IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CIVIL DIVISION
BUSINESS LIST
BUILDING CASES DIVISION

Not Restricted

Case No. CI-06-01208

BRADY CONSTRUCTIONS PTY LTD
(ACN 055 285 259) Plaintiff

v

DOMINION LIFESTYLE TOWER APARTMENTS PTY LTD
(ACN 102 850 000) Defendant

JUDGE:	HIS HONOUR JUDGE SHELTON
WHERE HELD:	Melbourne
DATE OF HEARING:	22nd and 24th August 2006
DATE OF JUDGMENT:	29th September 2006
CASE MAY BE CITED AS:	Brady Constructions Pty Ltd v Dominion Lifestyle Tower Apartments Pty Ltd
MEDIUM NEUTRAL CITATION:	[2006] VCC 1830

REASONS FOR JUDGMENT

Catchwords: *Building and Construction Industry Security of Payment Act* 2002, Sections 14, 15, 18, 25, 27 and 42 – Summary Judgment Application – Accord and satisfaction – *Domestic Building Contracts Act* 1995, Sections 54 and 57.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr A Schlicht	Brendan J Archer
For the Defendant	Mr A Kincaid	Freehills

HIS HONOUR:

1 Submissions in this somewhat complex interlocutory matter lasted for several hours. In the course of these submissions, I made some orders and indicated I would give my reasons for those orders at a later time. These are those reasons.

2 In addition, I reserved on some matters before me, and I now proceed to give judgment on these matters.

3 The main application before me is the hearing of the plaintiff's Summons dated 18 May 2006, seeking summary judgment pursuant to Rule 22.02 of the *County Court Rules*.

4 The approach to be adopted on the hearing of such an application is succinctly stated in *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, at 89, where the Court stated:

> ""The power to order summary or final judgment is one that should be exercised with great care. It should never be exercised unless it is clear that there is no real question to be tried."

5 The summary judgment application is put on alternate bases. Before considering those, it is necessary to give some background.

Background

6 It is not in dispute that on 11 August 2004, the plaintiff and the defendant entered into a contract, pursuant to which the plaintiff agreed to design and construct sixty residential apartments and associated car parking and ground floor commercial area at 285 City Road, Southbank for the defendant for the Contract price of $15,947,000.00. ("the Contract"). General conditions of contract for design and construct (AS4300-1995) ("the General Conditions") formed part of the Contract.

7 On 31 January 2006, the plaintiff served on the defendant a payment claim

pursuant to s.14 of the *Building and Construction Industry Security of Payment Act* 2002 ("the *Act*") for the sum of $1,644,668.43. On 7 February 2006, a mediation was held, at which representatives of the plaintiff and defendant attended.

8 At the conclusion of the mediation, a representative of the plaintiff dictated an agreement which was signed on behalf of both parties. It stated:

> "**Re: 285 City Road, Southbank Victoria**
>
> 1. The sum of $1.9 million dollars (plus GST) is to complete the works at 285 City Road, Southbank.
>
> 2. Scheduled date of completion is now 28.2.2006.
>
> 3. If the site is not fully handed over a LD penalty of $6000.00 will be applicable per day until PC.
>
> 4. All parties to cease current litigation and execute all documents needed to do so, and each party to bear their own cost[s].
>
> Variation Claims & Extension Time
>
> All current variations and extension of time claims lodged by either party are deemed to be satisfied by the adjustments complimented [sic] by this agreement.
>
> No further variations will be lodged by either party unless an explicit agreement is made between either party.
>
> Dominion Lifestyle Tower Apartments Pty Ltd agree to grant a licence agreement from the date of the Certificate of Occupancy to Tony Brady as purchaser of (3) apartments.
>
> Signed on the 7th day of February 2006."
>
> *("The February Agreement")*

9 Unfortunately, the February Agreement did not resolve matters in dispute between the plaintiff and defendant. There was dispute between them as to the precise meaning of the February Agreement. On 14 February 2006, the plaintiff lodged a payment schedule pursuant to s.15 of the *Act*, indicating that it proposed to make payment in the sum of $549,428.00.

10 On 21 February 2006, the plaintiff made application pursuant to s.18 of the *Act* to the Australian Institute of Building, an authorised nominating authority

pursuant to s.42 of the *Act*, for the appointment of an adjudicator. An adjudicator was appointed and handed down a determination on 10 March 2006, in favour of the plaintiff, in the sum of $537,445.15.

