

JUDGMENT : Nicholas J : New South Wales Supreme Court : 11th February 2005

- 1 These proceedings concern a dispute as to the validity of an adjudicator's determination under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act). The matter for determination was a payment claim under s 13 of the Act by a sub-contractor for work done and materials supplied during the construction of a residential development known as "Nuova Apartments" at 70A Vista Street, Mosman (the project). The project involved the construction of 86 apartments, a public pool, and various retail outlets.
- 2 By his determination dated 7 July 2004 the adjudicator found that there was a construction contract under s 4 of the Act, and determined that the Plaintiff, Okaroo Pty Limited (Okaroo) pay the First Defendant, Vos Construction and Joinery Pty Limited (Vos) the sum of \$275,267.27 in respect of the amount claimed in the payment claim dated 19 May 2004, with interest at nine percent per annum from 19 June 2004 to date of payment, and that the costs and expenses of the adjudication be paid by each party in equal shares.
- 3 By its summons filed 19 July 2004 Okaroo sought an order under s 69 *Supreme Court Act 1970* (NSW) for relief in the nature of certiorari quashing the adjudicator's determination, and orders to restrain the Defendants from acting upon it. Following the decisions of the Court of Appeal delivered on 3 November 2004 in *Brodyn Pty Limited v Davenport & Anor* [2004] NSWCA 394 and *Transgrid v Siemens Limited & Anor* [2004] NSWCA 395 Okaroo, by letter from its solicitors dated 8 November 2004, sought leave to amend the summons by substituting the claim for relief in the nature of certiorari for a claim for a declaration that the adjudication determination is void. By their letter dated 20 December 2004 Okaroo's solicitors informed the court that Vos consented to the proposed amendments on condition that Okaroo pay any costs thrown away by Vos in respect of the amendment. The amended summons was filed on 5 January 2005.
- 4 Thereupon the court sought further submissions from the parties, particularly as to whether, having regard to *Brodyn* (paras 53-56) and *Transgrid* (para 30), the basic and essential pre-conditions for the existence of the adjudicator's determination in this case had been satisfied. Further submissions on behalf of the parties were made to the court on 7 February 2005 which demonstrated that the issues remaining for determination had been narrowed.
- 5 The issue which remained for determination in these proceedings is whether the adjudicator was correct in finding that there was an arrangement between the parties which was a construction contract as that expression is defined in s 4 of the Act. Both parties accepted that if the adjudicator was wrong and the court found there was no construction contract he had fallen into jurisdictional error so that the determination was void, and Okaroo was entitled to the declaration sought. It was also accepted that if the court found there was a construction contract the amended summons should be dismissed.

Background

- 6 On about 19 March 2002 Okaroo as the developer entered into a contract with Consolidated Constructions Pty Limited (Consolidated) pursuant to which Consolidated agreed to perform all construction works associated with the project. Relevantly these included the supply and installation of joinery items including vanity units, kitchen units, laundry benches, and linen cupboards.
- 7 Pursuant to cl 10 of the contract Vos was nominated as the sub-contractor to Consolidated for the supply and installation of the joinery items. Clause 10.5 provides for direct payment of the sub-contractor in these terms:
"10.5 Direct Payment of Nominated Subcontractor
In respect of Nominated Subcontract Work performed by a Nominated Subcontractor, the Principal shall make payment directly to the Nominated Subcontractor. Except where the Contractor has accepted an assignment of the benefit of a prior contract made between the Principal and a Nominated Subcontractor -
(a) *such payment shall be made on behalf of the Contractor; and*
(b) *if the Contractor reasonably requests the Principal in writing not to make a payment to the Nominated Subcontractor, the Principal shall withhold payment but under no circumstances, including bankruptcy or winding up of the Contractor, shall payment be made to the Contractor.*
The Principal as stakeholder shall hold retention moneys and security provided by a Nominated Subcontractor and shall disburse or apply the retention moneys or security as jointly requested by the Contractor and the subcontractor or in accordance with the decision of an arbitrator or Court".
- 8 On about 12 August 2002 Vos was invited to tender for the sub-contract for the joinery work for which it provided a quotation on 4 October 2002.
- 9 On 14 November 2002 there was a meeting attended by Mr Michael Wiltshire, general manager of Vos, Mr Peter Hing, a director of Okaroo, Mr John Suprun of Allen Jack + Cottier the architect and superintendent of the project, and Mr Adam Strong of Consolidated. Mr Wiltshire expressed his concern at Consolidated's poor payment performance for work carried out by Vos on other projects, and indicated unwillingness to be involved in this project.

