**JUDGMENT : Acting Justice Macready :** Supreme Court of New South Wales. 18th October 2002

1 His Honour: This is the hearing of a notice of motion filed by the plaintiff on 20 August 2002 in which it seeks summary judgment in respect of a builder's progress claim number 7 dated 26 April 2002 in the amount of $702,678.45. The relief sought in paragraph 3 of the motion in respect of progress claim number 6 was not pressed when the matter came on for hearing.

**The background facts**

2 The plaintiff is a builder carrying out for the defendant the construction of levees and associated works at Brewarrina New South Wales. The contract incorporates the Australian standard general conditions of contract (AS 2124-1992). On 27 March 2002 the plaintiff issued progress claim number 6 pursuant to the contract. The contract required the superintendent to assess that claim within 14 days and issue a payment certificate stating the amount of the payment which in the opinion of the superintendent was to be paid by the principal to the contractor or by the contractor to the principal. The plaintiff's progress claim was for an amount of $465,437.25 and the superintendent assessed the amount of the claim (out of time) at nil.

3 On 18 April 2002 the new superintendent Mr Corven issued a direction for the plaintiff to provide a progress report by 4 PM on 30 April 2002. Mr Corven's purpose in issuing this direction was to enable him to assess the next progress claim when it was made. The plaintiff delivered a progress report on 29 April 2002 that was within the time limited by the superintendent in his direction.

4 The plaintiff's next progress claim was submitted on 26 April 2002. This claim number 7 was in a covering letter expressed to be a claim under the contract and also carried an endorsement required by the **Building and Construction Industry Security of Payment Act** 1999 and may arguably have been a payment claim under that Act as well as a progress claim under the contract.

5 On 3 May 2002 the superintendent wrote to the plaintiff referring to that progress report and drawing to the plaintiff's attention what the superintendent alleged were deficiencies in the report.

6 Without there being any response by the plaintiff to the letter of 3 May 2002 the superintendent issued a payment certificate in respect of progress claim number 7 on 28 May 2002 assessing a nil payment. This certificate was issued after the two-week period required by clause 42.1 of the general conditions of contract. Those conditions are of importance in this case. The relevant provisions of clause 42.1 are as follows: --

*"'**At the times for payment claims stated in the Annexure** and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment **supported by** evidence of the amount due to the Contractor and **such information as the Superintendent may reasonably require**. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof.*

*Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The 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 Contractor, the reasons for the difference. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the Contract including but not limited to any amount due or to be credited under any provision of the Contract.*

*If the Contractor fails to make a claim for payment under Clause 42.1, the Superintendent may nevertheless issue a payment certificate.*

*Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal **shall pay** to the Contractor or the Contractor **shall pay** to the Principal, as the case may be, an amount not less than the amount shown in the certificate as due to the contractor or to the Principal as the case may be, **or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim**. A payment made pursuant to this clause 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 Principal or Contractor, 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 Another term of some importance is clause 47.1 which is in these terms:-
*"If a dispute between the Contractor and the Principal arises out of or in connection with the Contract, including a dispute concerning a direction given by the Superintendent, then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.*

*Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the contract, and subject to clause 44, the Contractor shall continue with the work under the contract **and the Principal and the Contractor shall continue to comply with clause 42.1**.*



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*A claim in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration, may be included in arbitration.*

**The parties' contentions**

8 Having regard to the failure of the superintendent to issue the certificate within time the plaintiff says that it is entitled to payment in respect of the amount of the progress claim in accordance with condition 42.1. The plaintiff relied on a number of cases dealing with the entitlement to payment respect of progress certificates most of which were collected in **Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd** (1997) 14 BCL 215. The plaintiff also submitted that it was entitled to payment pursuant to the rights given under the **Building and Construction Industry Security of Payment Act 1999.**

9 The defendant raised a general discretionary ground as to why the summary judgment application should not be entertained. This is based upon the practice in this list that applications for summary judgment are not normally entertained because the substance of the matter can normally be dealt with expeditiously. In addition it raises the following serious issues to be tried in relation to the contract claim:

*(i) The alleged progress claim (no. 7) was not supported by such information as the Superintendent reasonably required, and therefore no entitlement to payment arose under clause 42.1;*

*(ii) Further, or in the alternative, the alleged progress claim was not made in conformity with the contract because such claims could only be made monthly, whereas this claim was not;*

*(iii) Further, or in the alternative, no contractual entitlement arose in the absence of a statutory declaration required by clause 43;*

*iv) Further, or in the alternative, most of the items comprising the claim had previously been claimed in progress claim no. 6, and rejected by the Superintendent;*

*v) Further, or in the alternative, the alleged progress claim was ambiguous, uncertain and of no effect by reason of the endorsement thereon of the words: "This claim is made under the **Building & Construction Industry Security of Payment Act**"..*

10 The serious issue in respect of the plaintiff's claim under the Act is that the plaintiff could only serve a payment claim within the meaning of section 13 of the Act if, at the time of serving the payment claim, the plaintiff was entitled to a contractual progress payment and as it was not entitled under the contract the plaintiff had no entitlement under the Act. It was also suggested that on the proper construction of the Act the contractual claim had to be payable before the right to make a statutory claim arose

