

Judgment : Court of Appeal, New South Wales before Mason P; Ipp JA ; Young CJ in EQ : 17th February 2003.

1 **MASON P:** I agree with Ipp JA

2 **IPP JA:** In a concurrent hearing before this Court, the Brewarrina Shire Council ("the Council") applied for leave to appeal and appealed against an order for summary judgment in the sum of \$702,678.45 granted by Macready AJ against it and in favour of Beckhaus Civil Pty Ltd ("Beckhaus"). At the conclusion of argument the Court granted the Council leave to appeal and these reasons relate only to the appeal.

3 The judgment sum of \$702,678.45 is the amount of a payment claim (progress claim No 7) submitted by Beckhaus (allegedly in accordance with cl 42.1 of the contract) to the superintendent appointed pursuant to the contract. The contract in question is the Australian Standard General Conditions of Contract (AS21 24 - 1992).

4 Clause 42.1 contains elaborate mechanisms for the making of claims for payment, the issuing of payment certificates and payment of amounts owing under the contract. It provides, relevantly:

"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.

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 42.8. ..."

5 Before Macready AJ, Beckhaus contended that, in the circumstances that had occurred since the submission of progress claim No 7, the effect of cl 42.1 was to require the Council to pay the amount of that claim. The circumstances in question were that the superintendent had not issued a payment certificate within the time stipulated by cl 42.1 (a period of 14 days after receipt of the claim) and a period of 28 days had expired since receipt by the superintendent of the claim.

6 The Council conceded that the superintendent had not issued a payment certificate within the time stipulated by cl 42.1 and that 28 days had expired since receipt by the superintendent of the claim. The Council contended, however, that in terms of cl 42.1 the superintendent's obligation to issue a payment certificate was subject to a condition precedent which had not been fulfilled. The condition precedent was, it was submitted, the requirement that the contractor (Beckhaus) support the claim for payment with evidence of the amount due to it and with such information as the superintendent might reasonably require.

7 In the alternative, the Council submitted that Beckhaus had been premature in submitting progress claim No 7 as the contract provided that progress claims could only be made "monthly", and the claim had not been so made. In passing, I would mention that the Council raised other defences before Macready AJ that were unsuccessful and which are not raised in this appeal.

8 Macready AJ rejected the Council's arguments and, consequently, granted summary judgment in favour of Beckhaus. In this appeal, the Council pressed the two arguments to which I have referred, namely, that its obligation to pay progress claim No 7 was subject to a condition precedent that had not been fulfilled and, in any event, progress claim No 7 was premature.

- 9 The following circumstances are relevant to the condition precedent argument:
- (a) On 18 April 2002 the superintendent wrote to Beckhaus 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."*
 - (b) Macready AJ remarked in connection with this letter: *"Although he [ie the superintendent] 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"*.
The "information" to which his Honour was referring was information reasonably required by the superintendent, as contemplated by the first paragraph of cl 42.1.
 - (c) On 26 April 2002 Beckhaus submitted progress claim No 7.
 - (d) On 29 April 2002 Beckhaus delivered a progress report (in response to the superintendent's request contained in the letter of 18 April 2002).
 - (e) On 3 May 2002 the superintendent wrote to Beckhaus referring to the progress report and drawing attention to what he contended were deficiencies in the report.
 - (f) Beckhaus did not respond to the letter of 3 May 2002.
 - (g) On 28 May 2002 the superintendent issued a payment certificate in respect of progress claim No 7; the amount certified was nil.
- 10 It was common ground between the parties that, as the payment certificate issued on 28 May 2002 was outside the period of 14 days referred to in the second paragraph of cl 42.1, it was invalid and had no legal effect.
- 11 In regard to the information that Beckhaus had in fact supplied to the Council, Macready AJ observed: *"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"*.
- 12 The parties accepted that his Honour had accurately described what both agreed were triable issues. Further, it was common ground that the learned judge should, at the stage of summary judgment, determine the legal issues whether cl 42.1 contained a condition precedent as contended for by the Council and whether progress claim No 7 had been made in accordance with the requirement under the contract that payment claims were to be made "monthly".
- 13 Macready AJ dealt with the Council's argument based on the condition precedent as follows: *"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."*
- 14 I do not agree, with respect, that the condition precedent contended for by the Council would be inconsistent with the provision that "if no payment certificate has been issued, the principal shall pay the amount of the Contractor's claim". The obligation to pay the amount of the contractor's claim when no payment certificate has been issued is, by the third paragraph of cl 42.1, expressed to be "subject to the provisions of the contract". This express qualification (that is, that the obligation to pay be subject to the terms of the contract) means that no inconsistency arises.
- 15 Macready AJ observed that the procedure in cl 42.1 "allows the superintendent to cater for the situation where insufficient information in his opinion or, indeed, no information has been supplied". The solution proposed by his Honour was that the superintendent could treat "harshly" those claims inadequately supported by appropriate evidence or information. Mr Harrison SC, who appeared for Beckhaus, supported this reasoning. He contended

