

JUDGMENT : Handley JA ; Hodgson JA ; Hunt AJA . Court of Appeal, Supreme Court of New South Wales.
19th September 2006

Judgment HANDLEY JA:

1 I agree with Hunt AJA, and subject thereto I agree with Hodgson JA.

Judgment HODGSON JA:

- 2 On 10 August 2005, Nielson DCJ commenced hearing proceedings in which the claimant, Falgat, sought judgment against the opponent, Equity, on a cause of action based on ss.14 and 15 of the Building and Construction Industry Security of Payment Act 1999 (the Act). The proceedings were defended by Equity, primarily on the basis of a denial that it had not provided a payment schedule as required by s.14 of the Act. The proceedings were part heard on that day, and then stood over to 12 September 2005, and they then continued until 15 September 2005.
- 3 On 14 September 2005, the fourth day of the hearing, Falgat sought leave to amend its pleadings to allege that Equity was estopped from claiming that the payment schedule was delivered to Falgat on 22 October 2004. The primary judge refused leave to amend.
- 4 On 15 September 2005, the primary judge found that Equity's defence was made out, and gave a verdict and judgement for Equity, and ordered Falgat to pay Equity's costs of the proceedings.
- 5 Falgat has put on a summons for leave to appeal from the primary judge's decisions on 14 and 15 September 2005; and the matter has been heard on the basis that, if leave is granted, the appeal will be disposed of without further argument.
- 6 In fact, since this claim was for well over \$100,000, Falgat had an appeal as of right from the decision of 15 September 2005; and to the extent that the interlocutory decision of 14 September 2005 was material to that decision, a challenge to that interlocutory decision could be included in the appeal as of right: *Gerlach v Clifton Bricks Pty. Ltd* (2002) 209 CLR 478. Accordingly, Falgat should have brought an appeal, not an application for leave. In order to regularise the situation, the Court granted leave to appeal and ordered a Notice of Appeal to be filed within 7 days.

HISTORY

- 7 In order to understand the issues, it is appropriate to set out some history of dealings between the parties.
- 8 Equity owns property at Bronte. It entered into a construction contract dated 9 May 2003 with Falgat for Falgat to convert a building on the property into two town houses. Falgat did construction work on the site until about 5 December 2003.
- 9 On 8 April 2004, Falgat commenced proceedings in the District Court against Equity and a director of Equity, Mr. Hosken, claiming amounts said to be due by reason of building work carried out by Falgat on the property. On 2 July 2004, Hughes DCJ stayed those proceedings until Falgat provided security for costs in the sum of \$50,000. Falgat applied for leave to appeal from that decision but did not proceed with it, and it was dismissed with costs.
- 10 On 13 October 2004, Falgat served on Equity a payment claim under the Act dated 1 October 2004, claiming \$232,114.30 in respect of building work on Equity's property, this substantially overlapping the amount claimed in the District Court proceedings.
- 11 It is common ground that s.14(4) of the Act required that Equity provide a payment schedule to Falgat on or before 27 October 2004. Equity prepared a payment schedule dated 21 October 2004. Before the primary judge, Equity claimed that it had provided this payment schedule to Falgat by delivery on 22 October 2004, and by post on or before 27 October 2004; while Falgat claimed it was not provided until 28 October 2004, one day too late.
- 12 On 9 November 2004, Falgat made an adjudication application under s.17 of the Act to the Master Builders Association of NSW Pty. Ltd. In this application, it gave the date of service of the payment claim as 13 October 2004 and date of receipt of the payment schedule as 28 October 2004.
- 13 On 15 November 2004, Equity applied by way of Notice of Motion in the District Court proceedings for an injunction against Falgat proceeding with the adjudication application. This application was supported by an affidavit by Mr. Hosken dated 12 November 2004, which asserted among other things that Equity "on 27 October 2004 served a payment schedule upon" Falgat, and annexed the payment Schedule dated 21 October 2004. This assertion was repeated by Equity's Counsel to Naughton DCJ on 25 November 2004.
- 14 On 26 November 2004, Naughton DCJ granted an injunction against Falgat proceeding with the adjudication application pending final determination of the District Court proceedings, on four grounds:
(1) Falgat's statutory claim was vexatious and oppressive.
(2) The statutory adjudication would frustrate the District Court's task.
(3) Falgat had elected to submit to the District Court's jurisdiction.
(4) Statutory proceedings should be commenced before court proceedings are commenced.
- 15 Falgat applied for leave to appeal from that decision; and on 3 March 2005, the Court of Appeal allowed Falgat's appeal, dissolved the injunction, ordered that Equity's application for injunction be dismissed with costs, and ordered Equity to pay Falgat's costs of the appeal. The Court of Appeal rejected each of the four grounds

relied on by the primary judge. In the course of the decision, Handley JA (with whom both other judges agreed) stated:

[4] *The parties have taken the necessary steps to prosecute or defend this claim up to the s 19 stage. The nominating authority has referred the builder's adjudication application to an adjudicator who has not yet accepted the appointment. It was common ground that the statutory proceedings remain on foot and could be validly continued should this Court dissolve the injunction granted by the primary judge.*

- 16 On 8 March 2005, the proposed adjudicator, Mr. Finnane, sent a facsimile to Falgat and Equity, care of their respective solicitors, noting that Falgat stated in the adjournment application that the payment schedule was served on 28 October 2004, and that this was one day late, so that the current adjudication application was not valid. Mr. Finnane also noted that he had received a facsimile from Equity's solicitors stating that the payment schedule was sent by courier and express mail on 22 October 2004; and that if service had been effected on 22 October 2004, the adjudication application was too late. On either basis, Mr. Finnane asserted, the adjudication application was not valid and he had no jurisdiction.
- 17 On 9 March 2005, Falgat's solicitor sent a facsimile to Mr. Finnane alleging that Falgat had received only one payment schedule which it had collected from its post box on 28 October 2004, but stating that Falgat was prepared to accept that the payment schedule was provided on 27 October 2004. On the same day, Equity's solicitor's sent a facsimile to Mr. Finnane contending that service had been effected on 22 October 2004, and that if that was not accepted, Falgat's position was that service was effected on 28 October 2004; and that in either event, the adjudication application was invalid. Later again the same day, Falgat's solicitor's sent a facsimile to Mr. Finnane, stating among other things that Equity had confirmed to the Court of Appeal that, on removal of the injunction, the application could be adjudicated, so Equity was estopped from alleging otherwise; and also making other submissions.
- 18 On 10 March 2005, Mr. Finnane sent a facsimile to Falgat and Equity stating that he considered the adjudication application was not valid and that he would return the adjudication application to the Master Builders Association.
- 19 On 14 March 2005, Falgat's solicitors wrote to Equity's solicitors claiming that the payment schedule was not provided in time, and demanding \$232,114.30 plus interest. Equity did not pay this amount, and these proceedings were commenced on 2 May 2005.
- 20 The hearing before the primary judge concerned primarily evidence as to the service of the payment schedule; and the primary judge found that the payment schedule was provided on 22 October 2004 by delivery to Falgat's registered office and also provided by post on 25 or 27 October 2004. On that basis, the primary judge found against Falgat.
- 21 In its application on the fourth day of the hearing, Falgat alleged estoppel arising from assertions by Equity that the payment schedule was served on 27 October 2004, inter alia in Mr. Hosken's affidavit filed in support of Equity's application for injunction. Falgat's application was refused by the primary judge on the grounds that the detriment relied on was slight, and did not outweigh prejudice to Equity arising from the lateness of the application.
- 22 Falgat claims that the primary judge erred both in refusing the amendment and as to his decision as to when the payment schedule was provided.

STATUTORY PROVISIONS

- 23 This application requires consideration of a number of statutory provisions.
- 24 First, ss.13, 14, 15, 17 and 31 of the Act:

13 Payment claims

- (1) *A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.*
- (2) *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.*
- (3) *The claimed amount may include any amount:*
 - (a) *that the respondent is liable to pay the claimant under section 27 (2A), or*
 - (b) *that is held under the construction contract by the respondent and that the claimant claims is due for release.*
- (4) *A payment claim may be served only within:*
 - (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), whichever is the later.*
- (5) *A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.*

- (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

14 Payment schedules

- (1) A person on whom a payment claim is served (the respondent) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule:
- (a) must identify the payment claim to which it relates, and
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If:
- (a) a claimant serves a payment claim on a respondent, and
 - (b) the respondent does not provide a payment schedule to the claimant:
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served, whichever time expires earlier,
- the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

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, or
 - (ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and
 - (b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (3) A notice referred to in subsection (2) (b) must state that it is made under this Act.
- (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.

