in the past. But if the defendant's construction were correct, the word "becomes" should have been "will become" or, to cover the possibility of a payment claim served precisely ten business days before the due date for the progress payment, "will become or

becomes". Since that language was not used, there is no strain in construing "becomes" to mean "became, becomes or will become".

- 49 Secondly, whether or not the provisions creating a strict regime where claimants are not paid, and the provisions requiring adjudication to be prosecuted expeditiously, point towards the defendant's construction, there is no express language supporting it. The conclusion that the significant statutory rights conferred are only capable of being availed of by claimants within the narrow time period contended for by the defendant could only be drawn if the language used were clear. It is certainly possible for statutory rights of a valuable kind to be granted on the strictest temporal conditions, but in the absence of clear language one would not lightly arrive at a construction having the result that they could be lost by a short delay, whether that delay was the result of intentional behaviour by the claimant, or oversight, or accident, or some intervening and overriding event. And the clear language necessary is language which one would expect to exist not in s 14, dealing with responses to payment schedules, but in s 13, dealing with the conditions which must be satisfied by payment claims. Section 13(2) states formal requirements for payment claims. If there were to be a substantive strict requirement in relation to time, one would expect to find it there. It is not there.
- 50 Thirdly, there is nothing in s 13 which suggests that a payment claim cannot include entitlements to more than one progress payment. If it can, that points significantly against any time limitation barring payment claims for any progress payment but the last being inferred from s 14(4) and from other aspects of the statutory scheme.
- 51 Fourthly, the two limbs of that part of the definition of "reference date" appearing in s 8(2)(a) reveal a legislative intention to permit payment claims to be made either by reference to a contractual date for making a claim (ie under clause 42.1) or by reference to a contractual date by reference to which the amount of the progress payment is to be calculated (ie taking into account clause 42.2). An entitlement to a progress payment resting on recourse to the latter date is not precluded by the fact that there was an earlier entitlement to a progress payment resting on a recourse to the former date. And if recourse is had to the latter date, the statutory entitlement to a progress payment created by s 8(1) includes an entitlement to sums owing from periods anterior to the month at the end of which the latest contractual claim is made. While clause 42.1 obliges the Subcontractor to make a claim each month, and to include in it "all amounts then due", clause 42.2 makes it clear that the amounts due include those referable to earlier months, because the "amount due" is "the value of the work ... in performance of the Subcontract *to that time*", not just in that month. While clause 42.1 compels monthly claims, s 8 contemplates entitlements to progress payments arising not only by reason of the dates for making claims under clause 42.1, but by reason of a date by reference to which the amount of the progress payment is to be calculated under clause 42.2, and the latter date includes periods which may be greater than the preceding month.
- 52 Finally, the defendant's arguments based on the speedy system of adjudication, the importance of inspection, and the need to arrive at a construction preserving the Main Contractor's right to inspect are very substantially weakened by the Main Contractor's rights under clause 31.1 and clause 31.2.
- 53 Accordingly, on the true construction of the *Building and Construction Industry Security of Payment Act 1999* it is permissible for a person entitled to a progress payment under a construction contract to serve a payment claim on the person who under the contract is liable to make the payment even though the claim relates to work done in periods prior to the month in which the payment claim is served. Hence the defendant's payment claim was not invalid.

Discretionary considerations

- 54 The defendant's submissions need to be evaluated in the light of the following circumstances. The 28 February 2001 Tax Invoice, Progress Claim No 9, was served on or about that day. By that day two earlier Tax Invoices had not been paid: one dated 28 December 2000 and one dated 25 January 2001. Mr A T McLennan, who signed the Subcontract on behalf of the plaintiff and who is said by Mr Penglis in an affidavit to have been the plaintiff's representative for six years and to have been one of the two plumbers who with two apprentices carried out the work, swore an affidavit dated 1 February 2002. It was filed by the plaintiff in resistance to the defendant's application to this Court for a stay of the trial judge's orders pending the application for leave to appeal. Mr McLennan described the Tax Invoices dated 28 December 2000, 25 January 2001 and 28 February 2001 as being respectively Progress Claims Nos 7, 8 and 9. So to speak was to speak the language of clause 42.1 of the Subcontract, and each document so described itself. He said that each document was delivered to the plaintiff on or about the date it bears. He said that none of the money claimed had been paid by 6 April (so that the payments required by clause 42.1 were respectively at least two months six days, one month six days and six days overdue). According to Mr Penglis' affidavit of 24 December 2001, when he told Mr McLennan that all the areas that Mr McLennan needed to work on were now ready for him, Mr McLennan said "I am not going to do any more work until I've been paid". On that date Progress Claim No 7 was about six weeks overdue.
- 55 On 6 April 2001 Mr McLennan sent the following letter to Mr Penglis: *"Please be advised that we put Fyntray Constructions Pty Ltd on notice under Clause 44 of the subcontract conditions for failure to make payments in breach of Clause 42.1*