that a superintendent who could not adequately assess a claim for payment because it was not supported by evidence or information should issue a certificate assessing the value of the claim at nil.

- 16 In some situations, the failure on the part of a contractor to support its claim for payment with evidence of the amount due and information reasonably required might make it difficult or even impossible for the superintendent to value the claim. I accept that in many instances the superintendent will be familiar with the work done and be able to assess its value of his or her own accord, without reference to evidence or information supplied by the contractor. But there may well be instances where this would be difficult or even impossible. In large construction projects, work is sometimes performed 24 hours per day over a large area of ground by a contractor who employs hundreds of workers, or more, and also employs sub-contractors, who in turn employ large numbers of workers themselves. In these circumstances, it may happen that work is completed and closed up before it has properly been inspected, measured and valued by the superintendent. This is but one example of circumstances under which a superintendent may need evidence and information from a contractor to be able reliably to assess and value a progress claim. Other and different circumstances may also occur which may result in the same need.
- 17 Beckhaus submitted that the ability of a superintendent to issue a nil payment certificate, where a contractor failed to provide evidence and information in support of its claim, afforded a practical way out of the dilemma in which, in those circumstances, the superintendent might experience. The Council, on the other hand, submitted that cl 42.1 provided for this situation by requiring the contractor to support its claim with evidence and the requisite information, failing which the superintendent's obligation to issue a payment certificate would be suspended.
- 18 In considering the merits of these opposing arguments, the question arises whether cl 42.1 imposes a contractual obligation on the contractor to supply evidence and information. Inherent in this question is the further question whether a claim for payment comprises the formal claim document as well as the evidence and information (or the claim document alone).
- 19 Beckhaus accepted that a claim for payment within the meaning of cl 42.1 would have to "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" (as provided by the second sentence of the first paragraph of the clause). Beckhaus submitted, however, that the evidence of the amount due to the contractor and the information that the superintendent might reasonably require did not form part of the claim.
- 20 The ordinary meaning of the first paragraph of cl 42.1 supports Beckhaus' submission. The first sentence of the paragraph distinguishes between "claims for payment" and the evidence and information that is to support such claims. The second sentence of the paragraph sets out matters that are expressly included in claims for payment - and evidence and information are not mentioned in this context. In my opinion, the evidence and information do not form part of payment claims.
- 21 This conclusion, however, does not mean that the requirement to support the claim with evidence and provide information to the superintendent cannot condition the performance of the superintendent's obligation to issue a payment certificate.
- 22 The requirement to support the claim with evidence and information can constitute such a condition on either of two bases. First, it may be a non-promissory condition to which the superintendent's obligation to issue a payment certificate is subject (as to non-promissory conditions of this kind, see *Perri v Coolangatta Investments Pty Limited* (1982) 149 CLR 537 at 551 to 552 and 565). Second, it may constitute an obligation imposed on the contractor, performance of which conditions the superintendent's obligation to issue a payment certificate. On either basis, a failure by the contractor to support a payment claim with evidence and the required information would mean that the superintendent would not be obliged to issue a payment certificate.
- 23 It is not necessary for the purposes of these reasons to decide whether the requirement as to evidence and information is a non-promissory condition or an obligation imposed on the contractor. But the question does call for some examination.
- 24 One possible argument against the requirement being a contractual obligation the contractor is required to perform is that it is contained in a sentence requiring the contractor to deliver payment claims at specified times. It may be thought that it is unlikely that the parties would intend the contractor to be contractually obliged to make its claims at specified times - the question may be asked, if the contractor feels like delaying its claim, why should the principal under the contract be concerned about that? If the contractor is not obliged to make claims at specified times, it might be difficult to contend that the contractor is obliged to support its claims with evidence and information.
- 25 The answer to the question posed in the preceding paragraph is provided by Darter and Sharkey, *Building and Construction Contracts in Australia* (2nd ed) at para 10.270: "In practice, whether it be through oversight or for tactical reasons, sometimes the contractor does not make a claim when he or she should. Accordingly, there can arise situations where the overall interests of the contract and the project require recognition of the need, nonetheless, to make a progress claim, for example entitlements of nominated sub-contractors or other unpaid third parties. Accordingly, AS 4000 and AS 2124-1986 contain the sensible, flexible and wider discretion for the superintendent to issue a payment certificate even though the contractor has not made a claim for payment".

