



Transcript of Proceedings

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DISTRICT COURT

CIVIL JURISDICTION

SENIOR JUDGE SKOEN

No 541 of 2006

DARE SUTTON CLARKE PTY LTD
(ACN 008 036 940)

Applicant

and

KNJ PTY LTD
(ACN 082 047 952)

Respondent

BRISBANE

..DATE 10/03/2006

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MR P D HAY (instructed by Bennett & Philp) for the applicant

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MR L ALFORD (instructed by McDonnells) for the respondent

HIS HONOUR: Now, this is back to the matter from last Tuesday. Now, as I recall this matter was adjourned for two reasons. One, to give the defendant the opportunity to spend a couple days to consider the position. He - saying that his client had no trace of the materials - certain material and, as a sort of adjunct to that, there was this debate about whether it had been properly served. Do you have any material to add to that?

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MR HAY: Yes, I do, your Honour, may it please the Court. I have a written - supplementary written outline to be read-----

HIS HONOUR: Yes.

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MR HAY: -----with my original outline.

HIS HONOUR: Yes.

MR HAY: I seek your Honour's leave to read and file a further affidavit from Robert Gary Knight sworn 10 March 2006 and an affidavit of Andrew John Lambros sworn 9 March 2006.

HIS HONOUR: Sorry, Gary Knight is it?

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MR HAY: Robert Gary Knight.

HIS HONOUR: Robert Gary, yes.

MR HAY: K-N-I-G-H-T.

HIS HONOUR: Sworn?

MR HAY: Sworn 10 March 2006.

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HIS HONOUR: Yes, and?

MR HAY: And an affidavit of Andrew John Lambros sworn 9 March 2006.

HIS HONOUR: Yes. Very good. Leave granted.

MR HAY: Your Honour, that material which I'll hand up, the affidavit from Andrew John Lambros goes further to the issue of the service of the application. We cannot assist the Court further other than it was duly posted.

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HIS HONOUR: Mmm.

MR HAY: Enquiries have been made with Australia Post, by both parties, which have not indicated any problem with the postage. But then again, have not indicated anything at all, in fact.

HIS HONOUR: Just a second. Now, Knight's affidavit relates to this question of the identification of the party, doesn't it?

MR HAY: That's correct, your Honour.

HIS HONOUR: Did you hand up the affidavit - here it is, Lambros. Well, the document was posted on the 20th of February and hasn't been returned - sorry, it hasn't-----

MR HAY: It hasn't been returned, your Honour.

HIS HONOUR: -----been returned. Nor has the document of the 2nd of March?

MR HAY: No, your Honour.

HIS HONOUR: What was in the document of the 20th of February?

MR HAY: Of the - there was the originating application on the 27th of February and filed with that application was an affidavit sworn on the 24th of February by Mr Knight. There was also a supplementary affidavit sworn by Mr Knight.

HIS HONOUR: Well, just a moment. I'm just looking at Mr Lambros's affidavit and you're talking about a letter that he sent on the 20th of February.

MR HAY: My apologies, your Honour. My instructing solicitor, Mr Lambros, informs me that's a clerical error. It should read 28 February.

HIS HONOUR: I remember once people used to read affidavits before they swore them. All right.

MR HAY: I apologise for that, your Honour.

HIS HONOUR: All right. Well, I'll read that as 28 February. And that had in it the application and-----

MR HAY: Yes, your Honour. The application together with the affidavit sworn by Mr Knight.

HIS HONOUR: Mmm. Mmm.

MR HAY: There was also an inquiry as to the affidavit sworn by Mr Knight on 2 March 2006 which hadn't made its way to the court file on Wednesday.

HIS HONOUR: Mmm.

MR HAY: My search of the Court file list this morning on the internet indicates that it has now made the Court file as document number 3.

HIS HONOUR: Yes.

MR HAY: I believe my friend has some material which we have
some objections to but I'll-----

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HIS HONOUR: All right, yes, Mr Alford.

MR ALFORD: Thank you, your Honour. Your Honour, I'd like
also to read into the record an affidavit sworn by Andrew
Evans. This is the affidavit in terms of Mr Evans's inquiries
in relation to trying to locate the reason for the failure of
KNJ Proprietary Limited to - in terms of receiving the post,
to no avail.

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HIS HONOUR: That's an affidavit sworn?

MR ALFORD: Sworn on - sworn today.

HIS HONOUR: 10 March.