In his statutory declaration made 17 June 2004 Mr Wiltshire stated the following:
"4. To the best of my recollection, at the end of the Meeting I said to Hing that I was "not happy with the payment debt still owing from Consolidated on the Avis and David Jones project", and indicated that Vos were willing to walk away from his project, to which Hing replied "well, we will pay you direct"."

- 10 By letter dated 14 March 2003 Mr Peter Hing wrote to Vos in the following terms: *“Please find attached a cheque in the sum of fifty five thousand dollars (\$55,000), including GST, as deposit for the Nominated Joinery Sub-Contract for Nuova Mosman.*
- The deposit is a sign of goodwill to allow VOS to proceed with preparation of shop drawings and manufacturing of the prototype apartments, prior to entering into a Nominated Sub-Contract with the Building Contractor, Consolidated Constructions Pty Limited.*
- As agreed, the deposit will form part of the contract sum, and the amount will be reflected in your first progress claim.*
- We confirm that your future drawdowns will be paid direct by Okaroo Pty Limited, upon recommendations by Consolidated Constructions; AJC, the Superintendent and WT Partnership, Quantity Surveyors.*
- Please provide a breakdown of the claims made by your sub-contractors, namely, the glazer and stone installer. The glazer and stone installer will also be paid direct by Okaroo.*
- We look forward to working with you on Nuova Mosman and other projects in the future”.*
- 11 By letter dated 23 April 2003 Mr John Suprun wrote to Vos in the following terms: *“We write this letter to advise you that on behalf of the Principal, Okaroo Pty Ltd, we have instructed Consolidated Constructions Pty Ltd (Contractor) to accept your quotation for the supply and installation of the joinery to the above project. Contractually, you will become a subcontractor to Consolidated Constructions Pty Ltd and will be bound by all conditions of contract.*
- As discussed and agreed with the Principal and the Contractor, the stone tops and glass splashbacks will be treated as subcontracts to Vos Construction and Joinery Pty Ltd. Your monthly claims will include separate items for these subcontracts, and along with your claim will be assessed as part of the normal monthly assessment. The only variation to contract conditions will be that the Principal will pay yourselves, the stonetops subcontractor and the glass splashback subcontractor directly”.*
- 12 On about 21 May 2003 Consolidated entered into a sub-contract with Vos for the supply and installation of the joinery items. Clause 41 provided a regime for payment. Relevantly it provides:
- “41 PAYMENT**
- “Incorporated Works” means that the item of work or supply must be built into the Subcontract Works.*
- 1. Consolidated is to pay the Subcontractor the Subcontract Price specified in the Contract Information by progress payments subject to and in accordance with the Subcontract, based on the value of Incorporated Works carried out. The Subcontract Price is fixed and not subject to rise or fall in the cost of labour or materials, import duty, exchange rate fluctuations, or for any other reason, unless expressly specified in the Subcontract.*
 - 2. Payment claims for Incorporated Works are to be made by the Subcontractor as provided in the Contract Information and if nothing is so provided then once each month on the day of each month specified by Consolidated to the Subcontractor. ...*
 - 4. Progress payments shall be made at the time provided in the Contract Information and if not so provided, then within 31 calendar days after a payment claim is made pursuant to Clause 41.2 (subject to any other requirements of this, Clause 41). Consolidated may deduct or withhold any monies that it is entitled to set off against progress payments under this Subcontract. If the setting off produces a negative balance, the Subcontractor must pay the shortfall to Consolidated within 21 calendar days of receiving written notice of the shortfall”.*
- 13 Item 12 of the Contract Information in the sub-contract states:
- “12. Progress Payments (clause 41.4): Direct from Okaroo Pty Ltd”.*
- 14 Between about 29 May 2003 and 30 April 2004 Vos submitted direct to Okaroo 13 progress claims and tax invoices relating to the joinery work. Vos also sent a copy of the documentation to Consolidated.
- 15 During the course of the project Consolidated submitted to Okaroo its monthly progress claims which included amounts referable to sub-contractors including Vos. Following a process of assessment and recommendation amounts were paid by Okaroo directly to sub-contractors, including Vos, which amounts were deducted from those otherwise payable to Consolidated. This procedure was in accordance with the arrangement under cl 10.5 of the main contract and as contemplated in item 12 of the contract information in the sub-contract between Vos and Consolidated.
- 16 During the period 12 March 2003 to 5 February 2004 Okaroo made seven payments (including a deposit) in the total amount of \$827,616.70 direct to Vos in respect of the joinery work.
- 17 On or about 29 March 2004 Consolidated went into liquidation.
- 18 On about 19 May 2004 Vos served Okaroo with a payment claim under s 13 of the Act for the amount of \$390,045.33.
- 19 In its letter to Vos dated 2 June 2004 Okaroo denied the validity of the claim as a payment claim under the Act on the ground that it was not a party to a construction contract and thus not liable to Vos for performance under its terms. Alternatively, Okaroo sought to protect its position under the Act by providing a payment schedule in response to the payment claim in which it stated that the amount of the payment proposed to be made was nil.

