JUDGMENT : **Einstein J :** Supreme Court of New South Wales : 18 April 2006

The proceedings

1 There is before the court an application for summary judgement pursuant to the *Building and Construction Industry Security of Payment Act* 1999 ["the Act"].

2 The proceedings are able to be determined by a short point of statutory construction and principle.

The facts

3 Jillcris Pty Ltd ("Jillcris") is the trustee of the Masters Family Trust, having its registered office at 14 Glenview Street, Paddington, New South Wales.

4 Jillcris was the registered proprietor of 10 Weaver Place, "The Point", Bulli, New South Wales.

5 Rojo Building Pty Ltd ("Rojo") carried on business as a building company.

6 On 24 January 2005, Rojo and Jillcris entered into a written agreement [the Australian Building Industry Contract (ABIC SW1-1 2002 Simple Works Contract] pursuant to which Rojo agreed to build a two-storey beach house with landscaping on the property for the sum of $1,415,000 (inclusive of GST) ("the Contract").

7 The contract specified a supervising architect.

8 Between 1 March 2005 and 14 October 2005, Mr Robert Hanson, the principal of Rojo, caused to be served upon the architect progress claims Nos. 1 to 8.

Service of a Payment Claim

9 An issue arises as to whether or not Rojo served a payment claim on Jillcris on 2 December 2005. Jillcris denies that such a document was served on that date. The denial has a number of alternate bases:

i) There is a factual contention that a payment claim was received on 2 December 2005: Jillcris contends that the payment claim was not received before 6 December 2005 and was arguably only received on 12 December 2005.

ii) Jillcris takes issue with the manner in which Rojo, by a number of intermediaries, purported to effect a valid service of the payment claim.

10 If it be that the payment claim was validly served on 2 December 2005 then it is clear that Jillcris had until 16 December 2005 in which to serve a payment schedule [s 14 (4) (b) (ii)]. It is common ground that no payment schedule was served on or before that date.

Interrupting the chronology to outline some provisions of the Act

11 It is common ground that in a particular circumstance, the Act gives to a respondent, not one but two opportunities to provide a payment schedule to an applicant. The circumstance in which these two opportunities may be given requires:

i. A claimant to have served a payment claim on the respondent;

ii. The respondent to have failed to provide a payment schedule to the claimant within the time delimited by s14(4)(b);

iii. The claimant to have:

(a) eschewed it's right pursuant to s 15 (2) (a) (i) to recover, by curial process, the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant,

(b) determined to make an adjudication application under s 17 (1) (b) in relation to the payment claim

12 Critically for present purposes, s 17(2) provides that where a claimant determines to make an adjudication application in relation to a payment claim following a respondent having failed to provide a payment schedule [within the time delimited by s 14 (4) (b)], such an adjudication application cannot be made in the absence of:

i. The claimant having notified the respondent, within [the defined period] of the claimant's intention to apply for adjudication of the payment claim; and

ii. The respondent having been given an opportunity to provide a payment schedule to the claimant within five business days after receipt of the claimant's notice.

Returning to the chronology

13 On 19 December 2005 Rojo gave a notice under s 17 (2), of its intention to apply for adjudication of the payment claim on Jillcris. In accordance with s17 (2) (b) the notice so served advised that Jillcris had five business days from the date of the notice to provide a payment schedule to Rojo under s 17 (2) "after which time, if the payment claim has not been paid in full, we will be lodging an adjudication application…"

14 On 20 December 2005 Jillcris provided a payment schedule to Rojo.

15 On 23 December 2005 Rojo by its solicitors, advised Jillcris by its solicitors, that Rojo did not propose to proceed to make an application for adjudication under s 17 (1). This communication then proceeded to add: *"Accordingly your client is not required to provide a payment schedule in accordance with s 17 (2) (b) of the Act."*

16 On 23 December 2005 Jillcris lodged an application with the Consumer Trading and Tenancy Tribunal claiming relief in contract.

17 The summons in these proceedings was filed on 20 January 2006.

Decision

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.

19 The authorities make very plain that the Act sets up a fast-track and interim set of measures to treat with the expeditious determination of disputed progress claims. An overview of the recent case law was given in ***Procorp Civil Pty Ltd v Napoli Excavations and Contracting Pty Ltd*** [2006] NSWSC 205 (at [9]).

