DISTRICT COURT OF QUEENSLAND

CITATION:	*All Systems Pty Ltd v MAW Group (Aust) Pty Ltd & Anor* [2019] QDC 211
PARTIES:	**ALL SYSTEMS PTY LTD trading as WIDE BAY ROOFING** ACN 123 530 343 (plaintiff) v **MAW GROUP (AUST) PTY LTD trading as OASIS CONSTRUCTION (AUST)** ACN 136 468 623 (first defendant) **BUNDABERG REGIONAL COUNCIL** ABN 72 427 835 198 (second defendant)
FILE NO/S:	7 of 2017 (Bundaberg Registry)
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	16 October 2019, ex tempore
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2019
JUDGE:	Porter QC DCJ
ORDER:	**1. Paragraph 7 of the Amended Statement of Claim is struck out.** **2. The application for summary judgment insofar as it relates to the part of the Claim in respect of the unlicensed building work is dismissed.** **3. The application for summary judgment on the defence insofar as it relates to the part of the Claim disputing the existence of the Subcontractors' Charges is granted.** **4. Proceeding M1465 of 2017 in the Brisbane Registry of the Magistrates Court of Queensland be transferred to the Bundaberg Registry of the District Court of Queensland [the Transferred**

Proceeding].

5. **The Transferred Proceeding be consolidated with this proceeding.**

6. **The remaining monies paid into Court by the second defendant in the Transferred Proceedings in the amount of $189,503.62 be paid out to the first defendant.**

7. **The order in paragraph 6 hereof is stayed for 21 days.**

8. **The second defendant have leave to apply to vary or be heard in respect of the order made in paragraph 5 hereof by notice to the Associate to His Honour Judge Porter QC within 14 days of the date of this order in respect to the order for payment out.**

9. **The first defendant pay the plaintiff's costs of the application to the extent it relates to the part of the Claim in respect of the unlicensed building work on the standard basis in any event.**

10. **The plaintiff pay the first defendant's costs of the application and of the proceedings to the extent they relate to the part of the Claim disputing the existing of the Subcontractors' Charges on the standard basis in any event.**

11. **To the extent that any costs of the application are not dealt with by orders 9 and 10, those costs be costs in the proceedings.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT – where the plaintiff was a subcontractor to the first defendant in relation to a building project – where the plaintiff alleges it is owed money by the first defendant for completing work under the subcontract – where the plaintiff gave the first defendant two notices of claim of charge under the *Subcontractors' Charges Act* 1974 (Qld) – where the first defendant alleges that the plaintiff is not licensed to perform the work under s 42 of the *Queensland Building and Construction Commission Act* 1991 (Qld) – where the first defendant alleges the sums said to be due are not secured by a charge under the *Subcontractors' Charges Act* 1974 (Qld) – whether the first defendant should be awarded summary

judgment on the basis that the plaintiff's work was "structural" work within the meaning of s 42 of the *Queensland Building and Construction Commission Act* 1991 (Qld) – whether the first defendant should be awarded summary judgment on the basis that the plaintiff's statement of claim was insufficient to enforce the purported charges

Subcontractors' Charges Act 1974 (Qld), s 10, s 15
Queensland Building and Construction Commission Act 1991 (Qld), s 42
Uniform Civil Procedure Rules 1999 (Qld), r 293

Re Galaxy Investments Pty Ltd (in liq), unreported, White J, SC No 152 of 1992, 17 August 1993

COUNSEL:	B Codd for the applicant/first defendant S Hogg for the respondent/plaintiff No appearance from the second defendant
SOLICITORS:	DWF (Australia) for the applicant/first defendant Sajen Legal for the respondent/plaintiff No appearance from the second defendant

BACKGROUND FACTS

[1] The commercial relationships between parties in this proceeding reflect common relationships in modest size building projects. The second defendant, Bundaberg Regional Council, was the principal in a contract with the first defendant, MAW Group (Aust) Pty Ltd, for the construction of the Bundaberg Multiplex, a sporting complex to be built in Bundaberg. The plaintiff was a subcontractor to the first defendant in respect of that project. There are a number of other subcontractors. The particular subcontract between the plaintiff and the first defendant was, in general terms, for the carrying out of metal roofing and wall cladding works.

[2] The plaintiff pleads that the subcontract was varied in some respects in respect of practical completion and similar matters, that the work was completed and the plaintiff is still owed $189,602.13 under the subcontract.