17 Adjudication applications

- (1) A claimant may apply for adjudication of a payment claim (an adjudication application) if:
- (a) the respondent provides a payment schedule under Division 1 but:
 - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or
 - (ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or
 - (b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.
- (2) An adjudication application to which subsection (1) (b) applies cannot be made unless:
- (a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
 - (b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.
- (3) An adjudication application:
- (a) must be in writing, and
 - (b) must be made to an authorised nominating authority chosen by the claimant, and
 - (c) in the case of an application under subsection (1)(a)(i) - must be made within 10 business days after the claimant receives the payment schedule, and
 - (d) in the case of an application under subsection (1)(a)(ii) - must be made within 20 business days after the due date for payment, and
 - (e) in the case of an application under subsection (1) (b)—must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and
 - (f) must identify the payment claim and the payment schedule (if any) to which it relates, and

- (g) *must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and*
- (h) *may contain such submissions relevant to the application as the claimant chooses to include.*
- (4) *The amount of any such application fee must not exceed the amount (if any) determined by the Minister.*
- (5) *A copy of an adjudication application must be served on the respondent concerned.*
- (6) *It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.*

31 Service of notices

- (1) *Any notice that by or under this Act is authorised or required to be served on a person may be served on the person:*
 - (a) *by delivering it to the person personally, or*
 - (b) *by lodging it during normal office hours at the person's ordinary place of business, or*
 - (c) *by sending it by post or facsimile addressed to the person's ordinary place of business, or*
 - (d) *in such other manner as may be prescribed by the regulations for the purposes of this section, or*
 - (e) *in such other manner as may be provided under the construction contract concerned.*
- (2) *Service of a notice that is sent to a person's ordinary place of business, as referred to in subsection (1) (c), is taken to have been effected when the notice is received at that place.*
- (3) *The provisions of this section are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of notices.*

25 Next, s.109X(1) and (7) of the Corporations Act 2001 (Cth):

109X Service of documents

- (1) *For the purposes of any law, a document may be served on a company by:*
 - (a) *leaving it at, or posting it to, the company's registered office; or*
 - (b) *delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or*
if a liquidator of the company has been appointed—leaving it at, or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or
if an administrator of the company has been appointed—leaving it at, or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC. ...
- (7) *This section applies to provisions of a law dealing with service whether it uses the expression "serve" or uses any other similar expression such as "give" or "send".*

26 Next, s.29 of the Acts Interpretation Act 1901 (Cth):

29 Meaning of service by post

- (1) *Where an Act authorizes or requires any document to be served by post, whether the expression "serve" or the expression "give" or "send" or any other expression is used, then unless the contrary intention appears the service shall be deemed to be effected by properly addressing prepaying and posting the document as a letter, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.*
- (2) *This section does not affect the operation of section 160 of the Evidence Act 1995.*

27 Finally, section 160 of the Evidence Act 1995 (NSW):

160 Postal articles

- (1) *It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth working day after having been posted.*
- (2) *This section does not apply if:*
 - (a) *the proceeding relates to a contract, and*
 - (b) *all the parties to the proceeding are parties to the contract, and*
 - (c) *subsection (1) is inconsistent with a term of the contract.*
- (3) *In this section:*
working day means a day that is not:
 - (a) *a Saturday or a Sunday, or*
 - (b) *a public holiday or a bank holiday in the place to which the postal article was addressed.*

FINDINGS AS TO PROVISION OF THE PAYMENT SCHEDULE

- 28 The primary judge made the following factual findings, which are not challenged.
- 29 At all material times, Falgat's registered office was 12 Withers Street Chiswick, a house which up to August 2004 was the home of the Gattellaro family, the persons concerned in Falgat. In August 2004, the Gattellaro family left that home to reside at Kellyville, but the home was maintained as the place of business and registered office of Falgat until December 2004. The address, 12 Withers Street Chiswick, was shown as Falgat's address on all relevant documents, including the construction contract and the payment claim. However, when the family left in August 2004, they caused mail to Falgat to be redirected to PO Box 708 Kellyville NSW 2155. Equity was not told that this had been done.

