JUDGMENT : McDougall J : New South Wales Supreme Court : 13th August 2004

1 The plaintiff ("ISIS") as builder and the defendant ("Clarence Street") as proprietor are parties to a construction contract dated 17 May 2002. ISIS served a number of progress claims on Clarence Street. Clarence Street has paid part only of the amount claimed by progress claim 12, and nothing claimed by progress claim 13. The question in these proceedings is whether ISIS is entitled to recover as a debt the unpaid portion of progress claim 12 and the amount claimed by progress claim 13.

The issues

2 ISIS says that the progress claims in question, numbers 12 and 13 served on 15 May and 15 July 2003 respectively, were payment claims within s 13 of the *Building and Construction Industry Security of Payment Act* 1999 ("the Act"). It says that Clarence Street did not serve payment schedules, in response to either progress claim, within the time limited by the Act.

3 The parties stated the issues for decision as follows:

(1) Whether progress claim 12 or progress claim 13 identified the construction work to which it related for the purposes of s 13(2)(a).

(2) If that question is answered "no" as to either or both of the progress claims, is that a defence to ISIS' claim?

(3) Whether progress claim 12 or progress claim 13 was a claim for work that had been the subject of a previous progress claim and payment schedule in respect of which there had been no adjudication application or determination.

(4) If that question is answered "yes" as to either or both of the progress claims, is that a defence to ISIS' claim?

(5) Whether progress claim 12 or progress claim 13 was a claim for work in respect of a reference date for which there had been a previous progress claim?

(6) If that question is answered "yes" for either or both of the progress claims, is that a defence to ISIS' claim?

(7) Whether progress claim 12 or progress claim 13 was supported by evidence of the amount due to the plaintiff and such information as was reasonably required to assess the claim.

(8) If that question is answered "no" for either or both of the progress claims, is that a defence to ISIS' claim?

The facts

4 Progress claim 12 was expressly described as a progress claim under the Act. It claimed $1,702,579.30.

5 Progress claim 12 was sent by facsimile transmission to:
Integrated Project Services Pty Limited, for the attention of James Chryssafis
"D G Jones", for the attention of George Kasadelis
"Clarence Pty Ltd", for the attention of Nick Anastasopoulos
"Clarence Pty Ltd", for the attention of Chris Voukidis.

In each case, the facsimile number of "Clarence Pty Ltd" was given as 9241 5814.

6 Integrated Project Services Pty Ltd ("IPS") was, by the time progress claims 12 and 13 were made, the Superintendent under the contract.

7 D G Jones & Partners Pty Ltd is a firm of quantity surveyors. It was retained by Clarence Street to provide cost management services in respect of the project. Mr Ian Tucker, a director of the company, was the person responsible for providing those services. He swore an affidavit that was read in these proceedings.

8 I infer that the reference to "Clarence Pty Ltd" was a misnomer of the defendant, and that progress claims 12 was sent to the defendant by facsimile transmission. The evidence shows that a Mr N Anastasopoulos was a director of Clarence Street. Correspondence on the letterhead of Clarence Street identifies its facsimile number as 9241 5814 and its postal address as PO Box 1600, Maroubra, NSW 2035.

9 Progress claim 12 consisted of:

(1) A cover sheet showing to whom it was sent (and showing that it was "faxed 15 May 2003") and a list of documents attached.

(2) A 6 page document described as "Lumpsum [sic] Tax Invoice" that described the work by a number of one line items (referring, I infer, to their descriptions in some contractual document) and showing for each the original contract value, the amount of previous claims, the value of work to date and the percentage completed. The tax invoice also described, in one line items, a large number of variations. For each variation, it gave a reference (in each case prefaced by the letter "V" and, I infer, referring to a previous claim for the variation bearing that reference), a short description of the work, the amount approved, the amount previously claimed, the value of work to date and the percentage complete. The tax invoice concluded (leaving aside formal matters and signature) with a summary of its contents, concluding with a calculation of the "total now due".

(3) A number of supporting documents.

10 On 26 June 2003, IPS certified an amount of $204,360 (excluding GST) as payable (by 28 June 2003). The attached assessment had been prepared by D G Jones (Mr Tucker).

11 On 1 July 2003, Mr Tucker sent some documents by facsimile transmission to Mr Harlem Suhanic (who was ISIS' senior project manager on this project). Those documents show that, in Mr Tucker's view, "those remaining costs associated on this project are related to unresolved variations and/or disputed amounts".

