

JUDGMENT HAMMERSCHLAG J Supreme Court New South Wales, Equity Division T&C List. 4th July 2008

- 1 The plaintiffs are builders.
- 2 In 2003 they contracted with the defendants under a Design and Construction Deed ("the Contract") to design, construct and commission a motorway including a tunnel, for a contract price exceeding \$1 billion.
- 3 On 30 April 2008 the plaintiffs made progress payment claim number 53 ("the claim") for \$9,020,196 of which \$8,304,335 is a disputed early completion bonus.
- 4 By summons sued out of this Court on 15 May 2008 the plaintiffs, relying on ss 15(1)(a) and (2)(a)(i) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act"), seek judgment in the amount of the claim.
- 5 Those sections provide as follows:

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*
- ...
- (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 ...*

- 6 Section 14(4) is in the following terms:

14 Payment schedules

- ...
- (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.*

- 7 It is not in issue that the claim was a payment claim within the meaning of s 13 of the Act.
- 8 It is also not in issue that the defendants did not within the time period provided by s 14(4)(b) of the Act serve a payment schedule.
- 9 No document which could constitute a payment schedule was served until 9 May 2008 when a document dated 5 May 2008 (which it is accepted by the plaintiffs would have constituted a payment schedule within the meaning of the Act) was delivered to the plaintiffs.
- 10 The period of 10 business days provided for in s 14(4)(b)(ii) expired on 14 May 2008. Accordingly unless s 14(4)(b)(i) applies (because the contract requires the service of a payment schedule as contemplated by that section at an earlier point in time), that is before 9 May 2008, the service of the payment schedule would be effective.
- 11 The first issue between the parties was whether the contract so provides.
- 12 On 17 June 2008 the defendants filed a Technology and Construction List Response, which in addition to responding to the first issue claimed that the plaintiffs, in the circumstances, by serving the claim in the form it took engaged in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of s 52 of the *Trade Practices Act 1974*, or engaged in conduct which was unconscionable within the meaning of s 51AA of that enactment.
- 13 Before me, the plaintiffs were represented by Mr Christie and Miss Culkoff of counsel and the defendants by Mr Corsaro of senior counsel and Mr Miller of counsel.
- 14 During the course of the hearing the parties through their respective counsel agreed and informed the Court that if the defendants succeeded on the first issue it would not be necessary to deal with the second issue, which I otherwise would have done. The effect of this agreement is that the plaintiffs agreed to accept as final and conclusive defeat, a loss on the first issue. There would in that event be no necessity for me to make a finding either way as to whether the plaintiffs had engaged in the conduct complained of.
- 15 Turning then to the first issue, although I was referred to no authority dealing expressly with the approach to be taken in determining whether a provision in a contract satisfies the requirement of supplanting the period provided in s 14(4)(b)(ii) of the Act, the parties agreed that the test is whether, on the proper construction of the Contract, the parties intended that its provisions were to supplant the provisions of s 14(4)(b)(ii).