MR ALFORD: Sworn 10 March by Andrew Evans.

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HIS HONOUR: All right, then hand it up then, thank you.

MR ALFORD: Thank you. I'd also like to-----

HIS HONOUR: All right. So inquiries of Australia Post drew a
blank? Yes?

MR ALFORD: Yes, your Honour. And also attached to that
affidavit, your Honour, is prior correspondence which in the
pursuit of trying to bring together our - having been - as
Wednesday, as you know, reacting to the fact that we - the
solicitors had not - had no knowledge of the application. But
we've had to scramble a little bit so there's a couple of
pieces of correspondence attached to that, that bear - that
bear a relationship to this matter.

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HIS HONOUR: Well, what's that got to with - letter to Yehtsi
Constructions?

MR ALFORD: Yes. A letter to Yehtsi Constructions and one
addressed to Mr Seirlis who is the principal of the
respondent.

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MR HAY: Your Honour, I might indicate that the applicant
objects to paragraph 7 of that affidavit and those exhibits.

HIS HONOUR: I'm just wondering what their relevance is.

MR HAY: On that very ground, your Honour.

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HIS HONOUR: What's the relevance of these?

MR ALFORD: Your Honour, in our submissions your Honour, where
we submit that the payment claim-----

HIS HONOUR: Well, have you handed up your - I don't think
you've handed it up yet?

MR ALFORD: I haven't yet handed them up, your Honour, because I'm doing the reading but I'm happy to hand those up, your Honour.

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HIS HONOUR: Yes.

MR ALFORD: If I can hand up my submissions. I'll just get those for your Honour. I might allow your Honour to read those that-----

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HIS HONOUR: Yes.

MR ALFORD: -----begin to explain that purpose of those correspondence.

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HIS HONOUR: Mr Alford, isn't the problem from your point of view is that the plaintiff followed precisely what was laid down in the Act, the - there's no dispute as I understand that the payment claim - although you say the payment claim has a defect in it, but there's no dispute that that was served as alleged?

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MR ALFORD: No, there is no dispute-----

HIS HONOUR: All right.

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MR ALFORD: -----on its face, your Honour.

HIS HONOUR: Yes.

MR ALFORD: Mmm.

HIS HONOUR: Well, assuming for the moment that it was a proper document, then, once your client received that you had a choice didn't you? You could either dispute it but if you don't, isn't it - is it we're all over bar the shouting, it's-----

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MR ALFORD: Your Honour, not on our interpretation of 19(4). Your Honour, it is our submission, your Honour, that providing we can find reason for the Court to see that there was, on foot, a cross claim or a dispute as to the contract that this Court should not give the judgment on the debt and it is our - and is my submission, your Honour, that this - as your Honour is aware - this legislation draws, is really drawn from the New South Wales Building and Construction Industry Security of Payment Act which has all but identical provisions and I'd-----

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HIS HONOUR: Well, just - I don't think you're really answering my question. Under section 18 you get the payment schedule-----

MR ALFORD: Yes, your Honour.

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HIS HONOUR: -----and then you can do - if you're challenging it - you - the section sets out what you must do. Subsection 3, you have to give reasons for withholding payment and if you don't section 19 says you're liable to pay.

MR ALFORD: Your Honour, section 19 does indeed say that you are liable to pay it but section 19, your Honour, also draws to the attention of the parties, being both the claimant and in this case the respondent, that - of certain objectives of the Act. And, your Honour, I draw you to the - my submission where I-----

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HIS HONOUR: Well, what does section - where does section 19 do that?

MR ALFORD: Your Honour, it gives an option-----

HIS HONOUR: Where?

MR ALFORD: -----in section, your Honour, I might just go to my copy of the Act.

HIS HONOUR: Mmm.

MR ALFORD: "The claimant may"-----

HIS HONOUR: Mmm.

MR ALFORD: -----your Honour, "recover the unpaid portion as a debt owing in any Court of - jurisdiction," which is your Honour's point-----

HIS HONOUR: Mmm.

MR ALFORD: -----"or make an adjudication application under section 21(1)(b) in relation to the payment claim"-----

HIS HONOUR: Mmm.

MR ALFORD: -----"and may serve a notice", et cetera, your Honour-----

HIS HONOUR: Well, that gives choices to the claimant, not to your client.

MR ALFORD: Your Honour, in our submission, it is the intent of the Act, your Honour, that the Act be used for the speedy - for the resolution of such disputes-----

HIS HONOUR: Mmm.

