IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

Not Restricted

No. 05740 of 2012

LYSAGHT BUILDING SOLUTIONS PTY LTD
(T/AS HIGHLINE COMMERCIAL CONSTRUCTION)
(ACN 103 232 444) — Plaintiff

v

BLANALKO PTY LTD
(ACN 005 822 926) — Defendant

BLANALKO PTY LTD
(ACN 005 822 926) — Plaintiff by First Counterclaim

AND

TWENTIETH SUPERPACE NOMINEES PTY LTD
(T/AS SCT LOGISTICS) — Plaintiff by First Counterclaim

v

LYSAGHT BUILDING SOLUTIONS PTY LTD
(T/AS HIGHLINE COMMERCIAL CONSTRUCTION)
(ACN 103 232 444) — Defendant by First Counterclaim

JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	4 APRIL 2013
DATE OF JUDGMENT:	21 AUGUST 2013
CASE MAY BE CITED AS:	LYSAGHT BUILDING SOLUTIONS PTY LTD v BLANALKO PTY LTD [No. 3]
MEDIUM NEUTRAL CITATION:	[2013] VSC 435

ARBITRATION – Stay application under s 8 of the *Commercial Arbitration Act 2011*- s 8 considered – Stay granted in part.

BUILDING CONTRACT - Clause 42 of Australian Standard Contract AS4300–1995 contract considered.

PRACTICE AND PROCEDURE - Summary judgment sought pursuant to s 63 of the *Civil Procedure Act 2010* or Order 22 of the *Supreme Court (General Civil Procedure) Rules 2005* - Applicable test for summary judgment under the *Civil Procedure Act 2010* determined by the Court of Appeal on a reference pursuant to s 17B(1) *Supreme Court Act 1986* [2013] VSC 201 and applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M Dempsey with Mr A Morrison	Holding Redlich
For the Defendant	Mr R Manly with Mr P Booth	Wisewould Mahony

HIS HONOUR:

Background

1 These proceedings relate to a design and construct contract for the construction of a rail freight terminal, a container paved area and a locomotive workshop together with associated facilities in Penfield, South Australia (the "Contract"). The Contract, which incorporates Australian Standard Contract AS4300–1995, is governed by Victorian law.

2 The plaintiff, Lysaght Building Solutions Pty Ltd ("Lysaght") is the contractor under the Contract and the defendant, Blanalko Pty Ltd ("Blanalko") is the principal.

3 Lysaght as the contractor lodged progress claims for payment relating to works done at a rail freight terminal. These claims were received by the Superintendent, Mr Michael Zerbst ("Zerbst") as follows:

(a) claim number 10, dated 29 February 2012 was received on 1 March 2012;

(b) claim number 12, dated 30 April 2012 was received on 3 May 2012; and

(c) claim number 13, dated 30 May 2012 was received on 11 June 2012.

4 Blanalko failed to make any payment under these payment claims.

5 By summons dated 7 November 2012, Lysaght sought summary judgment for three progress payments payable under clause 42.1 of the Contract ("clause 42.1") in the total sum of $3,130,522.97 (or alternatively $3,119,591.24) plus GST. These progress payments are claimed to have been outstanding from March to July 2012. The progress payment claims were not made under the *Building and Construction Industry Security of Payment Act 2002* (NSW) or its interstate equivalents.

6 On 27 February 2013, Blanalko filed a defence denying liability, and a counterclaim which:

(a) sought damages for alleged breaches of the Contract;

(b) sought payment of a debt in the sum of $1,984,880.71 relying on a certificate purportedly issued by the Superintendent on 2 January 2013 (the "January Certificate");

(c) claimed various waivers and estoppels against Lysaght; and

(d) purported to join Twentieth Superpace Nominees Pty Ltd (trading as SCT Logistics) ("SCT") as a second plaintiff by counterclaim.

7 By summons dated 8 March 2013, Blanalko seeks summary judgment in respect of the amount it alleges is owing under the January Certificate.

8 By amended summons dated 14 March 2013, Lysaght sought, in addition to its application for summary judgment:

(a) to stay each of the matters raised in Blanalko's counterclaim pursuant to s 8 of the *Commercial Arbitration Act 2011*;

(b) alternatively, a declaration that the January Certificate is invalid and of no effect; and

(c) an order that the purported joinder of SCT be set aside or struck out as irregular.

9 I heard the applications on 4 April 2013, and delivered a first judgment on the applications in reasons dated 26 April 2013 (the "first judgment").[1]

10 In the light of the authorities as they then stood, and as discussed in the first judgment, the issue of the appropriate test to be applied in an application for summary judgment under s 63 of the *Civil Procedure Act 2010* called for clarification. I considered that the question should be re-argued before any decision was made on the present applications, and it was appropriate to have the matter argued before the Court of Appeal.

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1 *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* [2013] VSC 201.

11 Section 17B(1) of the *Supreme Court Act 1986* provides:

> **17B Reference of matters to Court of Appeal**
>
> (1) Any case or question in a case which for any reason is deemed fit to be re-argued before decision or to be re-heard before final judgment, may be argued before the Court of Appeal, if the Trial Division so directs.

12 Accordingly, I directed that, pursuant to s 17B(1) of the *Supreme Court Act 1986*, the question as to the proper formulation of the test to apply to applications for summary judgment under s 63 of the *Civil Procedure Act 2010* and the appropriate approach to the practical application of the test under the section, be argued before the Court of Appeal.

13 By reasons delivered 24 June 2013 the Court of Appeal clarified the appropriate test to be applied, which I adopt and follow in these reasons.[2]

14 The relevant facts and events are set out in the first judgment.

Principles of summary judgment

15 The Supreme Court is empowered to order summary judgment pursuant to s 63 of the *Civil Procedure Act 2010* or Order 22 of the *Supreme Court (General Civil Procedure) Rules 2005* (the "Rules").

16 As determined in the first judgment, Order 22 of the Rules has no application.

17 Section 63 of the *Civil Procedure Act 2010* provides:

> **63 Summary judgment if no real prospect of success**
>
> (1) Subject to section 64, a court may give summary judgment in any civil proceeding if satisfied that a claim, a defence or a counterclaim or part of the claim, defence or counterclaim, as the case requires, has no real prospect of success.
>
> (2) A court may give summary judgment in any civil proceeding under subsection (1)—
>
> (a) on the application of a plaintiff in a civil proceeding;
>
> (b) on the application of a defendant in a civil proceeding;

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2 *Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Construction) v Blanalko Pty Ltd* [2013] VSCA 158.

(c) on the court's own motion, if satisfied that it is desirable to summarily dispose of the civil proceeding.

18 A further statutory overlay applies under the *Civil Procedure Act 2010*. Notwithstanding s 63, the Court retains a discretion to refuse summary judgment and order that the proceeding continue to trial, even if there is no real prospect of success in the defence.[3] Section 64 provides:

> **64 Court may allow a matter to proceed to trial**
>
> Despite anything to the contrary in this Part or any rules of court, a court may order that a civil proceeding proceed to trial if the court is satisfied that, despite there being no real prospect of success the civil proceeding should not be disposed of summarily because—
>
> (a) it is not in the interests of justice to do so; or
>
> (b) the dispute is of such a nature that only a full hearing on the merits is appropriate.[4]

19 The Court of Appeal determined the following upon the present state of authority, which I adopt and apply in these reasons:[5]

(a) the test for summary judgment under s 63 of the *Civil Procedure Act 2010* is whether the respondent to the application for summary judgment has a "real" as opposed to a "fanciful" chance of success;

(b) the test is to be applied by reference to its own language and without paraphrase or comparison with the "hopeless" or "bound to fail test" essayed in *General Steel*;

(c) it should be understood, however, that the test is to some degree a more liberal test than the "hopeless" or "bound to fail" test essayed in *General Steel* and, therefore, permits of the possibility that there might be cases, yet to be identified, in which it appears that, although the respondent's case is not hopeless or bound to fail, it does not have a real prospect of success;

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3 *Civil Procedure Act 2010* (Vic) s 64.

4 *Civil Procedure Act 2010* (Vic) s 64.

