JUDGMENT : HODGSON JA:

1 I agree with the orders proposed by Santow JA, and substantially with his reasons, subject to the following comments.

2 The Contractors Debts Act 1997 (NSW) make provision in ss.5-9 for the recovery of money owed by a contractor, in respect of work done or materials supplied, direct from the principal who receives the benefit of that work or materials. Those provisions are as follows:

5(1) A person (the "unpaid person") who is owed money for work carried out for or materials supplied to some other person (the "defaulting contractor") can obtain payment of that money in accordance with this Act out of money that is payable or becomes payable to the defaulting contractor by some other person (the "principal") for work or materials that the principal engaged the defaulting contractor to carry out or supply under a contract.

(2) However, the unpaid person can obtain payment from the principal under this Act only if the work carried out or materials supplied by the unpaid person are, or are part of or incidental to, the work or materials that the principal engaged the defaulting contractor to carry out or supply.

6(1) The following procedure must be followed to obtain payment of the money owed:
(a) firstly, a debt certificate must have been issued for the money owed (as provided for by section 7),
(b) secondly, the unpaid person must serve a notice of claim on the principal.

(2) A notice of claim is a notice in an approved form together with a copy of the debt certificate.

7(1) When judgment is given or entered up in any proceedings relating to the recovery of money owed to a person for work carried out or materials supplied, the court may, by order made on the application of the person in whose favour the judgment is given, issue a certificate (a "debt certificate") in respect of the debt under this section.

(2) If the debt concerned consists of daily, weekly or monthly wages, and the debt exceeds 120 days' wages, the amount certified in the debt certificate is not to exceed 120 days' wages.

(3) A debt certificate is not to be issued if the court is satisfied that the work was done on something moveable and it would be practicable for the applicant to exercise a lien by retaining the thing in the applicant's possession.

(4) A debt certificate is to be in an approved form.

(5) In this section, "judgment" includes a default judgment.

8(1) Service of a notice of claim on the principal operates to assign to the unpaid person the obligation of the principal to pay the money owed under the contract to the defaulting contractor.

(2) The assignment is limited to the amount of the unpaid person's certified debt.

(3) The assignment is subject to any prior assignment under this Act that is binding on the principal and the defaulting contractor.

9(1) After a notice of claim is served on a principal in accordance with this Part, the principal must pay the money owed to the defaulting contractor to the unpaid person.

(2) The principal must make the payments to the unpaid person as they become payable under the contract with the defaulting contractor until whichever of the following first occurs:
(a) the principal receives a discharge notice, or discharge notices, indicating that the certified debt has been fully discharged, or
(b) the payments are no longer payable under the contract.

Section 14 of that Act provides for the making of an order that prevents the principal paying money to the contractor:

14(1) If proceedings are commenced by an unpaid person against a person (the "defendant") for the recovery of a money owed to the unpaid person by the defendant for work carried out or materials supplied by the person, the court may, on the application of the unpaid person, make an order under this section (an "attachment order") against any other person from whom the unpaid person may be able to recover the debt under this Act.

(2) An application for an attachment order:
(a) may be made on the commencement of the proceedings or at any time before judgment is given in the proceedings, and
(b) may be heard in the absence of other parties, and
(c) is to be verified by oath or affirmation.

(3) The court may make an attachment order only if it is satisfied, on the basis of the application, that:
(a) the defendant owes the unpaid person money for work carried out or materials supplied by the unpaid person, and
(b) the work or materials are, or are part of or incidental to, work or materials for which the defendant is to be paid under a contract with the person against whom the order is sought.

(4) On service of a copy of the attachment order on the person against whom the order is made, any money that is payable or becomes payable to the defendant under the contract concerned, not exceeding the amount specified

in the order, is attached for the purposes of the proceedings and is to remain in the hands of the person against whom the order is made until judgment is given in the proceedings or until the court otherwise orders.

(5) An attachment order:

(a) is to be in an approved form, and

(b) is to specify the amount that is attached for the purposes of the proceedings (being the amount sued for by the unpaid person or such other amount as the court considers appropriate).

(6) An attachment order may be varied or set aside on the application of any person.

3 Having regard to the necessity for a court judgment for the purposes of ss.5-9, and to the reference to "judgment" in s.14(2)(a), there may be a question whether "proceedings" in s.14 are limited to court proceedings; but as noted by Santow JA, that point was not taken in this case.