11 On 16 March 2006, following a meeting of representatives of the parties, the parties entered into a further agreement, which is dated "16/3/05". It is not in dispute that this agreement was in fact entered into on 16 March 2006. Again, it was signed on behalf of both parties. It states:

> "Brady Construction indemnifies Dominion Apartments if purchasers reject stone benchtops, Bradys will replace the apartments rejected within a four week period after letter to acknowledge this applies to the pre-sale apartments. Brady withdraws adjudication detrimental of $540K which has the security payment due under the SOPA Act. In lue [sic] of these conditions Dominion will pay the remaining balance of the $1.900000 + G.S.T. on receive [sic] practical completion 'P.C.' Certificate. Which will be within the next 2 working days of the above date."
>
> *("The March Agreement")*

12 Unfortunately, and as appears particularly obvious in the case of the March Agreement, legal assistance was not sought in the drafting of either agreement. Had it been, a considerable amount of time and expense would have been saved.

13 Payments were made by the defendant to the plaintiff on 27 March 2006 and 4 April 2006, leaving a balance outstanding from the adjudicator's determination of $200,413.95. Included in this sum is $2,413.95, a half share of his fees, which the adjudicator determined was payable by the defendant. The plaintiff's claim is for the jurisdictional limit of $200,000.00 and it abandons its claim for the sum of $413.95. The sum of $198,000.00, being the sum of $200,413.95 less the sum of $2,413.95, is the sum of $180,000.00, being liquidated damages for the period from 22 December 2005 to 20 January 2006, at the rate of $6,000.00 per day plus GST of $18,000.00. The Superintendent, under clause 35.6 of the General Conditions, issued a Notice dated 20 January 2006, setting out this amount of liquidated damages. This

sum was then deducted by the defendant from a progress payment. The adjudicator determined that these liquidated damages were not payable by the plaintiff.

First Basis of Summary Judgment Application

14 The plaintiff seeks summary judgment for the sum of $200,000.00 pursuant to s.27 of the *Act*.

15 The defendant resists the summary judgment application on the basis that there is a question to be tried as to whether the March Agreement constitutes an accord and satisfaction.

16 *Cheshire and Fifoot's Law of Contract* (Eighth Australian edition) states, at page 184:

> "A compromise agreement falls into two, or possibly three classes. The first is termed 'accord executory' which is in the form of a unilateral contract whereby the plaintiff promises to abandon a claim in exhange for the defendant doing something. The second type of compromise agreement is termed 'accord and satisfaction' whereby the plaintiff promises to abandon the claim in exchange for the defendant *promising* to do something. The significance of the distinction arises when the defendant fails to do what is required and the effect this has on the original cause of action or complaint that is being settled. In the case of an accord executory, where the defendant fails to perform the requested act, the plaintiff's original rights continue on and can be enforced. In the case of an accord and satisfaction, the plaintiff has foregone his or her original rights and can only enforce the settlement agreement. There is the possibility of a third category whereby the parties make an accord and satisfaction that is conditional, that is, the plaintiff only abandons his or her rights so long as the defendant carries out her or his promise but, failing that, the plaintiff's original rights can still be enforced."

17 In *Soufflet Beheer v AWB Ltd* [2006] FCA 51, Kenny J, stated, at paragraphs 58 and 59:

> "Phillips JA (with whom Winneke P and Charles JA agreed) provides an excellent outline of the relevant principles in *Osborn v McDermott* [1998] 3 VR 1 ("*Osborn*"). As Phillips JA explains, the fundamental distinction between accord executory and accord and satisfaction is that 'the former does not operate to discharge existing rights and duties unless and until the accord is performed, whereas the latter operates as a discharge immediately the accord (or agreement) is achieved': *Osborn* at 7–8. Accord and satisfaction is the compromise of an existing cause of action in return for a promise while accord executory requires that something

be done before the cause of action is compromised.

> Somewhere between accord and satisfaction and accord executory 'is the accord and conditional satisfaction, which exists where the compromise amounts to an existing and enforceable agreement between the parties for performance according to its tenor but which does not operate to discharge any existing cause of action unless and until there has been performance': *Osborn* at 10."

18 Mr Kincaid, who appeared on behalf of the plaintiff, submitted that the March Agreement constituted an accord and satisfaction, while Mr Schlicht, who appeared for the plaintiff, submitted that it did not.

