

JUDGMENT : Einstein J : New South Wales Supreme Court : 23rd August 2005

The proceedings

1 There is before the court an application by the plaintiff, Lucas Stuart Pty Ltd ["Lucas Stuart"] seeking summary judgment against the Council of the City of Sydney ["the Council"] pursuant to UCPR s13 [formerly Supreme Court Rules Part 13 rule 2] in the sum of \$3,952, 474.00 (including GST of \$359,316). The claim is by summons and is pressed pursuant to s15 (2)(a) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ["the Act"].

Sections 15 of the Act

2 Section 15 provides inter alia:

"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."*

The procedural situation

3 This is not a situation in which Lucas Stuart having filed a summons seeking final relief has thereafter by notice of motion sought to have summary judgment in the absence of a defence. The summons itself sought "*summary judgment for the debt due and payable in accordance with s 15 of the Act*".

4 Notwithstanding this circumstance Lucas Stuart whilst accepting the applicability of *General Steel* principles, makes the point that what is being sought is summary judgment contending that it is entitled to such in light of the state of the pleadings and of the evidence presently before the Court.

The summons

5 The summons identifies the "Nature of the Dispute" in the following terms:

"Payment Claim

3 *At all material times the plaintiff was engaged under a construction contract and required to carry out and did carry out construction work for City of Sydney for the Customs House Reconstruction project that is governed by and subject to the SOP Act.*

4 *On 1 April 2005 the plaintiff served a payment claim seeking payment of \$3,952,474.00 (including GST of \$359,316.00) for construction work (the 'Payment Claim') in accordance with s.13 of the SOP Act.*

No Payment Schedule issued

5 *No payment schedule under s.14 of the SOP Act has been issued in the 10 business days after service of the payment claim.*

Due date for payment has passed

6 *The due date for payment of the payment claim under the Contract is either:*

6.1 *13 May 2005; or*

6.2 *under the SOP Act, 15 April 2005*

Particulars

(i) *The Reference Date is 1 April 2005*

(ii) *Either:*

A The Payment Claim is a progress claim for construction work and was to be assessed within 14 days of submission of the claim and was thereafter due for payment within 28 days of the assessment; or

B If the contractual regime for assessment of progress claims has failed, in accordance with the SOP Act, 10 business days after service of the Payment Claim on 1 April 2005, being 15 April 2005.

Details of payments and the unpaid portion

7 *Following submission of the Payment Claim, Lucas has not received any payment from City of Sydney in respect of the construction work or costs claimed in the Payment Claim. The "Unpaid portion" of the Payment Claim is therefore the full amount of the claim."*

6 The Contentions in the summons [3.1] repeat the facts and matters set out in the “Nature of the dispute”.

The Amended Defence

7 Subject to one matter [a denial of the allegation that Lucas Stuart has not received any payment from the Council in respect of the construction work or costs claimed in the Payment Claim as defined in Part 1 of the Summons] the Amended Defence under the “Defendant’s Contentions” admits paragraph 3.1 of the Contentions to the Summons.

The first sum

8 In part the matter the subject of this reservation is no longer contentious, Lucas Stuart accepting that since 1 April 2005 the Council has paid the sum of \$1,154,522.60 (including GST) [“the first sum”] for work completed by Lucas Stuart being payment on account of construction works incorporated as part of the \$3,952,474 (including GST) claimed in the Payment Claim.

The second sum

9 However the defendant’s contentions 3 (n) (ii) claims that: *“the sum of \$623,390 (including GST) constitutes the total amount conceded since 1 April 2005 by Lucas Stewart is not being owing in respect of variations and alleged unpaid contract sum amounts included in the Payment Claim form part of the \$3,952,474 (including GST) claimed by Lucas Stuart in the Payment Claim.”* [the \$623,390 sum is referred to as “the second sum”]

The Council’s stance

10 The position of the Council during the hearing was to seek [outside the second sum matter the subject of contentions 3 (n) (ii)], to rely only on the following defences described as follows in the words used in the Council’s written submissions:

- (i) *The Council contends that Lucas Stuart (principally through the actions of its director, Mr Ian Stuart-Robertson) engaged in conduct that was misleading and deceptive, or was likely to mislead and deceive, within the meaning of s52 of the Trade Practices Act and s42 of the Fair Trading Act, and concerning the making of its Payment Claim.*
- (ii) *In the circumstances, Council contends that the Court should exercise its discretion under s87(1A) of the Trade Practices Act (or the equivalent that arises by virtue of s72(2) of the Fair Trading Act) and make orders that preclude Lucas Stuart from relying upon (or in the alternative, that it be estopped from relying upon) its Payment Claim as the basis for summary judgment pursuant to s15 of the Act. That s87 provides the court with a very wide discretion and a “remedial smorgasbord” from which to choose is now clearly established: Akron Securities Ltd v Iliffe (1997) 41 NSWLR 353, at 366.*
- (iii) *The Council contends in the alternative that the conduct of Lucas Stuart referred to above is conduct which gives rise to estoppel by representation and/or estoppel by conduct, so as to prevent Lucas Stuart from relying on the documents provided to the Council on 1 April 2005 as a Payment Claim under the Act.*

11 The precise terms of the relevant defendant’s contentions in support of the denial that the plaintiff was entitled to summary judgment for any sum were as follows: *“In further reply to the Summons filed and served by the plaintiff, the defendant states:*

- i *The plaintiff commenced work under a contract between the defendant and plaintiff (“the Contract”) for the refurbishment of Customs House (“the Works”) on or after 18 September 2003;*
- ii *From the outset of the Contract, and at all material times thereafter, the defendant retained and appointed Incoll Project Management Consultants (“Incoll”) to project manage the Works, and Widnell Quantity Surveyors (“Widnell”) to assist Incoll in that respect by assessing progress claims, variation and other claims made under the Contract, and Payment Claims made under the Act;*
- iii *Payment Claim No. 21 dated 1 April 2005), the plaintiff provided or served all progress, variation and other claims under the Contract, and all payment claims under the Act, to Incoll and/or Widnell, and not to the Superintendent, or to the defendant, or to Mr Petar Vladeta who at all material times was the Director of Legal Services with the defendant, and between 1 October 2004 and 14 February 2005 had been the Acting General Manager of the defendant;*
- iv *At all times from 18 September 2003 until immediately prior to 1 April 2005 (that is, prior to Payment Claim No. 21 dated 1 April 2005), the practice followed by the parties and the defendant was for Incoll / Widnell to receive and assess those claims referred to in the previous subparagraph and make recommendations for payment (or otherwise) with respect thereto to the Superintendent under the Contract;*
- v *Prior to 1 April 2005, the plaintiff provided or served twenty (20) progress claims under the Contract, and payment claims under the Act, to Incoll and / or Widnell in the manner described above;*
- vi *During or around late February / early March 2005, the plaintiff (by its Managing Director, Mr Ian Stuart-Robinson) represented to the defendant (Mr Petar Vladeta) that it had a number of contractual claims which awaited resolution, or which had been assessed by the defendant to that time in a manner that it was dissatisfied with;*

Particulars

The representation was oral and occurred during a conversation between Petar Vladeta and Ian Stuart-Robinson (a director of the plaintiff) in or about late February 2005/early March 2005.

- vii *During that same discussion in around late-February / early-March 2005, Mr Stuart-Robinson (for and on behalf of the plaintiff) represented to Mr Vladeta that he (Mr Stuart-Robinson) would forward to Mr Vladeta a summary of the previous claims made under the Contract by the plaintiff (“Summary Package”), which the plaintiff asserted had not at that time been resolved to its satisfaction, for the purpose of Mr Vladeta endeavouring to facilitate discussions or a process to lead to the possible resolution of those contractual claims;*

Particulars

The representation was oral and occurred during a conversation between Petar Vladeta and Ian Stuart-Robinson (a director of the plaintiff) in or about late February 2005/early March 2005.

