

JUDGMENT : Sidis DCJ : District Court, New South Wales. 16th May 2008

- 1 The defendant, BHCF Pty Limited, seeks orders setting aside the judgment entered against it on 15 February 2008 in the sum of \$121,204.99 and the repayment of that sum by the plaintiff, Ontrac Constructions Pty Limited.
- 2 Judgment was entered on a claim brought by Ontrac in a statement of claim issued on 11 January 2008. It claimed that moneys were due to it pursuant to:
 1. A contract for the construction on behalf of BHCF of a swimming pool and associated works at 951 Broken Head Road, Broken Head.
 2. A contract for the construction of a storeroom at the same premises.
- 3 Ontrac claimed that it had served payment claims under the *Building and Construction Industry Security of Payment Act 1999* in respect of amounts due under each contract and that no payment schedule had been provided by BHCF in response.
- 4 A defence not having been filed, Ontrac proceeded to enter judgment.
- 5 In response to the application to set aside judgment, Ontrac relied on provisions of the Act which it claimed prevented BHCF from raising a defence or bringing a cross claim.
- 6 The affidavit evidence filed on behalf of BHCF indicated that there were issues between the parties that raised a prima facie defence.

Facts and Chronology

- 7 The parties are in dispute concerning the sums, if any, outstanding under a contract for the construction of the swimming pool and associated works, dated about 20 October 2005. A copy of the contract was said to be part of exhibit TGH-1 to Mr Holdsworth's affidavit but it did not include the printed part of AS2124-92.
- 8 So far as I could ascertain from that part of the contract that was in evidence, monthly progress claims were provided for. The contract was varied in the course of the works to add and delete various parts. There was no evidence concerning the provisions of the contract for the service of documents.
- 9 It was claimed that a separate contract was entered into between the parties for the construction of a storeroom and associated works. The date and terms of this contract were not in evidence.
- 10 Contractual relations between the parties were terminated on 11 November 2006.
- 11 The following claims have been made since 14 November 2006 in respect of the swimming pool contract:
 1. 24.11.06: Progress claim 14 for \$66,874
The claim stated that it was made under the *Building and Construction Industry Security of Payment Act 1999*.
The claim was not responded to by or on behalf of BHCF within the period prescribed by s 14 of the Act. On 13.12.06 Mr McMaster, on behalf of BHCF forwarded a document, said to respond to the claim of 24.11.06.
 2. 5.3.07: Progress claim 15 for \$89,431
The claim stated that it was made under the *Building and Construction Industry Security of Payment Act 1999*.
BHCF claimed that it responded to this claim by letter of 5 March 2007 referring Ontrac to its letter of 12 December 2006.
 3. 22.3.07: Progress claim 15 for \$89,431
The claim stated that it was made under the *Building and Construction Industry Security of Payment Act 1999*.
BHCF did not respond to this claim.
 4. 9.5.07: Final claim for \$103,653
The claim stated that it was made under the *Building and Construction Industry Security of Payment Act 1999*.
BHCF did not respond to this claim.
- 12 The following claims have been made since 14.11.06 in relation to the store room and associated works:
 1. 5.3.07: Claim for Storeroom area unit 16 \$7,495
The claim stated that it was made under the *Building and Construction Industry Security of Payment Act 1999*.
BHCF did not respond to this claim.
 2. 22.3.07: Claim for storeroom area unit 16 \$7,495
The claim stated that it was made under the *Building and Construction Industry Security of Payment Act 1999*.
BHCF did not respond to this claim.

