Abacus Funds Management Ltd v Phillip Davenport, Renascent Interiors & Refurbishers P/L & Adjudicate Today P/L

JUDGMENT: HIS HONOUR McDougall J : Supreme Court of New South Wales. 14th November 2003

Introduction

1 The plaintiff ("Abacus") engaged the second defendant ("Renascent") to carry out refurbishment of Abacus' premises at 109 Pitt Street, Sydney. On 25 August 2003, Renascent served on Abacus a payment claim made pursuant to s 13 of the *Building & Construction Industry Security of Payment Act* 1999 ("the Act"). The claim was in the sum of $1,750,844.48.

2 On 9 September 2003, Abacus served on Renascent a payment schedule under s 13 of the Act. That payment schedule was accompanied by a progress certificate of Morgan Moore & Associates Pty Ltd, the "architect" under the contract. The progress certificate was in the amount of $372,038.32 and it was that amount that Abacus, in its payment schedule, said that it proposed to pay. It is accepted that the amount of $372,038.32 has been paid to or for the benefit of Renascent (in the latter case, by payment to a subcontractor of Renascent, who had obtained and served on Abacus a debt certificate under the C*ontractors Debts Act* 1997).

3 Renascent was dissatisfied with Abacus' response to the payment claim, and accordingly applied to the third defendant ("Adjudicate Today"), an authorised nominating authority under the Act, for the appointment of an adjudicator. Adjudicate Today referred the application to the first defendant ("Mr Davenport") under s 19(1) of the Act. Mr Davenport accepted the application and accordingly, by s 19(2), "is taken to have been appointed to determine the application".

4 Thereafter, Abacus lodged with Mr Davenport an adjudication response under s 20 of the Act.

The Determination

5 Mr Davenport made a determination in writing on 3 October 2003. Adjudicate Today provided that determination to the parties on 9 October 2003. Mr Davenport determined that Renascent was entitled to a progress payment of $819,796.32, made up as follows:

Admitted amount (i.e., the amount set out in Abacus' payment schedule)	$372,038.32
Variations	$ 49,687.00
On-site costs	$313,081.00
Backcharges	$ 84,990.00

6 The first of these amounts is self-explanatory. The second relates to a number of variations that had been claimed by Renascent that the architect, in its progress certificate, noted had not been resolved and that would be certified once resolved.

7 The third item relates to delay costs claimed by Renascent. That claim comprised an amount for on-site overheads and an amount for off-site overheads. Mr Davenport allowed the former, but not the latter.

8 The fourth matter relates to backcharges that Abacus had deducted. Mr Davenport found that the deduction was unjustified, and accordingly included it in the calculation of the progress payment.

The issues for determination

9 Abacus sought relief in the nature of certiorari to quash Mr Davenport's determination. It relied on five asserted errors of law that, it said, were apparent "on the face of the record". However, whilst my judgment was reserved, the parties resolved their differences in relation to variations: the error alleged by para 1(a) of the summons. That means that paras 2(a) and 6 were not pressed.

10 Renascent submitted that, on the proper construction of the Act, relief in the nature of certiorari was not available.

11 The issues for decision were therefore:

1. Does relief in the nature of prerogative relief in principle lie against the determination of an adjudicator made under the Act?
2. If the answer to the first question is "yes", on what grounds will that relief lie?
3. If the answer to the first question is "yes", are any grounds for relief made out on the facts of this case?

12 Abacus also sought the following orders:

1. An order restraining Renascent from requesting Adjudicate Today to issue an adjudication certificate under s 24 of the Act in respect of Mr Davenport's determination;
2. An order restraining Adjudicate Today from providing Renascent with any adjudication certificate;
3. In the alternative, an order restraining Renascent from filing, under s 25 of the Act, any adjudication certificate that it may have obtained; and
4. An order claiming restitution of the amount of $49,687 paid by Abacus to Renascent pursuant to the conditions imposed by Gzell J on the grant of interlocutory relief referred to in the next paragraph (the claim for restitution was one of those that was compromised whilst my decision was reserved).

