Austruc Constructions Ltd v ACA Developments Pty Ltd v ACA Developments Pty Ltd as Trustee for the Bellagio Unit Trust v Peter Sarlos and Austruc Constructions Ltd

JUDGMENT : His Honour McDougall J : Supreme Court of New South Wales : 11th March 2004.

Introduction

1 On 19 December 2002, the plaintiff ("ACA") and the second defendant ("Austruc") entered into a contract ("the contract') whereby Austruc as builder agreed to carry out building works in connection with a residential development undertaken by the plaintiff at 1161-1171 Pittwater Road, Collaroy. The contract is a "construction contract" as that expression is defined in s 4 of the *Building and Construction Industry Security of Payment Act* 1999 ("the Act").

2 On 3 November 2003, Austruc made a progress claim, No. 9, in the sum of $1,038,066.24. It is common ground that, if the Act applied, that progress claim was a payment claim for the purposes of s 13. The architect under the contract certified the progress claim at nil. However, ACA did not serve a payment schedule under s 14 of the Act. As a result, Austruc commenced proceedings 55063 of 2003 ("the Austruc proceedings") in this Court for recovery of the amount claimed. The claim was based both on the provisions of the contract and on s 15 of the Act.

3 On 1 December 2003, Austruc made a further progress claim, No. 10, in the sum of $1,368,127.84. That sum was made up of the amount of progress claim 9 and an additional amount of $324,246.38 claimed in respect of work carried out since 3 November 2003. It is again common ground that, if the Act applies, progress claim 10 was a payment claim within s 13.

4 Again, the architect certified the progress claim at nil. This time, however, ACA served a payment schedule within time. That payment schedule indicated, in substance, that ACA disputed a liability to pay any amount.

5 On 18 December 2003, Austruc made an adjudication application under s 17 of the Act. The first defendant ("Mr Sarlos") accepted appointment as the adjudicator.

6 On 24 December 2003, ACA served its adjudication response in accordance with s 20 of the Act.

7 Mr Sarlos made his determination on 13 January 2004, which was within the time permitted by s 21 of the Act (having regard to the intervening Christmas break and to the definition of "business day" in s 4). His determination was released to the parties on 15 January 2004, after Austruc had paid his fees. He found that ACA was liable to pay Austruc $1,308,727.84, together with interest, and approximately two thirds of his fees.

8 ACA did not pay any part of the amount that Mr Sarlos determined. Accordingly, on 23 January 2004, Austruc requested and obtained the issue of an adjudication certificate under s 24 of the Act. Austruc's solicitors sought to file it as a "judgment" pursuant to s 25(1) of the Act. In support of that application, Austruc's solicitors filed, among other things, a draft minute of judgment referring to: "FILE NO: of 2004".

9 However, an officer in the registry entered the number of the Austruc proceedings – 55063/03 – and the judgment that was sealed was, on its face, given in the Austruc proceedings.

10 In the Austruc proceedings, Austruc has filed a "slip rule" notice of motion seeking an order pursuant to Pt 20 r 10, that "[t]he judgment entered … in proceedings 55063 of 2003 … be corrected by, in its place, entering judgment in new proceedings such judgment to take effect from 23 January 2004." That is the first of the notices of motion with which I am presently concerned.

11 ACA has commenced proceedings No. 30008 of 2004 ("the ACA proceedings"), seeking an order in the nature of *certiorari* to quash Mr Sarlos' determination on the grounds of "error on the face of the record", want of jurisdiction and denial of procedural fairness. In those proceedings, there are two notices of motion with which I am presently concerned. The first, in point of logic, is ACA's notice of motion seeking to restrain Austruc, until further order, from taking any action on Mr Sarlos' determination of 13 January 2003. The other is Austruc's "notification" notice of motion seeking an order that ACA give it "not less than 2 business days' written notice of any disposition or divestiture by it or on its behalf of any or all of the assets it presently holds or controls either itself or as Trustee for [a certain unit trust]".

The issues

12 The issues raised by the three notices of motion are as follows:

(1) Has Austruc brought itself within the slip rule?

(2) Does the Act apply to the contract? (This issues relates to s 7(2)(a) of the Act, ACA contending that the contract "forms part of" a loan agreement between it and Westpac Banking Corporation ("Westpac").)

(3) Is Mr Sarlos' determination vitiated by denial of natural justice? (ACA's submissions on this issue were less than clear, but it appears to be asserted either that Mr Sarlos committed a jurisdictional error of law in taking into account a statutory declaration of a Mr John Finlay, made on 18 December 2003, or that he denied ACA procedural fairness by not giving it "a fair and reasonable opportunity of putting forward" material in response to that statutory declaration.)

13 As to the second and third issues: given that they arise in connection with ACA's application for interlocutory relief, the correct principle, and the basis on which I consider ACA's notice of motion, is whether ACA has shown, on either basis or both bases, a serious question to be tried.

14 ACA's written submissions recognised, correctly, that there were two further question to consider in connection with its application for interlocutory relief:
(1) Whether damages are an adequate remedy; and
(2) Whether the balance of convenience favours the granting of injunctive relief.

15 However, ACA did not direct written or oral submissions to either of these questions.

The slip rule notice of motion

16 Ms Ellen Farmer-Maloney, a solicitor in the employ of Clayton Utz, had the day-to-day carriage of the matter on behalf of Austruc. She arranged for the adjudication certificate to be obtained. She then prepared a draft minute of judgment (corresponding to the certificate) and an affidavit of debt to be sworn by Mr Samuel Catalano, the managing director of Austruc. In each document, the number of the proceedings was given as "FILE NO: of 2004". She then, having procured Mr Catalano to swear the affidavit of debt, instructed a clerk, Mr Andrew Rees, to file the adjudication certificate, the draft minute of judgment and the affidavit of debt. Mr Rees brought the documents to the Court's registry and handed them to a clerk.

