Aquatec-Maxcon P/L v Minson Nacap P/L [2004] Adj.L.R. 03/05

Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd [2004] VSCA 18

CATCHWORDS : Building and Construction - Standard form of contract - Construction of clauses 42 and 44 of A.S.4303-1995 considered - Entitlement of sub-contractor to obtain judgment for unpaid progress claims.

Practice and Procedure - Claim for summary judgment by sub-contractor in respect of unpaid progress claims after termination of contract.

Practice and Procedure - Claim for summary judgment pursuant to Order 22 Rules of Supreme Court - Whether arguable defence raised by defendant head contractor - Whether judge entitled to enter summary judgment.

Practice and Procedure - Defendant admitting on pleadings existence of sub-contract - Whether defendant entitled to amend defence to allege that no sub-contract existed.

JUDGMENT : Court of Appeal at Melbourne: Supreme Court of Victoria before Winneke P : Buchanan JA : Eames JA. 5th March 2004.

1. In February 1997 the appellant, Aquatec-Maxcon Pty. Ltd. (whom we shall call "the appellant") entered into a design and construct contract with Otway (later Barwon) Water Authority (to whom we shall refer as "Barwon") to design and construct water treatment plants at Lorne and Apollo Bay. In March 1997 the appellant - as the "principal" or the "main" contractor - engaged Minson Nacap Pty. Ltd. (to whom we shall refer as "the respondent") as its sub-contractor to design and construct the civil works for the project. The respondent, in turn, engaged Montgomery Watson Pty. Ltd. as its design sub-contractor. The value of the work to be carried out by the respondent was approximately 3.5 million dollars. At all material times, the respondent contended that the terms of its contract with the appellant were in the form of those contained in the Australian Standard Contract 4303-1995. In a number of its pleadings filed prior to these proceedings, the appellant had admitted that it did have a sub-contract with the respondent, and that its terms were in the form of A.S.4303-1995. The appellant, itself, had entered into a "back to back" head contract with Barwon.

2. In 1997 and 1998, the respondent carried out works in respect of the projects at Lorne and Apollo Bay under the supervision of the "sub-contract superintendent" appointed by the appellant. During the course of the work, the respondent submitted progress claims to the superintendent. In response to claims 1-9 inclusive, the superintendent issued Payment Certificates in a total amount of $3,290,918. From time to time between November 1997 and March 1998, the superintendent wrote to the respondent seeking information to support the claims made in respect of "variations". In November and December 1997, cracking had been noted in the aeration basin of the plant at Apollo Bay. Notwithstanding, the respondent made Progress Claim No.10 on 19 December 1997. On 24 December, the appellant requested the respondent to cancel all the works at Apollo Bay pending investigations. On 19 January 1998, the "head contract superintendent" issued a notice to the appellant pursuant to the head contract (clause 30.3 of A.S.4300-1995) with regard to the Apollo Bay aeration basin. On the same day the appellant issued a similar notice to the respondent pursuant to clause 30.3 of A.S.4303-1995.

3. On 28 January 1998, the appellant, through its superintendent, issued Payment Certificate 10 to the Respondent for an amount of $304,630.79; and on 12 February 1998 the superintendent issued a further Progress Certificate (No.11) for an amount of $155,543.36. The appellant did not pay the respondent the amount certified in Progress Certificate No.10. The respondent thereafter issued a notice pursuant to clause 44 of A.S. 4303-1995.

4. In February 1998, cracking was noted in the aeration basin of the Lorne works. On 3 March 1998 the appellant advised the respondent that its own claim (i.e. the appellant's claim No.10) under its head contract with Barwon had not been certified because of the failure of the aeration tanks at Apollo Bay and Lorne. The appellant, thus, issued Payment Certificate No.12 pursuant to the sub-contract on 12 March 1998 for an amount of $665,867.92 payable by the respondent to the appellant. This was, as the trial judge noted, a "negative certificate". It was, as his Honour further noted, erroneous because the certificate was constructed on the basis that the respondent had been paid a total sum of $3,595,549 on account of work done to date, whereas - in truth - the respondent had been paid only $3,290,918. Thus, although Certificate 12 remains "a negative certificate", it should have recorded a payment of $361,238 as due from the respondent to the appellant.

5. Following the issue of Payment Certificate No.12, the respondent made three further claims for **progress payments**; namely claims 13, 14 and 15. At the time of the claim made pursuant to Progress Claim 15, the total amount outstanding, as claimed by the respondent, was $1,277,020. This was the amount which the respondent claimed in its application for summary judgment before the trial judge. No Payments Certificates were issued by the superintendent in respect of Progress Claims 13, 14 and 15.

6. On 25 June 1998, the "head contract superintendent" issued a notice to the appellant in accordance with clause 44.2 of A.S. 4300-1995. Thereupon, the appellant issued a similar notice to the respondent. On 8 July 1998 Barwon took the civil component of the work out of the hands of the appellant; and, on the following day, the appellant terminated the sub-contract of the respondent and engaged another sub-contractor to complete the civil works.

The Proceedings

7. These proceedings - arising out of the facts which we have described - were commenced by writ with statement of claim annexed, issued on 14 April 2000 by the respondent. The appellant filed its initial defence to the respondent's claim in June 2000. Thereafter, there were various amendments made to the pleadings. On 25 August 2000, the respondent issued a summons seeking summary judgment for progress claims made but unpaid. This summons was heard by the judge on 22 September 2000, and was conducted on the basis of affidavit material sworn and filed on behalf of each party. The proceedings were commenced and determined in accordance with Rule 2 of Order 22 of the Rules of Court. The appellant resisted the respondent's claim for summary judgment, submitting that it had reasonably arguable defences to that claim. At the outset of the hearing, the appellant sought leave to further amend its defence, and leave to file a counterclaim. The proposed amended defence sought to plead, in the alternative and for the first time, that no sub-contract in accordance with A.S. 4303-1995 had been concluded between the appellant and the respondent, even though the existence of such a contract had been earlier admitted by the appellant in its previous pleadings. This admission continued to be made in the earlier paragraphs of the amended defence for which leave was sought. The judge refused to allow the amendment sought, expressing the view that, so long as the appellant/defendant unconditionally admitted the existence of the sub-contract, he would not permit it to resile from that admission, albeit in the alternative, within the same pleading.

8. The summary judgment application thus proceeded on the basis of the admission of a sub-contract contained in the defence of 18 August 2000. The respondent contended that it was entitled to payment of its Progress Claims 13, 14 and 15 on the basis that the superintendent had failed to issue Progress Certificates in response to those claims in accordance with clause 42.1 of A.S. 4303-1995. It was not in dispute that the superintendent had not issued Progress Certificates in response to those claims. The appellant contended that the respondent's Progress Claims did not comply with the formal requirements of clause 42.1. The basis of that contention was that the information provided by the respondent to support these claims was insufficient to enable the superintendent to make a determination. The trial judge concluded that the claims were in accordance with the contract and that the appellant's contention was not reasonably arguable.