- 20 By its application to the Third Defendant, LEADR, dated 17 June 2004 Vos made application for adjudication of its payment claim. On 23 June 2004 the Second Defendant, Mr Gerald Rafflesath, (the adjudicator) accepted appointment as adjudicator.
- 21 On 25 June 2004 Okaroo served its adjudication response under s 20 of the Act on Vos and the adjudicator.
- 22 On 7 July 2004 the adjudicator made the determination earlier referred to.
- 23 On 19 July 2004 Okaroo filed its summons in these proceedings and interim orders were made restraining Vos from taking steps to enforce the determination, and from applying for an adjudication certificate under the Act.

The determination

- 24 The adjudicator decided that Okaroo was bound by the sub-contract between Consolidated and Vos (to which Okaroo was not a party) and that it was a construction contract under the Act. He held that in terms of the executed sub-contract Vos was entitled to have payments of its progress claims made to it directly by Okaroo (para 11). He proceeded to express the view that it seemed "... to be unambiguously clear from the terms of the sub-contract that the person liable to make the payment is the (Okaroo) and thus held Okaroo to be the person obliged to pay Vos any amount properly found to be due to Vos under the sub-contract". (Para 12).
- 25 However, in these proceedings Vos does not argue that the adjudicator was correct in so deciding, and does not contend that it was open on the evidence before him to find that there was a contract between Okaroo and Vos which was a construction contract as defined.
- 26 The issue in these proceedings arises from the adjudicator's alternative finding that the relationship between the parties under which the construction work was undertaken was an arrangement which met the definition of a construction contract, pursuant to which Vos was to be paid direct by Okaroo. Vos contends that the finding was correct and that there existed a construction contract evidenced by the arrangement.
- 27 The relevant passages from the determination are the following:
- "13 If I were to be wrong in this view, I nevertheless consider that the relationship between the Claimant and the Respondent is what might properly be described as an "arrangement" under which the Claimant has undertaken to carry out construction work for the Respondent which has agreed to pay the Claimant for that work. The Claimant clearly commenced to supply the joinery work in terms of a direct relationship with the Respondent, and it does not seem to me that the superimposition of a nominated subcontract terminated or negated that arrangement. The arrangement and the subcontract were perfectly well able to survive together. Indeed, so far as payment is concerned, the subcontract entrenched the arrangement, and Special Condition 7 removed the possibility of conflicting terms.*
- 14. It may be that the proper analysis of the position is that the Claimant made an arrangement with the Respondent under which the Claimant undertook to carry out construction work for the Respondent, the subcontract being the method by which that arrangement was implemented. Considering the background to the matter it seems to me to be clear that the Claimant and the Respondent agreed that the Claimant would supply and install the joinery, and it commenced its task before the subcontract was entered into on the basis of the arrangement it had with the Respondent. The nominated subcontract then takes the colour of a supplemental agreement providing for the proper administration of the arrangement already entered into. It is easily understandable why the Respondent would want Consolidated to supervise the work, being part of the whole project, and approve progress claims for payment. But it is clear that this did not make Consolidated liable to make the payment, which means that there must have been some other party liable to make the payment. Such liability is to be found in the arrangement already referred to. ...*
- 18. I reject the submission (paragraphs 39 and 40 of the Respondent's submission) that even if the Respondent is found liable to pay the Claimant, it will still be liable to Consolidated. In view of the arrangement that the Claimant should be paid direct, Consolidated can clearly not insist on payment of the Claimant's progress claims being made to it. I further conclude that there is no substance in the grounds relied upon by the Respondent for its submissions either that I should determine that no amount is payable to the Claimant, or that I would be acting in excess of jurisdiction under the Act, and I reject them".*

