Australian Remediation Services P/L v Earth Tech Engineering P/L, Robert Hunt & The Institute of Arbitrators & Mediators Australia NSW Chapter

JUDGMENT : Campbell J : New South Wales Supreme Court : 14th/15th July 2005

1 Thursday 14 July 2005:

2 This is an application for interim relief. It arises from a situation where the plaintiff had engaged the first defendant to carry out certain work involving land remediation. On 14 March 2005 the first defendant served a Payment Claim under the ***Building and Construction Industry Security of Payment Act 1999*** ("**the Act**"), seeking an amount in the order of $4.17m. On 22 March the plaintiff served a Payment Schedule under that Act, stating that no further amount was payable, as the contractual amount payable for the work had been capped, and as well the work was inadequate or defective.

3 This payment claim has been the subject of previous litigation in the Court. On 14 April 2005 McDougall J gave judgment in ***Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd*** [2005] NSWSC 362 declining to prevent an adjudication in relation to the Payment Claim from commencing.

4 On 8 July 2005, the appointed adjudicator, the second defendant, delivered his adjudication to the parties. He held that an amount of $3,787,193.48 was due, together with interest at nine percent on that sum from 11 April 2005.

5 These proceedings were begun by the plaintiff and brought on, on an interlocutory basis with great urgency, seeking to restrain the third defendant, which was the appointing authority, from issuing a certificate relating to the determination, and to restrain the first defendant from filing in the Court any certificate which might be issued.

6 There are various attacks which the plaintiff seeks to make on the determination. Those claims are summarised in the notice of motion in the proceedings, and expanded on in written submissions of Mr Jacobs of Queens Counsel which I shall place with the papers.

7 One of the grounds of challenge relates to the conduct of the adjudicator in seeking further submissions, in the course of the adjudication proceedings.

8 Section 21(4) of the Act in terms confers a power on an adjudicator to request further submissions from either party. The contention, however, as I understand it, is that the proper extent of that power must be ascertained by reference to the frame of the Act as a whole, and that the adjudicator does not have carte blanche to request absolutely any submissions which might take his fancy. In the present case, it is submitted that the adjudicator went too far in the matters concerning which he requested additional submissions, and that his conduct in doing so results in vitiation of the decision.

9 The Act has frequently been the subject of consideration by the Courts in recent years, but it cannot be said that questions relating to its proper construction and application have yet become quite clear cut. The decision of the Court of Appeal in ***Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*** (2004) 61 NSWLR 421 shows the Court of Appeal holding that a somewhat more restrictive attitude should be taken to the question of whether a determination under the Act was void than had previously been taken by various judges at first instance. When the law relating to this topic is still very much in a state of development, the question of just what conduct on the part of an adjudicator involves going too far is one which is very much open for debate. I am satisfied that there is a serious question to be tried about whether the determination in the present case is void.

10 The procedure which is followed, when an adjudication certificate is obtained, is that contained in section 25 of the Act, which enables an adjudication certificate to be filed in any Court of competent jurisdiction and enforced as a judgment. A judgment so obtained can be set aside, but the grounds on which it can be set aside are restricted by section 25(4). In ***Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*** (2004) 61 NSWLR 421, at paragraph [61], the Court of Appeal considered proceedings which seek to set aside such a judgment, when a document purporting to be an adjudicator's determination has issued, and resulted in a judgment, but the plaintiff alleges that the sort of circumstance referred to in paragraphs [53] to [58] of that judgment have not arisen, and in consequence the determination is void. The Court of Appeal held that such an attempt to set aside a judgment is not forbidden by section 25(4)(a)(iii) of the Act.

11 The price of commencing proceedings of that kind to set aside a judgment, as set out in section 25(4)(b), is payment into Court of the unpaid portion of the adjudicated amount, as security. Mr Forster SC submits that if my granting the injunction which the plaintiff seeks prevents there being a judgment, the price of that injunction should be no less than the price that the legislature has decided should be paid for a stay of a judgment which has been obtained, namely an actual payment into court. I accept that the policy which is implicit in section 25(4)(b) is one that I should take into account in deciding what counts as a preponderance of the balance of convenience. That policy is that the person who has obtained an adjudication determination should be in a position actually to receive the amount payable under it, virtually as soon as a court has held that the adjudication determination is not void. I do not accept, however, that the precise mechanics by which section 25(4)(b) carries out that policy – that is, by requiring that there be a payment of money into court – is the only way that the court should consider, when determining where the balance of convenience lies. Obtaining payment out of money which is held in court is something which can take a little time. As well, the fact that the money in court is not put to productive use during the time that it is in court is a disadvantage of requiring payment in. If some alternative to payment in is permitted, though, the court needs to ensure as far as it can that if the defendant were to succeed in upholding the validity of the determination, the defendant receives at least the same sort of interest that would have been earned on money paid into court.