- 26 In other words, the principal may have good reason to require the contractor to make claims at specified times or at specified intervals. This seems to be the reason why the first paragraph of cl 42.1 provides that the contractor "shall" deliver claims to the superintendent at the times for payment "stated in the Annexure". The word "shall" is an indication that the parties intended to impose a contractual obligation on the contractor to deliver its payment claims at the times stipulated.
- 27 On the other hand, it is difficult to see how a breach of such an obligation could sound in damages, and ordinarily it would be impractical to seek specific performance of it.
- 28 One thing, however, is plain: the significance of the requirement that payment claims should be delivered at specified times is that failure by the contractor to comply therewith allows the superintendent to issue a payment certificate of his or her own accord (as provided by the third paragraph of the cl 42.1). In some circumstances, as Dorte and Sharkey point out, this right could be of importance to the principal.
- 29 Similar considerations apply to the requirement to supply evidence and information.
- 30 Mr Harrison submitted that the words requiring the contractor to supply evidence and information in support of claims for payment are merely facilitative and do not impose any obligation on the contractor. For my part, however, I can see no point in the clause incorporating the words in question without those words having some contractual effect. There is a strong presumption against words being otiose.
- 31 One does not have to go far to find an important contractual and practical purpose for the requirement that the contractor provide evidence of the amount due and information reasonably required by the contractor. I have referred to the real possibility that a superintendent might need evidence and information before being able to issue a reasonably accurate payment certificate. By cl 23 of the contract the principal is required to ensure that the superintendent "arrives at a reasonable measure or value of work, quantities or time". Without a contractor providing evidence of the amount claimed by it and information that the superintendent might reasonably require, the superintendent might well not be able to make a reasonable measurement or valuation of the work, quantities or time. It follows that superintendent's ability to issue a certificate in accordance with cl 23 might well depend on the contractor supporting its claim for payment by evidence and by providing information to the superintendent that he or she may reasonably require.
- 32 Moreover, the second paragraph of cl 42.1 requires the superintendent, in a payment certificate, to set out his or her calculations and the reasons for any difference between the amount certified and the amount claimed. The superintendent's ability to comply with this requirement, also, may well rest on whether the requisite evidence and information is provided.
- 33 The fact that the ability of the superintendent to comply with cl 23 and the second paragraph of cl 42.1 may depend on whether the contractor complies with the requirements set out in the first sentence of the first paragraph of cl 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.
- 34 In this sense, the requirement that the contractor provide the necessary evidence and information is comparable to the purchaser's obligation to serve a notice to complete. This notice has to be served before the vendor can be required to complete the sale: *Michael Realty Pty Limited v Carr* [1977] 1 NSWLR 553 at 571. In the same way, the evidence and information have to be provided before the superintendent can be required to issue a payment certificate. They are both conditions precedent to performance.
- 35 The form of cl 42.1 supports this inference. For the sake of convenience, I shall repeat the relevant parts of the clause. They are: *"At the times for payment claims stated in the Annexure ..., 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. ...*
Within fourteen days after receipt of the 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".
- 36 The requirement that payment claims be supported by evidence and information is closely followed by the provision that, within 14 days after receipt of a claim for payment, the superintendent shall issue a payment certificate. The juxtaposition between the requirement to supply evidence and information, on the one hand, and the obligation of the superintendent to issue a payment certificate, on the other suggests that there is a relationship and connection between the provision of evidence and information and the issue of a payment certificate. In my opinion, the relationship and connection is as stated above.
- 37 On the basis of the construction contended for by Beckhaus, the superintendent would be required to issue a payment certificate even in circumstances where he or she was entirely unable to assess the claim. This, in my view, is an incongruous result that could not have been intended. In this regard Dorte and Sharkey *op cit* say the following in regard to the second paragraph of cl 42.1: *"The drafter could have perhaps better have employed the relative 'such' (as he has in other clauses) ... This may not be so if the intention were in fact to require the*

