

JUDGMENT : Magistrate J Orchiston. Downing Centre Local Court, New South Wales. 16th June 2006

1. The Court is asked to determine the respective Notices of Motion brought by each party. The Plaintiff (PI) moves the Court for an order for judgment for the PI under Rule 13.1 and 16.3 of the Uniform Civil Procedure Rules. The Defendant (D) moves the Court for an order that the Statement of Claim be struck out pursuant to Rule 14.28 of the Uniform Civil Procedure Rules.
2. The Statement of Claim seeks an order pursuant to ss 15(2)(a) and/or 14(4) of the Building and Construction Industry Security of Payment Act 1999 (the Act) that the D pay to the PI an amount of \$33,135.63, and interest.

The facts

3. It is not in dispute that:
 - the PI had entered into a contract with North Sydney Council (the Principal) to construct a walkway along the foreshore known as the Dr Mary Booth Reserve, Kirribilli
 - the PI and the D entered into a Sub-contract, dated 12 July 2005, (the contract) for the D to construct the walkway the D defaulted in the performance of the contract
 - the D failed to show cause for the default within the specified period as a result, the PI exercised its rights under cl 42 of the contract cl 42 entitled the PI to take over the whole or any part of the work (cl 42 (c)(i)); or to cancel the contract (cl 42 (c)(ii)); and in either case have others complete the work (cl 42(f)), with the D liable to the PI for any difference in cost (cl 42 (j)).
 - the PI elected to retain others to complete the work and now serves a claim on the D under the Act for the difference in costs incurred for that work pursuant to the terms of the contract.
 - whilst the PI may well have rights under the contract to make a claim against the D for recovery of the difference in costs, it now pursues its claim under the Act.

The Issue

4. The central issue for determination on both Notices of Motions is whether the PI is a person who is entitled to make a claim for payment against the D under the Act. The determination of this issue turns upon the proper construction of the Act as to whether the PI is a person who has "undertaken" to do "construction work" and is thus entitled to "progress payments" under the Act.

The Plaintiff's Notice of Motion

5. Mr Dixon, counsel for the PI claims that at all material times, the PI was a person who was entitled to a progress payment within the meaning of s 13 of the Act. In support of this contention, he points to the following Special Conditions (the Special Conditions) of the contract:
 - Clause 48 sub-clause 6, which provides that:
"In the event the [D] fails to meet its obligations under this Contract or is in default of a provision of this Contract, the [PI] undertakes; after issuing notice in writing and subject to the terms and conditions of this contract to execute and complete the Works on behalf of the [D]."
 - Clause 48 sub-clause 8, which provides that:
"The [D] undertakes to pay to the [PI] any amount or debt due which may become due and payable under this contract. The [D] also acknowledges that the [PI] is entitled to submit a payment claim for any works completed on behalf or for the [D] under this Contract, and in this scenario the [D] will take the role and liabilities of the Respondent as defined in the Building and Construction Industry Security of Payment Act 1999, as amended from time to time."
 - Clause 48 sub-clause 36, which provides that
"Without limiting anything in clause 42, in the event that the [PI] exercises its rights under clause 42(c)(i) or 42(c)(ii), then the [PI] may issue a payment claim under the Building and Construction Industry Security of Payment Act 1999, at any time to the [D] in respect to works carried out by the [PI] in carrying out the whole or any part of the work remaining, and shall be entitled to a progress payment under that Act in the amount of expenses incurred in carrying out that work that, but for the exercise of its right in clause 42(c)(i) or (ii), the [D] would have been bound to carry out."
6. Mr Dixon submits that these Special Conditions of the contract clearly contemplate that the parties intended that in the event of default by the D, the PI would effectively stand in the shoes of the D and be liable to undertake the construction work and hence would be entitled to a progress payments from the D under the Act.

The Defendant's Notice of Motion

7. Mr Drew, counsel for the D, submits that it is clear from s 8 of the Act that a right to a progress payment is not automatic, but must be established by meeting the criteria in that section that is, the person must have "undertaken" to carry out "construction work" under a "construction contract".

He submits that the entitlement to serve a payment claim under s 13 is predicated upon establishing a contractual entitlement as a person referred to in section 8(1) who has undertaken to carry out construction work. In support of this construction of the Act, he relies on *Consolidated Construction Ply Ltd v Ettamogah Pub* [2004] NSWSC 110 at [57], quoting *Jemzone v Trytan* [2002] NSWSC 395 at [38] and [39].
8. In reply, Mr Dixon submits that the PI was exercising a right and entitlement under the contract and was engaged in an "undertaking" which brings the PI within the scope of s 8 of the Act. He says that the PI served a valid claim

for a progress payment on the D under the Act. He contends that under the terms of the contract, the PI is now liable to undertake the works which are the subject of the payment claim. The PI has undertaken to do those works instead of the D, thereby relieving the D from its obligation to undertake those works. Accordingly, he says, the PI is entitled to make a payment claim against the D in respect of that work.