The legislation

- 28 The relevant provisions of the Act include the following:

"3 Object of Act

- (1) *The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*
- (2) *The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments".*

Section 4 contains these definitions:

"construction contract" means a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party. ...

“progress payment” means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement):

- (a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or
- (b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or
- (c) a payment that is based on an event or date (known in the building and construction industry as a “milestone payment”). ...

7 Application of Act

(1) Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales”.

Section 7(2) excludes the application of the Act to certain construction contracts to which it is unnecessary to refer.

“8 Rights to progress payments

- (1) On and from each reference date under a construction contract, a person:
 - (a) who has undertaken to carry out construction work under the contract, or
 - (b) has undertaken to supply related goods and services under the contract, is entitled to a progress payment.
- (2) In this section, “reference date”, in relation to a construction contract, means:
 - (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or
 - (b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month. ...

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”.

29 In his second reading speech (Hansard, 8 September 1999, Legislative Assembly p 104ff) the Minister said: “The main thrust of this bill is to reform payment behaviour in the construction industry. The bill creates fair and balanced payment standards for construction contracts. The standards include use of progress payments, quick adjudication of disputes over progress payment amounts and provision of security for disputed payments while a dispute is being resolved. The bill will speed up payments by removing incentives to delay. Reforms include the power for an unpaid contractor or subcontractor to suspend work and a ban on pay-when-paid and pay-if-paid clauses. ...

The bill is divided into four parts and two schedules. Part 1 deals with the broad objectives of the bill, its commencement and definitions. The legislation will not apply to construction contracts formed before the date of its commencement. Part 2 introduces a statutory right to receive progress payments for construction work. It also provides default provisions dealing with matters such as intervals at which progress claims are made, time for payment following a progress claim and how to value work for progress payments. The default provisions operate if the construction contract is silent on these matters but do not override any such relevant provisions in the contract.

Part 3 of the bill deals with the procedure of claiming for progress payments and describes the adjudication process if a dispute arises over payment. It covers issues such as how adjudicators are appointed and consequences of adjudication such as provision of security for payment and rights to suspend work. Part 4 covers miscellaneous matters, including the regulation-making power and that the Act will bind New South Wales State Government contracts, but not contracts with the Commonwealth.

I shall now describe in more detail the many salient features of this bill. Some construction contracts do not explicitly provide for progress payments. A construction contract will now have to include provision for making progress payments and for determining the amount of each progress payment, otherwise these matters will be covered by the default provisions in the bill. In forming their contract, the parties are free to agree upon the intervals for making payment claims, times for making payment and how such payments are valued.

Page 105

But if the contract does not cover these matters, part 2 of the bill provides that payment claims can be made at four-weekly intervals, with payment becoming due two weeks after a payment claim is made. If the construction contract is silent on how a payment is to be valued, then part 2 also provides that the amount is calculated on the basis of the value of work carried out and related goods and services provided. Some subcontracts provide that a subcontractor is not entitled to be paid until the principal pays the contractor, even though the principal is late in paying or withholds payment on account of something unrelated to the subcontractor’s performance. ...

