JUDGMENT : McDOUGALL J Supreme Court, New South Wales, Equity Division, T&C List. 12th July 2007 (ex tempore – revised 6 August 2007)

1 The *Building & Construction Industry Security of Payment Act* 1999 (the Act) was intended to provide those who carry out construction work, or supply related goods and services, under a construction contract with a statutory right to claim progress payments and a speedy method for the expeditious determination, although on an interim basis, of those claims. It has given rise to a vast number of cases in this Court. One might have thought that, by now, all the quirks of and possible gaps in the Act have been explored. Unfortunately, as these proceedings show, that is not the case. Further, and again as these proceedings show, the clear legislative intention - for swift enforcement of interim rights - is not always achieved.

Background; the fundamental question

2 The plaintiff (Rojo) is a builder. By contract dated 24 January 2005, Rojo undertook to construct a beach house for the defendant (Jillcris). There was no dispute, at least on the hearing before me, that the provisions of the Act applied to that contract. There is a dispute (which remains to be dealt with, although not - at least initially - in this Court) as to whether the provisions of the *Home Building Act* 1989 also apply.

3 On 2 December 2005, Rojo served a payment claim on Jillcris. The claimed amount was $251,537.09. Jillcris did not provide a payment schedule within the time limited by the Act. Accordingly, Jillcris became liable to pay the claimed amount (see s 14(4)). Thus, Rojo had a choice. It could sue to recover the claimed amount as a debt due (see s 15(2)(a)(i)). Or it could make an adjudication application (see s 15(2)(a)(ii)). Rojo gave written notice to Jillcris that it intended to follow the latter course (see s 17(2)(a)). That notice gave Jillcris a further opportunity to provide a payment schedule (see s 17(2)(b)). Jillcris did indeed provide a payment schedule. However, it did so before it received Rojo's notice, not "*within five business days after receiving [that] notice*".

4 After Rojo received that payment schedule, it notified Jillcris that it did not propose to proceed with adjudication. Thus, Rojo stated, Jillcris was not required to provide a payment schedule in accordance with s 17(2)(b).

5 Rojo then sued to recover the claimed amount. Jillcris contends that Rojo, having given notice of intention to make an adjudication application, must proceed with that statutory alternative. It contends that Rojo is not entitled to withdraw that notification, or to follow the other statutory alternative. That is the fundamental question for decision in this case.

The statutory scheme

6 Section 3 sets out the objects of the Act and the means by which those objects are to be achieved. It reads as follows:

> "*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.*
>
> *(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:*
>
> *(a) the making of a payment claim by the person claiming payment, and*
>
> *(b) the provision of a payment schedule by the person by whom the payment is payable, and*
>
> *(c) the referral of any disputed claim to an adjudicator for determination, and*
>
> *(d) the payment of the progress payment so determined.*
>
> *(4) It is intended that this Act does not limit:*
>
> *(a) any other entitlement that a claimant may have under a construction contract, or*
>
> *(b) any other remedy that a claimant may have for recovering any such other entitlement.*"

7 Section 8 confers a right to progress payments. There is no need to set it out.

8 Part 3 of the Act is headed "*Procedure for recovering progress payments*". It starts with s 13, which gives to a person (a claimant) who is or claims to be entitled to a progress payment the right to serve a payment claim. It is not necessary to set out s 13.

9 Section 14 sets out how a respondent on whom a payment claim is served may reply. That is to be done by providing a payment schedule within the earlier of the time limited by the construction contract or ten business days after service of the payment claim (s 14(4)(b)). If no payment schedule is provided within the applicable time limit then, as s 14(4) states, "*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*". I set out s14 so far as it is relevant:

> "*(1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant. …*
>
> *(4) If:*
>
> *(a) a claimant serves a payment claim on a respondent, and*

(b) the respondent does not provide a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or

(ii) 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."

10 Section 15 sets out the consequences where no payment schedule has been provided and the claimed amount is not paid. It reads as follows:

"*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."

11 Section 16 provides an analogous scheme to cover the situation where, although a payment schedule is provided that specifies an amount (the "scheduled amount") that the respondent proposes to pay, the respondent does not pay the scheduled amount by the due date.

12 Section 17 sets out the procedure by which adjudication of a payment claim is to be undertaken. So far as is relevant, it reads as follows:

"*(1) A claimant may apply for adjudication of a payment claim (an* ***adjudication application****) if:*

(a) the respondent provides a payment schedule under Division 1 but:

(i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or

(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1)(b) applies cannot be made unless:

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and

(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice."

