

**JUDGMENT** : Mason P ; Giles JA ; Santow JA : New South Wales Court of Appeal : 16<sup>th</sup> November 2005

- 1 **MASON P:** Progress claims are a common feature of construction contracts. The rights of the parties are governed by the law of contract which is found in the general law with statutory modification in particular areas.
- 2 By contrast, the rights enforced to judgment in the proceedings under appeal are free-standing statutory rights, albeit that statute allows limited incorporation of contractual provisions. The **Building and Construction Industry Security of Payment Act 1999** (the Act) provides a scheme whereby what are described as “payment claims” to “progress payments” can give rise to statutory debts unless the recipient responds timeously by payment of what is claimed or delivery of a “payment schedule”.
- 3 A single document may satisfy the contractual criteria for a progress claim while at the same time constituting a “payment claim” within the Act. But this need not be so.
- 4 The appellant and respondent were parties to a construction contract dated 17 May 2002. The respondent served two documents called “Progress Claims” (Nos 12 and 13). Neither was answered with a payment schedule. Part only of the money claimed in Progress Claim 12 was paid and none of the money claimed in Progress Claim 13 was paid.
- 5 In the circumstances, s15(2)(a)(i) and (4) of the Act entitled the respondent to recover the unpaid portions of the claimed amounts as a debt, subject to proof that the appellant had become liable under s14(4). Section 14(4) stipulates that if the recipient of a payment claim does not provide a payment schedule to the claimant within the lesser of the time required by the contract or 10 business days after service of the payment claim, the recipient “becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates”.
- 6 Section 15 spells out what may happen where the recipient both fails to provide a payment schedule and to pay the sum claimed. One consequence is the creation of a statutory debt recoverable in a court of competent jurisdiction. The relevant provisions are:  
**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  
(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:  
(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction ....  
(4) If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt:  
(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and  
(b) the respondent is not, in those proceedings, entitled:  
(i) to bring any cross-claim against the claimant, or  
(ii) to raise any defence in relation to matters arising under the construction contract.
- 7 Pursuant to these provisions the respondent to this appeal recovered judgment in the sum of \$910,847.92 as a statutory debt (including interest) (*Isis Projects Pty Ltd v Clarence Street Pty Ltd* [2004] NSWSC 714).

**Progress Claims 12 and 13**

- 8 The trial judge, McDougall J, described the respondent’s Progress Claim No 12 as consisting of:  
(1) A cover sheet showing to whom it was sent (and showing that it was “faxed 15 May 2003”) and a list of documents attached.  
(2) A 6 page document described as “Lumpsum [sic] Tax Invoice” that described the work by a number of one line items (referring, I infer, to their descriptions in some contractual document) and showing for each the original contract value, the amount of previous claims, the value of work to date and the percentage completed. The tax invoice also described, in one line items, a large number of variations. For each variation, it gave a reference (in each case prefaced by the letter “V” and, I infer, referring to a previous claim for the variation bearing that reference), a short description of the work, the amount approved, the amount previously claimed, the value of work to date and the percentage complete. The tax invoice concluded (leaving aside formal matters and signature) with a summary of its contents, concluding with a calculation of the “total now due”.  
(3) A number of supporting documents.
- 9 Progress Claim No 12 claimed \$1,702,579.34. Integrated Project Services Pty Ltd (IPS), the Superintendent of the contract, responded to it on 26 June 2003, writing to the appellant as follows: *We enclose Progress Certificate No 12 for the amount of Five Hundred and Fifty Eight Thousand, Two Hundred and Seven Dollars and Seventy Seven Cents \$558,207.77 (excluding GST), being payment to ISIS Projects Pty Ltd for works undertaken to 15th May 2003.*  
*We enclose a copy of certification no/. 12 prepared by D G Jones & Partners Pty Ltd.*

Note that Clarence Street Pty Limited will be required to pay the amount of Two Hundred and Four Thousand and Three Hundred and Sixty Dollars \$204,360.00 (excluding GST), as their payment component of this certificate.

