Main Roads Construction P/L v Samary Enterprises P/L [2005] Adj.L.R. 09/28

Main Roads Construction Pty Ltd v Samary Enterprises Pty Ltd [2005] VSC 388

CATCHWORDS : Building Contract – Standards Australia General Conditions of Contract AS 4000-1997 – Claim by builder for payment on progress certificates – Whether proprietor can raise cross-claim in answer – Construction

Procedure – Summary judgment application – Whether question whether proprietor can raise cross-claim in answer to claim by builder for payment on progress certificates raises triable issue – *Supreme Court Rules*, r.13.14.

HIS HONOUR Habersberger J : Common Law Division. Melbourne : Supreme Court of Victoria. 28th September 2005.:

1 This is an application by the plaintiff, Main Roads Construction Pty Ltd, for summary judgment against the defendant, Samary Enterprises Pty Ltd, in the sum of $456,978.98 said to be owing pursuant to six progress certificates issued by the superintendent under a building contract, plus interest under the contract on each of the overdue amounts from the date payment was due.

2 The proceeding was commenced by writ on 6 May 2005 and entered into the Building Cases List. The application for summary judgment was made by summons filed 17 June 2005. It was supported by an affidavit of the managing director of the plaintiff, Richard Frank Furnari, sworn on 2 September 2005. The name of the plaintiff in the heading to the affidavit was said to be "Main Roads Corporation Pty Ltd", and this is the name of the plaintiff given in some of the court documents filed by the defendant. An exhibited company search confirmed that this is indeed the correct name of the plaintiff, however, no order has yet been made permitting the name of the plaintiff to be amended in this way. Although nothing turns on this point, because the incorporation of the plaintiff is admitted, there will need to be an amendment made to state the correct name of the plaintiff in the title of the proceeding.

3 Contrary to the order made by me on 19 August 2005 that any affidavits from the defendant in opposition to the application for summary judgment be filed and served by 12 September 2005, the defendant did not serve any such affidavit until about 5.15 p.m. on 15 September 2005, which was the day before the adjourned date for the hearing of this application. This was an affidavit of one James Lytifi Sabri, the principal of a firm of chartered accountants, which acted as accountants for the defendant. Mr Sabri said that he had been actively involved in all aspects of the project and thus had personal knowledge of the relevant matters. Despite the late service of Mr Sabri's affidavit, no objection was raised by the plaintiff to the defendant relying on its contents.

4 Mr Furnari's affidavit established that on or about 27 April 2004 the plaintiff and the defendant entered into an agreement whereby the plaintiff as contractor agreed with the defendant as principal to undertake the construction of a sub-division, including but not limited to the civil works associated with the provision of roads, sewer, electricity and water, on the defendant's land at Broadford for the sum of $795,000. The agreement was a standard form contract, Standards Australia General Conditions of Contract AS 4000-1997 ("the contract"). Pursuant to cl.20 and the definition of "Superintendent" in cl.1 and item 5 of the contract, the superintendent appointed by the defendant was WBS Consultants Pty Ltd.

5 According to Mr Furnari, the plaintiff has carried out the works and, pursuant to cl.37.1 of the contract, made 12 progress claims for payment to the superintendent. Pursuant to cl.37.2 the superintendent has certified each of the 12 progress claims for payment. The defendant paid the first six progress certificates in the sum of $693,384.23, but did not pay anything in respect of progress claims numbers 7 to 12. The relevant progress certificates, which were dated between 29 October 2004 and 1 April 2005, totalled $456,978.98. Any argument about a lack of proof that the six outstanding progress certificates were received by the defendant was removed, in my opinion, by the admission by Mr Sabri in his affidavit that "the Superintendent has issued various progress certificates for the works carried out by Main Roads", without raising any suggestion that the defendant has not received all of them, and by a statement by the defendant's counsel that, apart from certain technical objections, no further point was taken about the sufficiency of the plaintiff's proof of the claim.

6 However, there still remains, in my opinion, an issue about whether the claim for interest has been proved. Pursuant to cl.37.2 of the contract the obligation of the defendant was to pay the amount certified "within 7 days after receiving" the progress certificate. There is no evidence before me of the dates on which the defendant received, or is deemed under cl.7 of the contract to have received, each of the six unpaid progress certificates. It is therefore not possible to fix a "date of default" for the purpose of calculating interest under cl.37.5 of the contract.

