

JUDGMENT : Goldring DCJ. New South Wales District Court. 13th February 2008

- 1 On 8 April 2005, the parties entered into a contract for various works at the Hartley Quarry. Lifese Pty Limited ("Lifese") commenced these proceedings against Adelaide Brighton Cement Ltd ("ABC") to have judgment entered for the sum of \$500 699.99. It alleges that the sum is due and owing under the Building and Construction Industry Security Payment Act 1999 ("Building and Construction Act"), ss 14(4) and 15 (2), because ABC failed to serve any payment schedule in response to a claim served by Lifese on 5 December 2006.
- 2 This application is for leave by ABC to further amend its defence to include a defence said to be "an answer to the whole of the plaintiff's claim".
- 3 Both parties conceded that the issue raised by the application is a legal issue, concerning the construction of the contract and the Act.
- 4 In determining the application I must have regard to the Civil Procedure Act 2005, especially s 64. Leave to amend a pleading will not be granted where the proposed amendment would be futile, is manifestly groundless, or will raise no reasonable cause of action. As the respondent puts it, leave to amend should be refused if the proposed amendment would be struck out if contained in the original pleading: *General Steel Industries Inc v Commissioner for Railways* (1964) 112 CLR 125, 129; *Heath v Goodwin* (1987) 8 NSWLR 478, 482.
- 5 The applicant relies on the decision of McDougall J in *John Holland Pty Ltd v Roads and Traffic Authority of NSW* (2006) 66 NSWLR 624; affirmed on appeal [2007] NSWCA 140. It says that, as a result of the events that transpired under the contract, the claim made by the respondent has been "undone" by a certificate issued by the Superintendent appointed under the contract. The respondent argues that the events that transpired have no such effect, and further, that the proposed amendment has no reasonable prospects of success and is manifestly groundless because
 1. it misstates the effect of clause 7.10.5 of the contract;
 2. it is unsupported by the authority relied upon; and
 3. the Building and Construction Act, s 15(4)(b)(ii), prevents it being raised.
- 6 The provisions of the relevant clause of the contract are:

7.10.5 Within 14 days of the contractor's final payment claim or the expiration of the period specified in clause 7.10.4 the Superintendent shall issue a final payment certificate endorsed "final certificate". In the certificate the Superintendent shall certify the amount which, in its opinion, is finally due to the contractor under the terms of the contract.

Unless either party, before the final certificate has been issued but not later than 21 days after the issue thereof, serves a notice of dispute under clause 7.16.1, the final certificate will be evidence that the works have been completed in accordance with the terms of the contract and that any necessary effect has been given to all the terms of the contract which require additions or deductions to be made to the contract sum . . .

Within 14 days after the issue of a final certificate the principal shall release to the contractor or any security, retention moneys or both then held by the principal. '
- 7 The relevant provisions of the Building and Construction Act are:

14 Payment schedules

 - (1) A person on whom a payment claim is served (the "respondent") may reply to the claim by providing a payment schedule to the claimant.
 - (2) A payment schedule:
 - (a) must identify the payment claim to which it relates, and
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the "scheduled amount").
 - (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
 - (4) If:
 - (a) a claimant serves a payment claim on a respondent, and
 - (b) the respondent does not provide a payment schedule to the claimant:
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served,whichever time expires earlier,the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

15 Consequences of not paying claimant where no payment schedule

 - (1) This section applies if the respondent:
 - (a) becomes liable to pay the claimed amount to the claimant under section 14 (4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and
 - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

- (2) In those circumstances, the claimant:
- (a) may:
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or
 - (ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and
 - (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act.
- (4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the claimed amount from the respondent as a debt:
- (a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and
 - (b) the respondent is not, in those proceedings, entitled:
 - (i) to bring any cross-claim against the claimant, or
 - (ii) to raise any defence in relation to matters arising under the construction contract.