5 *Lysaght Building Solutions Pty Ltd (t/as Highline Commercial Construction) v Blanalko Pty Ltd* [2013] VSCA 158 [35].

(d) at the same time, it must be borne in mind that the power to terminate proceedings summarily should be exercised with caution and thus should not be exercised unless it is clear that there is no real question to be tried; and that is so regardless of whether the application for summary judgment is made on the basis that the pleadings fail to disclose a reasonable cause of action (and the defect cannot be cured by amendment) or on the basis that the action is frivolous or vexatious or an abuse of process or where the application is supported by evidence.

Plaintiff's Application for Summary Judgment

20 Lysaght relied on clause 42.1 of the Contract. The scheme of clause 42.1 is as follows:

(a) The contractor may at the time for payment claims stated in the schedule deliver to the Superintendent claims for payment supported by evidence of the amount due to the contractor and such information as the Superintendent may reasonably require;

(b) Within 14 days of receipt of a claim for payment, the Superintendent shall issue a payment certificate stating the amount of the payment which in the Superintendent's opinion is due to the contractor;

(c) Within 14 days of the issue of the Superintendent's payment certificate, the principal shall pay to the contractor (or the contractor shall pay to the principal, as the case may be) the amount stated in the certificate;

(d) If the Superintendent fails to issue a payment certificate, the principal shall, within 28 days of receipt by the Superintendent of the contractor's claim for payment, pay to the contractor the amount of the claim (or the contractor shall make a payment to the principal, as the case may be);

(e) A payment made pursuant to clause 42.1 shall not prejudice the right of either party to dispute under clause 47 whether the amount so paid is the amount properly due and payable under the contract;

(f) A payment made pursuant to clause 42.1, apart from a payment made pursuant to a final certificate, shall be a payment on account only and is not to be taken as evidence that work has been executed satisfactorily.

21 The relevant text of clause 42.1 (numbered here for convenience in square brackets) is as follows:

> [1] At the times for payment claims or upon completion of the stages of the work under the Contract stated in Annexure PtA and upon the issue of a Certificate of Practical Completion and within the time prescribed by clause 42.5 the Contractor shall deliver to the Principal's Representative claims for payment supported by evidence of the amount due to the Contractor and such information as the Principal's Representative may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time including variations. The value of the work shall be based on the priced Trade Summaries for each building provided by the Contractor to the Principal's Representative under the Contract or, in the case of a variation, in accordance with the Contractor's detailed quotation under clause 40.3 if applicable. Full supporting documentation must be provided to the Principal's Representative with each payment claimed.
>
> [2] If the time for any payment under the proceeding paragraph falls due on a day which is a Saturday, Sunday, Statutory or Public Holiday the Contractor shall submit the claim either on the day before or next following that date which itself is not a Saturday, Sunday, Statutory or Public Holiday.
>
> [3] If the Contractor submits a payment claim before the time for lodgement of that payment claim, such early lodgement shall not require the Principal's Representative to issue the Payment Certificate in respect of that payment claimed earlier than would have been the case had the Contractor submitted the Payment Claim in accordance with the Contract.
>
> [4] Within 14 days of receipt of a claim for payment the Principal's Representative shall assess the claim and shall issue to the Principal and to the Contractor a Payment Certificate stating the amount of the payment which, in the Principal Representative's opinion, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Principal's Representative shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Principal's Representative shall also set out, as applicable, in any Payment Certificate issued pursuant to clause 42, the allowances made for -
>
> (a) the value of the work carried out by the Contractor and the performance of the contract to the date of the claim;
>
> (b) amounts otherwise due from -
>
> (i) the Principal to the Contractor; and

(ii) the Contractor to the Principal;

(c) amounts assessed under clause 46.4 and not duly disputed;

(d) amounts paid previously under the Contract;

(e) amounts previously deducted for retention monies pursuant to Annexure A; and

(f) retention monies to be deducted pursuant to Annexure Pt A.

arising out of the Contract resulting in the balance due to the Contractor or the Principal, as the case may be.

[5] If the Contractor fails to make a claim for payment under this clause 42.1, the Principal's Representative may nevertheless issue a Payment Certificate and the Principal or the Contractor, as the case may be, shall pay the amount so certified within 14 days of that Certificate.

[6] Subject to the provisions of the Contract, within 28 days of receipt by the Principal's Representative of a claim for payment or within 14 days of issue by the Principal's Representative of the Principal's Representative's Payment Certificate, whichever is the earlier, and within 14 days of the issue of a Final Certificate, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal, as the case may be, or if no Payment Certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to clause 42.1 shall not prejudice the right of either party to dispute under clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or the Contractor, 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.

[7] The 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 under clause 42.6.

22 Lysaght's affidavit material and exhibits which are in evidence, deposes to it having made claims for payment for the months of February, April and May 2012.

23 In the case of the February Payment Claim, the Superintendent responded on 14 March 2012: "*Terry, all these variations and claim are ok.*"

24 In the case of the April Payment Claim, the Superintendent responded on 4 May 2012: "*Approved, there are some issues in the claim as previously pointed out on your previous*

claims, however these are relatively minor now, please submit your tax invoice with the appropriate Stat Dec."

25 Lysaght submitted that if the Superintendent's responses are to be considered certificates for the purposes of clause 42.1 of the Contract, then the Superintendent must be taken to have approved the March Payment Claim and the April Payment Claim in their entirety.

26 If, on the other hand, the Superintendent's responses are not to be considered payment certificates, then it was submitted by Lysaght that, by his failure to issue a payment certificate, the amounts claimed in the March Payment Claim and the April Payment Claim are due and payable by the defendant within 28 days of the date of receipt of the claims for payment.

27 In the case of the May Payment Claim, Lysaght's evidence discloses that the Superintendent's response noted parts of the works that in his opinion were over claimed. Lysaght then issued the Revised May Payment Claim amending certain amounts and leaving the amount claimed for landscaping unchanged. The Superintendent responded that "*The landscape is still way over claimed given the balance of works to be completed*" (landscape - $34,255.33). This prompted Lysaght to issue the Further Revised May Payment Claim "*reduced landscaping as required*" (landscape - $24,317.40). The Superintendent gave no response to the Further Revised May Payment Claim.

28 Lysaght submits that either the Superintendent's response to the Revised May Payment Claim was a payment certificate approving it save for landscaping in the sum of $849,908.17, or alternatively, the Superintendent has failed to provide a payment certificate in respect of the Further Revised May Payment Claim in the sum of $839,970.25. As such, Blanalko is now liable to pay the amount claimed in the Revised May Payment Claim or the Further Revised May Payment Claim.

Applicable principles in relation to clause 42.1

29 In *Daysea v Pty Ld v Watpac Australia Pty Ltd* ("*Daysea*")[6] the Court of Appeal of the Supreme Court of Queensland considered the position under a contract which contained provisions very similar to clause 42.1 of the AS4300-1995 standard form. In that case the Superintendent failed to issue a progress payment certificate within the stipulated 14 days after receipt of a claim, but did so before the expiry of the 28 day period for payment. The Court of Appeal accepted that if the Superintendent under an AS4300-1995 failed to respond to a claim for payment under clause 42.1 within 14 days, even if it did respond shortly thereafter, the Principal was still obliged to pay the amount of the claim. Williams JA observed that a strict approach to the construction of clause 42.1 should be adopted at least with respect to the provisions for payment, set off and deductions, and this was so because of the consequences which flow from the issuing of the certificate. His Honour reasoned as follows:

> Of more significance is the decision of Rolfe J in *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* (1997) 14 BCL 215. The clause in question there was in the same terms as clause 42.1 here. The learned Judge found that the certificate issued by the Principal's Representative did not satisfy the requirements of paragraph (a) to paragraph (f) of paragraph [4]. In consequence he said that "the Payment Certificate failed to comply with various contractual obligations as to its contents and that, accordingly, it was not a valid notice". His reasoning for so concluding is set out in the following passage:
>
> > "… the effect of a Payment Certificate is to require the recipient to pay the amount stated. Failure to do so could lead to summary judgment and there is no right to dispute the amounts payable until the dispute resolution procedures are activated. Accordingly, the recipient of the certificate is required to pay money during the course of the contract which, at the end of the day, it may be found it does not owe. The requirement to pay money may lead to financial difficulties for the payer, just as the failure to receive money during the course of the contract may cause financial difficulties to the payee. Also the payee may not be able, at the end of the day, to refund any overpayment. Considerations such as these lead me to the conclusion that a certificate must comply strictly with cl 42.1 if it is to have the consequences specified".
>
> That reasoning is in my view compelling. As all of the cases I have just referred to establish, the consequences of issuing a certificate are serious. The proprietor

6 *Daysea v Pty Ld v Watpac Australia Pty Ltd* (2001) 17 BCL 434.

