

JUDGMENT Einstein J : New South Wales Supreme Court ; 29th March 2004

The Appeal

- 1 There is before the court an appeal from the judgment of Master Maccready delivered on 23 February 2004 dismissing a notice of motion by which the appellant, the plaintiff below, Isis Projects Pty Ltd ["Isis"] had sought summary judgment pursuant to Part 15 rule 2 of the Supreme Court Rules in the sum of \$770, 347.11. The respondent, the defendant below, Clarence Street Pty Limited ["Clarence Street"] has filed a notice of contention.
- 2 The issues, which are raised, concern the proper construction and application of particular sections of the Building and Construction Industry Security of Payment Act 1999 ["the Act"]. The Act has been the subject of much attention over the past few years there now being a reasonably considerable body of first instance decisions covering a variety of disparate issues.
- 3 The significance of the central issue here raised for decision concerns the effect of the amendments to the Act effected by the *Building and Construction Industry Security of Payment Amendment Act 2002*.
- 4 The principal issue concerns the amendments to section 13(1) and to section 15(4) of the Act.
- 5 Section 13 (1) prior to the amendment provided: "A person who is entitled to a progress payment under a construction contract (the claimant) may serve a payment claim on the person who under the contract is liable to make the payment."
The amendment replaced this provision with the following: "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." [emphasis added to identify the new wording-note also that some words were removed]
- 6 Section 15(4) prior to the amendment provided: *Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in subsection (1)*.
The amendment replaced this provision with the following: *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.***The proper construction of the words appearing in subsection (4) (b) "**in relation to matters arising under the construction contract**" is crucial to the central proposition contended for by the appellant.
- 7 The proposition for which the appellant contends ["the critical issue"] is that the *now* scheme of the Act requires the recipient of a payment claim to set out any objection it may have to the claim (whether it be an objection arising out of the contract or otherwise) in a payment schedule. The proposition is that if it fails to do so it is liable to pay the claim, whether or not the claimant was in fact entitled to the progress payment. The proposition is that the recipient may not later defend proceedings brought against it by the claimant for the payment of the claim by raising matters arising under the contract, or on the basis that the claimant was not entitled to the payment in question.

The Principles

Appeals from a Master to the Court

- 8 An appeal from a decision of a Master lies to a judge of the Court as of right. Generally the present appeal requires to be approached by reference to the same considerations and principles as inform appeals to the Court of Appeal. It is necessary for an appellant, therefore, to show that the Master acted on a wrong principle, allowed extraneous or irrelevant matters to guide or affect him or her, mistook the facts, did not take into account some material consideration, or that the decision was unreasonable or plainly unjust; see *House v R* (1936) 55 CLR 499 at 505; see also *Hession v Century 21 South Pacific Limited (In Liquidation)* (1992) 28 NSWLR 120 at 122 per Meagher JA with whom the Court agreed.

General Steel

- 9 Applications for summary judgment generally require to be determined by well-established principles. However, it has been submitted that the Act may require an adjustment in terms of parameters of those principles. This is because an adjudication pursuant to the Act does not finally determine the rights of the parties. The matter is examined below.
- 10 The well established general principles which treat with the entitlement of a party to a final determination of his/legal rights make clear that a party will not be denied a trial unless the absence of a cause of action is clearly demonstrated: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129. Once it is apparent that there is a real question to be determined the court does not deal with the matter summarily: *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91. The test to be applied has been variously described as whether the matter is "**so obviously untenable that it cannot possibly succeed**", "**manifestly groundless**", "**so manifestly faulty that it does not admit of argument**", one which "**the court is satisfied cannot succeed**", one where "**under no possibility can there be a good cause of action**", or one which "**would involve useless expense**": *General Steel at 129*; *Pannizutti v Trask* (1987) 10 NSWLR 531 at 536; *Rajski v Powell* (1987) 11 NSWLR 522 at 524; *Brimson v Rocla Concrete Pipes Limited* [1982] 2 NSWLR 937 at 942.