superintendent to issue a payment certificate on any claim for payment whatsoever but such an intention is very unlikely."

- 38 In my view, the solution suggested by Beckhaus in regard to the situation where the superintendent is unable to assess or value the claim for payment by reason of a dearth of evidence or information (that is, for the superintendent to issue a nil certificate) is unsatisfactory and artificial.
- 39 The unsatisfactory nature of the solution lies in the fact that it prevents the contractual intent of parties (that the superintendent should arrive at a reasonable measure or value of the work) from being realised. It removes an incentive to the parties to work together to arrive at a fair and accurate value for payment claims and is a recipe for litigious disputes. In this regard, the dispute resolution mechanism under the contract is contained in cl 47 and this clause contemplates that disputes may lead to arbitration or litigation. Clause 42.1 itself appears to contemplate that either party would have the right under cl 47 to dispute whether the amount certified is the amount properly due and payable (see the fourth paragraph thereof).
- 40 The artificiality lies in the fact that the certification of the claim as a nil value is likely to be false - the likelihood is that the work will have at least some value.
- 41 Should a dispute arise as to whether the work has indeed a nil value, and should the contractor, in arbitration or other proceedings, set out to prove that money is owing to it, the practical consequence is likely to be that it will have to support its claim with evidence, and may well have to provide the information required by the superintendent. After all, in such proceedings the contractor will assert that the work it performed has some value and the principal, while probably conceding this, will assert that it is not able to determine the value because of the paucity of evidence and information. The contractor, in order to prove its case, will have to lead evidence of the work in question and its value. On this basis, the superintendent will only be able to obtain the material he or she needs to assess the claim after a dispute has crystallised and steps have been taken to resolve it. This would be an expensive, impractical and undesirable consequence. Surely, so as to avoid possible disputes, the parties would have intended that the contractor be compelled at an earlier stage (either by the force of a contractual obligation or the practical incentive of having to comply with a non-promissory condition precedent) to provide the material necessary for a proper valuation.
- 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 to it 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.
- 43 Mr Walker SC, who together with Mr M Christie and Ms V Culkoff appeared for the Council, submitted that, under the first paragraph of cl 42.1, the contractor had to provide information reasonably required by the superintendent both before the submission of a payment claim and within a reasonable time thereafter (as long as it was prior to the expiry of the 14 day period). He submitted that the provision of such information (requested both before and after the delivery of a claim) was a condition precedent to which the obligation of the superintendent to issue a payment certificate was subject.
- 44 I do not accept these submissions. The first paragraph of cl 42.1 requires claims to be delivered "at the times for payment claims stated in the Annexure"; in other words at the times stipulated. It follows that the evidence and the information in question must be delivered at the time each payment claim is delivered; hence the information, the superintendent may reasonably require in terms of the first paragraph, is information required by the superintendent prior to the delivery of the claims for payment - and not thereafter. Macready AJ said in this regard: *"The superintendent would need to have identified 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"*.
- I agree with these remarks.
- 45 As there are admittedly triable issues that arise in the event that the Court finds that cl 42.1 contains a condition precedent as contended for by the Council, and as I would uphold the Council's contentions in this regard (to the extent stated), I would uphold the appeal.
- 46 I shall also express my views in regard to the second ground of appeal.
- 47 Clause 42.1 provides that the contractor shall deliver payment claims to the superintendent *"at the times ... stated in the Annexure"*. Those "times" according to the Annexure are "monthly". At common law a month is a lunar month or 28 days: *Kodak (Australasia) Pty Limited v Hally; Ex parte Hally* [1960] Qd R 452; *Ninubon v Gag Pty Ltd*, unreported NSWSC 21 July 1998 per Young J. This meaning may, however, be displaced by modern usage and found to be a reference to a calendar month: *Development Underwriting (Queensland) Pty Limited v Weaber* [1971] Qd R 182.
- 48 The contract defines "month" as a calendar month. Moreover, the reference in the fourth paragraph of cl 42.1 to "28 days" indicates (by the use of terminology different to "monthly") that the parties intended "monthly" to be something other than 28-day periods. In my view, therefore, "monthly" means each calendar month.
- 49 In *McPherson v Lawless* [1960] VR 357 Sholl J was required to determine when the period of one calendar month from 5 November expired. He said at 365: *"[When] one is dealing with a calendar month beginning in the month*