Under the Conditions of Contract, payment for Progress Claim No 12 is required to be paid before 28th June, as agreed.

[The "agreed" date of 28 June 2003 derives from cl 42.1 of the **General conditions** of contract (see below).]

- 10 Between 26 June 2003 and 4 July 2003 various payments amounting to \$984,225.85 were made, leaving \$718,353.49 outstanding. No payment schedule under the Act was supplied.
- 11 Progress Claim No 13 claimed \$749,091.72 and purports to be a final progress claim. It differed from Progress Claim 12 in that there was no column for the amount previously claimed. The sum included \$718,353.45 outstanding under the earlier Progress Claim and new work valued at \$30,738.23. The Act permitted a claimant to include in a payment claim an amount that had been the subject of a previous claim (s13(6)). The Progress Claim was faxed on 15 July 2003 to the appellant and the Superintendent. The Superintendent responded with a "zero" progress certificate (cf Blue 411). The appellant paid nothing and failed to supply a payment schedule.
- 12 Each Progress Claim described itself as made under the Act (cf s13(2)(c)). It concluded with a Summary that computed the amount "Now Due". This portion of the Progress Claims is explained in the affidavit of Mr Suhanic (Blue 2-4, 5-6). There was no complaint that the Progress Claims had failed to indicate the amount of the progress payment claimed to be due (cf s13(2)(b)).
- 13 These two Progress Claims purported to serve the dual purpose of invoking the contractual right to make a progress claim and the statutory right to make a "payment claim".
- 14 Clause 42.1 of the **General conditions of contract** signed by the parties is the source of the contractual right.
- 15 The **General conditions** were promulgated by Standards Australia in 1992. In the present case, the parties adopted the first paragraph of cl 42.1 of the standard form and substituted their own variant for the second, third and fourth paragraphs, also adding a paragraph at the end of the clause (Blue 91-2, 159, 160).
- 16 So far as presently relevant, cl 42.1 provided (emphasis added):

**Payment claims, Certificates, Calculations and Time for Payment**

*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 7 days of receipt of a claim for payment, the Superintendent shall:*

- (a) *issue to the Principal and to the Contractor a payment certificate stating in the opinion of the Superintendent:*
- (i) *the value of the work carried out by the Contractor in the performance of the Contract at the time for a claim for payment.*
  - (ii) *any moneys due to the Contractor under any provisions of the Contract.*
  - (iii) *amounts which the Principal is entitled to deduct for retention moneys, and*
- (b) *Refer to the Principal*
- (i) *claims for breach of Contract and interest on overdue payments, and*
  - (ii) *the matter of any moneys due from the Contractor to the Principal as setoffs.*
- together with such advice in respect of (a) and (b) as the Superintendent deems appropriate.*

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

**Within 28 days from the end of the month after receipt by the Superintendent of a claim for payment from the Contractor the Principal shall pay to the Contractor the amount due to the Contractor and shall provide written particulars of how the amount due was calculated.**

*The Principal's liability is to pay the amount due ascertained in accordance with Clause 42.2. In the calculation of the amount due to the Contractor, the Principal shall be bound to accept the amounts shown on the certificate of the Superintendent in respect of (a), (i), (ii) and (iii) above except in the case of manifest error. ...*

[The reference to "Clause 42.2" in the last paragraph quoted appears to be an error for clause 42.1.]

- 17 The Annexure to the **General conditions** stated :
- |  |   |
|--|---|
| <i>Times for payment claims: (Clause 42.1)</i> | <i>Monthly on the 15th of the month or the Nearest working day after the 15th day</i> |
|--|---|
- 18 The parties agree that cl 42.1 was correctly summarised by the primary judge (at [20]) as follows:
- (1) *ISIS should make progress claims monthly on the 15th day of the month or the nearest working day thereto and upon the issue of a certificate of practical completion and (a final payment claim) within 28 days after the expiry of the defects liability period.*
  - (2) *The progress claims were to be "supported by evidence of the amount due to [ISIS] and such information as the Superintendent may reasonably require".*
  - (3) *The Superintendent was required to issue a payment certificate within 7 days of receipt of a claim for payment.*

- (4) The amount certified as due was to be paid within 28 days from the end of the month in which ISIS gave the claim to the Superintendent.
- (5) Interest accrued at "the rate stated in the Annexure and if no rate is stated the rate shall be 18% per annum; interest compounded at 6 monthly intervals". The annexure, referring to this provision, stated the rate of interest as "not applicable".
- 19 Progress Claims 12 and 13 were issued after the grant of practical completion on 14 April 2003. These proceedings were not commenced until 29 August 2003.