The relevant facts

13 The relevant facts fall within a narrow compass. They were not disputed. I have stated the substance of them already. I give this fuller statement only to enable some of the submissions with which I shall deal to be understood.

14 At the relevant time, Mr R J Hanson was the sole director of Rojo. Pursuant to Rojo's constitution, he had full authority to manage the business of Rojo, and to exercise all powers of Rojo other than those reserved to a general meeting. On 1 December 2005, Mr Hanson, on the letterhead of Rojo, authorised his solicitor, Mr Nolan of Hewetts, "to sign a payment claim on behalf of Rojo...relating to "the claim to which I have leave as referred. Mr Nolan did this the next day. The document that he prepared stated that it was "a payment claim under" the Act. In case the point were less than clear, the letter under cover of which it was served made the same assertion.

15 Mr Southwick of counsel, who appeared with Mr Lambert of counsel for Jillcris, accepted that Mr Hanson was acting within the powers given to him by Rojo's constitution when he authorised Mr Nolan to sign the payment claim.

16 There was some complaint as to the format of the payment claim. It was prepared, incorporating a format prescribed by Jillcris' architect Mr Chuah, for progress claims under the contract. Eight progress claims using that format were prepared, served, assessed and paid (to the extent assessed) before the payment claim with which these proceedings are concerned was served. Mr Chuah, who is the brother of a principal of Jillcris, was a principal of the firm of architects Chuah Mainwaring Pty Limited who were nominated as the supervising architects under the contract. I am satisfied that the payment claim was in a form, and gave sufficient detail, to enable it to be understood and dealt with. This follows, if not from the matters to which I have just referred, then from the fact that Jillcris was able, although late, to provide a payment schedule.

17 It was common ground that the payment claim was served at the registered office of Jillcris on 2 December 2005. Some further documents were served at the same address on 6 or 7 December 2005. Although much had been made of those further documents in the evidence, the parties now accept that they have no relevance to the issues for my decision.

18 The parties agree that the last day for Jillcris to provide a payment schedule was 16 December 2005. They agreed further that it did not provide a payment schedule until 20 December 2005. That payment schedule comprised a letter from Jillcris' solicitor, Mr English of Surry Partners, together with annexures. It was dated 20 December 2005 and served that day by email and fax transmission to Hewetts. The document (insofar as it assesses the payment claim) is a little difficult to follow, but appears to assert that there was no amount owing by Jillcris to Rojo.

19 The previous day (19 December 2005) Mr Nolan had posted a letter to Jillcris at its registered office. That letter referred to the payment claim served on 2 December 2005, and to the failure of Jillcris "to *provide a payment schedule in response...within the time allowed by the Act*". It stated: "*We hereby put you on notice of our client's intention to apply for adjudication of the payment claim under the Act. You have five (5) business days from the date of this letter to provide a payment schedule to our client under s 17(2) of the Act after which time, if the payment claim has not been paid in full, we will be lodging an adjudication application on behalf of our client.*"

20 The parties accepted that Mr Nolan's letter of 19 December 2005 was received by Jillcris on 22 December 2005 - that is, some two days after the payment schedule was provided. Mr Southwick did not contend that the payment schedule had been provided in response to the letter of 19 December 2005.

21 On 22 December 2005, Mr English wrote to Hewetts. That letter was sent by facsimile transmission, and received after business hours on its date. Mr English said that his client disputed the alleged date of service of the payment claim. He referred to a document that, he said, supported his client's position. The document on which Jillcris relied referred not to the payment claim but to the documents served on 6 or 7 December 2005. Mr English concluded that "our client's response and payment schedule was served upon your office within ten business days of [6 December 2005] being 20 December 2005.

22 Mr Nolan responded by fax on 23 December 2005. He disputed the proposition that the payment claim was served on 6 December 2005, and maintained that it had been served at the registered office of Jillcris on 2 December 2005.

23 At the same time, Mr Nolan sent another letter by fax to Surry Partners. That letter referred to "*the notice served on your client pursuant to s 17(2) of the Act*". It stated:

"Please be advised that our client does not propose to proceed to make an application for adjudication under s 17(1) of the Act.

Accordingly your client is not required to provide a payment schedule in accordance with s 17(2)(b) of the Act.".

24 Lest it be thought that some question of estoppel might arise, I should make it plain that Mr Southwick accepted that his client had not acted to its detriment on the last paragraph of Mr Nolan's letter, and that no case of estoppel was put.