17 It appears that the clerk, of his own volition, consulted his computer, and then wrote on the two copies of the draft minute of judgment and on the original and three copies of the affidavit of debt, the file number for the Austruc proceedings (in doing so, changing the printed date "2004" in hand to "2003"). The clerk then said, in effect, that the minute of judgment would be given "to the registrar to sign" and would then be returned.

18 Mr Rees did not ask the clerk to insert the number of the Austruc proceedings. He does not know why this was done. He did not understand its significance. He therefore did not question the clerk, or mention what had been done to anyone at Clayton Utz.

19 When Mr Rees returned to Clayton Utz, Ms Farmer-Maloney requested another clerk employed by Clayton Utz, Mr Gerard Murphy, to ask the duty registrar to enter the judgment that day. Mr Murphy attended the duty registrar and was told that the judgment could be entered that day, "but we require the court file and a letter of urgency … ".

20 Thereafter, Mr Murphy asked a clerk at the registry to locate the file and give it to the duty registrar. He gave the clerk a copy of the affidavit of debt that had earlier been filed (and numbered 55063 of 2003) and sealed.

21 Mr Murphy then returned to the offices of Clayton Utz and procured a letter of urgency. He took the letter of urgency back to the duty registrar. After some delay (relating to documents which the duty registrar required but did not have), she signed and sealed the orders.

22 The letter of urgency that Mr Murphy obtained is addressed to the duty registrar of the Court. It is headed: "*Austruc Constructions Limited ats ACA Developments Pty Limited, Technology and Construction List proceedings No. 55063 of 2003*".

23 Mr Murphy says that he took the number from the affidavit of debt that had been filed and sealed and showed the number of the proceedings as 55063 of 2003. He had not been instructed to do this but did it because he "assumed because the Court had stamped the document, that it was the correct number".

24 Whilst all this was going on, there was correspondence passing to and fro between Clayton Utz and ACA's solicitors, Henry Davis York. On 22 January 2004, Henry Davis York wrote to Clayton Utz stating, among other things: "*We are instructed to file today in Court a summons in the form attached seeking to have the Determination quashed on the following bases: ……*

We are in the process of filing the summons and will serve you with a filed copy shortly unless you inform us by return that you do not have instructions to accept service.

We put you on notice that our client intends to approach the Court for an injunction should we not receive in writing at this office by 5 pm today an undertaking by or on behalf of your client that your client will not seek to enforce the adjudicated amount or costs … pending the Court's determination of our client's summons."

25 Clayton Utz responded the same day and, it would appear, before 5 pm. They confirmed that they did not have instructions to accept service. They made observations as to the form of the summons. They then said: "*In relation to your request for an undertaking we are instructed that no such undertaking will be given. …*

As your client is aware … our client is presently indebted to its subcontractors and suppliers in respect of the abovementioned project for an amount in excess of $1.1M. Our client requires payment by your client of the adjudicated amount in order to satisfy those outstanding claims.

In the circumstances, we are instructed to proceed to recover the adjudicated amount …

In relation to your indication that your client may seek injunctive relief in the absence of the undertaking you requested by 5 pm today, we confirm that we require not less than 1 hours' [sic] written notice of any proposed application … ."

26 On 23 January 2004, ACA approached the vacation judge, Hamilton J. Henry Davis York apparently gave prior notice of this to Clayton Utz and, accordingly, when the matter was called before his Honour, not only did Mr Corsaro SC appear for ACA, but Mr S A Kerr of Counsel appeared for Austruc. It appears that his Honour did not reach the matter (or the parties did not come before his Honour) until after lunch on 23 January. The record of proceedings shows that at 3.05 pm, his Honour directed "that no judgment be entered consequent upon filing of

adjudication certificate until further order". Subsequently, it appearing that judgment had been entered before that direction was given, his Honour (at 3.20 pm) retracted the direction. He did however order that Austruc "be restrained from taking any further step in relation to the adjudication determination … or taking any step to execute the judgment entered in its favour on 23/1/04 in proceedings 55063/03 up to and including 2/1/04".

27 Austruc submits that the facts that I have briefly summarised bring the matter within Pt 20 r 10. ACA submits that they do not. ACA submits, further, that if I find Pt 20 r 10 does apply, I should withhold relief on discretionary grounds.

The relevant principles

28 The slip rule (as I shall call Pt 20 r 10) gives the Court a discretion to correct, relevantly, a minute of a judgment or order where there is a clerical mistake, or an error arising from an accidental slip or omission, in that minute. That the power is discretionary appears both from the wording of the rule and from the decision of McHugh JA in ***Storey and Keers Pty Ltd v Johnstone*** (1987) 9 NSWLR 446, 453 (and see the decision of Needham J in ***Gikas v Papanayiotou*** (1977) 2 NSWLR 944, 954). The operation of the rule does not now appear to be confined to cases where the mistake, slip or omission relates to "*ancillary or consequential matters*": ***Storey and Keers*** at 451 (McHugh JA); *Gikas* at 951-952. However, the proposed amendment must relate to a matter that was in issue in the proceedings, or that was incidental to such a matter: ***Storey and Keers*** at 453 (McHugh JA).

29 In ***Hatton v Harris*** [1892] AC 547, 557-558, Lord Herschell said, of the form of the rule there under consideration:

"I myself think that it was a mere accidental omission that the words were not inserted … ; and if attention had been called to the fact that those words were not so inserted, and that one incumbrancer might therefore be prejudiced as against another in respect of the omission, I cannot doubt that the correction would at once have been made."

30 In ***Storey and Keers***, McHugh JA, at 453, approved what Lord Herschell had said as expressing *"[i]n general the test of whether a mistake or omission is accidental"*.