12 I accept that it is a factor relevant to the balance of convenience that a judgment against a company can create a commercial stigma, both for the company subject to the judgment and, sometimes, its associated companies, even if the court later sets the judgment aside.

13 The plaintiff in this case is a company, the accounts of which demonstrate that it has few assets. It is only if the first defendant can be put, for all practical purposes, back into the same situation as it would have been in if these proceedings had not been brought, in the event that it were to be held that the determination was a valid one, that, in my view, the balance of convenience would favour the granting of an injunction pending the hearing of this action. In my view that can be done adequately by the provision of bank guarantees, rather than by actual payment into court.

14 I have discussed with Mr Jacobs of Queens Counsel for the plaintiff, the regime which would be necessary, in my view, to protect the first defendant. The usual undertaking as to damages is one prerequisite. Further, for a company in the poor financial position of this defendant, a fully secured undertaking as to damages would be required. The parties have reached an agreement that, at least as things appear at the moment, an amount of $373,840 would be an adequate amount to provide as security for the undertaking as to damages. That amount is calculated on the principle of having interest run from 15 April 2005, and continuing to run for 180 days from today. That period of time has been fixed upon because that is the estimate of how long it would take to bring the matter on for hearing and have it determined. In the event that that estimate proves incorrect, I propose to reserve liberty to apply or vary the security for that undertaking.

15 As well, the plaintiff proffers, now, an undertaking that it will proceed with expedition to bring the case to a final hearing.

16 Because the matter has been brought on at such speed, it has not been possible, this afternoon, for the plaintiff to be able to proffer to the Court an undertaking which would have the practical effect of ensuring that, in the event that the plaintiff loses the present litigation, the first defendant receives, promptly thereafter, the amount which is the subject of the adjudicator's determination. Mr Jacobs QC tells me that his instructions are that appropriate bank guarantees can be put in place early next week. The way in which I propose to deal with that is by making an injunction now of the type the plaintiff seeks, which lasts until 5 pm on Tuesday of next week, subject only to the usual undertakings as to damages, and the undertaking to proceed with expedition. I shall also make an order that in the event that by 5 pm Tuesday there has been deposited with the Registrar bank guarantees, from either the Commonwealth Bank of Australia, the National Australia Bank, Westpac or the ANZ, expressed to be in favour of the Registrar of the Court or such person as the Registrar might nominate, promising to unconditionally pay on demand the sums of $3,787,193.48, plus the sum of $373,840, an injunction in like terms will be made to endure until the hearing of the suit or further order. I will also require there to be filed in Court, by 5 pm Tuesday 19 July 2005, a written undertaking from the plaintiff not to take proceedings to prevent any call on that bank guarantee, or payment of any call which might be made upon it.

17 I shall grant liberty to any party to apply to discharge or vary the injunction on 3 days notice, such application being made in the Technology and Construction List.

18 To record these matters, I shall now temporarily cease hearing the case, to give counsel the opportunity of preparing short minutes of the order, which I will settle in the event that there is any dispute.

19 **FRIDAY 15 JULY 2005:** I recognise that procedural mechanisms other than the one I decided yesterday to adopt can be used to achieve the same sort of objectives as I sought to achieve, and that such alternatives are sometimes used in the Technology and Construction List. One of them involves requiring a bank guarantee to be issued in favour of the opposite party to the litigation, and for that guarantee to be held in safe custody in the Registry pending the final determination of the matter. Yesterday's decision was made without exploration of these alternative procedures. It does not involve any view that the particular method of providing a bank guarantee which I decided to adopt is superior to any other way in which it could be provided.

20 I make the following orders: Upon the plaintiff by its Counsel giving to the Court:
(a) the usual undertaking as to damages; and
(b) an undertaking to use its best endeavours to cause these proceedings to be heard expeditiously the Court:

1.1 Orders that up to 5pm on Tuesday 19 July 2005, the first defendant be restrained by itself its servants and agents from requesting the third defendant to provide to it a certificate under section 24(1)(a) of the ***Building and Construction Industry Security of Payment Act 1999*** ("**the Act**") and from proceeding to file any such certificate in Court under section 25 of the Act.