The issues

25 I have already described the principal issue, and dealt with what might have been a factual issue, above.

26 Jillcris raised as an issue the authority of solicitors to sign and serve (or provide) payment claims and payment schedules. That issue was formally pressed at the hearing. However, Mr Southwick very properly referred me to the decision of the Court of Appeal in ***Baulderstone Hornibrook Pty Ltd v Queensland Investment Corporation*** [2007] NSWCA 9. He accepted that this case was authority for the proposition that a payment schedule could be signed by a solicitor, and that whether or not a payment schedule so signed would be effective was a question of fact. He accepted that there was no sensible distinction between the authority of a solicitor to sign a payment schedule and the authority of a solicitor to sign a payment claim, each being a question of fact.

27 In this case, I find that Mr Nolan was authorised to sign and deliver the payment claim. His action in doing so was thus the action of Rojo, and the payment claim so signed must be taken to have been served by Rojo on Jillcris.

28 There was no evidence of Mr English's express authority to sign and deliver the payment schedule. Mr Drummond of counsel, who appeared for Rojo, did not raise as an issue the authority of Mr English so to act. It is, therefore, unnecessary for me to make a finding as to his authority.

29 Having thus disposed of the incidental issues, I return to the primary issue. That raises a number of questions:

(1) did Rojo make any election?

(2) if so, what was the election made?

(3) was it open to Rojo to withdraw any election made?

The authorities

30 Before I turn to those questions, I will look at some of the authorities to which the parties referred me.

31 Mr Southwick laid great stress on the decision of Einstein J given at an interlocutory stage in these proceedings: ***Rojo Building Pty Limited v Jillcris Pty Limited*** [2006] NSWSC 309.

32 At the time his Honour gave that decision (which was on an application by Rojo for summary judgment) there was a question as to whether the payment claim was served on 2 (or 6 or 7) December 2005. His Honour made no finding to resolve that question, but appears to have proceeded on the assumption that the payment claim had been served on the earlier date.

33 His Honour's initial decision (there was an application to re-open, to which his Honour acceded) is contained in para [18] of his reasons:

> *"[18] It is plain that once Jillcris received the s 17 (2) (a) and (b) notifications, its anterior failure to provide a payment schedule within the time delimited by s 14 is no longer visited with Rojo's initial right to recover the unpaid portion of the claimed amount as a debt by curial process. Rather, Jillcris has been given an alternate statutory opportunity to provide a payment schedule within an entirely different bracket of time: five (5) business days after receiving the Rojo notification of intent to apply for adjudication. Effectively the case presently being pursued by Rojo would deny Jillcris' said alternate statutory opportunity. Indeed, that alternate statutory opportunity had been exercised even prior to Rojo's endeavour to withdraw its notice of intention to apply for adjudication."*

34 There was then, as I have indicated, an application to re-open. That application was made on the basis that his Honour appears to have accepted "that the payment schedule forwarded...on 20 December 2005 had been responsive to Rojo's s 17(2) notice of intent to apply for adjudication, dated 19 December 2005 (see para [22] of his Honour's reasons).

35 Einstein J rejected that proposition. He referred to the evidence before him that the notification of 19 December 2005 had been received *"on or about"* that date. As I have indicated, it is now accepted that the notification was not received until 22 December 2005.

36 Einstein J granted leave to re-open but held, nonetheless, that the application for summary judgment should fail. His Honour referred to what he had said in ***Vince Schokman v Xception Construction Pty Limited*** [2005] NSWSC 297 at para [19] to [22]. He then said in ***Rojo*** at para [35]) that the legislature could not have intended to give a claimant two bites of the cherry: proceeding first by way of adjudication application and then, *"in the event that the adjudication miscarried"*, in a court.

37 His Honour said that Rojo had made an election to pursue the course of adjudication, and that this election had given Jillcris a statutory right to provide a payment schedule. He expressed it thus at paras [36] and [37]:

> *"[36] Once Rojo had served its s 17 (2) notice of intent to make an adjudication application [it being quite plain that certainly by 22 December 2005 that service had been effected], Jillcris became entitled to exercise its statutory right to provide a payment schedule within five business days of service of the notice of intent to apply for adjudication. In those circumstances Rojo, having elected:*
>
> *i. not to proceed by the route provided for in s 15 (2) (a)[vide by proceeding to recover the unpaid portion of the claimed amount as a debt by curial process],*
>
> *ii. instead to make an adjudication application under s 17 (1) (b) became disentitled from restoring the position ante.*
>
> *[37] Rojo's election had now triggered a statutory right in Jillcris. That step having been taken, Jillcris was entitled to exercise that statutory right."*