9. Finally, it was contended by the appellant that it had no obligation to pay the claims of the respondent following the termination of the sub-contract. Its argument was that, upon the proper construction of clause 44.10, the rights of the parties following termination were to be determined as they would be at common law had the defaulting party repudiated the sub-contract. It was not in dispute that, prior to termination, the appellant had issued a "show cause notice" under clause 44.4 of A.S. 4303-1995, in accordance with which the appellant was entitled to suspend payments pending termination. The respondent contended that, upon termination, the right of the appellant to suspend ceased, and that its entitlement to be paid on its Progress Claims revived as an accrued entitlement in respect of which it could proceed to summary judgment. The appellant resisted the claim on the basis that the right to payment, having been suspended, could not be considered as having accrued upon termination; and that it was entitled to set-off against the respondent's claims, its own claims for damages for breach of contract by the respondent. His Honour determined this issue in favour of the respondent.

10. The judge thus concluded that the appellant had no reasonably arguable defence to meet the respondent's claims; and - in accordance with reasons given - entered summary judgment in favour of the respondent on 13 October 2000 in the sum of $1,277,020 together with interest in the sum of $378,678.53. He further ordered the appellant to pay the respondent's costs including costs reserved.

Appeal

11. Mr. Manly, who appeared with Mr. Carr for the appellant sought at the outset of the appeal to file amended grounds. There being no opposition by Mr. Burnside, who appeared with Mr. Neal for the respondent, such leave was granted. The amended grounds of appeal, although seven in number, raised three discrete issues in respect of which the judge was alleged to have erred. The arguments on appeal were limited to those three issues. In summary form they were as follows:

    (i) Grounds 1 to 4 asserted that the judge had erred in not allowing the appellant to amend its defence, and in determining that he would not receive argument directed to the issue as to whether there ought to be a trial on the question of the existence of a sub-contract between the appellant and the respondent. It was further submitted in support of these grounds that the judge had erred in determining that the material filed by the appellant did not raise a question which ought to be tried and in failing to dismiss the application for summary judgment on the basis that the appellant's material established that it had an arguable defence on the merits in respect of this matter.

    (ii) Grounds 5 and 6. These grounds asserted that the judge had erred in holding that, on the proper construction of clause 42.1 of A.S. 4303-1995, the sub-contract superintendent had an obligation to issue Payment Certificates 13, 14 and 15 on the basis of the evidence and information which had been provided by the respondent prior to and with each of its relevant Progress Claims. It was further asserted that his Honour had erred in holding that, on the proper construction of clause 42.1, the respondent's Progress Claims 13, 14 and 15 were deemed to have been certified by reason of the sub-contract superintendent's failure to assess the respective claims and to issue Payment Certificates within 21 days.

    (iii) Ground 7 - this ground asserted that his Honour was in error in holding that on the proper construction of clauses 44.4 and 44.10 of A.S. 4303-1995, any right that the plaintiff might have had to be paid its Progress Claims was or became an accrued right at the time the sub-contract was terminated.

Grounds 1 to 4

12. In its original defence and two further amended defences the appellant admitted that it had entered into a contract with the respondent. At the commencement of the hearing of the summons for final judgment counsel for the appellant sought leave to amend the defence to introduce the plea that *"no subcontract was concluded between the plaintiff and the defendant"* and accordingly *"the defendant denies the ... allegations in the amended statement of claim by which reliance is placed upon the terms and conditions of any subcontract between the plaintiff and the defendant."*

13. The trial judge refused leave to make the amendment. His Honour said: *"Having formally admitted the existence of the subcontract and such of its terms as Aquatec relies upon by way of defence and as one foundation of its counterclaim, Aquatec then says in the alternative that there was no such contract. I accept that R.13.09 permits a pleader to make inconsistent allegations of the fact in the alternative. This, however, cannot permit the pleader to discard ordinary logical and rational processes. It is, of course, not uncommon to see a defendant deny a contract and then, in the alternative, to rely upon it or certain parts of it. It does not follow that these alternatives may be reversed. So long as the defendant in this case unconditionally admits the existence of the subcontract I will not permit it to resile from that admission in the alternative within the same pleading."*

    As he held that the conditions of the contract alleged by the respondent must stand, his Honour refused to entertain any argument based upon the absence of a contract between the appellant and the respondent.

14. The appellant submitted that the application for summary judgment should have been determined in the light of the facts relating to the existence of a sub-contract to which its witnesses deposed in affidavits before the trial judge. Even if the form of the proposed amendment was defective, a pleading could have been framed which properly raised the issue of the existence of a contract, and the appellant should have been able to rely on the point. It was submitted that the case was to be decided according to the real controversy between the parties revealed by the evidence, and not by the pleadings. It was submitted that it was incumbent upon the trial judge to see that the pleadings reflected the issues which were raised by the evidence.[1]

[1] See ***Banque Commerciale S.A., En Liquidation v. Akhil Holding Ltd.*** (1990) 169 C.L.R. 279 at 296-7 per Dawson, J.; ***Damberg v. Damberg*** (2001) 52 N.S.W.L.R. 492 at 518-22 per Heydon, J.A.

15. The difficulty facing the appellant lies not so much in the state of the pleadings as in the facts which it cannot controvert. While the appellant and the respondent did not formally execute a sub-contract document, both parties conducted themselves as if a subcontract was in existence between them and as if that subcontract contained the terms found in AS4303-1995. The respondent performed the bulk of the civil construction work required for the waste water treatment plants, made progress claims for payment for the work pursuant to clause 42.1, the appellant's subcontract superintendent responded to those claims in the manner prescribed by the clause by issuing payment certificates, the appellant paid all but one of the certified amounts and, when Barwon terminated the engagement of the appellant, the latter purported to terminate the subcontract by following the procedure set out in clause 44 of AS4303-1995. While there may be some room for debate as to its terms, there can be no doubt that the appellant and the respondent entered into and largely performed a subcontract for the performance of the civil construction of the plants. Nor can it be gainsaid that clause 42.1 of AS4303-1995 constituted one of the terms of that contract.[2]

16. Accordingly, in our opinion the challenge to the existence of a subcontract between the appellant and the respondent which contained the terms as to payment relied upon by the respondent did not constitute an arguable defence to the claim.

