acted in bad faith or exercised unfair coercion to get his increase, the agreement to grant it would have been held unenforceable on the grounds of economic duress.

Provided that coercion is absent and both parties act in good faith, the safest way for a contractor to secure his legal right to an increase is to sign a written agreement with the party granting it and to ensure that he (the contractor) provides some specific identifiable benefit to the grantor in exchange for the promise. The value of this benefit need not be in proportion to the extra money agreed to be paid, and may in fact be nominal. The benefit agreed to be given by the contractor should not consist of money alone, as a lesser sum of money is insufficient consideration for a promise to pay a greater sum. Rather, it should consist of a promise to perform some extra work which the contractor is not already obliged to perform, or it can consist of a readily identifiable non-monetary benefit, for instance a promise to supply a peppercorn (or pineapple, or avocado) on demand. Alternatively, the agreement may be cast in the form of a deed, for which the law does not require consideration to be given.

Finally, it is useful to bear in mind in the present context that a compromise of a claim can constitute valid consideration for a promise to pay an additional amount, provided that the claim is made in good faith and the contractor making the claim honestly believes that it is well founded (even if on a correct legal analysis it would be held not to be well founded). Thus, if the sub-contractor in *Williams v Roffey Bros* had had a bona fide contractual claim against or dispute with the head contractor, whether for extra payment or in respect of the scope or extent of work which the sub-contract required him to perform, and the head contractor had disputed that claim, the sub-contractor's agreement to forgo it would in the eyes of the law have constituted adequate consideration for the promise to pay extra.

-Leslie Kelety, Blake Dawson Waldron, Solicitors, Sydney.

Progress Payment Certificate Issued by Architect: JCC Form of Contract

Thiess Contractors Pty Ltd v Pavements and Excavations Pty Ltd, Supreme Court of Queensland, (No. 3709 of 1989) Williams J, 2 February 1990.

The unreported Queensland Supreme Court decision of *Thiess Contractors Pty Ltd v Pavements and Excavations Pty Ltd* (No. 3709 of 1989, Williams J, 2 February 1990, 2 March 1990) concerns, amongst other things, the issue of an architect's progress certificate pursuant to clause 10 of the JCC form of contract.

Triden Contractors Pty Ltd v Belvista Pty Ltd & Anor (1987) 3 BCL 203 considered the position of an architect's progress certificate issued pursuant to clause 28 of the Edition 5b form of contract and more recently the Queensland Supreme Court in *Grahame Allen Earthmoving Pty Ltd v Woodwark Bay Development Corporation Limited* (No. 4304 of 1988, Dowsett J, 15 December 1988, 19 December 1988) dealt with the same issue, this time pursuant to an AS2124-1986 form of general conditions of contract.

The possible exceptions to the view that, in general, a principal does not have the right to refuse to pay or to revalue the work and pay less than the amount certified were approached somewhat cautiously by Smart J in *Triden Contractors*. His Honour recognised the "majority view" in relation to the principle concerning the existence of a right of set-off [*Mondel v Steel* (1841) 8 M & W 858] before noting that the principles were derived from decisions on particular English forms of contract. Considering the terms of the Edition 5b form of contract there under consideration, His Honour found that the contractor was entitled to payment on the certificate.

Dowsett J in *Grahame Allen Earthmoving* was met with similar arguments from the defendant/respondent in response to an application by the plaintiff/applicant for progress payment certificate issued under AS23124-1986. His Honour dealt with the challenges to the judg judgment to be entered in its favour in reliance upon a judgement summons including that the action should be stayed pursuant to Section 10 of the Arbitration Act (1973) (Qld); an attack on the basis of pre-contractual conversations including statements allegedly made by the plaintiff as to its intention or capacity to perform its obligations "... which statements may amount either to a collateral contract, or to an actionable misrepresentation, or to estoppels" (Dowsett J at page 9 of his judgment); and equitable set-off. Considering the terms of clause 42 of AS2124-1986 His Honour found as follows:

> "... The thrust of the submission was that although it was encumbent upon the superintendent to issue a certificate, the amount so certified was not the amount due and payable referred to later in that clause. To my mind it is clear that clause 42.1 is designed to require the superintendent to certify the amounts due in accordance with the method prescribed by clause 42.2. It would be specious for the superintendent to be required to provide a certificate if it were then left to the principal to himself decide what the amount due in fact was."

[cf., for example, *Construction Services Civil Pty Ltd v J & N Allen Enterprise Pty Ltd & Anor* (1985) 1 BCL 363 and the cases cited therein.]

Thiess Contractors Pty Ltd v Pavements and Excavations Pty Ltd was similar to the *Grahame Allen Earthmoving* case, in that it also concerned circumstances where the plaintiff had issued a specially endorsed Writ of Summons, presumably with the intention of the plaintiff being to apply for summary judgment in reliance upon an architect's certificate. As was the case in *Grahame Allen Earthmoving*, the defendant purported to rely on the provision in the agreement (this time clause 13 of the JCC form) dealing with arbitration and the reference of disputes to an arbitrator. The matter came on before Williams J on the defendant's application for a stay of the litigation to enable the dispute to be arbitrated.