The relevant background

- 11 Early in the Master's judgment the following background was set out:
- "2 On 17 May 2002 plaintiff entered into a construction contract with the defendant for the refurbishment and fit out of an office building at 50 Clarence Street Sydney. The contract includes the general conditions of contract (AS 2124 -- 1992).
- 3 The plaintiff's claims in the summons are for statutory progress claims under the Building and Construction Industry Security of Payments Act 1999 (NSW)(the Act) which was recently amended on 3 March 2003. The relevant progress claims were issued after the commencement of the amendments. The claims in the summons are not made pursuant to the plaintiff's contractual entitlement
- 4 Practical completion in respect of the contract was achieved on 4 April 2003 at the request of the plaintiff company and the certificate was issued on 14 April 2003.
- 5 On 15 May 2003 the plaintiff served a progress claim number 12 on the defendant claiming the sum off \$1,702,579.34. Under the terms of the contract this progress claim would be due on 28 June 2003. Between 26 June 2003 and 4 July 2003 various payments were made in relation to this progress claim amounting to \$984,225.85 leaving outstanding the sum of \$718,353.45. No payment schedule under the Act was supplied by the defendant.
- 6 On 15 July 2003 the plaintiff served a further progress claim number 13 on the defendant claiming \$749,091.72. This included the \$718,353.45 outstanding under progress claim number 12 and new work valued at \$30,738.23. Under the contract this would become due for payment on 28 August 2003.
- 7 There is correspondence in response to this progress claim on 17 and 25 July 2003. Although the defence raised a defence that this was a payment schedule it was conceded for the purposes of this application that the correspondence did not amount to a payment schedule. Therefore in respect of this claim there was no payment schedule supplied under the Act.
8. Proceedings were commenced by way of a summons on 29 August 2003."

The decision of the Master

Master's description of the triable issues contended for by the respondent

- 12 The Master described the respondent's contentions as raising triable issues including the following:
- (a) Whether Claims 12 and 13 were payment claims made under s 13 of the Act in relation to a progress payment. ["The first issue"]
- (b) Whether Progress Claims 12 and 13 were supported by the evidence and information required by the contract and the Act ["the second issue"].
- (c) Whether Progress Claims 12 and 13 involve a contravention of s 13(5) of the Act ["the third issue"].
- 13 The holding was that neither the first nor the third issues could be said to be triable but that the second issue constituted a triable issue.
- 14 There is no notice of contention ground challenging the finding that the third issue did not constitute a triable issue. It may be noted that the issue concerned whether the appellant had purported to serve more than one payment claim in respect of each reference date under the subject contract. It is unnecessary to examine that section of the Master's judgment.
- 15 Counsel addressing submissions on the appeal challenged the accuracy of the above-described short summaries of the first and second issues. In particular the appellant contended that the Master, in finding for the respondent on the second issue, had failed to address *at all* the principal contention advanced by the appellant to the Master.

Agreed Statement of Issues

- 16 The parties were able to agree upon a 'Statement of Issues' for the purpose of the Appeal as follows:

Issue 1

Whether the exercise of discretion by the Master not to order summary judgment in favour of the appellant miscarried by reason of the failure to deal with the effect of the amendments made in March 2003 to the *Building and Construction Industry Security of Payment Act 1999* ("the Act") and in particular the amendments made to sections 13(1) and 15(4) of the Act.

Issue 2

In light of the provisions of the Act and the evidence do any of the following defences give rise to a triable issue:

- a) That the progress claims were not supported by evidence and information required by the contract;
- b) That the progress claims did not relate to progress payments within the meaning of the Act;
- c) That the progress claims did not sufficiently identify the construction work to which they related, and therefore failed to satisfy the requirements of s13(2)(a) of the Act.

Application to withdraw concession made before the Master

- 17 It will be noticed that the Master in his early statement of the background, had stated that no payment schedule under the Act had been supplied by the defendant in relation to progress claim number 12 or in relation to progress claim number 13.
- 18 A notice of motion was filed before the Court on the hearing of the Appeal by which the respondent sought leave to withdraw a concession it had made before the Master to the effect that no payment schedule had been served by the respondent in response to *progress claim 13*. If that leave was to be granted the respondent further sought leave

to raise as a ground in its notice of contention that there was a triable issue as to whether on the proper construction of the 17 July 2003 communication to the appellant from DG Jones, this document comprised a payment schedule within the Act.