**Discretionary reasons for not entertaining or granting the motion for summary judgment**

11 The defendant relied upon the comments made by Bergin J in **Baulderstone Hornibrook Pty Ltd v HBO & DC Pty Ltd** [2001] NSWSC 821. Her Honour at paragraphs 7 to 11 set out the history of the way in which the commercial division was supposed to operate. Her Honour noted the various references in the Practice Note that as a general rule applications for summary judgment will not be entertained. She made reference to the amendment of the rules in January 2000 and referred to Part 1 rule 3 which provides: -- *"The overriding purpose of these rules in the application to civil proceedings, is to facilitate the just, quick and cheaper resolution of the real issues in such proceedings."*

12 Her Honour then referred to the current Practice Note 100 and in particular to paragraph 25 which is in the following terms: -- *"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.'*

13 Her Honour noted that part of the Practice Note emphasises that it is only if it is clear that the just, quick and cheaper resolution of the case would be assisted by hearing an application for summary judgment that such applications could be entertained.

14 Her Honour had to consider the circumstances of that case which included the fact that the matter was raised at the time it was sought to obtain a hearing date for the motion for summary judgment and in the circumstances declined to hear the motion. In the present case these proceedings have been on foot since the summons was filed on 4 June 2002. On its return on 14 June 2002 it was stood over for a week so the defence could be filed and on 21 June after the filing of the defence the matter was fixed as a motion for summary judgment and appropriate directions given. Apparently no submissions were made at that stage that the motion was inappropriate.

15 When the matter first came before me the point was raised as a preliminary matter. I declined to accede to the application and when the matter came back before me on the adjourned hearing the application was repeated. I declined to accede to it for the reasons that I then gave. On both occasions the parties had incurred the expenses of preparing for a hearing and in practical terms refusing to continue with a hearing of the motion would save nothing. In these circumstances I think that I should proceed with the hearing. Applications of this nature should in the ordinary course be made at the time it is sought to set the motion down for hearing.

**The plaintiff's claim for summary judgment**

16 I have already set out above the terms of the relevant clauses in the general conditions. These clauses are substantially the same as those which were considered by Rolfe J in **Algons**. The case was one where the sub-contractor brought a motion for summary judgment and the contractor endeavoured to raise a defence by way of



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equitable set off. The issue for his honour was whether, on a proper construction of the contract, the contractor was bound to pay the amount of the progress claim without recourse to the equitable set off, on the basis that the amount was now due and payable. His Honour found that the contractor was bound to pay the amount without regard to any other claim or set off. His Honour also held that in the circumstance (which happened in the case) that no payment certificate was issued the parties were returned to the position where there was an obligation on the contractor to pay the progress claim.

17 In **Daysea Pty Ltd v Watpac Australia Pty Ltd** [**2001**] **QCA 49** the Full Court was concerned with a situation where the payment certificate was issued after the 14-day period allowed under a clause, which in material respects was the same as that which I am considering. They concluded that in the circumstance where a payment certificate was issued late and therefore invalidly the practical consequence is that that there is no valid payment certificate in existence and therefore "no certificate" for the purposes of clause 42.1. The result was that the principal must pay the contractor's claim.

18 The court referred to the decision of Rolfe J in **Algons** and quoted and accepted part of his reasoning. The part that the Full Court quoted was in fact not from His Honour's decision referred to by the Full Court but a later unreported decision of His Honour between the same parties on 14 October 1997. As it sets out the commercial justification for the strict approach adopted by His Honour it is worth noting what His Honour said. At page 7 he said: -- *"As appears from my earlier reasons the effect of a payment certificate is to require the recipient to pay the amount stated. Failure to do so can lead to summary judgment and there is no right to dispute the amount payable until the dispute resolution procedures are activated. Accordingly, the recipient of the certificate is required to pay money during the course of the contract which, at the end of the day, it may be found it does not owe. The requirement to pay money may lead to financial difficulties for the payer, just as the failure to receive money during the course of the contract may cause financial difficulties to the payee. Also the payee may not be able, at the end of the day, to refund any overpayment. Considerations such as these lead me to the conclusion that a certificate must comply strictly with clause 42.1 if it is to have the consequences specified."*

19 The defendants did not suggest that these principles were wrong and clearly they would normally entitle a plaintiff to summary judgment. Instead it raised a number of matters which it submitted gave rise to a triable issue in the context of a summary judgement application relying upon the well known principles in **General Steel Industries Inc v Commissioner for Railways (NSW)** (1964) 112 C.L.R. 125.

**The defendant's triable issues on the contract claim**

20 I turn to a consideration of each of the matters raised by the defendant in this respect.

**The progress claim (no. 7) was not supported by such information as the Superintendent reasonably required, and therefore no entitlement to payment arose under clause 42.1**

21 In its defence the defendant particularised the information as being the request contained in the letter from the superintendent to the plaintiff dated 3 May 2002. The letter was in the following terms: -- *"I refer to your submissions of a progress report and advise that your report is inadequate. In particular, you have not itemised your request for variations so that they can be properly assessed, you have not explained your intentions with regard to outstanding Superintendent's directions, you have not provided a summary of hold points released to date or of outstanding hold points or of hold points in dispute, and you have not provided a summary of testing carried out to date.*

*I advise that I will not be in the position to review your progress claim until I have received and reviewed a satisfactory progress report."*

22 The entitlement to receive information is based upon the opening subparagraph of clause 42.1 of the general conditions. That provision requires the contractor to deliver "to the superintendent claims for payment supported by evidence of the amount due to the contractor and such information as the superintendent may reasonably require". On a first reading of this clause it would seem that the claim when delivered needs to be supported by the appropriate information. The superintendent would need to have identified the information prior to the lodgement of the claim. Making a request after the lodgement of the claim would not be in accordance with the clause.