31 In ***Hatton,*** Lord Watson at 560 referred to the rule as permitting the Court "*if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce.*" A somewhat similar view was expressed by Cotton LJ in ***Re Swire: Mellor v Swire*** (1885) 30 Ch D 239 at 243, where his Lordship said that *"in my opinion the Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction which it will in a proper case exercise, to correct its record …".*

Analysis

32 In the present case, what the Court was asked, and intended, to do was to give effect to an application made under s 25(1) of the Act. That required the Court to enter a judgment, on the terms of the adjudication certificate, for Austruc against ACA in proceedings brought into existence for that very purpose. As I understand it from the evidence, the Court's procedure in such cases is to require the adjudication certificate to be filed together with the appropriate number of copies of a draft minute of judgment and an affidavit of debt. The Court was not asked, and did not intend, to enter a judgment in existing proceedings between Austruc and ACA.

33 In my view, it is clear beyond doubt that what happened was either a clerical error or an accidental slip or omission. The clerk in the registry should have created a new file and allocated a new number. Instead, he took the application as being made in the Austruc proceedings. He was not told or asked to do this, and his action in so doing can only be the result of a misunderstanding or mistake.

34 As a result, the judgment that was sealed and entered was one expressed to be given in the Austruc proceedings. It was, however, intended to be a judgment in accordance with the adjudication certificate and between the parties named in that certificate. The Austruc proceedings were not based on that certificate. The only defect in the judgment was that it was given, as I have said, in existing proceedings rather than in new proceedings.

35 If, as McHugh JA said is the general test, one asks the question *"if the matter had been drawn to the court's attention would the correction at once have been made?"*, the answer must clearly be "yes".

36 Equally, if one applies the test suggested by Cotton LJ, and asks whether "the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon" then, equally, the answer is "yes". There has been no adjudication upon the claim made by Austruc in the Austruc proceedings.

37 I therefore conclude that the matter is within the slip rule, so that the Court has power to correct the judgment that was, by mistake, entered in Austruc's proceedings. In my view this is so even though the correction of the mistake requires to be done what should have been done in the registry – namely, the allocation of a new number in new proceedings, between Austruc as plaintiff and ACA as defendant, and the entry of judgment in those new proceedings.

Discretionary considerations

38 It was submitted for ACA that, if I came to the view that the matter fell within the slip rule, I should nonetheless hold relief on discretionary grounds. Mr Corsaro, who appeared for ACA with Mr Goldstein of Counsel before me, relied upon the history that I have summarised in paras [24] to [26] above.

39 I do not think that those matters justify the withholding of relief. Austruc had the benefit of an adjudication application in its favour. It had obtained an adjudication certificate. It had the right, under the Act, to have that certificate registered as a judgment of this Court.

40 True it is that ACA had notified Austruc that ACA wished to contest Mr Sarlos' determination. However, it is equally true that Austruc had declined to give any undertaking not to enforce the determination: indeed, in my view, it had made it perfectly clear that it would do so.

41 A party against whom an injunction is sought is not obliged, by the fact that an application for injunction has been made, forthwith to cease doing that which is sought to be restrained. (Conversely, if the party continues to do that which is sought to be restrained, it may do so at its own peril, as to inconvenient consequences, if an injunction is granted.) *A fortiori,* it seems to me, where an application for injunction is merely threatened, the party against whom the threat is made is free to continue to do that which is the subject of the threat until the threat is carried into effect and (if it should happen) an injunction is granted.

42 The evidence shows that Austruc sought to have the judgment entered as a matter of urgency on 23 January 2004. It may be – the evidence is not completely clear – that Austruc took this course knowing that ACA was about to move, or was indeed moving, the Court. But that does not seem to me to matter. There is nothing to show that Austruc in any way misled ACA, or lulled ACA's suspicions, and took some unconscientious advantage of any resultant delay.

43 In summary, on the evidence before me, Austruc was moving as swiftly as it could to secure its legal entitlement; and the fact that it was moving swiftly because it wished to have that entitlement secured before it was restrained from doing so (assuming, without deciding, that this is a correct inference to draw from the scant material before me) does not in my view disentitle it to the relief which it now seeks.

Conclusions on the slip rule notice of motion

44 In my judgment, the case falls within the slip rule and there are no specific discretionary considerations showing that I should not make the order sought. The precise form of the order must have regard to the amendment of the slip rule notice of motion that was sought in the course of the hearing before me (see para [88] below).

Section 7(2)(a): construction of "forms part of"

45 In my judgment in ***Consolidated Constructions Pty Ltd v Ettamogah Pub (Rouse Hill) Pty Ltd*** [2004] NSWSC 110, which was handed down immediately before this judgment, I concluded at para [29] that the words "forms part of" in s 7(2)(a) should be read "*in accordance with their ordinary English meaning, and in a way that recognises their well understood meaning in the discourse of contracts*". I concluded at paras [14] to [16] that the words "form part of" connote something akin to inclusion, as opposed to association; that they require more than that one thing is ancillary to the other. However, as I observed in those paragraphs, it may be difficult in any given case to determine the point at which association changes to inclusion, or at which one thing ceases to be merely ancillary to, and comes to form part of, another.

46 I gave separate considerations to the question of construction in this matter, based on the more detailed submissions that were made (compared to those made in ***Consolidated Constructions***). However, I see no reason to change the opinion that I expressed in ***Consolidated Constructions***.