4 Section 14(1) requires that the proceedings be by an "unpaid person", that is, in terms of s.5, "a person ...who is owed money"; but plainly, s.14 contemplates that this requirement can be fulfilled without a final determination that money is owed. Similarly, the requirement in s.14(3) that the court be satisfied that the defendant owes the unpaid person money can be fulfilled without there being a final determination to that effect. This follows from the words "on the basis of the application" in s.14(3), and from the consideration in that a final determination would support a judgment in terms of s.14(4) and s.7.

5 The question then is, what is the nature of the determination required by s.14(3)? I agree with Santow JA that it is a prima facie determination, and that, if such a determination is made in favour of an applicant, a mandatory threshold is crossed but the court still has a discretion as to what if any attachment order should be made. I agree with Santow JA that "on the basis of the application" does not mean that the court must have regard only to the verified application itself, or only to the applicant's evidence.

6 In my opinion, what is required is that the court should have regard to the evidence led on the application, considered in the way appropriate to evidence led on an application for an order to regulate matters pending a final determination of rights, that is, on a prima facie basis. What is then required is that the court be satisfied, on this prima facie basis, that some money is owed by the defendant to the applicant for work or materials and that the work or materials are, or are part of or incidental to, work or materials for which the defendant is to be paid. This statement perhaps makes the mandatory threshold a little more difficult to cross than would Santow JA's formulation, to the effect that the claim must have some real prospect of success: in my opinion, the court is required to be satisfied at least that the evidence on the application gives reasonable grounds for the findings required by s.14(3), and justifies those findings on a prima facie basis.

7 In the present case, where the claimant had a clear claim for $300,000.00 for work and/or materials, and both the contractor's opposition to this claim and the claimant's claim for a further $660,000.00 depended on hotly contested issues as to delay, I think the primary judge was in error in saying that the evidence established no more than the making of a claim, denial of liability, and a genuine dispute. In those circumstances, it is appropriate for this Court to consider whether the mandatory threshold is crossed. With some hesitation, I think the evidence on the application did support a prima facie view that the contractor owed money to the claimant, though not that it owed $300,000.00 or indeed any particular sum.

8 Turning to the question of discretion, I accept that it should be exercised having regard to the apparent purpose of the legislation; but I do not think the principles applied by equity courts in granting interlocutory injunctions are irrelevant. I think the court should have regard to the balance of convenience, in the light of the purpose of the legislation, and make such order, if any, as it considers fair to those affected. In some cases, the court can in my opinion decline to make an order unless the balance of convenience is tipped in favour of an applicant by an undertaking as to damages. I note also that s.14(5)(b) makes it clear that an attachment order need not be for the amount claimed, or even for such amount as the court may find prima facie to be owing under s.14(3).

9 In the present case, it would in my opinion plainly have been a wrong exercise of discretion to attach more than $300,000.00. And, having regard to the nature and extent of the conflicting claims and the prejudice to the contractor from attaching sums until the dispute could be determined, I do not think that the case for an exercise of discretion in favour of the claimant is such as to justify the grant of leave to appeal

10 I agree that the claimant should not now be permitted to rely on the Building and Construction Security of Payment Act 1999 (NSW). As shown by the case of Jemzone referred to by Santow JA, and also Fyntray Constructions Pty. Ltd. v. Macind Drainage & Hydraulic Services Pty. Ltd. [2000] NSWCA 238, that Act also raises difficult questions as to its construction and application. Its application depends in various ways on the true effect of the contract between the parties, which is not before us. There is good reason to think that the claim of 29 November 2001 was not a claim for a progress payment under s.8 of that Act and accordingly not a payment claim under s.13 of that Act.

11 For those reasons, I agree that the application should be dismissed.

12 **SANTOW J:**

INTRODUCTION

This is an application for leave to appeal from a decision denying statutory attachment to a subcontractor, of monies payable by the principal to the head contractor. The statute under which attachment is sought is remedial legislation, the *Contractors Debts Act* 1997 (NSW). It is designed to assist subcontractors. It is intended, according

to the Claimant, to protect the fruits of a prospective judgment against the contractor said to be in default in paying the subcontractor. But the case throws up, for (it appears) the first time, this dilemma. It is usually only the later proceedings which will determine definitively if indeed the contractor is in default in paying the subcontractor. So on what basis does the statute permit the freezing of such assets by attachment with potential adverse consequences for the contractor? If there be merely a genuine dispute as to the claimed indebtedness, is that an end to the matter as the Trial Judge concluded? Or may the Trial Judge still allow attachment and, if so, on what discretionary or other basis?