19 In *El-Mir v Risk* [2005] NSWCA 215, McColl JA, with whom Handley and Ipp JJ.A agreed, stated, at paragraph 54:

> "The question whether there has been an accord and satisfaction is one of fact . . . It turns upon determining the parties' intentions, which may be discerned from the terms of any document said to constitute all or part of the agreement or in the surrounding circumstances."

20 In *Osborn v McDermott*, the Court held that there was accord executory. By contrast, here, on a proper construction of the March Agreement, it is, in my view, arguable that the plaintiff is promising to abandon its claim under the adjudicator's determination in return for a promise by the defendant to pay the sum of $1.9 million plus GST upon receiving a Certificate of Practical Completion under the Contract.

21 Since accord and satisfaction gives rise to a fresh agreement, it must be supported by consideration. In *El-Mir v Risk,* McColl JA held, at paragraph 69, that the settlement reached there was capable of being construed as mutual promises by the parties to forbear from pursuing their respective rights which would fulfil the requirement of consideration. Here, in my view, it is arguable that there are such mutual promises, with the plaintiff forbearing to pursue its rights under the *Act*, while a possible interpretation of the March Agreement is that the defendant forbore to exercise any rights it had in respect of the stone bench tops and not to lodge security for payment pursuant to s.25(1)(b) of the *Act.* It was within time to do this pursuant to

s.27(1)(b) and (6)(a) of the *Act,* since 10 March 2006 was a Friday and the following Monday, 13 March, was a public holiday throughout Victoria (see definition of "business day" in s.4 of the *Act*). 16 March 2006 was the third business day after the date of the adjudicator's determination.

22 In my view, it is certainly arguable that the March Agreement constituted an accord and satisfaction. There is thus a real question to be tried on this issue. I therefore concluded that the plaintiff was not entitled to summary judgment on this basis.

Defendant's Stay Application

23 The plaintiff, in its Amended Statement of Claim dated 15 June 2006, claims, in paragraphs 11 to 16, the sum of $198,000.00 pursuant to the February Agreement and the March Agreement. These paragraphs read:

> "11 Further and in the alternative by agreement made 7 February 2006 the Plaintiff and Defendant agreed as follows:
>
> (a) the sum of $1,900,000.00 plus GST was the amount owing to the Plaintiff by the Defendant for the completion of the works under the contract ('the sum due');
>
> (b) the scheduled date for practical completion is 28 February 2006:
>
> (c) a liquidated damages penalty of $6,000.00 per day will be applicable after the date for practical completion;
>
> (d) all parties to cease current litigation and execute all documents needed to do so ('the February agreement').
>
> **PARTICULARS**
>
> The February agreement is in writing and dated 7 February 2006. A copy of the agreement is available for inspection in the offices of the Plaintiff's solicitor by appointment
>
> 12 By further agreement dated 16 March 2006 the Plaintiff and Defendant agreed, inter alia:
>
> (a) the Plaintiff would not enforce the adjudicated amount or its remedies pursuant to the Act;
>
> (b) the Defendant would pay the sum due that remained outstanding on receipt of a practical completion certificate

('the March agreement').

PARTICULARS

The March agreement is in writing and dated 16 March 2006. A copy of the agreement is available for inspection in the offices of the Plaintiff's solicitor by appointment.

13 A certificate of practical completion was issued on 17 March 2006 giving the date of practical completion as 3 March 2006.

PARTICULARS

The certificate is in writing and dated 17 March 2006. A copy of the certificate is available for inspection in the offices of the Plaintiff's solicitor by appointment.

14 Pursuant to the February agreement and/or the March agreement the following payments were made in part satisfaction of the sum due as follows:

	Paid Ex GST	GST Paid	Paid Incl GST
Paid 13/02/06	$616,978.00	$61,698.00	$678,676.00
Paid 27/03/06	$1,082,530.00	$108,253.00	$1,190,783.00
Payment 04/04/06	$20,492.00	$2,049.00	$22,541.00
Total:	**$1,720,000.00**	**$172,000.00**	**$1,892,000.00**

15 Accordingly, there is an outstanding balance on the sum due as follows:

	Ex GST	GST	Total
Sum Due	$1,900,000.00	$190,000.00	$2,090,000.00
Sum Paid	$1,720,000.00	$172,000.00	$1,892,000.00
Total:	**$180,000.00**	**$18,000.00**	**$198,000.00**

16 By reason of the foregoing, the Defendant is indebted to the Plaintiff in the amount of $198,000.00."

24 By Summons dated 17 August 2006, the defendant seeks a stay of the proceeding, so far as it is pleaded in these paragraphs, pursuant to s.57 of the *Domestic Building Contracts Act* 1995 ("the *DBC Act*"). S.57 of the *DBC Act* provides:

"**Tribunal to be chiefly responsible for resolving domestic building**

disputes

(1) This section applies if a person starts any action arising wholly or predominantly from a domestic building dispute in the Supreme Court, the County Court or the Magistrates' Court.