MR ALFORD: -----and that in this case the Act should - the dispute resolution mechanisms in that Act which are to go to adjudication are and should have been the first port of call, if you will, to be called upon by the claimant, given that the fact that the claimant was fully aware as to the dispute concerning the walling system, concerning the failure to deliver the walling system which was at the heart and base of the claim for fees.

HIS HONOUR: Well, are you referring to subsection 4?

MR ALFORD: I'm then referring - well, what I'm saying, your Honour, is that the intent of the Act is to resolve these matters within the parameters of the alternative dispute resolution provisions-----

HIS HONOUR: Well, don't we look at subsection 4?

MR ALFORD: Then we look at subsection 4, yes, your Honour, and it is for your Honour to determine, prior to giving this judgment, if your Honour is satisfied in - of the existence of the circumstances referred to in subsection 1.

HIS HONOUR: Well, that's the nuts and bolts, the-----

MR ALFORD: Yes, nuts and bolts.

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HIS HONOUR: -----schedule - the payment claim was served and your client failed to pay, all right. So, I'm satisfied with this. Putting aside for the moment whether the payment claim is a good one or not.

MR ALFORD: Well, as your Honour, yes, that's - your Honour, and-----

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HIS HONOUR: And then (b)-----

MR ALFORD: -----the respondent is not in these proceedings entitled and we would say that our - the respondent is entitled to bring a counter-claim and to raise a defence.

HIS HONOUR: Well, now what material do we have to reach that conclusion?

MR ALFORD: Well, your Honour, we were about to file a further affidavit from - or an affidavit from Mr Seirlis of KNJ Proprietary Limited.

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HIS HONOUR: All right.

MR ALFORD: To read and file.

HIS HONOUR: He - want to file an affidavit of-----

MR ALFORD: Mr Terry Seirlis. Spelt S-E-I-R-L-I-S. Sworn - it's the 10th of March 2006.

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HIS HONOUR: All right, then.

MR ALFORD: And we would invite, your Honour, to read that.

MR HAY: Your Honour, the applicant objects to that entire affidavit.

HIS HONOUR: All right. Yes. Well, he says he didn't actually get - that's - he can swear to that can't he? Says he checks the mail everyday and didn't get-----

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MR HAY: Yes, your Honour, this affidavit was served upon us this morning. There may be small matters like that in places in the affidavit. It deals by and large with supporting the argument that my learned friend has advanced to your Honour-----

HIS HONOUR: Mmm.

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MR HAY: -----which, in our submission, is very simple and plain under the Act, that what is being attempted here is to set up some sort of counter-claim or defence argument, which is not the purpose of this application, not the purpose of the procedure under the Act that the applicant is following. And with the greatest of respect the argument cannot be raised pursuant to section 19(4), the defence and the counter-claim that my learned friend now seeks to set up, simply cannot be raised in this Court and we object on that basis.

HIS HONOUR: Now, why is that? I mean, I-----

MR HAY: If I may turn, your Honour, to the sections, they're probably the easiest way to explain it?

HIS HONOUR: Yes.

MR HAY: This is an application for a statutory debt. It's not an action on the contract. The debt arises by virtue of certain facts which the Act sets out. Firstly, there must be a payment claim made.

HIS HONOUR: Yes.

MR HAY: That has been done. And as I understand it, my learned friend does not dispute - take any further issue with the identity of the party.

HIS HONOUR: Is that right?

MR ALFORD: That's correct, your Honour.

HIS HONOUR: Oh, all right then. Yes?

MR HAY: So there's a payment claim. It has been served. The second element is really that, have they lodged a payment schedule? No payment schedule has been lodged.

HIS HONOUR: Mmm.

MR HAY: Third question is, well, have they paid any or the whole of the amount?

HIS HONOUR: And they haven't.

MR HAY: In this case, the whole - they haven't.

HIS HONOUR: No.

MR HAY: Section 18 (5) - (4), sorry your Honour, then says, "Subsection 5 applies if a claimant serves a payment claim on a respondent"-----

HIS HONOUR: Sorry, you're looking at what?

MR HAY: Section 18, subsection 4.

HIS HONOUR: Yes, all right.

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MR HAY: "If a claimant serves a payment claim on a respondent, and the respondent does not serve a payment schedule, either within the time contemplated under the contract" - which here the contract didn't refer to that - "or otherwise in 10 business days."