The legislation

- 13 S 4 of the Act contains the following definition:
"progress payment" means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):
 - (a) the final payment for construction carried out (or for related goods and services supplied) under a construction contract, or

- (b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or
- (c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").
- 14 S 13 of the Act provides that a person who claims to be entitled to a progress payment may issue a payment claim. The payment claim must be served on the person liable to make the payment under the construction contract concerned. The payment claim must:
- (a) identify the construction work to which it relates;
 - (b) indicate the claimed amount;
 - (c) state that it is made under the Act.
- The payment claim must be served within the later of a period determined by reference to the contract or the period of 12 months after the construction work to which the claim relates was last carried out. Only one payment claim may be made in respect of each reference date under the construction contract. An amount that has been the subject of a previous claim may be included in a subsequent payment claim.
- 15 S 31 of the Act prescribes the manner in which notices may be served. Of relevance to the current proceedings was s 31(1)(c) which permits notices to be served by post or facsimile addressed to the respondent's ordinary place of business. S 31(1)(e) permits notices to be served *in such other manner as may be provided under the construction contract concerned*. A notice that is sent to a respondent's ordinary place of business for the purposes of s 31(1)(c) is taken by s 31(2) to have been served when it is received at that place.
- 16 Ontrac's statement of claim pleads reliance only upon the claim made on 9 May 2007 in respect of the swimming pool and associated works and on 22 March 2007 in respect of the storeroom.
- 17 For the purposes of the defendant's application it is necessary only to deal with these claims.
- 18 The defendant raised no issue in respect of the payment claim made on 22 May 2007 in respect of the storeroom. This claim is not considered further. The plaintiff was entitled to proceed to judgment in respect of that claim.
- 19 In respect of the payment claim of 9 May 2007 for the swimming pool and associated works, the defendant raised a number of issues.

Was it a valid claim?

- 20 In the absence of evidence to the contrary, I have assumed that the contract provided for progress payments. I have also noted that the payment claim is titled *Final Claim at Completion*. Under the definition of progress payment, the final claim must be for construction work carried out or for the supply of related goods and services under a construction contract.
- 21 BHCF challenged the claim on the basis that the contract was terminated in November 2006 and no further work was done or goods or services provided by Ontrac after that date. It was contended that the progress claim was for payment of the whole of the alleged contract sum, namely for construction work that remained incomplete at the date of termination of the contract. A letter from the defendant to the plaintiff dated 13 December 2006 was in evidence indicating that the defendant considered that work under the contract had not been completed.
- 22 The requirements for a valid payment claim were considered by Justice Barrett in *Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd & Ors* (2004) 20 BCL 276, a case in which the contract was terminated before the construction work was complete. In that case, the dispute between the parties was referred to adjudication. The adjudicator was held to be in error in including in his determination the full contract price when construction work was incomplete. Justice Barrett found that it was significant that the totality of the work had not been undertaken when the contract was terminated. He noted that the focus of paragraph (a) of the definition of *progress payment* was on work actually done and said at [27]: *The payment must accordingly be found to have the character of remuneration or reward referable to the doing of the work*. Justice Barrett went on to say that even a final payment imports a notion of part payment ... referable to or on account of actual work.
- 23 I have reviewed all of the progress payment claims made by the plaintiff from the date upon which the contract was terminated. They all appeared to suffer from the same defect. They did not refer to actual work nor did they state that they were rendered on account of actual work. They were in essence a reconciliation of the original contract price, the variations made and the progress claims paid.
- 24 I find that the progress claim made on 5 May 2007 in respect of the swimming pool and associated works did not meet the requirements of s 13 of the Act and that it was not a payment claim upon which the plaintiff was entitled to rely for the purposes of s 15(2)(a) of the Act.

Was the claim validly served?

- 25 BHCF denied having received the claim of 5 May 2007. Ontrac's evidence was that the claim was served both by post and by facsimile. Affidavit evidence to this effect was provided by Mr McMaster for BHCF and Mr Holdsworth for Ontrac. Neither was cross examined on this evidence and I was thus unable to assess by observation of their demeanour the credit of this evidence. I therefore proceed on the basis that the documents were posted and put through Ontrac's facsimile machine but that they were not in fact received by either method by BHCF.