**Issues on appeal**

- 20 Two issues are raised on appeal. The appellant contends that:
- neither of the "Progress Claims" were "payment claims" within the Act because each failed to identify the construction work to which the claimed progress payment relates; and
  - the "due date" for the progress payments had not arisen prior to the commencement of proceedings.

**Were Progress Claims 12 and 13 valid "payment claims"?**

- 21 Part 2 of the Act (ss8-12) confers and regulates the right to recover "progress payments" under a construction contract. Each entitlement is statutory (cf s8(1)). However, the date on which it arises (referred to as the "reference date") is to be determined in accordance with the contract, with a statutory gap-filler if the contract makes no express provision with respect to the matter (s8(2)). A similar scheme identifies the amount of the progress payment (s9) and the valuation of construction work and related goods and services (s10). Section 11 defines when a progress payment becomes due and payable. This provision bears on the second issue in the appeal and will be set out later in these reasons.
- 22 Part 3 of the Act (ss13-32) addresses the procedure for recovering statutory progress payments. The key concepts are "payment claims" and "payment schedules". Claimants may refer disputes for adjudication whether or not a payment schedule is delivered. But if it is not delivered within time then, as indicated, the claimant may proceed to enforce the ensuing statutory debt.
- 23 In the present case, the defence raised by the appellant in answer to the respondent's claim to enforce the statutory debt in the Supreme Court was that Progress Claims 12 and 13 were not "payment claims" in accordance with the Act because they failed to identify the construction work to which the claimed progress payment related. Section 13(2) provides:
- 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 (the **claimed amount**), and
  - (c) must state that it is made under this Act.
- 24 McDougall J held at [34]: *Each of [the previous 11 progress claims] was, both in form and substance, the same as progress claims 12 and 13. That is to say, each of the earlier progress claims identified the work in respect of which the claim was made by single line item descriptions (including some form of reference to what I have inferred was the contractual description of the variation number as the case may be). There was no evidence to suggest that Mr Tucker, or IPS, or Clarence Street, had ever suggested that those earlier progress claims did not adequately identify the work to which they related, or that they were not capable of assessment without substantial investigation (as Mr Tucker suggested was the case for progress claim 12 and 13).*
- 25 Mr Tucker is a quantity surveyor retained by the appellant to provide cost management services in respect of the project. He swore an affidavit that was admitted subject to relevance asserting that "it was not possible for me to assess those progress claims [ie Nos 12 and 13] in the form in which they were originally submitted" (emphasis added). In each case, he said, it was necessary for him to undertake discussions with representatives of the respondent "in order to **determine exactly** what they were claiming for each period" (emphasis added). Access to the invoices of third party contractors was needed at times "to **obtain measurements to justify the amount claimed**" (emphasis added). This was because it was part of his task to identify that the work was a variation and not part of the original contract works. This evidence was not challenged in cross-examination.
- 26 The respondent relied on an affidavit of Mr Barker, a quantity surveyor retained as an independent expert. As summarized by the primary judge, his evidence, also admitted subject to relevance, stated that:
- (1) *Each of the progress claims in question was consistent with industry practice at the time of its issue and was of the style and content that he would have expected for such a project.*
  - (2) *Each of those progress claims was "well prepared in accordance with good industry practice" and contained "sufficient detail and information to identify the work for which a payment claim was made".*
  - (3) *Each of the progress claims valued the amount claimed in accordance with the terms of the contract.*
- 27 When he turned to address the first issue, the trial judge applied by analogy the reasoning of Palmer J in **Multiplex Constructions Pty Ltd v Luikens & Anor** [2003] NSWSC 1140 at [76]-[78]. Palmer J had said:
- 76 A payment claim and a payment schedule are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim. A payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves. A payment claim and a payment schedule should not, therefore, be required to be as precise and as particularised as a*

pleading in the Supreme Court. Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.