He further submits that there is no ambiguity in the language of the Act. He says that it contemplates the present scenario between the PI and the D upon its plain and simple construction, that is, that the purpose of the Act is to ensure that progress payments, which are the "life-blood" of the construction industry, are paid promptly.

Reasons for Decision

9. I have had the benefit of written submissions and oral argument by the parties on the Motions. I have carefully considered all the points raised by them.

The legislative provisions

10. So far as is relevant, s 3(1) states that the Object of the Act is:
"is to ensure that any person who undertakes to carry out construction work under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work."
11. Section 7 Application of Act provides so far as is relevant that:
*"....this Act applies to any construction contract."
"construction contract" is defined in s 4 to mean:
"a contract or other arrangement under which one party undertakes to carry out construction work.....for another party."*
12. Section 8(1) provides that:
*"...under a construction contract, a person:
(a) who has undertaken to carry out construction work under the contract...is entitled to a progress payment."
"progress payment", so far as is relevant, is defined in s 4 " to mean:
"a payment to which a person is entitled under section 8 ..."
"respondent" is defined in s 4 to mean:
"a person on whom a payment claim is served under section 13."*
13. Section 13(1) provides that:
"A person referred to in section 8(1) who is or claims to be entitled to a progress payment ("the claimant") may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment."

Object of the Act

14. Mr Drew has taken the Court to extracts from the Second Reading Speech and the Hansard Reports in ascertaining the intention of the legislature and the purpose of the legislation (see paragraphs 22 -25 of his written submissions). He points to "the upward operation of the Act" which he submits provides for the protection and timely payment of the subcontractor from the contractor, and the builder against the principal. He relies in particular on the observations of Mr McBride, member for the Entrance, and Mr Tripodi, member for Fairfield, made on the introduction of the Bill (see extracts from their speeches at paragraphs 24 and 25 of his written submission).
15. I accept their sentiments reflect the beneficial, protective nature of the legislation to ensure prompt payment in the construction industry. I am aware that the Act has been amended since, although I do not consider that this changes the general purpose of the Act. I am also mindful of the general principle that beneficial legislation should be broadly construed, but, of course, always within the language of the Act itself.
16. In the present context, the Act expressly states the Object of the Act. The Court must therefore be governed by this legislative statement. Section 3 specifically provides that *"any person who undertakes [my emphasis] to carry out under a construction contract is entitled to receive and is able to recover progress payments in relation to the carrying out of the work"*. For the present purposes, the word "undertakes" in s 3, which occurs again in the s 4 definition of "construction contract" and again in s 8 of the Act, as well as the statutory definition of "construction contract" itself, must be carefully considered.

Meaning of "undertake"

17. The Act does not define the term "undertake". The Australian Oxford dictionary defines it to mean:
"to bind oneself to perform, make one self responsible for, engage in, enter upon (work, an enterprise, a responsibility), accept an obligation, promise, guarantee, affirm"
18. I consider therefore that to "undertake" for the purposes of the Act involves a person entering into an obligation with another person to do something. The need for some form of obligation to arise is particularly reflected in the dictionary definitions of "bind oneself to perform" and "accept an obligation".
19. I accept that there is no doubt that the language of the Special Conditions attempts to achieve this result by direct reference to the Act and incorporating the language of the Act, for example, it provides that in the event that the D fails to meet its obligations under the contract or is in default, the PI *"undertakes to execute the Works on behalf of [the D]"; and that [the PI] "may issue a payment claim under the Building and Construction Industry Security of Payment Act 1999... and shall be entitled to a progress payment under that Act"; and that "in this scenario [the D]*

will take the role and liabilities of the Respondent as defined in the Building and Construction Industry Security of Payment Act 1999..."

20. However, I do not consider that the mere use of these words in the contract, in particular the use of the word "undertakes" in this context, suffices, of itself, to establish that for the purposes of the Act, the PI has undertaken to carry out construction work.
21. Mr Drew submits, in this regard, that the relevant provisions of the contract are highly conditional and provide for a "self-help remedy" for the PI which cannot be characterised as an "undertaking", as defined above. Simply stated, he says that the natural meaning of an undertaking cannot be the enforcement of a self-help remedy.

He further submits that, in the present context, the PI has made no promise, rather it has made an election on default by the D. In support of this contention, he points to the statutory definition of "construction contract", which he says, refers to the mutuality of obligation of one party undertaking to carry out construction work 'for another party', not the contemplation of one party undertaking to carry out construction work for itself as a self-help remedy.