47 In the course of oral submissions, I asked Mr Corsaro what was the construction that he advanced of the words "forms part of" in s 7(2)(a). Mr Corsaro responded as follows (T 24.5-.25):

> *"CORSARO: What would we say in relation to the construction of the words "form part of" in that section, in our submission, where the performance of the rights and obligations by either the principal or the contractor under the construction contract, in turn, create, or affect, a right or obligation between the lender and the principal under the loan agreement, then the section is enlivened and the construction contract is excluded from the provisions of the Act.*
>
> *HIS HONOUR: Could you go through that again, please?*
>
> *CORSARO: Where the rights and obligations by either the principal or the contractor under the construction contract and the way that contract is performed affects or creates rights or obligations which affect the lender and the principal as borrower under the loan agreement, then the plain English construction for which we contend is that the construction contract forms part of the loan agreement."*

48 The difficulty with that submission is that it does not state the construction of the words *"forms part of"*. It states their application: which is, conceptually, something different. However, I take it from the submission that what was contended for was a degree of association, or a relationship, less than inclusion or incorporation. If that is what was contended for then, in my view, in moving away from the well understood ordinary English and legal meaning of the words "forms part of", it substitutes an imprecise and subjective test for one which is, in principle, easy to understand (although it may be, in practice, difficult to apply in particular cases).

49 Further, the apparent underlying meaning of the words ("forms part of") for which Mr Corsaro contended would lead to the difficulties that I referred to in paras [33] to [40] of my judgment in ***Consolidated Constructions***. (I should say that, lest it be thought that I have simply applied my reasoning in one case to different submissions in another, the written submissions in both – particularly in so far as they dealt with the policy underlying s 7(2)(a) and its intended operation - were essentially identical: no doubt because Mr Corsaro appeared, in each case, for the party advancing those submissions. Mr Kerr of Counsel, who appeared for the defendant in ***Consolidated Constructions***, and with Mr Finch SC for Austruc, and Mr Corsaro agreed that I could have regard to the submissions made in both cases in deciding each.)

Section 7(2)(a): the evidence

50 The evidence relied upon in support of the proposition that the contract formed part of a loan agreement was as follows:

(1) ACA relied upon funding provided by Westpac, pursuant to what was a "loan agreement" for the purposes of s 7(2)(a).

(2) On a date which is not proved by the evidence, but which was after 19 December 2002, Westpac, ACA and Austruc entered into a "builder's side deed", to which I will refer in more detail in a moment.

(3) Westpac assessed (or caused others to assess) Austruc's progress claims and paid the amount assessed by it (or on its behalf) to ACA which passed on that amount to Austruc and, in addition (where applicable), paid the certified amount of any variations.

51 The builder's side deed includes the following:

(1) It recited that ACA had given Westpac a charge over ACA's assets, including its rights under the contract, and contained Austruc's consent to that security.

(2) Austruc agreed with Westpac to comply with the terms of the contract, but clause 1.2 provided:

"*1.2 Nothing in this Deed obliges the Bank to make any payments under the Building Contract, and for the avoidance of doubt, the Owner and not the Bank is liable to make all payments to the Builder under the Building Contract.*"

(3) It contained provisions restricting the rights of ACA to vary the contract "in a substantial way", and Austruc's entitlement to act on any instruction that would have that effect.

(4) It provided that Austruc should notify Westpac if Austruc were contemplating exercising its rights to terminate the contract or suspend work thereunder, and provided what would happen if such notice were given.

(5) It provided for the effects of termination by reason of Austruc's default.

(6) It dealt with payment of progress claims as follows:

"***6 PAYMENT OF BUILDER'S PROGRESS CLAIMS FROM TIME TO TIME***

When the Builder from time to time makes any claim for a progress payment in accordance with the terms of the Building Contract, upon request by the Builder the Owner agrees to instruct the Bank to make that payment direct to the Builder by way of issuing a bank cheque in favour of the Builder. The Bank agrees to comply with the Owner's instructions only if the Bank would otherwise be obliged to make a payment to the Owner in accordance with the financing arrangements between the Bank and the Owner."

(7) It dealt with the position, as between Austruc and Westpac, if Westpac enforced its securities and went into possession.

(8) It provided for the assignability of all subcontracts and supply agreements to Westpac.

52 Clause 15 of the side deed is of some significance, and I set it out in full:

"**15. SECURITY OF PAYMENT**

1.22 The Builder agrees to give the Bank:

1.1.31 at the same time as it gives a notice to the Owner or makes a claim under the *Security of Payment Act,* a copy of any notice that it gives to the Owner or any claim that it makes under the *Security of Payment Act;* and

1.1.32 within 24 hours of receipt, a copy of any notice provided or claim made by a subcontractor under the *Security of Payment Act;*

1.23 The Owner agrees to give the Bank, within 24 hours of receipt or issue, a copy of any notice provided or claim made under the *Security of Payment Act*.

1.24 The Owner and the Builder agree that the Bank may, but is not obliged to, issue payment schedules in accordance with the *Security of Payment Act* in relation to any claim made under the *Security of Payment Act,* whether by the Builder, and any payment schedule so issued will be taken to be a payment schedule for the purposes of the *Security of Payment Act*.

1.25 The Bank may, in its absolute discretion, make payment direct to the Builder of any amount, and any amount so paid:

1.1.33 may be deducted from any amount which the Bank is required to pay or advance to the Owner under the financing arrangements between the Owner and the Bank;

1.1.34 will be deducted from any amount which is certified or determined as owing to the Builder under the Building Contract; and

1.1.35 will be a debt due from the Owner or the Bank.

1.26 The Owner and the Builder agree and confirm that the agreed authorised nominating authority for the purpose of the *Security of Payment Act* is the Chartered Institute of Arbitrators, or if they are not available, the Institute of Arbitrators and Mediators Australia.

1.27 In this clause, "*Security of Payment Act*" means the *Building and Construction* [sic] *Security for* [sic] *Payment Act* 1999 (NSW)."

(The idiosyncratic numbering is taken direct from the document.)