[His Honour proceeded to order that the application for summary judgment be dismissed as plainly misconceived and to make a costs order and other orders for the future conduct of the proceedings]

[At 3.00pm and following argument on an application to reopen His Honour ordered that the orders made at about 11.00am on the same day be stayed until further order]

Application to reopen

20 Following the delivery of the above judgment, Rojo sought leave to reopen its case on the basis that the judgment had proceeded on a misapprehension of fact. The application was pursued by a notice of motion. I formally grant leave to file the notice of motion in the form which I now initial and date 19 April 2006.

21 Both parties were permitted to address. A decision was reserved. These reasons give that decision.

22 Rojo submitted that the Court had proceeded in the judgment, upon the basis that the payment schedule forwarded by Jillcris' solicitors on 20 December 2005 had been responsive to Rojo's s 17 (2) notice of intent to apply for adjudication, dated 19 December 2005. The proposition was that there had been no evidence that the 19 December 2005 notice was received by Jillcris on 19 December 2005.

23 That proposition is rejected. The evidence of Ms Masters in her affidavit of 10 March 2006 had been that on or about 19 December 2005, Jillcris had *received* the 19 December 2005 notice. Evidence to similar effect [although in slightly looser terms] had been given by Mr English in his affidavit of 16 February 2006.

24 That notwithstanding, Rojo proceeded to seek leave to reopen its evidence by the tender of:

i. a copy of the 19 December 2005 notice to which there has been stapled a Registered Post-Customer Receipt dated 19 December 2005;

ii. an original of a Delivery Confirmation-Advice Receipt signed, it appears, by Ms Georghiou , who had been the housekeeper and nanny working for Mr and Mrs Masters at the time.

25 Neither of these documents had been tendered before the delivery of the judgment. Counsel for Jillcris submitted that he had proposed objecting to that tender, had an attempt to tender the documents been made. He submitted that there were other documents being delivered during this period of time, and that it was not apparent that the registered post receipt was necessarily for the 19 December letter. He had been proceeding on the basis of the material before the Court in Ms Masters affidavit evidence. Nor had he been given a proper opportunity to obtain any instructions in relation to this new claim, having been unaware of the existence of the documents before the morning when the hearing took place.

26 The issue of whether or not Rojo should, following delivery of the judgment, be permitted to reagitate this question of fact is not a simple one.

27 It must be recalled that the application before the court is for summary judgment and that although it is in theory possible for the Court to determine disputed questions of fact on such an application, the Court will often eschew that approach save where the facts are very clear. The approach taken by the parties before the judgment was delivered was not to seek to cross-examine one another's witnesses.

28 Returning to the point of the exercise, Rojo's proposition appears to be as follows:

i. The payment schedule submitted by the solicitors for Jillcris by e-mail on 20 December 2005 was not responsive to the s 17 (2) notice.

ii. If the additional evidence be allowed, then it becomes clear, so it was contended, that at the time when the payment schedule was submitted on 20 December 2005, the s 17 (2) notice had not even been received by Jillcris.

iii. Even if the additional evidence be disallowed, a careful reading of the terms of Jillcris' solicitor's letter of 20 December 2005 [and indeed of its subsequent letter of 22 December 2005] make clear its intent as being to serve the payment schedule in purported compliance with the provisions of s 14 (2) and (3) of the Act.

iv. It was necessary for precision in relation to precisely what the payment schedule was: and in this case, in order for the payment schedule to comply with s 17 (2), it had to state that it was sent pursuant to a s 17 (2) (b) entitlement. It did not so state. It purported only to be compliant with the entitlement to provide a payment schedule provided for in s 14.

v. In ***Taylor Projects Group Pty Ltd v Brick Department Pty Ltd*** [2005] NSWSC 439, the Court had held that service of a payment schedule outside of the times delimited within s 14, but on the day *before* receipt of a claimant's s 17 notice of intent to apply for adjudication, did not comply with s 17 (2) (b), since it was not served "after" the respondent had received the claimants notice of intent to apply for adjudication.

vi. For that reason the prime basis upon which the judgment given yesterday had proceeded was misconceived.

The principles concerning leave to reopen

29 Clearly the court has jurisdiction to entertain a motion to set aside or vary a judgment provided that the motion is filed before entry of the judgment. The position at common law as stated in ***Smith v New South Wales By Association (No 2)*** (1992) 176 CLR 256 at 265 was as follows: *"It has long been the common law that a court may review, correct or alter its judgment at any time until its order has been perfected."*

30 In ***Autodesk Inc v Dyason*** **[No. 2]** (1993) 176 CLR 300 at 302-3, Mason CJ identified various circumstances in which, under the authorities, the Court has exercised the jurisdiction to reopen a judgment which has apparently miscarried. One of the circumstances identified was the case of ***New South Wales Bar Association v Smith*** (unreported, Supreme Court of New South Wales Court of Appeal, 4 July 1991) in which the New South Wales Court of Appeal reconsidered orders previously made in view of an argument that the Court had mistakenly assumed that particular evidence had not been given at earlier hearings. Another example given was ***Pittalis v Sherefettin*** [1986] QB 868 in which a judge recalled orders the day after the day they were made upon determining that he had erred in a material matter in his approach to the case.