- 77 A respondent to a payment claim cannot always content itself with cryptic or vague statements in its payment schedule as to its reasons for withholding payment on the assumption that the claimant will know what issue is sought to be raised. Sometimes the issue is so straightforward or has been so expansively agitated in prior correspondence that the briefest reference in the payment schedule will suffice to identify it clearly. More often than not, however, parties to a building dispute see the issues only from their own viewpoint: they may not be equally in possession of all of the facts and they may not equally appreciate the significance of what facts are known to them. This will be so especially where, for instance, the contract is for the construction of a dwelling house and the parties are the owner and a small builder. In such cases, the parties are liable to misunderstand the issues between them unless those issues emerge with sufficient clarity from the payment schedule read in conjunction with the payment claim.
- 78 Section 14(3) of the Act, in requiring a respondent to “indicate” its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word “indicate” rather than “state”, “specify” or “set out”, conveys an impression that some want of precision and particularity is permissible as long as the essence of “the reason” for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.
- 28 To similar effect are the following remarks of Davies AJA (Handley JA and Stein JA concurring) in **Hawkins Construction (Aust) Pty Ltd v Mac’s Industrial Pipework Pty Ltd** [2002] NSWCA 136 at [20]: [Section 13] should not be approached in an unduly technical manner .... The terms used by subs (2) of s13 are well understood words of the English language. They should be given their normal and natural meaning. As the words are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner.
- 29 In this Court, the parties were agreed that these principles were generally applicable to the resolution of the first issue.
- 30 In **Multiplex**, Palmer J was considering the requirements for a valid payment schedule. The function of that document is apparent from the statutory scheme to which reference has already been made. Section 14(2) provides that the payment schedule must identify the payment claim to which it relates, and must indicate the amount of the payment (if any) that the recipient of the payment claim proposes to make. Section 14(3) requires the recipient to indicate why payment in full is withheld and the reasons for doing so. The joinder of issue thus achieved sets the parameters for the matters that may be contested if an adjudication under the Act ensues (cf s20(2A) and (2B)).
- 31 I respectfully agree with the principles stated by Palmer J in **Multiplex**. I would however point to two matters that need to be borne in mind when they are applied to a situation such as the present, ie testing the validity of a payment claim. The first is that a “payment claim” is no more than a claim. It must comply with s13, but (unlike a payment schedule) it is not its function to identify the scope of a dispute. Many claims will not be disputed, but if they are, it is a matter for the respondent to the payment claim to state the extent and reasons for failing to pay the sum withheld.
- 32 Secondly, I draw attention to the fact that Palmer J is referring (at [78] of his reasons) to s14(3), which states matters that the respondent to the payment claim “must indicate”. This is also the language of s13(2)(b). By contrast, s13(2)(a) (with which the present appeal is concerned) defines what the claimant “must identify”. It is however unnecessary in the present case to consider the difference between identification and indication.
- 33 McDougall J applied the principles in **Multiplex** when dealing with the first issue. He said:  
37 In principle, I think, the requirement in s 13(2)(a) that a payment claim must identify the construction work to which the progress payment relates is capable of being satisfied where:  
(1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;  
(2) That reference is supplemented by a single line item description of the work;  
(3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;  
(4) There is a summary that pulls all the details together and states the amount claimed.
- 38 Where payment claims in that format have been used, apparently without objection, on 11 previous occasions, it is very difficult to understand how the use of the same format on the 12th and 13th occasions could be said not to comply with the requirements of s 13(2)(a). If payments claims in that format had sufficiently identified the construction work to which the progress payment claimed related on 11 previous occasions, I find it hard to understand how they would lose that character on the 12th and 13th occasion.
- 39 Some support for this is obtained from Mr Barker’s analysis.
- 40 I do not regard Mr Tucker’s evidence as establishing the position for which Clarence Street contended. Firstly, I think, the question is to be determined objectively and not subjectively. That is why I think that, in principle, Mr Barker’s evidence of industry practice has some bearing on the issue. Secondly, and of more importance, Mr Tucker does not explain what it was about progress claims 12 and 13 that made them relevantly distinguishable

from the previous 11 progress claims in respect of which, so far as the evidence goes, there was no problem of identification of construction work.