23 No doubt because of this argument, in submissions, the defendant went beyond the terms of the material pleaded in its defence and suggested that the information reasonably required was that which had been sought by the superintendent in his letter of 18 April 2002. Although outside the terms of the defence it is appropriate here to consider that material to see whether it might give rise to a triable issue. The letter of 18 April 2002 was in the following terms: -- *"I have reviewed my files including those handed to me by the previous superintendent and have not found any progress reports as is required under clause 22 of the special conditions of contract. I advise that your submission of progress claims do not constitute progress reports.*

*Accordingly I confirm the advice of 17 April 2002 that I am unable to agree to your proposed progress meeting on 18 April 2002 until such time as I have received from you a progress report on the whole of the contract to date in the format that I have attached.*

*I direct that you provide me with a progress report in accordance with the attached format by 4.00 pm on 30 April 2002."*

24 The letter enclosed a form headed "contractor's monthly report", which was the one which was filled out and submitted under cover of letter of 29 April 2002 from the contractor to Council. Although he expressed his view that he sent the letter for the purpose of assessing the next progress claim when it was submitted, that is not apparent to the contractor on the face of the letter. For the purpose of this application I will proceed on the basis that the information was required as a result of this letter.

25 It can be seen from the letter of 3 May that the superintendent was of the view that the information supplied in that report was not sufficient. Without going into the merits of whether or not sufficient information was supplied or whether it was supplied within time it is useful to consider whether, in the absence of the information, the superintendent was entitled to refuse to consider the progress claim and thus not issue the payment certificate. The defendant's contention was that the time period would not commence to run for the purposes of clause 42.1 if there was not the supply of such information as the superintendent "may reasonably require".

26 The plaintiff's submissions on this aspect were that the superintendent's dissatisfaction or, indeed, the failure to include the information with the progress claim, is of no consequence under the terms of the contract. It was submitted that his contractual obligation under clause 42 is to make an assessment and to issue a certificate or alternatively the consequences provided for in the condition would follow. The plaintiff submitted that the superintendent could not use his dissatisfaction in order to suspend his obligation to assess. Rather what he should do is to carry out his obligation to assess in the light of the information before him. If the information he then has is insufficient then no doubt in his assessment he would not include items which were not supported by what the superintendent considered to be information which he reasonably required.

27 The defendant's submission was in effect that the supply of the information was a condition precedent to the superintendent's obligation to consider and assess. It is to be noticed that at the end of the second paragraph of the clause the superintendent is to set out the amount that in his opinion is to be paid. He is to set out his calculations in writing of the amount and his reasons for the difference. That procedure certainly allows the superintendent to cater for the situation where insufficient information in his opinion or, indeed, no information has been supplied. If the contractor is foolish enough to not comply with the reasonable request of the superintendent he cannot be heard to complain if the superintendent treats his claim harshly. In these circumstances it is hard to see how the obligation on the superintendent that he "shall issue" should be suspended. The reasoning behind the cases to which I have referred would not support such a construction. It would be necessary to imply a condition precedent to the effect contended for by the defendant. Such a condition would be inconsistent with an express term of the contract, namely, "if no payment certificate has been issued, the principal shall pay the amount of the contractor's claim". This express term has no qualifications to its operation.

28 Whether or not the information supplied to the superintendent was within the terms of the clause is a factual matter, which in the present case if it were relevant would raise a triable issue. Similarly the failure to supply the information in the monthly report along with the progress claim would raise a triable issue. The question is whether one can imply a condition precedent that suspends the obligation to assess. In my view, having regard to the express terms of the contract one cannot and, accordingly, I do not think that there is a triable issue on this ground.

**The progress claim was not made in conformity with the contract because such claims could only be made monthly, whereas this claim was not**

29 The contract in this matter was entered into on 3 October 2001. Clause 42.1 refers to claims for payment being made at the time stated in the annexure. The annexure specifies "monthly". The evidence establishes that progress claims were made on the following dates: 30 October 2001, 7 December 2001, January 2002, 31 January 2002, 1 March 2002, 27 March 2002 and 26 April 2002.

30 The submission of the defendant was that on the proper construction of the contract a progress claim made on 26 April 2002 could not consistently with the contract be made until 3 May 2002. I was not directed to any authority in support of the defendant's proposition but the dictionary definition of the word "monthly" is of assistance. The Shorter Oxford English Dictionary definition of the word is as follows: -- *"Once a month; in each or every month; month by month."*

31 Given that the previous progress claim was in the month of March I see no basis for suggesting that a claim made on the 26th of April would not fall within the definition of monthly. In the circumstances I see no triable issue on this aspect.