12 Clarence Street did not provide ISIS with a document that was, or purported to be, a payment schedule: either within the time allowed by s 14 of the Act or at all.

13 Between 6 June and 4 July 2003, Clarence Street made payments totalling $984,225.85 in relation to progress claim 12.

14 Progress claim 13 was again expressly described as a progress claim under the Act. It claimed $749,091.72. That included the amount of $718,353.45 outstanding under progress claim 12 and new work said to be valued at $30,738.23.

15 Progress claim 13 was sent by facsimile transmission to the same recipients, described in the same way and (in the case of "*Clarence Pty Ltd*" with the same facsimile number) as was progress claim 12. In addition, there is a hand written note on the coversheet under which progress claim 13 was sent. That note was made and initialled by Mr Suhanic. Mr Suhanic's note shows that the original of progress claim 13 was mailed to "*Clarence St.*" at PO Box 1600, Marouba [sic], NSW 2035.

16 Otherwise, the description that I have given of progress claim 12 and its supporting documents applies equally to progress claim 13.

17 On 17 July 2003, Mr Tucker sent a facsimile transmission to Mr Suhanic. He said that he had "taken a "preliminary" look through your pc # 13". He made a number of comments. He asked Mr Suhanic to "review pc # 13 considering [those comments] before we meet with IPS/50C next week to resolve". Attached to the facsimile transmission was a copy of the "Lumpsum [sic] Tax Invoice" forming part of progress claim 13. Mr Tucker had ruled through a number of items completely; he had noted that others were deleted; he had noted that others again were disputed; and in respect of some he had written in values other than those claimed in the tax invoice.

18 It is a fair inference that the reference to "50C" is a reference to Clarence Street and that Mr Tucker was proposing that there should be a meeting to resolve what would appear to be concerns that he had with progress claim 13. There is nothing in Mr Tucker's facsimile transmission that would indicate what amount (if any) Mr Tucker would recommend to IPS as payable, or what amount Clarence Street proposed to pay, in respect of the progress claim. Nor was there any indication in the facsimile transmission of why Mr Tucker had ruled through some items, or of the basis of dispute for the claims so annotated, or on what basis he had written in values for others different to the values claimed in the tax invoice.

19 On 25 July 2003, IPS wrote to Mr Suhanic advising "that a zero progress certificate is to be issued" in response to progress claim 13, and referring Mr Suhanic to Mr Tucker's facsimile transmission of 17 July 2003 for details. There was no indication of the basis upon which IPS thought it was appropriate to issue "a zero progress certificate" except insofar as reference to Mr Tucker's earlier facsimile transmission might be thought to convey, to the initiated, some clue.

The relevant contractual provisions

20 Clause 42.1 of the contract, read in conjunction with the annexure to the contract and some special conditions that varied the standard terms, provided that:

(1) ISIS should make progress claims monthly on the 15th day of the month or the nearest working day thereto and upon the issue of a certificate of practical completion and (a final payment claim) within 28 days after the expiry of the defects liability period.

(2) The progress claims were to be "supported by evidence of the amount due to [ISIS] and such information as the Superintendent may reasonably require".

(3) The Superintendent was required to issue a payment certificate within 7 days of receipt of a claim for payment.

(4) The amount certified as due was to be paid within 28 days from the end of the month in which ISIS gave the claim to the Superintendent.

(5) Interest accrued at "*the rate stated in the Annexure and if no rate is stated the rate shall be 18% per annum; interest compounded at 6 monthly intervals*". The annexure, referring to this provision, stated the rate of interest as "*not applicable*".

The relevant provisions of the Act

21 In s 4, "payment claim" is defined, less than helpfully, to mean "a claim referred to in section 13" and "payment schedule" is defined, in the same spirit, to mean "a schedule referred to in section 14".

22 Section 13(1) provides that a person who is or who claims to be entitled to a progress payment may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment. Sub section (4) provides that a payment claim may be served only within the period determined by or in accordance with the terms of the construction contract (paragraph (a); paragraph (b) may be disregarded for present purposes).

23 Section 13(2) sets out some mandatory requirements relating to payment claims. It reads as follows:

"*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."