22. I accept these submissions. In the context of the Act, the word "undertake", in my view, does not extend to a right or a unilateral discretion to do something, without an element of obligation being involved. In this regard, I consider that it is highly pertinent that the statutory definition of "construction contract" refers to a contract under which one party undertakes to carry out construction work "for another party" [my emphasis].

23. I am also satisfied that there is some degree of implied recognition of this position in the PI's submissions where Mr Dixon refers to the PI "exercising a contractual right" in the present context:

"There is in the current case no dispute the contract existed, or that the [PI] had an entitlement to do the works and invoice the [D] for that work. The contract remained on foot and was enforceable by either party. It was not a case of the [PI] seeking damages for breach. It was a case of the [PI] exercising a contractual right [my emphasis] to do the works in accordance with the provisions of the contract and seek payment for that work -that the [D] originally had to do" (paragraph 22 of the PI's written submissions).

24. It is further instructive that the Special Conditions of the contract also expressly refer to "in the event that the PI exercises its rights under clause 42. .." and "but for the exercise of its right in clause 42 " (see Clause 48 sub-clause 36).

25. I am satisfied that both the reference, by Mr Dixon in his submissions and in the Special Conditions, to the PI having a contractual right or rights, accurately describes the legal nature of the relevant terms of the contract. Upon a proper construction, I do not consider that the contract provides for the giving of any contractual undertaking by the PI to the D to do the construction work in the event of default by the D. Upon default by the D, the PI has the right to take over the construction work, with additional remedies against the D to recover various costs that might be incurred by the PI.

26. I do not consider that in the event of default by the D, the PI is contractually bound to the D to complete the work merely by virtue of the use of the word "undertakes" in Special Condition, clause 48 sub-clause 6 of the contract. Upon a proper construction of the contract, and in accordance with the plain and ordinary meaning to be given to the word "undertake" in the Act, I am satisfied that the D gave an undertaking to the PI to complete the construction work, but that the PI did not give any equivalent or reciprocal "undertaking" to the D in the event of default by the D. To find otherwise, as Mr Dixon contends, would be to place an artificial construction upon its meaning.

27. Further support for this view is found when one considers the situation under the contract, should the PI fail to complete the construction work after default by the D. In these circumstances, I do not consider that the D would have any right under the contract to oblige the PI to complete the construction work, nor would the D have any remedy under the contract against the PI for the PI's failure to complete the work.

28. Mr Drew submits in this regard that:
"The [D] was the party who undertook to carry out construction work under the contract. The [PI] stood to receive the benefit of that construction work but did not undertake to carry out construction work under the contract. There is no entitlement for a party who stands to receive the benefit of the construction work under a contract to a 'progress payment' under... the Act. The [PI] may have an entitlement to a progress payment in respect of its [separate] contract with the Principal, but not with the [D]."

I accept this submission.

Application of the Act

29. Mr Drew further relies on s 34 of the Act, the "No contracting out" provision, to support his case.

Section 34(1) provides that:

"The provisions of this Act have effect despite any provision to the contrary in any contract."

Section 34 (2)(a) provides that:

"A provision of any agreement.. ..under which the operation of this Act is, or is purported to be, excluded, modified, or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), is void."

30. Mr Drew submits that s 34 does not permit the parties to "contract in" and thereby modify the Act, which, he says, is what the PI is attempting to do in the present case. He says that any attempt to extend the operation of the Act in this way falls foul of s 34.

31. I do not find s 34 to be relevant to the determination of the issue before the Court. I consider that the construction of s 34, for which Mr Drew contends, is contrary to the clear and unambiguous purpose of the section that parties cannot seek to oust the jurisdiction of the Act when it otherwise applies to a construction contract.
32. This approach is consistent with the broad application of the Act under s 7 which states that the Act applies to "any construction contract". Equally, however, I do not consider that every party to a construction contract automatically becomes a person who falls within the terms of s 8 of the Act merely by incorporating the language of the Act in an attempt to attract its provisions, even with the agreement of the other party. In the present case, I am satisfied that whilst the D falls within the terms of s 8, the PI does not.

Conclusion

33. In conclusion, upon a proper construction of the Act and the contract, I am satisfied that the PI is not a person who falls within s 8 of the Act as being a person "*who has undertaken to carry out construction work under the contract*". Accordingly, I am satisfied that the PI is not a person entitled to make a claim for a progress payment against the D under the Act.

Order

1. Order that the Plaintiffs Notice of Motion 1 be dismissed.
2. Order in accordance with paragraph 1 of the Defendant's Notice of Motion that the Statement of Claim be struck out.
3. Order that the Plaintiff pay the costs of the Defendant on the Notices of Motion, as agreed or as assessed.

Mr Dixon - Solicitor
Mr Drew - Solicitor