**No contractual entitlement arose in the absence of a statutory declaration required by clause 43**

32 Clause 43 of the contract provides for the supply of a statutory declaration as to the payment of subcontractors. In this case no such declaration accompanied the progress claim No 7 and the evidence discloses that the contractor provided a declaration to the superintendent on 13 August 2002. This date is of course well after the commencement of these proceedings in June 2002. The terms of clause 43 of the contract are as follows: --

***43 PAYMENT OF WORKERS AND SUBCONTRACTORS***

*(a) Before the Principal makes each payment to the Contractor, the Superintendent may, not less than five days before a Payment Certificate is due, in writing request the Contractor—*

*(i) to give the Superintendent a statutory declaration by the Contractor or, where the Contractor is a corporation, by representative of the Contractor who is in a position to know the facts declared, that all workers who have*



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*at any time been employed by the Contractor on work under the Contract have at the date of the request been paid all monies due and payable to them in respect of their employment on the work under the contract; and*

*(ii) to provide documentary evidence to the Superintendent that at the date of the request all workers who have been employed by a Subcontractor of the Contractor have been paid all monies due and payable to them in respect of their employment on the work under the Contract.*

*"(b) Not earlier than 14 days after the Contractor has made each claim for payment under Clause 42.1, and before the Principal makes that payment to the Contractor, the Contractor shall give to the Superintendent a statutory declaration by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts declared, that all subcontractors have been paid all moneys due and payable to them in respect of the work under the contract.*

*(c) If the Contractor fails-*

*(i) within five days after a request by the Superintendent under Clause 43(a), to provide the statutory declaration, or the documentary evidence (as the case may be) required pursuant to Clause 43; or*

*ii) to comply with Clause 43(b), notwithstanding Clause 42.1, the Principal may withhold payment of moneys due to the Contractor until the statutory declaration or documentary evidence (as the case may be) is received by the Superintendent.*

*If the Contractor provides to the Superintendent satisfactory proof of the maximum amount due and payable to workers and subcontractors by the Contractor, the Principal shall not be entitled to withhold any amount in excess of the maximum amount.*

*At the written request of the Contractor and out of monies payable to the Contractor, the Principal may on behalf of the Contractor make payments directly to any worker or subcontractor.*

*If any worker or subcontractor obtains a court order in respect of monies referred to in Clause 42(a) or in (b) and produces to the Principal the court order and a statutory declaration that it remains unpaid, the Principal may pay the amount of the order, and costs included in the order, to the worker or subcontractor and the amount paid shall be a debt due from the Contractor to the Principal.*

*After the making of a sequestration order or a winding up order in respect of the Contractor, the Principal shall not make any payment to a worker or subcontractor without the concurrence of the official receiver or trustee of the estate of the bankrupt or the liquidator as the case may be."*

33 The defendant relied upon two grounds to raise a triable issue. The first relied upon the judgment of Bergin J in **AB & MA Chick (Vic) Pty Ltd v 526 Olive Street Pty Ltd** [2001] NSWSC 575 at paragraphs 45-48. It is apparent from her judgment that there was an allegation of falsity in respect of the relevant statutory declaration. In these circumstances it seems to me that this is a somewhat different situation to the present where one is simply concerned with the effect of a failure to supply the statutory declaration.

34 The more important reason advanced under this ground relies upon the principle that the plaintiff cannot amend its pleading to bring into existence a cause of action which did not exist at the date the summons was filed. The defendant referred to **Wigan v Edwards** (1971) 47 ALJR 586 at page 596 and 597. There Mason J referred to the well-known proposition that to succeed the plaintiff must establish his cause of action at the date of the plaint as that is the origin of the action. He referred to the fact that an amendment dates back to the original filing of the plaint and it was for that reason that the plaintiff cannot in the absence of statutory authority, amend the proceedings without the consent of the defendant by adding a cause of action, which has accrued to him since the commencement of the action. In the absence of such authority an amendment, if allowed, must be regarded as asserting a cause of action existing at the date of the writ.

35 That submission does not take account of the statutory amendments that have been made and which are comprised in part 20 rule 1(3A). There is no reference in the summons to the supply of the statutory declaration. Since reserving judgment there has been an application for an amendment to include such a reference but before dealing with this aspect I will look at the contractual position and the effect of the non-supply of the statutory declaration.

36 There is no evidence of a request under clause 43(a) and accordingly clause 43(b) is relevant. The latter imposes an obligation to supply the declaration and the result if it is not supplied is set out in clause 43(c)(iii). The statutory declaration cannot be supplied until after the obligation to make payment arises under 42.1. The reason for the suspension of the obligation to make payment is clearly enough to allow the matters in the last four paragraphs of clause 43 to be put into effect.

37 The question is whether during the period of non-supply there is no amount due to the contractor or whether the words at the end of subclause (c) merely suspend payment. There are three matters that tend to indicate that the answer is the latter. The first is that at the end of subclause (c) the words used are "may withhold payment of moneys due". This contemplates the moneys still remaining due in the period when the statutory declaration has not been supplied. The third last paragraph with its reference to "monies payable to the contractor" is also evidence of an amount still remaining due notwithstanding the non-supply of the declaration. In addition the second last paragraph in circumstances where a payment is made to a subcontractor raises an amount due from

the contractor to the principal. This is for the obvious purpose of set off against amounts, which are due by the principal to the contractor.