HIS HONOUR: And that's - that time has elapsed, hasn't it?

MR HAY: That's passed.

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HIS HONOUR: Mmm.

MR HAY: Subsection 5 then applies, your Honour. "The respondent, by virtue of the statute, becomes liable to pay the claim amount on the due date for the progress payment."

HIS HONOUR: Yes.

MR HAY: Now, setting aside the due date for the progress payment, if I may for a moment, your Honour. That has also elapsed. The liability is in place, pursuant to the - section 18 (5) of the Act. Section 19 then deals with the consequences of non-payment. If the Court is satisfied as to liability arising under section 18, which in my respectful submission, it must be.

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HIS HONOUR: You're reading now from - yes, the (a).

MR HAY: Section 19 (1). Yes.

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HIS HONOUR: Yes, got it. Mmm.

MR HAY: And the respondent fails to pay, the claimant then has an option. Either to go to an adjudication, or to seek the Court's assistance to recover that sum as a debt.

HIS HONOUR: Mmm.

MR HAY: That is very plain under the statute.

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HIS HONOUR: Yes.

MR HAY: Despite the construction my learned friend seeks to place on that.

HIS HONOUR: Mmm.

MR HAY: Subsection 4 then says, "If the claimant starts proceedings under subsection 2 (a) (1)"-----

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HIS HONOUR: Yes.

MR HAY: -----which is what these proceedings are.

HIS HONOUR: Mmm.

MR HAY: "To recover the unpaid portion" - the whole amount in this case - "as a debt, judgment in favour of the claimant is not to be given unless the Court is satisfied of the circumstances in subsection 1."

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HIS HONOUR: Oh, I see. Yes.

MR HAY: Of - that's section 19 (1). And the respondent is not-----

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HIS HONOUR: (B) is actually a denial of the respondent's rights to do these things.

MR HAY: Yes, your Honour.

HIS HONOUR: Sorry, I misread that. Yes.

MR HAY: And that's the part of the scheme of the - that's a very integral part of the scheme of the Act

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HIS HONOUR: Yes. I misunderstood that. It's not something that the Court has to be satisfied of, it's something that is denied the respondent.

MR HAY: Yes, your Honour.

HIS HONOUR: Mmm.

MR HAY: Under the scheme of the Act. Now, your Honour-----

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HIS HONOUR: It wouldn't stop him - it's only in these proceedings.

MR HAY: No, it's in these proceedings.

HIS HONOUR: He can always "see you later" if he says you've breached your contract.

MR HAY: Yes, your Honour. The Act maintains the curial process available.

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HIS HONOUR: Yes. Yes.

MR HAY: But in this application, there can be no defence put forward.

HIS HONOUR: Mmm.

MR HAY: In my submission, there is no basis for those submissions.

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HIS HONOUR: Yes. I'm sorry-----

MR HAY: It's a fairly new piece of legislation, your Honour-----

HIS HONOUR: I led myself into error before by reading it - subsection 4 too quickly.

MR HAY: It's a new piece of legislation, your Honour, so-----

HIS HONOUR: It's - yes, well when I was discussing this with you before, Mr Alford, I can see - and I confess I frankly misread the effect of subsection 4. It's been properly - I think, summarised by Mr Hay. If you follow the statutory procedure, and your client fails to comply with the payment claim, there's now no argument about the identity of the - of Dare Sutton. Nor that it was served on that particular day, nor the fact that the days have elapsed. Then the plaintiff's entitled to that judgment. And under subpara B, you can't bring a counter claim in these proceedings, or raise a defence. You can do it elsewhere if you want to.

MR ALFORD: But your Honour-----

HIS HONOUR: That's right, isn't it?

MR ALFORD: Your Honour, in our submission, your Honour, I believe it can be read on the basis that - it can also be read, and I'll revert to some authorities in New South Wales, your Honour - that-----

HIS HONOUR: Well, I'd rather hear your submissions on this.

MR ALFORD: Thank you.

HIS HONOUR: All right, well-----

MR ALFORD: So, could I hand up to your Honour the following authorities - copies of which I've given to my learned friend?

HIS HONOUR: Well, now, the first one of Demmer, that's a winding up matter. Does it - do any of these authorities concern a section which is in these terms?

MR ALFORD: Your Honour, they concern a section - which in very close - is all but identical, your Honour.

HIS HONOUR: Yes.

MR ALFORD: And if I could hand up, your Honour, the sections of the New South Wales Building and Construction Industry Security of Payment Act?