41 Approaching the question in accordance with the instruction offered by Palmer J in *Luikens*, I think that the previous conduct of the parties (when, apparently, there was no dispute) supports the conclusion that progress claims 12 and 13 do sufficiently identify the construction work to which their respective progress payments claimed relate.

34 I agree.

35 The appellant submits that his Honour erred by failing to recognise that the object of a payment claim under the Act is to enable the recipient to provide a payment schedule under s14. The proposition is self-evident, but not very informative. On closer analysis, it is quite circular if applied to resolve the matter presently at issue.

36 According to the appellant, the focus of the inquiry should have been whether Progress Claim 12 and Progress Claim 13 provided sufficient detail of the work the subject of the claims to enable the appellant to make its own assessment of the amount payable and to prepare a payment schedule accordingly. Once again, this tends to state the problem in terms of circularity rather than offer a basis for arguing that the trial Judge erred in construing and applying s13(2)(a). It also tends to elide the distinction between the informative and the persuasive roles of a payment claim. Section 13(2) prescribes matters that must be brought to the attention of the recipient, who then has the option of paying in full or submitting a payment schedule explaining why payment is withheld. It may be expected that a claimant will be concerned to persuade the other party to accept the claim and pay promptly, but s13(2) makes no prescription in this regard.

37 The appellant places reliance upon Mr Tucker's evidence to which reference has already been made.

38 When reciting that evidence I drew emphasis to particular words used by Mr Tucker (par 25 above). There is a distinction between understanding a claim and accepting it. Section 13(2)(a) is concerned only with identification of the subject matter of the payment claim in the sense of the construction work (or related goods and services) to which it relates.

39 In my opinion, the appellant's focus upon what Mr Tucker actually did in response to Progress Claims 12 and 13 is ultimately unhelpful, and not only because of the opacity of his evidence about the nature of the particular problems that he encountered. I do not suggest that it was wrong to examine the issue from the vantage points of the parties to the particular contract, including the way the recipient would have viewed the later claims in light of the pattern of earlier ones. But the focus must remain on the objective circumstances, not the subjective intentions or perceptions of one of the parties. The Court must take its guidance from the statutory language, which is both simple and clear, in my opinion.

40 The payment claims are to be read in context, including the context of industry conventions and the usage adopted by the parties in their earlier contractual dealings. Construction work for which a claim is made may be identified by reference to earlier documents such as variation claims and other documents capable of being identified by reference to the contract or the earlier dealings of the parties. This list is not intended to be exhaustive.

41 "[T]he 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 common sense, is reasonably clear" (*Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [83], per Nicholas J, citing *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 39 ALR 565 at 571).

42 The claims in question are to be found at Blue 329 and 375 and are described by his Honour in the passage set out above. They amply satisfied the statutory requirement.

#### The timing issue

43 Before judgment may be given on a claim for the statutory debt the court must be satisfied of the existence of the circumstances referred to in s15(1) (see s15(4)(a)). One of them is that the respondent to a (valid) payment claim has failed 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" (s15(1)(b)).

44 Section 11(1) defines when a progress payment becomes due and payable:

#### **11 Due date for payment**

(1) 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 10 business days after a payment claim is made under Part 3 in relation to the payment.