Under part 3, when a payment claim is made, and the other party, called the respondent, does not intend to pay the full amount of the payment claim, it must issue a payment schedule stating the amount, if any, of the payment claim which will be paid and the reasons for not paying the amount claimed. The time for issue of the payment schedule is

10 business days after receipt of the payment claim. The payment schedule alerts the claimant to the existence of a dispute over payment and allows the claimant to immediately commence the adjudication process available under the legislation. This is a critical component of the bill as it provides a statutory early warning to claimants that the respondent does not propose to pay their claim in full”.

The submissions

- 30 Mr S A Kerr, of counsel, appeared for Okaroo. He submitted that the adjudicator’s determination was void in that there was no construction contract within the meaning of s 4 of the Act pursuant to which Okaroo was or might be liable to make the payment the subject of the payment claim by Vos under s 13 and, hence, an essential pre-condition for the existence of the adjudicator’s determination had not been met.
- 31 In developing the submission he argued that for a contract or other arrangement to satisfy the definition of construction contract it was necessary that under its provisions the party for whom the construction work was undertaken was made legally liable to pay the other party for it. He argued that this requirement follows from the terms of s 13(1) which enables a claimant to serve a payment claim “... on the person who, under the construction contract, is or may be liable to make the payment”.
- 32 It was put that, upon the proper construction of s 13(1) the liability of the person to make the payment is a liability incurred under the arrangement which is the construction contract as defined. Mr Kerr argued that the term “arrangement” in the definition should, having regard to the language of s 13(1), be understood to be one under which the person for whom the construction work has been done has incurred an enforceable liability to pay the person by whom it was carried out. Thus it is necessary to have careful regard to the evidence as to the terms and conditions of the arrangement claimed to constitute a construction contract as defined. If the arrangement is one under which no such liability is incurred it is not a construction contract within the meaning of s 4. In short, Mr Kerr submitted that for the purposes of the Act there is no distinction to be drawn between a contract or other arrangement. (T p 22, 7 February 2005).
- 33 Accordingly, it was submitted that a claimant can only serve a payment claim on the person who, under the contract or arrangement, is or may be liable to make the payment.
- 34 It was put that the evidence was that Okaroo made payments to Vos on behalf of Consolidated pursuant to the procedure under cl 10.5 of the head contract, although it was under no contractual liability to Vos to do so. The party liable to Vos to make the payments was Consolidated pursuant to cl 41 of the sub-contract, and it was only against Consolidated that Vos had any enforceable claim for payment for the construction work.
- 35 It was submitted that it therefore followed that as there was no contract or arrangement under which Okaroo was liable to pay Vos for the construction work Okaroo was not a person who is or may be liable to make the payment within the meaning of s 13(1) and thus Vos was not entitled to embark upon the procedure for the recovery of a progress payment under Pt 3 of the Act.
- 36 Finally it was submitted that where Okaroo had no legal liability to pay Vos for the construction work under the sub-contract pursuant to which it was undertaken, the adjudicator had fallen into jurisdictional error in finding that there was a construction contract under s 4 between the parties, and thereupon proceeded to determine Vos’s entitlement under its payment claim. As a consequence, the determination was void.
- 37 Mr Duncan Miller, of counsel, appeared for Vos. His submission was, in effect, that on the evidence the essential pre-condition was satisfied in that the necessary construction contract was evidenced by an arrangement by which Vos undertook to carry out construction work and/or to supply related goods and services for Okaroo as the adjudicator correctly found.

The arrangement

- 38 I turn first to the question whether there was, in fact, an arrangement between the parties for construction work.
- 39 A construction contract under s 4 is established by proof of the existence of a contract or other arrangement under which construction work is carried out by one party for another. The Act does not define “contract” or “arrangement”.
- 40 Arrangement” is a word without precise meaning. It appears in many statutory contexts and has been given meaning in those contexts in many cases. For the purposes of this case I find assistance in the following statements: “... the word “arrangement” is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons – a plan arranged between them which may not be enforceable at law”. (*Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1 at p 7).
- “The expression “arrangement or understanding” in ss 45(2) and 45A requires that at least one party assume an obligation or give an assurance or undertaking that it will act in a certain way. A mere expectation that as a matter of fact a party will act in a certain way is not enough”. (*Australian Competition and Consumer Commission v CC (New South Wales) Pty Ltd (No 8)* (1999) 165 ALR 468 per Lindgren, J at p 469).
- (See also, *Legal & General Assurance v Stock* [1993] 49 IR 464 at pp 480-481; *State Bank of NSW v Grover* (1996) 64 IR 451 at pp 456-457).
- 41 With regard to the authorities, and to its context in the Act, in my opinion the term “arrangement” in the definition is a wide one, and encompasses transactions or relationships which are not legally enforceable agreements. The distinction in the definition between “a contract” and “other arrangement” is intended by the legislature to be one