HIS HONOUR: Yes.

MR ALFORD: And if I could take your Honour to sections 16 and 24 (5) particularly-----

HIS HONOUR: Mmm.

MR ALFORD: Your Honour, the authorities on this matter - section 16, which is really the equivalent provision to section 19-----

HIS HONOUR: Yes.

MR ALFORD: As your Honour will note.

HIS HONOUR: I see that.

MR ALFORD: Has - there - has not been tested, in terms of it's word.

HIS HONOUR: It hasn't.

MR ALFORD: But the same words, your Honour, that are in section 24 (5) - oh, and section 25, your Honour-----

HIS HONOUR: I haven't got section 25 before me.

MR ALFORD: Oh, goodness, well I should issue section 25, your Honour. On my part that's a mistake.

HIS HONOUR: But we're not dealing with an adjudication certificate here.

MR ALFORD: We are dealing, your Honour, with - I, indeed appreciate that - we're dealing with a payment claim and a payment schedule.

HIS HONOUR: Yes.

MR ALFORD: And what has been found, is that in the case of a statutory debt, under the determination under an adjudication certificate, your Honour, which is not a dissimilar situation because in section 19-----

HIS HONOUR: But look, I'm sorry to interrupt you, but 19 (2) gives the applicant plaintiff here the right to do one of two things. Can either come to this Court claiming a debt, or can make an adjudication application. Section 25 relates to adjudication application. We - we're not facing that, we're not dealing with that. We're here to decide whether as a debt in this Court, the sum can be retained - obtained.

MR ALFORD: Your Honour if I-----

HIS HONOUR: That's right. There's no two ways about that. That's right.

MR ALFORD: Your Honour, if it's able to be entertained that a legitimate claim which has - a legitimate claim for a counter claim or an offset claim-----

HIS HONOUR: Yes.

MR ALFORD: -----which has been already notified to the other party under a Commonwealth Act, which would be the Trade Practices Act, and attached to the affidavits that your Honour has before you.

HIS HONOUR: Yes. You can sue for that, but not here-----

MR ALFORD: Your Honour, we would-----

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HIS HONOUR: -----in these proceedings.

MR ALFORD: We would suggest, your Honour, that 19 (4) can be, your Honour, read such as to allow this Court to-----

HIS HONOUR: Tell me how. Let's just go through it together. If the claimant starts proceedings under subsection 2 (a) (1), which the plaintiff - the claimant has done. Right?

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MR ALFORD: Your Honour, yes.

HIS HONOUR: To recover the unpaid portion of the claimed amount from the respondent as a debt, which the plaintiff applicant has done. Right?

MR ALFORD: Yes, your Honour.

HIS HONOUR: A judgment in favour of the claimant is not to be given by the Court, unless the Court is satisfied of the existence of the circumstances referred to subsection 1. Now, subsection 1 is not in dispute from what you've told me because you concede that the payment claim was made, properly identifying the claimant, on a certain date. And (B), the appropriate time has elapsed, and it hasn't been paid. So, (1) has been complied with.

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MR ALFORD: Your Honour, we - on it's face, I have to agree with that.

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MR ALFORD: Your Honour, we - on its face, I have to agree with that-----

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HIS HONOUR: Not-----

MR ALFORD: -----although I have challenged the validity of the payment claim itself on a separate argument.

HIS HONOUR: No, you conceded a moment ago that you weren't continuing that.

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MR ALFORD: No, no, no. On the contrary, your Honour. I'm saying on its face - what I'm trying to say is that I'm not drawing away from that this is a payment claim by this firm with this ABN.

HIS HONOUR: All right.

MR ALFORD: With the specification on it that it is a claim under the Act, all of which complies.

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HIS HONOUR: Yes.

MR ALFORD: I'm not taking away from that, your Honour.

HIS HONOUR: And it talks-----

MR ALFORD: My-----

HIS HONOUR: -----about the project address?

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MR ALFORD: And it talks about the project, and it describes the project and it describes the agreement, your Honour, which-----

HIS HONOUR: So, it's a proper claim, isn't it?

MR ALFORD: So, it's-----

HIS HONOUR: A proper payment claim.

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MR ALFORD: Other than it's invalid, your Honour, based on that fact that it is voidable at the date of its issue.

HIS HONOUR: No, no, no, no. That's something that you can raise in a subsequent action if you want to. But - no.