45 Senior counsel for the respondent pointed out that s11 deals with the due date for payment of a "progress payment". He submitted that s11(a) had no work to do unless and until the contract purported to confer a right to receive such a statutory entitlement. "Progress payment" is defined in s4 as follows:

**progress payment** means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):

(a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or

- (b) a single or one-off payment for carrying out construction work (or for supplying goods and services) under a construction contract, or
- (c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").
- 46 Section 8 (mentioned in this definition) is the provision that confers the entitlement to a progress payment. The entitlement is statutory notwithstanding that it may take its content in a particular case from the terms of the particular construction contract, at least as regards "reference date" (cf s8), amount (cf s9) and valuation (cf s10).
- 47 These provisions enable the parties to provide for aspects of the statutory entitlement to progress payments by "the terms of the contract". In each aspect, the statute also fills any void "if the contract makes no express provision with respect to the matter" (cf ss8(2)(b), 9(b), 10(1)(b), 2(b)).
- 48 Barrett J suggested in **Quasar Constructions NSW Pty Ltd v Demtech Pty Ltd** [2004] NSWSC 116 at [18] that this use of "express provision" indicates that "terms of the contract" refers to and is confined to express terms. A wider view is open (cf **Rose v Hvrlic** (1963) 108 CLR 353 at 358), but it is unnecessary to resolve that issue in the present case. Even the wider view would require clear textual support for a necessary implication that the contract has provided an answer to the particular problem.
- 49 The right to a progress payment cannot be bargained away entirely (see s34 which precludes contracting out). This appeal does not throw up any issue about the scope of s34.
- 50 As indicated at the commencement of these reasons, a contract may confer and regulate a contractual entitlement to receive a progress payment. Clause 42.1 of the **General conditions** has this role. In **Quasar Constructions**, Barrett J held (at [21]) that just because a contract's express terms do not adopt the statutory definition of "progress payment" does not mean that the parties are forced onto the default timing and quantification regime prescribed in ss8(2)(b), 9(b) and 10(1)(b) and (2)(b). It is unnecessary to address the correctness of this view or its application to the interpretation of s11 that senior counsel for the respondent invites us to take.
- 51 However, it is a separate question whether cl 42.1 served the additional function of **expressing** a due date for payment. If such a date is expressed it is the due date for payment of the progress payment (assuming cl 42.1 has anything to do with that entitlement) (see s11(1)(a)). If cl 42.1 makes no express provision as to due date, then payment is due 10 business days after the claim was made (see s11(1)(b)).
- 52 I return to the particular dispute. The appellant submits that the respondent had no entitlement to enforce the statutory debt for the progress payments to which the Payment Claims related because it had not arisen by the time of commencement of the proceedings.
- 53 The issue involves the possible interplay between cl 42.1 of the **General conditions** and s11(1) of the Act (each set out above). The appellant's submission, in brief, is that cl 42.1 expressed a payment date but that it had not yet arrived for either Progress Claim by the time proceedings were commenced on 29 August 2003.
- 54 The appellant's argument proceeds in the following steps:
- Clause 42.1 requires claims for payment to be supported by "evidence of the amount due to the Contractor and such information that the Superintendent may reasonably require".
  - Progress Claims Nos 12 and 13 were not supported by evidence of the amount due, in essence because of the defect in identification of construction work that is the subject matter of the first ground of appeal. [It was conceded that this point fails if the first ground is rejected. The concession is noted and accepted, although it should be pointed out that cl 42.1 speaks of "evidence of the amount due" whereas s13(2)(a) speaks of "identification of the construction work to which the progress payment relates". In truth, there was never any problem concerning evidence about the amounts claimed due.]
  - Alternatively, the Progress Claims were not supported by "such information as the Superintendent may reasonably require".
  - It followed that the time for payment of the progress payment had not yet arrived because cl 42.1 on its true construction precluded it from arriving unless and until the earlier contractual requirements were complied with.
  - These contractual breaches nullified the validity of the Progress Claims both as grounds of contractual entitlement and in their statutory function as "payment claims". The due date for payment of the statutory debts never arose.
- 55 The two experts gave contradicting evidence as to the sufficiency of the information provided, not specifically with reference to the contractual setting. Neither was cross-examined, leaving the trial judge (at [54]) unable to resolve the apparent conflict between their testimony concerning the "evidence of the amount due". His Honour further held that the second sub-issue (ie whether there was such information as the Superintendent might reasonably require) was not assisted by Mr Tucker's testimony. This was because Mr Tucker was not the "Superintendent" and there was no evidence that the Superintendent, IPS, required any information in relation to either progress claim. On this basis, his Honour (at [55]) did not think that the issue arose in fact.
- 56 The trial judge continued:
- 56 *But even if it did arise in fact, it would afford no defence. That follows from the provisions of ss 14 and 15.*