7 Therefore, it seems to me that at this stage the plaintiff has not verified the facts on which that part of its claim relating to interest is based. Nevertheless, apart from the technical objections mentioned by Mr Upjohn of counsel, who appeared for the defendant, the plaintiff has verified the facts on which the claim for payment of $456,978.98 is based.

8 The first of the technical objections was that not all of the contract was put into evidence because Mr Furnari did not exhibit all of the contractual documents. As Mr Furnari himself stated, the "Bill of Quantity pages numbered 1 to 15" and the "Numbered plans" were not produced. However, counsel for the defendant conceded that there was no argument which he wished to advance which was impeded by the lack of these contractual documents. Although it may have been preferable to exhibit all of the contractual documents, I do not consider that the plaintiff's application for summary judgment should be defeated by the omission of bulky and detailed documents and plans which were not relevant to any of the issues raised by the defendant. This is particularly the case where, as discussed below, the pleaded agreement was admitted by the defendant.

9 The second technical objection was that the best evidence rule was not followed because only photocopies of the contract, the progress claims and the progress certificates were exhibited. Again, counsel for the defendant conceded that nothing turned on this point. In my opinion, there is no substance in it.

10 It seems to me, therefore, that the plaintiff has made out a prima facie case that it would be entitled to summary judgment for the sum of $456,978.98, unless the defendant satisfies me that in respect of that part of the claim "a question ought to be tried or that here ought for some other reason be a trial of that claim or part" (r.22.06(1)(b) of the *Supreme Court (General Civil Procedures) Rules* 1996 ("the *Supreme Court Rules*").

11 The test for deciding whether or not it is appropriate to give the plaintiff summary judgment in respect of all or part of its claim is well established. The power to order summary judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried. If it is not possible to say without doubt on the whole of the material that there is no question to be tried, there should be leave to defend: ***Dey v Victorian Railway***

Commissioners (1949)[1] ***General Steel Industries Incorporated v Commissioner for Railways (NSW***)[2]***; Fancourt v Mercantile Credits Ltd.*** [3] However, the summary judgment procedure is not confined to cases which are plain and obvious and the fact that a transaction is intricate does not disentitle a plaintiff to relief in a clear case. Even extensive argument may be necessary to show that there is no question to be tried: ***Australian Can Co Pty Ltd v Levin & Co Pty Ltd***[4]***; Dey v Victorian Railway Commissioners***[5]***; General Steel Industries Incorporated v Commissioner for Railways (NSW***).[6]

12 I turn then to consider whether there should be leave to defend. On 5 July 2005 Samary had filed a defence which could only be described as a "holding" defence which did not comply with the rules governing pleading. Apart from admitting incorporation of the plaintiff and the defendant, that it owned certain land in Broadford and that Main Roads had lodged a caveat over the land, Samary simply denied every other allegation. However, pursuant to my order made on 19 August 2005, the defendant served an amended defence and counterclaim. This pleading still contained a number of bare denials, but in it the defendant did admit the agreement between the plaintiff and the defendant. It also contained allegations of breaches by the plaintiff of the agreement in respect of delay in achieving practical completion and a failure by the plaintiff to install a rising main, both of which were said to have caused the defendant loss and damage. The defendant also complained about the wrongful lodging by the plaintiff of two caveats, which although subsequently removed, allegedly caused further delay and forced the defendant to incur legal costs. Finally, the defendant alleged that the plaintiff published certain false statements about the solvency of the defendant which had caused it further loss.

13 In his affidavit Mr Sabri developed these complaints about the plaintiff's performance. He produced invoices said to total $91,930.35 for the cost of maintenance and rectification works which the plaintiff had allegedly failed to carry out. He also produced a quotation for the installation of the rising main in the sum of $340,000, which was said to be $175,000 more than the price for which the plaintiff had agreed to do this work. Mr Sabri said that this quotation had not been accepted by the defendant because he considered it to be too high.

14 Mr Sabri deposed that the principal area of damage sustained by the defendant arose as a result of the plaintiff's failure to bring the works to practical completion within the stipulated contract period and as a result of the further delays caused by the plaintiff's wrongful lodging of the caveats. Under the contract, the date for practical completion was 30 August 2004, being 80 days from the contract date. This was apparently extended to 12 November 2004, but practical completion was not achieved until 13 May 2005, according to the certificate of practical completion issued by the Superintendent, which was exhibited to Mr Furnari's affidavit.