The architect had issued a certificate. The defendant paid part of the sum certified but not the whole. After the date of the certificate the architect purported to issue a replacement progress certificate for a significantly less amount. The plaintiff issued a Specially Endorsed Writ of Summons seeking to recover the unpaid portion of the architect's certificate together with interest. After service

of the Writ there was an undertaking by the plaintiff not to proceed further without notice to the defendant. Subsequently by letter, the plaintiff's solicitors advised the defendant that their client's instructions were to proceed to obtain default judgment unless the defendant took steps to prevent that from happening. (The plaintiff's undertaking had been given in the first place due to the defendant having taken steps to have the matter in dispute referred to arbitration). Upon receiving the plaintiff's letter in relation to default judgment, an appearance was entered on the defendant's behalf along with a summons seeking an order to stay the plaintiff's action pursuant to the Arbitration Act (Qld).

Williams J considered the terms of clauses 5, 10 and 13 of the JCC form of contract, concluding firstly that generally the architect was not permitted to withdraw a certificate once it had been presented and to replace it with a substitute certificate. His Honour noted the exception:

> "Clearly if an obvious error was made in the certificate an adjustment could be made in the later certificate; prima facie the amount of a progress certificate is, in terms of the contract, payable immediately by the proprietor. Of course, if the amount of the certificate was paid and it was subsequently ascertained that there was an error in calculation, or that for some reason the amount certified was not properly due and payable, the matter could be rectified by a decision on arbitration".

The defendant's argument on its application for a stay of the litigation was that the amount certified was not due and payable until an arbitrator had determined on the issues in dispute. His Honour noted that the applicant defendant had taken all the required steps within time to have the matter referred to arbitration pursuant to Clause 13 of the JCC form of contract, before referring to the *Grahame Allen Earthmoving* case as follows:

> "I was referred in the course of argument to the decision of Dowsett J in *Grahame Allen Earthmoving Pty Ltd v Woodwark Bay Development Corporation Limited*, No. 4303 of 1988, unreported judgment delivered 15 December 1988. With respect, it seems to me that the approach therein adopted by His Honour is correct, and I would adopt a similar approach to the resolution of the matters in dispute before me. It follows from that that the substitution of an amended certificate for that initially issued, and the due reference of the matter in dispute to arbitration does not alter the consequence that, pursuant to the contract, the amount initially certified as being payable is due and payable by the defendant to the plaintiff. That does not, of course, in any way effect the applicant defendant's rights so far as arbitration is concerned."

Accordingly, both Williams and Dowsett JJ, upon the forms of contract being considered by them in their respective judgments, effectively aligned themselves with a general principle that a principal is obliged to pay a contractor the amount shown on the certificate and that the existence of an arbitration clause does not upset this right: *G Hawkins & Sons Pty Ltd v Cable Belt (Australia) Pty Ltd* (1986) 2 BCL 246, a decision governed by the contractual provisions in question where Rogers J also denied the defendant's attempt to set off cf. *Civil & Civic Pty Ltd v Wilmore* (Supreme Court of New South Wales; Clark J; 20 September 1985) in relation to the effect on a progress certificate of a notice of dispute, as noted in (1986) 2 BCL 5. Both Williams J in *Thiess Contractors* and Dowsett J in *Grahame Allen Earthmoving*, observed that upholding the sanctity of an architect's certificate did not mean that the defendant could not later challenge the accuracy of the certificate, as contemplated by each of the building contracts under consideration, in arbitration proceedings. Both Williams and Dowsett JJ, upon their consideration of the respective contract conditions under scrutiny, noted that whilst not prejudicing the principal's entitlement to challenge the amount by arbitration, the language of the clauses in question contemplated payment being made pursuant to the certificate:

> "Once it is understood that the parties have agreed that the certificate is to be the warrant for payment, much of the difficulty in the present case disappears" (Dowsett J in *Grahame Allen Earthmoving*).
>
> "Pursuant to the agreement an architect was empowered to certify with respect to work done by the builder and for payments due by the proprietor with respect thereto" (Williams J in *Thiess Contractors*).

It is suggested that each of these authorities purport to recognise that contractors enter into agreements where independent third parties are appointed to make decisions on matters such as quality, time, payment, etc and that the decisions of such third parties should be given effect. Putting it the other way around, the rhetorical question could be posed as to whether the contractor would have entered into the agreement (and for the same price), had it been the case that the principal did not have to pay the amount certified by a third party's certificate or if it had in fact been left entirely to the principal to determine how much the contractor was to be paid.

While each case must depend upon the actual language used in the agreement [and for this reason the decision in *Grahame Allen Earthmoving* has been the subject of criticism: Mr P Davenport - "Progress Certificates" - (1989) 5 ACLN 2], the cases of *Triden* in relation to E5b, *Grahame Allen Earthmoving* in relation to AS2124-1986 and most recently *Thiess Contractors* with respect to the JCC form, support the merits of a contractor's argument that he is entitled to payment for the full amount certified with the principal's right to later contest the certificate, as provided for by the contract enabling reference to arbitration, reserved.

- **Brad McCosker, Blake Dawson Waldron, Solicitors, Brisbane.**

Editorial Note:

The irony of Dowsett J's decision in the *Grahame Allen Earthmoving* case (see Issue #5 of the Newsletter at page 2) is that the Standards committee which prepared AS2124-1986's payment provisions did so expressly to avoid the conclusions made by Dowsett J; rather, if appropriate, to permit an amount other than the superintendent's (advisory) determination to be paid.

Whilst it is possible that the matter will come before another court at some stage and that a view may be taken that Mr Justice Dowsett's interpretation of AS2124-1986's clause 42 is not open on the words used, in the meantime, better that any principal concerned to have this flexibility, and to overcome the *Grahame Allen Earthmoving* decision, add a special condition to clarify the operation of clause 42. See the previous article in Issue #5 at page 3 for a special condition proposal.