57 By s 14(4), where a claimant (ie, by reference of s 13(1), a person who is or claims to be entitled to a progress payment) serves a payment claim on a respondent (ie, by reference s 14(1), the person on whom the payment claim is served) and where the respondent does not provide a payment schedule within the relevant time limit, “the respondent becomes liable to pay the claimed amount to the claimant on the due date ...”.

58 Section 15 applies, as sub s (1) makes clear, where a respondent has become liable under s 14(4) and has not paid the whole or part of the claimed amount before its due date. In those circumstances, by sub s 2(a)(i), the claimant may “recover the unpaid portion of the claimed amount from the respondent, as a debt due”.

59 Where a claimant commences proceedings under s 15(2)(a)(i) to recover the unpaid portion of the claimed amount as a debt, the respondent is not entitled, among other things, “to raise any defence in relation to matters arising under the construction contract”: s 15(4)(b)(ii).

60 In my judgment, the defence raised under issue 7 is a defence of the kind that, by s 15(4)(b)(ii), Clarence Street “is not entitled ... to raise”.

[Issue 7 had earlier been identified by his Honour as whether the Progress Claims were supported by evidence of the kind required under cl 42.1.]

57 The appellant submits that the judge erred in viewing s15(4)(b)(ii) as dispositive.

58 The appellant further submitted that the Progress Claims were not valid according to the contractual dispensation of cl 42.1. Clause 42.1 had not been complied with because of the insufficiency of the supporting evidence/information.

59 The respondent submitted that validity of a payment claim according to s13(2) is all that is required in proceedings under the Act. Thereupon s11(1) fixes the date on which the progress payment becomes due and payable as a statutory debt. That date accrued well before proceedings were commenced, either because it was expressed in cl 42.1 in effect as the 18th day of the month after receipt by the Superintendent of the Progress Claim (cf s11(1)(a)) or because it occurred 10 business days after any payment claim embodied in the Progress Claim was made (cf s11(1)(b)).

60 The appellant’s submission that invokes cl 42.1 as an additional basis for invalidating the payment claim should be rejected for several reasons.

61 First, it trespasses into the area forbidden by s15(4)(b)(ii). I agree with the trial judge in this regard.

62 Secondly, nothing in the facts suggests that any contractual pre-condition of validity was unmet. Each Progress Claim was supported by evidence of the amount due. And there was no withholding of “such information as the Superintendent may reasonably require”, because no such information had been required by the Superintendent before the Progress Claims were sent (cf *Brewarrina Shire Council v Beckhouse Civil Pty Ltd* (2003) 56 NSWLR 576 at 586[44]). Indeed, none was required afterwards either (McDougall J at [55]).

63 Thirdly, cl 42.1 did not **express a date** for payment other than 28 days from the end of the month after receipt by the Superintendent of the claim. This is so even if, which I doubt, the clause conditioned the obligation to pay upon provision of the supporting evidence of amount due and of the information that the Superintendent had reasonably required. The contractual stipulation for provision of evidence and information did not make that evidence or information part of the payment claims (*Brewarrina* at 582[20]). In the unlikely event that there was a gap in the contractual expression of a due date for making the progress payment, s11(1)(b) supplied that gap, indicating dates that had come and gone by the time proceedings in the Supreme Court were commenced.

64 The appeal should be dismissed with costs.

65 **GILES JA:** I agree with Mason P.

66 **SANTOW JA:** I agree with Mason P.

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Respondent: J Gleeson SC/ M Elliott instructed by Turtons Lawyers