15 The wrongful lodging of the caveats, according to Mr Sabri, delayed the registration of the Plan of Subdivision which meant that various pre-subdivision contracts of sale could not be settled. Three such contracts were cancelled by the purchasers by reason of the inability of the defendant to achieve registration of the Plan of Subdivision within the agreed period. It was also said that the delay in completing the rising main was holding up the issue of titles for five lots as Goulburn Valley Water would not certify the subdivision until the rising main was completed.

16 Mr Sabri deposed that these delays had resulted in the defendant suffering losses because holding costs of $15,000 per month had been extended allegedly by 14 months, land prices had fallen and the market had changed (which meant that the defendant might now have to incur extra expense by constructing houses to encourage sales interest), and extra legal costs had been incurred. In addition, the defendant had incurred legal costs of $29,160.57 in relation to the removal of the caveats.

17 Finally, Mr Sabri claimed the plaintiff's defamatory statements about the defendant's solvency had caused contractors to inflate their quotations for carrying out the remaining works for stages 2 and 3 of the development. These new quotations were far in excess of the cost of stage 1. For example, the cost of basic works for stage 1 of $40,000 per lot were now being quoted at $55,000 per lot.

18 Although it was not explicitly stated by Mr Sabri, the purport of his affidavit was that the defendant arguably had set-offs or counterclaims in excess of the plaintiff's claim. The plaintiff disputed the way in which the defendant raised these issues and made its calculations. It denied, therefore, that the set-offs or counterclaims provided a complete, or even any substantial, defence. However, Mr Dixon of counsel, who appeared for the plaintiff, submitted that it was unnecessary to explore the strengths and weaknesses of the defendant's case that it had sufficient set-offs or counterclaims to justify the matter going to trial on all issues. This was because, Mr Dixon submitted, the parties had, by their contract, excluded the ordinary right of set-off, other than in accordance with the contract, so that the defendant was bound by the contract to pay the amount of each progress certificate without any deduction.

19 Before considering the parties' submissions it is helpful to set out the relevant provision of the contract. Clause 37 which is headed "Payment" reads as follows:

"37.1 **Progress claims**

The Contractor shall claim payment progressively in accordance with Item 28 [on the 25th day of each month].
An early progress claim shall be deemed to have been made on the date for making that claim.
Each progress claim shall be given in writing to the Superintendent and shall include details of the value of WUC [work under the contract] done and may include details of other moneys then due to the Contractor pursuant to provisions of the Contract.

37.2 ***Certificates***

The Superintendent shall, within 14 days after receiving such a progress claim, issue to the Principal and the Contractor:
a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and

1 78 CLR 62 at 91 per Dixon J
2 (1964) 112 CLR 125 at 130 per Barwick CJ
3 (1984) 154 CLR 87 at 99 per Mason, Murphy, Wilson, Deane and Dawson JJ
4 [1947] VLR 332 at 334-335 per Herring CJ and Lowe J
5 (1949) 78 CLR 62 at 91 per Dixon J
6 (1964) 112 CLR 125 at 130 per Barwick CJ

b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.

If the Contractor does not make a progress claim in accordance with Item 28, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).

If the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1, that progress claim shall be deemed to be the relevant progress certificate.

The Principal shall within 7 days after receiving both such certificates, or within 21 days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after deducing retention moneys and setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.

Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only.

37.3 ***Unfixed plant and materials*** *...*

37.4 ***Final payment claim and certificate***

Within 28 days after the expiry of the last defects liability period, the Contractor shall give the Superintendent a written final payment claim endorsed 'Final Payment Claim' being a progress claim together with all other claims whatsoever in connection with the subject matter of the Contract.

Within 42 days after the expiry of the last defects liability period, the Superintendent shall issue to both the Contractor and the Principal a final certificate evidencing the moneys finally due and payable between the Contractor and the Principal on any account whatsoever in connection with the subject matter of the Contract.

Those moneys certified as due and payable shall be paid by the Principal or the Contractor, as the case may be, within 7 days after the debtor receives the final certificate.