Grounds 5 and 6

17. These grounds assert that the judge had erred in holding that, on the proper construction of clause 42.1 of A.S. 4303-1995 the Progress Claims numbered 13, 14 and 15 were deemed to have been certified by reason of the superintendent's failure to assess the respective Progress Claims and to issue Payment Certificates within 21 days. It was further contended that his Honour had erred in holding that, on the proper construction of clause 42.1, the superintendent had an obligation to issue Payment Certificates numbered 13, 14 and 15 on the basis of the evidence and information which had been provided by the respondent with its relevant claims. Relevantly clause 42.1 provides as follows (We will number the relevant paragraphs of the clause, as the judge did, even though the numbering does not appear in the clause itself.):

> *"(1) At the time for payment claims or upon completion of the stages of the work under the Subcontract stated in Annexure Part A and upon the issue of a Certificate of Practical Completion and within the time prescribed by clause 42.5, the Subcontractor shall deliver to the Subcontract Superintendent claims for payment supported by evidence of the amount due to the Subcontractor and such information as the Subcontract Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Subcontractor in the performance of the Subcontract to that time together with all amounts then otherwise due to the Subcontractor arising out of the Subcontract. (4) Within 21 days of the receipt of a claim for payment, the Subcontract Superintendent shall assess the claim and shall issue to the Main Contractor and to the Subcontractor a payment certificate stating the amount of the payment which, in the Subcontract Superintendent's opinion, is to be made by the Main Contractor to the Subcontractor or by the Subcontractor to the Main Contractor. The Subcontract Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Subcontractor, the reasons for the difference. (6) Subject to the provisions of the Subcontract, within 35 days of receipt by the Subcontract Superintendent of a claim for payment or within 14 days of issue by the Subcontract Superintendent of the Subcontract Superintendent's payment certificate, whichever is the earlier, and within 21 days of the issue of a Final Certificate, the Main Contractor shall pay to the Subcontractor or the Subcontractor shall pay to the Main Contractor, as the case may be, an amount not less than the amount shown in such certificate as due to the Subcontractor or to the Main Contractor, as the case may be, or if no payment certificate has been issued, the Main Contractor shall pay the amount of the Subcontractor's claim. A payment made pursuant to this clause 42.1 shall not prejudice the right of either party to dispute under clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under clause 47 or as otherwise agreed) of the amount so properly due and payable, the Main Contractor or the Subcontractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable. (7) Payment of monies shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided under clause 42.6."*

18. Before his Honour the respondent asserted that it was entitled to be paid the amounts of its Progress Claims 13, 14 and 15 because, pursuant to clause 42.1, the appellant was bound to pay such claims within 35 days of the receipt of them by the superintendent, failing the issue by the superintendent of a Payment Certificate. It was not disputed in this case that the claims had in fact been made and that no certificates had been issued. However, again before his Honour, the appellant had asserted that clause 42,1 did not operate because the three Progress Claims did not comply with the formal requirements of the contract in two respects. Firstly, it was contended by the appellant that the claims, which had been lodged after the issue of the "negative" Progress Certificate 12 had failed to have regard to the variation of the contract work by the deletion of water retaining and other reinforced concrete structures. His Honour rejected this argument mounted on behalf of the appellant. He inferred, from the evidence which had been put before him, that the appellant had been asserting as the reason for its depreciation of the work value the fact that the basins at the respective sites were leaking; that there was no value to the structural work being carried out at Apollo Bay, and that the value of the structural work carried out at Lorne was 23% less than that which had been claimed by the respondent. As his Honour said: *"If, however, the reduction in Certificate 12 [i.e. the `negative certificate'] represents a change by the superintendent in his assessment of the value of work performed as a result of the appearance of defects, then [the respondent] cannot be criticized for holding a different view of this value. As to any difference of opinion as to the value of work performed, the contract provides procedures for resolving this. The first of these procedures is for the superintendent to reject the sub-contractor's assessment with reasons in the certificate issued in response to the claim."*

Thus, his Honour concluded, the first basis of the attack on the Progress Claim failed.

19. His Honour also rejected the second argument of the appellant for failing to issue Payment Certificates in respect of the claims. That argument was that the claims contained "one line" variation claims. This, the appellant had argued, violated the contractual obligation of the respondent to support its claims by evidence. As his Honour noted, these claims for variations had been included in earlier claims and rejected. The superintendent had, in the past, criticized the respondent for submitting and

[2] If the plea of the subcontract by the appellant in the proposed amended pleading upon which it sought to rely in its defence to the summons for final judgment is taken as a plea in the alternative to its denial of any subcontract, the subcontract alleged by the appellant contained conditions found in AS4303-1995 as varied by certain correspondence. That correspondence contained no term inconsistent with clause 42.1. Nor was any inconsistency advanced in the affidavits in opposition to the application for summary judgment.

re-submitting claims in that form. However, as his Honour noted, that did not mean that the claims were in such a form that they did not satisfy the requirements of clause 42.1. His Honour was of the view that because Progress Claims were cumulative, past rejected claims which the respondent wished to pursue may be included in its assessment of the work performed. In such a case, his Honour concluded, it was not necessary that on each occasion they must be documented in full. Thus, as his Honour said, the claims were payable in full in the same way as a certified sum. In his Honour's view the appellant was obliged to pay those sums without deduction for defective work and consequential losses. It was his view that: *"A great advantage of standard form contracts is that the parties have the benefit of judicial decisions as to their meaning. In the case of forms which are used throughout the country there is the added advantage that the law in this area shall not differ from jurisdiction to jurisdiction. This gives the contracting parties a certainty which is valuable for them and for the construction industry generally. That said, the court must be cautious lest, even when such forms are adopted, small changes may have been introduced which may bear upon their construction. Happily that is not the case here. Clause 42.1 of the Australian Standard contracts has for relevant purposes been very stable for many years."*

His Honour referred to ***In re Concrete Constructions Group Pty. Ltd***[3], ***Algons Engineering Pty. Ltd. v. Abigroup Contractors Pty. Ltd***[4] and ***Lamac Developments Pty. Ltd. v. Devough Pty. Ltd.***[5].

20. On this appeal the appellant contended that his Honour was in error in concluding that the form of the variation claims which were part of the Progress Claims 13, 14 and 15 were not deficient and in breach of clause 42.1. At the very least, it was submitted, his Honour was in error in not concluding that it was arguable that the claims were not in a form required by that clause. It was submitted by Mr. Manly that most of the uncertified variations had not been substantiated and consisted of no more than a one line entry on a spread sheet; and that the superintendent had on several occasions requested further information. It was further submitted by Mr. Manly that, to comply with clause 42.1, it was necessary for the sub-contractor to provide evidence and information to support a Payment Claim because the provision of that evidence and information conditions the performance of the superintendent's obligations to issue a Payment Certificate either as a "non promissory condition" or as a "condition precedent". It was submitted that the amounts claimed in the unsubstantiated variations were not so insignificant that the failure by the respondent to provide "supporting evidence" might be disregarded. Thus, so it was submitted, there was a triable issue as to whether sufficient evidence and information as required by clause 42.1 was provided either prior to or with the Progress Claims 13, 14 and 15; and that, therefore, the failure of the superintendent to issue Progress Certificates within time could not bring into play the deeming provisions of that clause.