- viii On 1 April 2005 the plaintiff served on the defendant (marked to the attention of Mr Vladeta) a document purporting to be a payment claim under the Act (and comprising 3-volumes of material) seeking payment of \$3,952,474 (including GST of \$359,316.00) (“the Payment Claim”);
- ix At no time prior to the provision of the Payment Claim did the plaintiff (Mr Stuart-Robinson, or anyone else) communicate to the defendant (Mr Vladeta) that a payment claim under the Act was instead to be served on the defendant rather than the foreshadowed and represented Summary Package;
- x The failure by the plaintiff to so communicate to the defendant (Mr Vladeta) that the document(s) to be provided to him, and in fact provided to him, were not copy or summary documents in accordance with the representations set out in (f) and (g) above, and were instead to be, or were in fact, a payment claim under the Act, constituted misleading and deceptive conduct within the meaning of s52 of the Trade Practices Act, and section 42 of the Fair Trading Act;
- xi By reason of that misleading and deceptive conduct, the defendant failed to issue a payment schedule in accordance with the Act within ten (10) business days after service of the Payment Claim;
- xii In the circumstances, relief should be granted pursuant to section 87(1A) of the Trade Practices Act (or in the alternative section 72(2) of the Fair Trading Act) to order that the plaintiff be not permitted to rely upon (or in the alternative be estopped from relying upon) the Payment Claim for the purposes of the Act, and its application for summary judgment;
- xiii In the alternative, and for the reasons set out above, the conduct of the plaintiff was misleading and induced the defendant (Mr Vladeta) to consider that the document(s) provided to him, and in fact provided to him on 1 April 2005, were copy or summary documents in accordance with the representations set out in (f) and (g) above, and were not a payment claim under the Act, such that the Plaintiff should at law, or in equity, be estopped from relying upon those documents as being a payment claim under s13 of the Act.

Particulars

Paragraphs 3(e), (f), (g), (h), (i) and (j) above but excluding the last two lines in paragraph 3(j) above.”

- 12 Hence it is apparent that:
 - The Council’s estoppel claim seeks to set up an equitable entitlement to prevent Lucas Stuart from asserting its right at law to maintain that in the material circumstances the Payment Claim as served engaged the provisions of s 15.
 - The Council’s claim to relief pursuant to s 87 (1A) of the Trade Practices Act and s 72 (2) of the Fair Trading Act seeks to set up an entitlement to effectively restraining orders of like nature.

The scheme of the Act

- 13 It is unnecessary to repeat the proposition that the Act provides those who carry out construction work [or the supply of related goods and services] under a construction contract to access to a “fast track” adjudication procedure whereby the amount of such payments can be determined on an interim basis and enforced immediately without prejudice to the right of the parties to have disputes ultimately determined in accordance with ordinary litigious procedures: cf *Brodyn Pty Ltd v Philip Davenport* [2003] NSWSC 1019 at [14]; *The Building and Construction Industry Security of Payment Act 1999*, September 2004 paper http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/mcdougall_020904 by the Hon. R McDougall [at page 1].
- 14 Section 15(4) does not stand alone in terms of the structure of the Act. Precisely the same approach and generally the same terminology, is to be found in s 16 (4) [dealing with the consequences of not paying a claimant in accordance with a payment schedule]. Likewise s 25 (4) [dealing with the filing of an adjudication certificate as a judgment debt] echoes the same concept.
- 15 The statutory framework clearly treats with and treats *only* with the interim nature of the fast track adjudication proceedings set up to avoid subtle legal niceties without prejudice to those issues becoming the subject of a final hearing in the fullness of time: cf *Emag Constructions Pty Ltd v Highrise Contractors (Aust) Pty Ltd* [2003] NSWSC 903 at [36], [38] – referring to the ‘essentiality of time’, and at [59] referring to ‘strict compliance’.

Conditions precedent

- 16 The conditions precedent which require to be satisfied in order for a claimant:
 - to be entitled to a judgement pursuant to s15 (4)(a), as well as
 - to be entitled to the benefit of the restrictions to be imposed on the respondent provided for in s15 (4) (b) are clearly worded in s15 (1).
- 17 Those conditions precedent are engaged 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. [emphasis added]
- 18 Section 14 (4) provides that 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 relevant 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.