The final certificate shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the Contract except for:

a) fraud or dishonesty relating to WUC or any part thereof or to any matter dealt with in the final certificate;

b) any defect or omission in the Works or any part thereof which was not apparent at the end of the last defects liability period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the final certificate;

c) any accidental or erroneous inclusion or exclusion of any work or figures in any computation or an arithmetical error in any computation; and

d) unresolved issues the subject of any notice of dispute pursuant to clause 42, served before the 7th day after the issue of the final certificate.

37.5 ***Interest***

Interest in Item 30 [12.5% per annum] shall be due and payable after the date of default in payment.

37.6 ***Other moneys due***

The Principal may elect that moneys due and owing otherwise than in connection with the subject matter of the Contract also be due to the Principal pursuant to the Contract."

20 Clause 42 of the contract, which is referred to in cl.37.4(d), is headed "Dispute Resolution". It reads as follows:

"42.1 **Notice of dispute**

If a difference or dispute (together called a 'dispute') between the parties arises in connection with the subject matter of the Contract, including a dispute concerning:

a) a Superintendent's direction; or

b) a claim:

i) in tort;

ii) under statute;

iii) for restitution based on unjust enrichment or other quantum meruit; or

iv) for rectification or frustration,'

or like claim available under the law governing the Contract,

then either party shall, by hand or by certified mail, give the other and the Superintendent a written notice of dispute adequately identifying and providing details of the dispute.

Notwithstanding the existence of a dispute, the parties shall, subject to clauses 39 ['Default or insolvency'] and 40 ['Termination by frustration'] and subclause 42.4, continue to perform the Contract.

42.2 ***Conference***

Within 14 days after receiving a notice of dispute, the parties shall confer at least once to resolve the dispute or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.

If the dispute has not been resolved within 28 days of service of the notice of dispute, that dispute shall be and is hereby referred to arbitration.

42.3 ***Arbitration***

If within a further 14 days the parties have not agreed upon an arbitrator, the arbitrator shall be nominated by the person in Item 32(a). The arbitration shall be conducted in accordance with the rules in Item 32(b).

42.4 ***Summary relief***

Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the Contract or to seek injunctive or urgent declaratory relief."

21 Mr Dixon referred to three authorities in support of his submission. In ***L U Simon Builders Pty Ltd v H D Fowles,***[7] a builder sued the proprietor to recover moneys allegedly owed upon progress certificates for work done by it under a building contract. In opposition to an application for summary judgment the proprietor alleged that it was entitled to claim liquidated and other

[7] 1992] 2 VR 181

damages against the builder arising out of the builder's performance of the contract. Smith J held that there was no real question to be tried because he concluded that it was clear that the defendants were not able, on a proper construction of the contract in that case (Building Works Contract – JCC B 1985), to raise any cross-claims under the contract by way of defence in answer to a claim by the plaintiff for payment of progress certificates.[8] His Honour reached this conclusion after reviewing in detail the provisions of the relevant contract. His Honour said: *"Having regard to the foregoing provisions, it appears to me that the parties provided a comprehensive scheme for the certification of payments and the adjustments of liabilities between them. If there is a dispute about the progress certificate it can be referred to the arbitrator. If the arbitrator comes to a different conclusion to that of the architect, the contract sum can be adjusted and the amounts taken into account in a later progress certificate or the final certificate. In the meantime, as Giles J commented in Sabemo, at p.29: 'The scheme of the contract is that claims and cross-claims which are disputed will go to arbitration but that each party shall continue to fulfil its part of the contract – performance of the works by the builder and payment by the proprietor – notwithstanding the reference of disputes to arbitration. At the end of the contract, account will be taken of the disputes in relation to the payment of the final certificates. The disputes may have been resolved by an award prior to that time, but if they have not the result of the arbitration will determine what monetary adjustments (either way) will be made.'*

While the terms of the contract do not speak expressly in terms of set-offs and counterclaims, it appears to me to be clear that it would be contrary to the agreement between the parties to allow the defendants to now make such claims by way of defence to claims for payment of progress certificates under cl.10.07." [9]