21. To the contrary, Mr. Burnside submitted that clause 42 of the sub-contract applied, and that there was a "deemed acceptance" of the Progress Claims numbered 13, 14 and 15. It was Mr. Burnside's submission that clause 42 provided a simple mechanism for **Progress Payments**. It required Progress Claims which were payable to the extent certified or, if not certified, payable in full. The information which had been provided by the respondent was sufficient to satisfy the requirements of clause 42 that "the sub-contractor shall deliver to the superintendent claims for payment supported by evidence of the amount due to the sub-contractor and such information as the sub-contract superintendent may reasonably require". The clause, he submitted, is intended to provide a simple way of determining immediate rights to payment, subject to later adjustment, when disputed items are to be resolved. It requires, he submitted, the superintendent to act as an initial arbiter in the sense that his certificates operate preferentially, but provisionally. It was his submission that the clause required only that the claim provide a breakdown into component parts and material identifying the nature of each component part. The Progress Claims, he submitted, fulfilled that requirement. Progress Claim No.15 was for 1.277.820 dollars. It was, so Mr. Burnside contended, supported by:

(a) Details of work at Lorne, showing the value of each component of the work, the extent to which each component had been completed, and the amount due accordingly in respect of that work.
(b) Details of work at Apollo Bay showing the value of each component of the work, the extent to which each component had been completed, and the amount due accordingly in respect of that work.
(c) Variations to work at Lorne and Apollo Bay, showing every component of the variations, the value of each variation, the extent to which each variation had been completed and the amount claimed accordingly.
(d) A summary of each of the above amounts, a note of amounts previously paid, and a calculation of the balance currently claimed.

This level of detail, so it was submitted, is prima facie sufficient evidence of the amount due. It remained open to the superintendent to seek further information. Despite his ability to do so, the superintendent did not do so. The evidence which had been referred to by the appellant, so he submitted, did not seek any particular information of any component of any Progress Claim. Furthermore, it was contended that the superintendent had failed to seek any information about components of the claims even though he had that opportunity. He pointed to the fact that Progress Claim 11 had included details of 57 "variation components" since the beginning of the contract; that Progress Claim 12 had added details of variation components 58 to 71; that Progress Claim 13 had added a variation component No. 72 and that Progress Claim 14 had added variation component No.73. Progress Claim 15 showed no changes from Progress Claim 14. These variation components and each Progress Claim, so Mr. Burnside contended, are very specific; and to a qualified person intimately involved in supervising a project are likely to be self-explanatory. The superintendent was, as Mr. Burnside contended, intimately involved with the project because "that is his job". He pointed out that Progress Claim 12 was provided to the superintendent on 27 February 1998; and that there was no evidence of the superintendent seeking any information about any of the added variation components; and that the same was true of later Progress Claims. The sub-contract provided, so it was submitted, for a Progress Claim every month and for certification within 14 days. This system of claim and certification, it was submitted, would be unworkable in practice if the superintendent was entitled to ignore Progress Claims, not seek information if he actually needed it, and then assert that the information was insufficient.

22. In support of its contention that there was a triable issue as to whether the appellant was in breach of clause 42 in failing to certify or pay Progress Claims 13, 14 and 15, the appellant relied upon the decision of the New South Wales Court of Appeal in ***Brewarrina Shire Council v. Beckhaus Civil Pty. Ltd.***[6], a decision which, although handed down well after his Honour's judgment in this case, is clearly pertinent to the issues raised on this appeal.

[3] (1997) 1 Qld.R. 6.
[4] (1997) 14 B.C.L. 215.
[5] (1999) W.A.S.C. 76.
[6] (2003) N.S.W.C.A. 4 (17 February 2003).

23. In the ***Brewarrina*** case the contractor, Beckhaus, had sought summary judgment in the sum of $702,678, being the amount of an unpaid Progress Claim. The contract between Beckhaus and the Shire, as head contractor, was governed by the provisions of Australian Standard Contract 2124-1992, clause 42.1 of which was, so far as relevant, in the same terms as clause 42.1 of A.S. 4303-1995. In the ***Brewarrina*** case, as in this case, the contract superintendent had not issued a Progress Certificate within the time specified by clause 42.1 or within the time specified for the payment of the claim by the principal. The Shire had contended before the trial judge that the obligation on the superintendent to issue a certificate pursuant to clause 42.1 was subject to a condition precedent which had not been fulfilled; namely the requirement upon the contractor to support its Progress Claim with evidence of the amount due and such information as the superintendent might reasonably re quire. This argument had been rejected by the trial judge who gave summary judgment in the amount claimed by the contractor. The trial judge had rejected the Shire's argument that it was a condition precedent to a valid claim that the contractor should provide evidence to support its claim and such information as the superintendent should reasonably require. It was the judge's view that clause 42.1 *"allows the superintendent to cater for the situation where insufficient information has been supplied"* by treating the claim *"harshly"*. To regard the provision of *"evidence in support"* and *"such information as the superintendent might reasonably require"* as conditions precedent to a valid claim would, so his Honour said, be inconsistent with the provision in clause 41.2 that *"if no payment certificate has been issued, the contractor shall pay the amount of the claim"*.

24. The Court of Appeal, by a majority (Mason, P. and Ipp, J.A.), disagreed with the judge's construction of clause 42. Ipp, J.A., with whom Mason, P. agreed, having canvassed the provisions of clause 42.1 in some detail, concluded (at page 586, para [42]): *"In my view, therefore, by the contract, the obligation of the superintendent to issue a payment certificate in regard to Progress Claim No.7 was subject to the condition precedent that Beckhaus support that claim with evidence of the amount due and with such information as the superintendent might reasonably have required. Therefore, unless the requisite evidence and information supported the claim, the superintendent was not obliged to issue a payment certificate in response to it."*

This conclusion was premised upon his Honour's closely reasoned analysis of clause 42.1, in the context of the contract as a whole. His Honour had earlier noted (pp. 583-4, paras [30]-[32] that there was "an important contractual and practical purpose for the requirement that the contractor provide evidence of the amount due and information reasonably required" by the superintendent. His Honour referred to the obligation imposed upon the superintendent to make a reasonable measurement or valuation of "the work, quantities or time"; and to the provisions of clause 42.1 itself which requires the superintendent, in the payment certificate which he is called upon to issue, to set out his calculations and the reasons for difference between the amounts certified and the amount claimed. The superintendent's ability to comply, in the view of Ipp, J.A., *"may well rest on whether the requisite evidence and information is provided"*. Thus, his Honour stated (p. 584, para [33]): *"The fact that the ability of the superintendent to comply with clause 23 and the second paragraph of clause 42.1 may depend on whether the contractor complies with the requirements set out in the first sentence of the first paragraph of clause 42.1 is a powerful indication that the latter requirements are intended to have contractual force. For present purposes, it is not to the point whether that force results in a contractual obligation to perform or a non-promissory condition. What is to the point, in my view, is that on either basis, the superintendent does not have to issue a payment certificate until the evidence and information is provided."*

His Honour went on to find that, because there were triable issues of fact which arose in the event that Clause 42.1 was interpreted to contain a condition precedent, the appeal should be upheld, summary judgment set aside and leave to defend the claim be granted.