MR ALFORD: Your Honour, I would-----

HIS HONOUR: All right.

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MR ALFORD: I respectfully say, your Honour-----

HIS HONOUR: I hear-----

MR ALFORD: I respectfully say, your Honour, one of the purposes of the BCIPA your Honour, is to try-----

HIS HONOUR: Yes.

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MR ALFORD: -----for these matters to be dealt with under the processes of BCIPA and the alternative dispute resolution.

HIS HONOUR: I see. Well, you-----

MR ALFORD: And that these folk, in the knowledge of a dispute, have sought to come here, should have gone - should have sought further adjudication-----

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HIS HONOUR: Mmm.

MR ALFORD: -----at which stage, then, we would have had a situation, your Honour, where the relevant law in New South Wales whereby we would be standing here and had it been a statutory - you know - had it been a statutory demand-----

HIS HONOUR: Yes.

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MR ALFORD: -----or a statutory debt, under an adjudication decision-----

HIS HONOUR: Mmm.

MR ALFORD: -----we could have had it quashed based on the authority in Demere.

HIS HONOUR: Yes, you could have. Now, look-----

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MR ALFORD: And I'm simply saying your Honour, it is new legislation and I feel that the Court - a decision in this matter given that the facts that are placed - that have been placed before the Court, will really only end up in a further Court, at further cost.

HIS HONOUR: Well, that may be so but, Mr Alford, can I just tell you that the practice in Queensland when interpreting a statute - and I expect it's the practice in New South Wales too - is to refer to the plain words of the section.

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MR ALFORD: Yes, your Honour.

HIS HONOUR: The High Court says it applies through the Commonwealth of Australia. The claimant/applicant here has complied with subsection 1. If we go now to - then he has the choice, it can proceed by coming here or going to adjudication under subsection 2. Having done that we go to 4, proceedings under 2(a)(i) which is the case here have been brought, judgment is not to be given unless we're satisfied that subsection 1 has been complied with. I am satisfied of that. And your client is not, in these proceedings, entitled to talk about a counter-claim or to raise a defence. They're the plain words of the section. And unless you can refer me to an authority that says you do not follow the plain words of the section, I'm against you.

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MR ALFORD: Your Honour-----

HIS HONOUR: Can you refer me to an authority that says the section doesn't mean what it says?

MR ALFORD: No, I-----

MR HAY: Your Honour, may I refer your Honour to an authority to put the matter beyond doubt?

HIS HONOUR: What?

MR HAY: There is a decision of Lucas Stewart Pty Ltd and Council of the City of Sydney-----

HIS HONOUR: Yes.

MR HAY: -----which I handed up to your Honour on the last occasion.

HIS HONOUR: Did you, yes?

MR HAY: The excerpt - relevant excerpt is at page 3 of my original submissions.

HIS HONOUR: Yes?

MR HAY: If I may just read it to your Honour if that's convenient?

HIS HONOUR: Yes, do it.

MR HAY: Decision by Justice Einstein of that Court, discuss-----

HIS HONOUR: Yes, you referred me to this.

MR HAY: Yes, your Honour. It's the last passage from my excerpt there which really provides the lead judgment at this point on this type of legislation. His Honour is talking about sections 15 and 14 of the New South Wales Act-----

HIS HONOUR: Yes.

MR HAY: -----and states, "These words create what may be described as a strictly mechanical scheme, whilst ever the environment concerns the engagement of the fast track interim provisions of the Act (as opposed to the parties retained curial rights to have a final determination of their dispute on a later occasion) there is simply no room for moving outside of this scheme."

HIS HONOUR: Yes. You had referred me to that.

MR HAY: Thank you, your Honour.

HIS HONOUR: Mr Alford?

MR ALFORD: Yes, your Honour.

HIS HONOUR: I hesitate to cut you off but I really don't think you can say anything to persuade me that I should not apply section 19(4) and I'm assisted, although I frankly didn't really need the assistance, but I'm assisted by the authority to which I've just been referred.

MR ALFORD: And your Honour does not consider that your Honour should entertain the validity or otherwise of the payment claim-----

HIS HONOUR: No, well-----

MR ALFORD: -----on a contractual test.

HIS HONOUR: -----you see I understood you before to concede that, but I will briefly refer to it because it seems to me to be beyond - be beyond dispute. It -it's exhibited where?

MR ALFORD: Your Honour, well the affidavits in which some of the-----

HIS HONOUR: Here we are.