of substance so that under the Act construction contracts include agreements which are legally enforceable and transactions which are not. Thus in distinguishing between these relationships I understand the legislature intends that “contract” is to be given its common law meaning and that “arrangement” means a transaction or relationship which is not enforceable at law as a contract would be. Accordingly I reject the submission for Okaroo that the term “arrangement” should be understood to mean an agreement which is tantamount to a contract enforceable at law.

42 In deciding whether a contract or other arrangement is within the definition of construction contract the only matter for consideration is whether it is one under which one party undertakes to carry out construction work, or to supply related goods and services, for another party. There is no other requirement or qualification which is expressly or by implication included in the definition which must be satisfied. It may be safely assumed that had the legislature intended any additional requirement or qualification it would have included it in the definition. (Contrast, for example, s 22(2)(b) whereby the adjudicator is, in terms, directed to consider the provisions of the construction contract from which the application arose in determining an adjudication application).

43 The evidence establishes, and I find, that from about 14 March 2003 when Vos commenced the joinery works there was an arrangement under which Vos undertook to carry out construction work and to supply related goods and services for Okaroo. Vos, in fact, carried out the joinery work and, as part of the arrangement Okaroo would, and did, make payments direct to Vos for the work done. The arrangement as it operated was as contemplated in the conversation between Mr Wiltshire and Mr Hing on about 14 November 2002, and in the letters of 14 March and 23 April 2003 (paras 9, 10, and 11 above, respectively). It commenced before the sub-contract between Vos and Consolidated was made. This arrangement was one which plainly accords with the descriptions given in the judicial statements to which I have referred.

44 However, Okaroo submits that to find the existence of such an arrangement is not sufficient to meet the definition of construction contract. It is put that the arrangement must be one under which the liability to pay for the construction work is legally enforceable.

45 The question raised in the submission requires consideration of the statutory scheme and its objects.

46 A comprehensive analysis, with which I respectfully agree, was provided by Macready, AJ in **Beckhaus v Brewarrina Council** [2002] NSWSC 960:

“60 The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress payments when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties’ existing contractual rights. See ss 3(1), 3(4)(a) and 32. The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties’ contractual regime. There is only a limited modification in s 12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual scene. This causes confusion and hence the defendant’s submission that the words “person who is entitled to a progress payment under a construction contract” in s 13(1) refers to a contractual entitlement.

61 The trigger that commences the process that leads to the statutory rights in s 15(2) is the service of the claim under s 13. That can only be done by a person who “is entitled to a progress payment under a construction contract”. The words “progress payment” are a defined term in the Act. It means a payment to which a person is entitled under s 8. That section fixes the time of the “entitlement” given by the section by reference to the contractual dates for making claims or, if there is no contractual provision, for making claims by reference to a four week period. Section 9 deals with the amount of such a statutory progress payment. Importantly, s 9 uses similar words to s 13 in that it refers to “a progress payment to which a person is entitled in respect of a construction contract” and then directs determination of that amount by reference to both contractual amounts or if no contractual amount on the basis of the value of the work done.

62 Section 11 then deals with the due date for payment in respect of “a progress payment under a construction contract”. It does it also by reference to contractual due dates and if no such provision then by reference to a two-week period. One thus has a series of sections which create a statutory right to a progress payment by fixing entitlement, the date for making claims, amount of claims and due date for payment of claims. The statutory right to claim is for both situations, namely, where a contract provides for such claims and where it does not.

63 Thus s 13 merely continues on the statutory procedure and the opening words must be a reference to the statutory entitlement created in the previous sections not the contractual entitlement submitted by the defendant”.