24 Sub section (5) prevents a claimant from serving more than one payment claim in respect of each reference date. However, by sub s (6), a payment claim may include an amount that has been the subject of a previous claim.

25 Section 14 deals with payment schedules. By sub s (1), a person on whom a payment claim is served may reply to that claim by providing a payment schedule to the claimant.

26 Sub sections (2) and (3) contain mandatory provisions relation to payment schedules. They read as follows:

"*(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."

27 By sub s (4), if the respondent to a payment claim does not provide a payment schedule to the claimant within the lesser of the time required by the contract or 10 business days after service of the payment claim, "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."

28 Section 15 deals with the consequences of failure to provide a payment schedule within time. It reads, relevantly, as follows:

"*(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 related.

(2) In those circumstances, the claimant:

(a) may:

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

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

(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.

The affidavit and other evidence

29 ISIS relied upon an affidavit sworn by Mr Suhanic and a bundle of documents exhibited thereto. Mr Suhanic provided the factual material to support the claim.

30 ISIS also relied upon an affidavit of Mr John Barker, a Quantity Surveyor. Mr Barker was retained as an independent expert. His evidence was admitted subject to relevance. The burden of his opinion was that ;

(1) Each of the progress claims in question was consistent with industry practice at the time of its issue and was of the style and content that he would have expected for such a project.

(2) Each of those progress claims was "well prepared in accordance with good industry practice" and contained "sufficient detail and information to identify the work for which a payment claim is made."

(3) Each of the progress claims valued the amount claimed in accordance with the terms of the contract.

31 Clarence Street relied upon an affidavit sworn by Mr Tucker. Mr Tucker was familiar with the property "having visited it almost daily whilst work were being carried out". Mr Tucker proved a bundle of documents, few of which were, in the event, the subject of submissions. In relation both of the documents proved by Mr Suhanic and the document proved by Mr Tucker, I have considered only those documents to which counsel referred either in written submissions or in the course of the hearing.

32 The bulk of Mr Tucker's affidavit was admitted subject to objection as to its relevance. The burden of his evidence was:

(1) It was not possible for him to assess the progress claims in the form in which they were originally submitted to him. In each case, he said, it was necessary for him to undertake discussions with representatives of ISIS "in order to determine exactly what they were claiming for each period".

(2) The progress claims were issued after the grant of practical completion on 14 April 2003.

(3) To Mr Tucker's knowledge and observation, ISIS had performed no work on site after the grant of practical completion and before the issue of each of the progress claims in question.

33 As to progress claim 12, Mr Tucker submitted (again over objections as to relevance) a detailed analysis of each of the variations referred to in it.

34 The bundle of documents tendered through Mr Suhanic included the previous 11 progress claims made by ISIS on Clarence Street pursuant to the contract. Each of those progress claims was, both in form and in substance, the same as progress claims 12 and 13. That is to say, each of the earlier progress claims identified the work in respect of which the claim was made by single line item descriptions (including some form of reference to what I

have inferred was the contractual description or the variation number as the case may be). There was no evidence to suggest that Mr Tucker, or IPS, or Clarence Street, had ever suggested that those earlier progress claims did not adequately identify the work to which they related, or that they were not capable of assessment without substantial investigation (as Mr Tucker suggested was the case for progress claim 12 and13).

35 In addition, ISIS tendered copies of the payment claims that had been in suit in ***Parist Holdings Pty Ltd v W T Partnership Australia Pty Ltd*** [2003] NSWSC 365 and ***Leighton Contractors Pty Ltd v Campbelltown Catholic Club Ltd*** [2003] NSWSC 1103. As I understood the point of the tender, it was to demonstrate that payment claims not distinguishably different from the present (insofar as they described the work by single line item references) had been held to the payment claims for the purposes of the Act. I have to say that I found their tender to be of no utility, and the submission based on them to be less than persuasive.

First issue: do the progress claims identify the construction work to which they relate?