1.2 Orders that up to 5pm on Tuesday 19 July 2005, the third defendant be restrained by itself its servants and agents from issuing to the first defendant a certificate under section 24(1)(a) of the Act.

2. Orders that in the event that by 5pm on Tuesday 19 July 2005:
(a) there has been deposited with the Registrar of the Court a bank guarantee by one of the Commonwealth Bank of Australia, Westpac Banking Corporation, the National Australia Bank or the Australian and New Zealand Banking Group Limited, promising unconditionally to pay on demand, to the said Registrar or such person as the Registrar may nominate, at any time on or prior to 19 July 2006 such sum not exceeding $3,787,193.47 as the said Registrar may demand, and
(b) there has been deposited with the Registrar of the Court a further bank guarantee by one of the four banks named in (a) promising unconditionally to pay on demand to the said Registrar or such person as the

Registrar may nominate, at any time on or prior to 19 July 2006, such sum not exceeding $373,840.00 as the said Registrar may demand,

(c) the plaintiff has filed in Court a written undertaking to the Court that it will take no proceedings or other step to prevent or deter any calling by the Registrar on either of the guarantees referred to in (a) and (b) above, or to prevent or deter the payment of any call on either of such guarantees that might be made by the Registrar orders in the same terms as that set forth in orders 1.1 and 1.2 hereof will apply, but replacing the words "*up to 5pm on Tuesday 19 July 2005*" with the words "*until the determination of these proceedings by the trial judge at the final hearing of this matter or until further order*".

3. Notes that, without imposing any legal obligation on the Registrar or any other person, it is the intention of Order 2

(a) that the Registrar shall, upon receipt of a request from the solicitors for the first defendant to make demand and a nomination of the person in whose favour the said solicitors request that demand is to be made, or upon authorisation by a judge, or in such other circumstances as seem appropriate to the Registrar, make demand under the first-mentioned guarantee for a sum that the Registrar decides is appropriate. Circumstances where demand might be made include, but are not necessarily limited to

(i) after considering the judgment and orders of the trial judge at the final hearing of this matter, or

(ii) in the event that the said guarantee is not replaced by a like guarantee for a further period of twelve (12) months by a date no later than fifteen (15) days before the expiry of the said guarantee,

(iii) or in the event that any second or subsequent guarantee is not replaced with a like guarantee no later than fifteen (15) days before its expiry

(b) that the Registrar shall upon receipt of a request from the solicitors for the first defendant to make demand and a nomination of the person in whose favour the said solicitors request that demand is to be made, or upon authorisation by a judge, or in such other circumstances as seem appropriate to the Registrar, make demand under the second-mentioned guarantee for such sum as the Registrar decides is appropriate. Circumstances where demand might be made include, but are not necessarily limited to

(i) when the Registrar has formed an opinion that a particular amount is due be due pursuant to either the usual undertaking as to damages herein, or any order for costs which might be made in these proceedings, or both such factors, or

(ii) in the event that the said guarantee is not replaced by a like guarantee for a further period of twelve (12) months by a date no later than fifteen (15) days before the expiry of the said guarantee, or

(iii) in the event that any second or subsequent guarantee is not replaced with a like guarantee no later than fifteen (15) days before its expiry.

(c) that the bank guarantee operate to provide security to the first defendant that is in commercial terms no less secure than a payment into court of cash.

(d) that in the event that a dispute arises about whether a guarantee should be called on or in what amount, that dispute might be decided by a judge in the Technology and Construction List, if the dispute is brought before the judge in sufficient time before expiry of the guarantee.

4. Direct the plaintiff to provide to the solicitors for the first defendant a copy of any bank guarantees, and any undertakings in writing, deposited with the Court, by 6pm Tuesday 19 July 2005.

5. Directs that the proceedings be placed in the Technology and Construction directions list on Friday 22 July 2005.

6. Grants to any party liberty to apply to discharge or vary the injunction on three (3) days' notice, or on such shorter notice as the Court may consider appropriate, such application to be made in the Technology and Construction List.

7. Orders that the costs of this application be costs in the proceedings.

M S Jacobs QC – Plaintiff instructed by D Grynberg
R G Forster SC - First Defendant instructed by Allens Arthur Robinson
Unrepresented (Submitting Appearance) - Second Defendant
Colin Biggers & Paisley (Submitting Appearance) - Third Defendant