

JUDGMENT : Studdert J : New South Wales Supreme Court : 22nd April 2005

1 The plaintiff, Air Dynamics Control & Services Contracting Pty Limited, has commenced proceedings in the Administrative Law List against Helen Durham, as first defendant, and Ishtar Painting Pty Limited, as second defendant. The first defendant has filed a submitting appearance.

2 The final relief sought in the summons has been expressed as follows:

“5. A Declaration that the Adjudication is void and of no effect upon the grounds that:

a. The Adjudication does not comply with section 17(1)(a)(i) and section 17(3)(c) of the Act in that the payment schedule was supplied by the Plaintiff to the Defendant on 16 December 2004 and the Second Defendant provided further information constituting additional material by a document bearing date 4 January 2005 but pursuant to section 31(2) of the Act not received by the Plaintiff until 10 January 2005 which is 14 working days after the receipt of the payment schedule by the Second Defendant and contrary to the requirements of the Act aforesaid and the application for adjudication thereby being incompetent and the First Defendant was without jurisdiction; and/or

b. The Plaintiff was denied Natural Justice alternatively Procedural Fairness in that the document entitled ‘NOTIFICATION OF ACCEPTANCE OF ADJUDICATION APPLICATION 2004ADJT247’ and bearing date ‘7 January 2005’ contained within it the express provision ‘ADJUDICATION SCHEDULING, 5.1 “Conference of the parties TBA” which was understood by the Plaintiff to mean ‘To Be Advised’ and further understood by the Plaintiff to mean that it would be afforded the further opportunity [to] present its response, such Conference of the parties was not held by the First Defendant and the Plaintiff was not notified that such conference would not be held and did not know such Conference would not be held until the Plaintiff received the Adjudication on 19 January 2005; and/or

d [sic] The Plaintiff was denied Natural Justice alternatively Procedural Fairness in that the document entitled ‘NOTIFICATION OF ACCEPTANCE OF ADJUDICATION APPLICATION 2004ADJT247’ and bearing date ‘7 January 2005’ contained within it the express provision ‘ADJUDICATION SCHEDULING, 5.2 “Inspection TBA” which was understood by the Plaintiff to mean ‘To Be Advised’ and further understood by the Plaintiff to mean that it would be afforded the further opportunity to present its response, such Inspection was not held and the Plaintiff was not notified by the First Defendant that such Inspection would not be held until the Plaintiff received the Adjudication on 19 January 2005.

6. An Order that the Plaintiff and the Second Defendant cause an Account to be taken of the moneys paid, unpaid and/or overpaid by the Plaintiff to the Second Defendant in respect of Contract works as varied and known as Telephone Exchange, Chatswood – Painting.”

3 The plaintiff also seeks interlocutory relief. When the matter came before the court on 11 April last, the plaintiff sought an order that the second defendant make a payment into court in the sum expressed in the notice of motion filed. The second defendant resisted such relief as was sought on the notice of motion.

4 The plaintiff moves upon affidavits of its solicitor, John Patrick Gould, that affidavit being sworn 30 March 2005, and the affidavit of Francis Ah Sit Ang, the managing director of the plaintiff. His affidavit was sworn on 31 March 2005. The second defendant relies upon affidavits sworn by a director of the second defendant, Hannibal Shabaz. Those affidavits were sworn on 4 April 2005 and 11 April 2005.

5 I propose to record a brief outline of the relevant facts.

6 The plaintiff engaged the second defendant to carry out painting work at the Chatswood Telephone Exchange. It appears there was eventually a dispute concerning the quality of the painting work carried out by the second defendant and the extent of any indebtedness by the plaintiff to the second defendant in respect of work done. This prompted the second defendant to make an application pursuant to the **Building and Construction Industry Security of Payment Act, 1999**, the object of which, in short, is expressed to include the facilitation of progress payments.