36 In my judgment, the approach to be taken to this question is that described by Palmer J in ***Multiplex Constructions Pty ltd v Luikens & Anor*** [2003] NSWSC 1140. His Honour dealt at paras [72] and following with the question of "what a payment schedule should show". In my respectful opinion, his Honour's observations are (as is in any event apparent from para [76]) applicable equally to payment claims. His Honour pointed out that, in considering whether a payment claim or a payment schedule contained sufficient detail, it was necessary to bear in mind that they were given and received by people experienced in the building industry and familiar with the particular contract, the history of construction work on the project and the broad issues underlying the dispute. He said:

> *"76 A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.*
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> *77 A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.*
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> *78 Section 14(3) of the Act, in requiring a respondent to "indicate" its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word "indicate" rather than **"state", "specify"** or **"set out",** conveys an impression that some want of precision and particularity is permissible as long as the essence of **"the reason"** for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication."*

37 In principle, I think, the requirement in s 13(2)(a) that a payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where:

(1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;
(2) That reference is supplemented by a single line item description of the work;
(3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;
(4) There is a summary that pulls all the details together and states the amount claimed.

38 Where payment claims in that format have been used, apparently without objection, on 11 previous occasions, it is very difficult to understand how the use of the same format on the 12th and 13th occasions could be said not to comply with the requirements of s 13(2)(a). If payments claims in that format had sufficiently identified the construction work to which the progress payment claimed related on 11 previous occasions, I find it hard to understand how they would lose that character on the 12th and 13th occasion.

39 Some support for this is obtained from Mr Barker's analysis.

40 I do not regard Mr Tucker's evidence as establishing the position for which Clarence Street contended. Firstly, I think, the question is to be determined objectively and not subjectively. That is why I think that, in principal, Mr Barker's evidence of industry practice has some bearing on the issue. Secondly, and of more importance, Mr Tucker does not explain what it was about progress claims 12 and 13 that made them relevantly distinguishable from the previous 11 progress claims in respect of which, so far as the evidence goes, there was no problem of identification of construction work.

41 Approaching the question in accordance with the instruction offered by Palmer J in *Luikens,* I think that the previous conduct of the parties (when, apparently, there was no dispute) supports the conclusion that progress claims 12 and 13 do sufficiently identify the construction work to which their respective progress payments claimed relate.

42 By clause 42.1, a payment claim was required to "include the value of 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."

43 In this case, the entitlement of ISIS under s 9(a) of the Act was to an amount "calculated in accordance with the terms of the contract". By s 10(1)(a), valuation of that work was to be carried out "in accordance with the terms of the contract". The requirement, under s 13(2)(a), for a payment claim to identify the construction work to which the progress payment claimed relates must, I think, be analysed against the relevant requirement of the contract: see *Leighton Contractors* at [51].

44 The approach taken by Einstein J in that case focuses attention on the extent to which the payment claim in question facilitates the working out of the applicable contractual method of valuation. To my mind, that reinforces the significance of the prior conduct of the parties in relation to payment claims framed in exactly the same way.

45 Some support for Clarence Street's position might be found in the judgment of Austin J in ***Jemzone v Trytan*** [2002] NSWSC 395 at [43] and [44]. His Honour's decision was given on s 13 as it stood prior to the amendments effected by the *Building and Construction Industry Security of Payment Amendment Act* 2002 (NSW). Before those amendments, s 13 referred only to *"a person… who is entitled to a progress payment"*. It now refers to *"a person… who is or who claims to be entitled to a progress payment"*. The changes to s 13 (which included no change to s 13(2)(a) but did include a significant change to s 13(2)(b)) may bear upon the proper construction to be given to s 13(2)(a) in its statutory context. But, leaving this difficult question aside, I do not think that the relevant paragraphs of the decision of Austin J in ***Jemzone*** can be taken as indicating anything other than that, on the facts before his Honour and by reference to the statutory scheme then in place, the relevant payment claim fell "well short" of what was required. I do not think that his Honour's reasons are capable of extension, by analogy, to a different payment claim in a revised statutory context.

46 In any event, what Austin J said in ***Jemzone*** was doubted by Nicholas J in ***Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd*** [2003] NSWSC 266 at [63] – [66] and by Einstein J in ***Leighton Contractors*** at [52]. It might also be regarded as not entirely congruent with the approach of Palmer J in ***Luikens*** (see para [35] above) and with the views of Davies AJA in ***Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd*** [2002] NSWCA 136 at [20]. I express no concluded view on this because, as I have tried to indicate, I think that the question is one to be resolved by the application of s 13(2)(a) in the context of the particular contractual provisions and particular facts of each case.

47 Since I have found that progress claims 12 and 13 did identify the construction work to which their claimed progress payment related, the second issue does not arise.