> 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 contractor 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.
>
> Because of the consequences which flow from the issuing of the certificate strict compliance with the provisions of clause 42.1 is required …[7]
>
> [Emphasis added]

30 *Daysea* was applied by Byrne J in *Southern Region Pty Ltd v State of Victoria (No 3)* ("*Southern Region*").[8]

31 It follows that a certificate purportedly issued under clause 42.1 which does not satisfy the formal requirements of the clause is ineffective and invalid, or as Byrne J said in *Southern Region*: "*… it was as if no certificate had issued at all.*"[9]

Defendant's Submissions on Plaintiff's Summary Judgment Application

32 Blanalko opposes the orders for summary judgment sought in the Lysaght Amended Summons.

33 It emphasised the text of part of clause 42.1 of the Contract, which is in the form:

> At the times for payment claims or upon completion of the stages of the work under the Contract stated in Annexure part A and within the time prescribed by clause 42.5, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require …
>
> [Emphasis added]

34 Blanalko submitted that the authorities are clear in the following respect: a failure by the contractor to support a payment claim with evidence and any information required by the Superintendent means that the Superintendent is not be obliged to issue a payment certificate to certify the payment of a progress claim.

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7 *Daysea Pty Ltd v Watpac Australia Pty Ltd* (2001) 17 BCL 434, 439 [20]–[22].
8 *Southern Region Pty Ltd v State of Victoria (No 3)* (2002) 18 BCL 211.
9 *Southern Region Pty Ltd v State of Victoria (No 3))* (2002) 18 BCL 211 [25].

35 It relied on *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* ("*Brewarrina*") [10] where the New South Wales Court of Appeal considered a summary judgment application in relation to Australian Standard General Conditions of Contract AS2124-1992. Clause 42.1 was in virtually identical terms as the clause in issue in the present proceeding. The question arose as to whether clause 42.1 imposed a contractual obligation on the contractor to supply evidence and information.[11]

36 In *Brewarrina* Ipp JA, who reasoned for the majority, noted that:

> In some situations, the failure on the part of a contractor to support its claim for payment with evidence of the amount due and information reasonably required might make it difficult or even impossible for the superintendent to value the claim. I accept that in many instances the superintendent will be familiar with the work done and be able to assess its value of his or her own accord, without reference to evidence or information supplied by the contractor. But there may well be instances where this would be difficult or even impossible. In large construction projects, work is sometimes performed 24 hours per day over a large area of ground by a contractor who employs hundreds of workers, or more, and also employs sub-contractors, who in tum employ large numbers of workers themselves. In these circumstances, it may happen that work is completed and closed up before it has properly been inspected, measured and valued by the superintendent. This is but one example of circumstances under which a superintendent may need evidence and information from a contractor to be able reliably to assess and value a progress claim. Other and different circumstances may also occur which may result in the same need.[12]

37 The obligation to provide information was further explained by Ipp JA in the following passage in *Brewarrina*:

> The first sentence of the paragraph distinguishes between "claims for payment" and the evidence and information that is to support such claims. The second sentence of the paragraph sets out matters that are expressly included in claims for payment — and evidence and information are not mentioned in this context. In my opinion, the evidence and information do not form part of payment claims.
>
> This conclusion, however, does not mean that the requirement to support the claim with evidence and provide information to the superintendent cannot condition the performance of the superintendent's obligation to issue a payment certificate.
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> The requirement to support the claim with evidence and information can constitute such a condition on either of two bases. First, it may be a non-

10 *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576.
11 *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576, 582 [18].
12 *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576, 581-582 [16].

> promissory condition to which the superintendent's obligation to issue a payment certificate is subject (as to non-promissory conditions of this kind, see *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, 551-552 and 565). Second, it may constitute an obligation imposed on the contractor, performance of which conditions the superintendent's obligation to issue a payment certificate. On either basis, a failure by the contractor to support a payment claim with evidence and the required information would mean that the superintendent would not be obliged to issue a payment certificate.[13]

38 Ipp JA reasoned further as follows:

> One does not have to go far to find an important contractual and practical purpose for the requirement that the contractor provide evidence of the amount due and information reasonably required by the contractor. I have referred to the real possibility that a superintendent might need evidence and information before being able to issue a reasonably accurate payment certificate. By clause 23 of the contract the principal is required to ensure that the superintendent "arrives at a reasonable measure or value of work, quantities or time". Without a contractor providing evidence of the amount claimed by it and information that the superintendent might reasonably require, the superintendent might well not be able to make a reasonable measurement or valuation of the work, quantities or time. It follows that the superintendent's ability to issue a certificate in accordance with clause 23 might well depend on the contractor supporting its claim for payment by evidence and by providing information to the superintendent that he or she may reasonably require.
>
> Moreover, the second paragraph of c1ause 42.1 requires the superintendent, in a payment certificate, to set out his or her calculations and the reasons for any difference between the amount certified and the amount claimed. The superintendent's ability to comply with this requirement, also, may well rest on whether the requisite evidence and information is provided.
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> …
>
> In my view, therefore, by the contract, the obligation of the superintendent to issue a payment certificate in regard to progress claim No 7 was subject to the condition precedent that Beckhaus support that claim with evidence of the amount due to it and with such information as the superintendent might reasonably have required. Therefore, unless the requisite evidence and information supported the claim, the superintendent was not obliged to issue a payment certificate in response to it.[14]

39 In *Brewarrina* the majority[15] concluded that under clause 42.1 of AS2124–1992 the obligation of the Superintendent to issue a payment certificate in relation to a progress claim was subject to the condition precedent that the contractor support that claim

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13 *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576, 582-583 [20]-[22].

14 *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576, 583-584 [31]-[32] and 586 [42].

15 *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576; Mason P and Ipp JA; with Young CJ in Eq in dissent.

with evidence of the amount due to it and with such information as the Superintendent might reasonably require.

40 In *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd* ("*Aquatec* ")[16] the Victorian Court of Appeal[17] considered a similar situation to that which arose in *Brewarrina.* The appellant contended that there was a triable issue as to whether sufficient evidence and information as required by the contract has been provided either prior to or with the progress claims and that therefore the failure of the Superintendent to issue certificates within time could bring into play the deeming provision of clause 42.1. In so doing, the appellant relied upon the *Brewarrina* decision. The Court of Appeal referred to *Brewarrina* and in following the decision and rejecting a submission that it had been wrongly decided, said:

> The decision is a recent, and carefully considered, decision by the New South Wales Court of Appeal which, so far as we have been told and so far as we are aware, is the only decision which currently exists on this particular point of construction of this paragraph of the clause. The point was argued by counsel for the appellant before the trial judge, in the course of which counsel referred his Honour to evidence which showed, or suggested, that the superintendent had repeatedly been seeking substantiation for the "one line variation claims", and submitted that where the contractor persisted - in the face of opposition and request for further information - in submitting "one line claims" there must come a point where clearly the Progress Claim as presented is entitled to be regarded by the superintendent as not a claim within the meaning of clause 42.1. His Honour requested of counsel whether he (ie counsel) was able to show to him any authority where such an approach had been adopted to a claim, ie "where the claim has been treated by the court as being invalid for noncompliance …". Trial counsel for the appellant conceded that he was not able to refer his Honour to any authority on the point; and his Honour then indicated to trial counsel for the respondent that he would not "trouble him" about the criticisms made of the progress claims. [18]

41 The Victorian Court of Appeal in *Aquatec* considered that the question of whether the requisite information had been supplied was a triable issue, concluding that:

> Those matters were "triable issues" in the event that the evidence in support of the claim and such information as is reasonably required are to be construed as conditions precedent to the validity of the claim. For the purposes of this appeal, we can see no reason why we should not accept the majority decision in *Brewarrina* as accurately construing the relevant provision of clause 42.1. It

16 *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd* (2004) 8 VR 16.
17 *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd;* Winneke P, Buchanan and Eames JJA.
18 *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd* (2004) 8 VR 16, 29 [26].