13 On 20 October 2003, Gzell J granted interlocutory relief, the effect of which was to restrain Renascent from taking any steps to enforce Mr Davenport's adjudication. Those orders were made on conditions, as to payment (either direct into court, or into a solicitor's trust account) of the net amount of Mr Davenport's determination; those conditions were complied with.

14 Although Mr Davenport and Adjudicate Today were parties (and necessarily so, having regard to the relief that Abacus sought) they filed submitting appearances.

15 On 31 October 2003, I gave judgment in ***Musico & Ors v Davenport & Ors*** [2003] NSW SC 977. That judgment dealt with a number of the questions of principle that were argued in this case, and also bore on the specific complaints asserted by Abacus. Accordingly, I gave the parties an opportunity, which they accepted, to make written submissions in relation to my judgment in *Musico*. Abacus relied upon my judgment, both as authority for the proposition that relief in the nature of prerogative relief may lie against the determination of an adjudicator made under the Act, and to support its claim that such relief should be granted in this case. Renascent, whilst maintaining its position that relief in the nature of prerogative relief was not in principle available, nonetheless, on the assumption (consistent with my decision in *Musico*) that it was, relied on my decision to support its argument that no jurisdictional error was shown in the present case and that, if there were errors of law (which was not conceded), they were errors of law within jurisdiction.

Availability of and grounds for relief

16 I dealt with these issues in my judgment in ***Musico*** at paras [21] to [60]. I concluded that:

1. Relief in the nature of prerogative relief would in principle lie against the determination of an adjudicator under the Act;
2. Relief would lie for jurisdictional error (including refusal to exercise jurisdiction, acting in excess of jurisdiction and what I described as jurisdictional error of law on the face of the record) and denial of natural justice (on the basis that the requirements of natural justice had to take into account, not only the circumstances of the particular case, but also the legislative scheme); and
3. Relief would not lie in the case of non jurisdictional error of law on the face of the record.

17 I should make it quite clear that, in *Musico*, I was not intending to express in a comprehensive way all the grounds on which review might be available. What I said was, of course, said in the context of, and in the course of, deciding the particular issues propounded for decision in that case. There may be circumstances beyond those that I described that might ground an application for relief in the nature of prerogative relief. However, consideration of that question should wait until it is raised on the facts of a particular case.

18 I adhere to the views that I expressed in ***Musico. I*** note that the approach that I took in that case has been followed by Einstein J **in *Brodyn Pty Ltd v Davenport & Ors*** [2003] NSW SC 1019. Accordingly, the remaining issue for decision in this case is whether Abacus has demonstrated jurisdictional error, including jurisdictional error of law on the face of the record (there being no claim of denial of natural justice).

What constitutes the record?

19 There was some dispute between the parties as to what constitutes the record. I dealt with that issue in ***Musico*** at paras [65] to [68]. I do not think that, in the present case, the paries took a position that was substantially different to what I there said, although it was submitted that, to the extent that an adjudication application or adjudication response contained submissions, those submissions might not form part of the record. Reliance was placed on the wording of ss 17(3)(h) and 20(2)(c) of the Act, which (in contrast with the preceding paragraphs of the sub sections in question) show that the inclusion of submissions is discretionary rather than mandatory. However, given that the submissions may define, or further define, the issues that the adjudicator is required to determine, the better view seems to me to be that they should be taken to form part of the record. I do not think it will necessarily be a matter of great significance in any given case whether or not they do.

The errors of law that were alleged

20 By paragraph 1 of its summons, Abacus sought relief in the nature of certiorari for five asserted errors of law, being those set out in sub paragraphs (a) to (e). However, it is not clearly apparent from the form of the summons whether those errors are said to amount to jurisdictional errors of law.