22 Importantly, Smith J also held that the existence of r.13.14 of the *Supreme Court Rules* did not assist the defendant. His Honour said: *"I initially considered that there may be an issue to be tried here, but on reflection consider that there cannot be if my earlier conclusion about the construction of the contract is correct. The problem facing the defendants is that the argument is contrary to that conclusion. To succeed, they must show a contract term allowing a deduction from the certified* ***progress payment****. The contract in cl.10.14 and 10.15 expressly provides a mechanism whereby the proprietor is allowed to deduct liquidated damages from amounts certified in progress certificates but that procedure has not been invoked. It cannot now be invoked in relation to the progress payments in question."* [10]

23 The reference to ***Sabemo*** was to the decision of Giles J of the Supreme Court of New South Wales in ***Sabemo Pty Ltd v De Groot.***[11] In that case, which was also concerned with the standard form of contract JCC B 1985, it was held that the proprietor was obliged to pay the amounts of the progress certificates notwithstanding that it contested those amounts and claimed damages from the builder and notwithstanding that those disputes had been referred to arbitration..

24 In **John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd,**[12] Hansen J decided a similar issue in respect of the same form of contract. His Honour followed the decisions in Sabemo and Simon. In his judgment, Hansen J dealt with an argument by counsel for the defendant that both Sabemo and Simon were wrongly decided because each Judge had merely addressed a question of construction of the contract without having due regard to the general principle of law that the right of set-off was a substantive defence at common law and not a mere procedural rule. [13] Hansen J stated his conclusion as follows: *"In my view the distinction which counsel seeks to draw in terms of the failure of those judges to direct their mind to the principle of set off and whether that was excluded by the particular contract is artificial on a fair reading of each judgment, and particularly* ***Simon,*** *read as a whole. The judgment in Simon addresses the relevant consideration which is whether, acknowledging the decision of* ***Gilbert-Ash*** *which is concerned with the basic principle concerning set off, the parties have by their contract excluded the operation of the principle. I would not depart from the reasoning of Smith J and do not have a doubt about it as would warrant leave to defend."* [14]

25 His Honour also considered the question of whether r.13.14 was excluded by the provisions of the contract and whether in this respect the decision to that effect in ***Simon*** was correct. He stated: *"It was submitted that there is nothing in the contract which excludes the right of set off under the Rule. In my view the right given by the Rule is not absolute (see* ***Moffat v Pinewood Resources Ltd,*** *Tadgell J unreported 7 April 1989) and that parties to a contract may agree to exclude the operation of the Rule. Smith J so decided in Simon and held that on the intention of the parties as he found it to be, R13.14 could have no operation. I agree with his Honour's decision on this point."* [15]

26 Finally, Mr Dixon referred me to the decision of Rolfe J of the Supreme Court of New South Wales in ***Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd.***[16] This decision contains a useful summary of the relevant authorities, including a reference to the fact that Hansen J's decision in *John Holland* had been considered by the Court of Appeal.[17] Hansen J had granted a stay on the entry of judgment until the matter could be considered by Byrne J, the Judge then in charge of the Building Cases List. Byrne J dismissed the plaintiff's application to have the stay terminated. Brooking JA, with whom Hayne JA agreed,[18] considered that leave to appeal from Byrne J's decision should be granted and the appeal allowed as "no good reason" had been shown for the stay.[19] As Rolfe J said in ***Algons Engineering,*** it was inherent in the reasoning of Brooking JA that the decision of Hansen J was correct.[20]

27 ***Algons Engineering*** was concerned with a standard form of contract which was similar to the present contract in many respects. Clause 42 of that contract, which set out the obligation of the Main Contractor to pay to the Subcontractor, or of the Subcontractor to pay to the Main Contractor, the amount shown in the payment certificate of the Main Contractor's Representative or if no payment certificate had been issued, the amount of the Subcontractor's claim, then continued: *"A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Cl.47 whether the amount so*

8 [1992] 2 VR 181 at 195
9 1992] 2 VR 181 at 194-195
10 [1992] 2 VR 181 at 196
11 (1991) 8 BCL 132
12 Unreported, 27 July 1995, BC 9503852
13 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689
14 BC 9503852 at p.11
15 BC 9503852 at p.12
16 (1997) 14 BCL 215
17 ***John Holland Construction and Engineering Pty Ltd v Majorca Projects Pty Ltd,*** unreported, 21 August 1995, BC 9503898
18 BC 9503898 at p.8
19 BC 9503898 at p.7
20 (1997) 14 BCL 215 at 226

paid is the amount properly due and payable and on determination (whether under Cl.47 or as otherwise agreed) of the amount so properly due and payable, the Main Contractor or Subcontractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Cl.42.8."