> may well be that the proper construction of the provision will be conditional upon the resolution of the factual dispute in respect of the information required by and given to the superintendent. In this case, there has – as yet – been no such resolution. [19]

42 The issue was also considered by Warren CJ in *Kane Constructions Pty Ltd v Sopov*.[20] Her Honour expressed some reservations regarding the application of *Brewarrina* and *Aquatec* as to the timing issue in the matter before her.[21] However, she said she was bound by the adoption of *Brewarrina* in *Acquatec* at the very least, or to regard *Brewarrina* as highly persuasive.[22]

43 Accordingly, pursuant to clause 42.1 of the AS4300-1995 standard form contract, a failure by the contractor to support a payment claim with evidence and any information required by the Superintendent means that the Superintendent is not be obliged to issue a payment certificate to certify the payment of a progress claim.

Evidence as to Requests of the Superintendent for Information

44 There was evidence of extensive requests for both information and the provision of documents in relation to each progress claim which was relied upon by Blanalko. This evidence relied upon by Blanalko in resisting Lysaght's application for summary judgment on the three progress claims is summarised below in Blanalko's written submissions.

Requests prior to 1 March 2012

45 Prior to progress claim number 10, received on 1 March 2012, the Superintendent (Zerbst) wrote 24 emails to Lysaght requesting documents and information.

46 The requests related, variously, to the container pavement area ("CPA") (design drawings, querying whether 200mm was an adequate thickness, and seeking an engineers certificate that the design was adequate) and the design of the stormwater

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19 *Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd* (2004) 8 VR 16, 29-30 [28].
20 *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237.
21 *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237 [761]-[764].
22 *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237 [766]. Cf the observations of Debelle J in *One Steel Manufacturing Pty Ltd v United KG Pty Ltd* (2006) 94 SASR 376 [68].

retarding basin. In November 2011 Zerbst was told by the Lysaght project manager, Ms Brookes, that she would provide an engineers "sign-off".

47 Zerbst was informed by Lysaght on a number of occasions that a further engineering certification would be provided. Lysaght informed Zerbst that it was endeavouring to obtain the certification from two engineers. Zerbst was not provided with any further engineers certification.

48 Zerbst informed Lysaght that the failure to provide engineering qualifications would "... *result in further payments being delayed …*"

49 On 13 October 2011 Lysaght provided a report by Scott & Associates, engineers, regarding the CPA. Zerbst informed Lysaght on 17 October 2011 that the Scott & Associates letter did not address his concerns.

Requests after 1 March 2012

50 Progress claim number 10 related to a number of elements of construction, including "concrete works" which at that stage were said to be 52.46% complete and were the subject of a claim in respect of 14.27% of the budgeted concrete works. It also claimed a further 3.5% completion in respect of "*stormwater*".

51 After receiving progress claim number 1 0, Zerbst continued to request documents and information. He wrote numbers of emails to Lysaght.

52 Zerbst requested documents and information in relation to the CPA (concrete test results, engineers certification, design drawings) and in relation to the locomotive workshop (defects and rectification).

53 On 16 March 2012 Zerbst informed Lysaght that "*this February claim will be held til there* is some *certainty on the container area*". Lysaght informed Zerbst that "*testing* is *underway*".

54 On 19 March 2012 Zerbst foreshadowed that the CPA may need replacing.

55 Mr Zerbst retained Tonkin Consulting Engineers to provide a design for a replacement CPA. Zerbst was also concerned about defects in the locomotive workshop and requested certification from an engineer regarding the design of the area. Ms Brookes told him that Ancon Beton would provide a report. Zerbst told Ms Brookes that he would "*withhold money*" until he was satisfied that the repair methods would result in the locomotive workshop complying with the performance brief. On 27 March 2012 Zerbst told Ms Brookes that the failure to provide engineers computations and certification of the CPA was the reason why he would not certify the progress claims.

56 On 3 April 2012 Zerbst was provided with a request by Peritas Group in relation to the CPA which concluded that the slab "*in the short term can withstand repetitive loading*".

57 On 11 April 2012 Zerbst was informed that a further engineer would be retained by Lysaght to certify the CPA. On 16 April 2012 Zerbst informed Lysaght that he considered the Peritas report to be inadequate. By email dated 26 April 2012, Zerbst directed Lysaght to replace all CPA concrete. Zerbst wrote to Lysaght on 27 April 2012 and again stated that it was his opinion that "*the only course of action* is *to now pour* a *new slab beside the current container area*".

58 Zerbst then met with senior Lysaght representatives on 30 April 2012 and agreed to pay $1 million as a contribution toward the monies outstanding to Lysaght at that time (a total of approximately $2.2 million). The meeting also discussed the CPA, but Lysaght's insistence was conducted on a without prejudice basis.

59 On 2 May 2012 Ms Brookes wrote to Zerbst with two proposals to rectify the stormwater retarding basin. These were both rejected by Zerbst on 3 May 2012.

Requests after 3 April 2012

60 Progress claim number 12 contained claims for various components of the building works including "concrete works", (at that time 80.53% complete) as to a further

24.09% completion. It also contained a claim in respect of "stormwater" (at the time 94% complete) as to a further 9% completion.

61 Zerbst, by email dated 4 May 2012, informed Lysaght why the stormwater rectification proposals were rejected. On 4 May 2012 Zerbst received advice from Tonkins, engineers, as to why the CPA was inadequate and that a concrete thickness of 400-600 was required.

62 Zerbst wrote to Lysaght and confirmed its refusal to provide the documents and information which he had requested and that there was no engineering design for the CPA, it being designed "in-house" by Lysaght. Zerbst reiterated his requests for documents and information in relation to the CPA and stormwater retarding basin. During May 2012, Ms Brookes told Zerbst that Lysaght had unsuccessfully approached three engineers to certify the CPA and that Lysaght was retaining another engineer to design a replacement CPA.

63 On 9 May 2012 Zerbst requested amongst other things, " *... as built information ...".* The requests for information were repeated via multiple emails on 15 May 2012.

64 Ms Brookes informed Zerbst, in the site meeting on 17 May 2012, that a "*new slab design has been received and has been circulated for pricing* ...".

65 Lysaght provided Zerbst with an "update" on 22 May 2012 with most matters being described as "*verification being sought from consultants* ...".

66 By email dated 8 June 2012 Mr Roepen wrote to Zerbst and informed him that a second engineer was being retained to prepare a design for a new CPA.

Requests after 11 June 2012

67 Progress claim, number 13, contained a claim for 18.6% further completion of "concrete *works*"; and asserted that "*structural steel"* and "*steel and panel erection*" were 100% complete.

68 Zerbst wrote to Lysaght on 12 June 2012 about replacement of undersized steel bolts in the rail freight terminal building and inquired whether Lysaght's engineers had advised that the building is "*safe in its current form ...*".

69 Zerbst wrote to Ms Brookes on 13 June 2012 and reiterated his requests for information and requested a commencement date for the CPA replacement slabs.

70 At the site meeting on 13 June 2012, Ms Brookes informed Zerbst that the design of the new CPA had been revised and had been circulated for "*pricing*".

71 Zerbst wrote to Mr Roepen reiterating his request for certification that the rail freight terminal building (with undersize truss bolts) was "*safe*".

72 Zerbst wrote to Ms Brookes seeking that rectification works to the rail freight terminal be certified by an engineer.

73 On 19 June 2012 Zerbst requested Mr Roepen provide him with design details for the new CPA as well as a commencement date. Mr Zerbst provided a copy to Mr Roepen of his earlier email to Ms Brookes in which he (Mr Zerbst) had said "*... I am not wanting to hold further payments, but the current situation is forcing* me *to do so*".