21 The first alleged error is that Mr Davenport, in assessing that Renascent was entitled to $49,687 for variations, is said erroneously to have failed to take into consideration the architect's assessment set out in its progress certificate forming part of the payment schedule given by Abacus to Renascent (see para [2] above), and erroneously purported to determine the value of the work said to have been undertaken in respect of those variations. That is the issue that was resolved after my judgment was reserved.

22 The second alleged error is that Mr Davenport is said to have "erroneously applied cl 10.02.01 of the Contract as overriding the mandatory requirements in relation to reimbursement of damages or reimbursement of any costs and expenses incurred by the builder in respect of delay or delays as set out in cls 9.10 and 9.02 [sic], 10.9 and 10.12 of the Contract".

23 The third alleged error is that Mr Davenport is said to have "erroneously purported to assess the delay claims submitted by the Second Defendant where the Second Defendant has not fulfilled the conditions precedent of the Contract as set out in clauses 9.10, 9.20, 10.09 and 10.12 of the Contract".

24 The fourth alleged error is that Mr Davenport is said to have "erroneously failed to take into consideration the Architect's assessment of the delay claim set out in the letter dated 9 September 2003" (i.e., the progress certificate to which I have referred in para [2] above).

25 The fifth alleged error is that Mr Davenport is said to have "erroneously purported to assess the quantum of the delay claim with reference to an incomplete document which did not form part of the payment claim or the Adjudication Application submitted by the Second Defendant".

26 Abacus further alleges, by paragraph 2 of its summons, three instances of "jurisdictional error".

27 The first is that, it is said, Mr Davenport had no jurisdiction to determine that Renascent was entitled to payment of variations otherwise than in accordance with the contract. That, again, is the issue that was resolved.

28 The second is that, it is said, Mr Davenport had no jurisdiction to determine that Renascent was entitled to a delay claim where that claim was specifically excluded by the terms of the contract.

29 The third is that, it is said, Mr Davenport had no jurisdiction to determine the amount of a progress payment other than by reference to the contract or by assessing the value of work performed. That appears to be a catch-all assertion that the specific alleged errors referred to in (now) paragraphs 1(b) to (e) of the summons amount to jurisdictional errors of law.

Jurisdictional error of law

30 Although it is not clear from the summons, Abacus' case, so far as I could understand it (and I interpose that my understanding was hindered by the failure of Abacus specifically to address its submissions, written or oral, to the individual errors of law and jurisdictional errors asserted in the summons) was that the five errors of law that I have set out constituted jurisdictional errors of law. That was said to be the case because the Act did not permit an adjudicator "to step into the shoes of architect [sic]". In other words, as I understood the submission, it was Abacus' case that where, under a contractual mechanism such as clause 10.02, the architect (or person fulfilling the role of the architect) had certified the amount of a progress claim, the builder's only entitlement was to the progress claim so certified, and an adjudicator under the Act had no power to re-evaluate the architect's certification.

31 It was further submitted that an adjudicator would fall into error if he or she reached a legal conclusion without identifying the propositions of law on which that conclusion is based and unless those propositions of law were correct.

32 I do not accept the second argument, at least in the unqualified form in which it was put. For the reasons that I gave in ***Musico*** at paras [46] to [54], an adjudicator under the Act is entitled, in the course of making his or her determination, to make mistakes of law as long as those mistakes do not cause the adjudicator either to exercise a jurisdiction that he or she does not possess, or to decline to exercise jurisdiction that he or she does possess.

33 I do accept the submission that was put for Abacus that the legislature intended that, so far as possible, an adjudicator should determine a builder's entitlement to a progress payment in accordance with any applicable terms of the contract. That follows from ss 9(a) and 10(1)(a) of the Act; cf *Musico* at para [77].

34 Clause 10 of the contract deals with payment and adjustment of the contract sum. Clause 10.01 provides for the making of progress claims. Clause 10.02 provides for the issue (by the architect) of progress certificates. Clause 10.07 provides that, in effect, the builder's entitlement is to be paid, as a progress payment, "*the amount specified by that certificate*".