28 Rolfe J said in respect of cl.42 that he found it: *"difficult to conceive of clearer words obliging payment of the progress claim without deduction, a conclusion which is fortified by other provisions of the subcontract."* [21]

29 In concluding that there should be summary judgment for the plaintiff, Rolfe J said: *"In my view the construction of the clause, viewed again the authorities to which I have referred, does not give rise to any real issue or question to be tried. The subcontract, on its proper construction, requires the defendant to pay the amount of the progress claim, in the circumstances of this case, without any deduction for amounts claimed by way of set-off or cross-claim. Accordingly, conformably with the test laid down in General Steels and the other authorities on the point, I think that I should give effect to that view."* [22]

30 His Honour also rejected the argument that the defendant could rely on a common law right of set-off or equitable set-off. He said: *"I do not see that there is any unjustness in requiring the parties to abide by the terms of their contract, particularly when in so doing the Court is not precluding the defendant, ultimately, from raising the amounts sought to be set-off as a defence to the final claim and allowing the defendant to rely upon its entitlement to such a set-off under the contract, but in due course. It was submitted on behalf of the defendant that if it had a defence that defence can be availed of immediately. I think the answer to that submission is that on a proper construction of the contract, and in the circumstances which have occurred, it does not have a present right to raise that defence. The defence will be available at a later point, the right to bring it being deferred by the terms of the contract."* [23]

31 One of the authorities relied on by Rolfe J in ***Algons Engineering*** was the decision of the Court of Appeal of the Supreme Court of Queensland in ***Re Concrete Constructions Group Pty Ltd.***[24] This case was concerned with a standard form of contract, General Conditions of Contract AS 2124-1992, which would appear to be reasonably similar to the contract in this proceeding. Rolfe J said that as he understood it this decision of the Court of Appeal was: *"not authority for the proposition that the superintendent in that case could not have deducted the amount of liquidated damages, but rather that as this had not been done the obligation was to pay the amount specified in the certificate. Appropriate adjustments, if any, were to be made at a later date."* [25]

32 In ***Concrete Constructions***, McPherson JA and Helman J, in a joint judgment, emphasised that progress claims and payments in building contracts were "***provisional only".*** Their Honours continued: "*That is to say, they await the day when a final certificate issues, in which the ultimate indebtedness by one party to the other is ascertained and fixed.*" [26]

Their Honours rejected the principal's submission that a term could be implied in the contract allowing the principal to deduct liquidated damages from the amount certified by the superintendent: *"In a contract which, like this, contains extensive and detailed provisions regulating the rights of the parties, the process of implying terms is not something to be undertaken except where the need or the context compels it. That is especially so in a matter like progress payments, which are ordinarily critical to the survival of the contractor and so to the completion of the project. If not paid as he goes, on a substantial project like this, the contractor will soon be forced to stop work. His express right to payments certified by the superintendent should not be qualified by discovering hidden meanings extricated from half expressed reservations in other parts of the document."* [27]

33 Fitzgerald P, who reached the same conclusion, stated that "what is certified is intended to be paid." His Honour referred to all of the amounts which the superintendent had to assess before issuing his certificate and continued: "*The payment certificate accounts for all of these amounts, including any claim by the principal for liquidated damages for delay in practical completion if such a claim is made, and then certifies the amount to be paid whether by principal to contractor or contractor to principal.*" [28]

34 In a later decision of the Court of Appeal of the Supreme Court of Queensland, ***Daysea Pty Ltd v Watpec Australia Pty Ltd,***[29] the contract in question, which again had some similarity with the present contract, was constituted by the General Conditions of Contract AS 4300-1995, with variations set out in Special Conditions. Williams JA, with whom Davies JA [30] and Mackenzie J [31] agreed, described the reasoning of Rolfe J in ***Algons Engineering*** as "compelling". Williams JA continued: *"As all of the cases I have just referred to establish, the consequences of issuing a certificate are serious. The proprietor is bound to pay the amount of the certificate notwithstanding that the amount is provisional only and subsequently may be found to be incorrect. Notwithstanding such considerations the proprietor must pay the amount specified in the certificate and take the chance that any excess can be recovered subsequently. Similarly, the contactor is not entitled to payment of anything more than the amount specified in the certificate though it may well be less than the progress claim made. Even though it may ultimately be found that the contractor was entitled to more, the recovery of any such amount must await the determination of disputes at the end of the contract."* [32]