Third issue: do progress claims 12 and 13 constitute claims for work the subject of previous payment schedules in respect of which no adjudication application has been lodged?

48 I have great difficulty in understanding this issue. That difficulty has not been resolved by the submissions (written or oral) for Clarence Street.

49 The effect of s 13 (6) of the Act is that a payment claim may include an amount that has been the subject of a previous payment claim. Where the respondent to that previous payment claim had replied by way of payment schedule, and where the payment schedule had put in issue the particular amount that was later claimed again, it would be open to the respondent to repeat whatever it was that had been said on the prior occasion. There is nothing in the language of s 13(6) that restricts it to circumstances where the respondent to the previous payment claim has not replied by payment schedule. I cannot see why such a limitation should be read into the subsection.

50 Accordingly, even if this issue arises on the facts – and I am prepared to assume that it does, although I was not favoured with submissions showing that this is so – it does not raise a defence. Thus, even if the question raised by the third issue should be answered "yes", the question raised by the fourth issue should be answered "no".

Fifth issue: do progress claims 12 and 13 claim for work in respect of reference dates for which there have been previous payment claims?

51 To the extent that this remained in issue – and, like the third, it was not expressly covered in written or oral submissions – the reasons that I have given for the third issue apply equally. Assuming for the moment that the issue arises in fact, it does not give rise to a defence.

Seventh issue: were progress claims 12 and 13 supported by evidence of the kind required under clause 42.1?

52 The relevant requirements of clause 42.1 are twofold. The payment claim is to be supported by:
(1) "Evidence of the amount due to" ISIS;
(2) "Such evidence as the Superintendent may reasonably require".

53 As to the first matter, each of the progress claims was supported by evidence. It was not suggested that that evidence could not bear upon "the amount due" ISIS. The issue was as to its sufficiency.

54 Mr Barker was of opinion that the payment claims did contain sufficient evidence; Mr Tucker was of opinion that they did not. Neither was cross-examined. I am not able to resolve the apparent conflict between them. Nor, on

this particular issue, is the difference between them one that is necessarily capable of resolution by reference to the parties' positions in relation to the previous progress claims. That is because the evidence did not show what (if any) evidence of the amount due was furnished in support of those previous payment claims.

55 As to the second matter, the only evidence of the requirement for further information came from Mr Tucker. He was not the "Superintendent"; neither was his company. There is no evidence that the Superintendent, IPS, required any information in relation to either progress claim. On that basis, I do not think that this issue arises in fact.

56 But even if it did arise in fact, it would afford no defence. That follows from the provisions of ss 14 and 15.

57 By s 14(4), where a claimant (ie, by reference of s 13(1), a person who is or claims to be entitled to a progress payment) serves a payment claim on a respondent (ie, by reference s 14(1), the person on whom the payment claim is served) and where the respondent does not provide a payment schedule within the relevant time limit, "the respondent becomes liable to pay the claimed amount to the claimant on the due date …".

58 Section 15 applies, as sub s (1) makes clear, where a respondent has become liable under s 14(4) and has not paid the whole or part of the claimed amount before its due date. In those circumstances, by sub s 2(a)(i), the claimant may "recover the unpaid portion of the claimed amount from the respondent, as a debt due".

59 Where a claimant commences proceedings under s 15(2)(a)(i) to recover the unpaid portion of the claimed amount as a debt, the respondent is not entitled, among other things, "to raise any defence in relation to matters arising under the construction contract": s 15(4)(b)(ii).

60 In my judgment, the defence raised under issue 7 is a defence of the kind that, by s 15(4)(b)(ii), Clarence Street "is not entitled … to raise".

61 This issue is one that was considered in interlocutory proceedings in this matter by Macready M ([2004] NSWSC 73) and, on appeal, by Einstein J ([2004] NSWSC 222). The Master heard an application by ISIS for summary judgment. He held at [45], in substance, that this issue raised a triable defence. Einstein J upheld the Master's conclusion.