(2) The Court must stay any such action on the application of a party to the action if—

(a) the action could be heard by the Tribunal under this Subdivision; and

(b) the Court has not heard any oral evidence concerning the dispute itself."

25 The question arises as to whether the plaintiff's action, as pleaded in paragraphs 11 to 16, arises "wholly or predominantly from a domestic building dispute". If so, I have no discretion in the matter and it must be stayed. S.57(2) of the *DBC Act* raises no issues. A "domestic building dispute" is defined in s.54(1) of the *DBC Act*, so far as is relevant, as:

"a dispute or difference arising –

(a) between a building owner and –

(i) a builder

. . . in relation to a domestic building contract or the carrying out of domestic building work".

26 "Domestic building contract" and "domestic building work" are defined in Sections 3, 5 and 6 of the *DBC Act*. It was not in dispute that the plaintiff was a builder and the defendant a building owner, that the Contract was a domestic building contract and that, pursuant to it, the builder was carrying out domestic building work. The real issue before me was whether the plaintiff had started an "action arising wholly or predominantly from a domestic building dispute".

27 Mr Kincaid referred me to several cases which considered the meaning of the words "in relation to".

28 As I indicated in the course of submissions, in my view, the action as pleaded in paragraphs 11 to 16 of the Amended Statement of Claim is, as a matter of

construction, based upon the February Agreement and the March Agreement, which were compromise agreements, rather than an action "arising wholly or predominantly from a domestic building dispute" whether regarded as arising in relation to the Contract or the carrying out of domestic building work. The action pleaded in paragraphs 11 to 16 is essentially for monies due under the February Agreement and the March Agreement.

29 Mr Kincaid sought to rely upon *Presser v Ocean View Properties Pty Ltd* [2006] VSC 143, where Habersberger J, stated, with respect to s.57(1) of the *DBC Act*, at paragraph 39:

> "Initially, it seemed to me that a possible construction of this part of s. 57(1) was that one looked only at whether or not the action as started by the plaintiffs arose from a domestic building dispute. Given my finding that it did, this would have been sufficient to require the granting of a stay. On further reflection, however, I consider that the correct construction is that one looks at the plaintiffs' action as a whole, including any subsequent claims against additional parties, at the time the application for a stay is made in order to decide whether the action started by the plaintiffs arose 'wholly or predominantly from a domestic building dispute.'"

As appears, I have considered the plaintiff's action at the time of the application, and, in my view, this decision is of no avail to the defendant.

30 I therefore refused the defendant's stay application.

Alternate Basis of Summary Judgment Application

31 In the alternative, the plaintiff bases its summary judgment application on the matters pleaded in paragraphs 11 to 16 of the Amended Statement of Claim. The sum claimed is $198,000.00, the same sum which was unpaid under the adjudicator's determination, apart from the adjudicator's fee of $2,413.95.

32 The defendant also opposes the application for summary judgment on this alternate basis. It alleges that it has a set-off by way of a claim for damages, being for liquidated damages and defective works, and claims that it should be able to raise these by way of defence to the plaintiff's summary judgment

application.

33 Rule 13.14 of the *County Court Rules* provides:

> "Where a defendant has a claim against a plaintiff for the recovery of a debt or damages, the claim may be relied on as a defence to the whole or part of a claim made by the plaintiff for the recovery of a debt or damages and may be included in the defence and set-off against the plaintiff's claim, whether or not the defendant also counterclaims for that debt or damages."

34 I consider, firstly, the claim for liquidated damages. The Superintendent determined that Practical Completion was achieved on 3 March 2006. The defendant contends that Practical Completion was not achieved until 6 March. It relies upon a letter from Origin Energy stating that the gas meter at 285 City Road, Southbank was not installed until 6 March 2006, and upon the definition of "Practical Completion" contained in clause 2 of the General Conditions, which, relevantly, provides:

> "(e) . . . the following requirements are necessary for Practical Completion:
>
> . . .
>
> (2) All services and installations performed as required by the terms of the Contract both under normal operating conditions and under simulated emergency operating conditions subject to any defects arising out of any tenancy fit-out work."

