

JUDGMENT : Gzell J. Supreme Court of New South Wales Equity Div. 2nd April 2004

- 1 The plaintiff sought an order in the nature of a writ of certiorari under the *Supreme Court Act 1970*, s 69 quashing a determination of the first defendant as an adjudicator appointed under the *Building and Construction Industry Security of Payment Act 1999* ("Act").
- 2 The structure of the Act is set out in *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 935. It was there decided that certiorari lies to quash a determination of an adjudicator in appropriate circumstances. Those circumstances were further analysed in *Musico v Davenport* [2003] NSWSC 977, a decision that has been followed, in this regard, on a number of occasions (*Brodyn Pty Ltd v Davenport* [2003] NSWSC 1019, *Abacus v Davenport* [2003] NSWSC 1027, *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, *Transgrid v Walter Construction Group Ltd* [2004] NSWSC 21).
- 3 On 28 September 2003, the second defendant served a payment claim on the plaintiff for \$195,222.64 exclusive of GST. On 29 September 2003 the plaintiff responded that the second defendant's wrongful repudiation of the contract had been accepted by the plaintiff and the contract was no longer in force, that it had submitted a detailed payment schedule in response to an earlier claim and relied upon that information and that the claim was beyond jurisdiction because a final claim had been submitted already.
- 4 On 2 October 2003, the second defendant applied for adjudication of its payment claim. The adjudication application was accepted by the first defendant who on 16 October 2003 made his determination requiring the plaintiff to pay \$180,059.00.
- 5 Section 24(1) of the Act provided that if there was a failure to pay the whole or any part of the adjudicated amount, the claimant might request the authorised nominating authority to provide an adjudication certificate. On 17 October 2003, the second defendant obtained an adjudication certificate.
- 6 Section 25 of the Act was in the following terms:
 - "(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.
 - (2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.
 - (3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.
 - (4) If the respondent commences proceedings to have the judgment set aside, the respondent:
 - (a) is not, in those proceedings, entitled:
 - (i) to bring any cross-claim against the claimant; or
 - (ii) to raise any defence in relation to matters arising under the construction contract; or
 - (iii) to challenge the adjudicator's determination; and
 - (b) is required to pay into court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings."
- 7 On 17 October 2003, the second defendant filed the adjudication certificate in the District Court of New South Wales. The plaintiff has not moved to set aside the judgment.
- 8 On 13 June 2003, the plaintiff purported to terminate the construction contract between it and the second defendant. Its entitlement to do so is in dispute. No further construction work was carried out for the plaintiff by the second defendant.
- 9 On 27 June 2003, the second defendant submitted a final claim for \$115,340.39 exclusive of GST. The plaintiff responded on 9 July 2003 alleging that the second defendant owed it \$125,695.29. The second defendant took no steps to enliven the interim payment procedure under the Act.
- 10 On 28 August 2003, the second defendant submitted a further document entitled "final claim" in an amount of \$191,800.78 exclusive of GST. The difference between that amount and the amount in the earlier final claim related to materials left on site and an interest charge. The plaintiff responded on 9 July 2003 alleging that the second defendant had lodged a final claim and was not entitled to lodge a second one.
- 11 On 15 September 2003, the second defendant applied to an authorised nominating authority for its claim to be adjudicated but on 23 September 2003 it notified the plaintiff that it had withdrawn its adjudication application.
- 12 The difference between the second final claim and the claim dated 28 September 2003 was an additional interest charge.
- 13 Section 8(1) of the Act provided that on and from each reference date under a construction contract a person who had undertaken to carry out construction work or had undertaken to supply related goods and services under the construction contract was entitled to a progress payment. The reference date was a date determined in accordance with the terms of the contract on which a claim for a progress payment might be made or, if the contract was silent, the last day of the month in which the construction work was first carried out and the last day of each subsequent month. The contract between the plaintiff and the second defendant provided that progress claims could be submitted on the 14th and 28th of the month.

- 14 A progress payment was defined in s 4 of the Act to mean a payment to which a person was entitled under s 8 including the final payment for construction work carried out or for related goods and services supplied under a construction contract.
- 15 The plaintiff argued that the statutory entitlement to serve a final payment claim was limited to a single claim because a progress payment included but one final payment, the reference date was limited to a period in which construction work was carried out and s 13(5) of the Act provided that a claimant could not serve more than one payment claim in respect of each reference date. As I have said, the second defendant had ceased to carry out construction work for the plaintiff before its first final claim was served.
- 16 The plaintiff argued that if the first final claim was properly served, notwithstanding that it was not so served on the 14th or 28th of a month, the second defendant was not entitled to serve the second or third payment claims. Alternatively, if the first final claim was invalid because of the date upon which it was served, the second final claim was the only one the second defendant was entitled to serve and the payment claim upon which the adjudication determination in favour of the second defendant was made was invalid.
- 17 If these arguments be correct, the first defendant mistakenly asserted the existence of a power he did not have. That is jurisdictional error and certiorari is available to quash the determination (**Craig v The State of South Australia** (1994-1995) 184 CLR 163 at 175-176).
- 18 However, the plaintiff's claim to certiorari must be viewed in light of s 25 of the Act.
- 19 The scheme of the Act was to ensure that contractors obtained expeditious payment of progress claims. If there was a dispute as to the amount, a fast adjudication system was provided. The adjudicator's decision had to be obeyed and judgment could be entered for the adjudicated amount without the opportunity of challenge by way of defence or cross claim.
- 20 The structure is an interim regime only. The plaintiff is not debarred from claiming any relief to which it is entitled in other proceedings. Section 32 of the Act was specific. Nothing in the interim regime affected any rights that a party to a construction contract may have had under the contract or apart from the Act in respect of anything done or omitted to be done under the contract. The plaintiff had commenced separate proceedings in the District Court claiming damages.
- 21 Integral to the protection of the interim regime was s 25 of the Act. If the plaintiff sought to set aside the District Court judgment constituted by the filing of the adjudication certificate, it could not challenge the adjudicator's determination. The only utility of an order in the nature of certiorari is to ground an application to set aside the judgment but in such proceedings the plaintiff is debarred from challenging the adjudicator's determination.
- 22 In **R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd** (1949) 78 CLR 389 at 400, the High Court said there were well recognised grounds upon which a court might, in its discretion, withhold the remedy of a prerogative writ. It might not be granted if a more convenient and satisfactory remedy existed, if no useful result could ensue, if the party had been guilty of unwarrantable delay, or if there was bad faith on the part of the applicant.
- 23 In **Ex parte Malouf; Re Gee** (1943) 43 SR (NSW) 195 the court refused to prohibit or quash a summary conviction that was itself suspended pending an appeal.
- 24 In my view no useful result could ensue from the issue of an order in the nature of certiorari and, in my discretion, I refuse to grant such relief.
- 25 The consequence is that I dismiss the summons and order the plaintiff to pay the defendants' costs.

Ms Rashda Rana- Plaintiff instructed by Schrader & Associates

Mr Patrick Fisher- 2nd Defendant instructed by Turnbull Bowles Lawyers Pty Ltd