

JUDGMENT : Rolfe DCJ. New South Wales District Court. 5th March 2008

- 1 The plaintiff, Project Architecture Pty Limited, provides architectural services. The defendant, Peter's of Kensington Pty Limited, owns and operates the retail shop known as "Peter's of Kensington" at 57 Anzac Parade Kensington (the "Shop").
- 2 The plaintiff commenced these proceedings when it filed its Statement of Claim on 19 September 2007. An Amended Statement of Claim was filed in Court on 14 February 2008.
- 3 In essence, the plaintiff claims it entered into an agreement with the defendant on 5 October 2006 to provide architectural services for proposed alterations and additions to the Shop. The plaintiff says that it then provided architectural services to the defendant under the agreement and is also owed money for fees which it paid to engineers who were engaged by it on behalf of the defendant.
- 4 The plaintiff's claim against the defendant is pleaded, first, in contract and, secondly, on the basis that the plaintiff says it served on the defendant payment claims in accordance with s 13 of the **Building and Construction Industry Security of Payment Act 1999** (the "Act").
- 5 On 29 November 2007 the defendant was directed to file and serve its defence by 13 December 2007. The defendant did not do so. Instead, the defendant waited until 13 February 2008 to file its defence. A consequential amendment to the Defence was made as a result of the grant of leave made by the Court on the hearing of the Notice of Motion for summary judgment for the plaintiff to amend the Statement of Claim. The Amended Defence was forwarded to my associate on 21 February 2008.
- 6 Meanwhile, on 23 November 2007 the plaintiff had filed the Notice of Motion for summary judgment which came before the Court for hearing on 14 February 2008. On the Summary Judgment application, the plaintiff sought an order for judgment in the amount of \$308,550.00 in respect of three payment claims which it says it had made on the defendant under the Act as follows:
 - (i) 31 March 2007 (Invoice No. 621/07) \$36,300.00
 - (ii) 30 April 2007 (Invoice No. 621/09) \$41,635.00
 - (iii) 31 May 2007 (Invoice No. 621/11) \$230,615.00

Total \$308,550.00
- 7 The plaintiff says that each of the three payment claims conformed with s 13 of the Act, that each such claim was served on the defendant and that the defendant failed to reply to each of the payment claims by providing a payment schedule as required under s 14 of the Act. The plaintiff says that, consequently, pursuant to s 14 (4)(b)(ii) of the Act, the defendant is liable to pay the full amount of each claim totalling \$308,550.00. Therefore, the plaintiff says it is entitled to summary judgment in this amount.
- 8 The starting point is that, if it is demonstrated to the Court that there is a real question of fact or law to be determined, then it is inappropriate for the Court to make an order for summary judgment: **General Steel Industries Inc v Commissioner for Railways (NSW) (1964)** 112 CLR 125; **Dey v Victorian Railway Commissioners (1949)** 78 CLR 62.
- 9 There is a triable issue in a case where there is a serious conflict between the parties on any relevant matter of fact going to the plaintiff's cause of action: **Sidebottom v Cureton (1937)** 54 WN (NSW) 88. Isaacs J demonstrated what is required of a defendant to establish this in **Cloverdell Lumber Co Pty Ltd v Abbott (1924)** 34 CLR 122 at 133 as follows:

"All the defendant has to do is to establish a state of facts that displaces the prima facie effect of the statement of mere belief of the deponent (in this case Mr Tsakalos) that there is no defence in fact or law (to the plaintiff's claim). Unless that statement (of Mr Tsakalos) as to his "belief" remains unimpaired – and if the matter is left in doubt, it is impaired – the plaintiff has no right to summary judgment ..."
- 10 In paragraph 13 of the Amended Statement of Claim the plaintiff alleges that it served on the defendant each of the payment claims referred to in paragraph 6 of this judgment.
- 11 In paragraph 19 of its Amended Defence, the defendant denied each of the facts and matters alleged in paragraph 13 of the Amended Statement of Claim. Specifically, in paragraph 20(d) of the Amended Defence, the defendant denied that the documents referred to in paragraph 13 of the Amended Statement of Claim were served.
- 12 Vasilios Tsakalos is a director of the plaintiff. In his affidavit made on 22 January 2008 he set out some of the important facts which the plaintiff will be relying on to make out its claim in contract. Mr Tsakalos said in paragraph 62 that on 31 March 2007 the plaintiff served invoice no. 621/07 on the defendant. He said in paragraph 9 that the plaintiff served invoice no. 621/09 on the defendant. He said in paragraph 77 that the plaintiff served invoice no. 621/111 on the defendant.
- 13 Peter Satouris is a director of the defendant. In his affidavit made on 11 February 2008 Mr Satouris said in paragraph 7 that the "version of the agreement Mr Tsakalos alleges was made between the parties is false". In other words, according to Mr Satouris, Mr Tsakalos is a liar. Next, in paragraph 24, Mr Satouris said that up until 7 August 2007 he had always paid whatever invoices Mr Tsakalos had handed to him. In addition, Mr Satouris denied that the tax invoices in question had been served on the defendant by post. He said he had never opened