of November, and excluding 5 November ... , in accordance with the modern rule, one has to determine the length of a calendar month commencing in November, which is a month of 30 days and commencing on the sixth of that month. Thirty days commencing from and including 6 November takes up to and includes 5 December but not 6 December."

In my view, the word "**monthly**" in cl 42.1 bears a corresponding meaning.

50 The contract does not expressly stipulate the day of the month on which the monthly periods are to commence. In my view the monthly period commenced on the date upon which Beckhaus commenced work on the site and expired at the end of a calendar month, whereupon the next monthly interval commenced, and so on. On this basis, the first payment claim should have been in respect of one calendar month's work, as should the claims for each succeeding month. That, it seems to me, was the intent of the contract. Accordingly, the commencement of each monthly period depends upon the date on which Beckhaus commenced work on the site.

51 Clause 35 of the contract deals with the date on which work is to commence. There is, however, no evidence as to when work in fact commenced and it is not possible to determine that date on the material before the court.

52 Macready AJ found that the evidence established 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. It is simply not possible, however, to determine from these dates the date on which the first claim for payment (or the date on which progress claim no 7) should have been made.

53 As the contract was entered into on 3 October 2001, it seems that the first claim for payment was made prematurely. It may be that the parties, by their conduct, accepted that claims for payment should be made at times different to the times specified in cl 42.1, or that the monthly periods were to be calculated in a way that differed from that required by the contract. But there was no evidence to this effect and this does not appear to have been an issue before Macready AJ.

54 Macready AJ dealt with the issue whether progress claim No 7 was premature as follows:

"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 of 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."

55 In essence, Mr Harrison's argument followed his Honour's reasoning. He submitted that, provided only one claim was made in each month, it would be made "monthly". Thus, he submitted that, if a claim for payment was made on the last day of a particular month, and another was made on the first day of the very next succeeding month, the claims would be made "monthly" (as they were made in different months).

56 I do not think that this is a meaning that was intended by the contract. The stipulation that claims be made "monthly" seem to me to indicate that they should be made at intervals of one month each. There would be good practical reasons for this. Such a construction would ensure that the superintendent would have a reasonable time to deal with each particular claim. I therefore do not accept the submission so made.

57 Nevertheless, I am unable to uphold this ground of appeal. As there is no evidence as to the date on which work commenced on the site, it is not possible to determine the date in each succeeding month on which payment claims were to be made. Hence, it is not possible to determine whether progress claim no 7 was made prematurely.

58 As I have indicated, it may be that, by their conduct, the parties agreed to different dates. But, in the light of the way the matter was conducted, it is not possible for this Court to investigate that issue. As the Council has not established, by evidence, that progress claim No 7 was premature, I would dismiss this ground.

59 For the reasons given, I would uphold the appeal, set aside the summary judgment orders and grant leave to defend. I would order that Beckhaus pay the costs of the application for summary judgment and the costs of the appeal.

60 **YOUNG CJ in EQ:** I have read in draft the reasons of Ipp JA in which his Honour so thoroughly presents the salient facts, documents, submissions and issues that it is unnecessary for me to repeat them, save in most basic summary.

As his Honour notes, there are two basic questions for determination in this appeal:

- (1) whether there is an obligation on the contractor to supply the superintendent with information which conditions the superintendent's obligation to issue a payment certificate under cl 42.1 of the contract; and
- (2) the meaning of the word "monthly" in that clause.