25. The third member of the Court of Appeal, Young, C.J. in Equity, dissented. His Honour's view was that the framework and purpose of Clause 42.1 would be defeated if the words in the first paragraph of Clause 42.1 were found to contain a condition precedent to the validity of the progress claim. His Honour said (at page 589, paragraph [70]): *"The cases which have considered Clause 42.1 have virtually all emphasised the point that Clause 42.1 does not finally decide rights, it merely provides a quick and convenient method of making sure that the contractor is supplied with the funds to pay its sub-contractors and providers of material so that the work may continue in the interests of both parties. [His Honour then referred to the cases, some of which had been referred to by the trial judge in this case, including* ***Re Concrete Constructions Group Pty. Ltd.***[7] *and* ***Algons Engineering Pty. Ltd. v. Abigroup Contractors Pty. Ltd.***[8]*.]"*

Young, C.J. in Equity then concluded as follows (pages 589-90, paragraphs [72]-[74]): *"The purpose of the clause is to provide a speedy provisional determination of what should be paid to the contractor to keep the work moving. A purposive construction of the clause accordingly requires freedom from technicalities and the minimisation of the possibilities of dispute. Thus a purposive construction tells against the inclusion of conditions precedent to performance. One must also consider the context in which the clause occurs. The contract gives to the superintendent quite copious rights to be informed of what is occurring on the site. To cite a selection of clauses in the contract, although the contractor has possession of the site, the superintendent has ample rights of access under Clause 27.2, he has the power to direct the contractor to supply details of the source of material it is employing in the works (Clause 29.3), he may direct the contractor to remove what he considers to be defective work, he may order tests to be carried out. Furthermore, ... the superintendent may direct in what order the work is to be performed, he has considerable input into the construction programme ... and he is in control of the variations to be effected ... . To me, these provisions show the parties' contractual intent that the superintendent is able to be and expected to be au fait with the works and their progress at all times."*

26. As I have previously indicated, Mr. Burnside submits that this Court should conclude that the majority decision in the case of ***Brewarrina*** is wrong and that we should accept the construction placed upon the clause by Young, C.J. in Equity. We do not believe that we should accept this invitation put to us by Mr. Burnside. The decision is a recent, and carefully considered, decision by the New South Wales Court of Appeal which, so far as we have been told and so far as we are aware, is the only decision which currently exists on this particular point of construction of this paragraph of the clause. The point was argued by counsel for the appellant before the trial judge, in the course of which counsel referred his Honour to evidence which showed, or suggested, that the superintendent had repeatedly been seeking substantiation for the "one line variation claims", and submitted that where the contractor persisted - in the face of opposition and request for further information - in submitting "one line claims" there must come a point where clearly the Progress Claim as presented is entitled to be regarded by the superintendent as not a claim within the meaning of Clause 42.1. His Honour requested of counsel whether he (i.e. counsel) was able to show to him any authority where such an approach had been adopted to a claim, i.e. "where the claim has been treated by the court as being invalid for non-compliance ...". Trial counsel for the appellant conceded that he was not able to

[7] (1997) 1 Qd. R. 6 at pages 12-13.
[8] (1997) 14 B.C.L. 215.

refer his Honour to any authority on the point; and his Honour then indicated to trial counsel for the respondent that he would not "trouble him" about the criticisms made of the Progress Claims.

27. As might be expected, having regard to the debate between counsel and his Honour at the hearing, very little time was spent by his Honour in his reasons for judgment in regard to this submission put on behalf of the appellant. His Honour said: *"The second argument is that the claims contain `one line' variation claims. This, it was said, violated the contractual obligation of [the respondent] to support its claims by evidence. These claims and variations had, it seems, been included in earlier claims and rejected. In the past the superintendent had criticized [the respondent] for submitting and resubmitting claims in this form. Be that as it may, it does not mean that the claims are in such a form that they do not satisfy the requirements of Clause 42.1. Since Progress Claims are cumulative, past rejected claims which Minson wishes to pursue may be included in its assessment of work performed. In such a case it cannot be necessary that on each occasion they must be documented in full. It follows from my rejection of these submissions that the claims are, in terms of clause 42.1, payable in full in the same way as a certified sum."*

28. It will be apparent that these reasons do not descend in any detail to the construction of Clause 42.1; in particular, to the first paragraph thereof. Because his Honour does not descend in any detail to the construction of that paragraph, it became unnecessary for him to determine the evidential dispute between the parties as to whether the relevant Progress Claims for payment were "supported by evidence of the amount due to the sub-contractor and such information as the sub-contract superintendent may reasonably require". Those matters were "triable issues" in the event that the evidence in support of the claim and such information as is reasonably required are to be construed as conditions precedent to the validity of the claim. For the purposes of this appeal, we can see no reason why we should not accept the majority decision in ***Brewarrina*** as accurately construing the relevant provision of Clause 42.1. It may well be that the proper construction of the provision will be conditional upon the resolution of the factual dispute in respect of the information required by and given to the superintendent. In this case, there has - as yet - been no such resolution.

29. His Honour was correct to point out that it is advantageous for all concerned with standard-form construction contracts to have the benefit of uniform judicial construction of the clauses of such contracts throughout the Commonwealth. The authorities to which his Honour referred (and which we have noted in paragraph [20]) clearly demonstrate that clause 42.1 is not intended to finally determine rights but to provide a speedy means of resolving what ought to be paid to the contractor to keep the work moving. However, it seems to us that such a purpose is not necessarily - at least in the face of particular fact-findings - inconsistent with the view taken by the majority in *Brewarrina*.

30. It follows that we would allow grounds 5 and 6 of the amended appeal. For the reasons given, we are of the view that these matters do raise a triable issue as to the question whether the contract superintendent was obliged to issue certificates in respect of the relevant Progress Claims, and as to whether the appellant was required to pay those claims within the time specified in the clause.

