

JUDGMENT Master Macready : New South Wales Supreme Court : 23rd February 2004

1 This is the hearing of the plaintiff's notice of motion filed 26 September 2003 in which the plaintiff seeks summary judgment pursuant to Part 15 rule 2 of the **Supreme Court Rules**. Judgment is sought in the sum of \$770,347.11 plus interest.

Background

2 On 17 May 2002 plaintiff entered into a construction contract with the defendant for the refurbishment and fit out of an office building at 50 Clarence Street Sydney. The contract includes the general conditions of contract (AS 2124 -- 1992).

3 The plaintiff's claims in the summons are for statutory progress claims under the **Building and Construction Industry Security of Payments Act 1999** (NSW)(the Act) which was recently amended on 3 March 2003. The relevant progress claims were issued after the commencement of the amendments. The claims in the summons are not made pursuant to the plaintiff's contractual entitlement.

4 Practical completion in respect of the contract was achieved on 4 April 2003 at the request of the plaintiff company and the certificate was issued on 14 April 2003.

5 On 15 May 2003 the plaintiff served a progress claim number 12 on the defendant claiming the sum off \$1,702,579.34. Under the terms of the contract this progress claim would be due on 28 June 2003. Between 26 June 2003 and 4 July 2003 various payments were made in relation to this progress claim amounting to \$984,225.85 leaving outstanding the sum of \$718,353.45. No payment schedule under the Act was supplied by the defendant.

6 On 15 July 2003 the plaintiff served a further progress claim number 13 on the defendant claiming \$749,091.72. This included the \$718,353.45 outstanding under progress claim number 12 and new work valued at \$30,738.23. Under the contract this would become due for payment on 28 August 2003.

7 There is correspondence in response to this progress claim on 17 and 25 July 2003. Although the defence raised a defence that this was a payment schedule it was conceded for the purposes of this application that the correspondence did not amount to a payment schedule. Therefore in respect of this claim there was no payment schedule supplied under the Act.

8 Proceedings were commenced by way of a summons on 29 August 2003.

The defendant's contentions as to triable issues

9 The defendant contended that its defence raises triable issues including the following:

- (a) Whether Claims 12 and 13 were payment claims made under s 13 of the Act in relation to a progress payment.
- (b) Whether Progress Claims 12 and 13 were supported by the evidence and information required by the contract and the Act.
- (c) Whether Progress Claims 12 and 13 involve a contravention of s 13(5) of the Act.

10 There were two defences in the defence which the defendant did not raise on this application. One I have mentioned above and the other was that the work was in some way in breach of the **Home Building Act 1989** (NSW). Given the concessions made it is not necessary for me to address those defences.

Whether Claims 12 and 13 were payment claims made under s 13 of the Act in relation to a progress payment

11 This question involves the construction of clause 42.1 of the contract and arises because of the way the Act fixes liability for payment by reference to the contractual entitlement. In this case there was no service of a payment schedule in response to the claims and accordingly s 14(4) of the Act applies. It is in these terms:

(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.

12 Section 15 of the Act then sets out what it describes as the consequences of not paying the claimant where there is no payment schedule. The section is in the following terms:

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) 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.
- 13 It is apparent that both ss 14(4) and 15(1)(b) presuppose the existence of a due date for the progress payment to which the payment claim relates. Accordingly, for the Court to be satisfied as to the existence of the circumstances referred to in s 15(1) it must be demonstrated that there exists a progress payment to which the payment claim relates, and a due date for that progress payment.
- 14 A progress payment is defined under the Act to mean a payment to which a person is entitled under s 8. By s 8(1) of the Act a person who has undertaken to carry out construction work under the contract is only entitled to a progress payment on and from each reference date under the contract. By s 8(2) of the Act, 'reference date' is defined as a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made (unless the contract makes no express provision with respect to that matter). The contract in this case contained express provisions in that regard.
- 15 The relevant provisions are contained in clause 42.1 of the general conditions of contract as modified by the special conditions of contract. The relevant parts of the clause are as follows:
- "42.1 Payment Claims, Certificates, Calculations and Time for payment.**
- At the times for payment claims stated in the Annexure and upon issue of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of the work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof.*
- Within 7 days of receipt of a claim for payment, the Superintendent shall:*
- (a) *issue to the Principal and to the contractor a payment certificate stating the opinion of the Superintendent:*
- (i) *the value of the work carried out by the Contractor in the performance of the Contract at the time for a claim for payment.*
- (ii) *any moneys due to the Contractor under any provisions of the Contract.*
- (iii) *amounts which the Principal is entitled to deduct for retention moneys, and*
- (b) *Refer to the Principal*
- (i) *claims for breach of Contract and interest on overdue payments, and*
- (ii) *the matter of any moneys due from the Contractor to the Principal as setoffs.*
- together with such advice in respect of (a) and (b) as the Superintendent deems appropriate.*
- If the contractor fails to make a claim for payment, the Superintendent may nevertheless issue a payment certificate.*
- Within 28 days from the end of the month after receipt by the Superintendent of a claim for payment from the Contractor the Principal shall pay to the Contractor the amount due to the Contractor and shall provide written particulars of how the amount due was calculated.*
- The Principal's liability is to pay the amount due ascertained in accordance with Clause 42.2. In the calculation of the amount due to the Contractor, the Principal shall be bound to accept the amounts shown on the certificate of the Superintendent in respect of (a) (i), (ii) and (iii) above except in the case of manifest error.*
- Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Clause 42.8.*
- Notwithstanding Clause 42.4, the Principal shall be obliged to pay for any item of unfixed plant and materials where the item is -*
- (i) *to be imported into Australia, provided the Contractor has given the Principal a clean on board bill of lading or its equivalent, drawn or endorsed to the order of the Principal and, where appropriate, a custom's invoice for the item; or*
- (ii) *(ii) listed in the Annexure and which is not an item to be imported into Australia, provided the Contractor establishes to the satisfaction of the Superintendent that the Contractor has paid for the item, and the item is properly stored, labelled the property of the Principal and adequately protected.*
- Upon payment to the Contractor of the amount which includes the value of the item, the item shall be the property of the Principal free of any lien or charge.*
- Except as provided in the contract, the Principal shall not be obliged to pay for any item of unfixed plant and materials which is not incorporated into the Works."*

- 16 The difference between the parties in respect of the construction of this clause is whether the clause provides for progress claims on a monthly basis on the 15th day of the month or the nearest working day after the 15th day, which is what is set out in the annexure, up until the issue of a certificate of practical completion or whether there exists a right to issue progress claims for the subsequent months after the certificate of practical completion up until the expiration of the defects liability period 12 months thereafter. The plaintiff suggests that the contractual ability to make progress claims continues after practical completion whilst the defendant contends that the proper construction of the clause provides that the right to issue monthly claims only continues up until the issue of a certificate of practical completion.
- 17 In the present case progress claims 12 and 13 are in respect of dates and work in part performed subsequent to practical completion. According to the defendant's submissions, therefore, none of these progress claims was a progress claim made under the contract, as there is no due date for such claims.
- 18 After adding in the annexure referred to the words at the commencement of clause 42.1 provide that claims may be made: *"Monthly on the fifteenth day of the month or the nearest working day after the fifteenth day and upon issue of a certificate of a practical completion and within the time prescribed clause 42.7"*.
- 19 Of importance in understanding the meaning of 'payment claim' are the terms of s 42.7 which are as follows:
*"42.7 Final payment claim
Within 20 days after the expiration of the defects liability period, or where there is more than one, the last to expire, the contractor shall lodge with the superintendent a final payment claim and endorse it 'final payment claim'."*
- 20 Thus one has a clause dealing with payments which includes payment claims in general and a final payment claim. On the face of the clauses there is nothing in them to give any indication that a payment claim may not be issued after the issue a certificate of practical completion. On the ordinary meaning of the words payment claims can continue on the dates provided for in the clause.
- 21 Although the plaintiff's argument was not expressed as claim for an implied term one would almost need an implied term in order to justify such a reading of the contract. The defendant sought to justify its reading of the contract in this way by reference to, inter alia, the effect of practical completion. It pointed to the fact that it was the builder that nominated practical completion on this occasion and referred to the definition of practical completion in the general conditions which, inter alia, required the works to be complete except for minor omissions and minor defects. The defendant also pointed to the fact that there might be on the plaintiff's construction two payments in one particular month, for example in the month of practical completion. The date of practical completion and the time for the final payment are natural times for a payment claim and may not necessarily occur on the fifteenth day of the relevant month. It is probably for this reason that they are specified as additional times.
- 22 It is to be noted that clause 40 of the special condition deals with variations which may be directed by the superintendent. Clause 40.1, in dealing with variation to the work, provides, inter alia: *"The contractor shall not be bound to execute a variation directed after practical completion unless the variation is in respect of rectification work referred to in clause 37."*
- 23 Clause 37 is the clause giving power to the superintendent to direct rectifications in respect of defects or omission which exist at practical completion. It is thus clear that there is a power for the direction of a variation in connection with rectification work during the defects liability period. The other thing to notice about clause 40.1 is that it is expressed in terms of the contractor not being bound to execute a variation. It is always open, of course, for a contractor to waive that protection and agree to a variation. From a practical point of view there may well be circumstances in many projects where after the project is handed over by the builder the proprietor sees that it is desirable to carry out some changes to the work. Such work in these circumstances would fall under the terms of the contract.
- 24 The defendant's construction, which would seek to imply a term to the effect that no payment claim could be made between the date of practical completion and the final payment claim under 42.7, on the face of the contract contradicts the express terms to which I have referred. I would not have thought that it is so obvious that it goes without saying and the contract is quite effective without the implied term.
- 25 The plaintiff also supported this position on the basis that the defendant had, in fact, issued a progress certificate number 12 on 26 June 2003. This, it said, was a clear recognition of the fact that there was a right to make progress certificates between practical completion and the end of the defects liability period. The answer to this, from the defendant, is simply that the plaintiff is not asserting payment under a contractual right but under its statutory right under the Act. It points to the fact that there has been no variation of the contract alleged or that there has been some estoppel alleged.
- 26 In my view the construction contended for by the defendant on this aspect of the contract is untenable and accordingly I would not see it as giving rise to a triable issue.