30 Clause 29 of the contract provided as follows:

29. Service of Notices

A notice (and other documents) will be deemed to have been given, received or served:-

- (a) if addressed or delivered to the other party at the relevant address in the Contract or the address last communicated in writing to the person giving the notice; and*
- (b) On the earliest date of:-*
 - (i) actual receipt*
 - (ii) confirmation of correct transmission or fax; or*
 - (iii) 3 days after posting.*

31 The payment schedule was placed by a courier under the glass door at the front of this property at 4:22pm on Friday 22 October 2004; and the courier also left a card advising of the delivery in the mail box at the premises.

32 The payment schedule was also posted on 22 October 2004 by express post from Edgecliff 2027 to Falgat's address at Chiswick 2046. Express post guaranteed delivery next day in respect of post codes between 2000 and 2249. This postage was redirected to Kellyville and scanned as having been received at Baulkham Hills distribution centre at 4:54am on 27 October 2004. This payment schedule was collected by a member of the Gattellaro family on 28 October 2004. The box had been checked on 27 October 2004, but the evidence did not disclose at what time it was checked; and the judge was not satisfied that the payment schedule was not placed in the box on 27 October 2004.

ESTOPPEL

33 The essence of Falgat's claim is that, if Equity had on or about 15 November 2004 asserted that it had served the payment schedule on 22 October 2004, Falgat would have appreciated that its adjudication application might have been too late and would have served another payment claim before 5 December 2004, this being 12 months after completion of the work done by Falgat; and also would not have incurred costs in maintaining the adjudication application.

34 The primary judge refused Falgat's application to amend to raise estoppel on the following grounds:

- (1) The application was made on the fourth day of the hearing, after evidence had been completed (with Equity's director Mr. Hosken not being required for cross-examination), after the address of Equity's counsel, and after three and a half hours of address by Falgat's counsel.*
- (2) Falgat's case on detriment was "exceedingly slight," in that*
 - (a) Section 13 of the Act would not have permitted service of another payment claim, claiming the same amount, prior to 5 December 2004, and*
 - (b) there was no indication that substantial costs had been incurred and no evidence to prove costs was then available.*
- (3) Any detriment did not outweigh prejudice to Equity from the late application and further wasting of time.*

Submissions

35 Ms. Culkoff for Falgat submitted that the primary judge was in error in holding that Falgat's case on detriment was exceedingly slight, and submitted that there was no substantial prejudice to Equity because no further evidence was necessary. In particular, she submitted that the primary judge erred in holding that s.13 of the Act would not have permitted the service of another payment claim prior to 5 December 2004.

Decision

36 In my opinion the primary judge was in error in relation to s.13 of the Act. I adhere to the view I expressed in *Brodyn Pty. Limited v. Davenport* [2004] NSWCA 394, (2004) 61 NSWLR 421, at [62]-[66], to the effect that after cessation of work there continue to be reference dates in respect of which successive payment claims can be made, up to the twelve month limit under s.13(4)(b), and that s.13(6) permits successive payment claims to be for the same work. Mr. Rudge SC for Equity did not seek to submit to the contrary, and accepted that there was a reference date at about the end of November 2004 in respect of which a further payment claim, claiming the same amount, could have been served.

37 However, for other reasons I consider that Falgat's estoppel case was very weak, so that the primary judge's error in this respect did not vitiate his decision.

38 In the first place, the representation relied on was an assertion in Mr. Hosken's affidavit of 12 November 2004 that the payment schedule had been served on 27 October 2004, a representation repeated by Equity's Counsel at the hearing before Naughton DCJ on 25 November 2004. However, this did not amount to an express representation that the payment schedule was not also served on a previous occasion; and there was no evidence of circumstances which would support a conclusion that there was an implied representation to that effect, and no evidence that anyone on behalf of Falgat understood such an implied representation to have been made.

39 It appears that both Falgat and Equity assumed at around this time that there were no breaches of time limits which could invalidate the adjudication application; but that does not amount to a representation by Equity to Falgat that there was no earlier service of the payment schedule, at least in the absence of evidence of understanding that an earlier service would have invalidated the application. The assumption could possibly support an estoppel by convention to the effect that the adjudication application was not invalidated by any

breach of time limits; but Falгат is not seeking to rely on an estoppel to that effect, but rather to rely on an estoppel which would have the effect of establishing a breach of time limits which neither party at that time adverted to.