Dealing with the critical issue

- 19 It may be that the best approach is to deal with the critical issue immediately and to then deal with such of the matters which were before the Court as may still require determination.
- 20 This issue is raised by grounds of appeal 2 and 3. It is also identified as an agreed issue in paragraphs 1 and 2 (b) of the agreed statement of issues.
- 21 The Appellant submits that although submissions were addressed to the Master on the issue, he effectively simply failed to deal with the submission at all, albeit briefly referring to the issue [at 35].
- 22 To paraphrase sections 3, 8, 13, 14(4) and 15 of the Act they essentially [and of course subject to the definitions to be found in section 4] provide as follows:
- On and from **each reference date under a construction contract** a person who has undertaken to carry out construction work under the construction contract is entitled to a progress payment (section 8);
 - a person referred to in section 8 (1) who is or who claims to be entitled to a progress payment may serve a payment claim on the person who under the construction contract concerned is or may be liable to make the payment (section 13);
 - if a claimant serves a payment claim on a respondent and the respondent does not provide a payment schedule to the claimant within the time required by the construction contract or 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 (section 14(4));
 - if a respondent 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 within the time allowed by that section** and 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 (section 15(1)) then the claimant may recover the unpaid portion of the claimed amount from the respondent as a debt due to the claimant in any court of competent jurisdiction (section 15(2)(a)(i));
 - if a claimant commences proceedings under section 15(2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt the respondent is not in those proceedings entitled to bring any cross-claim against the claimant or to raise any **defence in relation to those matters arising under the construction contract** (section 15(4)).
- 23 The appellant's submission was that the scheme of the amended Act is that:
- *Section 15(4)(b) of the Act prohibits the respondent from raising by way of defence a matter arising under the contract; and*
 - *section 13 of the Act provides that it is only necessary for a claimant to claim to be entitled to a progress payment in order to serve a payment claim: s13 of the Act.*
- 24 The appellant asks rhetorically: why would the Act permit a person who only claims to be entitled to a progress payment to serve a payment claim, but then deny it the rights that accrue under the Act to persons who serve such a claim?
- 25 The appellant submits that the legislative scheme is such that the claimant need not later demonstrate by reference to the contract that it was, *in fact*, entitled to a progress payment. The Master, it is submitted, therefore erred by approaching this matter on the basis that a triable issue in these proceedings was whether Isis was in fact entitled to payment of the subject payment claims in the proceedings.
- 26 The submission is that rather than giving proper effect to s13(1) and s15(4)(b)(ii) of the Act, the Master erred by ignoring the amendments to the Act since the decision of the Court of Appeal in **Brewarrina Shire Council v Beckhaus Civil Pty Ltd** (2003) 56 NSWLR 576.
- 27 The mainstay of the contradictor argument put by the respondent is as follows:
- that the summary judgment which was pursued by the appellant before the Master, could only be given if the Court was satisfied of the existence of the circumstances referred to in section 15 (1);
 - that section 15 (1) in turn requires that the respondent be shown to have:
 - become liable to pay the claimed amount under section 14 (4) as a consequence of having failed to provide a payment schedule within the time allowed by that section;
 - 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 related.
 - that section 14 (4) [as indeed section 15 (1) (b)] presuppose that the Court will be in a position to identify what is the due date for the progress payment to which the payment claim relates;
 - that this is a case in which *there was no relevant due date* for the subject progress payments because the proper construction of the construction contract [clause 42.1 as varied] was [or was arguably-this raising a triable issue], that no progress claim could be made in respect of work carried out after the date of practical completion and before the final payment claim [the final payment claim entitlement being found in clause 42.7].