- 19 This legislative scheme is concerned and concerned only with strict compliance by each party with every parameter of the letter of the legislation. Hodgson JA in *Brodyn Pty Ltd v Davenport* used the words “the strong legal effect provided by the Act” (at [52]), also endorsing the proposition that the Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay (at [51]). Hodgson JA also made the point that the procedures contemplated a minimum of opportunity for court involvement (at [51]).
- 20 The position on the pleadings has already been referred to. They accept that the payment claim was duly served in accordance with s 13 and that no payment schedule was provided by the Council within the time delimited by s 14.
- 21 It seems to me that in those circumstances [and notwithstanding the pleaded equitable estoppel and Trade Practices Act/Fair Trading Act issues] the Court may comfortably be satisfied that[subject to the second sum issue] the Council has become “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”, within the meaning of these words as found in s 15 (1) (a). The critical words are “has become liable to pay the claimed amount to the claimant under section 14 (4)”. These words create what may be described as a strictly mechanical scheme. Whilst ever the environment concerns the engagement of the fast track interim provisions of the Act [as opposed to the parties retained curial rights to have a final determination of their dispute on a later occasion] there is simply no room for moving outside of this scheme.
- 22 In my view the Council can be seen by its stance in the instant proceedings to seek to move outside this strictly mechanical scheme. The Act permits no such thing.
- 23 Returning to the structure of s15, the above described circumstances have the consequence that s15 (4) (a) is seen to be fulfilled - the Court is on the pleadings and on the limited evidence [going to whether or not s 14 (4) (a) and (b) are satisfied hence creating the liability provided for in s 14], satisfied of the existence of the circumstances provided for in s 15 (1)(a) and (b).
- 24 It seems clear that the attempt by the Council to invoke the cause of action under the *Trade Practices Act* and under the *Fair Trading Act*, albeit sought to be pleaded in the defence, requires a positive cross-claim proceeding. For that reason alone the Council in relation of those causes of action could not pursue such a cross-claim: s 15 (4) (b) (i).
- 25 The attempt by the Council to invoke the estoppel defence flies in the face of s15 (4) (b) (ii).

Entitlement to summary judgment

- 26 For all those reasons it seems to me that upon the proper analysis of the instant environment Lucas Stuart is entitled to its summary judgment in respect of all parts of its monetary claims excepting what I have referred to as ‘the second sum’.

Alternative analysis

- 27 Against the event that any of the above analysis be incorrect it is appropriate to examine whether the evidence sought to be relied upon by the Council, even if accepted in its entirety, raises an arguable case. In my view no arguable case is seen to be raised by that evidence.
- 28 The matter may be approached at two alternative levels.

Level one

- 29 The first would deny to the Council any entitlement to raise any defence “in relation to matters arising under the construction contract”: s 15 (4) (b) (ii). A close reading of the defendant’s contentions [3] (b)-(g) inclusive demonstrates that each of these sub paragraphs [albeit being put as foundational anterior matters of fact in support of the alleged estoppel] may be properly described as seeking to raise a defence in relation to matters arising under the construction contracts. The very facts so pleaded are all said to be factual matters and all are said to have arisen under the construction contract. As to the width of the expression “arising out of”: see *IBM Australia Limited v National Distribution Services Limited* (1991) 22 NSWLR 466 at 474, 477.
- 30 At this level an assessment of the merit [in terms of arguable case] of the estoppel [as well as the *Trade Practices Act/Fair Trading Act*] causes of action must deny to the Council the entitlement to plead or refer to or rely upon these so-called foundational anterior matters of fact. Hence the Council at this level of analysis, becomes limited to reliance upon its Contentions [3](h)-(k). The exercise of so contracting the Contentions limits vary considerably indeed any otherwise weight which the entirety of the Contentions might otherwise have demonstrated in terms of arguable case.

Level two

- 31 The second alternative level is to view the Council’s contentions as unfettered by the level one analysis. However even at this level, in my view the evidence before the Court does not demonstrate an arguable case sufficient to deny to Lucas Stewart its entitlement to summary judgment.
- 32 The evidence which is material to the *Trade Practices Act / Fair Trading Act* and estoppel defences is primarily to be found in the affidavits of Mr Petar Vladeta sworn 18 July 2005 (Council’s Director of Legal Services, and for a time the Acting General Manager of Council, and, the addressee of the Payment Claim) and Mr Ian Stuart-Robertson (a Director of Lucas Stuart) in an affidavit sworn 21 July 2005.