35 Mr Kincaid submitted that the gas could hardly be operating prior to installation of a gas meter.

36 In an affidavit affirmed on 10 July 2006, Ali Moustafa, a director of the defendant, states that the February Agreement does not accurately state the agreement reached between the parties on 7 February 2006. In particular, he states in paragraph 11 of his affidavit:

> "(a) Brady would achieve Practical Completion on or before 28 February 2006, with a three day grace period until 3 March 2006;
>
> (b) . . .
>
> (c) if Brady failed to achieve Practical Completion on or before 3 March 2006, then the whole deal would fall over and be of no force and

effect;

(d) if Brady failed to achieve Practical Completion on or before 28 February 2006, Dominion would be entitled to liquidated damages at the rate of $6,000 per day (this would provide Dominion with an entitlement of $18,000 liquidated damages if Brady achieved Practical Completion by 3 March 2006)."

37 The Date for Practical Completion under the Contract was 30 November 2005. The plaintiff claims for ninety six days liquidated damages from 30 November 2005 to 6 March 2006, at the rate provided for in the Contract of $6,600.00 per day, making a total of $633,600.00. From this is to be deducted the sum of $198,000.00 liquidated damages already withheld, leaving a net sum claimed to be outstanding by the defendant for liquidated damages of $435,600.00.

38 The plaintiff relies upon the Superintendent's Certificate of Practical Completion dated 17 March 2006, which certifies Practical Completion as having been achieved on 3 March 2006. It further relies upon a statutory declaration made on 7 March 2006 by Moustafa in proceedings before the Victorian Civil & Administrative Tribunal, where he states, in paragraph 26:

"As at the time of affirming this affidavit, the Superintendent has not certified Practical Completion. There is therefore currently no obligation upon Dominion to pay Brady any amount by way of settlement sum. In the event that the Superintendent certifies that Practical Completion was achieved on or before 3 March 2006, Dominion shall honour the agreement, the essential terms of which are recounted in paragraph 10 above."

39 Paragraph 10 of this statutory declaration is in identical terms to paragraph 11 of Moustafa's affidavit affirmed on 10 July 2006.

40 The plaintiff further relies upon the affidavit of Moustafa of 10 July 2006, where he states that an employee of the defendant, Steve Demir, was told by a sub-contractor, on or about 6 March 2006, that the gas supply had only been connected on that date. Demir was present at the meeting on 16 March 2006, and yet no reference is made to this issue of Practical Completion in the March Agreement. Demir is a signatory to the March Agreement.

41 The plaintiff submits that I should not accept Moustafa's contention that the February Agreement was subject to a condition precedent that Practical Completion was to be achieved by 3 March 2006, otherwise the February Agreement would be of no effect, particularly given that both the February Agreement and the March Agreement were signed by both Moustafa and Demir on behalf of the defendant.

42 While I have some sympathy with this submission, I am faced with the affidavit of Moustafa sworn 10 July 2006, which, if accepted, would afford the defendant a set-off which would extinguish the plaintiff's claim.

43 I further note that the plaintiff gave Notices of Dispute pursuant to clause 47.1 of the General Conditions disputing the Superintendent's determination that Practical Completion was achieved on 3 March 2006.

44 In all the circumstances, it appears to me that it is at least arguable that the defendant has a claim for liquidated damages in the net sum of $435,600.00.

45 That would be sufficient to dispose of the plaintiff's claim for summary judgment on the alternate basis. For the sake of completeness, however, I now deal with the defendant's set-off based upon defective workmanship.

46 The defendant relies, firstly, upon an invoice dated 23 August 2006, from National Plumbing and Irrigation Pty Ltd in the sum of $128,370.00 for the cost of rectifying alleged drainage defects. Secondly, it relies upon an estimate of the cost of rectification of alleged defective works provided by Mr Brett Rogers of Baracon Group Pty Ltd dated 14 June 2006, in the sum of $143,420.00. Included in this sum is an estimate for the rectification of the drainage defects of $90,000.00. Deducting this sum from $143,420.00 and adding the cost of rectifying drainage defects, gives a net figure of $181,790.00 claimed for defective workmanship.

47 The plaintiff relies upon the bank guarantee of $398,000.00 being held by the

defendant in lieu of retention pursuant to clause 5 of the General Conditions and submits that this sum, being in excess of the defendant's claim for the cost of rectifying defective workmanship, is sufficient cover for the defendant.