- 28 In *Brewarrina* the Court held that the obligation of the superintendent to issue a payment certificate in relation to a progress claim [under the contract which was there examined] was subject to a condition precedent that the claimant supports the claim with such information as the superintendent might reasonably require. *Brewarrina* was decided at a time when s13(1) of the Act provided that in order for a party to serve a progress claim it must be entitled to the progress payment.
- 29 The appellant relies upon the Ministers statement in paragraph 4 of the Second Reading Speech of 12 November 2002 (when the *Building and Construction Industry Security of Payment Amendment Bill* was introduced in Parliament): "By raising in court defences such as that the work does not have the value claimed or that the claimant has breached the contract by doing defective work, some respondents have been able to delay making progress payments for a long time. Those respondents have forced claimants to incur considerable legal costs. They have effectively defeated the intention of the Act. To overcome the problem, the bill clarifies that in court proceedings by a claimant to enforce payment of the debt due under the Act, a respondent will not be able to bring any cross-claim against the claimant and will not be able to raise any defence in relation to matters arising under the construction contract. A respondent who wants to raise these matters must do so in a payment schedule in response to a payment claim under the Act, or in separate proceedings."
- 30 An anterior question arises as to whether recourse may be had to the Second Reading Speech. That turns upon whether or not there is a clear ambiguity thrown up in respect of the issue.
- 31 In my view the appellants proposition would be made good if and only if it was possible to construe:
- Section 14 (4) as concluding with the words:
 - the respondent becomes liable to pay the claimed amount to the claimant on the claimed due date for the progress payment to which the payment claim relates;
 - Section 15 (1) (b) as providing that the section is to apply if the respondent:
 - fails to pay the whole or any part of the claimed amount on or before the claimed due date for the progress payment to which the payment claim relates.
- 32 Notwithstanding the terms of the Second Reading speech it does not seem to me that the appellant's above-described proposition can be accepted. To read the word "claimed" into each of sections 14 (4) and 15 (1) (b) would be to do violence in an unprincipled way to the proper construction of these sections.
- 33 Hence it is clearly necessary in order that a claimant prove that a respondent's liability has accrued under section 15 (1) (a) [to satisfy the precondition to be found in subsection (4) (a)], that the claimant prove that a *valid* payment claim has been served and also clearly prove what is the due date for the progress payment. There will of course always be a due date for a progress payment under a construction contract because the Act [section 11] provides for such a date as being either:
- the date on which the payment becomes due and payable in accordance with the terms of the contract; or
 - if the contract makes no express provision with respect to the matter, the date occurring 10 business days after a payment claim is made in relation to the payment.
- 34 The Master found (at [26]) that there was no triable issue of the type raised by the respondent. That proposition was effectively that:
- upon the true construction of clause 42.1, there is no reference date between the issue of the Certificate of Practical Completion, and the period for the making of the Final Payment Claim under clause 42.7 (save perhaps in respect of work performed in execution of a variation directed after Practical Completion);
 - it follows that in this case there was no entitlement to a progress payment in respect of work done between those times, yet Progress Claims 12 and 13 impermissibly assert such an entitlement;
 - by Progress Claims 12 and 13 the Appellant has purported to make progress claims in respect of dates, and work performed, subsequent to practical completion yet prior to the period for the making of the Final Payment Claim under clause 42.7.
- 35 In short the proposition depended upon the proper construction of clause 42.1 which read inter alia: "*At the times for payment claims stated in the Annexure [it is common ground that the Annexure required payment claims to be made monthly on the 15th day of the month or the nearest working day after the 15th day] 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...*"
- 36 Clause 42.7 provided inter alia: "*Within 28 days after the expiration of the Defects Liability Period, or where there is more than one, the last to expire, the Contractor shall lodge with the Superintendent a final payment claim and endorse it 'Final Payment Claim'...*"
- 37 The real question, which arises on the Appeal, is as to whether the Master is shown to have committed an appellable error on the approach which he took to this construction issue in the environment of a summary judgment application.
- 38 In my view, for the reasons given below, the answer to this question is in the affirmative.