7 The first defendant, who has filed a submitting appearance, was the adjudicator, and on 7 January 2005 the managing director of the plaintiff, Mr Francis Ah Sit Ang, received a document entitled “Notification of Acceptance of Adjudication Application” advising of the identity of the adjudicator appointed. That document contained details as to “adjudication scheduling”, including the following:

“5.1 Conference of the parties

At:
Date: T.B.A.
Time:

5.2 Inspection

At:
Date: T.B.A.
Time:”

8 It is the plaintiff’s contention that it is entitled to the declarations sought in para 5 of the summons upon the grounds which have there been expressed.

- 9 It has been submitted on behalf of the plaintiff that the **Building and Construction Industry Security of Payment Act** imposed a strict requirement that the full detail of the second defendant's claim was to be received by the plaintiff within ten working days of the plaintiff rejecting the second defendant's claim. The evidence of Mr Ang (para 3 of his affidavit) was that the rejection occurred on 15 December 2004 and that the application was not made within ten working days. The application was not made, the plaintiff argued, until it received, on 10 January 2005, a copy of the second defendant's payment claim so as to complete the full detail of the claim being made. Mr George, on behalf of the plaintiff, drew attention to the provisions of s 17(1) and (3) of the statute. It was submitted that the adjudication application was out of time and that in consequence under the statute the adjudicator acted without authority.
- 10 The second defendant does not accept that submission. In short, it contends that the adjudication application was received by both the nominating authority and by the plaintiff on 16 December 2004, and that the determination of the adjudicator was made within the time frame provided by the statute.
- 11 The other issue which the plaintiff raises concerns the content of the document which the plaintiff received on 7 January 2005 (which is set out at para 7 above). According to Mr Ah Sit Ang, having read the document received from the adjudicator, he understood that there was to be scheduled at a time to be arranged (TBA) a conference of the parties and an inspection. Subsequently, no conference was appointed and no inspection was arranged at any time prior to the receipt of the adjudicator's determination. As I understand what is being put, the plaintiff was misled by the understanding that there was going to be a conference and that there was going to be an inspection, and this misunderstanding affected the reply which he forwarded to the adjudicator on 7 January 2005. In these circumstances it is submitted that there was a denial of natural justice.
- 12 The second defendant, in submitting to the contrary, argued that the form of the document issued by the adjudicator does not advise the recipient that a conference and/or an inspection would take place at all. The document is a pro forma document and what it conveys to the reader is that the adjudicator *may* decide to conduct a conference and that the adjudicator *may* decide to hold an inspection. It should not be read as indicating that there would necessarily be either happening at a time to be arranged. The plaintiff had the opportunity to respond to the claim and was not limited to what was written by Mr Ang on 7 January 2005.
- 13 I have recorded shortly the competing arguments. I do not intend to determine the issues which the claim for final relief presents. It would be inappropriate for me to do so on this interlocutory application. The determination of those issues must await the final hearing of the summons. However, the expression of the competing submissions emphasises that there are genuine issues to be determined between the parties and this is relevant to the exercise of discretion when determining whether the second defendant should be ordered to make the payment into court which the plaintiff seeks.
- 14 On 30 March last Hulme J made an order expressed as follows:
"1. Until further Order, the Second Defendant be restrained from dealing with or in any way disposing of, other than in accordance with orders of this Court, moneys paid to it by the Local Court Parramatta pursuant to Judgment of the Local Court Parramatta Registry No. 282 of 2005."
- 15 His Honour made other directions for the filing and service of affidavits and of a copy of the summons and the motion upon the second defendant. The motion was adjourned until 1 April, by which time the second defendant was represented. His Honour adjourned the matter again, to be listed before the registrar on 7 April 2005, and on that date a timetable was set for the service of affidavits, and the registrar referred the matter to the Duty Judge on 11 April 2005. Hence the matter came before me on that date. It is important to note from this chronology that whilst it does not disclose the precise time at which the second defendant became aware of the ex parte order that Hulme J had made on 30 March 2005, it was certainly no earlier than the afternoon of that date because the order was made at 1.45 pm on 30 March 2005. The associate's record of proceedings indicates this to have been so.
- 16 It transpires that by the time it became aware of the order made by Hulme J on 30 March 2005, and, indeed, by the time his Honour made that order, the second defendant had already received a cheque from the Local Court to which the funds garnisheed had been paid.
- 17 Although Mr Gould's affidavit discloses that the Clerk of the Local Court had been informed that steps were going to be taken in the Supreme Court to set the adjudication aside, and although the plaintiff's solicitor was informed by an officer at the Local Court that money would not be paid out of that court without notice, in fact the Local Court forwarded a cheque to the second defendant. According to Mr Shabaz, a cheque was received from the Local Court on 21 March 2005 in the sum of \$34,617.01 and was banked in the second defendant's account with the Commonwealth Bank at Baulkham Hills (affidavit paras 11-12).
- 18 Mr Shabaz asserted in para 14 of his affidavit of 4 April 2005 that it was on 25 March 2005 he received a telephone call from the accounts manager at the Parramatta Local Court informing him that the cheque had been forwarded to the second defendant in error. He was requested to return it. Mr Shabaz informed the accounts manager that the cheque had already been deposited and the funds used and that, further, there was no money left.
- 19 It appears that the account held by the second defendant and into which the cheque received from the Local Court was deposited is an overdraft cheque account. The account has an overdraft limit of \$200,000. As at 11 April 2005 the debit balance was \$130,089.

