

Margaret Anne Cooper v Home Productions P/L, Consumer Trader & Tenancy Tribunal

JUDGMENT: Patten AJ : New South Wales Supreme Court : 28th June 2005

- 1 This is an appeal from Master Harrison, who, on 14 March 2005, made these orders:
1. That the proceedings be stayed until the First Respondent (Ms Cooper) pays into the court as security, the sum of \$9,834.41, being "the unpaid portion of the adjudicated amount" within the meaning of s.25 (4) of the Building and Construction Industry Security of Payment Act 1999 (the Act), pending the final determination of these proceedings.
 2. That the proceedings are referred to the Registrar on 13 April 2005 to ascertain whether they should be stayed pending lodgement of the security.
 3. Ms Cooper is to pay the Second Defendant's (Home Productions) costs as agreed or assessed.
- 2 The Master's orders were made upon a Notice of Motion filed on behalf of Home Productions. These proceedings were instituted by summons seeking various forms of relief. The summons as amended sought various forms of relief as follows:
1. A declaration that the Adjudication Determination made by the First Defendant in favour of the Second Defendant against the Plaintiff under the Building and Construction Industry (Security of Payment) Act, 1999 (NSW) (BCISP Act) is null and void and of no effect.
Grounds:
 - (i) That the first Defendant, being a 'court' within the meaning of the term in s22(1) of the Consumer Trader and Tenancy Tribunal Act, 2001, had no jurisdiction 'to hear or determine' the adjudication because, pursuant to s22(3) of the Consumer Trader and Tenancy Tribunal Act, 2001, proceedings in respect of the 'same issue' the subject of the dispute between the Plaintiff and the Second Defendant were 'pending' before the Tribunal at the date the First Defendant was appointed;
 - (ii) That the Plaintiff was denied natural justice in that she was not afforded any opportunity to put her case to the First Defendant because she was not served and/or had no knowledge of the Adjudication Application, the Adjudication Response Form and Notice of Acceptance of Adjudication Application, until after the Adjudication was made and contrary to the provisions of the BCISP Act including the provisions for service.
 - (iii) That the purported making of the Adjudication Determination was not a bona fide exercise of the power by the First Defendant pursuant to the BCISP Act.
 2. In the alternative, an order setting aside the Adjudication Determination *ex debito justitiae*.
 3. Orders, in respect of an order of the Local Court at Parramatta made on 24th September 2004, annexed and marked "A":
 - (i) extending time for leave to appeal, pursuant to SCR Pt 51A r2A(3), from 14 days to 27 days, that is, to the date of this summons;
 - (ii) Granting leave to appeal from the order of Mr Garbett, Magistrate, on the ground that the Magistrate erred in his exercise of discretion to not continue a stay of the enforcement of the default judgment when there had been no trial on the merits and the parties were waiting on a decision on jurisdiction from the CTTT as stated in the letter annexed at "B";
 - (iii) Allowing the appeal and setting aside the order of Mr Garbett made on 24th September 2004 and in its place make an order setting aside the default judgment dated 17th June 2004, pursuant to s69(4) (a) Local Court (Civil Claims) Act 1970, if the Plaintiff is otherwise successful in the relief claimed above in respect of the Adjudication Determination.
 4. Order pursuant to ss 65 and 67 of the Consumer Trader and Tenancy Tribunal Act 2001, in respect of an appeal from that part of a decision of the Tribunal delivered on 21st October 2004, with reasons dated 20th October 2004, that it lacked jurisdiction to hear the Plaintiff's claim for relief from payment;
 - (i) Appeal allowed;
 - (ii) A declaration, pursuant to ss 65(1)(a) & (2) (a) of the Consumer Trader and Tenancy Tribunal Act 2001, that the Tribunal has jurisdiction to hear the claim by the Plaintiff under s8(1) (d) of the Consumer Claims Act 1998;
 5. Costs."
- 3 In order to understand the significance of the learned Master's orders, it is necessary to refer in some detail to the background of the matters as appears from the evidence before the Master and, in particular, the affidavit of Ms Tanya Segelov, the solicitor for Ms Cooper. The following matters were established by evidence or were common ground.
- On or about 19 December 2003, an agreement was entered into between Ms Cooper and Home Productions, whereby Home Productions contracted to carry out certain construction work at commercial premises and to supply related goods and services. As a deposit, Ms Cooper paid Home Productions the sum of \$8,000.
 - In the period December 2003 to January 2004, Home Productions performed work and supplied goods and services pursuant to the agreement.
 - On 3 March 2004, Home Productions claimed against Ms Cooper the sum of \$7,328.50 for work performed to date, under the agreement.
 - On 8 March 2004, Ms Cooper, by letter to Home Productions, terminated the agreement.
 - On 31 March 2004, Home Productions served upon Ms Cooper, a payment claim under s13 of the Act. The sum claimed was \$7,636.50.