61 As to the first matter, the appellant's first argument was that the clause required the contractor, as a condition precedent to provide the superintendent with a package of information comprehending a claim for payment, supporting evidence and such information as the superintendent might reasonably require.

62 Macready AJ held that the supply of information was not a condition precedent to the superintendent's obligation to issue his certificate.

- 63 His Honour held that the proper construction of the clause was that if the contractor did not supply proper information to support its claim, then the superintendent could simply determine that the amount payable was nil. On this basis, there was no purpose in construing the obligation to provide supporting evidence as a condition precedent.
- 64 Before this Court, it was put that there must be a distinction between a claim which complies with cl 42.1 and one which does not. Mr Walker SC for the appellant said that a bald statement that the contractor claimed a certain sum would not amount to a claim for payment within the clause. That is certainly so, but it is difficult to see how this affects the outcome of this litigation.
- 65 The proposition noted in the previous paragraph often occurs in cases under s 459G of the **Corporations Act, 2001** (Cth) where, unless the alleged debtor files a motion *with an affidavit supporting the application* within a strict time limit, the debtor is disabled from challenging the creditor's statutory demand. In such cases, it is clear that a bald assertion of dispute on the one hand is insufficient, but it is also clear that the affidavit in support does not have to go into great detail as to the facts of the case; see eg **Graywinter Properties Pty Ltd v Gas & Fuel Corporation Superannuation Fund** (1996) 70 FCR 452.
- 66 Indeed it seems to me relatively clear that the clause distinguishes between the making of a claim for payment and the requirement to support the claim with evidence and, in this regard, I respectfully agree with what Ipp JA has said.
- 67 I also respectfully agree with Ipp JA's construction of the phrase "such information as the superintendent may reasonably require".
- 68 However, his Honour says that the requirement to support the claim with evidence might impose an obligation on the contractor which, if not fulfilled, will mean that the correlative obligation of the superintendent to issue his certificate will not arise. That is that, whilst the obligation to provide the evidence is not a provision, the breach of which will sound in damages, it operates as a condition precedent to performance of the superintendent's obligation.
- His Honour gives supportive reasoning for his view.
- 69 However, with respect, there is a lot that can be said for the opposing view. Indeed, Mr Walker SC properly acknowledged in argument, that there are difficulties with interpretation for both sides.
- 70 The cases which have considered cl 42.1 have virtually all emphasized the point that cl 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 materials so that the work may continue in the interests of both parties. One sees statements to that effect in the judgments of the Queensland Court of Appeal in **Re Concrete Constructions Group Pty Ltd** [1997] 1 Qd R 6 at 12 and 13 and **Daysea Pty Ltd v Watpac Australia Pty Ltd** [2001] QCA 49 (17 BCL 434) at [18] and the decision of Rolfe J in **Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd** (1997) 14 BCL 21.
- 71 Furthermore, it is instructive to remember that a building contract is rarely considered to be an entire contract; see eg the discussion in **Hoenig v Isaacs** [1952] 2 All ER 176. The contractor is entitled to be paid for the work done and materials supplied progressively. How progressively is usually determined by the contract. Provisions such as cl 42.1 are inserted in building contracts principally for the benefit of the proprietor. Not only does the clause give a person sympathetic to the proprietor (though owing fiduciary duties to the contractor) some control of the amount payable, it also eliminated the possibility of the proprietor underestimating what is due and thus having to pay the costs of a dispute in court.
- 72 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.
- 73 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 cl 27.2, he has the power to direct the contractor to supply details of the source of the materials it is employing in the works (cl 29.3), he may direct the contractor to remove what he considers to be defective work (cl 30.3), he may order tests to be carried out (cl 31.1). Furthermore, under cl 33.1, the superintendent may direct in what order the work is to be performed, he has considerable input into the construction program (cl 33.3) and he is in control of the variations to be effected (cl 40.1).
- 74 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.
- 75 I realise that, in practice, there can be situations where, as Ipp JA notes, the superintendent in fact is not aware of what is really happening on site and the contractor actively assists in making sure he remains in the dark. However, this is not the situation that is intended by the parties in their contract.