We require Fyntray Constructions Pty Ltd to show cause, in writing within 7 days of this notice, why Macind Drainage & Hydraulic Services Pty Ltd should not exercise its rights as stated in Clause 44.9 and request notice of cause be sent to our postal address.

It is with deep regret that we take this action but feel contractual process should be followed."

Clause 44.7 provided in part: *"If the Main Contractor commits a substantial breach of contract and the Subcontractor considers that damages may not be an adequate remedy, the Subcontractor may give the Main Contractor a written notice to show cause." One substantial breach indicated was "failing to make a payment, in breach of Clause 42.1".*

Clause 44.9 provided in part: *"If by the time specified in a notice under Clause 44.7 the Main Contractor fails to show reasonable cause why the Subcontractor should not exercise a right referred to in Clause 44.9, the Subcontractor may by notice in writing to the Main Contractor suspend the whole or any part of the work under the Subcontract."*

- 56 On 9 April Messrs Penglis and McLennan met at the work site. Mr McLennan said they had the following conversation:

"McLennan: 'How's it going, Theo?'

Penglis: 'Alan, not bad. Look Alan I am sorry that payments have gotten all messed up. Please accept my apology. I have a cheque here to give you for progress claims 7 and 8.'

McLennan: 'What about progress claim 9? When will I be paid?'

Penglis: 'As soon as the Council pays us I will give you the money. I can't say when that might be but I could have some more money for you next week.'

McLennan: 'OK'."

Mr McLennan received from Mr Penglis a letter dated 6 March shortly after 6 April: it would seem that the date "6 March" was an error for a date early in April. It said:

"Further to our discussions regarding breach of clause 42.1 we hereby forward the following resolution.

Progress Claim 7 & 8 will be paid on Monday 9th April 2001 on site by Hand

Progress Claim No 9 will be by agreement

We further note of your stop work as from the 15th March 2001 till your notification of the 6th April 2001.

In an effort to resolve this situation we hope the above is to your satisfaction."

- 57 Mr McLennan said the defendant did not pay Progress Claim No 9 in the week following the conversation described. About two weeks after that conversation, he and Mr Penglis had another conversation as follows:

"McLennan: 'We still haven't been paid for progress claim 9. When is the money coming?'

Penglis: 'Alan, the Council hasn't paid our progress claim. They're holding off paying us because earlier on in the project the Council had made an overpayment and now they are holding off payment in reduction of that overpayment. As soon as we get more money from the Council, I'll promise we'll pay you first, you're like family.'

McLennan: 'Well I can't afford to buy materials if I don't know when I'm going to be paid next.'

Penglis: 'I know, I know'."

- 58 On 30 April 2001 Mr Penglis gave the following written notice to the plaintiff:

*"Pursuant to clause 35.2 of the subcontract conditions, the Main Contractor gives **NOTICE** to the subcontractor to conform to the direction as set out below.*

Direction 1) To complete all outstanding works by Thursday 3rd May 2001.

Direction 2) To forward all construction certification, manufacturers warranties or guarantees, As built drawing (where applicable) by close of business on Thursday 3rd May 2001.

*The above **NOTICE** is imperative to occupation by Saturday 5th May 2001."*

Clause 35.2 of the Subcontract provides: "The Subcontractor shall execute the work under the Subcontract to Substantial Completion by the Date for Substantial Completion. Upon the Date of Substantial Completion the Subcontractor shall give possession of the Works to the Main Contractor."

