

Abacus Funds Management Ltd v Phillip Davenport (1) Renascent Interiors & Refurbishers Pty Ltd (2) Adjudicate Today (3) [2003] NSWSC 935

JUDGMENT Gzell J : New South Wales Supreme Court : 20th October

- 1 By its notice of motion, the plaintiff seeks an injunction restraining the second defendant from taking any steps to enforce a determination of the first defendant under the *Building and Construction Industry Security of Payment Act 1999* ("the Act"), an injunction restraining the second defendant from applying for an adjudication certificate under the Act and an injunction restraining the third defendant from issuing such a certificate.
- 2 The plaintiff engaged the second defendant to carry out construction work on its premises. The second defendant lodged a progress claim and the provisions of the Act were enlivened. In its summons, the plaintiff seeks orders in the nature of certiorari under the *Supreme Court Act 1970*, s 69 quashing the determination of the first defendant and permanent injunctive relief against the second defendant requesting an adjudication certificate and the third defendant issuing one.
- 3 The structure of the Act as amended by the *Building and Construction Industry Security of Payment Amendment Act 2002* ("the Amendment Act"), is set out in the judgment of Bergin J in *Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd* [2003] NSWSC 869 at par 25 and following.
- 4 The object of the legislation as stated in s 3(1) of the Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
- 5 The structure of the Act as it applies to the issues between the parties in these proceedings is as follows. Under s 8, an entitlement to progress payments is created in terms of any provision in the construction contract or on the last day of the month in which construction work is carried out. A person entitled to a progress payment, a claimant, may serve a payment claim in terms of s 13 identifying the construction work in question and the amount claimed. Section 14 obliges the recipient of a payment claim, a respondent, who disputes the payment claim to respond by way of a payment schedule identifying the amount proposed to be paid and the reasons for withholding the balance. If no payment schedule is raised, liability to pay the amount of the payment claim arises.
- 6 If the amount of the payment schedule is less than the payment claim, the claimant may, pursuant to s 17 of the Act, apply to an authorised nominating authority which is duty bound to refer the application to an adjudicator. The third defendant is the authorised nominating authority to which the second defendant applied on receipt of the plaintiff's payment schedule in an amount less than its payment claim.
- 7 An adjudicator may accept the adjudication application by causing notice of acceptance to be served on the claimant and the respondent under s 19(1) of the Act. The first defendant was the adjudicator who accepted the second defendant's adjudication application.
- 8 Section 20 of the Act enables a respondent to lodge an adjudication response with the adjudicator. Section 21 requires the adjudicator to determine the matter as expeditiously as possible and, in any case, within 10 business days from the date of acceptance of the adjudication application or within such further time as the parties may agree. If the adjudicator determines that the respondent is required to pay an adjudicated amount, it must be paid within five business days of service of the adjudicator's determination under s 23. Section 24 provides that if a respondent fails to pay the adjudicated amount, the claimant may request the authorised nominating authority to provide an adjudication certificate. Section 25 provides that that certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly. If a respondent commences proceedings to have the judgment set aside, the respondent is not entitled to bring any cross claim against the claimant, to raise any defence in relation to matters arising under the construction contract, or to challenge the adjudicator's determination and is required to pay into court as security, the unpaid portion of the adjudicated amount pending the final determination of the proceedings.
- 9 In this case, the first defendant's adjudication determination, requiring the plaintiff to pay an adjudicated amount of \$819,796.32, was served on 9 October 2003.
- 10 Of significance to the question whether an order in the nature of a prerogative writ lies against an adjudicator or an authorised nominating authority, is s 30 of the Act. It is in the following terms:
“(1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:
(a) in exercising the adjudicator's functions under this Act, or
(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.
(2) No action lies against an authorised nominating authority or any other person with respect to anything done or omitted to be done by the authorised nominating authority in good faith:
(a) in exercising the nominating authority's functions under this Act, or
(b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority's functions under this Act.”
- 11 Also of significance in this regard is s 32 of the Act which provides that any right that a party has under a construction contract is unaffected by the Act and nothing done under the Act for the purpose of recovering progress payments affects any civil proceedings arising under a construction contract. A court or tribunal in which

proceedings under a construction contract are taken, must allow for any amount paid to a party under the Act but may make such orders as it considers appropriate for restitution of any such amount.