Ground 7

31. Finally, the appellant relied on ground 7 as giving rise to a triable issue which should have led the judge to dismiss the application for summary judgment and to have granted leave to defend that action. Ground 7 reads as follows: *"The judge erred in holding that on the proper construction of clauses 44.4 and 44.10 of AS4303-1995 any right that the plaintiff might have had to be paid its progress claims was or became an accrued right at the time the subcontract was terminated."*

32. Clause 44.2 provides that where a subcontractor commits a substantial breach of contract the head contractor may give written notice to show cause. The requirements for notice are set out in clause 44.3 which reads as follows:

> *"**44.3 Requirements of a Notice by the Main Contractor to Show Cause** A notice given under Clause 44.2 shall - (a) state that it is a notice under Clause 44 of these General Conditions of Subcontract; (b) specify the alleged substantial breach; (c) require the Subcontractor to show cause in writing why the Main Contractor should not exercise a right referred to in Clause 44.4; (d) specify the time and date by which the Subcontractor must show cause (which time shall not be less than 5 clear days after the notice is given to the Subcontractor); and (e) specify the place at which cause must be shown."*

33. It is an essential prerequisite for the appellant's argument under this ground that notice had been given under clauses 44.2 and 44.3. The respondent did not concede that such notice had been given. There was some difficulty in determining this question because, as counsel for the appellant conceded, the notices which had been exhibited before us were not the notices which it served on the respondent in this case but were in fact notices given by Barwon to the appellant. Counsel sought the opportunity to correct that oversight and we granted leave to file an affidavit exhibiting the appropriate notices.

34. An affidavit dated 18 December 2003 from Raymond Thomas McFarlane was filed and exhibited copies of notices dated 5 June 1998 and 30 June 1998 which he deposed had been issued by him to the respondent on those dates. In a supplementary submission Mr Burnside conceded that copies of those documents were received by the respondent but did not concede that either document constituted a valid notice under clause 44.2 and/or met the requirements of clause 44.3. The contentions as to the deficiencies in the notices are those set out in paragraphs 45 to 51 of the amended statement of claim of the respondent.

35. An examination of those paragraphs of the statement of claim discloses that the primary contention as to the invalidity of the notices is that the respondent denied the factual basis for the assertions in the notices that the respondent was guilty of substantial breaches of the contract. In addition, it was contended that some formal requirements set out in clause 44.3 were not complied with, in particular, that the notices were given not by the appellant but by "the Superintendent", who had no authority to do so, and that 5 clear days notice to show cause had not been given to the respondent.

36. For the purpose of determining the issues before us on this appeal we are satisfied that the notices, in their form, provide sufficient evidence of compliance with clause 44.2 and clause 44.3 to overcome the contention that the appeal falls at the threshold. As to the specific contentions of non-compliance with clause 42.3, first, the deponent, Mr McFarlane, has sworn that he was employed by the appellant as the project manager for the head contract and as superintendent of the sub-contract. That is sufficient evidence for the purposes of this appeal that the notices were authorised by the appellant. As to the second contention, the notices specify a date to show cause which in each instance is more than five days from the date of the notice. In addition, the first notice and a covering letter accompanying the second notice are both apparently date stamped by the respondent with dates falling within five days of the dates of the respective notices.

37. The broader contentions - that the notices are defective because the substantial failures in performance of the contract which they assert are denied -could only be resolved by hearing evidence, at trial, as to the disputed questions of fact as to the

deficiencies or otherwise of the work performed by the respondent. Those issues could not be resolved upon a hearing of an application for summary judgment.

38. We proceed, therefore, on the basis that, without the question falling to be finally determined on this appeal, an apparently valid notice under clause 44.2 was given by the appellant. Upon the giving of such notice clause 44.4 takes effect. That reads as follows:

"***44.4 Rights of the Main Contractor*** *If by the time specified in a notice given under Clause 44.2, the Subcontractor fails to show reasonable cause why the Main Contractor should not exercise a right referred to in this Clause 44.4, the Main Contractor may by notice in writing to the Subcontractor - (a) take out of the hands of the Subcontractor the whole or part of the work remaining to be completed; or (b) terminate the Subcontract. Upon giving a notice under Clause 44.2, the Main Contractor may suspend payments to the Subcontractor until the earlier of - (i) the date upon which the Subcontractor shows reasonable cause; (ii) the date upon which the Main Contractor takes action under Clause 44.4(a) or (b); or (iii) the date which is 7 days after the last day for showing cause in the notice under Clause 44.2. If the Main Contractor exercises the right under Clause 44.4(a), the Subcontractor shall not be entitled to any further payment in respect of the work taken out of the hands of the Subcontractor unless a payment becomes due to the Subcontractor under Clause 44.6."*

39. The notice in this case terminated the sub-contract pursuant to clause 44.4(b). The rights of the parties on termination are governed by clause 44.10:

"**44.10 Rights of the Parties on Termination** If the Subcontract is terminated pursuant to Clause 44.4(b) or 44.9, the rights and liabilities of the parties shall be the same as they would be at common law had the defaulting party repudiated the Subcontract and the other party had elected to treat the Subcontract as at an end and recover damages. If Alternative 2 of Clause 13.2 applies and the Main Contractor has terminated the Subcontract, the Main Contractor may also, without payment of compensation, take possession of the Design Documents."

40. Mr Burnside, for the respondent, submitted that in the event of termination of the contact, the governing principle was that stated by Dixon, J. in ***McDonald v. Dennys Lascelles Ltd.***[9] where his Honour said: *"When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected."*

41. Whilst accepting that as a general principle partial performance of a contract before its termination for breach will not give rise to an accrued right to receive all of the promisor's performance, Mr Burnside submitted that the situation would be different where the contract expressly provided for **progress payments** upon partial performance of the contract. He cited ***Hyundai Heavy Industries Co. Ltd. v. Papadopolous*** [10] in which Lord Edmund Davies held: *"But there is no warrant for saying that such right was acquired in substitution for their accrued right to recover the due but unpaid second instalment. On the contrary, having regard to what Lord Wilberforce once called `the matrix of facts' (**Prenn v. Simmonds** [1971] 1 W.L.R. 1381, 1384A), there are sound commercial reasons for holding that a vested and indubitable right to prompt payment on a specified date of a specified sum, expressly provided for in the contract, should not be supplanted by or merged in or substituted by a right to recover at some future date such indefinite sum by way of damages as, on balance and on proof, might be awarded to the builders, following upon a scrutiny of the parties' respective rights and obligations under the contract as a whole."*

42. In his judgment Byrne J. said that counsel for the appellant had not disputed the proposition that any accrued right to progress payment which the respondent had at the time of termination was unaffected by the termination. It was conceded by Mr Burnside, for the respondent, however, that that statement did not accurately reflect the position which had been adopted by counsel for the appellant before his Honour. The true position taken by the appellant, then and now, was that it was only those rights to payment which had *unconditionally* accrued as at the time of termination which would not be affected by the fact of termination. Mr Manly, senior counsel for the appellant, submitted that any right to progress payment in this case was not unconditional at the time of termination, because such right had been suspended.