38 Accordingly, I am of the view that the non-supply of the statutory declaration does not mean that the amount under clause 42.1 is not due by the principal to the contractor. This means that the non-supply of the statutory declaration is not a condition precedent to liability. That non-supply may lead to a stay of any judgment obtained founded upon the liability. In the present circumstances where there has been a supply of the statutory declaration and no complaint as to its efficacy there would be no reason for a stay of judgment.

39 In these circumstances it is not necessary to consider the application to amend to include an allegation that "the plaintiff provided to the defendant a statutory declaration in conformity with clause 43(b) of the general conditions of contract on 13 August 2002". However, in case I am wrong, I will consider the application in respect of which I have received further submissions. Part 20 rule 1(3A) applies to a summons and provides:-

> "*(3A) An order may be made, or leave may be granted, under subrule (1) notwithstanding that the effect of the amendment is, or would be, to add or substitute a cause of action arising after the commencement of the proceedings, but in such a case the date of commencement of the proceedings, so far as concerns that cause of action, shall, subject to rule 4, be the date on which the amendment is made.*"

40 No question of limitation defence applies and there was no application under rule 4.

41 The defendant submitted that the Court should not entertain a summary judgment application brought prematurely and that the plaintiff would suffer minimal prejudice if its application to amend is disallowed.

42 No doubt the statutory declaration was supplied on 13 August 2002 as the defence filed on 21 June 2002 raised the non-supply as a matter of defence.

43 In support of the first ground the defendant again raised the statements in Practice Note 100 to which I have already referred. On the question of prejudice they submitted that they would not oppose the amendment sought after the termination of the summary judgment application and all that was involved was the loss of summary judgment.

44 As the factual matter was attended to well prior to the hearing the only matter that affects the exercise of the discretion to amend, in my view is the question of costs. Costs thrown away by what was a premature action can be ordered to be paid by the plaintiff. Accordingly, I would have allowed the amendment. The question of the Practice Note at this stage I do not see as relevant.

**Most of the items comprising the claim had previously been claimed in progress claim no. 6 and rejected by the Superintendent**

45 There is no doubt that progress claim No 7 included substantially the whole of what had been rejected in progress claim No 6. The difference of $237,241.20 mainly comprised the two additional variation claims included in claim No 7. The other difference was some adjustments to the measurement of work, which had been included in the previous claim on a provisional basis.

46 It is perfectly apparent from the course of correspondence that upon the rejection of progress claim No 6 the parties were in dispute about its rejection. The payment certificate in respect of claim No 6 assessing it as nil was issued on 11 April 2002. On 24 April the plaintiff gave notice of dispute under clause 47.1 of the contract and that notice, inter alia, raised a dispute in respect of the failure to pay the amounts claimed in progress claim No 6. The day after this letter was Anzac Day and a day later on 26 April progress claim No 7 was submitted. The submission was that the progress claim was not made bona fide particularly as no further information was submitted in support of the matters referable to progress claim no 6.

47 Before one could conclude this one needs to consider the contractual position on how progress claims are to be made. A similar issue occurred in ***Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd*** (Giles CJ, SCNSW, April 1988). His Honour had to deal with a similar problem of a later progress claim including an earlier progress claim. His Honour analysed the matter in this way:-

> *"But, said Abigroup, the amount claimed in progress claim 10 was $480,260.54, and that was the amount caught by the default operation of cl42.1 ("the Main Contractor shall pay the amount of the Subcontractor's claim"). Not so with progress claim 13. Progress claim 13 claimed $558,308.34, part of that amount being the $480,260.54 for which Algons already had judgment. It could not be that cl42.1 entitled Algons to payment of the cumulative amounts of progress claim 10 and progress claim 13 (and the intermediate progress claims in the same form), as Algons itself acknowledged by claiming only the difference of $78,048 (the cents were rounded out). For the operation of cl42.1, Abigroup submitted, the progress claim had to be for an amount which excluded the amounts of earlier progress claims as to which there had either been a payment certificate or default operation of cl42.1, and the notice of motion had to be dismissed because there was at least a real question to be tried that progress claim 13 was not in appropriate form to enliven the default operation of cl42.1.*
>
> *Algons' response included that progress claim 13 should be construed so as to extract from it only a claim for payment of the total amount of variations 69 to 74, but I do not think it can be seen as other than a claim for the "total now due", that is, $558,308.34. The words "the Main Contractor shall pay the amount of the Subcontractor's claim" relate back to the "claim for payment", the claim for payment is the progress claim, and the amount thereof is the amount it says is claimed. The answer to Abigroup's argument is a different one*

*Abigroup was obliged by the default operation of cl42.1 to pay the amount of the progress claims, but that did not mean an accumulation of obligations when progress claims took the common form of those seen in these proceedings. By the default operation of cl42.1 in relation to progress claim 10 Abigroup became obliged to pay $480,260.54 to Algons, and by the default operation it became obliged to pay $558,308.34 to Algons. But on the face of the progress claims the two amounts were not cumulative, and the two obligations stood together - Abigroup's obligation to pay $480,260.50 was repeated as part of its obligation to pay $558,308.34, and it was obliged to pay $558,308.34 in total. So also would the intermediate progress claims be accommodated.*

