JUDGMENT : HER HONOUR BERGIN J : Supreme Court of New South Wales. 14th September 2001.

1 This is an application to have a Motion for summary judgment referred to the call over list today for it to be listed as a special fixture.

2 The plaintiff is the moving party, and will rely upon the *Building and Construction Industry Security of Payment Act (1999) (NSW)* (the Act) for its entitlement to judgment. The sections relied upon by the plaintiff have not been the subject of judicial decision and the plaintiff submits that it is clear beyond doubt that having regard to the evidence it has filed, it is entitled to a judgment in its favour, pursuant to Part 3 of the Act. Section 15(4) provides that judgment in favour of a claimant is not to be entered until the Court is satisfied of the existence of certain circumstances. Those circumstances are set out in s 15(1) of the Act.

3 Mr Rudge SC has helpfully outlined the issues on a summary judgment application in his Outline of Submission dated 21 August 2001. Mr Jacobs QC, in his submissions of 13 September has responded to those issues and raised a number of very interesting points. It is clear that the defendant will argue that the plaintiff is not entitled to an order for summary judgment for reasons which include that the payment claim is not a claim within the meaning of ss 13 or 14 of the Act. Other issues to be argued appear on page 9 and following of Mr Jacobs' Outline of Submissions.

4 Mr Rudge submitted that this Motion should be referred for a listing for hearing because it will be able to be dealt with shortly and quickly. He submitted that it will save a great deal of costs and it is an entitlement that his client should not be shut out of at this stage. If it were so clear, it may be appropriate to refer this matter, but I am concerned that it is not so clear.

5 In the short time that I have dealt with this matter the number of issues that have emerged, purely in the directions list, seem to me to suggest that the hearing of the Motion will be longer than a day. I have seen the list of affidavits and the issues upon which the defendant relies, and although the plaintiff has very sensibly approached the matter to try and shorten the issues, I am of the view it is not a short or straightforward matter.

6 If the matter is referred for listing a special fixture it would have to be allocated more than one day and, having regard to the work of the List, it may be some time before two days are able to be allocated. It is also important to note that the defendant's cross claim has proceeded to the point where all the evidence for the cross claimant, but for one statement that will be served by 5pm today, is already filed. Mr Rudge submitted that his client will need eight weeks to respond to that evidence which will mean that the whole matter will be in a state of readiness for hearing, subject to evidence in reply in the cross claim, by 9 November.

7 It is important to review the history of the way in which this List is supposed to operate. In 1986 Street CJ issued Practice Note 39 (1986) 6 NSWLR 119 in respect of the Commercial Division which came into effect on the same day the Commercial Division was established.

8 The Practice Note referred to applications for summary judgment and it was noted that as a "general rule" applications for summary judgment would not be entertained. It was also noted that the Court was concerned to avoid the delay occasioned by the majority of such applications, and that the Court would focus instead on the preparation for an early hearing of proceedings in the Division. The commentary noted that the Practice Note provided for a fundamental change to pre-trial procedures. Its purpose was to provide for "speedy" hearings.

9 Practice Note 58 was issued by Gleeson CJ in February 1990 (1990) 18 NSWLR 280 in relation to the Construction List which had previously been administered by the judges of the Common Law Division but thereafter was administered by the judges of the Commercial Division. Paragraph 14 of the Practice Note stated:

> *14. Orders will be made and directions given at any directions hearing subsequent to the first directions hearing with a view to the just, quick and cheap disposal of the proceedings.* (emphasis added)

10 In 1996 Gleeson CJ issued Practice Note 89 (1996) 38 NSWLR 382 in relation to the Commercial Division and the Construction List. In the commentary to this joint Practice Note it was noted that for some years the judges of the Commercial Division had administered the Construction List applying similar approaches to those that had been applied generally in the conduct of proceedings in the Commercial Division. The commentary continued: *The observation in the commentary to Practice Note 39 that as a general rule applications to strike out or for summary judgment will not be entertained requires emphasis. Sometimes applications are appropriate, but increasingly applications are made which have little to commend them and only cause delay and additional costs. Practitioners should expect greater strictness in declining to entertain such applications.*

11 Since 1990, when Gleeson CJ first referred to the "just, quick and cheap" disposal of proceedings, the Rules of the Supreme Court have been amended in January 2000 to enshrine this approach. Part 1 rule 3 provides: *The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings.*

12 In 1998 the cases then assigned to the Commercial Division were assigned to the Equity Division and entered into the newly established Commercial List. Proceedings entered in the Construction List remained in the Common Law Division until 1999 when they were assigned to the Equity Division.

13 Practice Note 100 was issued by Spigelman CJ on 12 August 1998 (1997/98) 43 NSWLR 586. The approach previously noted in the commentary now forms part of the Practice Note. Paragraph 25 of the Practice Note states:

> *25. The observation in the commentary of Practice Note 89, that as a general rule applications to strike out or for summary judgment will not be entertained, requires emphasis. Sometimes applications are appropriate, but increasingly applications are made which have little to commend them and only cause delay and additional costs. Practitioners should expect greater strictness in declining to entertain such applications.*

14 Mason P in ***Akins v Abigroup Ltd*** (1998) 43 NSWLR 539 said at 543 that Practice Note 39 "***governed***" proceedings in the Commercial Division. Practice Notes need to be read in conjunction with the Rules and one must be careful not to elevate a Practice Note to a status that it does not have. A Practice Note governs or guides the way in which the proceedings are expected to be administered. Practitioners, and thus parties, should be aware of the requirements of the Practice Note and it is to be expected that orders and/or directions will be made consistently with the Practice Note which governs the particular list.

15 In this instance the plaintiff submitted that it is just, quick and cheap to entertain the summary judgment application. The defendant submitted that it would only be just if the cross claim is heard at the same time or if judgment were to be obtained a stay is ordered. It submitted it would not be cheap as extra costs would be incurred which would not otherwise be incurred if all issues were to be heard at the same time. It also submitted that it would not be quick because whichever party is unsuccessful would proceed to appeal, thus delaying the hearing of all issues even further.

16 Mr Rudge submitted that if his client is successful in the application for summary judgment, it would not have to prepare a great deal of evidence. I am not persuaded that this is correct. The defendant's cross claim puts in issue matters that will require evidence that would go to the proof of the plaintiff's case. It seems to me that the parties will have to deal with all of these issues in any event.

17 The important issues raised in relation to the Act will need to be decided in this case, but I am not satisfied that entertaining a summary judgment application separately is consistent with the just, quick and cheap resolution of this litigation. These issues can be determined at the time the whole matter is heard.

18 If it is clear that the just, quick and cheap resolution of a case would be assisted by hearing an application for summary judgment then such application may well be entertained. I am not satisfied that this is one of those cases.

19 I refuse to refer the Motion for summary judgment to the call over for a listing as a special fixture.

20 In respect of the further preparation of the matter for hearing, by consent, I make the orders in the Short Minutes of Order dated today and initialled by me.

21 The matter is relisted on 30 November 2001 for further directions and should the parties not be able to agree on an appropriate costs order in respect of this application I will hear argument on that day.

M.G. Rudge SC (Plaintiff) instructed by Baker & McKenzie
M.S. Jacobs QC (Defendant) instructed by Michell Sillar