Whether Progress Claims 12 and 13 were supported by the evidence and information required by the contract and the Act

- 27 Clause 42.1 of the contract provides that progress claims shall be *"supported by evidence of the amount due to the contractor and such information as the superintendent may reasonably require"*. Relying upon **Brewarrina Shire**

- Council v Beckhaus Civil Pty Ltd** (2003) 56 NSWLR 576, [2003] NSWCA 4; the defendant submits that there was no compliance with the condition precedent.
- 28 It relied upon evidence of Mr Tucker, a quantity surveyor who was responsible for assessing matters for the defendant, that he was unable to assess the progress claims without a detailed discussion with representatives of the plaintiff in order to understand the claims made in the progress claims.
- 29 The plaintiff's argument sought to distinguish the case relied upon by the defendant, both upon the terms of the contract and the legislation. It also submitted that if the contract had not provided a due date s 11(b) of the Act applied making the payment payable within 10 days after the claim was made.
- 30 In **Brewarrina Shire Council v Beckhaus Civil Pty Ltd** the Court of Appeal held by a majority that the obligation of the superintendent to issue a payment certificate in regard a progress claim under the contract is subject to the condition precedent that the contractor support that claim with evidence of the amount due to it and with such information as the superintendent might reasonably require. The relevant judgment of the majority was that given by Ipp JA.
- 31 One of the arguments in **Beckhaus** was that the condition precedent contended for by the Council was inconsistent with the clause in that case namely that if no payment certificate has been issued then the principal shall pay the amount of the contractors claim. This was referred to at paragraph 14 of the judgment of Ipp JA in these terms:
"14 I do not agree, with respect, that the condition precedent contended for by the Council would be inconsistent with the provision that "if no payment certificate has been issued, the principal shall pay the amount of the Contractor's claim". The obligation to pay the amount of the contractor's claim when no payment certificate has been issued is, by the third paragraph of cl 42.1, expressed to be "subject to the provisions of the contract". This express qualification (that is, that the obligation to pay be subject to the terms of the contract) means that no inconsistency arises."
- 32 The submissions of the plaintiff were that the relevant parts of the clause in **Beckhaus** and in the present case were different and in particular the fourth paragraph of the clause in the present case did not contain the words "subject to the provisions of the contract". It was these words, according to the submissions, that allowed the condition precedent to apply because there was no inconsistency.
- 33 It is to be noted that it is the fourth and fifth paragraphs of the clause in the present case, quoted at paragraph 15 above, which are important and which are quite different to the provisions of the contract in **Beckhaus**, which appears at paragraph 4 in the judgment of Ipp JA. Although the relevant words have been deleted, it is apparent that the issue of a certificate is still required because in the fifth paragraph, in the present case, if payment is to be made the principal is bound to accept the certificate of the superintendent in respect of certain items. This would tend to suggest that the principal's liability to pay is thus also conditioned upon the issue of a certificate. In these circumstances an inconsistency does not arise. Accordingly, it would seem to me, that the principles in **Beckhaus** equally apply having regard to the contract in the present case.
- 34 The plaintiff also submitted that it would be an unusual condition for a payment claim to exist under the Act that does not fall due for payment because of non-compliance with a condition precedent. It referred to amendments to the Act in March 2003 which included:
(a) The addition of the words "or who claims to be" in s 13;
(b) The addition of "no contractual defences" provision in s 15 (4)(b);
(c) The tightening of the "no contracting out" provisions in s 34.
- 35 None of these matters particularly touch upon the present question and it is still clear that the Act provides two paths for determination of progress claims. One relies upon the contractual provisions agreed between the parties, and the other where there is no such agreement. There is nothing, that I perceive that would suggest that the contractual provisions should not be adopted if they have particular terms which suspend their operation in certain circumstances.
- 36 It was also submitted that in the circumstance where the condition precedent applies, namely information not having been provided, that s 11 (1)(b) of the Act applies. Section 11 (1) of the Act is as follows:
11 Due date for payment
(1) 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 10 business days after a payment claim is made under Part 3 in relation to the payment.
- 37 The argument advanced by the plaintiff was that s 11(1)(a) does not apply because as a result of the condition precedent there is no date on which the payment becomes due and payable. It is clear that the contract in this matter does provide for a date when the payment becomes due and payable. Therefore, it cannot be said in accordance with s 11(1)(b) that the contract makes no express provision in respect of the matter. It does make express provision although there is provision for a condition precedent which might suspend for some time the obligation to issue the certificate.
- 38 There is evidence from Mr Tucker that progress claims numbers 1 to 11 all required substantial explanation and information from the plaintiff for him to assess those claims on behalf of the superintendent. In respect of progress