- 40 Falгат also sought to rely on representations by Equity's Counsel to the Court of Appeal to the effect that the adjudication application would continue if the injunction was discharged, which was reflected in the passage of Handley JA referred to in par.[14] above. However, this occurred after 5 December 2004, the last date for service of a fresh payment claim.
- 41 It appears that orders made by the Court of Appeal in favour of Falгат, dissolving an injunction and granting costs in its favour, were based on the common ground that the adjudication could be validly continued; and it may be that, although the decision was interlocutory in form, it was final in substance, so as to support an issue estoppel to this effect: *Inasmuch Community Inc. v. Bright* [2006] NSWCA 99 at [60]-[65]. However, Falгат did not seek to rely on any estoppel of this kind.
- 42 The second main reason why I regard Falгат's case in estoppel as very weak is the absence of evidence supporting detrimental reliance. Although evidence of what someone would have done in the past in different circumstances is hypothetical, such evidence is received and should normally be given; and in this particular case, having regard to the difficulty and complexity of the legislation, there was I think a need for someone on behalf of Falгат to give evidence to the effect that he or she appreciated at the time that, if the payment schedule had been received on 22 October 2004, the adjudication application would have been too late; and that, had there not been a representation that no payment schedule was served earlier than 27 October 2004 (or at least, if he or she had been aware of an allegation that a payment schedule was served on 22 October 2004), he or she would, notwithstanding that Falгат's instructions were that no payment schedule was received prior to 28 October 2004, have taken the precaution of serving another payment schedule prior to 5 December 2004.
- 43 During oral argument, I expressed the view that Falгат faced the further difficulty that, on its own assertion that the payment schedule was received on 28 October 2004, the adjudication application was invalid. That was a view expressed by Mr. Finnane as one of his reasons for refusing to go ahead with the adjudication application.
- 44 On further reflection, I am not certain that this is correct. Where a respondent does not provide a payment schedule within the time limited by s.14(4) of the Act, s.15(2) states that a claimant may make an adjudication application under s.17(1)(b); but s.15(2) does not explicitly exclude the possibility of an adjudication application being made under s.17(1)(a). Under s.17(1)(a), a claimant may make an adjudication application if the respondent provides "a payment schedule under this Division" and if other requirements are met; but s.17(1)(a) does not require that the payment schedule was provided within time. If a payment schedule is provided in circumstances where there is doubt as to whether or not it is provided in time, I am inclined to the view that a claimant may be able to make an application pursuant to s.17(1)(a): it would not make sense for s.17(1)(b) and s.17(2) to apply in those circumstances, because these provisions are plainly directed to giving the respondent a further opportunity to provide a payment schedule that has not yet been provided.
- 45 If that analysis is correct, Mr. Finnane was in error in refusing to proceed. If the payment schedule was received for the first time on 28 October 2004, an application could have been made under s.17(1)(a). Any dispute as to whether the payment schedule was also received on 22 October 2004 could have been determined by the adjudicator; and it may be that an estoppel arising out of the Court of Appeal proceedings would have supported validity in any event. As noted earlier, this approach was not at the time pressed by Falгат.
- 46 In any event, for the two reasons I have given, I think Falгат's case in estoppel in these proceedings was very weak. My analysis also confirms that substantial further evidence and argument would have been required. In my opinion, having regard to the prejudice to Equity that this would have involved, and the lateness of the application, the application was correctly refused.

TIME OF PROVISION OF THE PAYMENT SCHEDULE

- 47 On the basis of the factual findings set out above, the primary judge held:
- (1) The word 'provide' in s.14 of the Act meant the same as 'serve';
 - (2) It is not necessary that a payment schedule be personally served;
 - (3) The payment schedule was lodged at Falгат's ordinary place of business during normal office hours (within s.31(1)(b) of the Act) on 22 October 2004 and thus was provided on that date;
 - (4) The payment schedule was also deemed to be received on 27 October 2004, being 3 days after posting to Falгат's address, this being the effect of cl.29 of the construction contract, which in turn was adopted by s.31(1)(e) of the Act;
 - (5) The payment schedule was served in accordance with s.109X of the Corporations Act 2001 by being left at Falгат's registered office on 22 October 2004, in terms of s.31(3) of the Act;
 - (6) The payment schedule was served in accordance with s.109X of the Corporations Act 2001 and s.29 of the Acts Interpretation Act 1901 by post on 25 October 2004; and this was not affected by s.160 of the Evidence Act 1995.