43. In response to that contention Mr Burnside first argued that for there to be a suspension of payment under clause 44.4 a notice of such suspension had to be served on the respondent by the appellant. No such notice had been given.

44. In our opinion, for suspension of payment to take effect under clause 44.4 there is no requirement that a formal notice be given. Clause 44.4 itself does not require such a notice whereas, by way of contrast, clause 44.3 expressly requires that a notice to show cause for breach must be given and spells out the contents of such notice. In our view, the terms of clause 44.4 in stating that once that notice has been given the main contractor "may suspend" payment until the date of termination is an enabling provision which merely gives the option to the main contactor to chose to make no such payment. No express notice of suspension is required.

45. As to the substantive argument that the right to **progress payments** was rendered conditional by virtue of the suspension provision in clause 44.4 we agree with Mr Burnside that the fact that payments are suspended until termination of the contract does not mean that the right to payment is "conditional". If the sub-contractor has acquired rights to payments under clause 44.1 of the contract then those rights have been "unconditionally acquired" as discussed in ***McDonald v. Dennys Lascelles Ltd.,*** and may be considered to be a "vested and indubitable right to prompt payment" as discussed by Lord Edmund Davies. Whilst the right is not enforceable during the period of suspension that situation only pertains "until" the main contractor takes action by way of termination under clause 44.4(b). At that moment the suspension of payment ceases and the right, which always existed, once again becomes enforceable.

46. The real question in this case is whether, upon the lifting of the suspension of payment for the unconditionally acquired right of the sub-contractor to payment which it derives from clause 44.1, the main contractor may resist summary judgment by way of a defence based on equitable set-off. The proposed defence would be to set-off sums claimed to be payable as liquidated damages under clause 35.6 (for extra costs incurred by reason of the delay in practical completion of the contact work) and/or to set-off claims to unliquidated damages for defective workmanship. Byrne, J. held that no set-off could be made as against the sums due under clause 42.1 and accordingly, there was no defence to the claim for progress payment. It followed, therefore, that summary judgment ought be granted. In so concluding Byrne, J. cited a number of authorities including an

[9] (1933) 48 C.L.R. 457 at 476-477
[10] [1980] 1 W.L.R. 1129 at 1141

earlier decision of his own ***Leighton Contractors Pty. Ltd. v. East Gippsland Catchment Management Authority***,[11] which, in turn, relied upon a decision of Rolfe, J. in ***Algons Engineering Pty. Limited v. Abigroup Contractors Pty. Limited***.[12] In that case Rolfe, J. concluded that the terms of the standard contract made it clear that the obligation to make **progress payments** under clause 44.1 was without prejudice to the right of the head contractor to dispute the claim in due course and to recover any overpayment.

47. In support of his conclusion that the terms of the contract denied a right to set-off, as claimed by the main contractor in that case, Rolfe, J. noted that clause 42.1 provided that the head contractor "shall pay" once the conditions for progress payment have arisen and that: *"A payment made pursuant to this Clause 42.1 shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable".*

48. Furthermore, clause 42.1 concludes with the statement that: *"Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by clause 44.6".*

49. In addition, Rolfe, J noted that clause 44.1 provided that: "If a party breaches or repudiates the Subcontract, nothing in clause 44 shall prejudice the right of the other party to recover damages or exercise any other right". The scheme of the contract, Rolfe, J. concluded, was that if summary judgment was entered the head contractor could nonetheless later, on a final accounting, raise its claims to equitable set-off.

50. Neither *Leighton Contractors* nor *Algons Engineering* were instances where a notice of termination of the contract had been given. In the decision under appeal, Byrne, J. held that that factor did not affect the principle which had been earlier stated by him and by Rolfe J. Since giving his decision in this case the correctness of the conclusion of Byrne, J. as to the effect of termination of the contract has been doubted.

51. In ***Queensland University of Technology v. Project Constructions (Aust.) Pty. Ltd. (In Liq.)***[13] the Court of Appeal of Queensland, in a decision published after judgment was handed down by Byrne, J. in this matter, considered a similar argument to that which had been addressed by his Honour, as to whether an equitable set-off was available to the appellant with respect to a claim for liquidated damages raised against a demand for a certified progress payment. Holmes, J. (with whom Davies, J.A. and Mullins, J. agreed) followed an earlier decision of the court[14] and noted that it had, in turn, been followed in ***Algons Engineering*** by Rolfe, J. Holmes, J. held that there would be no right of set-off against a claim for a progress payment due under a certificate except as provided by the terms of the contract and that where such a contract did not so provide it should be presumed that there was no right to a set-off in the contract between the parties. Holmes, J. referred to the judgment of Byrne, J. in the present case and noted that his Honour had interpreted the same standard form contract as containing a provision in clause 42.1 which amounted to an agreement that not only would there be no right of set-off against certified progress claims during the life of the contract, there would also be no right of set-off where the contract had been terminated. Holmes, J. did not accept the latter proposition.

His Honour said: "*It does not seem to me inevitably to follow that, where the contract evidences an agreement that progress claims will not be the subject of deduction or set-off, that preclusion must extend to the event of termination. Such a conclusion seems to me to move rather away from the rationale expressed in* ***Daysea***[15] *for discerning and preserving a right to progress payment without set-off; that is, the need of the contractor to remain viable in order to finish the contract. There seems no reason, either in general terms or on examination of the contract, that the party's respective entitlement should not be the subject of set-off upon termination of the contract. The better view, I think, is that clause 42.1 operates to defer any right of set-off during the life of the contract. If that be correct, and there exists a right of set-off on termination which is not available while the contract remains on foot, there would be some point in suspending payments to the contractor pending the showing of cause or the principal's decision as to whether to terminate or to take the work out of the hands of the contractor."*

52. As Mr Burnside correctly noted, the passage quoted above is strictly obiter, since in that case no notice of termination had been given. The proceedings involved a restitution claim by the head contractor to recover sums which it said had been paid to the sub-contractor in ignorance of the fact that it was entitled to give notice under clause 44.4(a) to take the work out of the hands of the sub-contractor. Had it done so, it submitted, that would have suspended the head contractor's obligation to make **progress payments**. The head contractor contended that it would then have been entitled to set-off any demand for progress payment against the costs incurred to complete the project. The sub-contractor argued that the progress payment was an accrued right and that any suspension of payment applied only to future work, not work completed. In the course of the appeal debate arose as to whether the effect of suspension of payments differed according to whether notice of termination was given under clause 44.4(b) or notice of taking the work out of the hands of the sub-contractor under clause 44.4(a). The court held that in the former case a set-off was possible but not in the latter.