NARRATIVE OF FACTS

13 Austin Australia Pty Limited ("Austin") is the Second Opponent in this application. Austin contracted with the First Opponent, Energy Australia Pty Limited ("Energy Australia"). The contract was for Austin to construct the Central City Zone electricity sub-station in Sydney. I shall refer to this contract as "the "principal contract". Under the principal contract it was acknowledged that Austin would engage subcontractors to provide labour, materials and services as required. Accordingly, Austin engaged the Claimant, De Martin and Gasparini ("DMG"), on 5 July 2000 as subcontractor to supply labour and materials for concreting for the project (AB, 25). I shall refer to this contractual arrangement as "the subcontract".

14 Between 13 July 2000 and 22 September 2001 DMG performed work and rendered accounts to Austin for the work as required under the subcontract (AB, 25J, 118T). Austin then assessed and paid the account on the assessed figure (AB, 25M, 119C, 123R-S). In the early stages of the subcontract, there did not appear to be any significant disputes (AB, 25J-N). However at the latter stages disputes arose between the parties concerning the assessment of claims (AB, 25O). Pursuant to the subcontract, DMG served two Notices of Dispute ("Notices") on Austin, first on 25 July 2001 and then on 21 November 2001 (AB, 25P, 163-172).

15 The total amount claimed under these Notices was $960,009.05 plus GST (AB, 25R). According to the Second Opponent's Counsel, Mr Rudge, SC, interpreting the summary document before the Trial Judge (Blue, 122), this sum is derived from subtracting the amount that Austin had actually paid to DMG, from the total amount that DMG had claimed through its disputed progress claims 11 through 17 (after allowing for a credit of $937); (T, 21.25-.55). This is with the result that the $960,009.05 equalled the total of DMG's rejected progress claims that were the subject of the Notices. That can be taken to be the case.

16 DMG claimed that $300,000 of their claim related to variations that had been assessed and approved by Austin (AB, 130) but that Austin had not paid. Austin responded that this amount had been "set-off" against back charges and liquidated damages (AB, 34J-O, 60S). In written submissions Counsel for Austin stress that at no time has it conceded that this amount has been approved and is owed to DMG (Opponent's further written submissions, paras 1 and 2). "Back charges" refer to charges that are levied by the head contractor against a subcontractor for matters arising during the course of the works where the head contractor has been obliged to pay somebody else to do something which the head contractor contends was the responsibility of the subcontractor (AB, 58I-Q). This sort of charge comprises 26% of the set-off figure (see AB, 130). Liquidated damages were claimed for DMG's delay in completing its portion of works within the allotted times and comprise the remaining 74% of the set-off amount (see AB, 130).

17 Further, Austin submitted that it had a contractual entitlement to set-off because of delays and additional expense that had to be incurred because of damage from breaches of the subcontract by DMG (AB, 64Q-Y). The right of Austin to make such "set-off" is in dispute and is one of the notified grounds of dispute (AB, 165X).

18 The remaining $660,000 (out of the $960,009.05) related to claims that were submitted to Austin, but were rejected and thus were in dispute between the parties (AB, 174; Claimant's further written submissions dated 30 May 2002). The bulk of this amount claimed by DMG was in the nature of prolongation claims (AB, 56X, 36R-U). That is, claims for the additional cost of work and material incurred by reason of delay or because DMG followed Austin's instructions, which were contrary to the initial directions under the subcontract. (AB, 62X).

19 Briefly, the grounds of dispute listed in the Notices include (see AB, 164-172):

(a) Austin's rejection of some of DMG's claims for extensions of time.
(b) Austin's rejection of a claim arising from costs associated with industrial disputes, caused by Austin.
(c) Austin's rejection of claims relating to several variations.
(d) DMG disputed Austin's calculations of amounts payable relating to variations, back charges and liquidated damages and also that Austin had a right to deduct those amounts from DMG's progress claims.
(e) Austin's rejection of claims in relation to additional costs incurred by performing works pursuant to Austin's directions.
(f) Austin's rejection of DMG's claim for interest on late payment of assessed claims.
(g) DMG also claimed damages for breaches of the subcontract.

20 Resolution of these factually complex claims and counterclaims was not a task essayed by the Trial Judge. Rather she undertook, in conformity with s14(3) of the *Contractors Debts Act* 1997 ("the Act"), just a "preliminary assessment based on the limited evidence that would ordinarily be adduced on an application for an attachment order" (para [32]). That assessment led to her concluding:

"40 The upshot of all this is that the evidence establishes no more than that DMG has made a claim for payment on Austin; that Austin denies liability to pay the amount claimed; and that a genuine dispute exists (or genuine disputes exist) between the parties. Even bearing in mind the limited nature of the exercise contemplated by s14(3)(a), I am unable to be satisfied that Austin does in fact owe money to DMG."