*That cl42.1 was intended to operate so that consecutive progress claims did not result in cumulative obligations is demonstrated by its terms. A progress claim was to "include the value of work carried out by the Subcontractor in the performance of the Subcontract to that time together with all amounts then due to the Subcontractor arising out of or in connection with the Subcontract or any alleged breach thereof". It was not limited to work done since the previous progress claim, and was to include all amounts then due - that is, even if in an earlier progress claim. The form of progress claim adopted by Algons was in this respect in accordance with the sub-contract, and a progress claim excluding the amounts of earlier progress claims was not required by the sub-contract. That there may have been a progress certificate or default operation of cl42.1 as to earlier progress claims did not affect the form of the progress claim, and Algons was still entitled to claim payment of an amount which included the amounts of earlier unpaid progress claims.*

*So operating, cl42.1 can readily be given effect. If Abigroup has already paid to Algons some part of the amount making up a progress claim, it is obliged only to pay the balance; on an application such as the present, evidence of payment can be expected and judgment will be given only for the balance. If Algons already has judgment for part of the amount making up a progress claim, evidence thereof can be expected and again judgment will be given only for the balance. The obligation and entitlement are there, but the parties and the Court give effect to them with appropriate regard to payments made and any existing judgment. In my opinion the default operation of cl42.1 as applied by Rolfe J is just as conclusive where the progress claim is in the form of progress claim 13 as where the progress claim is in the form of progress claim 10, there is no real question to be tried, and Algons is entitled to summary judgment for $558,308.34 less the amount for which it already has judgment, that is, for the $78,048."*

48 His Honour's analysis is equally applicable in the present case, which concerns clauses in the same form. There is nothing intrinsically wrong in including earlier work and, if there are payments, giving credit for them. This is the mechanism contemplated by the contract. In the present case there would be no great burden placed upon the superintendent if he was still of the view that there had been no change from the position when he dealt with the previous certificate. His reasons for rejection could be quite succinct.

49 In order to claim for two extra variations and some re-measurement the contractor has merely followed the requirement of the contract to include the value of the work carried out "to that time". The fact that the parties are already in dispute does not, in my view, lead to it being done in bad faith. Even if it does, nothing has been advanced to say what effect that has on the contractual entitlements of the parties. I do not see any arguable defence on this aspect.

**That the progress claim was ambiguous, uncertain and of no effect by reason of the endorsement thereon of the words: "This claim is made under the Building & Construction Industry Security of Payment Act"**

50 It was submitted by the defendant that the progress claim was ambiguous, uncertain and of no effect by reason of the endorsement of the words: "This claim is made under the Building and Construction Industry Security of Payment Act". It was submitted that the progress claim must be framed with sufficient clarity and without ambiguity to show the recipient what the latter is required to do. Reference was made to ***Balog v Crestani*** (1975) 132 CLR 289 at 297.5 which dealt with the application of such principles to notices to complete. Reference was also made to **Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal** (1989) 91 ALR 363 at 376-378.

51 Given the view that I express below when I consider the statutory system I will deal with this matter later.

**The plaintiff's claim for judgment under s 15 (2) (a) of the Building and Construction Industry Security Payment Act 1999**

52 The defendant's submissions focused upon the provisions of s 13(1) of the Act to reach a conclusion that unless a progress payment under a contract is due and payable in accordance with the terms of the contract there is no statutory entitlement under the Act. In some writings on the Act and its Victorian equivalent, this view has been advanced. See **Australian Constitution Law Bulletin** Volume 11 No 10 at page 82 and Volume 14 No 4 at page 37. This requires a consideration of the terms of the Act.

53 Several definitions should be noted. They are:-
***construction contract*** means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.
**"due date"**, in relation to a progress payment, means the due date for the progress payment, as referred to in section 11.
**"payment claim"** means a claim referred to in section 13.
**"payment schedule"** means a schedule referred to in section 14.
**"progress payment"** means a payment to which a person is entitled under section 8.


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54 Sections 8 to 11 of the Act are in the following terms:-

***8. Rights to progress payments***

***(1)*** *On and from each reference date under a construction contract, a person:*

*(a) who has undertaken to carry out construction work under the contract, or*

*(b) who has undertaken to supply related goods and services under the contract,*

*is entitled to a progress payment under this Act, calculated by reference to that date.*

***(2)*** *In this section,* ***"reference date"****, in relation to a construction contract, means:*

*(a) a date determined by or in accordance with the terms of the contract as:*

*(i) a date on which a claim for a progress payment may be made, or*

*(ii) a date by reference to which the amount of a progress payment is to be calculated,*

*in relation to work carried out or to be carried out (or related goods and services supplied or to be supplied) under the contract, or*

*(b) if the contract makes no express provision with respect to the matter, the date occurring 4 weeks after the previous reference date or (in the case of the first reference date) the date occurring 4 weeks after construction work was first carried out (or related goods and services were first supplied) under the contract.*