- 33 In this regard it is sufficient to simply set out the background facts as contended for by the Council which, on this analysis, are to be accepted in their entirety for the reason that on a summary judgement application the Court does not proceed to determine disputed questions of fact.
- 34 The background facts as contended for by the Council were as follows:
- On or about 18 September 2003, Council and Lucas Stuart entered into a contract for the reconstruction of Customs House at Circular Quay.
 - The contract is modified version of AS-2124. Clauses 42.1 of the General Conditions make provisions for the making of progress claims and progress payments. The contract provides that the time to make progress/payment claims is the "first working day of every month".
 - The Contract (to which the subject Payment Claim relates) was entered into by the Council and Lucas Stuart on or about 18 September 2003. Works commenced then or shortly thereafter. The contract sum was \$10,717,385 excluding GST. The contractual Date for Practical Completion was 15 May 2004. That date was, however, extended during June 2004 by the then General Manager (Mr Domm) and the then Director of City Projects (Mr Whittaker). That Date for Practical Completion was extended to 31 July 2004. Additionally, Council agreed to pay to Lucas Stuart a sum of approximately \$170,000.00 on account of "promulgation costs" (query, "prolongation costs"). That amount was paid by or on 30 June 2004.
 - Council engaged an outside consultant, Incoll Project Management Consultants ("Incoll") to project manage the works. Council further engaged Widnell Quantity Surveyors ("Widnell") to certify Payment Claims.
 - Council had several layers of management involved with, or overseeing, the subject building contract. As stated, Council engaged Incoll to project manage the works. It effectively operated as the lead consultant. Below it, or with it, other consultants acted and reported on certain job specific tasks. Widnell reported to Incoll who in turn would make recommendations to Council on matters such as payment claims, variation claims and the like.
 - At all times from 18 December 2003 until immediately prior to 1 April 2005 (that is prior to Payment Claim No. 21 dated 1 April 2005), Lucas Stuart provided or served all Payment Claims (20 in number) under the contract (and the Act) on Incoll and/or Widnell. No such Payment Claims were served on the Superintendent, or at the premises of the defendant. Up to that point, no such Payment Claims were served on Mr Petar Vladeta (the Director of Legal Services of the Council).
 - At all times from 18 December 2003 until immediately prior to 1 April 2005 (that is, prior to Payment Claim No. 21), the practise followed by the parties was for Incoll/Widnell to receive and assess the payment/progress claims, and to make recommendations for payment (or otherwise) with respect to those claims to the Superintendent.
 - Incoll in turn effectively had three senior persons acting as day to day project managers on behalf of the Council. They were firstly Mr James Sherrard who acted in that position until August 2004. He was then replaced by Ms Kathryn Norton who acted as the senior Incoll person on site until around April 2005. Thereafter, Mr Barry Munns was the senior Incoll person on site.
 - During or around late February/early March 2005, Lucas Stuart (by its Managing Director Mr Stuart-Robertson) represented to the Council (Mr Vladeta) that it had a number of contractual claims which needed resolution, or which had been assessed by the Council in a manner that Lucas Stuart was at that time dissatisfied with. Those representations were made orally by Mr Stuart Robertson to Mr Vladeta on site and at a lunch meeting held at Beppi's Restaurant, Sydney.
 - Mr Vladeta's normal responsibilities with the Council were that of General Counsel, or, Director of Legal Services.
 - However, on 28 September 2004, the then General Manager of Council (Mr Robert Domm) resigned. That resignation took effect on 30 September 2004. On 1 October 2004, Mr Vladeta assumed the position of Acting General Manager. Mr Vladeta did not ever intend to apply to act in that position on full time basis, and indeed did not later do so. However, he remained in the position of Acting General Manager until 14 February 2005. During the last month of his tenure in that position, Mr Vladeta was aware that Mr Peter Seamer had been recruited to take over the role of General Manager on a full time basis. To facilitate that transition, Mr Vladeta liaised constantly or routinely with Mr Seamer during the period mid-January to mid-February 2005.
 - By 14 February 2005, Mr Seamer had commenced his position as the new General Manager. However, because Mr Vladeta had had a deal of involvement in projects such as Customs House, it was agreed as between himself and Mr Seamer that Mr Vladeta would continue to be the primary senior management point of contact for that project, and that he would furnish to Mr Seamer from time to time summary papers, or position papers, setting out his recommendation as to courses of action that should or may be taken with respect to that project, and the underlying contractual, property, financial and administrative matters that arose.
 - (i) In the period after 1 October 2004, Mr Vladeta (as Acting General Manager) was a party to many project control group ("PCG") meetings. These were internal Council meetings that involved a number of Council staff who had an interest in the finalisation of the Customs House building works and the operation of the development generally after its construction. The purposes of these meetings was to disseminate and coordinate information with respect to design, work status, the extent of completion, variations (in the sense of where they might impact financially or impact upon potential users of the building), maintenance issues, etc.
 - (ii) By August 2004, Council was concerned that the Project would not be finished by year end. The Date for Practical Completion had not been met – even with the extension to 31 July 2004. Council's concern focused

principally around the fact that many functions had been booked for the function centres during the lead up to Christmas, and the Council had committed to a substantial commercial tenant for level 2.