Submissions

- 48 Ms. Culkoff submitted that the Act required that a payment schedule actually be received by a claimant, before it could be said that the respondent had provided the payment schedule; and that this required personal service on a natural person, and required that the payment schedule come into the hands of some person on behalf of a corporation. Ms. Culkoff referred to *Pacific General Securities Limited v. Soliman & Sons Pty. Limited* [2005] NSWCA 378 at [27], *Taylor Projects Group Pty. Limited v. Brick Department Pty. Limited* [2005] NSWSC 439 at [18], and *Emag Constructions Pty. Limited v. Highrise Concrete Contractors (Australia) Pty. Limited* [2003] NSWSC 903 at [56].
- 49 Ms. Culkoff submitted that the use of the words “provide” and “receive” showed that, in relation to documents going from a respondent to a claimant, there was a more onerous responsibility placed than in relation to documents going from a claimant to a respondent, which merely had to be served. The use of different words “provide” and “serve” suggested different meanings: *The Guardian of the Parish of Brighton v. The Guardians of Strand Union* [1891] 2 QB 156 at 167. She submitted that the use of the word “provide” suggested that the document in question must actually come to the notice of the person to whom it is to be provided: *Nair v. Minister for Immigration & Multicultural Affairs* [2000] FCA 1305 at [67]-[72].
- 50 Accordingly, Ms. Culkoff submitted, s.31 of the Act did not apply in the case of “provision” of a payment schedule; and thus there was no basis for applying cl.29 of the construction contract. She submitted also that s.109X of the Corporations Act did not apply to provision as opposed to service; and that even if s.109X of the Corporations Act did apply, Falgat’s proof that the notice was not received until 28 October 2004 displaced the presumption in s.29 of the Acts Interpretation Act.

Decision

- 51 In my opinion, the onus of proof is on a claimant to show it has a cause of action under ss.14 and 15 of the Act; and accordingly, in this case the onus was on Falgat to prove that the payment schedule was not provided by Equity until after 27 October 2004.
- 52 In my opinion, even though the Act uses the word “provide”, s.109X of the Corporations Act does apply. In my opinion, s.109X(7) shows an intention that the provisions of s.109X apply to a word such as “provide”, which is relevantly very similar to “give”. The intention disclosed by this section is that, if one chooses to carry on one’s business through a corporation, the Commonwealth Parliament has determined that certain steps are sufficient for service of a document for the purpose of any law, and has also made it clear that use of a different word such as “give” makes no difference.
- 53 Section 109X does not itself expressly determine the time at which service (or provision) is effected.
- 54 In the case of leaving a document at a company’s registered office, prima facie the time service is effected would be the time of leaving the document; although, if a document is left there outside normal office hours, at a time when the office is in fact closed, it is at least arguable that service is not effected until the document is either detected by a person acting on behalf of the company, or the commencement of the next period of normal office hours, whichever is the earlier.
- 55 In the case of postage, s.29 of the Acts Interpretation Act gives a rebuttable presumption; and if there is evidence establishing what actually happened, in my opinion the time service is effected would be when the document actually arrives at the registered office to which it is addressed. If the post has been diverted so as to preclude delivery to that office, then the time service is effected would be no later than when the document actually arrives at the address to which it was diverted. (I say “no later than”, because, as pointed out by Hunt AJA, it is strongly arguable that proof of later arrival at an address to which the post has been diverted does not displace the rebuttable presumption.) In either case, I do not think detection by any person on behalf of the company would be necessary. In my opinion, this result would not be affected by State legislation, such as s.160 of the Evidence Act 1995.
- 56 For those reasons, in my opinion, irrespective of fine questions of construction arising under the Act itself, the payment schedule was provided to Falgat at 4.22pm on 22 October 2004 when it was placed under the door at Falgat’s registered office, this being during normal office hours. It also would have been provided no later than 27 October 2005 if the copy posted to Falgat was placed in Falgat’s box at Kellyville post office on that day; and Falgat did not discharge its onus of proving it was not placed in the box on that day.
- 57 Accordingly, it is not strictly necessary to express a view as to fine questions of construction under the Act. However, it is in my opinion appropriate to express views about this, because of the importance of clarity on this matter.
- 58 In the first place, in my opinion it is clear that if a document has actually been received and come to the attention of a person to be served or provided with the document, or of a person with authority to deal with such a document on behalf of a person or corporation to be served or provided with the document, it does not matter whether or not any facultative regime has been complied with: see *Howship Holdings Pty. Limited v. Leslie* (1996) 41 NSWLR 542; *Mohamed v. Farah* [2004] NSWSC 482 at [42]-[44]. In such a case, there has been service, provision and receipt.
- 59 Next, I agree with the view expressed by Einstein J in *Taylor* at [16] that payment claims are notices within s.31 of the Act; and in my opinion also, a payment schedule is also such a notice. Accordingly, s.31 of the Act plainly

applies in relation to service of payment claims. The question then is whether it also applies to provision of payment schedules.