- 76 If one is to construe cl 42.1 as being subject to a condition precedent to performance, I agree with lpp JA that the condition is not one, breach of which leads to damages, but is either a non-promissory condition or a condition on the performance of which the interdependent obligation of the superintendent depends.
- 77 There is no doubt that the superintendent has duties to the contractor under cl 23 of the contract and that, even though the superintendent may have close connections with the proprietor, he owes what could be termed fiduciary duties to the contractor; see eg **Perini Corp v Commonwealth** [1969] 2 NSW 530.
- 78 With respect, I cannot see why one should assume that the superintendent is dependent on the compliance with the contractor's obligations under cl 42.1 in order to carry out his obligations to certify. Even though his certificate is to include figures and calculations, he may well have this information from his own records. In any event, the contractor cannot complain of a deficiency in the certificate if the deficiency was a result of its own breach of obligation.
- 79 Furthermore, it must be remembered that the object of the exercise is not to fix an exact figure for what is due to the contractor, but merely to assess a provisional amount as a progress payment which will be adjusted on final accounts.
- 80 I should interpolate here that I am not completely comfortable with Macready AJ's proposition that, if he did not have sufficient information, the superintendent could just assess the payment claim as nil. I would have thought that there was a lot to be said for the view that the superintendent was bound to do the best he could with the information at hand and would only be doing his duty in assessing a claim at nil if there was no other option open. However, my view on this matter does not affect the basal point made by the learned judge.
- 81 I do not, with respect, agree that the present case is in any way analogous to the notice cases or the notice to complete cases referred to by lpp JA.
- 82 I realize that the point being made is the effect of a notice to complete at law because, in equity, if one is seeking specific performance, one does not give a notice to complete at all. One writes a letter to safeguard oneself against the defendant arguing that the litigation was unnecessary and so there should not be any cost, but, otherwise, merely files a summons for specific performance.
- 83 However, there is a rule that, in some situations, a person is not in breach of their obligations at common law, unless notice is given that the other party now expects that those obligations will be performed.
- 84 The basic rule was stated by Lord Abinger LCB in **Vyse v Wakefield** (1840) 6 M & W 442, 452-3; 151 ER 485, 489: "*where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him.*"
- 85 Later cases have expanded this proposition and made it clear that if a party to a contract is lulled into inactivity because of the conduct of the other, the other will not be able to compel the former to fulfil the contract without due notice of the change of attitude; see eg **Panoutsos v Raymond Hadley Corp of New York** [1917] 2 KB 473; **Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd** (1954) 90 CLR 235, 250.
- 86 The basic rule also applies where a creditor alone knows the amount of the debt. In such a case, there must be a demand before there can be an action to recover the debt, see **Brown v Great Eastern Railway Co** (1877) 2 QBD 406. This situation comes close to the present case, but only if one assumes, as I cannot, that the facts to enable one to compute of what is due are known only to the contractor.
- 87 There is an allied principle that "*whenever there are concurrent obligations the party who seeks to recover against the other must show that he has always been ready and willing to perform the obligation upon him*": **Forrest & Son Ltd v Aramayo** (1900) 83 LT 335, 338 applied by Isaacs J in **Cohen & Co v Ockerby & Co Ltd** (1917) 24 CLR 288, 298. This maxim is of no assistance unless one begs the question by saying that we here have concurrent acts.
- 88 It follows, that I am of the view that the factors which favour there being no condition precedent outweigh considerations pointing in the other direction.
- 89 The second point in the appeal concerns the meaning of the word "monthly".
- 90 No real assistance is gained from reference to previous decisions though it should be noted that when considering the present clause obliquely in **Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd** [2002] NSWCA 238, Heydon JA, with whom Hodgson and lpp JJA agreed, noted that the word "monthly" was used with the sense of compulsion.
- 91 Macready AJ held that this meant once in each month. Although his Honour did not refer to it, the High Court in another connection took the same view, see **Federated Seamen's Union of Australasia v Commonwealth Steamship Owners' Association** (1922) 30 CLR 144, 151.
- I would favour this view.
- 92 However, if it is wrong then the view adopted by lpp JA, a view consistent with the approach taken in s 8(2)(b) of the **Building and Construction Industry Security of Payment Act**, 1999 produces the same result.
- 93 It follows that in my view the appeal must be dismissed with costs.

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