21 By Notice of 21 November 2001, DMG had earlier referred to arbitration the disputes contained in both Notices (AB, 167D) pursuant to cl 47 of the subcontract. The Trial Judge held that the notice of an intention to appoint an arbitrator commenced the arbitration (AB, 31R-W). Without opposition from Austin, she concluded that this step, in the context of legislation clearly directed to the construction industry, satisfied one of the preconditions in s14(1) of the Act for an attachment order, namely, *"[I]f proceedings are commenced by an unpaid person ... for the recovery of money owed to the unpaid person ... for work carried out or materials supplied by the person"* (paras [20] to [29] inclusive of the judgment).

22 On 30 November 2001, DMG then applied for an attachment order under s14(1) of the Act. This was an order against Energy Australia in respect of the full amount claimed in the Notices of Dispute, being $960,009.05 (AB, 1-4). Under the principal contract Energy Australia made progress payments to Austin. The attachment order related to progress payments for the construction pursuant to the principal contract (AB, 24K, 122, 134P-U, 120H).

23 In the first instance, Bergin J granted an attachment order with the consent of Energy Australia, but without Austin having any knowledge of the application (AB, 24L). On 7 December 2001, Bergin J ordered that Austin should be joined as a party to the proceedings and continued the attachment order until 14 December 2001 (AB, 24M). When the matter was before Her Honour again, the attachment order was continued until further order (AB, 24O).

24 Under the attachment order granted by Bergin J, Energy Australia did not pay to Austin a payment due in early December 2001 in the amount of $411,733 (AB, 134Q). Austin's solicitor testified by affidavit that he believed the continuation of the attachment order would result in Energy Australia withholding a second progress payment in the amount of $178,899 (AB, 134S).

25 On 13 December 2001, a Notice of Statutory Demand under s459GE of the *Corporations Act* was served upon Austin by a third party in relation to an outstanding amount (AB, 104S, 106D). Austin commenced proceedings to have the Notice of Demand set aside on 3 January 2002 (AB, 104T), thus preventing any automatic presumption of insolvency (AB, 107L).

26 We do not have information on the status of the arbitration between the parties, nor the proceedings in relation to the Statutory Demand.

27 On 20 December 2001, Austin by Notice of Motion sought to have the attachment order discharged (AB, 24T). This application for discharge of the order was the subject of Simpson J's judgment from which this application is brought.

28 Simpson J set aside the attachment order. This was upon the basis that she was not satisfied on the basis of the application that Austin did in fact owe money to DMG when (as she was satisfied) that debt was genuinely disputed; that accordingly s14(3)(a) was not (in her view) satisfied. At para 32 of her judgment (AB, 11) she said:

> *"32 The words `on the basis of the application' in sub-s (3) are significant. They convey that a conclusion that money is owed does not amount to a final determination of the dispute between the parties, but is, rather, a preliminary assessment based on the limited evidence that would ordinarily be adduced on an application for an attachment order."*

29 Section 14(3) is in the following terms:

> *"(3) The court may make an attachment order only if it is satisfied, on the basis of the application, that:*
> *(a) the defendant owes the unpaid person money for work carried out or materials supplied by the unpaid person, and*
> *(b) the work or materials are, or are part of or incidental to, work or materials for which the defendant is to be paid under a contract with the person against whom the order is sought."*

THE ISSUES

30 This application raises, apparently for the first time, the question of the proper construction of one of the important prerequisites for, an attachment order under s14(3)(a) of the Act; what is meant by the requirement that the court, before making an attachment, must be satisfied "on the basis of the application, that the defendant [Austin] owes the unpaid person [DMG] money for work carried out or materials supplied by the unpaid person". Simpson J's answer is quoted above.

Construction of the *Contractors Debts Act* 1997 (NSW)

31 The Act was introduced as part of a broader strategy to resolve problems of security of payment of individuals such as subcontractors, labourers and suppliers involved in the building industry. The main objective of the Act is therefore "to provide a mechanism to enable persons such as ... subcontractors ... to recover debts owed to them for work carried out and materials supplied by them": see "Second Reading Speech, Contractors Debts Bill", Legislative Assembly Hansard 22 October 1997 by the Minister, the Honourable Carl Scully. Accordingly, the Act sets in place a scheme for the recovery of such monies owed, by attaching monies in turn owed by the principal to the head contractor under their contract. Earlier in the Act are other provisions assisting that objective. They are in aid of unpaid subcontractors who have taken out (ss5 to13 inclusive) a judgment debt against the head contractor. They permit a debt certificate to be issued and a notice of claim to be taken out against the principal. This latter, on service, effects an assignment of an equal amount of any indebtedness owed by the principal to the head contractor, in payment of what is owed to the subcontractor by the head contractor.