- 60 One relevant factor in approaching this question is that it seems to me highly unlikely that it was the intention of the legislature that provision of a payment schedule only occurs if the document actually comes into the hands of some person on behalf of the claimant. If that were the case, a claimant could acquire a cause of action under ss.14 and 15 of the Act by serving a payment claim, and then ensuring that no-one was at the claimant's address or registered office until expiry of the time for provision of a payment schedule.
- 61 The use of the word "provide" rather than the word "serve" does carry a suggestion that a different meaning is intended, and that accordingly s.31 does not apply in the case of the word "provide". Against this, however, I do not think the legislature would have (1) used a problematic word like "provide" with the intention that it have a different meaning from "serve", (2) given useful instructions as to how service may be effected, yet (3) given no instructions whatsoever as to how provision may be effected. When this consideration is combined with the consideration raised in the previous paragraph, in my opinion this justifies the conclusion, reached by the primary judge in this case, that "provide" does not mean anything different from "serve", and that s.31 applies to "provision" as well as to "service".
- 62 There remains the question of whether the time at which service or provision has taken effect is also the time at which a document is received, for the purposes of s.17(3)(b) (and see also s.17(2)(b) and s.21). I note that the word "receive" is also used in s.31(2), but used in the context of "received at that place". In my opinion, mail delivered to a registered office or place of business is received at that place when it is put into the mail box of that registered office or place of business, without the necessity of anyone actually seeing it.
- 63 In my opinion, the word "receive" in s.17(3)(c) does not necessarily require that the document come to the notice of a person authorised to deal with the document on behalf of the claimant. In general, in my opinion, it would be satisfied once the document has arrived at the claimant's registered office or place of business and is there during normal office hours. There may be circumstances in which service or provision has been effected within s.109X of the Corporations Act or s.31 of the Act, but the document has not been received, but I find it difficult to identify any such circumstances.

ORDERS

- 64 For those reasons, in my opinion the following orders should be made:
1. Appeal dismissed.
 2. Falgat to pay Equity's costs of the application for leave and appeal.

Judgment : HUNT AJA:

- 65 I agree with the orders proposed by Hodgson JA, and with his reasons except in relation to two matters referred to in pars [55] and [56] of his judgment, but which nevertheless do not affect the orders he has proposed.
- 66 The service of a document on a company is effected by posting it to the company's registered office: *Corporations Act 2001*, s 109X(1)(a). If the company does not change its registered address, but chooses to redirect its mail to another address, then, in my respectful opinion, s 109X continues to operate to constitute the posting of the document to that registered office as service on the company, notwithstanding the company's order redirecting its mail.
- 67 That document is deemed to have been served on the company at the time when it would have been delivered to that address in the ordinary course of post, unless the contrary is proved by the company: *Acts Interpretation Act 1901*, s 29. The company is entitled to prove that the document arrived at its registered office at a different time from that if the document had been delivered to that address in the ordinary course of post. However, it does not do so, again in my respectful opinion, by proving that it arrived at the address to which it had diverted its mail at a different time from that on which the document would have been delivered to its registered office in the ordinary course of post.
- 68 Section 31 of the *Building and Construction Industry Security of Payment Act 1999* permits service of a document on a person by sending it by post to that person's ordinary place of business. In the present case, the evidence is that the appellant continued to use its registered office as its ordinary place of business notwithstanding the diversion of its mail to another address. I therefore do not regard it as even arguable that the time the document arrived at the address to which the mail had been diverted was the time of service on the appellant.
- 69 It follows also that I do not agree with the last sentence of par [56].

Ms. V. Culkoff for the claimant instructed by Julie A. Orsini, Lilyfield

Mr. M. Rudge SC with Mr. G.A. Sirtes for opponent instructed by Stephen Wawn & Associates, Edgecliff