32 Effect of Part on civil proceedings

- (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:
- (a) may have under the contract, or
 - (b) may have under Part 2 in respect of the contract, or
 - (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
- (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:
- (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
 - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

- 8 The relevant provisions of the contract which McDougall J and the Court of Appeal considered in the John Holland case are set out in the judgment of Giles JA at [9]:

"42.7 Final Payment Schedule and return of security

42.7.1 Time and conditions for issue of Final Payment Schedule

The Superintendent must issue a Final Payment Schedule within 28 days after receipt of the Final Statement if:

- (a) the Contractor has completed all its obligations under the Contract; and
- (b) all Defects Liability Periods under the Contract have expired; and
- (c) the Contractor has provided a statutory declaration in accordance with clause 43.2; and
- (d) there are no outstanding claims or disputes between the Contractor and the Principal.

42.7.2 Contents of Final Payment Schedule

The Final Payment Schedule must set out the amount determined by the Superintendent as the amount finally due from the Principal to the Contractor or from the Contractor to the Principal in connection with the work under the Contract.

42.7.3 Money owing to Contractor

If the Final Payment Schedule shows money owing from the Principal to the Contractor, the Principal must within 28 days after the date of the Final Payment Schedule:

- (a) pay the Contractor the amount certified as payable by the Final Payment Schedule, and
- (b) release all security then held for the Contract.

42.7.4 Money owing to Principal

If the Final Payment Schedule shows money owing from the Contractor to the Principal:

- (a) the Contractor must pay the Principal the amount certified as payable by the Contractor within 28 days after the date of the Final Payment Schedule, and
- (b) the Principal has no obligation to release security held for the Contract until the Contractor has paid the money due."

- 9 The facts in this case are that Lifese made a contract claim. ABC has not provided a payment schedule. Lifese therefore commenced these proceedings to enter judgment for the amount claimed.
- 10 In December 2007, the superintendent certified that no money was payable by ABC Lifese under the contract. Within the time provided under the contract, Lifese served a notice of dispute.
- 11 ABC contends that the issue of the final certificate by the superintendent put an end to any claim made by Lifese. It says that the position of the claim is the same as a determination made by an adjudicator under the statutory

scheme, established under Part 3, Division 2 of the Building and Construction Act. It relies particularly on the following passage from the judgment of McDougall J

50 *As I have already said, the Act (at least implicitly) recognises that adjudicators may err. That is why an adjudicator's determination is not finally conclusive of rights and liabilities under the contract. (I recognise that, absent reviewable error, such a determination may be regarded as conclusive of an entitlement to the amount of a progress payment; but that is a different matter.)*

51 *In a practical sense, a final determination of a balance owing under a construction contract may "undo" the effect of a prior determination by an adjudicator of the amount of a progress payment. But that is because the final determination – however it is made – establishes, on a final basis, the amount owing by one party to the other. If the final determination is made by a court, or arbitral or other tribunal, of competent jurisdiction then it establishes finally and conclusively (of course, subject to any appeal that may lie) the relevant rights of the parties to the contract.*

52 *In the present case, the contract authorises the superintendent (in the first instance) to make a final determination of the balance due by one party to the other in respect of work under the contract. **There is no reason why a final determination by the superintendent could not "undo" the effect of a prior determination by an adjudicator, in just the same way as a final determination by a court or arbitral or other tribunal might do so.** Of course, the contract provides for a process of review of determinations by the superintendent (cl 45); there is no equivalent review process for the decisions of courts or arbitral or other tribunals (and such rights of appeal as there may be are not to be equated to the kinds of review for which cl 45 provides). But this relates to the finality of the superintendent's determination. It says nothing as to the subject matter of that determination, or as to its effects on prior determinations by adjudicators. [my emphasis]*