74 On 25 June 2012 Mr Roepen wrote to Zerbst proposing "*release*" of further payments to Highline, an amount of $800,00 to be withheld by Blanalko and an extension of relevant bank guarantees. The letter acknowledged that Zerbst had informed him "*from time to time*" that Blanalko had "*withheld payments because* of *matters to be resolved including the CPA, stormwater design ... and locomotive warehouse concrete repairs ...*".

75 On 22 June 2012 Zerbst replied and gave reasons as to why monies would not be paid to Lysaght. The reasons included lack of engineer's certification and offered to release monies progressively once requests for information were satisfied.

76 By letter dated 9 June 2012 Zerbst wrote to Lysaght setting out a summary of the requests for information over previous months.

77 By letter dated 8 August 2012 Mr Roepen wrote to Zerbst and informed him that Highline would not replace the CPA.

78 On 21 September 2012 Zerbst wrote to Mr Roepen requesting details of the welding of steelwork (in lieu of replacement bolts) in the rail freight terminal roof trusses and requested engineering certification of that work.

79 By letter dated 31 October 2012 Zerbst wrote to Mr Roepen and made a detailed request for documents, he also requested access to all documents lodged by Highline with the local council regarding the project.

80 On 8 November 2012 Zerbst wrote to Mr Roepen and again sought verification that the rail freight terminal building was safe. Mr Roepen refused to provide any certification by a letter dated 9 November 2012.

81 On 9 November 2012 Lysaght informed Zerbst that the main truck canopy at the rail freight terminal was unsafe for winds over 105km/hr and that further bracing would be installed. Zerbst wrote to Mr Roepen on 14 November 2012 and requested design drawings and reports in relation to the truck canopy. Mr Roepen refused by letter dated 16 November 2012.

82 On 29 November 2012 Zerbst was provided with a large volume of drawings for the project. Zerbst wrote to Mr Roepen seeking design drawings for the stormwater basin and the consent of the local authorities for further excavation works.

83 On 17 December 2012 Zerbst wrote to Mr Roepen requesting a full copy of all documents and information which had been requested. He informed Mr Roepen that the documents supplied on 29 November 2012 did not satisfy his various requests.

Blanalko's Concluding Submissions on the Provision of Information by Lysaght

84 By way of concluding submissions by Blanalko on the issue of the provision of information by Lysaght pursuant to clause 42.1, it said that:

(a) the project is large and complex;

(b) Zerbst the superintendent requested documents and information in relation to the design and construction of the CPA. He had doubts that it had been adequately designed. He was provided with no documents in response to his requests. He then insisted that an engineer certify the design of the CPA. Lysaght tried to obtain such a certificate from at least three engineers. Two reports were provided to Zerbst (by Scott & Associate and by Peritas), but neither was satisfactory.

(c) Highline told Zerbst on several occasions that it was obtaining a new design for a replacement CPA and that it was being "costed". Zerbst informed Lysaght on several occasions during this time that he would not authorise payment of progress claims due to his dissatisfaction with the CPA and its designs. In the event, Lysaght changed its position. It refused to provide documents and refused to replace the CPA.

(d) A similar process arose in relation to the stormwater retarding basin and aspects of structural construction of the rail freight terminal building. Lysaght agreed initially, but ultimately refused to provide any documents or information.

(e) It was submitted by Blanalko that Zerbst had made long standing, repeated and detailed requests for information. The requests were the subject of extensive correspondence between the parties.

(f) Zerbst told Lysaght on several occasions that further payments would not be certified until those requests were satisfied. In any event, Blanalko submitted that they were not satisfied and that the evidence on the application demonstrates Lysaght has refused to provide information and documentation as requested.

Lysaght's Submissions on the Provision of Information

85 Lysaght concedes that in *Brewarrina* and *Aquatec*, the NSW and Victorian Courts of Appeal both found that the task of assessing whether the Superintendent's requests

for information had been met was a triable issue, and that summary judgment could not be awarded.

86 It submitted however, that this case, however, is distinguishable from *Brewarrina* and *Aquatec* for the following reasons:

(a) Zerbst was clearly satisfied with the information that had been provided because in the case of the February Payment Claim and the April Payment Claim he approved the claims, and in the case of the claims for the month of May 2012, his correspondence demonstrated that he had sufficient information to approve, and did approve, the claims save for the landscaping in the case of the Revised May Payment Claim;

(b) Zerbst's explanation in his affidavit – that his approval emails dated 14 March 2012 and 4 May 2012 merely informed the plaintiff that the arithmetic basis of the claim was correct – is a "fanciful explanation" which has no credibility and no real prospect of success of being accepted at trial;

(c) Each of the requests for information Blanalko alleges were made by the superintendent were not made by the superintendent or a person acting in this capacity. Instead, in each of those communications, where Zerbst was involved, he held himself out to be requesting the information as the "General Manager – Property" of Blanalko. Lysaght says that Blanalko is now attempting to categorise those communications retrospectively as requests for information by the superintendent, which it cannot do.

(d) The information requested in the emails and letters relied upon by Blanalko could not, even if it's case is taken at its highest, be said to be reasonably required to assess the claims for payment. Lysaght notes in this respect that it is telling that Blanalko has not, in either its defence and counterclaim or supporting affidavit, attempted to set out how the

requested information relates to any of the payment claims the subject of this proceeding.

(e) The requests were not all made prior to the submission of the relevant claims for payment. Reference was made by Lysaght to paragraph 44 of Ipp JA's judgment in *Brewarrina*, to the effect that any requests for information made after the lodgement of the payment claim in question are irrelevant.

(f) Finally, Lysaght submits that there is a dispute between it and Blanalko as to the existence of defects in the works performed by the Lysaght. It says that it is continuing to rectify defects. Any dispute about the existence or the nature and dimension of any defects remaining after completion of Lysaght's work will need to be resolved in accordance with the Contract. In the meantime, Lysaght is entitled to recover progress payments due to it under the Contract pursuant to clause 42.1.

Conclusion on Lysaght's Summary Judgment Application on the 3 Progress Claims

87 In my opinion, Blanalko, which is the respondent to Lysaght's application for summary judgment, has a "real" chance of success on the material presented on the application.

88 Whether or not sufficient information was provided and whether or not the Superintendent's requests for information had been met constitute triable issues.

89 It follows that summary judgment should not be awarded in favour of Lysaght on the three progress claims.

90 Because I am likely to be the trial Judge, and because in this application only limited material has been presented and without the benefit of it being tested in cross-examination, it is undesirable that further reasoning be provided and further conclusions be arrived at beyond what is necessary to determine the present application.

Defendant's Application for Summary Judgment under the January Certificate

91 The defendant Blanalko applied for summary judgment for the amount claimed under the January Certificate.

92 The plaintiff Lysaght, on the other hand, sought a declaration that the January Certificate is invalid and of no effect.

93 Blanalko seeks summary judgment in the sum of $1,984,880.17 pursuant to its summons together with interest and costs.

94 Zerbst received a report by Mr Davis, consulting engineer, which concluded that the CPA was inadequately designed and a report by the quantity surveyor to rectify the defects.

95 Lysaght refused to rectify the defects.

96 Zerbst concluded that a payment certificate should be issued to Highline and did so in the sum of $1,984,880.71.

97 Lysaght has not paid the amount specified in the certificate.

98 Blanalko says that the Superintendent is entitled to issue the payment certificate. Further, as Lysaght did not make a claim for payment in the relevant month, the Superintendent is entitled to issue a payment certificate, following which Lysaght is obliged to pay the amount so certified within 14 days.

99 Blanalko submitted further that a payment made pursuant to clause 42.1 of the contract shall not prejudice the right of either party to dispute under clause 47. Whether the amount so paid is the amount due and payable and on determination (whether under clause 47 or as otherwise agreed) of the amount so properly due and payable, Lysaght or Blanalko 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. Blanalko pointed to the reservation of the right to challenge the certificate (after payment) being reiterated in clause 42.4 of the Contract, namely that the issue of a payment certificate shall not constitute approval of any work or other matter nor shall

it prejudice any claim by the principal or the contractor. Accordingly, it says that Lysaght's dispute of the certificate and any reference to an arbitrator on the question is independent of the liability to pay the amount certified by the Superintendent.