35 Finally, I refer to the joint judgment of the Court of Appeal in ***Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd.***[33] In that case, the Court, comprising Winneke P, Buchanan and Eames JJA, allowed an appeal from an order of Byrne J entering summary judgment in favour of the respondent on the grounds that triable issues were raised by the questions whether the contract superintendent was obliged to issue certificates in respect of the relevant progress claims when evidence in support of the

21 (1997) 14 BCL 215 at 219
22 (1997) 14 BCL 215 at 230
23 (1997) 14 BCL 215 at 230
24 [1997] 1 Qd R 6
25 (1997) 14 BCL 215 at 230
26 [1997] 1 Qd R 6 at p.12
27 [1997] 1 Qd R 6 at p.13
28 [1997] 1 Qd R at p.8
29 [2001] QCA 49
30 [2001] QCA 49 at [1
31 [2001] QCA 49 at [45]
32 [2001] QCA 49 at [21]
33 (2004) 8 VR 16

claims had not been provided as requested by the superintendent and whether the appellant was required to pay those claims within the time specified in the clause (appeal grounds 5 and 6) and by the question whether there could be a right of set-off against certified progress claims where the contract had been terminated, as compared with the situation of progress claims during the life of the contract (appeal ground 7).

36 Although none of these issues are raised in the present proceeding, it is helpful, in my opinion, to consider some of the more general observations of the Court of Appeal. First, it should be noted that the contract in ***Aquatec-Maxcon*** was also constituted by General Conditions of Contract AS 4300-1995.

37 Secondly, when dealing with appeal grounds 5 and 6, the Court referred, with apparent approval, to decisions such as ***Concrete Constructions*** and ***Algons Engineering***, which their Honours said: *"clearly demonstrate that cl.42.1 is not intended to finally determine rights but to provide a speedy means of resolving what ought to be paid to the contractor to keep the work moving."* [34]

The wording of cl.42.1 had some similarity with that of cl.37.2 of the contract in this proceeding.

38 Thirdly, when dealing with appeal ground 7, the Court referred, again with apparent approval, to **Algons Engineering** and stated: "*In that case Rolfe J concluded that the terms of the standard contract made it clear that the obligation to make progress payments under cl.44.1 was without prejudice to the right of the head contractor to dispute the claim in due course and to recover any overpayment.*" [35]

In a footnote to that passage, the Court added: *"The judgment of Rolfe J cites numerous instances (not involving termination of the contract) where judges had concluded that a* ***progress payment*** *could not be subject to deduction by way of set-off or cross-claim."* [36]

39 Mr Upjohn submitted, on behalf of the defendant, that it was a triable issue whether the particular contract in this proceeding excluded the defendant's right of set-off. He submitted that construed as a whole the contract did not do so either expressly or by implication. Mr Upjohn referred me to a passage in the judgment of White J of the Supreme Court of South Australia in ***Construction Services Civil Pty Ltd v J & N Allen Enterprises Pty Ltd***, dismissing an application for summary judgment, where his Honour stated that "*it takes very clear words to exclude the common law principle"* of set-off. [37] The contract in that case was, however, significantly different to the present contract. In particular, there was no provision that payment of the progress certificates was to be "on account only". On the contrary, in the contract before White J unless a progress certificate was disputed by notice in writing within ten days of issue it was "conclusive evidence of the cost of materials, labour and other items provided by the Builder during the period under review except in the case of fraud, dishonesty or error in computation."

40 Mr Upjohn recognised that the contract in this proceeding did provide for a setting-off of such amounts which the superintendent had certified were payable by the contractor to the principal for matters such as delay or defects. Nevertheless, he submitted that it would be a dangerous or unreliable course to apply the expressio unius est exlusio alterius rule to the construction of this contract. Given the history of the relevant cases, he submitted, one would have expected the wording of any exclusion of common law or equitable rights to be in the clearest possible terms.