MR ALFORD: -----evidence is distributed is under dispute.

MR HAY: Exhibit "C".

HIS HONOUR: Exhibit "C" of two-----

MR HAY: There are two parts, your Honour. Exhibit "C" to the affidavit of Mr Knight filed with the application on the 27th.

HIS HONOUR: Yes.

MR HAY: And there is a second page to the payment claim as Mr Knight deposes to in his further affidavit filed in this Court on 3 March 2006.

MR ALFORD: And Mr Evan's affidavit this morning, your Honour, the shorter of the two, draws attention to the previous correspondence which forms, in our submission, part of the contract from which this payment claim derives.

HIS HONOUR: Mr Hay, I'm looking at the affidavit that was sworn by leave the other day. It exhibited-----

MR HAY: The affidavit-----

HIS HONOUR: -----first - the first bill, the second bill. Now, where's the actual payment claim itself?

MR HAY: Your Honour, there are two affidavits that I might direct your Honour to. The first is the one filed 27 February and the second one which contains a second page to the payment claim was filed on 3 March.

HIS HONOUR: Yes. Is that Mr Lambros's or Mr Knights?

MR HAY: No, that's second affidavit by Mr Knight. I apologise, your Honour. The affidavits are somewhat fragmented in that respect but the-----

HIS HONOUR: Mmm.

MR HAY: -----material is there before the Court.

HIS HONOUR: Yes, here I have it. It's Exhibit "C".

MR HAY: And there was a second page to that document, your Honour-----

HIS HONOUR: Yes.

MR HAY: -----which is Exhibit "A" to that - the second affidavit of Mr Knight.

HIS HONOUR: Mr Knight, wait on. I'll locate that again. Is that the invoice that went with it?

MR HAY: Yes, your Honour, that was the breakdown of the work.

HIS HONOUR: Of the work, yes-----

MR HAY: Yes.

HIS HONOUR: -----set out in a box?

MR HAY: Yes, your Honour.

HIS HONOUR: All right.

MR HAY: And, your Honour, if I may say, my apprehension is, is that the challenge to the - or the purported challenge to the validity of this pay claim doesn't arise from the factors set out in the Act but arises from, again, an attempt to set up a counter-claim, or those factual matters.

HIS HONOUR: Well, I anticipated that and I thought that was why a concession had been made in the first place.

MR HAY: That was my understanding.

HIS HONOUR: Mr Alford, why do say that this is not a proper payment claim?

MR ALFORD: I say that it's not a proper payment claim, your Honour, because it is - the representations on which it's based and then in which it contains as a condition-----

HIS HONOUR: Mmm.

MR ALFORD: -----and that is, that this building is to be erected by a certain - by a wall system called "rabbit wall".

HIS HONOUR: No, you are setting up - you're seeking to set up something under section 19(4) here.

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MR ALFORD: Well, your Honour, it all-----

HIS HONOUR: As Mr Justice Einstein says, we have here a statutory scheme that provides a fast track. If the plaintiff complies with it, the plaintiff is entitled to the relief. You can go to another Court. You can go to another Court if you want to, litigate it there, but you can't do it here.

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TAKE IN ORDER

HIS HONOUR: If your client has a case, that there was a breach of contract or a breach, perhaps, of the Trade Practices Act, then nothing stops your client from bringing those proceedings but in another place. You're asking for judgment, are you Mr Hay?

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MR HAY: Yes, your Honour. The quantum of the judgment is set out at the last page, page 4 of my original submission.

HIS HONOUR: Yes.

MR HAY: And-----

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HIS HONOUR: You took the trouble to calculate interest and so forth, didn't you?

MR HAY: I have, your Honour. I might say instructing solicitor did.

HIS HONOUR: All right. Well, what I do now is subject, of course, to any challenge to the mathematics which can be brought at any time.

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MY HAY: Of course, your Honour.

HIS HONOUR: But within reason, that is, within a short time. So what is the total amount then? It's 54,638 is it?

MR HAY: The total amount, on today's figures, given that two further days have passed-----

HIS HONOUR: All right.

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MR HAY: -----is \$59,459.13.

HIS HONOUR: Would you be kind enough to give your opponents the basis on which that was calculated?

MR HAY: Precisely, your Honour. That is a principal sum in the payment claim sum of \$54,638 - sorry, I'll start again - \$54,638.93.

HIS HONOUR: Yes.