Lysaght's Response to Blanalko's Application for Summary Judgment

100 Lysaght seeks a declaration that the payment claim founded on the January 2013 certificate is invalid and of no effect.

101 By letter dated 2 January 2013, the defendant (under cover of a letter signed "Michael Zerbst – General Manager - Property") wrote to the plaintiff attaching the January Certificate, being a purported payment certificate pursuant to clause 42.1 signed by Michael Zerbst in his capacity as the Superintendent. The January Certificate purported to certify that $1,984,880.71 was due and payable as a progress payment from Lysaght to Blanalko arising from alleged defects in the works.

102 Lysaght submits that Blanalko is in possession of the works and in control of the facilities and the site and, as a result is able to, and has, undertaken its own inspections and investigations of the works, including the container park pavement and light poles. It says further that Lysaght is in the process of rectifying defects which have been identified by the Superintendent, and the ongoing work is demonstrated by letter dated 3 August 2012 from Lysaght to Blanalko. In these circumstances Lysaght submits that, it is (at least) "a moot point whether the defendant has or could have any present cause of action in respect of alleged defects in relation to the Works".

103 Lysaght referred to *Wulguru Height Pty Ltd v Merrit Cairns Construction Pty Ltd*, where McPherson JA said of a principal's obligations to make payment of a progress payment to which a contractor was entitled under clause 42.1 where it believed it had an entitlement to a set-off or cross claim:

> Taken together, these considerations show that the Principal is not entitled to avoid or defer its obligation under cl 42.1 to pay the amount certified by the Superintendent by asserting a set-off or cross-claim for damages for delay on the part of the Contractor. The Principal's remedy, if in the end its claim for damages is vindicated, is to obtain an order under the final provisions of

> cl 42.2, which authorises the arbitrator to order repayment with interest of an amount which has been overpaid, whether pursuant to a Superintendent's certificate or otherwise. No doubt that is a reason why the contract provides for a retention sum or for security for performance by the Contractor.[23]

104 Lysaght submitted that for three reasons, the January Certificate can have no effect on this proceeding.

105 First, the Superintendent had no power to issue the January Certificate pursuant to clause 42.1 of the Contract, and as a result that certificate is of no effect under the Contract. The Superintendent's power to issue payment certificates in the absence of a claim for payment by the contractor is set out in clause 42.1 of the Contract, as follows:

> If the Contractor fails to make a claim for payment under this clause 42.1, the Superintendent may nevertheless issue a payment certificate and the Principal or the Contractor, as the case may be, shall pay the amount so certificated within 14 days of that Certificate.

106 Referring to the observations of Williams JA in *Daysea Pty Ltd v Watpac Australia Pty Ltd*[24] which confirmed that for a purported certificate to fall within clause 42.1, strict compliance with that clause is necessary, Lysaght submitted that the Superintendent is only authorised to unilaterally issue a payment certificate where the contractor fails to make a claim for payment under clause 42.1. It was submitted that the Superintendent's power only arises, therefore, where the plaintiff would have had an equivalent right to seek a progress payment but did not.

107 Lysaght submitted that its right to seek a progress payment under clause 42.1 arises (according to the first paragraph thereof) "*At the times for payment claims or upon completion of the stages of the work under the Contract stated in Annexure A and upon the issue of a Certificate of Practical Completion and within the time prescribed by clause 42.6*". The time for payment claims set out in Annexure A is the 26th day of each month. With the plaintiff's claim for payment on 16 October 2012, Lysaght had claimed payment for 100% of the works under the Contract (including all variations), and was by extension doing no further work for which it was entitled to seek a progress

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23 *Wulguru Height Pty Ltd v Merrit Cairns Construction Pty Ltd* [1995] 2 Qd R 521.

24 *Daysea Pty Ltd v Watpac Australia Pty Ltd* (2001) 17 BCL 434.

payment. Further, it was submitted that Blanalko had by 2 January 2013 taken possession of the premises. Other than a final claim pursuant to clause 42.5, Lysaght no longer had an entitlement to seek progress payments pursuant to clause 42.1. As a result, it was put that Lysaght did not have an entitlement under the Contract to seek any more progress payments. On this basis it was submitted that as at 2 January 2013, the Superintendent had no right under the Contract to issue the January Certificate as a payment certificate in accordance with clause 42.1, and that document is a nullity.

108 It was further submitted that this situation is analogous to the facts in *Kingston Building (Australia) Pty Ltd v Dial D Pty Ltd.*[25]

109 Second, Lysaght submitted that the January Certificate failed to set out the matters it was required to contain under clause 42.1 including, in particular, "The value of the work carried out by the Contractor in the performance of the Contract to the date of the Claim".

Conclusion as to the January Certificate

110 In my opinion, Lysaght, which is the respondent to Blanalko's application for summary judgment, has a "real" chance of success on the material presented on the application on the two matters described above. In short, these are triable issues which should be determined at a trial.

111 It follows that summary judgment should not be awarded in favour of Blanalko on the January 2013 Certificate.

112 Again, because I am likely to be the trial Judge, and because in this application only limited material has been presented and without the benefit of it being tested in cross-examination, it is undesirable that further reasoning be provided and further conclusions be arrived at beyond what is necessary to determine the present application.

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25 *Kingston Building (Australia) Pty Ltd v Dial D Pty Ltd* (2013) NSWSC 173.

Lysaght's Stay Application

113 Lysaght points to Blanalko making the following claims in its counterclaim:

(a) paragraph 66: loss and damage for breach of Contract;

(b) paragraph 67: a debt in respect of the January Certificate; and

(c) paragraph 68: various waivers and estoppels.

114 Lysaght submits that each of the causes of action relied on by Blanalko ought properly to be referred to arbitration. However, it has failed to do so.

115 Lysaght also submits that, by letter dated 15 January 2013, it gave notice of the dispute pursuant to clause 47 of the Contract to Blanalko and to the Superintendent in relation to the validity of the January Certificate. Blanalko provided responsive submissions on 8 February 2013, and on 26 February 2013 that the Superintendent gave to the parties a written decision in relation to the notice. On 7 March 2013, the parties conferred in an attempt to resolve the dispute. However, no agreement was reached at that meeting in resolving the dispute, nor was there agreement on any alternative method of resolving the dispute.

116 Given that the dispute remains unresolved, Lysaght submits that it ought to be referred to arbitration pursuant to clause 47.2 of the Contract.

117 On this basis, Lysaght submits that the matters raised in Blanalko's counterclaim and paragraphs 56A to 56C of its defence must be referred to arbitration. If that is to occur, it further submits that those matters ought to be stayed.

The Arbitration Agreement - Clause 47 of the Contract

118 Clause47.1 of the Contract relevantly provides:

> If a dispute or difference (hereafter called a "dispute") between the Contractor and the Principal arises in connection with the Contract or the subject matter thereof, including a dispute concerning –
>
> (a) a direction given by the Superintendent; or
>
> (b) a claim –

(i) in tort;

(ii) under statute;

(iii) for restitution based on unjust enrichment; or

(iv) for rectification or frustration,

then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

119 Clause 47.2 proceeds to set out two alternative procedures for resolving a dispute contained in a notice: one requiring the parties to confer at least once to attempt to resolve the dispute, and the other permitting the other party to give a response to the notice of dispute with the Superintendent then required to provide a written response in relation to the dispute. If either alternative path fails to resolve the dispute, the dispute is then referred to arbitration.

120 Clause 47.2 provides:

47.2 Further Steps Required Before Proceedings

Alternative 1

Within 14 days of service of a notice of dispute, the parties shall confer at least once to attempt to resolve the dispute or to agree on methods of resolving the dispute by other means. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute.

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.

Alternative 2

A party served with a notice if dispute may give a written response to the notice to the other party and the Superintendent within 28 days of the receipt of the notice.

Within 42 days of service on the Superintendent of a notice of dispute or within 14 days of the receipt by the Superintendent of the written response, which is earlier, the Superintendent shall give each party the Superintendent's written decision on the dispute, together with reasons for the decision.