31 The guiding principle, as stated by Mason CJ (at 302) is as follows: *"These examples indicate that the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue where a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law."*

32 In the present case, the judgment is given in respect of an interlocutory application. In such a case, if it be established that the Court has proceeded on a misapprehension, the Court should ordinarily not be slow to take the step of reviewing or rehearing an issue: see for example ***Hutchinson v Nominal Defendant*** [1972] 1 NSWLR 443 at 447-448; ***Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd (No 15)*** (unreported Supreme Court of New South Wales Court of Appeal, 8 July 1993, Priestley JA, (BC9301787) at 6)." I return below to this consideration, as it pertains to the scheme provided for in the Act.

Dealing with the issue

33 Even assuming the correctness of the entirety of that which Rojo seeks to establish were the Court to grant leave to reopen, there remains an entirely disparate basis upon which Rojo's summary judgment application must fail. I turn to that matter.

34 In ***Schokman v Xception Construction Pty Ltd*** [2005] NSWSC 297 the Court held as follows:

19 The scheme of section 15 applies where no payment schedule has been served by the respondent and where pursuant to section 14 (4), the respondent has become liable to pay the claimed amount as a consequence of having failed to provide a payment schedule within the time allowed.

20 In those circumstances section 15 provides that the claimant:

"(a) may:

(i) recover the unpaid portion of the claimed amount from the respondent as a debt 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."

21 … The holding is that upon the proper construction of section 15(2)(a) the sub-section makes provision for two separate and distinct alternatives that may be adopted by a claimant.

22 The whole of the relevant scheme is clearly to provide a fast track approach leading to a result but importantly never operating to the exclusion of "any other entitlement that a claimant may have under a construction contract" [section 4 (a)].

35 On the particular facts before the Court in that case, the Could observed that it cannot have been the intention of the legislature to permit a claimant [in a circumstance where no payment schedule has been provided], to make an adjudication application in relation to the payment claim and later, in the event that the adjudication miscarried, to pursue curial proceedings to recover the unpaid portion of the claimed amount from the respondent as a debt. This would expose a respondent not to one set of interim procedures aimed at a swift (albeit interim) result, but to two such interim sets of procedures.

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 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.

The strictures imposed by the Act

39 Many of the authorities have focused upon the strictures imposed by the Act and upon the need for formal compliance with the provisions of the Act. The scheme of the Act is unforgiving in terms of the technicalities which require to be observed. There is no room for a claimant to approbate and reprobate. There is another party to be considered. There is no room for a claimant to leave a respondent in any form of doubt as to precisely what course is being followed by the claimant. Nor is there room for a respondent to leave a claimant in any form of doubt as to precisely what course is being followed by the respondent.

40 For those reasons it is inappropriate to grant leave to allow Rojo to reopen its case. To grant leave to reopen its case would simply be otiose.

41 It is unnecessary to travel further into the significance to be attached, upon an application to reopen, to the undoubted fact that the procedure provided for in the Act does not finally bind the parties in terms of their ultimate curial rights.

42 The orders of the Court are as follows:
1. I revoke the orders made at approximately 11.30am on 18 April 2006.
2. I order that the notices of motion filed on 20 January 2006 and on 19 April 2006 be dismissed.
3. I order that the plaintiff pay the defendant's costs of the notices of motion.
4. I order that the plaintiff pay the costs of both parties of the external transcription of the hearing of the motions.
5. I order that in the absence of the plaintiff communicating to the Commercial List Judge on or before 10.00 a.m. on 26 April, that the plaintiff wishes to continue the proceedings and/or seeks leave to amend the existing summons, the summons be taken as dismissed as at 10.00 a.m. on 26 April 2006.
6. I order that in the event that a communication is sent to the List Judge prior to 10.00 a.m. on 26 April 2002, the proceedings be listed before the List Judge for directions on Friday, 28 April 2006 in the Technology and Construction List.

Mr JS Drummond (Plaintiff) instructed by Hewitts Commercial Lawyers
Mr M Southwick (Defendant) instructed by Surry Partners