- (iii) In late August/early September 2004, Mr Vladeta attended a meeting with Mr Robert Domm (the then General Manager) and Ms Catherine Hart (the then superintendent), Mr Mark Georgiadis (Lucas Stuart), Mr Ian Redfern (Lucas Stuart). At that meeting, Lucas Stuart tabled a program which identified a completion date of February 2005. Council (Mr Domm) indicated that this was unsatisfactory and the completion had to occur prior to Christmas. At a second meeting, a week later, Stuart's had tabled a further revised program which showed pre-Christmas completion.
- (iv) By October 2004, Council and Lucas had agreed to a process whereby Lucas Stuart would progressively hand over various parts of the building as they were completed. Council would issue interim occupancy certificates for those parts. The agreement centred around the venue areas and the commercial tenancy on level 2 being completed and handed over first.
- (v) Mr Vladeta did not meet Mr Ian Stuart-Robertson until late November/early December 2004. At that time Mr Vladeta was on site for one of Council's routine site inspections/PCG meetings. Unexpectedly (to him) Mr Ian Stuart-Robertson introduced himself to him. Mr Stuart-Robertson handed Mr Vladeta two business cards, one of which indicated that he was the Managing Director of Lucas Stuart. Mr Stuart-Robertson proceeded to accompany the Council officers on their walk around the site. During that walk, he privately said to Mr Vladeta, words to the following effect:
ISR "I want to come and talk to you about some claims we have got."
PV "You have got to focus on finishing the building. We need a credible program you can stick to and deliver. I'm not across the detail of your claims. We should have that discussion once the project is finished."
ISR "We are putting a lot of resources into this. We're working very hard. It's a difficult project. We're doing our best. It's costing us a lot of money."
PV "We need you to finish the job."
No specifics were discussed. Mr Ian Stuart-Robertson did not indicate that he wanted to talk about claims that had not yet been lodged. Mr Vladeta assumed that he was referring to claims that had already been lodged under the contract in the usual way.
- (vi) Mr Vladeta's account of this discussion is not materially different from that set out by Mr Stuart-Robertson.
- (vii) Mr Vladeta next saw Mr Ian Stuart-Robertson on site during the first half of February 2005. Again, Mr Stuart-Robertson appeared at site unannounced and during one of Council's internal site inspections/PCG meetings. Mr Vladeta recalls he was present at the building with six Council staff as well as consultant staff.
- (viii) At that site inspection (in early to mid February 2005) and whilst Mr Vladeta was walking the site inspecting the works, Mr Ian Stuart-Robertson initiated a private discussion with Mr Vladeta. Mr Vladeta recalls that the following conversation occurred:
ISR "I would like to get together with you. I would like to wrap things up. We have a lot of big claims. This has cost us a lot of money this project. I want to resolve this amicably. Let's get together and talk about it, maybe even have a chat over lunch."
PV "I agree. I'm happy to do that. But we have got to get everything finished."
- (ix) Mr Stuart-Robertson does not depose to a different conversation in any specific terms. He agrees the private conversation occurred. He presumably agrees that he was the person who initiated it. He merely asserts that during this conversation he, "did not discuss claims". Mr Stuart-Robertson further concedes that the lunch meeting was organised by him – though his assertion as to the timing of this does not logically follow.
- (x) Mr Vladeta and Mr Stuart-Robertson met for lunch in late February 2005 or early March 2005. This lunch meeting occurred at Beppe's Restaurant. Mr Vladeta walked there. At the time the meeting occurred, Mr Seamer had already commenced in the General Manager's role. Mr Vladeta took no papers to the meeting. He took no notes at the meeting, nor made any notes after the meeting.
- (xi) Shortly after Mr Vladeta sat down Mr Stuart-Robertson handed to him a Lucas Stuart corporate brochure. When giving the brochure to him, Mr Stuart-Robertson said to him words to the effect that the project had been an unusual one for Stuarts, and that by reason of a connection with AJ Lucas, Lucas Stuart now did a lot of directional drilling work. For what it is worth, Mr Stuart-Robertson disagrees that this was said.
- (xii) Mr Vladeta and Mr Stuart-Robertson then talked about that form of work. Discussion also addressed topics such as Mr Vladeta's background, the fact that he had been the Acting General Manager, and some discussion about the new General Manager.
- (xiii) Around half an hour into the meeting/lunch, the discussion turned to the Customs House Project. Mr Vladeta recalls the conversation occurring as follows:
ISR "This has been a completely different project to that we started. There have been hundreds of variations. The changes just kept coming. We have done our best to deliver but it has cost us a lot. All we want is to get paid. I want to see if I were solve our claims amicably."
PV "There is a process under the contract. I don't have an understanding of the detail of the claims you have made, but if it is going to facilitate an outcome, I'm happy to look at something. But from our point of view, its taken a lot longer than it should have and we have had a lot of cost consequences as well."