- 12 Mr Nicholls, for the respondent, relied on differences in the wording of the two contracts. He placed emphasis on the wording of the contract between the parties to these proceedings, to the effect that the superintendent was required to "certify" an amount, rather than to determine the amount. Although Mr Christie, for the applicant, could not produce any primary authority to the effect that, in the context of a building or construction contract, "certify" encompasses a determination by the person who certifies, he was able to convince me that this is in fact the case. Under this contract therefore, when the superintendent certified an amount, the contract requires that that amount be determined by the superintendent before the certificate issues.
- 13 There is a further distinction upon which Mr Nicholls relied namely, that in the contract between these parties, the superintendent's certificate is to be "evidence" of the amount owing. In the contract considered in the *John Holland* case, the certificate was to be "conclusive evidence". The two expressions in my view are significantly different.
- 14 Where the word "evidence" is used without qualification, what is meant is that the certificate referred to is no more than a prima facie discharge of the evidentiary burden that rests on the party relying on the certificate. However, where the words "conclusive evidence" are used in the certificate, this is almost irrebuttably and conclusively presumed to be evidence of the matters stated in it, notwithstanding the effect of the Building and Construction Act, s 32. This distinction supports my conclusion that what was said in the *John Holland* case applies only to cases where there has been an adjudication, and even if I am wrong on that point, the different wording of the contract would be sufficient to distinguish the reasoning in that case.
- 15 The Building and Construction Act establishes a scheme for payment of amounts due to contractors under building and construction contracts. Under this scheme, the principal, that is the owner of the building, is obliged to pay a contractor amounts under the contract in two situations. The first is where the contractor claims a payment, and the principal issues a payment schedule. Normally the contractor will be paid at the same time. The contractor is entitled to enter judgment for the amount claimed if no payment schedule is issued.
- 16 The second situation is where the principal disputes the amount claimed. In this case the matter may be referred to an adjudication under Part 3, Division 2 of the Act. The adjudicator determines the amount owing and issues a certificate. That certificate is enforceable, on registration, as a judgment debt.
- 17 Under both schemes, the principal must pay the contractor either the amount claimed (where there is no adjudication) or the amount determined by the adjudicator. As provided in s 32, such payment does not affect any common law rights of either party, so that if there is ultimately a dispute, for example, as to whether or not work has been completed in a satisfactory way, or whether an amount claimed is due and owing, that question can be resolved by a court.
- 18 The clear policy of the Building and Construction Act is to ensure that contractors are paid promptly, and that disputes are resolved either under the statutory adjudication system set up under Part 3, Division 2, or after payment. Indeed, the contract in this case is totally consistent with the Act. The effect of paragraph 7.10.4, set out above, is that the principal must pay the contractor and provide a payment schedule promptly on issue of a claim or have the matter adjudicated.
- 19 That paragraph also provides for the issue of the final certificate by the superintendent. Notwithstanding what McDougall J said in the *John Holland* case, the issue of the final certificate does not, in my view, under the provisions of this particular contract at least, cancel or put an end to the statutory right of the contractor under s 14, unless there has been an adjudication. In the *John Holland* case his Honour was considering a totally different contract. I have set out the relevant provisions of the two contracts to show that this is so. Even if this were not the case, I find it impossible to construe what his Honour said as applying to any situation other than that where there

is an adjudication under the statutory scheme. I must have regard to the purpose of the Act, which is to ensure that contractors are paid promptly. To allow the issue of the final certificate in such a way that it puts an end to any claims previously made and left unpaid for more than the statutory period would frustrate the purpose and scheme of the Act. In this case there is every indication that ABC seeks to amend its defence at least in part for the purpose of delaying the hearing of the action and preventing the contractor, Lifese, from exercising its statutory right to obtain payment. I accept the respondent's contention that the notice of motion misrepresents the effect of the authority, and that that authority applies only in cases where there has been a statutory adjudication.

- 20 In any case, the third ground upon which the respondent opposes the application is also made out, because the applicant seeks to rely on a matter arising under the contract, something which is explicitly prohibited by s 15(4)(b)(ii).
- 21 For that reason alone, even if there were no other reasons, a defence in the form proposed would have been struck out, if it had been included in the original Defence.
- 22 I therefore refuse leave to amend the defence and dismiss the application.

Mr N.A. Nicholls (Plaintiff) instructed by Mills Oakley

Mr M. Christie (Defendant) instructed by Johnson Winter & Slattery Lawyers