32 Under s14 of the Act the court is empowered to make an "attachment order" on the application of an unpaid person against a defaulting contractor, if proceedings have been commenced in relation to the unpaid money. The effect of the attachment order is that it freezes the money owed by the principal contractor to the defaulting contractor pending the resolution of proceedings between an unpaid person and the contractor. The objective of this provision was said to be the protection of the "fruits of any judgment in the event that the unpaid person should prove successful in the proceedings": Scully (supra). Section 33 of the *Interpretation Act* 1987 provides that in interpreting a provision of an Act, a construction that promotes the purpose underlying the Act should be preferred to a construction that would not promote the purpose.

33 However, a "freezing" order may have serious ramifications for a contractor's solvency and may be prejudicial to other creditors. There are, accordingly, certain safeguards for the protection of contractors from vexatious or frivolous applications. These limits on the rights of subcontractors include that proceedings must have been commenced for the recovery of the outstanding amount of money: s14(1). Also the court's discretion to make such order is qualified by the requirement (s14(3)) that the court must be satisfied "on the basis of the application" that the unpaid person is owed money; the extent and nature of that qualification is the focus of this present application. However, the Claimant went further. It submitted that contractors are able outside the application itself subsequently to lead evidence that "undermines completely the existence of the debt, by proving that there has been a release, or an accord and satisfaction or an unconditional and clear admission (outside the proceedings) that no debt is owing" (AB, 196, para 16.2). That is disputed.

34 As I have recounted, Simpson J held that the foundational requirement of s14, that proceedings have commenced, was satisfied in this case by DMG's notice that it intended to appoint an arbitrator in the Notice of Dispute of 21 November 2001: ***De Martin and Gasparini v Austin*** [2002] NSWSC 55 at paras 27-28. Her Honour held that the term "proceedings" encompassed arbitration and that arbitration commences upon notification of an intention to appoint an arbitrator: *De Martin and Gasparini v Austin* (supra) at para 23. This issue was not in dispute on appeal: T, 3.16-.24. The focus of contention on the application was rather what was meant by the phrase "on the basis of the application".

35 Section 14(3) provides that the court may make an attachment order if it is satisfied on the basis of the application that the defendant owes the unpaid person money for work carried out or materials supplied by the unpaid person. This suggests that the court is required to undertake a two-step process. First, the court must be satisfied "on the basis of the application" that the defendant owes the unpaid person money for work carried or materials supplied. Second, if the court is so satisfied, it then still has discretion over whether or not to make the attachment order. That discretion is apparent from use of the word "may" in s14(3).

36 The first issue identified in the application was whether the phrase, "on the basis of the application" provided both the source and limits of the evidence that the court may consider in satisfying itself whether the defendant owes the unpaid person money. DMG submitted that the phrase means that at this first stage, the court *cannot* go beyond what is contained in the application. That is, the court may only take into account the application, with the evidence filed in support, in deciding whether or not it is satisfied as to the existence of the debt (AB 195, paras 12-14). The consequence of this interpretation is that once such evidence supporting the application *prima facie* satisfies the court that money is owed, then the court's discretion to make an attachment order is "enlivened". It is only having so reached that stage that the court should consider the evidence of the opponent (AB 195.14) to determine whether or not to make an order.

37 In opposition, Austin submitted that the words "on the basis of the application" do not impose restrictions on the court at the outset looking at evidence beyond what is apparent on the face of the application. Counsel for Austin suggested that the court is entitled to look at any evidence placed before it to determine whether or not money is actually owed (AB 200.6).

38 In ***Holloway v Chairperson of the Residential Tribunal*** (2001) 51 NSWLR 716, the Court of Appeal had occasion to consider the comparable phrase "*on the face of the application"* in the context of s63(2) of the *Residential Tribunal Act* 1998. Meagher JA held that the phrase could not mean that the decision maker was obliged only to consider what was apparent on the face of the application. However, His Honour said that what the phrase actually did mean was a problem, it possibly meaning "no more than *prima facie*": ***Holloway v Chairperson of the Residential Tribunal*** (supra) at para 15. Giles JA, with Beazley JA agreeing, reached a firm conclusion on the phrase. Giles JA (at 51) held that the words were: *"a threshold requirement... so that an application which on its face is hopeless need not be further investigated and can be refused without troubling the other parties...But if the threshold is passed the Chairperson may, and in many cases will have to, go beyond what is apparent on the face of the application."*

39 However, to distinguish *Holloway*, it might be said that those grounds upon which a person might suffer a substantial injustice, and thus qualify for a re-hearing under the *Residential Tribunal Act*, would necessarily require the chairperson to consider material outside the application. Thus, for example, that the decision was not "fair and equitable" would not ordinarily be apparent on the face of the application, though a hopeless case for such a claim may, exceptionally, be so apparent. So unless the statute permitted the Tribunal to look behind the application, it would deny a re-hearing in the face of injustice so demonstrated.