ISR "We are happy to knock off the liquidated damages. I will put something together for you to have a look at."

PV "Okay. I will get that done."

(xiv) Mr Stuart-Robertson does not appear to have any material dispute with this conversation – in the sense that his account of the conversation includes a reference to Mr Vladeta asserting that both parties needed to go through, "...the contractual process", with the view to seeing if he, Mr Vladeta, could help. Mr Stuart-Robertson asserts in that section of his affidavit (in an inadmissible way) that "impeding claims" were "broadly discussed", but gives not detail of the content thereof.

(xv) Moreover, and consistently with both Mr Vladeta's version of the content of the conversation, and his piecemeal role in and understanding of the project, Mr Stuart-Robertson's diary note that he alleges was produced shortly afterwards contains references to Mr Vladeta "not knowing the issues", and seeming, "...unwilling to get involved".

(xvi) As stated, at the time of that conversation, Mr Vladeta had only a rudimentary understanding of the status of Lucas Stuart's contractual claims. Mr Stuart-Robertson did not foreshadow to him that new claims were to be provided to him under either the Contract or the Act. He did appreciate that there had developed a deadlock in the contractual management of Lucas Stuart's claims in the sense that Lucas Stuart was dissatisfied with the timing of the resolution of the claims or the outcome of some of the claims. Therefore he agreed to receive a summary of the claims in order to see if there was some way that he could facilitate a resolution of the matter.

[Those matters are not seriously disputed by Mr Stuart-Robertson – who records himself as actually saying to Mr Vladeta that Lucas Stuart was, "...not satisfied with the approval and payment of the variation claims", and makes no mention at all in his account of anything to do with the Act.]

(xvii) As stated, up to that point Mr Vladeta had not ever been personally served by Lucas Stuart with any progress payment claims under the contract, or with any payment claims under s.13 of the Act. Rather, the process had always been that progress claims under the contract/Payment Claims under the Act were sent by Lucas Stuart to Widnell at first instance. Widnell then assessed those claims and made recommendations (with Incol Management) to the Superintendent.

(xviii) Despite that, the material payment claim under the Act (Payment Claim 21) was delivered on 1 April 2005 by Lucas Stuart to Council (to the attention of Mr Vladeta). It comprised three volumes. It was delivered to Mr Vladeta's office. Mr Vladeta recalls receiving in his office the three volumes on or shortly after 1 April 2005.

(xix) At no time did Mr Vladeta ever receive a telephone call or a letter or a facsimile from Mr Stuart-Robertson to advise that what had been sent to him was not a (summary) package of the Contract claims that have been made to that time, but was rather a new Payment Claim under the Act.

[Mr Stuart-Robertson does not disagree with this – he states merely that, "on delivery of the payment claim to the Defendant on 1 April 2005, he advised Mr Vladeta in writing that he had left a message with his office" to call him (Mr Stuart-Robertson), "...at his earliest convenience". That "writing" is not produced by Mr Stuart-Robertson.]

(xx) Had Mr Vladeta been aware of the nature of what it was that he was to be provided with, and was provided with, (ie, a payment claim under the Act and not a summary of claims) he would have moved promptly to ensure that a payment schedule issued within the time required under the Act. That he did not is illustrative of his reliance upon Mr Stuart-Robertson's representations and conduct as set out above.

(xxi) Mr Georgiadis' affidavit of 21 July 2005 (filed on behalf of Lucas Stuart) does not materially, or at all, impact upon the above summary of facts. Nor does Mr Redfern's affidavit of 21 July 2005 (again filed on behalf of Lucas Stuart). Those affidavits address the separate issue of the degree to which there has been an accord and satisfaction of the items the subject of the Payment Claim since 1 April 2005."