- 59 On 2 May 2001 Mr McLennan wrote to Mr Penglis as follows: *"Further your notice to Clause 35.2, dated 30th April 2001, we wish to advise that due to Fyntray Pty Ltd again being in breach of Clause 42.1 and the sensitive timing of this breach, we hereby suspend all onsite works until the matter is resolved.*

We again regret having to take this stand but can see no other course of action."

- 60 Mr McLennan's evidence has not been contradicted. Perhaps it was not necessary for it to be contradicted, since the parties reached agreement about a stay. Counsel for the defendant indicated that he did not object to the affidavits containing the above evidence being used in relation to the present application. Prima facie the following matters emerged.

- 61 First, despite having ample time within which to do so, the defendant never questioned the entitlement of the plaintiff to any part of the monies claimed in Progress Claims Nos 7, 8 and 9, so far as the evidence goes. Indeed

the defendant paid Progress Claims Nos 7 and 8, as Mr McLennan says and the trial judge found, even though the payments were late.

62 Secondly, no point was taken by the defendant that Progress Claims Nos 7-9 suffered from the vice now detected in Progress Claim No 11 and described in paragraph 21 of the defendant's written submissions set out above. Yet if that were a good answer to Progress Claim No 11 it would have been a complete answer to Progress Claims Nos 7-9.

63 Thirdly, if there was no flaw in Progress Claims Nos 7 and 8, there can be no flaw in Progress Claims Nos 9-11, which were each prepared in the same form and delivered in the same way.

64 These circumstances constitute grounds for the refusal of leave to appeal. All the points which the defendant wishes to agitate are highly technical points. To some extent they could have been deployed against earlier Progress Claims which have been paid, namely Progress Claims Nos 7 and 8. They were not deployed against Progress Claim No 9 until the proceedings began. There is no evidence that the defendant ever put forward a document or a formal complaint to the plaintiff explaining why Progress Claims Nos 9-11 should not be paid in whole or in part. The defendant has filed affidavits in this Court in support of its stay application which include a "Notice of Cross Claim" in the Registry of the Court of Appeal claiming \$188,226.52 and which include material purporting to justify that claim. It is open to the defendant to seek a stay in the District Court in support of that claim. The place in which to agitate such a claim was the District Court, and the time for doing so was before Gibson DCJ. There is nothing in her reasons for judgment which suggests that that subject was ever mentioned to her. The defendant's contention that the plaintiff should have served separate Payment Claims immediately after each contractual Progress Claim contained in a tax invoice is hollow in view of its record of late payment or non payment. One view of the conduct of the defendant overall is that it is desperately attempting to avoid having to make payments the legitimacy of which it never questioned when the initial demands for them were made or when the 2 May 2001 Payment Claim was sent. Indeed, as to one of them, Mr McLennan records explicit admissions that the demand was justifiable. No point was taken that either statutory enforcement or contractual enforcement was unavailable. Another view of the conduct of both parties is that there were arguable faults on both sides in the performance of the Subcontract. If so, the venue for debates on those subjects is the District Court. Leaving aside questions of stays in order to permit arbitration, and any good defence or ground of cross claim which the defendant might have, the plaintiff's contractual entitlement corresponds substantially with its statutory entitlement. The defendant wishes this Court to consider the merits of the trial judge's reasoning in relation to the plaintiff's statutory entitlement. It has, though there was little point in doing so, since the condition of the materials before her was such that the contractual entitlement would have produced substantially the same result. Nothing in the papers before this Court reveals precisely what claim was made before the trial judge and what defences the defendant was proposing to advance to that claim. The numerous formal deficiencies of the White Book are merely external signs of the substantive fact that this case has been a far from satisfactory vehicle for determining the correct construction of the Act. It cannot be said that the papers throw up any material showing that there is a clamant demand for the righting of an injustice. The trial judge's orders do not finally prejudice the defendant, since the defendant can bring its cross-claim, however belatedly. If it is said that payment of the judgment sum to the plaintiff might be irrecoverable in the event of the defendant succeeding under the cross-claim, the question of any stay is a matter to be debated before the District court.