41 It was pointed out by Mr Upjohn that in cl.34.7 of the contract, which dealt with liquidated damages, there was a reference to a right of set-off which, it was submitted, was not limited to the procedure set out in cl.37.2. I do not agree. Clause 34.7 provides as follows: *"If WUC does not reach practical completion by the date for practical completion, the Superintendent shall certify, as due and payable to the Principal, liquidated damages in Item 24 [$450 per day] for every day after the date for practical completion to and including the earliest of the date of practical completion or termination of the Contract or the Principal taking WUC out of the hands of the Contractor.*

If an EOT [extension of time] is directed after the Contractor has paid or the Principal has set off liquidated damages, the Principal shall forthwith repay to the Contract such of those liquidated damages as represent the days the subject of the EOT."

42 It seems to me that the reference in the first paragraph to the superintendent certifying an amount due and payable to the principal is clearly a reference to the procedure set out in cl.37.2. Further, the reference in the second paragraph to the principal having "set off liquidated damages" is also a reference to that procedure. Thus, the contract when read as a whole clearly does not, in my opinion, recognise any right of set-off other than in accordance with the procedure set out in cl.37.2.

43 Mr Upjohn did not dispute that it would have been open to the defendant to seek to have the superintendent certify the amount of liquidated damages due and payable to it by the plaintiff under cl.34.7 and the cost of rectifying defects under cl.35, and that the defendant could then have elected to set-off those amounts against the amounts otherwise due and payable under the progress certificates. Yet, for some reason, the defendant did not follow this course. Instead, it simply failed to pay the plaintiff the amounts of the six progress certificates. Over half of the amount claimed had been outstanding for over six months when this proceeding was commenced by the plaintiff.

44 In further support of his submission that the contract arguably did not exclude the general right of set-off, Mr Upjohn compared the language of the contract relating to a progress certificate in cl.37.2 with that relating to the final certificate in cl.37.4. He submitted that the clear and precise statement of the conclusiveness of a final certificate except for certain express situations was to be contrasted with the lack of any exclusion of the common law or equitable right of set-off in respect of progress certificates.

45 Again, I do not agree with this submission. It seems to me that, read as a whole, the contract makes it abundantly clear that apart from the procedure for set-off described in cl.37.2, the principal must pay to the contractor the amount of the progress certificates. As has been pointed out such payments are *"on account only"*. In my opinion, the parties have worded their contract in this way, for the very good reason that progress payments are the "life-blood" of contractors in the building industry. [38] Accordingly, set-offs against amounts otherwise payable to the contractor are not permitted except in accordance

[34] (2004) 8 VR 16 at [29]
[35] (2004) 8 VR 16 at [46]
[36] (2004) 8 VR 16 at [46 footnote 12]
[37] (1985) 1 BCL 363 at 367
[38] *Construction Services Civil Pty Ltd v J & N Allen Enterprises Pty Ltd* (1985) 1 BCL 363 at 365 per White J

with the agreed comprehensive scheme for the working out of disputes between the parties concerning their rights and liabilities under the contract. This means that the defendant cannot seek to rely on r.13.14.

46 This view is not altered by the defendant's final submission that there is no absolute right to payment of progress certificates, at least in the case of substantial breach by the contractor or possible insolvency of the contractor, because under cl.39.4 of the contract in such circumstances the principal may:

"(a) take out of the Contractor's hands the whole or part of the work remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 39.6; or

(b) terminate the Contract."

Subclause 39.6 provides that when the work taken out of the contactor's hands has been completed, the superintendent shall assess the cost incurred and certify the difference between that cost and the amount which would otherwise have been paid to the contractor.

47 Assuming, but without deciding, that the suspension of payment in cl.39.4 applies to progress certificates issued but unpaid, there is nothing in this specific provision concerned with particular factual situations (not present in this proceeding) which would warrant overriding what otherwise, in my opinion, is the clear intent of the contract that during the course of the contract the amount of progress certificates are to be paid without any set-off by the principal except in accordance with the procedures set out in cl.37.2 of the contract.

48 This conclusion is, in my opinion, in accordance with the views (set out above) expressed by a number of judges in cases dealing with contracts having similar wording to the contract in this proceeding. Like them, I am quite satisfied that, despite the matters raised by the defendant, there is no real question to be tried. Accordingly, after the amendment to the name of the plaintiff referred to above, there will be judgment for the plaintiff against the defendant in the sum of $456,978.98.

Mr J.R. Dixon instructed by Harwood Andrews Lawyers
Mr I.W. Upjohn instructed by John Matthies & Co