claim number 12, he gave evidence that he could not assess it because he required information so that he might assess it. He says that he needed copies of appropriate invoices or measurements in respect of certain work. He requested information from the plaintiff on eight separate occasions between 8 May 2003 and 23 June 2003 this was done in order for him to assess the claim.

39 It is to be noted in **Beckhaus** that in paragraph 44 reference was made to the time for any request for information. Paragraph 44 of the majority judgment was in these terms:

"44 I do not accept these submissions. The first paragraph of cl 42.1 requires claims to be delivered "at the times for payment claims stated in the Annexure"; in other words at the times stipulated. It follows that the evidence and the information in question must be delivered at the time each payment claim is delivered; hence the information, the superintendent may reasonably require in terms of the first paragraph, is information required by the superintendent prior to the delivery of the claims for payment - and not thereafter. Macready AJ said in this regard:

"The superintendent would need to have identified information prior to the lodgement of the claim. Making a request after the lodgement of the claim would not be in accordance with the clause".

I agree with these remarks."

40 Given that there has been a history, in respect of the first eleven claims, of continued requirement for further information it may well be that the superintendent has identified information that he normally would require in respect of the progress claim. The evidence did not address this aspect, but it would seem to me that given the general nature of what has happened, it is likely that there is a course of conduct which may be an appropriate request, or alternatively some waiver. In these circumstances it seems to me that there is a triable issue on this aspect of the matter.

Whether Progress Claims 12 and 13 involve a contravention of s 13(5) of the Act

41 Section 13 of the Act is 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.

42 The defendant's submissions were that progress claims 12 and 13 included claims for variations where the superintendent had previously rejected the amount of the work in respect of such variations which formed part of earlier progress claims. That is, although the relevant work formed part of an earlier progress claim, the plaintiff subsequently sought to claim additional amounts in respect of such work. It was submitted that arguably, this contravenes s 13(5) of the Act because it amounts to service of more than one payment claim in respect of a reference date. The inclusion of such items, it was submitted, is not merely the inclusion of amounts that had been the subject of a previous claim (see s 13(6) of the Act).

43 Reference was made in the evidence to variation 6407 to illustrate a point that this particular variation had been assessed at less than the amount claimed in an earlier progress certificate. The original amount was again claimed in progress claim number 12 but in progress claim number 13 the amount was corrected back to what had previously been allowed. It was suggested that this is an illustration of a new claim for work that had been rejected, not a claim for money outstanding in respect of old work. Reference was made to the approval by Heydon JA in **Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd** [2002] NSWCA 238 of the comments from IN Duncan Wallace (ed) **Hudson's Building and Engineering Contracts** (11th ed, 1995), para 8-105 in the following terms: "... 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 for 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 differenced 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."*

- 44 Although there may be difficulties caused by claiming a sum for work again in a later claim it was easily enough identified and refused by the superintendent. It does not seem to me that the service of the second claim can be said to be the service of another claim in respect of the same reference date and thus in breach of subsection (5). The later claim obviously has a different reference date and subsection (6) is in terms quite general and allows matters to be included in a later claim without any limitation.
- 45 In the circumstances and considering the plain and clear language of the section I do not think that there is a triable issue on this aspect.

Orders

- 46 The orders I make are that the motion of the plaintiff filed on 26 September 2003 be dismissed with costs.

Mr RJ Powell SC for plaintiff instructed by Turtos Lawyers

Mr RJH Darke SC and Mr M Southwick for defendant instructed by Watson Mangioni