

JUDGMENT : GZELL J. Equity Division. Supreme Court New South Wales. 31st August 2007

- 1 The plaintiff, Boutique Developments Ltd, seeks an injunction restraining the first defendant, Construction & Contract Services Pty Ltd, from taking any step to obtain or enforce any adjudication determination.
- 2 Boutique Developments also seeks an injunction to restrain the second defendant, The Institute of Arbitrators and Mediators Australia, from taking any step to determine an adjudication application.
- 3 The application relates to the provision of engineering reports to Boutique Developments in aid of its litigation with CGU Insurance Pty Ltd. The services are the preparation and provision of expert reports. The question is whether the provision of those reports falls within the definition of “construction work” or work undertaken to supply “related goods and services” in respect of both of which services a person is entitled to a progress payment under the *Building and Construction Industry Security of Payment Act 1999*, s 8(1).
- 4 The work in question has been described in an affidavit sworn by Simon Maddison Wilson as being limited exclusively to reading, drafting and attendance work that he did at the request of Boutique Developments, the work relating to construction work, in his submission, in that the whole purpose of the work that was conveyed in the documents that were produced by him was to assess the defects in the construction works completed by others and to assess the cost of rectifying the same, together with related issues, in support of Boutique Developments’ claim against the third party insurers.
- 5 The definition of “construction work” in the *Building and Construction Industry Security of Payment Act 1999*, s 5(1) contains itemised work including “construction” and “repair.” It was submitted that the work in question answers either or both those descriptions.
- 6 “Related goods and services”, for the purposes of the *Building and Construction Industry Security of Payment Act 1999*, s 8(1), is defined in s 6(1) and, in particular, in s 6(1)(b)(ii) as:
“services of the following kind:
(i) ...
(ii) architectural, design, surveying or quantity surveying services in relation to construction work,”
- 7 In my view, the work in question does not fall within either the definition of “construction work”, or the definition of “related goods and services”. The work was not itself repair work. It was the provision of reports to determine what repair work was necessary. The work was not itself construction work. It was the provision of expert reports in relation to the quality of construction work done by others. The work was not architectural, design, surveying or quantity surveying services in relation to construction work. Those services must relate to the actual construction work itself. Architectural, design, surveying, or quantity surveying services provided in the establishment of documents germane to the performance of construction would fall within the definition, but not engineering expert reports on defects in construction already carried out.
- 8 In my view, therefore, the adjudicator would act outside the scope of his jurisdiction if he proceeds to deal with the matter.
- 9 Reference was made to *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd & Anor* [2005] NSWSC 362, in which McDougall J refused to entertain a jurisdictional entitlement question under a submission that the court could easily and quickly determine the matter and the plaintiff ought not be put to the trouble and expense of making its response to the adjudication application.
- 10 That case was different from the instant circumstances. The issue related to remediation work on, apparently, a much contaminated site. His Honour said at [13] that one of his reasons for rejecting the submission was that the legislature had made it quite clear that it was adjudicators who were the primary organs for the resolution of these disputes. The power of the court came in either to enforce a determination or, in the limited circumstances described in *Brodyn Pty Ltd v Davenport & Anor* [2004] NSWCA 394, to restrain enforcement of a determination.
- 11 Another case in which this court refused to intervene was *Lifestyle Retirement Products No 2 Pty Ltd v Parisi Homes Pty Ltd & Anor* [2005] NSWSC 411. Again the situation was different from the instant circumstances in that the dispute was whether a claim was served by the first defendant within the time prescribed by the *Building and Construction Industry Security of Payment Act 1999*. Palmer J followed *Australian Remediation Services*.
- 12 Notwithstanding the factual differences between those cases and the one before me, the principle enunciated by McDougall J in *Australian Remediation Services* should guide the approach I take to this issue.
- 13 The only case counsel was able to cite where the court restrained an adjudicator from entering upon a determination was where parallel proceedings were pending before the Court of Appeal - *Veolia Water Solutions & Technologies v Kruger Engineering Australia Pty Ltd* [2006] NSWSC 1406, a decision of McDougall J. That is not the situation in these proceedings.
- 14 In my view, it is for the adjudicator to determine the question whether or not he has jurisdiction, and I dismiss the summons. I order the plaintiff to pay the first defendant’s costs.

Mr J O’Sullivan – Plaintiff instructed by Wright Pavuk Lawyers
Mr M Lawson - Defendant