[3] The plaintiff gave two notices of claim of charge under the *Subcontractors' Charges Act* 1974 (Qld). The first was dated 6 February 2017 and claimed an amount of $140,811.65, for works carried out by the claimant pursuant to the subcontract agreement in this case. It contained, in Annexure A, a series of invoices identified and payments made which were said to and appeared to sustain the amounts said to be owing.

[4] That was, it seems to me, a fairly modest attempt at complying with the obligations under s. 10 of the *Subcontractors' Charges Act*. In particular, s. 10(1)(a), requires the notice to specify the amount and particulars of the claim certified as prescribed by a qualified person. However, no point is taken about that.

[5] That notice of claim of charge was never the subject of a proceeding under s. 15 to enforce the charge, a fact accepted by the plaintiff's current representatives, and it is not pressed as a valid charge. The statement of claim (not pleaded by current counsel) pleads a charge on 1 February 2017 in quite different terms, but there is no suggestion now that any such charge exists.

[6] The plaintiff delivered a second notice of claim of charge to the first defendant in respect of the subcontract on 17 March 2017. In that notice of claim of charge the amount of $48,691.97 was claimed. That was a claim for work carried out by the claimant pursuant to the subcontract, as set out in Annexure A to that notice. The notice identified dates when the work was said to have been carried out. The period identified was from 15 February 2016 to 28 February 2017, a period distinct from that which was the subject of the 1 February 2017 notice of claim of charge. It contained, again, a modest form of vouching for the purposes of s. 10, which identified a series of invoices which, with GST, totalled the amount claimed.

[7] On 4 April 2017 the plaintiff commenced proceedings. Those proceedings are important, because although they have been since amended, the form of the proceeding as brought is relevant to identifying whether the proceeding has been commenced to enforce the charge within the one-month period specified in section 15 of the *Subcontractors' Charges Act*. The first defendant accepts that the plaintiff commenced proceedings within one month of the 17 March 2017 notice of claim of charge being given.

PLEADINGS

[8] The 4 April 2017 statement of claim, after reading some parts of the subcontract, said this:

> *5. Pursuant to the Subcontract the plaintiff performed the Works from May 2016 to February 2017.*
>
> *6. Pursuant to the subcontract, the plaintiff issued monthly payment claims and related invoices for the Works for the first defendant ... totalling $662,818.95.*
>
> *7. The first defendant assessed each payment claim and made progressive payments to the plaintiff in partial reduction of the debt owing to it for the Works so that at the date of this claim an amount of 189,602.13 is currently due and owing to the plaintiff for the Works.*
>
> *8. In breach of the subcontract the first defendant has failed, refused or neglected to pay the plaintiff the balance sum of $189,602.13 for the Works.*

[9] The pleading then went on to attempt to plead the claim of charge in respect of two notices of claim of charge:

> *9. At all material times:*
>
> *(a) the plaintiff was a "subcontractor" within the meaning of the* Subcontractors' Charges Act *1974 as amended) ("Act");*

(b) the first defendant was a "contractor" within the meaning of the Act;

(c) the second defendant was an "employer" within the meaning of the Act;

(d) the Subcontract constituted a "contract" within the meaning of the Act;

(e) the Head Contract constituted a "contract" within the meaning of the Act;

(f) the plaintiff was required to undertake "work" within the meaning of the Act.

10. On or about 1 February 2017:

(a) the plaintiff gave notice of claim of charge to the second defendant in the sum of $272,729.62 (including GST), being the sum then owing by the first defendant to the plaintiff for Works done on the Site (including retention), in respect of money that was then or would become payable by the second defendant to the first defendant pursuant to the Head Contract;

(b) the plaintiff gave notice to the first defendant of such claim of charge being given in relation to the monies owing;

(c) monies were then payable or, alternatively, thereafter became payable, by the second defendant to the first defendant pursuant to the Head Contract; and

(d) on 6 February 2017 the first defendant paid to the plaintiff the sum of $95,684.44.

11. On or about 17 March 2017:

(a) the plaintiff gave notice of claim of charge to the second defendant in the sum of $48,691.97 (including GST), being the sum then owing by the first defendant to the plaintiff for Works done on the Site (including retention), in respect of money that was then or would become payable by the second defendant to the first defendant pursuant to the Head Contract;

(b) the plaintiff gave notice to the first defendant of such claim of charge being given in relation to the monies owing;

(c) monies were then payable or, alternatively, thereafter became payable, by the second defendant to the first defendant pursuant to the Head Contract; and

(d) no sum has been paid to the plaintiff by the first defendant or second defendant in whole or partial discharge on the said charges.