***9. Amount of progress payment***

*The amount of a progress payment to which a person is entitled in respect of a construction contract is to be:*

*(a) the amount calculated in accordance with the terms of the contract, or*

*(b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out by the person (or of related goods and services supplied by the person) under the contract.*

*10. Valuation of construction work and related goods and services*

***(1)*** *Construction work carried out under a construction contract is to be valued:*

*(a) in accordance with the terms of the contract, or*

*(b) if the contract makes no express provision with respect to the matter, having regard to:*

*(i) the contract price for the work, and*

*(ii) any other rates or prices set out in the contract, and*

*(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and*

*(iv) if any of the work is defective, the estimated cost of rectifying the defect.*

***(2)*** *Related goods and services supplied under a construction contract are to be valued: .....*

***11. Due date for payment***

*A progress payment under a construction contract becomes due and payable:*

*(a) on the date on which the payment becomes due and payable in accordance with the terms of the contract, or*

*(b) if the contract makes no express provision with respect to the matter, on the date occurring 2 weeks after a payment claim is made under Part 3 in relation to the payment.*

55 Thus, in the present circumstances as the contract has the relevant provisions a contractor is entitled under s 8 to a statutory "progress payment" under the Act on the date the progress claim may be made under the contract. Such a statutory progress payment becomes due and payable under s 11 on the date when the contractual payment becomes due and payable. In this case it is 14 days after the submission of the contractual progress claim.

56 The rights that flow from the entitlement to a statutory progress payment are set out in Part 3 Division 1 which commences with s 13 which is in these terms:-

*13. Payment claims*

***(1)*** *A person who is entitled to a progress payment under a construction contract (the* ***"claimant"****) may serve a payment claim on the person who under the contract is liable to make the payment.*

***(2)*** *A payment claim:*

*(a) must identify the construction work (or related goods and services) to which the progress payment relates, and*

*(b) must indicate the amount of the progress payment that the claimant claims to be due for the construction work done (or related goods and services supplied) to which the payment relates (the* ***"claimed amount"****), and*

*(c) must state that it is made under this Act.*

57 Section 14 deals with service of payment schedules in default of which (the situation in this case) the person served *"becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates. "*

58 This fixes the commencement of liability for the statutory progress payment under the Act as the due date for contractual purposes. The consequences that follow are set out in section 15.

*15. Consequences of not paying claimant where no payment schedule*

***(1)*** *This section applies if the respondent:*

*(a) becomes liable to pay the claimed amount to the claimant under section 14 (4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and*



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*(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.*

***(2)*** *In those circumstances, the claimant:*

*(a) may recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, and*

*(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.*

***(3)*** *A notice referred to in subsection (2) (b) must state that it is made under this Act.*

***(4)*** *Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in subsection (1).*

59 The benefits are the twin remedies of the ability to obtain judgment and the right to serve notice of suspension.

60 The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties' existing contractual rights. See ss 3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties' contractual regime. There is only a limited modification in s 12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant's submission that the words "person who is entitled to a progress payment under a construction contract" in s 13(1) refers to a contractual entitlement.

61 The trigger that commences the process that leads to the statutory rights in s 15(2) is the service of the claim under s 13. That can only be done by a person who "is entitled to a progress payment under a construction contract". The words "progress payment" are a defined term in the Act. It means a payment to which a person is entitled under s 8. That section fixes the time of the "entitlement" given by the section by reference to the contractual dates for making claims or, if there is no contractual provision, for making claims by reference to a four week period. Section 9 deals with the amount of such a statutory progress payment. Importantly, s 9 uses similar words to s 13 in that it refers to "a progress payment to which a person is entitled in respect of a construction contract" and then directs determination of that amount by reference to both contractual amounts or if no contractual amount on the basis of the value of the work done.

62 Section 11 then deals with the due date for payment in respect of "a progress payment under a construction contract". It does it also by reference to contractual due dates and if no such provision then by reference to a two-week period. One thus has a series of sections which create a statutory right to a progress payment by fixing entitlement, the date for making claims, amount of claims and due date for payment of claims. The statutory right to claim is for both situations, namely, where a contract provides for such claims and where it does not.

63 Thus s 13 merely continues on the statutory procedure and the opening words must be a reference to the statutory entitlement created in the previous sections not the contractual entitlement submitted by the defendant. If the defendant's submission were correct it would mean that in respect of contracts which do not provide for progress payments there is no ability to recover the statutory right to progress claims in Division 3. This consequence makes otiose the earlier provisions of the Act and defeats its express object which is to:- *"ensure that any person who carries out construction work (or who supplies related goods and services) under a construction contract is entitled to receive, and is able to recover, specified progress payments in relation to the carrying out of such work and the supplying of such goods and services."*

64 In my view the submissions of the defendant are simply not arguable.

65 As under 42.1 the plaintiff is entitled to progress payments there is no reason why he cannot make the statutory claim at the same time as his contractual claim. The statutory claim must comply with Section 13(2). On its face the document appears to do this and there was no submission to the contrary.

66 The fact that the statutory claim can be made at the same time as the contractual claim lends itself to the claims being made in the one document. Provided it is made clear in the document that this is the case then there could be no objection to this course.

