

**JUDGMENT HIS HONOUR : Malpass AJ** : Supreme Court of New South Wales. 20<sup>th</sup> April 2006

1 The defendant did building work for the plaintiff (on, inter alia, a dwelling at Point Piper). There were three original contracts and a number of progress payment claims made pursuant to the Building and Construction Industry Security of Payment Act 1999 (the Act). Save for one of those claims, all have been paid.

2 The parties fell into dispute concerning invoice no. 1382. It is dated 20 January 2005 and claims the sum of \$29,040. It contains a description of the work as follows:-

*Variations:*

- a). *Supply and install curved F.C. ceiling to verandah*
- b). *Supply and install Fire Rated plasterboard to plant room. (Includes dismantling, removal and re-instatement of A/C unit)*
- c). *Supply and install plasterboard to underside of landing to stairs and voids.*
- d). *Supply and install plasterboard to entrance hall to walls and ceiling instead of render work.*
- e). *Supply and install walls to basement void instead of render work. Build cavity [sic] wall to suit stairs to basement level.*
- f). *Supply and install 1 x access panel and MDF door to basement.*
- g). *Remove limestone render off walls to ground floor and level 1. 1 x men x 2 weeks @ \$55/hr.*
- h). *Pack out walls and supply and install furring chanel [sic] to level walls.*
- i). *Supply and install plasterboard to storeroom in attic [sic].*

3 It is common ground that the plaintiff did not reply to the claim by providing a payment schedule in accordance with the Act. In those circumstances, s14 of the Act operates to make the plaintiff liable to pay the claimed amount on the due date for the progress payment in respect of which the payment claim relates.

4 The claimed amount was not paid. The defendant brought proceedings in the Local Court to recover it. The parties went to a defended hearing. The defendant was successful.

5 The plaintiff has filed a summons in this court seeking to challenge the decision of the Magistrate (Huber LCM). The judgment was delivered on 31 October 2005. The appeal has been brought out of time (the summons was not filed until 1 February 2006). The appeal is incompetent unless an extension of time is granted.

6 The plaintiff alleges error in point of law. The ambit of dispute is narrow. The plaintiff says that the claim was for work that was agreed to be done and was in fact done during January 2005. It looks to the provisions of s8 of the Act. This section is in the following terms:-

*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) who 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.*

7 It is common ground that the terms of the contract in this case made no express provision with respect to the matter of a “reference date”.

8 The plaintiff contends that the claim could not be made in a progress payment until on and from 31 January 2005. The defendant contended that the work had been first carried out prior to 31 December 2004. This was the point debated both before the Magistrate and in this court. The plaintiff says that there was an error of law on this matter and that it is entitled to have the decision of the Local Court set aside.

9 There has been reference to a number of cases which have involved a consideration of provisions of the Act. There is no dispute as to what is said by the cases. The dispute that unravelled before this court was whether or not the Magistrate was correct in holding that the work was done prior to 31 December 2004 (and accordingly, the reference date was on and from 31 December 2004).

10 I now turn to the evidence that was before the Magistrate. The relevant material is to be found in an affidavit sworn by Joe Blazevic (a director of the defendant) on 18 August 2005.

11 On 6 January 2005, the defendant received a letter from the plaintiff. It required what was described as “*design information*” to be completed within ten days of the date of the letter. Certain of the items contained therein involved the performance of variations. The defendant responded with a quotation and design information faxed on 11 January 2005.

12 A few days later, Mr Blazevic received a telephone call from the plaintiff’s site supervisor. Thereafter, a number of persons (including Mr Blazevic and James Horne (director of the plaintiff)) had a meeting at the site. It took place in or about mid to late January 2005.

13 Mr Blazevic deposed, inter alia, to the following conversation taking place between the two men:-  
*I said: “What are we going to do about all of the extras on this job?”*  
*James Horne Said: “What do you mean?”*

*I said: "I am going to have to bill you for all of the extra work which we have done on the site. This is for removal of the lime render off the wall which you were supposed to do, installing the external curved FC sheeting amongst other things."*  
*James Horne Said: "No worries. Send us the invoice for the extra works and we will sort it out with you."*  
*I said: "OK I will do that."*

- 14 During that meeting, there was a perusal of items drawn up by the supervisor (see annexure "Q" to the affidavit of Mr Blazevic, which has a reference to claim no. 1385 written on it).
- 15 Following that discussion, the work was completed within the next week or so.
- 16 Mr Blazevic also deposed, inter alia, to the following:- *On the 21st of January 2005 I prepared invoices for the outstanding works and variation and personally delivered those to the defendant's project manager for Point Piper, Mr Liam Rogers, at the defendant's office located at the University of New South Wales. Also included in those invoices were invoices (invoices number 1384 and 1380) which were for additional works which we performed at the request of the defendant at the University of New South Wales campus at Kensington.*
- 17 Invoice no. 1385 was later delivered on 27 January 2005. It was for "variations as per attached list".
- 18 The dispute before the Magistrate turned on a question of fact. She determined that question of fact in favour of the defendant. In my view, it was reasonably open to the Magistrate to make the findings that she did (she was satisfied that the invoice in question related to a progress payment claim for the period ending 31 December 2004).
- 19 It can be observed that the items listed in invoice no. 1382 include the "curved FC" work and the removal of the render.
- 20 As the appeal cannot succeed on its merits, it would be futile to dwell on the application for extension of time. However, it may be added that there is no evidence before the court which explains the delay in the bringing of the appeal. This is a further reason why an extension of time would not be granted.
- 21 The appeal fails. The summons is dismissed. The plaintiff is to pay the costs of the summons.

Mr J Miller (Plaintiff) instructed by Eakin McCaffery Cox (Plaintiff)  
Mr M Lozina (Defendant)