JUDGMENT : HODGSON JA : BRYSON JA : New South Wales Court of Appeal. 11th November 2004

1 **HODGSON JA:** This is an application for leave to appeal from an order for summary judgment made by Hughes DCJ on 5 March 2004, at which time he ordered that there be judgment in the sum of $93,925.43 in favour of the opponent. He ordered that the claimant pay the opponent's costs of the notice of motion and the proceedings, and ordered that there be interest pursuant to s.83A of the District Court Act. I am told subsequently that interest was quantified and has been included in the judgment.

2 The application came before the primary judge at a time when the time limit for a defence under an agreed timetable had not arrived. However, at the hearing before the primary judge, the claimant was given an opportunity to state what the defence would be, and the only matter raised before the primary judge was a possible defence to the claim made under the Building and Construction Industry Security of Payment Act. There was no suggestion of any defence to the claim to entitlement to progress payments in accordance with the terms of the contract in relation to progress payments certified by the architect.

3 It does seem to me that the matter raised was a possible defence under the Act, in that sending a progress claim to the architect with a view to the architect, issuing a certificate under the contract, may not have been service on the building owner, because the architect in acting in that role is not agent for the owner.

4 However, even if that was a defence to the statutory claim, it would not be a defence to the clear claim under the contract for the amount of progress payments certified by the architect. Had the claimant before the primary judge indicated other possible grounds of defence, or perhaps indicated an intention to put on a cross-claim, then there may have been more substance in complaints now made by the claimant about the judge not granting an adjournment and proceeding to deal with the matter then and there. However, as I have said, that was not done, and that takes away much of the weight that could otherwise be given to those considerations.

5 It is in my opinion clear that the judgment that has been given is a judgment only giving effect to entitlement to progress payments, and is not a judgment which determines in any way what the final rights of the parties under this building contract will be. It is clear in my opinion that no issue estoppel will arise, and no possible ***Anshun*** defence, should the owner seek to raise in other proceedings with a view to final determination of the rights of the parties matters such as a projected cross-claim for delay and other matters averted to in the material.

6 Having regard to those considerations and having regard to the relatively small amount involved in the matters sought to be relied on by the claimant, in my opinion application for leave to appeal should be refused.

7 **BRYSON JA:** I agree, although it should be clear from the reasons which have been given that nothing in this decision establishes whether or not it is appropriate to serve a statutory notice on the architect either in this particular case or as a general proposition. With those observations, I agree.

8 **HODGSON JA:** The order of the Court is application for leave to appeal dismissed with costs.

Mr. G. Foster for claimant instructed by Valenti & Valenti, Fairfield
Mr. E.C. Muston for opponent instructed by Massey Bailey, Sydney