- 20 Mr Shabaz was not required for cross examination on his affidavit and there is nothing in the evidence to indicate that the second defendant acted other than in good faith in banking a cheque obtained through the garnishee process after an award made by an adjudicator in the second defendant's favour. There is no evidence upon which I could find that Mr Shabaz was aware that the cheque had been forwarded to the second defendant contrary to the assurance Mr Gould had been given by an officer of the Local Court.
- 21 The statute pursuant to which the adjudication was made provides machinery for the prompt resolution of disputes over building payments. Having taken time to reflect on the competing submissions of counsel, there is plainly a genuine dispute about the determination of the first defendant. Until that dispute has been determined upon the final hearing of the summons, either the plaintiff or the second defendant must be out of pocket for the amount the subject of the adjudication. Having reflected upon the matter, and since I cannot presume that the plaintiff will ultimately succeed on the summons, I do not consider that I should make the order for payment into court which the plaintiff seeks.
- 22 Alternatively, the plaintiff sought an order restraining the second defendant from reducing the limit of available credit in its bank account below an amount of \$34,617. I am not persuaded it would be any more appropriate to make that order than the order for payment into court, and I decline to make this alternative order.
- 23 The order made by Hulme J on an ex parte basis proved in the events outlined above to be ineffectual and should accordingly now be discharged.
- 24 The final order that Mr George sought was an order in terms requiring the second defendant to consent to an application in the Local Court to stay proceedings pending there until determination of the final relief sought on the summons in this court.
- 25 What is being sought in the Local Court are the following orders:
"1. That the proceedings in that Court be stayed;
2. That any money received by that Court from enforcement process be retained by the Court pending further order of this Court."
- 26 It is plainly uneconomical and undesirable for the parties to be engaged in litigation both here and in the Local Court. The costs that will be incurred will obviously be disproportionate to the amount in dispute between the parties. Consideration should be given by the parties to the usefulness of keeping the notice of motion in the Local Court on foot. However, I do not consider that this Court should make an order compelling the second defendant to consent to the hearing in the Local Court being postponed.
- 27 Having regard to the amount in issue between the parties, they would be well advised to consider the referral of their dispute to mediation before the date listed for the next directions hearing.
- 28 For the above reasons, I now make the following orders:
1. The order made ex parte in this court on 30 March 2005 is discharged;
2. The relief sought in para 2 of the notice of motion filed on 30 March 2005 is refused;
3. The matter is to be listed for directions on 2 June 2005.
4. Costs of the motion are reserved.

I. George (Plaintiff) instructed by J.P. Gould (Plaintiff)

Submitting appearance (1st Defendant) instructed by Philip Davenport (1st Defendant)

G.B. Fernie (2nd Defendant) instructed by Turnbull Bowles Lawyers Pty Limited (2nd Defendant)