67 Such a procedure causes no conflict with contractual provisions as to when the amount becomes due as s 11 ties the time in both instances to the time the payment is due under the contract. The reliance on dual rights may however cause problems in the dispute resolution phase of the matter. This is because there will be both the dispute resolution procedures in Part 3 division 2 and under the contract. That both may proceed at the same time is indicated by s 32(3) and s 34. Non-compliance with one of the systems will produce default results. That problem does not arise in this case, as there has already been default in respect of the statutory regime that leads to the liability under section 15 (2).

68 It remains to consider whether there is any ambiguity in the claim document. The progress claim appears to have been sent with a covering letter dated 26 April 2002. Omitting formal parts the letter was in the following terms: --

*Re: CONTRACT for Brewarrina levee Construction.*

*Please find enclosed hereunder our progress claim No 7 for completed works on the above named contract in the value of $702,678.45 (including GST), a tax invoice for this amount is not attached and we would be grateful if you could supply a recipient generated tax invoice upon certification.*
*Original of this claim will be hand delivered by John Stritigis next Monday.*
*Your last progress certification was grossly in error and is now the subject of dispute. You have not granted practical completion, which is also the subject of dispute. We urge you to address these matters and this claim in a proper manner."*

69 The document which was attached was the progress claim. It was headed with the name of the plaintiff followed by the following:- *"Project: Brewarrina levee construction Ref:BRWNPC<7a*
*Progress Claim No 7 Date:26th Apr 2002*
*This claim is made under the Building and Construction Industry Security of Payment Act*
*Separable Portion A"*

70 And thereafter the document proceeded to list items of work with their description, tender value, percentage complete and other matters.

71 It is to be noted that the letter does not refer to the Act at all but merely to the contract. On its face the letter refers to the progress claim No 7 being in respect of the works on the contract. The actual claim form itself includes a statement that it is a claim under the act. This is a requirement of section 13 of the Act. At the end of the claim it calculates the amount said to be due for the claim. On its face the covering letter purports to make a claim under the contract whereas the progress claim document refers to the contractual progress claim number and purports to make a claim under the Act.

72 It is interesting to note that at a later stage in the dispute the plaintiff when it sought to further the dispute process issued two separate letters on 22 May 2002. One was a notice to show cause, which on its face was pursuant to cause 44 of the contract. The other letter was a notice of suspension of work under the Act. In respect of this procedure then adopted by the plaintiff it is abundantly clear that the plaintiff was seeking both to proceed under the Act and also under the contract.

73 I was referred to the decision of the High Court in **Balog v Crestani** which I have referred to above. Although in **Wilde v Anstee** (1999) 48 NSWLR 387 the debate as to whether a notice may refer to alternatives is resolved at first instance level, I do not find the discussion in the context of notices to complete as particularly helpful to the task which I have to address. I was also referred to the **Amalgamated Television Services v Australian Broadcasting Tribunal** 91 ALR 363 at 376-8. There the Full Federal Court was dealing with a statutory request for information under the Broadcasting Act. It appears from that case and other cases concerning statutory notices that such a notice may be invalid by reason of vagueness or ambiguity. However the court endorsed comments that it earlier made in **Pyneboard v Trade Practices Commission** (1982) 39 ALR 565 in these terms: -- *"provided a notice makes it reasonably clear, in the circumstances in which it is given and on a fair reading of its terms, what information or documents are required, the requirements..... as to clarity will be satisfied. In this regard, the mere fact that parsing and analysis in the artificial atmosphere of the courtroom can lead to the identification of a number of latent ambiguities will not invalidate what, as a matter of commonsense, is reasonably clear."*

74 In **Central Pacific (Campus) Pty Ltd v Staged Developments Australia Pty Ltd** (1998) V ConvR 54-575 the court said in deciding the meaning that is conveyed by a notice:- *"That is done by asking whether a reasonable person who had considered the notice as a whole and given it fair and proper consideration would be left in any doubt as to its meaning."*

75 The covering letter refers to the claim being under the contract. The letter directs attention to the enclosed claim. The actual claim form includes a reference to what the letter identifies as a contractual progress claim and is also clearly an explicit claim under the Act. If one looked at the letter and the claim form together I would think that a reasonable recipient who must know the law and thus the provisions of the Act would conclude that the claim was one under the contract and under the Act. That reasonable recipient would know that the scheme of the Act is to allow claims to be made both under the contract and the Act and that in this circumstance there is no question of an election between the two claims.

76 Although the test appears to be an objective one (see the above cases and **Mannai Limited v Eagle Star Life Insurance Co Limited** [1997] AC 749) there is no doubt in this matter that the recipient understood that he was to deal with it as a claim under the contract, which he did in fact, do. The evidence did not touch upon his knowledge of whether it was a claim under the Act.

77 In the circumstances I am satisfied that the plaintiff is entitled to summary judgement under s 15(2)(a) on a statutory basis as well as on a contractual basis.

78 I order that the plaintiff have judgment for $702,678.45 and I will give directions for the progression of the defendant's cross claim if that is desired.

Mr M.G. Rudge SC for plaintiff instructed by Dutton Lawyers.
Mr W.H. Nicholas QC and Mr M. Christie for defendant instructed by Paul Ward-Harvey & Co.