53. Whilst the decision is obiter it nonetheless provides a considered view adopted by the Queensland Court of Appeal which is at odds with that expressed by Byrne, J. Mr Burnside submitted that the interpretation adopted by Holmes, J. was also at odds with the policy behind the standard contract. If that approach was adopted, he submitted, it would be in opposition to the dispute resolution processes provided for in the standard contract by clauses 44.10 and 47 and would create a dispute process by way of claim and set-off ostensibly derived under clauses 44.1 and 44.4 although those clauses made no reference to such a right of set-off against **progress payments**.

54. There is undoubted force in Mr Burnside's submissions as to the policy behind the standard contract whilst a contract is continuing but, as Holmes, J. noted in the passage cited above, the policy considerations which would apply in that situation would not necessarily equally apply where the contact had been terminated. Rolfe, J., himself, noted "the clear policy of the contract to ensure that the plaintiff has funds to carry on the work".[16]

[11] [2000] VSC 26, at [23].
[12] (1997) 14 B.C.L. 215. The judgment of Rolfe, J. cites numerous instances (not involving termination of the contract) where judges had concluded that a progress payment could not be subject to deduction by way of set-off or cross-claim
[13] (2003) 1 Qd. R. 259
[14] ***Re Concrete Constructions Group Pty. Ltd.*** [1997] 1 Qd. R. 6. This decision was also relied upon by Byrne, J. in the judgment under appeal.
[15] ***Daysea Pty. Ltd. v. Watpac Australia Pty. Ltd.*** (2001) 17 B.C.L. 434
[16] ***Algons Engineering***, at 221.

55. Although Byrne, J. did not discuss the matter at any length it seems likely that the policy considerations identified by Mr Burnside were also important to his Honour's decision. We are faced, then, with a difference in approach between Byrne, J. and that suggested, obiter, by the Court of Appeal in Queensland. As Byrne, J. noted in his judgment under appeal, there are sound policy reasons why there should be consistency in decisions of courts in different jurisdictions passing upon common provisions of the standard contract.

56. Mr Manly submitted that the conclusion reached by Holmes, J. is not, plainly wrong. Indeed, he submitted that were it necessary for us to reach a concluded view on the matter we ought to conclude that it is correct. He submitted that once the contract had been terminated then it may be thought logical that a policy consideration predicated on the continuing performance of the contract by the sub-contractor would carry little weight. As Williams, J.A. noted in ***Daysea***,[17] the policy of the standard form contract is that claims and disputes between the main contractor and sub-contractor are intended "to be resolved at the stage of final resolution of any disputes between the parties". Thus, it is submitted, the termination of the contract, giving rise as it then does (by clause 44.10) to the rights of the parties at common law, is not an inappropriate time for the identification of claims, counterclaims and claims by way of set-off. Furthermore, it may be said that the lifting of suspension of **progress payments** upon termination of the contract would not impinge on the entitlement of the main contractor to set-off against the right to a progress payment any equitable set-off or cross-claim which it might have. That being so then it could not be said that such an approach would be in plain conflict with the provisions in the contract (clauses 44.10 and 47) for the resolution of disputes.

57. Mr Manly submitted that it is unnecessary and inappropriate for this court to attempt to finally resolve whether the interpretation given to the contract by the Court of Appeal of Queensland is correct. It is sufficient that it is an arguable and significant question of law to constitute a triable issue and leave to defend ought to have been granted so that the matter can be fully argued at trial. Mr Burnside, however, urged that we decide the issue, and in so doing determine that the opinion expressed, obiter, by the Court of Appeal is wrong and ought not be followed.

58. Although Mr Burnside accepted that it may be appropriate for a judge at first instance to grant leave to defend where difficult and complex questions of law have been raised by the defendant, neither at first instance nor on appeal would the mere fact that the defendant raised an intricate question of law in answer to an application for summary judgment be sufficient to justify refusal of summary judgment; the determination that the defendant's case is so clearly untenable as to justify summary judgment might in some cases be made only after extensive argument.[18] Mr Burnside submitted, however, that when an appeal court has heard full argument on the matter it ought resolve the question of law itself rather than grant leave to defend without so doing (see ***Theseus Exploration N.L. v. Foyster***[19]), and contended that the answer to the legal question raised by the appellant is so clear that there remains no real question to be determined.[20]

59. Whilst in an appropriate case the court might, after close analysis, resolve a complex question of law, it remains the case that summary judgment will only be entered in a very clear case; where it appears that there is a real question to be tried, either of law or fact, then summary judgment ought not be entered.[21]

60. In our opinion, although we have heard substantial argument as to the correctness of the interpretation of the contract adopted by his Honour it is not appropriate that we resolve the question. It may well be that the answer to the question will turn on questions of fact which have not yet been resolved or on policy considerations which have not been ventilated before us and which merit consideration, in the first instance, by a trial judge.

Disposition of the Appeal

61. For the reasons which we have given, we have concluded that the appellant has demonstrated that there were real questions to be tried in relation to the matters raised in grounds 5, 6 and 7 of the appeal grounds. That being so, summary judgment should not have been entered. The appeal based on grounds 5, 6 and 7 must succeed and the judgment entered against the appellant by Byrne, J. should be set aside, the application for summary judgment be dismissed, and the appellant be granted leave to defend the action.

Mr. R.J. Manly, S.C. and Mr. B. B. Carr instructed by Gadens Lawyers
Mr. J.W.K. Burnside, Q.C. and Mr. A.C. Neal, S.C instructed by Deacons

[17] ***Daysea***, at [19]

[18] ***Dey v. Victorian Railways Commissioners*** (1949) 78 C.L.R. 62, at 91, per Dixon, J.*;* ***General Steel Industries Inc. v. Commissioner for Railways*** *(NSW)* (1964) 112 C.L.R. 125, at 130, per Barwick, C.J.

[19] (1972) 126 C.L.R. 507, at 523, per Stephen, J.

[20] Among other cases, counsel cited a passage in the judgment of Kirby, J. in *British American* ***Tobacco Australia Ltd v. State of Western Australia and Anor*** [2003] HCA 47, at [103], in which his Honour acknowledged that in resolving the question whether to grant summary judgment the court may well have to undertake extended legal analysis. Whilst accepting that the mere fact that such analysis is required is not of itself the reason why summary judgment should be refused, it is to be noted that Kirby, J. concluded in that case, at [162], that summary judgment ought be set aside as the appellant's case "was reasonably arguable", which conclusion we also reach in this case after subjecting the question of law to extended legal analysis.

[21] *Dey*, at 91.