Conclusion on s 7(2)(a)

53 Mr Finch submitted that the words "forms part of" should be construed, in essence, as I have construed them in *Consolidated Constructions*. He submitted that the builder's side deed was not itself a loan agreement under which Westpac undertook to do any of the things referred to in subparagraphs (i) to (iii) of s 7(2)(a). That may be accepted as correct. But it does not seem to me to be the real question. The real question is whether the builder's side deed has the effect that the contract forms part of the loan agreement between ACA and Westpac (or, more accurately, whether there is a serious question to be tried that it does).

54 In my view, it is arguable that the builder's side deed does have that effect. I say this for the following reasons:
(1) It shows that ACA charged (among other things) its interest under the contract to Westpac; and it records Austruc's consent to that charge.
(2) Austruc undertook direct obligations to the bank in respect of Austruc's performance of the contract.
(3) Austruc's rights under the contract were limited in certain respects (eg, as to substantial variations).
(4) Austruc's exercise of its rights on default by ACA were qualified by the obligation to give notice to Westpac and the opportunity of Westpac thereon to remedy the default.
(5) The builder's side deed gave Austruc the right to request ACA to instruct Westpac to issue a bank cheque in favour of Austruc for payment of progress claims, and obliged Westpac to act on that request if it would otherwise be obliged to make a payment to ACA.
(6) It regulated the position that would arise (and, in so doing, again restricted Austruc's rights) if Westpac went into possession.
(7) It provided for the assignability of subcontracts, supply agreements and warranties.
(8) Finally, and significantly, it provided for Westpac to have the right, but not the obligation, to give a payment schedule in response to any payment claim made by Austruc under the Act (Austruc having accepted an obligation to give copies of any such payment claim to Westpac at the same time as it gave them to ACA); and provided that Westpac could pay direct to Austruc any amount admitted to be owed pursuant to such a payment schedule; and provided who was to be "the agreed authorised nominating authority for the purpose of" the Act.

55 In my judgment, there is a serious question to be tried as to whether these circumstances show that the contract forms part of the loan contract, within s 7(2)(a).

56 However, it does not appear, either from the determination or from the evidence on the notices of motion, that ACA submitted to Mr Sarlos that he had no jurisdiction because of the application of s 7(2)(a). There was no argument before me as to whether an adjudicator in the position of Mr Sarlos could be given jurisdiction by the express or implied consent of the parties, and accordingly I do not consider, let alone decide, that issue. However, I think that it is open to me to take into account, in the exercise of my discretion to grant relief (a serious question to be tried being shown), that the point now relied upon was not taken before Mr Sarlos. By itself, I would not have regarded this point as determinative on the grounds of discretion (contrast the equivalent point in relation to denial of natural justice, referred to in para [71] below). Nonetheless, and by analogy with the reasoning of Nicholas J in ***Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd*** [2003] NSWSC 365 at [33] to [37], I think that it is "wrong in principle" to enable a party to take, in this Court, a ground of objection that was available, and could have been taken, before the adjudicator. Section 25(4) of the Act is not in terms relevant, but I regard it as providing a measure of support to this analysis of the relevant discretionary consideration.

Denial of natural justice

57 The parties accepted that the principles relating to jurisdictional error of law and denial of natural justice were as stated in a number of decisions of this Court, including the decision of Palmer J in ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140, and my decisions in ***Musico v Davenport*** [2003] NSWSC 977 and ***TransGrid v Walter Construction Group*** [2004] NSWSC 21. The real issue arose as to the application of the relevant principles identified in those decisions.

58 This issue arose because Austruc's adjudication application included, among its supporting material, the statutory declaration of Mr Finlay that I have referred to in para [12(3)] above.

59 ACA appeared to put this submission in two different ways. Firstly, it was said, Mr Sarlos should have paid no heed whatsoever to the statutory declaration because it was not something that, by the Act, he was permitted to consider. Secondly, it was said, if Mr Sarlos were going to take it into account, he should have given ACA a reasonable opportunity to reply to it.

"Submissions" to an adjudicator

60 ACA's first argument was based on s 17(3) of the Act. That reads:

"***17 Adjudication applications*** …

(3) An adjudication application:
(a) must be in writing, and
(b) must be made to an authorised nominating authority chosen by the claimant, and
(c) in the case of an application under subsection (1) (a) (i) – must be made within 10 business days after the claimant receives the payment schedule, and
(d) in the case of an application under subsection (1) (a) (ii) – must be made within 20 business days after the due date for payment, and
(e) in the case of an application under subsection (1) (b) – must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and
(f) must identify the payment claim and the payment schedule (if any) to which it relates, and
(g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and
(h) may contain such submissions relevant to the application as the claimant chooses to include. … "

61 It is also relevant to note the equivalent provisions of s 20(2):

"***20 Adjudication responses*** …

(2) The adjudication response:
(a) must be in wring, and
(b) must identify the adjudication application to which it relates, and
(c) must contain such submissions relevant to the response as the respondent chooses to include. … "

62 Mr Corsaro submitted that the content of the adjudication application was limited by s 17(3) and that paragraph (h), dealing with "submissions", did not extend to evidence. He submitted that "[t]he word 'submissions' should be given its ordinary English meaning, namely the theory or reasoning to support the position for which a party is contending. 'Submissions' and 'evidence' are different."

63 Mr Corsaro next relied on s 22(2), dealing with the matters that the adjudicator can take into account:
*"**22 Adjudicator's determination** …*
(2) In determining an adjudication application, the adjudicator is to consider the following matters only:
(a) the provisions of this Act,
(b) the provisions of the construction contract from which the application arose,
(c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
(d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
(e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates. …"

64 Mr Finch submitted that s 17(3) did not contain an exclusive code of what might be included in an adjudication application. Further, as to s 22, he submitted, basing himself on paragraph (c), that, as is apparent, submissions may include "relevant documentation". There is no reason to think that the "submissions" referred to in paragraph (c) are qualitatively different to those referred to in s 17(3)(c).