35 It cannot be correct to say that an adjudicator under the Act is bound by the terms of any progress certificate issued, under a contractual regime of the kind that I have described, by the architect or someone in the position of the architect. That would mean that an adjudicator could not make a determination that was inconsistent with a certificate that was (for example) manifestly wrong. Indeed, it would mean that an adjudicator could not make a determination that was inconsistent with a certificate that had been issued in bad faith, or as the result of fraudulent collusion to the disadvantage of the builder.

36 Further, as was submitted for Renascent, it is not uncommon for building contracts to provide that it is the proprietor, or someone who is the proprietor's alter ego or agent, to occupy the certifying role that, under the form of contract presently under consideration, is occupied by the architect. In those circumstances, if the submission for Abacus be correct, an adjudicator would be bound by a certificate issued by a proprietor, or by its agent or alter ego, in bad faith, or one that flatly and obviously disregarded the rights of the builder.

37 Such a construction would undermine in a very serious way the evident intention of the legislature that is embodied in the Act. It would enable an unscrupulous proprietor (either by itself, if the contract so permitted, or with the collusion of an unscrupulous certifier) to set at nought the entitlement to progress payments that the Act provides and protects.

38 I do not think that the construction advocated by Abacus is required by the Act. It is correct to say that the amount of a progress payment is to be "the amount calculated in accordance with the terms of the contract" where the contract makes provision for that matter (s 9(a)). It is equally correct to say that construction work is to be valued "in accordance with the terms of the contract" where the contract makes provision for that matter (s 10(1)(a)). However, a reference to calculation or valuation "in accordance with the terms of the contract" is a reference to the contractual mechanism for determination of that which is to be calculated or valued, not to the person who,

under the contract, is to make that calculation or valuation. In the present case, it means that Mr Davenport was bound to calculate the progress payment in accordance with cl 10.02 of the contract. It does not mean that Mr Davenport was bound by the architect's earlier performance (or attempted or purported performance) of that task.

39 In the present case, what Mr Davenport was required to do was to undertake for himself the task that the architect had purported to undertake. He was not required simply and only to apply his rubber stamp and initials to the results of the architect's labours.

40 I therefore reject the fundamental proposition on which Abacus' case was based. Nonetheless, it is necessary to examine each of the errors of law to see whether jurisdictional error is demonstrated.

First alleged error of law

41 This matter was resolved between the parties and accordingly I need not consider it.

Remaining alleged errors of law

42 The remaining alleged errors relate to Mr Davenport's assessment of an amount for delay costs.

43 Under cl 10.02.02, the architect, in calculating the amount for which a progress certificate should be issued, is required to "determine the amounts of any other adjustments to the Contract Sum in terms of this Agreement".

44 Under cl 10.13, the Contract Sum is to be adjusted if there is an entitlement to delay costs under cl 10.09, and if the conditions precedent in cl 10.12 have been met.

45 The progress claim made by Renascent included a claim for delay costs. The architect rejected that claim. Had the architect allowed it, in whole or in part, the contract sum would have been adjusted and the amount allowed would have been incorporated, to the credit of Renascent, in the progress certificate.

46 It follows from what I have said above that Mr Davenport was required to carry out the same exercise. He sought to do this. He may have been wrong, either in substance or in detail, in what he did. But if he were, any such error was one that he was entitled to make. It could not amount to jurisdictional error.

47 For the reasons that I have given in relation to variations, upon a payment application being made in respect of (among other things) delay costs, it was not only open to but, in my view, incumbent upon, Mr Davenport to consider for himself the entitlement to delay costs, in terms of the relevant contractual provisions (including, but not limited to, cls 10.02.02, 10.09, 10.12 and 10.13). This Mr Davenport sought to do. If he erred in doing so then, again, that is an error within jurisdiction. That is equally so whether the error is one of fact or one of law.