38 The result, his Honour said at para [38], was not to restore the position that had existed prior to 19 (or for that matter 22) December, but to eliminate one of the alternatives available prior to whichever is the relevant one of those dates:

> *"[38] The effect of Rojo's solicitors communication of 23 December 2005 [advising that Rojo did not propose to proceed to make an application for adjudication and that accordingly, Jillcris was not required to provide a payment schedule in accordance with s 17 (2) (b)]:*
>
> *i. was not to restore the position to that which it had been prior to Rojo having made the election provided for in s 15 (2) (a) as between the two inconsistent routes;*
>
> *ii. was that Rojo had waived its anterior rights to proceed by curial process to recover the unpaid portion of acclaimed amount as a debt."*

39 In ***Kell & Rigby Pty Limited v Guardian International Properties Pty Ltd*** [2007] NSWSC 554, Bergin J considered a similar point, although one arising on a different factual basis. In that case, the payment claim had been served, and a payment schedule had been provided but outside the time limit under s 14(4)(b). The claimant gave no notice pursuant to s 17(2)(a). Nonetheless, matters proceeded as far as the making of an adjudication application, the provision of an adjudication response, and the consideration of the dispute by the adjudicator. When the problem was discovered, the parties submitted to the adjudicator that he should not determine the application because of the claimant's failure to comply with s 17(2)(a). He appears to have acceded to that view.

40 The claimant then commenced proceedings in this Court for recovery of the claimed amount. The defendant submitted, as Bergin J recorded at para [9], *"that the plaintiff is precluded from bringing these proceedings because it elected to pursue the adjudication option under s 15 (2)(a)(ii) of the Act instead of pursuing the curial option under...s 15(2)(a)(i) of the Act"*.

41 Her Honour referred to the decisions of Einstein J in ***Schokman*** and ***Rojo.*** However, she concluded that there was a significant distinction. In this case, her Honour held, the adjudication application was a nullity because of the failure to perform the mandatory condition laid down by s 17(2). Her Honour relied on the decision of McHugh JA in ***G J Coles & Co Ltd v Retail Trade Industrial Tribunal*** (1986) 7 NSWLR 503 at 522. Thus, her Honour held at para [25], *"[t]he act of filing and serving [the adjudication application] was incapable of creating legal consequences, including the legal consequence of the making of an election under s 15(2) of the Act"*.

42 Her Honour's decision confirms that the election is one between bringing proceedings in a Court and making an adjudication application. It confirms further that the election is not made unless there is an effective choice to pursue one course or the other.

The competing contentions

43 Before I turn to the questions involved, I will note the competing positions of the parties.

44 Mr Drummond submitted that there was no question of election between alternative and inconsistent rights. He submitted that what was involved was, at most, an election between alternative and inconsistent remedies. If an election had been made, it was an election to pursue a remedy, and not the election of an inconsistent right. He submitted that an election between inconsistent remedies did not become binding until the remedy elected was pursued to judgment: ***United Australia Limited v Barclays Bank Limited*** [1941] AC 1. (I note that although that case concerned an alleged election to sue one of two tortfeasors, it is clear that their Lordships' analysis applies equally where the election is to pursue one of two remedies against the same tortfeasor for the same loss.)

45 Mr Drummond submitted in the alternative that, at least in the case of election between statutory alternative remedies, it was necessary that the elector should know not just the material facts giving rise to the right to elect but also of the right itself: ***Latter v Council of the Shire of Muswellbrook*** (1936) 56 CLR 422; ***O'Connor v S.P. Bray Limited*** (1937) 56 CLR 464. He submitted that there was no evidence that Rojo knew of the statutory right to elect.

46 Mr Drummond submitted further that, regardless of the classification of the statutory alternatives provided by s 15(2)(a), the right to sue given by sub-para (i) could not be lost even if Rojo had pursued the alternative course of adjudication. This, he submitted, followed from the objects of the Act as set out in s 3 and from the wording of s 14(4) read in conjunction with s 15(1). He laid particular stress on the fact that failure to provide a payment schedule meant that "*the respondent becomes liable to pay the claimed amount...*".

47 Mr Drummond submitted further that the second statutory alternative, provided by s 15(2)(a)(ii), was to *"make an adjudication application...."*. He submitted that nothing less than this would constitute, or trigger, any election. Specifically, and to some extent in the alternative, Mr Drummond submitted that the mere service of a notice of intention in accordance with s 17(2(a)) could not constitute, or trigger, the election. He submitted that it was no more than a statement of present intention, and did not commit the giver of the notice to proceed with adjudication.