65 I do not think that the word "submissions", in either s 17(3) or s 22(2), should be limited as Mr Corsaro submitted. Firstly, I do not think that the ordinary English meaning of the word "submission" is limited in the way that ACA contends. It is certainly correct to say that one of the definitions given by the *Shorter Oxford English Dictionary* is "[t]he theory of a case put forward by an advocate". However, the same dictionary also defines the word to mean "the act of submitting a matter *to* a person for decision or consideration"; and it gives other definitions as well. Further, the *Macquarie Dictionary* defines "submission" as including "the act of submitting ... the condition of having submitted … submissive conduct or attitude … that which is submitted … *law* an agreement to abide by a decision or obey an authority in some matter referred to arbitration … ".

66 It is apparent from the definitions given by both dictionaries that the "ordinary English meaning" for which ACA contends is a specific application of the more general meaning, to the effect of "that which is submitted for decision or consideration".

67 Secondly, I think that the better view of s 17(3) is that it does not limit the matters that may be put to an adjudicator in an adjudication application. In this context, I think that the contrast between the mandatory language of paragraphs (a) to (g), and the discretionary language of paragraph (h), is clear.

68 Thirdly, and in any event, I think that it is s 22(2) that governs the situation. It will be recalled that that subsection specifies the only matters that an adjudicator may take into account. Those matters include, through paragraph (c), the relevant payment claim *"together with all submissions (including relevant documentation) …"*. Not only do the parenthesised words show that the legislature had in mind that the word "submissions" was not to be construed narrowly, as ACA contends; they show specifically that the submissions may include relevant documentation in support.

69 It follows, I think, that if a claimant chooses to include, as part of the relevant documentation supporting its payment claim, a statutory declaration whereby relevant matters are, in effect, verified, then that statutory declaration will form part of the material to be considered by the adjudicator. Equally, if a claimant includes such a statutory declaration in its adjudication application, that is part of the "submission" to be considered.

70 I have not overlooked that what is at issue is whether there is a serious question to be tried. However, as Powell J held in ***MCP Muswellbrook Pty Ltd v Deutsche Bank (Asia) AG*** (1988) 12 NSWLR 16, 30, where an application for an interlocutory injunction raises a pure question of law, or a question of law based on facts which are not in contest, it is the duty of the judge to decide that question, and it is in the interest of the parties that the judge do so. I regard this issue as raising either a pure question of law, or a question of law based on facts not in contest (it may be contrasted with the s 7(2)(a) issue, where clearly there are factual questions) and, therefore, as one that I should now decide.

71 There is a separate obstacle in ACA's way on this issue. ACA did not submit to Mr Sarlos that he could not rely upon the statutory declaration, because it was "evidence" rather than "submission". Indeed, it took the position that there was an entitlement to put "evidence" before Mr Sarlos: see para [78] below, where I set out the relevant parts of its adjudication response. Paragraphs 52 and 53 ("evidence in reply") and 54 ("evidence") make this point clearly. The only basis upon which, it was said, Mr Sarlos could not rely on the evidence of Mr Finlay was that asserted in paragraph 54: because he "declare[d] as to meetings in [sic] which he did not attend, and [did] not identify with whom he has had discussions". That is, at best, an objection to the quality, or "admissibility", of the evidence, and is consistent with the position that "admissible" evidence could be received and acted upon.

72 As a matter of discretion (separate to the discretionary matters that are considered later in these reasons), if I were of the opinion that it had not been open to Mr Sarlos to consider the statutory declaration, I would have declined to grant injunctive relief because the point was not taken; indeed, on a fair reading of ACA's adjudication response, Mr Sarlos might have been encouraged to think that he could receive and consider "evidence" as well as "submissions".

Alleged right to respond

73 The other way in which ACA put its case was that Mr Sarlos had denied it natural justice in not giving it notice of his intention to rely upon the statutory declaration, and in not giving it an opportunity to respond to that statutory declaration.

74 I do not think that Mr Sarlos was obliged to give ACA notice of his intention to rely upon the statutory declaration. It was properly before him, as part of the material supporting the adjudication application. It was for him to take a view as to what all the material before him showed. It was not incumbent on him to tell one party that he regarded particular parts of that material, supporting the other party's case, as having particular significance.

75 Further, the entitlements of a respondent in the position of ACA are, substantially, dealt with by the Act: see s 20(1), which entitles a respondent to lodge an adjudication response with the adjudicator within (for present purposes) 5 business days after receiving a copy of the application. It should also be noted that the right of the respondent to lodge an adjudication response, and the contents of that response, are further limited by s 20(2A), (2B).

76 It appears that ACA seriously misunderstood the time limit imposed by s 20(1)(a). Mr Peter Russell O'Toole, a bank manager who swears that he is "authorised by … ACA … to give evidence on its behalf and to swear" an affidavit, has deposed to the following facts (among others):

"***Adjudication***

30. Following issue of the Architect's certificate Austruc applied for an adjudication under the Act.

31. The adjudication application was received by ACA on 22 December 2003 (the Application).

32. Under the Act ACA had two business days to put on a response. By the time we had worked that out we had three hours left to submit a response."

77 It is clear that ACA misunderstood the legislation. Firstly, the relevant time limit under s 20(1) was that provided by paragraph (a), namely, five business days. Secondly, the definition in s 4 of "business days" excludes Saturdays, Sundays, public holidays and 27 to 31 December, both inclusive. The adjudication response that was filed on 24 December 2003 did not need to be filed until (by my calculation) 6 January 2004. In substance, if ACA was deprived of a meaningful opportunity to respond to the statutory declaration, that was because, through its misunderstanding of the relevant provisions of the Act, it deprived itself of approximately two weeks to prepare that response.