35 It is necessary to add to these background facts that during the course of the hearing before me, Mr Vladeta gave further evidence [no examination being permitted] as follows:

"Q. In paragraph 24 of your affidavit you refer to receiving in your office on 1 April 2005 three volumes of documents from Lucas Stuart, do you recall that?

A. Yes, I do.

Q. Can you just describe the appearance of these three volumes? Were they in folders or how did they present?

A. There were three lever arch folders.

Q. And was there anything on the outside of the folders to identify what they were?

A. I don't specifically recall. I believe there were - there was.

Q. Was there anything on the outside of the folders to indicate that they included a payment claim under the Act?

A. No, there was not to my recollection.

[I interpolate that it should be recalled that the Council does not put in issue the fact that it was served with the Payment Claim]

Q. Now, for the ten days after you received the three arched lever folders, where did they remain?

A. To the best of my recollection in my office.

Q. And during that time did you do anything in relation to those folders?

A. Well, I did this: I requested the director of city projects, being Katherine Hart, to convene a meeting with Incol to review the substance of the - the contents of the folders and did that not occur within the ten business days.

Q. Other than take that step, did you look at the volumes?

A. No, I did not.

Q. And why was that?

A. Because I had been expecting a summary or an analysis of claims already made. I think my reaction when I received three folders and understood they were from Stuarts was of exasperation. It certainly wasn't a summary and there was clearly going to be a lot of work to do, which was why I requested a meeting involving Incol."
[Transcript 37]

- 36 Having carefully considered each of the above outlined background facts and accepting for the purpose of the present exercise all of the evidence adduced by the Council at its highest, the finding is that no arguable case is made out on that evidence. Lucas Stuart were not responsible for what occurred within the offices of the Council. There is a huge slip 'twixt the cup and the lip' as between on the one hand, the terms of the conversation deposed to by Mr Vladeta as taking place with Mr Stuart-Robertson, and on the other hand any suggestion that the elements necessary to set up an estoppel have been established.
- 37 It is unnecessary to repeat the analysis of estoppel to be found in the judgment of Mason CJ in *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 409-413. Suffice it to say that the overarching doctrine of estoppel: "provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid, it would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption": per Mason CJ at 413.
- 38 Even taking the Council's evidence at its highest the evidence does not raise an arguable case that Lucas Stuart can by its submission of the Payment Claim in the circumstances be seen to have unjustly departed from an assumption as to a present or future state of affairs which that conduct caused the Council to adopt or accept. The whole of the environment involved as an important backdrop, the parties respective contractual rights, as well as the parties rights and obligations accruing by the very fact that the Act contained provisions regulating the interim fast track adjudication procedure. Further and independently of what has been said above, the Council has not, taking its evidence at its highest, raised an arguable case that the estoppel contended for would achieve the necessary proportionality between the remedy and the detriment which is its purpose to avoid. The Council's case here amounts to what would be a disproportionate making good of the relevant assumption. The case is entirely inchoate as to the period during which Lucas Stuart would have been disentitled from submitting a payment claim under the Act. In short taking its evidence at its highest, the Council's estoppel case is not an arguable case in the environment of the Act.
- 39 Likewise the Trade Practices Act/Fair Trading Act which rests upon the same central foundation is not an arguable case in the environment of the Act.

Section 34

40 Section 34 of the Act provides as follows:

"34 No contracting out

(1) The provisions of this Act have effect despite any provision to the contrary in any contract.

(2) A provision of any agreement (whether in writing or not):

(a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted (or that has the effect of excluding, modifying or restricting the operation of this Act), or

(b) that may reasonably be construed as an attempt to deter a person from taking action under this Act, is void."

41 It has been unnecessary to deal with Lucas Stuart's contentions to the effect that the estoppel defence flies in the face of section 34.

Short Minutes of Order

42 The parties are to bring in Short minutes of order which will provide for the entry of summary judgement in accordance with these reasons excluding what I have referred to as the second sum.

Mr PT Taylor SC, Mr M Luitingh (Plaintiff) instructed by Tress Cox (Plaintiff)

Mr DD Feller SC (Defendant) instructed by PricewaterhouseCoopers Legal (Defendant)