48 Abacus submitted that Mr Davenport had determined "a delay claim that was never made". The basis of this submission is that the delay claim propounded by Renascent was based on cl 10.09 of the contract, whereas Mr Davenport assessed it under cls 10.02.01 or 10.02.02. This submission appears to treat the construction of the relevant clauses as governed by their headings. It is true to say that cl 10.09 is headed "*Recovery of Damages for Delays due to Proprietor's Default*". However, as cl 10.13 makes clear, in an appropriate case, and subject to compliance with the conditions precedent set out in cl 10.12, the amount of damages ascertained under cl 10.09 is to be added to the contract sum. That means, in terms of cl 10.02.02, that it is another adjustment "to the Contract Sum in terms of this Agreement" that is to be included in the progress certificate that cl 10.02.03 requires to be issued. It is clear that any amount added under cl 10.02.02 (including, where available, cl 10.09 damages for delay) is to be brought to account in quantifying the amount of a progress payment.

49 Further, in my opinion, it is clear, if one analyses the payment claim and the payment schedule, that both parties understood that the payment claim, in so far as it sought delay costs, was, firstly, available under cl 10.09 (assuming that the relevant conditions precedent were met) but, secondly, that it worked its way into the progress payment through the mechanism of cls 10.13 and 10.02.02.

50 In this context, it may be worth noting that the architect in its letter of 9 September 2003 had stated that it had no authority under the contract to adjust the Contract Sum or to certify, as part of a progress payment, an amount for delay costs. In my opinion, the architect was wrong in this. Mr Davenport referred to that statement by the architect and disagreed with it. He said that cls 10.02.01 and 10.02.02 required, in an appropriate case, an adjustment to be made for delay costs. In my opinion, Mr Davenport was correct in this.

51 I therefore conclude that no jurisdictional error of law is shown in paragraphs 1 (b) to (e) of the summons.

Jurisdictional error: paragraph 2

52 Paragraph 2 of the summons as drafted seemed to be no more than assertions that the errors of law complained of in paragraph 1 amounted, both as to Mr Davenport's assessment of variations and as to his assessment of delay costs, to jurisdictional errors of law; although again, because Abacus did not address its submissions specifically to the particular matters complained of in the summons, it is difficult to be certain of this.

53 It may readily be accepted, in principle, that Mr Davenport had no jurisdiction to determine that Renascent was entitled to payment of variations otherwise than in accordance with the contract; or to allow an amount for a delay claim that was specifically excluded under the contract; or to determine a progress claim other than by reference to the contractual mechanism. But the question is: did Mr Davenport perpetrate any of those errors?

54 The issue under paragraph 2(a) has now been resolved as between the parties. The remaining complaints, in paras 2(b) and (c), relate to the method by which Mr Davenport assessed the payment amount.

55 For the reasons that I have given, in relation to the alleged underlying errors, I do not think that Mr Davenport erred in a jurisdictional sense.

Conclusion and orders

56 I conclude that Abacus has failed to sustain any of its remaining challenges to Mr Davenport's determination.

57 I therefore order as follows:
(1) Discharge order 1 made by Gzell J on 23 October 2003.
(2) Order that the summons be dismissed.
(3) Order the plaintiff to pay the second defendant's costs.
(4) Reserve liberty to apply.

58 The liberty to apply is reserved against the unlikely event that either Mr Davenport or Adjudicate Today seeks any relief, or in case Renascent wishes to claim against the usual undertaking as to damages given by Abacus as the price for obtaining interlocutory relief.

T J Davie (Plaintiff) instructed Colin Biggers & Paisley (Plaintiff)
M Christie (Second Defendant) instructed Clayton Utz (Second Defendant)
Phillip Davenport (First Defendant) submitting appearance
Adjudicate Today Pty Ltd (Third Defendant) submitting appearance