12. In the premises, the plaintiff is entitled to a charge on all monies including retention money payable or to become payable to the first defendant by the second defendant under the Head Contract.

> *13. Pursuant to section 11 or, alternatively, section 12 of the Act, the second defendant is liable to pay to the plaintiff the sum of $189,602.13 including GST as per paragraph 7 hereof.*
>
> *14. On 17 March 2017 pursuant to section 11(5) of the* Subcontractors' Charges Act *1974 (Qld) the Second Defendant paid into the Brisbane Magistrates Court an amount of $233,530.50 in relation to Brisbane Magistrates Court Registry Matter No. M1165/17.*
>
> *15. The plaintiff says that, as pleaded above, it is entitled to be paid the sum of $189.602.13 from those monies paid into Court.*

[10] As noted in [5] above, the notice of claim of charge pleaded in paragraph 10, at least in those terms, does not exist.

[11] It is to be noted in respect of the 17 March 2017 charge (**the March charge**), the statement of claim accurately pleads that the notice of claim of charge was in respect of the amount of $48,691.97. It then goes on to allege that that sum was the sum then owing by the first defendant to the plaintiff for works done on the site in respect of money that was then or would become payable by the second defendant to the first defendant pursuant to the head contract.

[12] I also note that paragraph 13 of the statement of claim articulates, consistent with paragraph 7, that the amount owing under the subcontract at the date of the pleading was $189,602.13. I also note an assertion that the plaintiff is entitled to be paid that amount from money paid into court by the second defendant.

[13] It is not in dispute that the second defendant paid sums into court in response to various notices of claim of charge given in respect of these works.

[14] It is convenient at this point to identify what has happened. Mr Weller, the managing director of the first defendant, swears that various notices given in respect of the project, which he identifies in his affidavit of 10 July 2019 at paragraph 44, are notices of claim of charge by other subcontractors. I interpolate that such notices of claim of charge should be served on him so it is reasonable to infer, so long as he has not overlooked anything, that that is accurate.

[15] Mr Weller notes that the second defendant paid a total amount of $255,751.25 in two instalments into court in Magistrates Court proceedings M1465 of 2017. He also identifies that a total of $66,247.63 has been paid out of court. The balance therefore, probably not coincidentally, is the amount claimed in both the original and amended statement of claim, some $189,000.

[16] The statement of claim was amended in March 2019. I agree with the submission of Mr Codd for the first defendant, which I do not think was cavilled with by Mr Hogg for the plaintiff, that when assessing whether s. 15 of the *Subcontractors' Charges Act* has been complied with, the question has to be considered from the perspective of the statement of claim as originally filed.

[17] The amended statement of claim, however, articulates quite clearly, in my view, that a written subcontract was entered into on 22 June 2016. In paragraph 7, the statement of claim alleges a variation to that contract, arising out of oral discussions

relating to the date for practical completion. Although on one view of it, that paragraph reads also somewhat like a prevention principle pleading.

[18] Either way, the allegation of the variation in respect of practical completion in its current form is, to use the old phrase, embarrassing. It is unclear whether the variation happened before or after the parties entered a contract which has been pleaded as being a contract in writing.

[19] This has a tendency to prejudice or delay a fair trial because the first defendant is not able to assess how the law of contract would apply to that allegation. Mr Hogg accepted that defect in paragraph 7 and I ought therefore to order that paragraph 7 of the amended statement of claim be struck out. This is not to say that the circumstances that underpin paragraph 7 cannot be pleaded in some way which is technically correct as a matter of law. However, in its current form it is not. The amended statement of claim otherwise did not materially alter the issues that arose on the original statement of claim.

[20] The defence raised a number of matters. Of particular relevance to this application are the following.

[21] **First**, the first defendant alleged that there was no entitlement to payment under the contract and no subcontractors' charge could arise, because the subcontract was unenforceable at the instance of the plaintiff because it was unlawful under s. 42(1) of the *Queensland Building and Construction Commission Act* 1991 (Qld) (**QBCC Act**). The substance of the submission was that the plaintiff held a low-rise builder's licence which authorised them, in broad terms, to work on low-rise buildings as long as the work was not structural work.