Conclusions in relation to the first group of grounds

65 Leave should be refused partly because the arguments of statutory construction which the defendant raised lack validity and partly because of the strong discretionary factors described above which point against a grant of leave.

Lack of reasoning

66 So far as the defendant complains about the trial judge's lack of reasoning, it is generally true that merely to set out two competing sets of reasons and to say that one is preferred, assuming that the defendant is correct in saying that the trial judge did this, is not a satisfactory method of complying with the judicial duty to give reasons. The reasons why that is so were explained by Kirby P in *Commissioner for Railways for the State of Queensland v Peters* (1991) 24 NSWLR 407 at 415-417. To those may be added the proposition that unless a trial judge endeavours to explain why one set of reasons is preferable, the reader cannot be sure that the competing strands of submission have been fully absorbed by the trial judge's mind, analysed and transmuted into a personal conviction that the orders ultimately made are both just and in accordance with law. However, there must be cases where to set out two sets of reasoning and to say that one is preferable is a reasonable course. It is not necessary to decide whether this is one of those cases, because if the trial judge committed an error in this respect, it is not an error raising a point of any general interest, and because the monetary sum in dispute is relatively low.

Stay

67 So far as the defendant complains about the trial judge's failure to grant a stay, none of the three sets of written submissions which have been filed say anything about that subject, nor was anything said about it in oral argument. It must be presumed that the point has been abandoned.

Orders

68 The following orders are proposed.
1. The Summons is dismissed.
2. The claimant is to pay the opponent's costs.

- 69 **HODGSON JA:** I agree with the orders proposed by Heydon JA and substantially with his reasons.
- 70 As noted by Heydon JA, cl.42.1 of the contract between the defendant (claimant) and the plaintiff (opponent) entitled the plaintiff to make progress claims on the 25th day of each month, and required the defendant, at the end of the following month, to pay the plaintiff the amount due, giving written particulars of how the payment was calculated and written reasons for any difference from the amount claimed. Under cl.42.2 of the contract, the amount due at the time of a progress claim was the value of all the work carried out by the plaintiff in performance of the contract to that time, less amounts already paid and amounts which the defendant was entitled to deduct.
- 71 Progress Claim No.9, served on 28 February 2001, claimed \$22,197.48 (including \$1,187.00 GST). Progress Claim No.10, served on 27 March 2001, claimed \$18,980.79 (including \$1,725.53 GST). Progress Claim No.11, served on 29 April 2001, claimed \$40,313.84 (including \$3,364.84 GST). Although cl.42.2 permitted the plaintiff to accumulate the progress claims, so that each succeeding progress claim could include unpaid balances from previous progress claims, the plaintiff did not in fact do that in these progress claims.
- 72 The demand made by the plaintiff on 2 May 2001, purporting to be under the Building and Construction Industry Security of Payment Act 1999 (the Act) was for \$74,423.58 (excluding GST), \$231.93 of which was in respect of work done since Progress Claim No.11.
- 73 The relevant sections of the Act are the definition of "progress payment" in s.4, ss.8-11, and ss.13-16. Those provisions are as follows: "progress payment" means a payment to which a person is entitled under section 8.
- 8(1) On and from each reference date under a construction contract, a person:
- (a) who has undertaken to carry out construction work under the contract, or
 - (b) who has undertaken to supply related goods and services under the contract, is entitled to a progress payment under this Act, calculated by reference to that date.
- (2) In this section, "reference date", in relation to a construction contract, means:
- (a) a date determined by or in accordance with the terms of the contract as:
 - (i) a date on which a claim for a progress payment may be made, or
 - (ii) a date by reference to which the amount of a progress payment is to be calculated, in relation to work carried out or to be carried out (or related goods and services supplied or to be supplied) under the contract, or
 - (b) if the contract makes no express provision with respect to the matter, the date occurring 4 weeks after the previous reference date or (in the case of the first reference date) the date occurring 4 weeks after construction work was first carried out (or related goods and services were first supplied) under the contract.
9. The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:
- (a) the amount calculated in accordance with the terms of the contract, or
 - (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out by the person (or of related goods and services supplied by the person) under the contract.
- 10(1) Construction work carried out under a construction contract is to be valued:
- (a) in accordance with the terms of the contract, or
 - (b) if the contract makes no express provision with respect to the matter, having regard to:
 - (i) the contract price for the work, and
 - (ii) any other rates or prices set out in the contract, and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
 - (iv) if any of the work is defective, the estimated cost of rectifying the defect.
- (2) Related goods and services supplied under a construction contract are to be valued:
- (a) in accordance with the terms of the contract, or
 - (b) if the contract makes no express provision with respect to the matter, having regard to:
 - (i) the contract price for the goods and services, and
 - (ii) any other rates or prices set out in the contract, and
 - (iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and
 - (iv) if any of the goods are defective, the estimated cost of rectifying the defect, and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.
11. A progress payment under a construction contract becomes due and payable:
- (a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or
 - (b) if the contract makes no express provision with respect to the matter, on the date occurring 2 weeks after a payment claim is made under Part 3 in relation to the payment. ...
- 13(1) A person who is entitled to a progress payment under a construction contract (the "claimant") may serve a payment claim on the person who under the contract is 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 for the construction work done (or related goods and services supplied) to which the payment relates (the "claimed amount"), and*
- (c) *must state that it is made under this Act.*