78 The response dealt with the statutory declaration as follows:

"***STATUTORY DECLARATION OF MR. JOHN FINLAY***

51. The Claimant seeks to rely upon a Statutory Declaration of Mr. John Finlay declared on 18 December 2003.

52. The Respondent would be severally [sic] prejudiced if the Claimant were able to do so as the declaration deals with matters in which the rules of natural justice would normally evail [sic] the Respondent to call evidence in reply.

53. In the normal course, the Respondent would seek to call evidence in reply from the following persons, but are [sic] simply not able to do so due to [sic] Christmas vacation period:

(a) Greg Hedge;

(b) Denis Leech;

(c) Vlad Joseph;

(d) Ken Demlakian;

(e) Kieran Mulcahy;

(f) Peter O'Toole;

(g) Representatives of Haley Somerset Ventris;

54. Further, Mr Finlay declares as to meetings in [sic] which he did not attend, and does not identify with whom he has had discussions. The Respondent submits that the Claimant is not able to rely on his evidence."

79 ACA did not indicate what evidence it was that it might call from the persons referred to in paragraph 53 of its response. It neither requested Mr Sarlos to allow it an opportunity to provide further written submissions (s 21(4)(a)), nor requested Austruc to agree to an extension of time, pursuant to s 21(3)(b), to enable "evidence in reply" to be furnished to Mr Sarlos.

80 Further, on 2 January 2004 (the first business day after 24 December 2003), Mr Sarlos made a written request, pursuant to s 21(4) of the Act, requiring the submission of further documents and a site inspection. That request was complied with, the relevant documents were delivered and a site inspection occurred. ACA did not use this opportunity to renew its complaints in relation to its alleged inability to answer Mr Finlay's statutory declaration.

81 In all the circumstances, I think, Mr Sarlos was entitled to assume that ACA had said what it wanted to say. In my judgment, he was not required to go further, and reagitate with ACA the issue of a response to Mr Finlay's statutory declaration.

82 I therefore conclude that there is no serious question to be tried in relation to either of the arguments that were developed under the general heading of denial of natural justice.

Further issues

83 Mr Corsaro advanced two other arguments in support of ACA's application for injunctive relief. Firstly, he said, Mr Sarlos was guilty of jurisdictional error of law because he did not value progress claim 10 (including, as it did, progress claim 9) in accordance with the architect's certificate under the contract. Mr Corsaro accepted that, for present purposes, this argument was answered by my decisions in ***Abacus v Davenport*** [2003] NSWSC 1027 and *TransGrid*.

84 Secondly, Mr Corsaro submitted that the form of the adjudication certificate did not comply with s 24(3) of the Act.

85 The certificate specified, relevantly: *"Adjudicated amount determined by the adjudicator: $1,308,727.84*
The amount of interest due and payable on the adjudicated amount is: 1.25 times the current Commonwealth Bankcard Rate from 15 December 2003
The unpaid share of the adjudicator's fees is: $25,471.88
Adjudicated amount after the addition of interest and the unpaid share is: $1,308,727.84 + interest (1.25 times the current Commonwealth Bankcard Rate) + $25,471.88."

86 The draft judgment that was submitted, and the judgment that was entered, read, relevantly, as follows: *"(1) That the Defendant pay the Plaintiff:*
(a) the adjudicated amount determined by the Adjudicator of $1,308,727.84
(b) interest accruing at the rate of 1.25 times the current Commonwealth Bankcard Rate from 15 December 2003; and
(c) $25,457.88 representing that portion of the Adjudicator's fees paid by the Plaintiff on the Defendant's behalf.
This judgment takes effect on 23 January 2004."

87 In my view, it was plain that interest accrued from 15 December 2003 up until 23 January 2004. That is to say, there was an order for interest up to judgment under s 94(1) of the *Supreme Court Act*.

88 In any event, Mr Finch sought leave for Austruc to amend its slip rule notice of motion by inserting, after the word "amount" where it first appears following paragraph 2(c), the following: *"(being an amount calculated as the sum of the items in paragraphs 2(a), 2(b) and 2(c) above)"*.

89 Leave was not opposed and was granted.

90 There was no evidence before me (and, I am prepared to assume, there was none before Mr Sarlos) of what was the "current Commonwealth Bankcard Rate".

91 Section 24 of the Act deals, among other things, with the form and content of adjudication certificates. It provides, relevantly, as follows:

> ***"24 Consequences of not paying claimant adjudicated amount*** …
> *(3) An adjudication certificate must state that it is made under this Act and specify the following matters:*
> *(a) the name of the claimant,*
> *(b) the name of the respondent, who is liable to pay the adjudicated amount,*
> *(c) the adjudicated amount,*
> *(d) the date on which payment of the adjudicated amount was due to be paid to the claimant.*
> *(4) If any amount of interest that is due and payable on the adjudicated amount is not paid by the respondent, the claimant may request the authorised nominating authority to specify the amount of interest payable in the adjudication certificate. If it is specified in the adjudication certificate, any such amount is to be added to (and becomes part of) the adjudicated amount. …"*

92 It was not submitted that Austruc was not entitled to interest at the rate specified in the adjudication certificate from 15 December 2003 up until the entry of judgment. The complaint that was made was that the certificate did not specify the "amount" of interest.

93 This issue was not addressed in writing. The oral submissions that were put in support of it were to the effect that it was beyond the power of the Registrar to award interest at a rate other than the prescribed rate. That may be so, if what was ordered was interest under s 95. But, as I have said, I do not think that it is; and in any event, if the judgment is to be further corrected in the manner suggested by the amendment that was made to the slip rule notice of motion during the course of the hearing, that will be made clear beyond doubt.