48 Further, Mr Drummond submitted, by analogy with the reasoning of Bergin J in ***Kell & Rigby*** at para [24], that an act that of itself created no legal consequences - the service of a notice of intention - could not constitute an election.

49 Mr Southwick submitted that the point was covered by the reasoning and conclusions of Einstein J in ***Rojo.*** He submitted, in substance, that Einstein J was correct both in his approach to the problem and in his resolution of it. Although Mr Southwick accepted that I was not bound by his Honour's reasoning, he submitted that, the reasoning being correct, I should adopt and apply it.

50 As to the question of knowledge, Mr Southwick submitted that it was plain that Rojo, through its solicitors, was aware not only of the relevant facts but also of the alternative and inconsistent rights given by s 15(2)(a). He submitted, in accordance with what Bergin J had said in ***Kell & Rigby*** at para [21], that the question, whether an election had been made, depends upon the facts of the particular case. In this case, he submitted, Mr Nolan's letter of 19 December 2005 was unequivocally a statement of intention to apply for adjudication.

51 Before I turn to a resolution of those competing contentions, I shall indicate briefly what this case does not decide.

What this case does not decide

52 The extreme position taken by Rojo is that there can never be an election so as to prevent a claimant from proceeding to a court after it has tried the remedy of adjudication. In other words, the extreme position taken by Rojo is that the decision of Einstein J on the earlier application in this case is in all circumstances incorrect.

53 Underlying the extreme position taken by Rojo is the proposition that, by force of s 14(4), a respondent always remains liable to pay the claimed amount once it has failed to provide a payment schedule within the requisite time limited by s 14(4).

54 Section 3 (3)(c) makes it clear that the legislature intended that any dispute over a payment claim should be dealt with by adjudication. There can only be a disputed claim if there is a valid payment schedule. A valid payment schedule may be provided:

(1) within the time limit prescribed by s 14(4); or

(2) where a claimant gives notice of intention to proceed to adjudication under s 17(2)(a), within the further time limit prescribed by s 17(2)(b).

55 In either case - and, relevantly for present purposes, specifically in the second - there will be a valid payment schedule and, therefore, a dispute between the parties on the terms of the payment claim and the payment schedule.

56 The legislature provided for the consequences, in terms of adjudication, of provision of a payment schedule within the further time prescribed by s 17(2)(b). It did not provide for the consequences in terms of court proceedings. Where a claimant seeks to enforce its rights by adjudication pursuant to s 15(2)(a)(ii), it must accept the consequence that a legitimate argument may be raised in defence of the claim. It would be quite extraordinary if, in those circumstances, the claimant could proceed to adjudication, lose before the adjudicator because of the issues raised in the s 17(2(b)) payment schedule, and then proceed to enforce the payment claim in a Court pursuant to s 15 (2)(a)(i) on the basis that there remains a statutory liability pursuant to s 14(4).

57 Those considerations suggest strongly that, once a s 17(2)(a) notice is given and a s 17(2)(b) payment schedule is provided in response within five business days thereafter, it is no longer open to the claimant to seek to enforce the payment claim by proceedings in a court. That tentative analysis is reinforced by s 3(3)(c) which, as I have said, suggests that once there is a disputed claim it is to be referred to adjudication. In other words, it suggests that once there is a disputed claim, it ought not to be dealt with in a court on the basis that it is not disputed.

58 It is, however, unnecessary for me to express a concluded view on that question. It does not arise on the facts of this case. In my view, it is one that should be left until it does arise.

59 In the meantime, I respectfully suggest that the legislature turn its attention to this aspect of the legislative scheme, with a view to expressing clearly and directly what consequences should follow, both for s 14(4) and for s 15(2)(a)(i), if a s 17(2)(b) payment schedule is given validly in response to a s 17(2)(a) notice of intention.

60 I now turn to the questions on which the resolution of this case depends.

First and second questions: what if any election was made?

61 The starting point is that Jillcris' payment schedule was not provided in response to Rojo's s 17(2)(a) notice. Specifically, and adopting the language of s 17(2)(b), Jillcris did not provide a payment schedule for Rojo "within five business days after receiving" that notice. Nor does Jillcris seek to make any case that it relied on Mr Nolan's letter of 19 December 2005 in making its decision (assuming - a matter on which the evidence is silent - that any relevant decision was made) not to avail itself of the opportunity given by s 17(2)(b).