40 The *Residential Tribunal Act* prohibits the chairperson granting the application "*unless* on the face of the application it appears ... that the applicant may have suffered a substantial injustice". [emphasis added]. Once that precondition is satisfied, no further discretion remains to be exercised. Whereas, under s14 of the Act there is a further discretion still to be exercised following satisfaction of the prerequisites under s14(3). That further

discretion (to deny attachment) ameliorates the hardship of an attachment otherwise following automatically, based on the application alone with its immediate supporting evidence. However, if the "unpaid person" succeeds at this initial stage, then the onus in an evidentiary sense will be upon the defendant to dissuade the court from exercising its resultant discretion.

41 The import of s63(2) of the *Residential Tribunal Act* depends crucially on earlier context (the delineation of substantial injustice). This is to escape these fairly precise words "*on the face of the application"* otherwise making what appears on its face the *sole* basis for establishing substantial injustice. If anything, the broader language of s14(2) of the Act using the words "on the basis of", is even more amenable to the ***Holloway*** interpretation in permitting the Court at the second discretionary stage to look beyond the application. Employing the ***Holloway*** reasoning, that comports with the first stage being to filter out the obviously hopeless application. If it however proceeds through that initial filter, then attachment is *prima facie* available; but it is still capable of being thereafter denied on discretionary grounds.

42 At appeal Austin sought to also draw an analogy between the phrase "on the face of the application" and "***on the face of the award***" (Second Opponent's Supplementary Summary Argument of 21 May 2002, para 6). In ***Promenade Investments v State of New South Wales*** (1992) 26 NSWLR 203, the court held that the phrase "***on the face of the award***" did not require that a judge make his or her decision based solely on the award. Rather, the court suggested that adversarial argument was required to assist the court in its assessment. Counsel for Austin sought to take this reasoning one step further. He submitted that the concept of adversarial argument and submissions from the parties also extends to allowing a party to adduce evidence in support of such adversarial argument (Second Opponent's Supplementary Summary Argument of 21 May 2002, para 7). This was in support of the Claimant's submission that the court is entitled to consider evidence of the opponent in determining whether a debt is owed. However, that analogy does not take matters further.

Summing up

43 The correct construction of s14(3) of the Act is that there are essentially two stages in order for the court to make an attachment. The first is for the court to be satisfied, at a mandatory threshold, that solely on the basis of the application and the evidence adduced in its support, the claim is not hopeless on its face; that, at the least, the claim is not bound to fail but has some real prospect of success, but based solely on the application and its supporting evidence. The claim is that the defendant owes the subcontractor ("unpaid person") for work carried out or materials supplied by the subcontractor to the defendant; that is, in terms of subparagraphs (a) and (b) of s14(3). (The expression ***"unpaid person"*** is to be read as the putatively unpaid person, else otherwise it would, as defined, beg the question.) If, however, the application fails at this threshold level so to satisfy the court, it must be rejected. Then the second, discretionary stage is never reached.

44 Satisfying that minimum threshold does not however pre-empt the second discretionary consideration nor render an order inevitable, though it provides an initial basis for that result, if that is so concluded. In particular the court then in exercising its discretion considers such matters as bear upon discretion such as whether, having regard to the objective of the Act, there is any basis for not making such attachment order and if to be made, then in what amount; see s14(5). The basis for a genuine dispute may emerge. That factor, with other discretionary factors, must be weighed up; it is not necessarily fatal, though it may be. Section 14(5) provides for attachment to be "*the amount sued for by the unpaid person* ***or such other amount as the court considers appropriate***" [emphasis added]. It is at this second discretionary stage that the party opposing attachment needs to advance any further matters in opposition, as for example that there is substantial doubt that the money is owed, or that there is a likely set-off. But that further stage necessarily falls short of essaying a final determination of these matters.

45 That second stage *may* see the Court conclude that there is such doubt surrounding the claimed indebtedness, that no order should be made at all, or else a lesser order in terms of amount than that sought. But merely to conclude that a genuine dispute exists, does not of itself foreclose the possibility of an order. The Court must look at the circumstances, but, importantly, without ultimately determining the dispute, to decide if such a freeze order is justified. This must be a genuine exercise of the discretion reposed on the Court, based necessarily on a picture ordinarily incomplete at that interlocutory stage.