62 Einstein J considered that s 15(4)(b)(ii) only arose "*if sub s (1)(a) and (b) are satisfied*".

63 His Honour's reasoning was directed to the proposition that ISIS had not shown that it had served a valid payment claim, because it had not shown (bearing in mind that what was before his Honour was an application for summary judgment) that progress claims 12 and 13 were served on or in accordance with reference dates under the contract. His Honour's conclusion at [45] needs to be read accordingly, as his Honour indicated by emphasising that it was expressed "*on this particular issue*" (his Honour's italics). His Honour was not dealing with the proposition that, quite apart from the "*reference date* " issue, s 15(4)(b)(ii) could not overcome a defence based on the "*clause 42.1 information*" issue. Thus, although on one view of things his Honour's decision might be difficult to reconcile with my own decision in ***Consolidated Constructions Pty Ltd v Ettamogah Pub*** [2004] NSWSC 110 at [61], it is unnecessary for me to reconcile any conflict that may in fact exist. A defence that there is no relevant reference date (ie, that a **statutory** requirement has not been satisfied) is conceptually different to a defence that some contractually required information has not been supplied (ie, a defence, arising under the contract, that a **contractual** requirement has not been satisfied).

64 The reason why a defence of this kind might be excluded by the statute is clear. If in truth a payment claim contained insufficient information to enable the superintendent, acting reasonably, to assist it (and I stress that the evidence does not make this point good in explicit terms) then it would be open to the principal to provide a payment schedule stating that it did not propose to pay any amount, and stating (if necessary) that the reason for withholding payment is, simply, that there was insufficient information given to it to enable it to assess the claim. On that basis, the statutory scheme and the contractual scheme would work hand in hand.

65 The statutory scheme is, undoubtedly, supplementary to the contractual scheme; see for example s 3(4) of the Act. However, one object of the statutory scheme is to provide a swift remedy to a claimant in circumstances where the scheme is engaged. That is why (for example) a respondent that does not raise a contractual defence in its payment schedule cannot raise that defence thereafter: s 15(4)(b)(ii); s 20(2B); s 22(2)(d); s 25(4)(a)(ii). In my judgment, that statutory scheme does not permit a respondent to refrain, upon some contractual basis, from providing a payment schedule but to retain the right, in subsequent proceedings, to rely upon whatever the contractual issue was. The matter may be tested simply. Under s 15(2)(a), a claimant to whom no payment schedule has been provided has two options. One is to recover the unpaid amount as a debt. The other is to make an adjudication application under s 17(1)(b). If the claimant took the latter course, the respondent could not, in its adjudication response, rely upon the contractual issue: s 20(2B). If an adjudication determination were made in the claimant's favour and the claimant sought to register as a judgment a certificate issued consequent upon that determination, the respondent could not rely upon the contractual issue: s 25(4)(a)(ii). It would be anomalous in the extreme if the claimant, by choosing the alternative path of suing for the debt as provided by s 15(2)(a)(i), were placed in a worse situation because, as a result of that choice, the respondent was able to raise an argument that it could not raise had the claimant followed the other path.

Other matters

66 The issues that were stated to arise for my decision may be seen to be somewhat different to those that Macready M and Einstein J held were available for argument. However, neither party suggested that the issues

should be limited to those perceived by the Master and Einstein J to be arguable. Thus, to the extent that there is some discrepancy between the issues that I have dealt with and the issues referred to by the Master and Einstein J, I have taken the view that I should deal with those expressly formulated by the parties for my consideration.

Interest

67 As I have noted, clause 42.9 provides for interest at the rate stated in the Annexure but, if no rate is stated, at the rate of 18 percent per annum, compounded at 6 monthly intervals. The Annexure states, against a reference to the rate of interest on overdue payments under clause 42.9, "not applicable". In my judgment, the effect is that no contrary rate, for the purposes of clause 42.9, is stated in the Annexure. It follows that ISIS is entitled to interest at the rate, and calculated upon the basis, set out in clause 42.9. It may be noted that no issue was raised as to the entitlement to ISIS to interest upon that basis.

Conclusions and order

68 For the reasons that I have given, each of the issues must be answered in favour of ISIS. The result is that ISIS is entitled to judgment in the amount claimed together with interest calculated on the basis set out in clause 42.9.

69 I stand the proceedings over to a date to be arranged with my associate for the parties to bring in short minutes of order to give effect to these reasons. That is to be done within fourteen days. On that occasion I will, if required, hear the parties on costs. If the parties do not wish to put submissions on costs then the short minutes should provide for Clarence Street to pay ISIS' costs of the proceedings

R J Powell SC/ M R Elliott (Plaintiff) instructed by Turtons Lawyers
F C Corsaro SC/ M H Southwick (Defendant) instructed by Watson Mangioni