- 16 There was further agreement that, in the present context, as was stated by Mason P in *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448 at 458 (in a different context), there must be clear contextual support for the necessary implication that the Contract provided an answer to the particular problem.
- 17 The only candidate put forward as being a provision under which the Contract required a payment schedule earlier than under the Act is cl 14.3A which is in the following terms:
“The Trustee must issue a payment schedule within 4 Business Days of receipt of the payment claim (including the payment claim made pursuant to clause 14.6(a)). The payment schedule must identify the payment claim to which it relates and if it is for an amount less than the claimed amount, the payment schedule must indicate why the amount stated in the payment schedule as payable is less and if it is less because the Trustee is withholding payment for any reason, the Trustee’s reasons for withholding payment, provided that the amount stated in the payment schedule may not be less than the amount certified by the Independent Verifier under the certificate referred to in clause 14.2(a) except as otherwise expressly provided by this deed, including clauses 14.5, 14.10 and 14.12.”
- 18 That provision, if it applies, required the payment schedule to be served within four business days.
- 19 Business days is defined in the Contract as:
“**“Business Day”** means any day on which banks are generally open for business in Sydney (other than Saturdays, Sundays and public holidays).”
- 20 This definition varies from the definition of business days in the Act which is as follows:
“**Business day** means any day other than:
(a) a Saturday, Sunday or public holiday, or
(b) 27, 28, 29, 30 or 31 December.”
- 21 The test is thus whether there is clear contextual support for a necessary implication that the Contract has supplanted the ten-day period in s 14(4)(b)(ii) with the four business day period in cl 14.3A.
- 22 Undoubtedly for a Contract to require a particular time as contemplated by s 14(4)(b)(i) it need not make express reference to that section.
- 23 In the present case, however, I consider that not only does the Contract not provide clear contextual implication that the “4 Business Days” supplants the “10 business days” in s 14(4)(b)(ii), but that there are clear contextual implications pointing in the opposite direction.
- 24 Firstly, cl 14.3A of the Contract required the defendants within four business days (differently defined to the Act) to serve a payment schedule.
- 25 However, the provision goes on to stipulate that the payment schedule may not state an amount less than the amount certified by the Independent Verifier under the Contract except as otherwise provided by it including, relevantly, by cl 14.5.
- 26 Clause 14.5 is in the following terms:
“**Disputed payments for the Contractor’s works**
If either party disputes the amount certified as payable by the Independent Verifier then that party must notify the other in writing of the reasons for the dispute and the Contractor and the Trustee must confer with each other within 5 Business Days after the notification to attempt to resolve the dispute. If the Contractor and the Trustee subsequently agree, or it is determined in accordance with this deed, that the disputed amount or any part of the disputed amount was, or was not due, the Trustee or the Contractor as appropriate must pay the amount agreed or determined to the Contractor within 5 Business Days of the agreement or determination.”
- 27 There is a clear incongruence between the operation of the Act and the Contract. The Act places no restriction on the amount of the payment claim the recipient may dispute in its payment schedule. The recipient gets four business days to respond to a payment claim which must be accompanied by a certificate from the Independent Verifier of the amount assessed to be payable. These are indications that the parties did not have cl 14.3A in mind as a substitute for the entitlement of the defendants to serve a payment schedule in response to a claim under the Act. The four business days specified in the Contract to respond to the species of payment claim under the Contract (including the Independent Verifier’s certificate and the contractual limitation on disputing it) were not intended to shorten the period given for the delivery of a different species of payment schedule under the Act which neither required the Independent Verifier’s certificate nor involved a limitation on how much of it the defendants could dispute.
- 28 The second incongruence is that cl 14.3A places a contractual obligation upon the recipient of a payment schedule to serve a schedule within fourteen business days. The terminology of the clause closely resembles some of the terminology in the Act, but that is not sufficient.
- 29 Under cl 14.5 the defendants had the opportunity to dispute that part of the claim certified by the Independent Verifier by notification to the other party in writing (there is no express specification of when this notification must be given) and thereafter there is a procedure involving two periods of five business days each, at the end of which payment must be made as agreed or as determined under the contract.

- 30 If the plaintiffs' approach was correct after four business days, notwithstanding the presence of cl 14.5, the defendants would be liable to pay not less than the amount certified by the Independent Verifier without the benefit that the operation of cl 14.5 provides.
- 31 This is an additional reason why there is a contextual implication against the plaintiffs' construction.
- 32 Finally, if the notice under cl 14.3A disputing the Independent Verifier's certification must be given within four business days under the contract (which appears to be the case) there is at least another five business days to attempt to resolve the dispute which would make nine days. This would give the recipient of a payment claim an additional day to serve a payment schedule to protect its position under the Act. This way the provisions of the Contract work together with the time periods in the Act.
- 33 Perhaps of minor importance only, is the non-congruence between the definition of the use of "business days" and also the use in cl 14.3A of the term "must" which requires service of a payment schedule rather than provides an option to do so as does the Act.
- 34 For all these reasons, in my view the four day period in cl 14.3A of the Contract is not a provision which was intended to supplant nor supplants the ten day period in s 14.4(b)(ii) of the Act.
- 35 It follows that the summons is to be, and is, dismissed.
- 36 As I have said, by agreement between the parties, it is not necessary to determine the alternative basis upon which the defendants put their case.
- 37 The plaintiffs are to pay the defendants' costs of the proceedings.

M. Christie with V. Culkoff (Plaintiffs) instructed by Andrew McKeracher (In-house)
F. Corsaro SC with D. Miller (Defendants) instructed by Minter Ellison