- 26 On this aspect of the challenge I was referred to the decision of the Court of Appeal in *Falgat Constructions Pty Limited v Equity Australia Corporation Pty Limited* (2007) 23 BCL 292 and the decision of Justice Austin in *Firedam Civil Engineering Pty Ltd v KJP Construction Pty Ltd* [2007] NSWSC 1162.
- 27 *Falgat Constructions* dealt with the date upon which the payment notice was served. There was no issue that it was received. It did not assist in the determination of this issue.
- 28 *Firedam Civil Engineering* involved claims that the payment notice was not served in accordance with the contract provisions and that it was not received. In respect of the method of service, Justice Austin referred to evidence that established that, regardless of the provisions of the contract document, the plaintiff's project manager had directed that correspondence be directed to the plaintiff's site office and a facsimile number for that office was provided.
- 29 The claim that the notice in question had not been received was rejected because the contractor was able to produce evidence of bar coded envelopes that established that the notice had been posted to the plaintiff at three different addresses, scanned and sent out for delivery. One envelope was returned undelivered to the contractor. This evidence satisfied Justice Austin that the notices had been received through the post at the other two addresses. Further, the contractor was able to produce a copy of a facsimile activity report showing the transmission of a 7-page fax to the number nominated by the project manager. This evidence satisfied Justice Austin that the notice had been received by facsimile.
- 30 The provisions of s 109X of the *Corporations Act 2001* (Cth) did not apply in the current case because the payment claim was not directed to the registered office of the defendant. Having accepted Mr McMaster's evidence that the payment claim was not received by BHCF, there is sufficient evidence to rebut the presumption provided by s 160 of the *Evidence Act 1995*.
- 31 BHCF in its letter of 14 November 2006 required that all future correspondence regarding the project be in writing and directed to BHCF. A post office box address was set out at the foot of that letter. The payment claim was posted to that address. There is no evidence that the payment claim was received at that address as required by s 30(2).
- 32 Mr Holdsworth stated that the parties to the contract had adopted a practice of corresponding via facsimile transmission and he therefore also forwarded the payment notice to BHCF at the facsimile number regularly used. He did not provide evidence that this transmission was effective. His explanation was that he had switched off the mechanism by which confirmation of transmission could be obtained from his facsimile machine in order to reduce the cost of providing paper for the machine. Mr Holdsworth provided a copy of a Telstra document that indicated that a charge was made for a document put through Ontrac's facsimile machine on 9 May 2007 and addressed to BHCF's facsimile number. I do not regard this material as demonstrating that the transmission of the document was effective. Thus, there is again no evidence that the payment claim was received via facsimile transmission as required by s 30(2).
- 33 I do not accept that evidence that the payment claim was forwarded either by post or by facsimile transmission was sufficient proof of service. My conclusion that s 30(2) of the Act requires that a payment claim be received is supported by the approach of Justice Austin in *Firedam Civil Engineering* of identifying the evidence that satisfied him that the notices in that case were in fact received. Further, the consequences to a party to a contract of failing to respond to a payment claim are severe. They include the loss of the right to defend proceedings commenced on the basis of the payment claim or to bring a cross claim. In my view the purpose of s 30(2) is to guard against the injustice that would follow if these rights were to be lost to a party that was ignorant of the claims made against it.
- 34 In the absence of the evidence necessary to establish that the payment claim of 5 May 2007 was received by the defendant, I find that the payment claim has not been served in accordance with the requirements of the Act.

Other issues

- 35 BHCF raised in its submissions a number of matters concerning the conduct of Ontrac and its advisors at the time that judgment was entered, a garnishee order taken out and served and payment of the judgment debt secured to Ontrac. In the light of my findings, it has not been necessary to consider these submissions in detail. On their face, however, they appear to have been steps that, had the judgment been obtained regularly, would have been legitimately open to Ontrac to take.
- 36 The findings that I have made lead to the conclusion that judgment was irregularly obtained in respect of the claim for the swimming pool and associated works.

Orders

- 37 Judgment will be set aside to the extent of \$103,653 and interest.
- 38 The proceedings are to be listed for directions on a date to be fixed to deal with costs, the repayment of the moneys received by the plaintiff pursuant to the judgment in respect of the swimming pool and associated works, the filing of a defence and the ongoing management of the matter.

P R Cummings (Plaintiff) instructed by Gillis Delaney Lawyers (Plaintiff)

J J Priestley (Defendant) instructed by Mulcahy Lawyers (Defendant)