[22] The first defendant alleged that part of the work contained in the scope of works was structural work because, amongst other things, it involved external works which, at the least, had the role in the building of resisting lateral forces such as wind and so on, and that some of the work had load-bearing characteristics. That was, in short compass, the complaint about the unenforceability of the contract at the instance of the plaintiff.

[23] **Second**, the first defendant also alleged that the second charge was invalid because the statement of claim, as originally pleaded, was not effective to be a proceeding to enforce the charge, because, amongst other things, it failed to articulate the basis in contract for the entitlement to the sum the subject of the charge. (I will ignore the first charge in the pleading, for reasons I have given already.).

[24] The pleadings thereafter included the usual array of claims in contract and claims for liquidated damages and so on that one sees when parties to a building contract are in dispute. It is unnecessary for the purposes of this proceeding to say more about them. They do not arise on this application.

[25] In those circumstances the first defendant brought an application for summary judgment on the claim by the plaintiff against it and on its own counter-claim. It also sought a declaration that the plaintiff was not entitled to either of the charges and sought consequent relief in the circumstance where the plaintiff's claim was

dismissed on a summary basis, or the subcontractors' charges were invalid for payment out of the money remaining in court, paid in by the second defendant.

[26] It sought in the alternative to strike out various paragraphs of the amended statement of claim. I have dealt with paragraph 7 of the statement of claim at [18] above, and the fate of the others will be a consequence of my ruling on the summary judgment application.

THE UNLICENSED WORK ISSUE

[27] The first point which arises on the application is whether I am able, to the standard required under r. 293 of the *Uniform Civil Procedure Rules* 1999 (Qld), to conclude that there is no real prospect of the plaintiff succeeding on the claim because, in respect of the first matter, no claim can arise under the contract because the work under the contract included work which was unlicensed work under s. 42 of the QBCC Act.

[28] There was a significant amount of work done and material put before me about this matter. It is unnecessary, in my respectful view, for me to give long reasons as to why I intend to dismiss the application, to the extent it is brought in reliance on the unlicensed work point.

[29] Suffice it to say, it seems to me to give rise to substantial factual questions as to whether and to what extent the work under the subcontract was structural work within the meaning of that word, where it appears in the particular licence the subject to the proceedings. I will say this much: Mr Codd put before me a number of cases dealing with the meaning of the word "structure" and "structural". I did not find any of them to be decisive in respect of this matter. It is my melancholy experience of this Act and its extensive regulations and schedules, that is difficult to give the same word the same meaning in different parts of the Act and the regulations without giving rise to constructions which are plainly not intended by Parliament.

[30] The most important question for construing this particular licence and the word "structural" where it appears, arises from the character of the licence itself. In those circumstances it seemed to me to be quite open for there to be considerable debate about what the word "structural" might mean. The question did not seem to me to be able to be resolved by ordinary dictionary definitions of structural.

[31] Mr Hogg's client relied on opinion evidence as to the meaning that can be given in the building industry of the word "structural". Mr Codd opposed me receiving that evidence. Ultimately I was not persuaded that I was unable to consider that evidence, because in construing the meaning of the word, especially where it is obvious its plain ordinary dictionary meaning did not seem to be appropriate on any view, I may well be assisted by understandings of the word in the building industry.

[32] Mr Codd submitted that it would not be appropriate to consider this evidence, given that the statute is intended to be understood and to protect non-builders as well as builders. The difficulty with that as a fundamental proposition of construction is that the regulations that identify the licence categories are replete with words that

ordinary people would not understand and whose meaning can only be understood in the context of the building industry.

[33] In any event, even if construing an ordinary meaning of the word "structural" could be done without expert assistance, the question of whether particular work was or was not structural would also, itself, need to be the subject of expert opinion.

[34] The first defendant has its own expert. In very broad terms, the difference between the experts' views is that "structural" can mean, according to the plaintiff's expert, parts of the building which bear gravity resisting load, while the first defendant's expert says that the definition goes beyond that and extends to lateral loads like wind loads. It may be that that is the better construction, but even if it is, the question then comes down to whether the work the subject of the scope of works necessarily involves structural work of that kind.

[35] Mr Codd sought to cross-examine the expert witness for the plaintiff. That is not an appropriate course to take on a summary judgment application of this kind. There is no absolute rule that leave will not be given to cross-examine on a summary judgment application. However, ordinarily on summary judgment an applicant must take the respondent's case at its highest. No good reason was proffered as to why a different approach should be taken in this case.