62 As a matter of construction, the alternatives for which s 15 (2)(a) provides are:

(1) enforcement of the liability for which s 14(4) provides in a court; or

(2) enforcement of that liability by making an adjudication application.

63 As both the language of s 17(2) and the decision of Bergin J in ***Kell & Rigby*** make plain, an adjudication application cannot be made until notice has been given under s 17(2)(a) and the respondent has been given five business days thereafter to provide a payment schedule. The provision of a notice under s 17(2)(a) gives the respondent a right: a further opportunity to provide a payment schedule. But neither the giving of a notice under s 17(2)(a) nor (if it happens) the provision of a payment schedule under s 17(2)(b) constitutes the making of an adjudication application. The claimant is not bound to apply for adjudication after the payment schedule is provided. It may decide, for any number of reasons, not to press the dispute further. For the reasons that I have given, I express no view as to whether the claimant could retreat to the other statutory alternative given by s 15(2)(a).

64 For present purposes, I am prepared to assume that s 15(2)(a) does provide for inconsistent alternatives, and that it does raise a question of election. That I think would be an election between remedies, not an election between rights. The right is to be paid the progress payment, or the statutory liability created by s 14(4). Section 15(2)(a) provides alternative remedies whereby that right can be enforced.

65 But, assuming that s 15(2)(a) does entail the notion of election, it is an election between bringing proceedings in a court and making an adjudication application. As I have said, a notice of intention to apply for adjudication does not amount to making an adjudication application. It is a procedural, although necessary, precondition to the making of such an application.

66 In those circumstances, I do not accept that the mere giving of a notice under s 17(2)(a) is of itself sufficient to constitute, or to trigger, the making of any election for which s 15 (2)(a) provides.

67 There was some debate as to whether an act that amounts to an election may be withdrawn before it is in some way acted upon. The decision of Stephen J in ***Sargent v A.S.L. Developments Limited*** (1974) 131 CLR 634 at 647 suggests that it may not. The decision of Jordan CJ in ***Miller v Miller*** (1945) 45 SR (NSW) 73 at 75 suggests that it may: at least as long as the party to whom the election is communicated does not incur detriment in reliance upon the communication.

68 The question in those cases arose in the context of election at law between alternative and inconsistent rights. For the reasons that I have given, I think that what is involved here is at most a question of election between alternative and inconsistent statutory remedies. The application by analogy of legal doctrines relating to election between inconsistent rights to statutory election between inconsistent remedies requires careful consideration. Specifically, it requires consideration of the extent to which the common law doctrine can sit with the statutory scheme. Since I have concluded that there was no election, it is unnecessary to pursue that topic further.

Third question: consequences of any election

69 For the reasons that I have given, there was no election. This question does not arise.

Conclusion and orders

70 Rojo's claim succeeds. It is entitled to judgment in the amount claimed together with interest on that amount from 2 December 2005. Since the contract did not prescribe a rate of interest, interest should be calculated in accordance with the applicable rates set out in schedule 5 to the *Uniform Civil Procedure Rules*.

71 As to costs: Mr Drummond submitted that Rojo should have its costs of the proceedings other than the costs that were the subject of orders made by Einstein J on 19 April 2006. Mr Southwick put no submission to the contrary.

72 Pursuant to orders made by me on 3 July 2007, Rojo gave security for Jillcris' costs in the sum of $15,000, paid to the Registrar of the Court. It is entitled to have that amount (and any accrued interest) paid out to it.

73 I make the following orders:

(1) direct entry of judgment for the plaintiff against the defendant in the sum of $251,537.09 together with interest on that sum from 2 December 2005.

(2) direct the parties to bring in an agreed calculation of the amount of the judgment, including interest, within 7 days.

(3) order the defendant to pay the plaintiff's costs of the proceedings other than those costs the subject of order (3) made by Einstein J on 19 April 2006.

(4) order that the costs payable by the plaintiff to the defendant under the orders of Einstein J made on 19 April 2006 be set off against the costs payable by the defendant to the plaintiff under order (3) above.

(5) order that the sum of $15,000 paid into Court by the plaintiff as security for the costs of the defendant, together with any interest accrued there on, be paid out to the plaintiffs.

(6) order that the exhibits remain with the file for 28 days and that thereafter they be held or disposed of in accordance with the rules.

J S Drummond (Plaintiff) instructed by Hewitts Commercial Lawyers
M H Southwick / C A Lambert (Defendant) instructed by Surry Partners Lawyers