

JUDGMENT : Sidis DCJ : District Court. New South Wales. 16th May 2008

- 1 In May 2006 Calsun Materials Handling Pty Limited entered into a contract with Lovton Pty Limited for the construction by Calsun of a coal crushing plant at a coal mine at Boggabri for the sum of \$5,129,820, excluding goods and services tax.
- 2 Work commenced on 12 May 2006 and reached practical completion on 24 November 2006. The contract provided for a defects liability period of 12 months.
- 3 On 13 November 2006 Lovton paid Calsun a progress or milestone payment for the whole of the balance of the contract price. It did not deduct any amount for the retention fund of 2.5% allowed for in the contract.
- 4 Calsun issued a tax invoice dated 27 December 2007 for \$265,961.22. The invoice was endorsed: *This is a claim under the Building and Construction Industry Security of Payment Act 1999*. It was said by Calsun to be a final progress claim.
- 5 Lovton received the invoice on 8 January 2008. No payment schedule was provided in response to the invoice. The amount claimed in the invoice remains unpaid.
- 6 Calsun applied for judgment against Lovton in the sum of \$270,551.78.
- 7 Lovton applied for orders that:
 1. the proceedings be dismissed;
 2. the proceedings be permanently stayed; or
 3. any judgment entered by permanently stayed.
- 8 The issues arising out of the applications were:
 1. Whether the payment claim made by Calsun was effectively a claim for damages for breach of contract and, if a progress claim, whether it was provided for in the contract between the parties; and
 2. Whether the payment claim was made within the period provided for in s 13(4) of the Act.

The nature of the claim

- 9 The payment claim was made up of a number of components details of which were provided in supplementary invoices as follows:

Invoice 1055-002/1 for \$22,284.21 for additional expenses incurred in providing the services of a supervisor as a result of delays extending the date of practical completion for five weeks from 20 October 2006 to 24 November 2006.

Invoice 1055-002/2 for \$51,200 for the cost of maintaining site infrastructure and resources during the same five week period.

Invoice 1055-002/3 for \$147,328.79 for interest on overdue milestone payments and the costs of the time of directors of Calsun expended in dealing with funding failures arising from periods of insolvency of Lovton.

Invoice 1055-002/4 for \$4,778 for costs associated with the calling out of engineering personnel and management during the defects liability period.

Invoice 1055-002/5 for \$2,934 for the costs of modifications made during the defects liability period.

Invoice 1055-002/6 for \$4,860 for the costs of modifications made during the defects liability period.

Invoice 1055-002/7 for \$7,840 for the costs of electrical maintenance support during the defects liability period.
- 10 The Act permits a payment claim to be made by a person who, under a construction contract, has carried out construction work or supplied related goods or services.
- 11 The definition of construction work in s 5 of the Act is very broad. It extends to:
 - work involving construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of various types of construction work;
 - installation of fittings, including those required to provide various building services.
 - external or internal cleaning of buildings, structures and works in the course of construction work;
 - site clearance, foundations, scaffolding, prefabrication, site works, painting and decorating; and
 - work prescribed by the regulations.
- 12 S 6 of the Act defines *related goods* as materials, components, plant or materials used in connection with construction. *Related services* are labour, architectural, design, survey, quantity survey, building, engineering decoration or landscape advisory services.
- 13 The defendant argued that the invoices were not for construction work or related goods or services but were effectively claims for damages for breach of the contract. I was referred to a number of authorities where this proposition had been dealt with. The decisions depended to a substantial degree on the provisions of the construction contract involved. Those decisions made it clear, however, that the use of the terms *damages* or *interest* are not conclusive in deciding whether a payment claim is for construction work or related goods or services for the purposes of s 13 of the Act.
- 14 Justice Hodgson in *Co-ordinated Construction Co Pty Limited v J M Hargreaves (NSW) Pty Limited* (2005) 63 NSWLR 385 said at [41] that, notwithstanding the use of those terms:

Rather, any amount that a construction contract requires to be paid as part of the total price of construction is generally, in my opinion, an amount due for that construction work, even if the contract labels it as "damages" or "interest"; while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction.

- 15 Invoices 1 and 2 claimed for additional services provided in consequence of the extension of the construction period.
- 16 The proposal for the work involved in the project was attached to the affidavit of Mr Sunter. The parties adopted the proposal as the construction contract. There was no provision in the proposal that dealt with the mechanism by which extension of time claims were to be dealt with. The proposal made it clear that the contract price was calculated on the basis that construction work was to take place over a specified period. In the absence of any provision that required Calsun to bear the risk of delays in completion of the project, I consider that it was entitled to claim the extra costs incurred.
- 17 I regard invoices 1 and 2 as progress claims falling within the definition provided in s 9(b) of the Act, namely claims calculated on the basis of the value of construction work carried out or of related goods and services supplied under the contract.
- 18 Invoices 4 – 7 claimed for modifications carried out or related services provided after the date of practical completion. It was apparent from invoices 1055-001/9, 5 and 4, attached to Mr Lovton's affidavit that expenses additional to the contract price were incurred from to time during the course of the construction work and that they were claimed in invoices and were paid. This practice represented an acknowledgment that construction work or related goods or services not included in the contract price would be paid for. I regard invoices 4 – 7 inclusive as falling within the definition provided in s 9(b) of the Act.
- 19 Invoice 3 was more problematic for Calsun. It was made up of claims for interest on overdue milestone payments and for the time of directors in dealing with what were described as *funding failures* by Lovton. The invoice also referred to lost income opportunities for Calsun resulting from the increased time and attention demanded from the directors by the project as a consequence of the difficulties encountered in funding.
- 20 The provision of assistance in securing finance or funding for a project is not included in the definition of *related goods and services* contained in s 6 of the Act. In the circumstances of this contract, claims for interest on overdue milestone payments and for loss of opportunity have characteristics of claims for damages.
- 21 I have concluded that this invoice claimed damages for breach of contract by Lovton in failing to meet its obligations to make payments to Calsun on achieving the agreed milestones. It was therefore not a valid payment claim for the purposes of s 13 of the Act.
- 22 I find that invoices 1 – 2 and 4 – 7 were valid payment claims.

Issue 2 – was the claim served in time?

- 23 Lovton asserted that, practical completion having been reached in November 2006, the payment claim served on 8 January 2008 was not served within the time limit imposed by s 13(4) of the Act. This provision requires a payment claim to be served within the later of:
- (a) *the period determined by or in accordance with the terms of the construction contract, or*
 - (b) *the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied).*
- 24 This argument cannot stand in the light of invoices 5 and 7, which indicated that construction work was undertaken and related services provided in August 2007 and March 2007 respectively.
- 25 I find that the payment claim was served within the time limit provided.

Other issues

- 26 Lovton raised a number of other issues directed at denying its obligations to pay the amounts. One such issue was whether work claimed had been done at its direction or at the direction of a third party.
- 27 These were issues that could and should have been incorporated into a payment schedule. This was not done and, in accordance with s 15(4)(b) of the Act they may not be raised in any defence or cross claim in these proceedings.

Orders

- 28 Judgment will be entered for Calsun in the sum of \$93,896.21 together with interest to be calculated and agreed.
- 29 The application filed on behalf of Lovton will be dismissed.
- 30 The proceedings are adjourned to a date to be fixed for the entry of judgment, argument in respect of costs of the applications and to deal with ongoing management of the remaining part of Calsun's claim.

J J Woodward (Plaintiff) instructed by Turnbull Hill Lawyers (Plaintiff)

D T Miller and J Chapman (Defendant) instructed by Whiteley, Ironside & Shillington (Defendant)