[36] Further, in my experience it is very difficult to be sure what the correct result is in cases like this without a trial and the time for analysis and understanding of the evidence that comes with a trial. Drawing on that experience, even if I thought Mr Codd's point seemed a strong one, which frankly at this stage it does, this would still be the sort of case where the discretion to deal with the matter at a trial would call to be exercised. I am not suggesting we are in that territory; however, I am just not satisfied there is no real prospect of making out that this work was not outside the scope of the licence.

[37] Having reached that conclusion, it is unnecessary to deal with the following issue, but I should mention it. Some of the work said to be of a structural character was the work installing top hats and girts. Top hats seem to be a kind of batten. The affidavit evidence raised for the first time, as far as I can tell, the proposition that the work involving 61 millimetre top hats and girts was agreed in the course of negotiating the contract, to be omitted from the contract scope. It also looks like 40 millimetre top hats were installed and, if that were the case, there seems to be an argument that they are structural work in the same way as 61 millimetre top hats are said to be.

[38] I note this issue because it is relevant to the identification of the scope of the contract and one cannot be sure as to how that would play out at trial. Mr Hogg has indicated that the plaintiff intends to plead a rectification case in relation to the exclusion of the 61mm top hats. The point which Mr Hogg made, I should say pithily, in his submissions was that the plaintiff's expert's evidence that none of the work in the scope of works was structural was given based on the scope of works, without regard to the elimination of the 61 millimetre top hats and girts and, if this is what has happened, their replacement with 40 millimetre top hats. It is therefore evident that the plaintiff has not yet brought forward its whole case on this issue.

[39] That seems to me to dispose of the application for summary judgment on the defence, to the extent it relied on the unlicensed work point.

[40] I should say, however, that my preliminary view was that if Mr Codd's client had persuaded me that the work was structural work, the other propositions he advanced in his submissions on law seemed to me to have merit. These propositions included that the entire contract is unenforceable unless it is severable, and this contract was not severable because it was an entire agreement.

SUBCONTRACTORS' CHARGE ISSUE

[41] Mr Codd's client also seeks summary judgment on that part of the defence which asserts that the sums said to be due under the contract are not secured by a charge under the *Subcontractors' Charges Act* and therefore money paid into court in respect of that charge should be paid back to his client.

[42] That argument focused on the notion that the statement of claim as originally filed failed to be, on its face, a proceeding to enforce the March 2017 charge. I agree with that submission. The main reason is that the pleading nowhere asserts, at the date of the pleading, that the items of work the subject of the March 2017 notice of charge remained outstanding and that the sum of $48,691.97 claimed in respect of that work remained due and owing.

[43] That seems to me to be fatal. Section 15 requires the subcontractor to commence a proceeding to enforce the charge. The charge is that which arises from the notice of claim of charge, which is made clear in s. 15(1), if nowhere else. The notice of claim of charge was given in the context of s. 10. This section, as I have noted, requires a notice of claim of charge to specify the amount and the particulars of the claim that give rise to the asserted charge. Section 10 relevantly provides:

> *(7) To remove any doubt, it is declared that a subcontractor may make 2 or more claims in relation to money payable or to become payable to the subcontractor for work done by the subcontractor under a subcontract.*
>
> *(8) However—*
>
> *(a) each claim must be about a specific and distinguishable item of the work done by the subcontractor under the subcontract; and*
>
> *(b) there must not be more than 1 claim about any 1 item.*

[44] It can be seen from those provisions that a notice of claim of charge gives rise to a charge for a specific sum in respect of identified work. If one is to commence a proceeding to enforce that charge, it must be the charge as articulated and identified in the notice of claim. Sections 10(7) and (8) require, as a matter of substance, the pleading to identify that the sum claimed for the items identified remains due and owing. That must be so because it is entirely possible that a notice of claim of charge could be given for items X, Y and Z, and then a proceeding commenced a month later, in which the claimant realises that item X was not truly owing and that he or she had overlooked that item Y had earlier been omitted from the works, such that only item Z is properly the subject of the proceedings.

[45] The statement of claim does not meet that requirement. In paragraph 11, it deals with the March charge. Paragraphs 11(a)-(d), which I have already set out, plead the matters which are said to allege that the charge has arisen. What they do not say anything about, however, is whether there is, in fact, a claim made in the statement of claim for the items of work the subject of the March charge.