- any mail sent to the defendant by the plaintiff which contained a tax invoice and his daughter, Fiona Sklavos, who opened the mail whilst Mr Satouris was away, had told him that the tax invoices had not been received.
- 14 In his affidavit made on 13 February 2008 in response, Mr Tsakalos set out the facts relied on to support the plaintiff's claim that the three invoices in question had been posted to the defendant.
- 15 Mr Roberts of counsel appeared for the plaintiff. He submitted that there could be no triable issue going to the question of service of the invoices in accordance with s 13 of the Act because Mr Satouris had not been cross-examined. First of all, there is no right of cross-examination on an interlocutory application such as this one: it is a discretionary matter for the Court to determine. Secondly, once the defendant filed its defence and served the affidavit of Mr Satouris, not only was it apparent that the defendant denied receiving the invoices, but it also denied that Mr Tsakalos had sent them. This is a serious allegation and one that may well have significant credibility issues for one or both of these witnesses at a final hearing. In any event, in the context of a summary judgment application, it was not necessary for counsel for the defendant to cross-examine Mr Tsakalos and put it to him that his evidence about serving the invoices was inaccurate, incorrect or false when clearly, there was a conflict on the evidence about this. In my opinion, it would have been a waste of the Court's time to allow such cross-examination: *Seymour v Australian Broadcasting Commission* (1990) 19 NSWLR 219 at 224-225; *Stern v National Australia Bank Limited* (2001) 171 ALR 192.
- 16 It follows that the Court is satisfied that there is a triable issue of fact as to whether or not the plaintiff served the payment claims on the defendant.
- 17 Once the plaintiff saw the affidavit of Mr Satouris made on 11 February 2008 it sought and was granted leave to file in Court on 14 February 2008 the Amended Statement of Claim. In paragraphs 33A-33F the plaintiff alleged that it served the payment notices again on 13 July 2007 and 7 August 2007. In response, first, the defendant again denied in paragraph 55(c) of the Amended Defence that these payment claims had been served on it. Secondly, the defendant also denied in paragraph 56(c) that these payment claims constituted payment claims under the Act.
- 18 The first point raised by the defendant again goes to there being a factual dispute about the fresh service of the invoices. The second point is a legal one: the Court cannot determine what the legal effect (if any) of the purported fresh service of the invoices was until such time as it has determined whether or not the payment schedules were first served on 31 March 2007, 30 April 2007 and 31 May 2007 as the plaintiff would have it. Thus, the defendant has made out that there is a triable issue of law on this point as well.
- 19 By reason of the Court's finding, it is unnecessary for the Court to consider the other points raised by the defendant.
- 20 It follows that the Plaintiff's Motion for summary judgment ought be dismissed.
- 21 Insofar as the defendant's Notice of Motion for security for costs was referred to during the hearing, I do not consider myself part heard on it and the matter should return for directions before the Judge managing the Construction List.
- 22 The orders of the Court are:
1. Dismiss Plaintiff's Notice of Motion for summary judgment filed on 23 November 2007.
 2. Stand over for Directions the defendant's Notice of Motion for security for costs filed on 20 December 2007 before the Construction List Judge on Thursday 13 March 2008 at 10am.
- 23 I will now hear submissions on costs.

I G Roberts (Plaintiff)
F Corsaro SC with D W Rayment (Defendant)