48 In response, Mr Kincaid referred to clause 37 of the General Conditions, which provides:

> "**Defects Liability**
>
> The Defects Liability Period commences at 4:00 pm on the Date of Practical Completion and continues for the period stated in Annexure Part A.
>
> As soon as possible after the Date of Practical Completion, the Contractor must rectify any defects or omissions in the work under the Contract existing at the Date of Practical Completion.
>
> At any time during the Defects Liability Period, the Superintendent may direct the Contractor to promptly rectify any omission or defect in the work under the Contract-existing at the-date-of-Practical which becomes apparent before the expiration of the Defects Liability Period. The direction must identify the omission or defect and state a date by which the Contractor must complete the rectification work and may state a date by which the rectification work must commence. The direction may provide that in respect of the rectification work in relation to the Specified Materials only, there will be a separate Defects Liability Period of a stated duration not exceeding the period stated in Annexure Part A. The separate Defects Liability Period commences on the date the rectification work is completed. This Clause 37 does apply in respect of the rectification work and the Defects Liability Period for that rectification work.
>
> If the rectification work is not commenced or completed by the stated dates, the Superintendent may have the rectification work carried out at the Contractor's expense, but without prejudice to any other rights that the Principal may have against the Contractor with respect to such omission or defect and the reasonable cost of the rectification work incurred by the Principal will be a debt due from the Contractor to the Principal.
>
> If it is necessary for the Contractor to carry out rectification work the Contractor must do so at times and in a manner which cause as little inconvenience to the occupants or users of the Works as is reasonably possible."

49 He submits that to be able to call upon the bank guarantee, the Superintendent must have exercised his discretion to direct the contractor to rectify defective works, that the plaintiff did not carry out such works, that the defendant had these works carried out by others and that then, under clause

37, “the reasonable cost of the rectification work” will be “a debt due” from the plaintiff to the defendant. Then, the bank guarantee could be called upon to satisfy such debt – see clause 5.6.

50 Mr Kincaid submitted that clause 37 imposed an obligation upon the plaintiff to rectify any defective work, that the Superintendent **may**, but was not obliged to, direct the plaintiff to rectify that work and that if the plaintiff did not do so then the Superintendent could have the necessary rectification works carried out by others. He noted that this is “without prejudice to any other rights“ that the defendant had against the plaintiff. He referred to *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Builders Ltd* [1974] AC 689 at 722-723 where Lord Salmon stated:

> “The parties to building contracts or sub-contracts, like the parties to any other type of contract are, of course, entitled to incorporate in their contract any clause they please. There is nothing to prevent them from extinguishing, curtailing or enlarging the ordinary rights of set-off, provided they do so expressly or by clear implication.”

and then at page 718, where Lord Diplock stated:

> “So when one is concerned with a building contract one starts with the presumption that each party is entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of materials supplied or work executed under the contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of the breach of this particular contract.”

51 Mr Kincaid indicated that the defendant was not relying upon clause 37 with respect to its claim in relation to defective workmanship, but rather on its common law rights.

52 He submitted that neither the February 2006 Agreement, the March 2006 Agreement nor clause 37 curtail the defendant’s common law rights of set-off in “clear, unequivocal words”. Therefore, he concluded, the defendant has arguably a set-off for defective work in the sum of $181,790.00.

53 In my view, there is some merit in this submission.

54 In the circumstances, there is, in my view, a question to be tried both with respect to the defendant's claims for liquidated damages and defective work and, on the proper construction of the February 2006 Agreement, the March 2006 Agreement and the Contract, the defendant is not precluded from raising these matters by way of set-off. These claims for damages exceed the plaintiff's claim for $198,000.00.

55 I conclude that the plaintiff is not entitled to summary judgment on the alternate basis either.

Plaintiff's Stay Application

56 In its Further Amended Defence and Counterclaim dated 10 July 2006, the plaintiff counterclaims for liquidated damages and damages for defective workmanship. By Summons dated 11 August 2006, the plaintiff seeks an order pursuant to s.57 of the *DBC Act* that this counterclaim be stayed. It was not in dispute that if I refuse the plaintiff's summary judgment application, I should grant this stay application. I accordingly stay the defendant's counterclaim contained in its Further Amended Defence and Counterclaim dated 10 July 2006.

Summary

57 I refuse the plaintiff's application for summary judgment and stay the defendant's counterclaim contained in its Further Amended Defence and Counterclaim dated 10 July 2006.

58 I will hear from the parties on the question of costs and other appropriate orders I should make.