94 It was further submitted that the adjudication certificate did not comply with s 24(3) [sic] (T 34.28) because it did not specify the amount of interest. However, it stated the entitlement; and the entitlement was picked up in the minute of judgment. The specification of the adjudicated amount was correct (in that it corresponded to the amount determined by Mr Sarlos) and the amount so specified did not need to be increased by an amount of interest (because no amount of interest was specified).

95 Section 24(4) authorises the adding of interest to the adjudicated amount where the amount of interest is specified. It does not seem to me to exclude what actually happened in this case: namely, the specification (perhaps because a quantification could not be carried out) of the entitlement. Further, and correspondingly, I think that a judgment that states the adjudicated amount, and the basis upon which interest is to be calculated on that adjudicated amount up until entry of judgment, is not irregular.

General discretionary considerations

96 I now turn to general discretionary considerations. These are separate to the particular discretionary considerations that I have identified in paras [56] and [71] above.

97 As I have said in paras [14] and [15] above, ACA recognised that consideration needs to be given to the adequacy of damages as a remedy and to the balance of convenience but did not address these questions.

98 In my view, notwithstanding the conclusions to which I have come on the s 7(2)(a) issue (and even if I were wrong on the remaining issues relied on by ACA), injunctive relief should not be granted.

99 Firstly, there is no basis for thinking that damages are not an adequate remedy. It is clear that there may be disputes between the parties as to the work done by Austruc: Mr O'Toole refers to "substantial defects", including alleged defects relating to some sheet piling. It is asserted that ACA has to meet costs of rectification of approximately $450,000. It is further asserted (and I am not sure how this can be reconciled to the alleged cost of rectification of $450,000) that the architect under the contract *"has certified a sum owing by Austruc to ACA in the sum of $713,213" (apparently relating to "the scope of rectification works") and that "[t]he QS has … assessed that … Austruc owes to ACA the sum of approximately $600,000"* (again, the reconciliation of this to the other figures is not clear). (I interpose that, although it is not clear who is the "QS" referred to, it may be the firm of Newton Fisher, Quantity Surveyors, retained by Westpac.)

100 As against this, ACA claims to have (or to have had, at the time Mr O'Toole swore his affidavit) some $980,000 cash at bank.

101 It is said, in a letter from Clayton Utz to Henry Davis York, that ACA requires payment of about "$1.1M" to enable it to meet its obligations to subcontractors. This assertion has not been separately proved; nor (on the material before me) has it been denied. I do not think that I should accept it as probative; but, in the ordinary way, one would expect that a builder in the position of Austruc has obligations to subcontractors and that such a builder might look to corresponding payments from its principal under the head contract to enable it to meet those obligations. Leaving those speculations aside, there is no evidence to suggest that Austruc would be unable to repay the adjudicated amount (or some lesser part thereof) if, upon a final hearing, there were found to be a balance owing by it to ACA.

102 The object of the Act is to ensure that a person who undertakes to carry out construction work is entitled to, and recovers, progress payments (see s 3(1)). The Act provides a quick, and it must be said somewhat rough and ready, mechanism for giving effect to that purpose. The whole scheme of the Act is to provide a quick and certain means of determination. The central importance of this was reinforced by the amendments made pursuant to the *Building & Construction Industry Security of Payment Amendment Act* 2002. It was emphasised by the Ministers in the Second Reading Speeches both on the Bill for the 1999 Act and on the Bill for the 2002 Act.

103 Those considerations suggest very strongly that the Court should be slow to interfere in, by restraining enforcement action taken under, the legislative scheme.

104 If I were otherwise minded to grant injunctive relief, I would require at least that Austruc be given, in exchange for its rights under the Act, some alternative: for example, payment in of, or acceptable security for, the adjudicated amount (including interest and costs). No such alternative has been proposed. In any event, because the relevant considerations were not argued, this should not be taken as a concluded view that it would be appropriate to grant relief on those (or some other) conditions.

105 Both because damages are an adequate remedy (the dispute relates to money and there is no evidence to suggest that Austruc could not, if called upon to do so, repay any relevant amount), and on grounds of balance of convenience (to grant injunctive relief would interfere in a fundamental way with the clear legislative intent, whilst providing nothing in return), I would in any event decline to grant injunctive relief.

The "notification" notice of motion

106 This may be dealt with briefly. The evidence filed in support of it shows that Austruc's solicitors sought, unsuccessfully, details of the financial position of both ACA and the unit trust of which it was trustee. That information was not provided. It appears that ACA has a paid up capital of $4, and that the only assets that it holds are held in its capacity as trustee of the unit trust.

107 Further, on ACA's own evidence, its liabilities (including its liability to Austruc under Mr Sarlos' determination) substantially exceed its available resources.

108 No serious argument was advanced in opposition to the relief claimed in this notice of motion. In view of the conclusions to which I have come, I need do no more than record that, if it were necessary, I would grant the relief sought.

Conclusions and order

109 The parties were agreed that I should state my reasons on the three notices of motion and then stand the matter over to enable the parties to bring in draft orders, both to give effect to these reasons and, to the extent that it may be necessary, to deal with any orders of the Court that are presently in force.

110 I have concluded that Austruc's slip rule notice of motion should succeed and that, if necessary, its "notification" notice of motion should succeed. I have concluded that ACA's notice of motion should not succeed.

111 In accordance with the parties' wishes, I stand the proceedings over, to a date to be arranged with my associate, but in any event no later than 2 April 2004, to enable the parties to bring in draft orders and to make submissions (if desired) on costs.

S G Finch SC/S A Kerr (Austruc) instructed by Clayton Utz
F C Corsaro SC/S Goldstein (ACA) instructed by Henry Davis York
Mr Sarlos (submitting appearance)