(Also, see generally **Jemzone Pty Limited v Tritan Pty Limited** [2002] NSWSC 395).

47 As His Honour pointed out, the Act contemplates a dual system by creating a statutory system alongside any contractual regime.

48 It must be kept in mind that the object of the Act is to ensure that a person who undertakes construction work under a construction contract is entitled to receive, and is able to recover, progress payments in relation to that work (s 3(1)). The means by which it is ensured that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments (s 3(2)). As Austin, J observed in **Jemzone** (para 41) the Act offers special statutory rights which override general contractual rights and place a claimant in a privileged position.

- 49 The procedure by which it is ensured that a person is entitled to recover a progress payment is explained in s 3(3).
- 50 The statutory entitlement to a progress payment for the benefit of a person who has undertaken to carry out construction work or to supply related goods and services under a construction contract is provided by s 8(1) which gives effect to the statement in s 3(2). The term “progress payment”, being the payment to which the statutory entitlement refers, is defined in s 4. Importantly, the statute contains default provisions which operate if the construction contract is silent, and which deal with matters such as intervals within which claims may be made (s 8(2)(b)), amount (s 9(b)), valuation (ss 10(1)(b), (2)(b)), and time for payment (s 11(1)(b)) (*Jemzone* para 26).
- 51 The statutory scheme therefore operates, as intended by s 3(2), regardless of the existence or absence in contracts or arrangements for construction work of provisions which govern entitlement to, and liability for, payments. Where, for example, the arrangement is one which does not give rise to liability for payment enforceable at common law against the party for whom the work is done the statute provides for liability for a progress payment.
- 52 The Act applies to any construction contract as defined (s 7(1)) except those referred to in s 7(2), (3), (4), and (5). It thus applies to provide a statutory entitlement to a progress payment (which itself is a creature of statute), and a procedure whereby liability for its payment may be established, which procedure extends to its recovery. It thus gives effect to the objects stated in s 3.
- 53 In that context, therefore, it will be seen that the provisions of s 13(1) should be construed consistently with those of s 8(1), as the opening words of s 13(1) direct. The liability referred to is in respect of the progress payment to which the statute entitles a person who meets the description in s 8(1)(a) or (b). So understood, it is clear that issues of entitlement and liability stem from the statute and not from the provisions of the contract or arrangement which is the construction contract.
- 54 In my opinion no support is to be found in the words of s 13(1) for Okaroo’s argument as to the proper construction of the expression “contract or other arrangement” in s 4. Indeed, they are totally irrelevant to that exercise.
- 55 In my opinion there is nothing in the definition of construction contract itself, or read with s 13(1), which indicates the qualification for which Okaroo contends. As I have earlier held, the only requirement to satisfy the definition is that the contract or other arrangement be one under which “... *one party undertakes to carry out construction work, or to supply related goods and services, for another party*”. The terms and conditions (if any) pursuant to which a liability is incurred to pay for the construction work carried out, or the related goods and services supplied, are entirely irrelevant to the requirement of the definition. Accordingly, I reject Okaroo’s submission that a construction contract must be a contract or other arrangement under which liability to pay for the construction work is legally enforceable.

Conclusion

- 56 I keep in mind that the only issue in these proceedings is whether there was a construction contract. I have found that there was. To the extent that the adjudicator held there was an arrangement which met the definition of construction contract in my opinion, with respect, he was correct. It follows that the essential pre-condition for the existence of his determination has been satisfied (*Brodyn* paras 53-56).
- 57 Upon the payment claim proceeding to determination under Pt 3 of the Act, the issues of liability to make the statutory progress payment were properly for determination by the adjudicator. I express no view as to his finding on liability, or as to any other matter decided by him.
- 58 For the above reasons the amended summons should be dismissed.
- 59 In the circumstances it is appropriate that I direct Vos to bring in short minutes, and to afford the parties the opportunity to address me in relation to costs but only if there is no agreement on that question. Arrangements should be made with my Associate by 18 February 2005 for the re-listing of the matter.

S A Kerr/A Matalani – Plaintiff instructed by Clayton Utz
D T Miller - First Defendant instructed by Cutler Hughes & Harris