- Ms Cooper failed to avail herself of the opportunity to reply to the payment claim, pursuant to s14 of the Act by providing a payment schedule to Home Productions and, as a consequence, s14 (4) of the Act came into operation.
- On 16 April 2004 made application to the Consumer Trader and Tenancy Tribunal, pursuant to s8 of the Consumer Claims Tribunal Act.
- In her application to the Consumer Trader and Tenancy Tribunal, Ms Cooper, in effect, sought compensation in respect of allegedly defective goods and workmanship supplied and carried out pursuant to the agreement and compensation for delay in completion of the agreement.
- In correspondence to the solicitors for Home Productions in her application to the Tribunal, Ms Cooper quantified her claim as less than \$25,000.
- On 20 April 2004 Home Productions, by letter to Ms Cooper, complies with s17 (2) of the Act.
- On 23 April 2004, the Consumer Trader and Tenancy Tribunal sent Notices of Hearing to Ms Cooper and Home Productions.
- On 30 April 2004, Home Productions made an Adjudication Application to an authorised nominating authority, pursuant to s 17 (3) of the Act.
- There is an issue as to whether Home Productions served a copy of the Adjudication Application upon Ms Cooper'.
- On 7 May 2004, the First Defendant, Mr Veghelyi, made a determination that Ms Cooper is to pay Home Productions the sum of \$7,636.50 together with adjudication fees and interest, the total payable being, \$9,834.41 in accordance with his adjudication certificate which stated the date of adjudication as 10 May 2004 and specified that the adjudicated amount was payable on 21 May 2004.
- ON 17 June 2004, Home Productions caused the adjudication certificate to be filed as a judgment for debt in the Local Court at Parramatta.
- There was a hearing in the **Consumer Trader and Tenancy Tribunal** (the Tribunal) on 12 May 2004 and 13 August 2004, as a consequence of which the Tribunal on 20 October 2004 published its reasons and orders. The hearing before the Tribunal was confined to the issue of its jurisdiction, it having been submitted on behalf of Home Productions that the determination by the Adjudicator in effect had deprived the Tribunal of jurisdiction. The Tribunal correctly, in my view, for the reasons which it gave, held that it had jurisdiction to deal with Ms Cooper's application and directions have been given for the further progress of that application towards hearing in the Tribunal.
- In its reasons for decision, the Tribunal noted that the orders sought by Ms Cooper following amendments made at the hearing on 13 August 2004, were:
 - “1. That (Home Productions) pay (Ms Cooper) the sum of \$3,950 or such other sum as the Tribunal determined, pursuant to s8 (1) (a) of the Consumer Claims Act 1998.
 2. An order declaring that \$7,500 or such other sum as the Tribunal determines is not due or owing by (Ms Cooper) to (Home Productions) pursuant to s8 (1) (d) Consumer Claims Act 1998.
 3. Costs, pursuant to s 53 of the Consumer Trader and Tenancy Tribunal Act 2001.
- The orders made by the Tribunal on the issue of its jurisdiction were expressed in the final six paragraphs of its reasons as follows:

“Further, for the reasons set out in section 32 of the BCISP Act, and under the reasoning in Brodyn above, the order of the Adjudicator is not a final, but only an interim order. With respect, the estoppel argument does not succeed, as requirement (2) of Lord Guest's summary is not satisfied.

Also, the issue of the merchantable quality of the good supplied, and any delay in supply (both raised in the present application) were not dealt with as an issue in the Adjudicator's proceedings, which suggests requirement (1) was also not satisfied.