14(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(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 recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, 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) *Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in subsection (1).*

16(1) This section applies if:

- (a) *a claimant serves a payment claim on a respondent, and*
- (b) *the respondent provides 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, and*
- (c) *the payment schedule indicates a scheduled amount that the respondent proposes to pay to the claimant, and*
- (d) *the respondent fails to pay the whole or any part of the scheduled amount to the claimant on or before the due date for the progress payment to which the payment claim relates.*
- (2) *In those circumstances, the claimant:*
 - (a) *may recover the unpaid portion of the scheduled amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, 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) *Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in subsection (1).*

74 Section 8 means that, on and from 25th of each month (s.8(2)(a)(i)), the plaintiff became entitled to a progress payment in accordance with the provisions of the Act. The amount of that payment was as calculated in accordance with the contract (s.9(a)). Such payment became payable in accordance with the provisions of the Act at the end of the following month (s.11(a)). In so far as the plaintiff submitted to the contrary, on the basis that the contract made no provision as to when a progress payment became due and payable in accordance with the terms of the Act, I would reject that submission: in my opinion, s.11(a) is referring to the terms of the contract in respect of progress payments payable under the contract.

75 Accordingly, on and from 25 April 2001, the plaintiff was entitled to make a payment claim under the Act, and was entitled to be paid pursuant to that payment claim the amount calculated in accordance with the terms of the contract. That amount contemplated the accumulation of entitlements from previous monthly progress claims. The claim under the Act which the plaintiff made on 2 May 2001 enclosed copies of the three progress claims (Nos. 9,

10 and 11) and thereby sufficiently particularised under s.13(2) a claim for a total of \$74,191.65, being the total of the amounts specified under those three progress claims, less GST. The defendant disclaimed any submission that the inclusion of the additional \$231.93 invalidated the payment claim; and accordingly, the plaintiff's claim under the Act was a valid claim to the extent of \$74,191.65.

76 The defendant was therefore required to pay that amount on 31 May 2001 (s.14(4)) unless, within ten business days of 2 May 2001, it provided a payment schedule justifying some different amount (s.14(1), (2) and (3)), in which case s.16 would have applied.

77 On that analysis, it is not necessary to decide whether a single payment claim under the Act can include amounts due under several progress claims previously made under a contract. If the contract entitles the contractor to make a progress claim which includes in it amounts due and unpaid under previous progress claims, then the single payment claim under the Act can be for that accumulated amount. It is also not necessary to decide whether there is any time limit for the service of a payment claim, for example, whether it must be at least ten business days before the time when the payment becomes due and payable in accordance with the terms of the contract. However, my tentative view is that Heydon JA's opinion that there is no such time limit is the preferable one.

78 **IPP AJA:** I agree with Heydon JA.

Mr G J McVay (Claimant) instructed by James A Moustakas & Co
Mr G O Blake (Opponent) instructed by Toomey Pegg Drevikovsky