- 12 The scheme of the Act as amended by the Amendment Act is obvious enough. It seeks to ensure that contractors obtain expeditious payment of progress claims. If there is a dispute as to the amount, a fast adjudication system is provided. The adjudicator's decision must be obeyed and judgment may be entered for the adjudicated amount without the opportunity of challenge by way of defence or cross claim. The structure sets up an interim regime because s 32 provides that disputes under a construction contract are not affected by the Act's regime.
- 13 In *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365, Nicholas J considered the legislation in its original form. He pointed to the Minister's second reading speech to the original legislation in Hansard, 8 September 1999, Legislative Assembly, p 107: "*The adjudicator's decision is only an interim decision until the final amount due in respect of the payment claim is finally decided in legal proceedings or in a binding dispute resolution process. This is the appeal.*"
- 14 In further proceedings in *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* (unreported, 16 May 2003, NSWSC), Nicholas J pointed to the significance s 32 of the Act and said at par 10: "... *It seems to me the legislature intended that a successful claimant should be entitled to the amount of the claim found payable to it, and should remain so entitled pending any adjustment or order for restitution which might be made following this determination of proceedings pursuant to s 32.*"
- 15 At least two amendments effected by the Amendment Act enforce this view of the structure of the legislation. Section 23 formerly provided that if an adjudicator determined that an amount was payable, the respondent was obliged to pay the amount or give security for that payment pending the final determination of matters in dispute. The omission of the alternative of giving security by the Amendment Act enforces the scheme of interim payment of progress claims after expeditious adjudication of disputes if necessary.
- 16 The other significant amendment was to s 25 of the Act. It used to provide that upon failure of a respondent to pay or to give security, a claimant might recover the unpaid or unsecured portion of an adjudicated amount as a debt due to the claimant in any court of competent jurisdiction. The present provision enabling the filing of an adjudication certificate as an enforceable judgment for a debt with exclusion of challenge in proceedings to set aside the judgment, enforces the purpose of the legislation.
- 17 In his second reading speech to the Amendment Act in Hansard, 12 November 2002, Legislative Assembly, p 6541, the Minister said: "... *Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid. ...*
- Cash flow is the lifeblood of the construction industry. Final determination of disputes is often very time consuming and costly. We are determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act.*"
- 18 The clear legislative purpose to provide an interim regime for payment of progress claims pending final resolution of disputes under construction contracts in the ordinary way, would suggest that a court should be slow to intervene for to do so would thwart that legislative purpose.
- 19 In this case, however, interlocutory relief is sought in preservation of the *status quo* pending a challenge by way of an order in the nature of certiorari quashing the first defendant's adjudication determination. The first question that arises is whether such an order lies against an adjudicator.
- 20 These proceedings arose last Thursday in my duty list. The proceedings were initiated in the Common Law Division and included in the Administrative Law List. The matter was, however, referred to me and the parties requested that I hear the application in the course of my list. The second defendant extended an undertaking given to the court that it would not take any steps to enforce the adjudication determination until 5.00 pm today to enable me to give judgment this morning. The submissions of counsel were limited as have been my researches. I have formed the following views in the time available to me.
- 21 Section 30(1) of the Act is not a privative clause. It does not seek to exclude judicial review. It is not of the nature of such provisions as were considered in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 and does not fall within the principles discussed in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1994-1995) 183 CLR 168 and more recently in *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454. Indeed, the current provision is less restrictive than it was in the original legislation which provided that no action lay against an adjudicator or any other person with respect to anything done or omitted to be done by the adjudicator in good faith in the exercise of the adjudicator's functions under the Act.
- 22 I do not construe the present legislation as seeking to exclude review by the courts of adjudicators' determinations by way of orders in the nature of prerogative writs.
- 23 Where the writ of certiorari runs, it enables the quashing of an impugned decision on the limited grounds of jurisdictional error, failure to observe some applicable requirements of procedural fairness, fraud and error on the face of the record (*Craig v South Australia* (1994-1995) 184 CLR 163 at 175-176)