If either party is dissatisfied with the decision of the Superintendent or if the Superintendent fails to give a written decision on the dispute within the time required under this clause 47.2, the parties shall, within 14 days of the date of receipt of the decision or within 14 days of the

> date upon which the decision should have been given by the Superintendent, confer at least once to attempt to resolve the dispute or to agree on methods of resolving the dispute by other means. At any such conference, each party shall be represented by a person having authority to agree to a resolution of the dispute.
>
> If the dispute has not been resolved within 28 days of the date of the Superintendent has given a decision or should have given a decision, that dispute shall be and is hereby referred to arbitration.

121 Clause 47.4 carves out claims for payments due under the Contract, in the following terms:

> 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 in respect of a dispute under clause 47 of any matter arising under the Contract.
>
> [Emphasis added]

122 Accordingly, Lysaght's action in respect of its three payment claims and Blanalko's action in respect of the payment claimed to be due under the January 2013 Certificate are not subject to arbitration under the Contract.

Stay Provisions of the *Commercial Arbitration Act 2011*

123 Section 53 of the *Commercial Arbitration Act 1984* gives the Court a discretion to stay proceedings if the parties were subject to an arbitration agreement.

124 Section 8 of the *Commercial Arbitration Act 2011* (the "Act"), on the other hand, confers no such discretion on the Court. This section relevantly provides:

> **8 Arbitration agreement and substantive claim before court (cf Model Law Art 8)**
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement *must*, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
>
> [Emphasis added]

125 The use of the imperative word "must" in s 8(1), rather than the permissive "may", which was employed in the superseded *Commercial Arbitration Act 1984*, removes the court's discretion to refuse to grant a stay, and renders the provision mandatory. The *only* reason a court can refuse to grant a stay is if the arbitration agreement is found to be "null, void, inoperative or incapable of being performed".[26] This means that if the requirements of the section are met the Court has no choice but to grant a stay of the proceeding before it and refer the matter to arbitration.[27]

126 This may result in some inefficiencies in case management in some cases, arising from the potential for litigation on the same project being conducted before different tribunals. Nevertheless the statutory meaning is clear.[28]

127 Section 8 of the Act provides for the statutory procedure in relation to a *matter* which is the subject of an arbitration agreement. The word "matter" is not confined by any definition in the Act. It is capable of a wide meaning. For example, in *Flakt (Aust) Ltd v Wilkins and Davies Construction Co Ltd*[29] an application for a stay of proceedings was made by the defendant under s 7 of the *Arbitration (Foreign Awards and Agreements) Act 1974 (Cth)*.[30] McLelland J held that "matter" included any claim for relief of a kind proper for the determination in a court but did not include every issue which would, or might arise for decision by the court in the course of the determination of such a claim. In this regard his Honour said

> [i]n my opinion, the word "matter" in s 7(2)(b) denotes any claim for relief of a kind proper for determination in a court. It does not include

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26 D Jones, *Commercial Arbitration in Australia* (2nd ed, Lawbook Co., 2013) p 108.

27 Although in the 2009 Consultation Draft Bill the provisions vested a discretionary power in the court and more closely reflected s 53 of the Superseded Uniform Acts, following submissions from over 17 different organisations, the final Bill reflected s 8 of the Model Law. The imperative "must" replaced the permissive "may" such that granting a stay is now mandatory unless the court finds that the arbitration agreement is "null, void, inoperative or incapable of being performed". D Jones, *Commercial Arbitration in Australia* (2nd ed, Lawbook Co., 2013) p 110.

28 It has been noted that there will be situations that arise where matters are referred to arbitration as a consequence of the word "must" that would have been more efficiently conducted in court, for example, multi-party proceedings that will require arbitrations and potentially different findings of fact. See: D Jones, *Commercial Arbitration in Australia* (2nd ed, Lawbook Co., 2013) p 111.

29 *Flakt (Aust) Ltd v Wilkins and Davies Construction Co Ltd* [1979] 2 NSWLR 243, 250.

30 Cited in D Jones, *Commercial Arbitration in Australia* (2nd ed, Lawbook Co., 2013) p 109.

> every issue which would, or might, arise for decision in the course of the determination of such a claim.[31]

128 Section 8 also has an inbuilt time limit. It operates only when a party makes a request (to refer the matter to arbitration) *not later than when submitting the party's first statement on the substance of the dispute.*

129 Finally, s 8 will operate in accordance with its terms, unless the Court finds that the agreement is *null and void, inoperative or incapable of being performed*. These factors were not raised as considerations in the present case.

130 Section 8 of the Act is supported by s 7 which provides a definition of an arbitration agreement in the following terms:

> **7 Definition and form of arbitration agreement (cf Model Law Art 7)**
>
> (1) An *arbitration agreement* is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

131 Section 43 of the Act provides that the Act applies to an arbitration agreement whether made before or after the commencement of the act, so long as the arbitration was not commenced before the commencement of the Act (being 17 November 2011).

Defendant's Submissions Opposing Stay of its Counterclaim

132 Blanalko contends that s 8 of the Act applies only to exclusive arbitration agreements and not to contracts in which arbitration is an option whereby a party may elect to invoke (or not as the case may be) the process of arbitration. It contends that the clause in issue (clause 47 of the General Conditions 4300-1995) is not an exclusive arbitration agreement and accordingly is not governed by s 8.

133 The Act came into force on 17 November 2011. There were no reported authorities cited on the question of the construction of s 8. The explanatory memorandum and second reading speech provide no assistance.

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31 *Flakt (Aust) Ltd v Wilkins and Davies Construction Co Ltd* [1979] 2 NSWLR 243, 250.

134 Blanalko submits on the issue that the ability to invoke arbitration arises pursuant to clause 47.1, which describes a series of steps. First, if a dispute or difference arises in connection with the Contract, then either party shall deliver a notice of dispute which identifies and particularises the dispute. However, it submits that the use of "shall" does not mean that the party is obliged only to refer the matter to arbitration. It says that only if it so elects, it must follow the procedure of providing a proper notice.

135 Blanalko submits that the effect of clause 47.1 of the Contract was to provide a party with a right to elect to arbitrate. In the particular circumstances of this matter, the election had not occurred prior to the commencement of these proceedings, with the result that it could not be said that there was a matter which is the subject of an arbitration agreement for the purposes of s 8 of the Act.

136 Thereafter, pursuant to clause 47.2, the opposing party "may" give a written response to the notice. Blanalko submits further that the use of "shall" in the reference to a decision to be made by the Superintendent is a reference to the prescribed procedures and not an explicit prohibition upon initiating Court proceedings. References to "shall" appearing subsequently in clause 47.2 only prescribe procedural steps. They do not work to oust the Court's jurisdiction.

137 On this principal basis, Blanalko contends that, having regard to the whole of the Act, on its proper construction, s 8 does not apply to non-exclusive arbitration clauses and in this case that clause 47 is such a non-exclusive arbitration clause. In other words, s 8, fairly read, only has application in instances where the parties have clearly contracted to an arbitration to the exclusion of the Courts (save for any appeal).

138 Blanalko points to a number of factors in support of its construction of s 8, arising from the differences between Court proceedings and arbitral awards, which:

(a) point to it not being the intention of Parliament to compel parties to have their disputes determined exclusively by arbitration in preference to a court, except where this is clearly their intention as manifested in their written agreement; and

(b) which underscore the need for a clear intention to be evident in the arbitration agreement to oust the jurisdiction of a court, before such a construction of the relevant contract may be safely arrived at.

Conclusion on the Stay Application

139 I do not accept that clause 47.2 of the Contract provides for a non-exclusive arbitration clause as contended for by Blanalko which conferred on the parties a right to elect to arbitrate, with the result that there was no matter which was the subject of an arbitration agreement for the purposes of s 8 of the Act.

140 Rather, clause 47.2 of the Contract had in essence the following effect:

(a) Under Alternative 1, the parties are required to meet together to attempt to resolve the dispute, and 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"; and

(b) Under Alternative 2, a more elaborate process is prescribed which involves the appointment of the Superintendent to make a decision on the issue, before the parties meet together to attempt to resolve the dispute. Again, if the dispute has not been resolved within 28 days of the date the Superintendent has given a decision, or should have given a decision, that dispute shall be and is hereby referred to arbitration.