General Steel and the construction issue

- 39 Before dealing with the construction issue it is necessary and appropriate to examine the extent to which the General Steel test remains applicable to the subject field of discourse.
- 40 The appellant has submitted that for the very reason that the legislative scheme preserves ultimate final rights [cf section 32] this is an environment in which the General Steel test should *not* be strictly applied. The submission is that the underpinning for that test concerns preserving the rights of a party to its day in court for the purpose only of determination of its ultimate rights at law.
- 41 I do not see the matter in this way. Notwithstanding the fast track legislative scheme aimed at ensuring quick adjudication of disputed progress claims, the fact remains that the pre-conditions stipulated for by the Act as requiring to be satisfied in order to permit a claimant to procure a judgment do require to be *strictly* complied with.
- 42 Where established, the entitlement of a claimant to enter judgment under the Act is likely to have very real consequences to the respondent in any given case. A respondent may be forced into liquidation by reason of the effect of the judgment or otherwise dramatically affected by the financial effect of the immediate requirement to pay the judgment debt. This is not an occasion for moving one jot outside of the General Steel principles.
- 43 Returning to the question of construction the following may be said:
- The approach taken by the Master was to regard the respondent's construction as seeking "to imply a term to the effect that no payment claim could be made between the date of practical completion and the final payment claim under 42.7, on the face of the contract contradicts the express terms [of the contract]".
 - The Master expressed the view that he would not have thought that such an implied term was so obvious that it went without saying and that the contract was quite effective without the implied term.
 - In my view this is not the territory of implication. It is rather the territory of contractual construction requiring to be determined in accordance with well-established principles in that regard.
 - I do accept that there is clearly something to be said in favour of the proposition that the respondents construction does not take into account the possibility that prior to the expiration of the Defects Liability Period, the Superintendent may direct the Contractor to rectify any omission or defect in the work under the Contract existing at the date of practical completion or which becomes apparent prior to the expiration of the Defects Liability Period [clause 37]. Further and as the Master noted, clause 40.1 permits the Superintendent to direct the Contractor to execute variations within the general scope of the Contract although it also provides that the Contractor is not to be bound to execute a variation directed after Practical Completion unless the variation is in respect of rectification work referred to in clause 37.
 - However, in my view the approach taken by the respondent cannot be said to be so obviously untenable that it cannot possibly succeed", "manifestly groundless", "so manifestly faulty that it does not admit of argument", one which "the court is satisfied cannot succeed".
 - The respondent has thrown up an area where there is a real issue to be tried and for that reason the summary judgment application required is to be dismissed.
- 44 The respondent having thrown up an area where there is a real issue to be tried, the Master's approach having been shown to fail on General Steel bases to accept this as a triable issue, the summary judgment application was appropriate to be dismissed on *this* basis. It has been unnecessary in this regard to consider any particular aspect of the dates of the instant progress claims [both of which were served well after the date of practical completion and many many months prior to the expiration of the Defects Liability Period].
- 45 Further in my view the appellant is incorrect in its 'outflanking' submission that *on this particular issue* the respondent is debarred by section 15 (4) (b) (ii) from raising a defence in relation to this as a *matter arising under the construction contract*. The holding is that section 15 only applies if subsections (1) (a) and (b) are satisfied and that the claimant must affirmatively establish what [within the meaning of section 14 (4)] was the due date for the progress payment to which the payment claim related.

The point reached on the Appeal

- 46 The Court has now held that:
- grounds 2 and 3 of the Notice of Appeal require to be dismissed;
 - there was a triable issue on the construction matter which was put to the Master who failed to uphold the respondent's argument.
- 47 It is unnecessary to go further and to deal with any of the other matters which were the subject of submissions on the Appeal and/or notice of contention. In particular it is not necessary to treat with the holding [at [40]] following the reasons given [at [27]-[39]] where the Master did uphold the respondents claim that there was a triable issue in relation to another matter. Nor is it necessary to deal with the motion seeking leave to withdraw the concession made to the Master.
- 48 The appellant did submit that this was a circumstance in which the Court should proceed to finally determine the question of construction. That course is not available on the appeal.

Short minutes of order

- 49 The parties are to bring in short minutes of order when costs may be argued.

Mr R J Powell SC, Mr Elliott (Plaintiff) instructed by Turtens Lawyers
Mr R J H Darke SC, Mr M Southwick (Defendant) instructed by Watson Mangioni