- 24 The plaintiff's challenge to the first defendant's adjudication determination is two-fold. First, the second defendant included in its payment claim 10 variation items totalling \$49,687. The plaintiff issued its payment schedule in the form of its architect's progress certificate. The certificate stated that as a number of variation claims had not been resolved and included in the progress certificate, they were set out on an attached schedule. The architect stated that a further certificate would be issued once they were resolved. The attached schedule was headed "outstanding variation claims at 8 September 2003 and not included in progress certificate no. 13". It set out the 10 variation items in the amounts claimed in the second defendant's payment claim.
- 25 Of this action the first defendant said in his adjudication determination at p 3: "This is not a reason for not including the amounts claimed [totalling \$49,687] in the calculation of the progress payment. It is not open to the Architect to fail to assess the value in this progress certificate and to issue a "further certificate... once these are resolved". The Architect has to assess the value in the current progress certificate. Since the Architect has failed to do so, I can find no reason for withholding payment of this amount of \$49,687."
- 26 The plaintiff argues that the inclusion of the schedule with the architect's certificate constituted the inclusion of the items in the payment schedule and their assessment therein. However, the schedule merely repeated the amounts claimed and none of those amounts was included in the progress certificate. In my view that does not constitute an inclusion of an assessed amount of nil in the payment schedule.
- 27 The second challenge is to an extension of time claim of \$564,585 rejected by the architect. Clause 9.03 of the contract provided that if the second defendant had complied with cl 9.01 and cl 9.02, the architect should determine what, if any, extension of time of practical completion should be granted. Clause 9.01 provided that the second defendant should as soon as practicable, but in any event not later than five business days, after the cause of delay first arose, give written notice. Clause 9.02 contained a like requirement upon the cessation of the cause for delay. Clause 10.12.04 provided that the entitlement of the second defendant to recover damages or reimbursement of any costs and expenses incurred as a result of delay was subject to the additional requirement that the second defendant give details in writing of the claim as soon as practicable after commencement of the delay.
- 28 The architect took the view that he had no authority to grant an extension of time since there had not been compliance with cl 9.01 and cl 9.02. In his adjudication determination, the first defendant agreed with this construction but went on to say at p 4: "Clause 10.02.01 requires the Architect to assess the value of work executed, including variations, and expenses of complying with the Architect's instructions as to the postponement of work. Clause 10.02.02 of the general conditions provides that the Architect shall "determine the amount of any other adjustments to the Contract Sum in terms of this Agreement". It may well be that the delay costs or part should have been included in the assessment under one of these heads."
- 29 The plaintiff wishes to challenge this conclusion of the first defendant. It is submitted that if an extension of time was not granted, there might be a claim for damages for breach of contract but that was not what was claimed and there was no authority in the contract for the architect to make a contract adjustment.
- 30 For the purpose of an order in the nature of certiorari, neither challenge, in my view, goes to jurisdictional error. The matters of which complaint is made do not constitute a mistaken assertion or denial of the existence of jurisdiction nor do they misapprehend or disregard the nature or limits of the adjudicator's functions or powers.
- 31 The only possible basis for an order is error of law on the face of the record. In my view the first challenge does not constitute an error at all and if it does, I am of the view that it is one of fact not amenable to cure by certiorari.
- 32 As to the second challenge, I do not rate the plaintiff's prospects of success at a high level. The scheme of the Act is to vest in an adjudicator the interim entitlement to construe construction contracts at a practical level. Niceties of interpretation to which a court may have regard, may be misplaced in the adjudication environment.
- 33 Nonetheless, that certiorari lies to quash a decision for error of law on the face of the record is clearly established (*R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338). In *R v Tennant; Ex parte Woods* [1962] Qd R 241 a Full Court of the Supreme Court of Queensland sought to exclude from the ambit of the writ trivial errors of law by limiting them to those that were fundamental or vital so as to make the impugned decision unwarrantable. That approach was criticised in Aronson and Dyer, *Judicial Review of Administrative Action*, Law Book Company, Sydney, 2000, at 178-179 on the basis that it equates patent error of law with jurisdictional error.
- 34 In light of this controversy, I am not prepared on this interlocutory application to find that the plaintiff has such slim prospects of success that the balance of convenience favours a dismissal of the notice of motion.
- 35 It will be for the plaintiff to establish what the record is. Reasons for a decision do not, of themselves, constitute part of the record but may be incorporated by reference (*Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 667, 671, 675, 678). I assume for present purposes that the record includes the first defendant's adjudication determination and the contract.
- 36 The plaintiff also complained that if the second defendant is paid and the plaintiff is ultimately successful in its dispute as to the entitlement of the second defendant to the moneys, it may not be able to recover judgment in its favour. It points to a history of complaints of failure to pay subcontractors of the second defendant.

- 37 The second defendant responded denying most of the assertions and tendering a balance sheet as at 30 June 2003 showing shareholders funds of just under \$400,000 with current assets of approximately \$3 million and current liabilities of approximately \$2.5 million. The items in contention in the adjudication determination total \$614,272. The plaintiff is prepared to secure payment of this amount by its payment into court or into a solicitor's trust account.
- 38 The second defendant is currently performing work in respect of 31 separate fit-out projects the total value of the contracts for which is approximately \$14 million. It has an overdraft facility with ANZ Bank in the amount of \$300,000, none of which has been utilised. Notwithstanding the submission that trade debtors at \$1.8 million is the most significant of the second defendant's current assets and may reflect the amount due by the plaintiff, I am not persuaded that a risk of non-payment of an ultimate judgment in favour of the plaintiff will go unpaid.
- 39 Notwithstanding my reluctance to do so in light of the legislative intention demonstrable in the Act, I am of the view that the plaintiff's second challenge raises an arguable case that there is error of law on the face of the record that may give rise to an order in the nature of certiorari quashing the determination. I am of the view that the *status quo* with respect to that issue should be preserved pending its determination. I reject the plaintiff's first challenge and decline to grant interlocutory relief in respect of it. I decline to make any order against the third defendant. No such order is necessary to protect the plaintiff pending determination of its summons.
- 40 This morning, in Chambers, I transferred the summons and notice of motion from the Common Law Division to the Equity Division to be included in the Technology & Construction List.
- 41 I will grant an injunction restraining the second defendant until further order from taking any steps to enforce the adjudication determination including an application to the third defendant for the issue of an adjudication certificate. The orders will cease to have effect should the plaintiff fail to pay to the plaintiff the adjudicated amount less the amount of \$564,585 together with accrued interest or fail to pay the \$564,585 into court or, with the agreement of the parties, into a solicitor's trust account within five business days. I will hear the parties on costs. I direct the parties to bring in short minutes of orders reflecting these reasons.

T Davie – Plaintiff instructed by Colin Biggers & Paisley
M Christie - 2nd Defendant instructed by Clayton Utz