

**JUDGMENT HIS HONOUR JOHNSTONE DCJ** : New South Wales District Court. 21<sup>st</sup> June 2006.

1. There are two notices of motions in these proceedings, which I heard together on 15 June 2006.
2. The plaintiff filed a Statement of Claim on 5 December 2005 claiming \$89,132.63 pursuant to a payment claim made under the Building and Construction Industry Security of Payment Act 199 (The BCISP Act) in respect of a building contract entered into on 28 May 2003.
3. The defendant filed a Defence on 16 March 2006 and an Amended Defence on 9 May 2006, disputing the claim.
4. The defendant filed a Notice of Motion on 16 March 2006 seeking an order that the plaintiff's proceedings be dismissed under r 13.4 of the UCPR.
5. The plaintiff filed a Notice of Motion on 16 June 2006 seeking an order that summary judgment be entered against the defendant under r 13.1 of the UCPR.
6. At the hearing of the motions both parties filed affidavits and made oral and written submissions. I reserved judgment.
7. The motions give rise to various issues.
8. The plaintiff relies on s 15 of the BCISP Act. The defendant, relying on s 7(2)(b), says that Act does not apply to this construction contract.
9. The plaintiff says that having served a valid payment claim on the defendant in accordance with s 13 of the BCISP Act, the defendant failed to reply by providing a payment schedule in accordance with s 14 thereof. It is, therefore, entitled to recover the amount of the payment claim as a debt, under s 15, and the defendant is not entitled, in these proceedings, to raise any defence or bring a cross-claim.
10. The defendant says a number of things by way of defence: first, that the plaintiff's purported payment claim is a nullity because the BCISP Act does not apply to the construction contract, by reason of it being a construction contract for the carrying out of residential building work within the meaning of s 7(2)(b) of the BCISP Act.
11. Secondly, the defendant says that even if the BCISP Act were to apply, the purported payment claim was not valid, as it was not given in good faith.
12. Thirdly, the defendant says that in any event she provided a payment schedule in accordance with s 14 the BCISP Act and accordingly s 15 cannot operate.
13. The plaintiff says, in reply, that there was no valid payment schedule. And it says that it is too late for the defendant to assert that s 7(2)(b) applies, as this is a matter which could and should have been raised in a payment schedule.

**The payment schedule**

14. I will deal firstly with the issue relating to whether the defendant provided a valid payment schedule under s 14 of the BCISP Act.
15. The plaintiff relies upon a payment claim dated 7 November 2005 (Annexure "B" to the affidavit of Mark Garden of 6 June 2006)
16. The defendant relies upon a letter dated 15 November 2005 to the plaintiff (Annexure "D" to the affidavit of Heather Loewenthal of 15 March 2006), which she says is a valid payment schedule.
17. This letter says: *"We are in receipt of your latest invoice.*

*As you are aware there are still many items outstanding (including: extensive formwork that remains despite assurances that it has been removed, sandstone work incomplete or defective, painting not complete, drainage from roof is noisy) and further items have failed in the interim or were not remedied correctly during the defects warranty period (including: French doors, security system, kitchen shelving, dimmer switches, stair railings).*

*As you are aware we have a claim against you. This cannot be finalised until after a suitable car hoist is installed in January 2006 and the other outstanding defects and failures remedied.*

*We look forward to settling this matter once these outstanding matters are quantified."*

18. Section 14 of the BCISP Act provides:  
“(1) A person on whom a payment claim is served (the respondent) may reply to the claim by providing a payment schedule to the claimant  
2) A payment schedule:  
(a) must identify the payment claim to which it relates, and  
(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount).  
(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.  
(4) .....