The Present Case and the Competing Contentions

46 At first instance, Simpson J drew a firm distinction between money claimed and money owed. This distinction was crucial to her judgment. Her Honour concluded that all the evidence established was that DMG had made a claim for money, Austin had disputed its liability and that a genuine dispute existed between the parties so precluding attachment (AB, 35U-V). The Claimant submitted that Simpson J's reasoning on this point, if correct, "effectively renders the remedy of an attachment order useless" (AB, 200Y). It submits that the only cases where an application for an attachment order would be successful, on her Honour's reasoning would be cases that are appropriate for default or summary judgment (AB 201C). In support, the objective of the legislation is invoked from the Minister's Second Reading Speech. It is to "protect the fruits of any judgment in the event that the unpaid person should prove successful in those proceedings". That objective clearly accommodates attachment for contested cases awaiting judgment to resolve real disputes about the existence of the debt (AB 197C). I would accept that reasoning, subject to the caveat which follows.

47 In oral submissions, the Claimant contended that all that is required by s14(3) to attain the relevant satisfaction that "*the defendant owes the unpaid person ... "* is that
(i) the application establishes that proceedings have been commenced, and

(ii) there is some verification that money is unpaid for work carried out or material supplied in the material supporting the application (T, 7.2-.8).

However, that submission would go too far, if it suggests that there is then no room for any discretion to deny attachment, or limit it. There clearly is, and one version of the Claimant's argument appears to concede this.

48 The Opponent sought to contend that the Court should not, in exercising its discretion, be required to engage in what it describes as so artificial a process of reasoning. The Claimant submitted that on the one hand to assess whether a debt is owing, the Court may only have regard to what is apparent on the face of the application. Yet, on the other hand, the Appellant's written submissions suggest that one form of protection of an opponent is that it may at the discretionary stage adduce evidence that undermines the debt completely (AB, 196, para 16.2). The logical consequence of these propositions, says the Opponent, is that the Court can only consider the evidence that no debt exists at the second stage, when the Court's discretion has been enlivened. Thus it is said the Court may end up in the seemingly illogical position of finding at the first stage that a debt exists, but at the second, discretionary, stage that no debt exists.

49 The short answer lies in the reasoning set out under "summing up" above. The effect of "considering" only the application and its then supporting evidence at the threshold stage, is that, *ex facie*, the claim is either eliminated as hopeless, or proceeds to the second discretionary stage, judged as not bound to fail but having some real prospect of success. That leaves the party resisting attachment then to advance such matters as bear against the appropriateness of an attachment order at the second discretionary stage with the subcontractor having the opportunity to respond.

50 It may well emerge, not only that there is a genuine dispute as to what is owing, but that, from a necessarily limited examination of that dispute, the discretionary considerations point against the attachment sought, though possibly justifying a lesser amount in terms of s14(5). That there is a genuine dispute may be fatal, but that is not inevitably so. In construction contracts, the contractual position will on closer analysis often be complex and replete with genuine disputes. Yet it may still allow the Court to conclude, having regard to the objective of the Act and all the circumstances, including prejudice to other creditors and any possible insolvency from withholding payment, that some attachment is nonetheless justified. On the other hand, these factors, including substantial unfairness sufficiently established, may ultimately point against any attachment. There is no illogical position in finding the (relatively modest) stage 1 threshold passed. Then, at the discretionary stage it can be determined whether in light of further evidence (though falling short of a final determination) and after considering any other relevant factors this indebtedness is too doubtful, or outweighed by likely set-offs, or otherwise taking any other relevant factors into account, not such as to justify attachment. That still leaves, if contested, the existence or otherwise of the claimed debt for final determination at trial, or in arbitration.

51 Simpson J, in dismissing the application for attachment on merely being satisfied there was a genuine dispute, without then considering discretionary factors for or against attachment, did disclose appealable error. The question then to be considered is whether that error would have altered the result when discretionary factors are taken into account.

DISCRETION

Discretionary factors in the Present Case

52 At the application for leave to appeal DMG introduced a new facet to its argument, one which had not been put before Simpson J. It submitted that the amount claimed was a statutory debt pursuant to ss13 to 14 of the *Building and Construction Industry Security of Payment Act* 1999 ("*Building and Construction Act*"). These sections provide in effect that if a "payment claim" is submitted under the *Building and Construction Act* and there is no response within the designated time by way of a "payment schedule", then the claimant can claim the amount through the courts as a statutory debt. DMG submitted that a statutory debt would satisfy the "money owing" criterion for the making of an attachment order. Austin submitted, with some justification, that leave should not be given with respect to this new contention raised only on appeal and not foreshadowed (Second Opponent's Supplementary Summary of Argument, para 12).