[46] Mr Hogg, in a rear-guard action, tried to persuade me that the pleading was sufficient for two reasons.

[47] **First**, he said the identification of the particular items of work could be seen to be a question of particulars such that, where the pleading claims a total amount of $189,602.13, it is only a matter of particularity to identify the items that are the subject of the notice of claim.

[48] I disagree that on the face of this pleading that would just be a matter of particulars. It might be so if the pleading's sufficiently articulated even in the barest manner, that the items of work identified in the notice of claim of charge that gave rise to the charge remained outstanding and the sum due remained payable, but it does not do that.

[49] Even if paragraph 13 of the statement of claim had said that the second defendant is "liable under the subcontract to pay the plaintiff the sum of $189,602.13, including $48,691 for the items the subject of the notice of charge", that might have been enough, but it does not say any such thing.

[50] There is no allegation on the face of the pleading that the amount and items the subject of the March 2017 notice of charge remain outstanding under the subcontract.

[51] **Second**, Mr Hogg also sought to rely on some of the facts in paragraph 11 of the statement of claim. However, those facts relate to the circumstances at the time of issue of the charge. They are not allegations which identify sums claimed in the proceeding which link them in any way to the amounts in paragraph 11.

[52] This is, I accept, a fairly technical reading of the Act. Courts in this State have been conscious of the consequences for subcontractors of technical readings of the Act and have consistently asserted that the Act must be strictly complied with because it creates for subcontractors proprietary interests that otherwise do not arise. A dated but convenient example is *Re Galaxy Investments Pty Ltd (in liq)*, unreported, White J, SC No 152 of 1992, 17 August 1993 at 9-10.

[53] That case was to hand because it is another example in which failure to plead the contractual basis for an amount necessary to be proved to give rise to the charge was fatal, such that s. 15(3) was not complied with and the charge was invalid.

[54] That case arose in slightly different circumstances. A claim had been made and the assertion was made that money was payable as retention money from the principal to the head contractor. However, no facts were pleaded to show that the retention money was actually owing, and that, her Honour said, was fatal.

[55] This case is not the same as that because here the claim in respect of the charge is not asserted beyond the amount that was paid into court in respect of it, but the

principle remains the same. The pleading which seeks to enforce the charge must adequately, at a minimum, advance a claim under the subcontract for the items of work that gave rise to the notice of charge. It must plead the work that is subject to the notice of charge and the amount claimed.

[56] Mr Codd also submitted that the statement of claim failed to assert an entitlement to a charge. I do not have to decide that, but I should say I do not agree. I do not think a declaration is necessary. Each pleading has to be interpreted against the requirements of the statute, and here where a charge is pleaded, it is pleaded that an amount was paid into court, it is pleaded that an amount remains in court, paid under a charge, and a claim is made for that amount to be paid out to the subcontractor. That seems to me to be, in substance, asserting the proprietary right recognised by s. 5 of the Act; however, that is by way of obiter, because Mr Codd has persuaded me in respect of his first point.

CONCLUSION

[57] The consequence, then, is that I dismiss the application for summary judgment on the defence, to the extent it relates to the question of the part of the claim relating to the alleged unlicensed work. I grant the application for summary judgment on the defence, to the extent it relates to the part of the claim disputing the existence or validity of any subcontractors' charge. The consequence of that is, it seems, that the remaining sum in the Magistrates Court of $189,602.13 should prima facie be paid to the first defendant.

[58] Unfortunately the second defendant is not here. However, bearing in mind Mr Weller's evidence and the fact that a reasonable period of time has passed since completion of the project, I propose to deal with that by ordering the payment out from the Magistrates Court, by authority of this court, the balance that is there and staying that order for 21 days.

[59] I order that notice of my order be given to the second defendant forthwith, and order that the second defendant has leave to apply to vary or otherwise be heard on the order within 14 days. If any such application is made it can be made to my Associate and I will arrange for its prompt hearing.

[60] In respect of costs I order that the first defendant pay the plaintiff's costs of the application, to the extent it relates to the unlicensed work issue, on the standard basis, in any event.

[61] I order that the plaintiff pay the first defendant's costs of the application, to the extent it relates to the Subcontractors' Charge issue, and the costs of the proceedings in respect of the Subcontractors' Charge issue, in any event.

[62] Finally, I order that costs of the application that are not dealt with by those orders are costs in the proceedings.