MR HAY: Plus interest for 161 days amounting to \$4,820.20. The interest calculation, your Honour, is made at 20 per cent which is the rate prescribed under the contract. Section 15 1(a) of the Act provides that where the - in short, it provides where the contract sets out an interest amount, then that is the amount to be followed. And -----

MR ALFORD: Excuse me, your Honour. My understanding is that there is the alternative of either of the Supreme Court scale and/or the 20 per cent in that - within the contract in the section.

MR HAY: If I may take your Honour to the section. It's in my submissions again, section 15, subsection 2.

HIS HONOUR: Yes.

MR HAY: Which provides that subject to subsection 3 interest for a construction contract is payable on the unpaid amount.

HIS HONOUR: It can be the greater of the two rates.

MR HAY: The greater of the two rates, yes, your Honour.

MR ALFORD: It may be, your Honour, but on the alternative your Honour, there is discretion for it to be at the Supreme Court scale.

HIS HONOUR: It's a commercial deal, a commercial contract, I don't see why I should interfere with the rate that the parties have agreed upon.

MR HAY: Your Honour, if I may just hand up to your Honour now, as annotated by me, just a calculation for your Honour's reference of the interest to today.

HIS HONOUR: I'll place that with the papers.

MR HAY: Thank you, your Honour.

HIS HONOUR: All right. Now, what about costs?

MR HAY: Your Honour, in relation to costs, the applicant seeks costs of the adjournment thrown away by the adjournment and of today's appearance of and incidental to the application on an indemnity basis.

HIS HONOUR: Now, I know I raised that the other day, on reflection, I'm not quite sure why I was talking about indemnity if-----

MR HAY: May I address your Honour on it?

HIS HONOUR: Yes.

MR HAY: Your Honour, that submission is not made lightly, of course, I recognise that indemnity costs are not the general provision. However, the application has been duly served in the first place. All that has been, further to the hearing on Wednesday, is an affidavit by the instructing solicitor for the respondent stating that an inquiry has been made with Australia Post to no avail, or doesn't enlighten the Court. There's no material, in fact, from Mr Seirlis explaining why there was no response or, in fact - and I may be corrected on this - deposing in relation to those matters.

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HIS HONOUR: He says that he checks his letterbox everyday and he didn't get-----

MR HAY: Well, your Honour that is-----

HIS HONOUR: I think he referring there to the Court proceedings.

MR HAY: That may be the case. That is - notwithstanding that, your Honour, and I hear what your Honour says in relation to postal services and the possibility that there may have been-----

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HIS HONOUR: Regrettably we all know that sometimes they don't deliver them.

MR HAY: The fact is here, your Honour, is that Mr Seirlis, acting for the respondent failed - also failed to respond to a payment claim which he doesn't challenge was, in fact, served. Mr Seirlis, further has - appears to have - had no difficulty in receiving other communications sent by the applicant. He, in fact, wrote to the applicant on the 31st of October 2006 referring - making issue in relation to some of the matters to do with the demands.

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HIS HONOUR: Look, I'm going to stop you now. He swears that he checks his mail daily and from the 28th of February to the date of swearing the affidavit he hasn't received-----

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MR HAY: He hasn't received.

HIS HONOUR: -----any correspondence from the solicitors.

MR HAY: Yes, your Honour.

HIS HONOUR: Now, I'm not prepared to find that he has wilfully ignored this.

MY HAY: Yes, your Honour. In that case, then your Honour, the submission would be that the applicant is, notwithstanding, entitled to costs on a standard basis thrown away by the application.

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HIS HONOUR: Well, I would have thought so.

MR HAY: In respect of today's application, your Honour, the basis for the submission that costs should be ordered on an

indemnity basis is that there has been, in fact, no manifestly arguable case put up before the Court today in my submission.

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HIS HONOUR: Yes, but that's not usually a basis for indemnity costs.

MR HAY: Well, your Honour, the basis that is relied upon is that it must have been obvious that on a reading of the clear words of the statute, that-----

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HIS HONOUR: No, no, no, Mr Hay, we do find, surprisingly often, a party turning up and arguing what turns out to be an unarguable case and that's not usually a basis for doing other than ordering costs on the standard basis.

MR HAY: Very well, your Honour. I would hear your Honour on that and the submission would be that costs should be ordered on a standard basis.

HIS HONOUR: Yes, I think it'd be difficult to argue that, wouldn't it?

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MR ALFORD: Yes, your Honour.

TAKE IN ORDER

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