19. The plaintiff says the defendant's letter of 13 November 2005 does not satisfy the requirements of s 14(2) because it fails to indicate the amount of payment (if any) the defendant proposed to make. It fails to rule out paying any sum and speaks, rather, of "settling the matter".
20. The defendant says that when properly construed the letter constitutes an adequate payment schedule for the purposes of s 14. It is submitted that it is not necessary to specify an amount if it is made clear that the whole of the payment claim is disputed, as a result of which the amount of payment proposed to be made is nothing. "Nothing" is an "amount": *Barclay Mowlen Constructions Pty Ltd v Tesrol Walsh Bay* [2004] NSWSC 1232 at [15] and [16]:  
*"That is because a respondent who proposes to pay nothing is clearly proposing to pay less than the amount claimed. In these circumstances, as s 14(3) makes clear, the claimant should know why."*
21. It is common ground that there was a substantial dispute between the parties in relation to the building work. No submission was made by the plaintiff relying on s 14(3)
22. In this context a payment schedule is adequate if it informs the claimant of the real issues in dispute : *Mutliplex Contractors Pty Ltd v Luikens* [2003] NSWSC 1140 at [76]:  
*"A payment claim and a payment schedule should not ...be required to be as precise and as particularised as a pleading...Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute."*
23. It was also said that sometimes the issue so straightforward or has been expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly: at [77]. And: some want of precision and particularity is permissible as long as the essence of the reason for withholding payment is sufficiently made known: at [78].
24. The issue is whether the defendant's letter of 15 November 2005 made clear to the plaintiff that the whole of the payment claim was disputed and the essence of the reason for withholding payment.
25. In my view, it is plain from reading the letter as a whole that the defendant made clear she disputed the whole of the claim and the essence of her reasons for withholding payment.
26. But even if there was said to be any doubt about the letter itself, the preceding correspondence is such as to remove that doubt. It was abundantly clear that the defendant had a number of disputes with the plaintiff, of which the plaintiff was aware, as to the building works, in excess of the amount claimed in the payment claim.
27. The plaintiff says there was doubt surrounding whether these disputes related to defects, relevant to a final claim as opposed to a progress claim. I do not regard that as a relevant consideration. This plaintiff was in no doubt that there was a substantial dispute with the defendant relating to the building work.
28. However, due to the basis of the decision I have made, I do not need to consider the issue of bad faith on the part of the plaintiff in serving the payment claim.
29. I am satisfied that the letter of 15 November 2005 constituted a sufficient payment schedule for the purposes of s 14 of the BCISP Act, and that the plaintiff is not therefore entitled to relief under s 15.

**The application of s 7(2)(b)**

30. Section 7(2)(b) of the BCISP Act provides:  
*"This Act does not apply to:*
  - (a) .....
  - (b) *a construction contract for the carrying out of residential building work (within the meaning of the Home Building Act 1989 ) on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in, or*
  - (c) ....."
31. The plaintiff says, in effect, that so long as the claimant is a person referred to in s 8(1) of the BCISP Act and serves a valid payment claim under s 13, and the defendant has not raised s 7(2)(b) in a valid payment schedule, it is too late to seek to rely on s 7(2)(b) in these proceedings. If the defendant wished to dispute payment relying on s 7(2)(b), she should have done so in a payment schedule, otherwise the opportunity is lost.
32. This proposition seemed absurd to me having regard to the usual principles of statutory construction, but I was assured that it was supported by case law.
33. The plaintiff relied upon *Nepean Engineering Pty Limited v Total Process Services Pty Limited (In Liquidation)* [2005] NSWCA 409 at [35], [49] and [63] to support its proposition.
34. The plaintiff also relied upon *Kembla Coal & Coke v Select Civil* [2004] NSWSC 628 for the proposition that a person referred to in s 8(1) may make a payment claim without being, in fact or in law, entitled to be paid a progress payment: at [33] – [35].
35. As the defendant submitted, however, *Kembla Coal & Coke v Select Civil* involved a dispute where it was not in dispute that the Act applied to the construction contract, and that fact was assumed by the court. That was not a case that dealt with a construction contract taken outside the ambit of the Act by s 7(2)(b).
36. Nor was *Nepean Engineering Pty Limited v Total Process Services Pty Limited (In Liquidation)* .

37. To my mind the defendant's position on this issue is patently correct. It would be a strange outcome if mere service of a payment claim under s 13 could somehow overcome the clear exclusionary effect of s 7(2)(b).
38. It follows that I am not satisfied that the defendant is precluded from relying upon s 7(2)(b) as a defence to the plaintiff's claim in these proceedings.