53 Section 15 of the *Building and Construction Act* provides a mechanism for allowing a claimant to recover the full amount of a "progress payment claim" if there has been no response to the claim. It provides, if a claimant serves upon the other party (Opponent) a payment claim in compliance with s13(2) and the Opponent fails to either pay the claim or reply to the payment claim by issuing a payment schedule in compliance with s14, that the claimant may recover the amount due as a debt in a court of competent jurisdiction.

54 DMG submitted that the statutory requirements of s13 had been satisfied as it presented Austin with payment claims under the *Building and Construction Act*. This in turn gave DMG an entitlement to receive payment schedules within 10 days after service, if the full amount claimed was not to be paid. Because Austin did not pay or submit a payment schedule within the prescribed time, DMG submitted that this failure then entitled DMG to recover the amount as a statutory debt (AB, 205 para 18).

55 In reply Austin argued that, because the amount claimed in the application was an amalgam of claims previously submitted and rejected, the provisions of the *Building and Construction Act* do not apply. Thus Austin argued that, in effect the amount sought was in the form of an account rendered (T, 21.54-.60 and 22.1-.11) and not a progress payment claim as required under the *Building and Construction Act*. It pressed that it could not be the case that the same claim could be simply repeated with the legislation deeming the claim to be a statutory debt.

56 Ultimately the resolution of this issue turns upon the contractual position itself. That, as I have shown, is one of considerable complexity. The term "progress payments" is not fully articulated in the *Building and Construction Act*. Austin J recently considered that term in *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42. He considered that the definition of progress payment under the *Building and Construction Act* was "unhelpful". Austin J held in that case that the meaning of the term was rather to be derived from the specific contract in question. The *Building and Construction Act* was seen as making "*default provisions to fill in contractual gaps*". He concluded (at [37] that *"if the Act was intended to apply in the case of final payment on practical completion, it would have been a simple matter for the drafter ... to refer to the entitlement to receive all payments due ... rather than only `**specified progress payments**'."*

57 I agree with that conclusion. The case for leave to add this ground is therefore not assisted by the fact that if it were allowed, it would require more detailed consideration of that complex contractual situation than is feasible at this interlocutory stage or on appeal. I would not grant the leave required to explore it further.

CONCLUSION

58 Taking into account the complexity of the contractual situation, with counter-claims, set-offs and other grounds of dispute not capable of ready resolution, I would not disturb the outcome at first instance, in concluding that the case for attachment has not been made out. I would accept, in reaching that conclusion that there is no firm evidence that Austin is insolvent, beyond there being a disputed statutory demand about which no firm conclusion can be reached; judgment paras [50] to [52].

59 Simpson J in her judgment did deal generally with these factors. But she did so, as relevant to whether DMG had established "to the requisite degree" that the money was owing (judgment para [49], and earlier paras [30] to [41]). I consider that the initial threshold for attachment was passed, so as to enliven the discretion. The existence of that discretion and the need for its exercise should at that point have been recognised. But then, when the cited factors against indebtedness are instead considered as matters going to discretion, I conclude that they sufficiently strongly point against attachment. That leads to its denial, as a matter of discretion leading to the same result as the Trial Judge though on a different basis of reasoning.

60 One needs to find the correct balance between a subcontractor's legitimate concern to secure a future judgment and the contractor's concern to be protected against weak subcontractor claims. The Trial Judge's assessment of discretionary factors is to be respected in the absence of appealable error affecting that exercise of discretion. The conclusion reached is often one of impression, on which views may legitimately differ. There is no reason to substitute a different discretionary determination of the appeal court where appealable error does not vitiate that exercise of discretion.

ORDERS

61 I propose the following orders:

(1) Application for leave to appeal dismissed with costs.

(2) Stay of Simpson J's order of 15 February 2002 discharged.

Noted that the discharge of the attachment order has been stayed pending the determination of this application.

62 **PEARLMAN AJA:** I have had the opportunity of reading in draft the judgments of Hodgson JA and Santow JA. I agree with the reasoning of Santow JA and the orders which he proposes.

C Gee, QC/ A J Abadee (Claimant) instructed by Minter Ellison (Claimant)
submitting appearance (First Respondent) instructed by Energy Australia (First Respondent)
M Rudge, SC/ S Kerr (Second Respondent) instructed by Colin Biggers & Paisley (Second Respondent)