141 However, whichever alternative is invoked by the parties under clause 47.2, on the assumption that a notice of dispute has been served and the dispute remains unresolved and has not been resolved within 28 days of service of the notice of dispute, that dispute "shall be and is hereby referred to arbitration".

142 In my opinion, provided these pre-conditions have been met, the parties have expressed a clear intention in their written agreement that an outstanding dispute, in the circumstances described, is required to be referred to arbitration, and is not to be

heard and determined by a Court. In these circumstances, clause 47.2 constitutes an agreement by the parties to submit to arbitration certain disputes which are defined.

143 This in turn enlivens s 8 of the Act. It follows that a Court before which an action is brought in a matter which is the subject of an arbitration agreement must, if a party so requests, not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration.

144 However, not all of the allegations in Blanalko's defence and counterclaim fall within the arbitration agreement provided by clause 47 of the Contract. The following facts serve to identify which claims may be maintained in the proceedings before the Court, and those which must be referred to arbitration.

145 By letter dated 15 January 2013, Lysaght gave notice of dispute pursuant to clause 47 of the Contract to the Defendant and to the superintendent in relation to the validity of the January Certificate. Blanalko provided responsive submissions on 8 February 2013, and on 26 February 2013 the superintendent gave to the parties a written decision in relation to the notice. On 7 March 2013, the parties conferred to attempt to resolve the dispute, but no agreement was reached at that meeting to resolve the dispute or on any method of resolving the dispute by other means. The dispute remains unresolved.

146 However, in my opinion, the payment claimed by Blanalko under the January Certificate is covered by the "carve out" provided by clause 47.4 which provides that nothing in the Contract shall prejudice the right of a party to institute proceedings to enforce payment due under the Contract. As such, even though the parties did invoke the provisions of clause 47.2 in an attempt to resolve the issue as to whether any and what sum is payable pursuant to the January Certificate, the parties specifically addressed the issue as to the forum to determine the dispute, in the event that it remained outstanding. They agreed not to preclude a party to the dispute to institute proceedings before a court to enforce the payment claimed to be due under

the Contract. This is precisely what paragraph 56A of the defence and paragraph 67 of the counterclaim seek to do.

147 For this reason, no stay or other order ought to be made in relation to paragraph 56A of the defence and paragraph 67 of the counterclaim.

148 In relation to paragraph 68 of the counterclaim which alleges various waivers and estoppels alleged in the defence, insofar as they relate to clause 42 of the Contract, and the payment claims made under that clause which are the subject of the present proceedings before the Court, the allegations ought to remain for determination by the Court. They constitute an issue for the decision of the Court in the course of the determination of the payment claims which are excluded from the arbitration agreement by clause 47.4

149 However, the balance of paragraph 68 of the counterclaim, and the paragraphs of the defence which support it, are properly the subject of the arbitration agreement, and are required to be referred to arbitration.

150 So too is paragraph 66 of the counterclaim claiming loss and damage for breach of the Contract, founded on the extensive paragraphs and particulars pleaded in the defence which support the allegation. This too must be referred to arbitration.

151 On 27 February 2013, Blanalko filed a defence denying liability, and its counterclaim. By amended summons dated 14 March 2013, Lysaght sought, in addition to its application for summary judgment to stay each of the matters raised in Blanalko's counterclaim pursuant to s 8 of the *Commercial Arbitration Act 2011*.

152 I am satisfied that this constitutes a request within s. 8 of the Act to refer the matter to arbitration, a step which was taken not later than when submitting the party's (Lysaght's) first statement on the substance of the dispute.

153 Further, I make no finding under s. 8 that the arbitration agreement is *null and void, inoperative or incapable of being performed*. These factors were not raised as considerations in the present case, and there was no basis for doing so.

154 It does not matter that no notice of dispute was formally delivered pursuant to clause 47.1 of the Contract. It will be recalled that clause 47.1 provides that if a dispute of the defined kind arises, then either party shall deliver to the other, and to the superintendent, in the prescribed manner, a notice of dispute in the prescribed form. The requirement is framed in mandatory terms.

155 In the present case, Blanalko failed to deliver such a notice, but nevertheless seeks to press all of the allegations pleaded in its defence and counterclaim, and have those matters dealt with, not in an arbitration, but in a proceeding before the Court. Can it take advantage of its own contractual transgression?

156 In my opinion, it is not open to Blanalko to avoid the bargain reflected in the arbitration agreement it has entered into. The failure on the part of one party to the arbitration agreement to comply with a prescribed procedural step does not avoid the obligation to comply with the contractual procedure. Still less does it have any effect on the enforceability of the agreement, as equity *deems to be done that which ought to be done*. As a consequence the operation of s 8 of the Act is unaffected, because a valid arbitration agreement triggers its operation.

157 In this case, I am satisfied that the pre-conditions of s 8 of the Act have effectively been met, insofar as they relate to the issues which are not subject to clause 47.4 of the Contract.

158 Accordingly, at the request of Lysaght, the matters pleaded in Blanalko's counterclaim in paragraph 66 and the supporting paragraphs of its defence, together with that part of paragraph 68 of the counterclaim and its supporting paragraphs in the defence to which I have earlier referred, must be referred to arbitration. Further, those matters, insofar as they are presently before the Court, ought to be stayed.

Plaintiff's Application as to Joinder of SCT

159 As noted above, the defendant by its counterclaim purported to join Twentieth Superpace Nominees Pty Ltd (trading as SCT Logistics) ("SCT") as a second plaintiff.

160 The plaintiff seeks an order that the purported joinder of SCT be set aside or struck out as irregular.

161 Without the leave of the Court, the purported joinder of SCT as a second plaintiff by counterclaim is irregular.

162 Rule 10.03 of the Rules[32] permits the joinder of a non-party as a defendant by counterclaim. However, there is no equivalent rule permitting the joinder of further plaintiffs by counterclaim.[33]

163 If Blanalko seeks to rely upon r 9.06 of the Rules to seek leave to join SCT because it is: either a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all questions in the proceeding are effectually and completely determined and adjudicated upon; or is a person between whom and any party to the proceeding there may exist a question arising out of, or relating to, or connected with, any claim in the proceeding which it is just and convenient to determine as between that person and that party as well as between the parties to the proceeding, I am not satisfied that, at this stage of the proceedings, it is either necessary or just and convenient to have SCT joined to Blanalko's counterclaim as a plaintiff.

164 Indeed, on the present material before the Court there is some doubt as to whether causes of action have been framed in a manner which should be permitted to go forward in relation to SCT.

165 Further, again on the material presently before the Court, the introduction of SCT as a party to the proceeding is likely to be productive of delay, expense and unnecessary complexity.

166 Accordingly, insofar as application has been made to the Court to permit the joinder of SCT as proposed, it should be refused.

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32 *Supreme Court (General Civil Procedure) Rules 2005*.

33 *Hunter v Croner Tyco Toys Pty Ltd* (unreported VSC, Gillard J, 23 July 1998 BC9804537).

167 That is not to say, that on the provision of further evidence and a re-pleading of the counterclaim, which significantly alters the present balance of considerations, a further application may not be successful.

168 It follows that the purported joinder of Twentieth Superpace Nominees Pty Ltd (trading as SCT Logistics) by Blanalko as a second plaintiff by counterclaim should be set aside as irregular.

Orders

169 The following orders are proposed to be made:

(a) the plaintiff's application for summary judgment made in its summons dated 7 November 2012 and in its amended summons dated 14 March 2013 is dismissed;

(b) the defendant's application for summary judgment made in its summons dated 8 March 2013 is dismissed;

(c) the matters pleaded in the defendant's counterclaim in paragraph 66 and the supporting paragraphs of its defence, together with that part of paragraph 68 of the counterclaim, and the paragraphs of the defence which support it, which plead a waiver or estoppel other than in relation to any of the payment claims which are the subject of the proceeding, are referred to arbitration, and those matters so referred, insofar as they are presently before the Court, are stayed;

(d) otherwise the plaintiff's application for a stay is dismissed; and

(e) the purported joinder of Twentieth Superpace Nominees Pty Ltd (trading as SCT Logistics) by the defendant as a second plaintiff by counterclaim is set aside as irregular.

170 I will hear the parties on costs, and if necessary, on the form of the orders.