**The construction of s 7(2)(b)**

39. The defendant only has the benefit of s 7(2)(b) as a defence if that subsection applies to this building contract.
40. There is no dispute that the building work involved "residential building work" (within the meaning of the *Home Building Act 1989*).
41. The issues as to the construction of s 7(2)(b) relate to the words "proposes to reside in" the premises.
42. Firstly, the plaintiff submits that these words must be read so as to mean "when the building work is complete" or, "as soon as" the building work has been completed. It contends for such a construction on the basis that this is beneficial legislation: *Nepean Engineering Pty Limited v Total Process Services Pty Limited (In Liquidation)* [2005] NSWCA 409 at [44]: "...it should not be construed in a manner which gives rise to an artificial result at odds with its purpose."
43. The plaintiff says, therefore, that unless the defendant proposes to immediately reside in the premises, s 7(2)(b) can have no application.
44. It seems to me that the purpose of the BCISP Act is clear but it is equally clear that it was not intended to apply to certain classes of building contract.
45. The defendant submits that an intention to reside in premises may relate to any time in the future since the section does not impose any time limit. In this sense there is no ambiguity in the language of s 7(2)(b) and, therefore, no justification for implying into it the qualifying words for which the plaintiff contends.
46. I agree with the defendant's submission. There is no ambiguity in s 7(2)(b). There is no basis for reading it in the restrictive way the plaintiff suggests, and so long as the defendant proposed to reside in the premises at some stage, that is sufficient to attract its operation and exclude the application of the BCISP Act to this building contract.
47. The second issue as to the construction of the words "proposes to reside in" the premises in s 7(2)(b) of the BCISP Act relates to the relevant point of time at which the defendant must have proposed to reside in the premises. In other words, when is it that she must have held that intention?
48. In my view it can only be an intention held at the time of the formation of the contract. In other words, the intention of the Act is to exclude from its operation construction contracts entered into between parties with a mutual understanding that the building work related to residential premises in which the party for whom the work is to be carried out either currently resides or proposes at some future time to reside.

**Is there an issue for trial?**

49. The plaintiff says that irrespective of issues of construction of s 7(2)(b), there remains a genuine factual dispute, which can only be determined at trial, as to whether the defendant proposes, within the meaning of s 7(2)(b), to reside in the premises.
50. The defendant says there is no genuine dispute on this issue.
51. The test to be applied as to whether a party should be denied the opportunity to place a case before the court at trial is that there must be a high degree of certainty about the outcome if the proceedings were to go to trial in the ordinary way: See *Thomson's NSW Civil Practice and Procedure* at 14.4.120. Where it is apparent that a case (or a defence) is "so obviously untenable that it cannot possibly succeed" it is appropriate for a court to intervene summarily: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1994) 112 CLR 125 at [8] and [10]. It is not sufficient that a case (or defence) be weak, as prima facie a party is entitled to a trial. A party is to be deprived of that entitlement only in the clearest of cases, where for example it is transparently clear that there is no reasonable cause of action (or defence): *Brinson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 946F-G.
52. Counsel for the defendant submitted that these principles should be applied having regard to s 56 of the *Civil Procedure Act 2005* ("the CPA"), and referred me to the decision in *Boulderstone Hornibrook Engineering Pty Limited v Gordian Runoff Limited* [2006] NSWSC 223. It was there said that the s 56(3) and the new UPCR "do not permit a party to prevaricate on whether or not an issue remains alive": at [1233].
53. It is also important that consideration of such applications for summary disposal are not restricted to consideration of the pleadings and questions of law, but may have regard to the available evidence: *Cox v Journeaux (No 2)* (1935) 52 CLR 713.
54. The defendant relies in particular on paragraphs 11, 12 and 13 of her affidavit of 15 March 2006 as evincing a clear and unequivocal intention to reside in the premises, as to which the plaintiff was clearly aware (see paragraphs 19, 20 and 21 of the affidavit). It is submitted that the absence of any evidence from the plaintiff refuting that evidence demonstrates that no "triable issue of fact" exists.
55. The plaintiff argues that the issue as to whether the defendant intends to reside in the premises remains in dispute. It points to various factors such as the fact that the defendant has leased the premises for a period of not less

than two years. It says it would wish to investigate this and associated facts surrounding the financing of the premises, including cross-examination of the plaintiff.

56. The fallacy in the plaintiff's position lies in the circumstance that these are all factors relating to the defendant's present intention. The relevant point of time for the intention was at the formation of the building contract. The evidence is clear that at that time the defendant proposed to reside in the premises and this intention was made known to the plaintiff before the contract was entered into. The contract was concluded on the basis of that mutual understanding.
57. There is simply no evidence to the contrary and in my view, therefore, it is transparently clear that there is no genuine reasonable factual dispute on this issue. The plaintiff's position is so obviously untenable that it cannot possibly succeed.
58. I am, therefore, satisfied that s 7(2)(b) of the BCISP Act applied to this building contract from inception, so that it was removed and remains removed from the operation of the Act.
59. The plaintiff's claim is premised on the application of the BCISP Act to this building contract, and accordingly the plaintiff's claim must fail.

**Disposition**

60. For these reasons I dismiss the plaintiff's motion for summary judgment and on the defendant's motion I dismiss the substantive proceedings, under r 13.4 of the UCPR.
61. I will hear argument as to the costs of the motions and the costs of the substantive proceedings.

Mr Christie (Plaintiff) instructed by Harris Friedman Hyde Page  
Mr D D Feller SC (Defendant) instructed by Mills Oakley