I may be that the application for “relief from payment” is in effect an attempt to go behind, or set aside the Adjudicator's determination. If so, it will not be heard at any subsequent hearing. The remaining issues are still extant.

The Tribunal therefore has jurisdiction, at the least to determine the issues other than the application fro relief from payment.

The application will therefore be listed before the Tribunal in due course of directions, to proceed the matter to a hearing.”
- During the pendency of the proceedings before the Tribunal, Ms Cooper sought relief in the Local Court at Parramatta in respect of the judgment entered against her upon the adjudication certificate. She received, at least one stay of proceedings but, as it appears, such stay was lifted as from 24 October 2004 by order of Local Court Magistrate, Garbutt, made on 24 September 2004.
- Ms Cooper has made no payment to Home Productions on account of the Local Court judgment.
- On 21 October 2004, Ms Cooper filed a Summons seeking relief in this court, such relief in its intended form being as set forth above.

- On 25 February 2005, Home Productions filed the Notice of Motion upon which Master Harrison made orders which are the subject of the appeal before me.
 - Whatever the result of this appeal, there looms before the parties to a dispute regarding a relatively very small amount of money, a hearing on the merits of Ms Cooper's Summons in this matter and a hearing on the merits of her claim before the Tribunal. Legal costs incurred by the parties to date and legal costs potentially to be incurred must, I infer, many times exceed the amount at issue, in what has aptly been described, in my opinion, as a tortuous piece of litigation.
- 4 It is appropriate, at this stage, that I turn to some relevant provisions of the Act. In that regard, as it seems to me, the purpose and scheme of the Act is encapsulated by s3 as follows:
- "(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.
- (2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.
- (3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
- (a) the making of a payment claim by the person claiming payment, and
 - (b) the provision of a payment schedule by the person by whom the payment is payable, and
 - (c) the referral of any disputed claim to an adjudicator for determination, and
 - (d) the payment of the progress payment so determined.
- (4) It is intended that this Act does not limit:
- (a) any other entitlement that a claimant may have under a construction contract, or
 - (b) any other remedy that a claimant may have for recovering any such other entitlement.
- 5 Section 5 of the Act defines construction work and the definition includes:
- (a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),
 - (f) the painting or decorating of the internal or external surfaces of any building, structure or works,
- 6 Section 8 deals with the rights to progress payments and relevantly to this case, provides:
- (1) On and from each reference date under a construction contract, a person:
- (a) who has undertaken to carry out construction work under the contract, or
 - (b) who has undertaken to supply related goods and services under the contract, is entitled to a progress payment.
- (2) In this section, "reference date", in relation to a construction contract, means:
- (b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.
- 7 Under section 9 the amount of a progress payment to which a person is entitled in respect of a construction contract is to be:
- (a) the amount calculated in accordance with the terms of the contract, or
 - (b) if the contract makes no express provision with respect to the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out by the person (or of related goods and services supplied or undertaken to be supplied by the person) under the contract.
- 8 The procedure for recovering progress payments is dealt with in part 3 of the Act which encompasses ss 13 to 32 inclusive. Those provisions which seem to have relevance to this case are as follows:
- S13(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the "claimant") may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.
- (2) A payment claim:
- (a) must identify the construction work (or related goods and services) to which the progress payment relates, and
 - (b) must indicate the amount of the progress payment that the claimant claims to be due (the "claimed amount"), and
 - (c) must state that it is made under this Act.
- (3) The claimed amount may include any amount:
- (a) that the respondent is liable to pay the claimant under section 27 (2A), or
 - (b) that is held under the construction contract by the respondent and that the claimant claims is due for release.
- (4) A payment claim may be served only within:
- (a) the period determined by or in accordance with the terms of the construction contract, or
 - (b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

S14(1) A person on whom a payment claim is served (the "respondent") may reply to the claim by providing a payment schedule to the claimant.

(2) A payment schedule:

(a) must identify the payment claim to which it relates, and

(b) must indicate the amount of the payment (if any) that the respondent proposes to make (the "scheduled amount").

(3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.

(4) If:

(a) a claimant serves a payment claim on a respondent, and

(b) the respondent does not provide a payment schedule to the claimant:

(i) within the time required by the relevant construction contract, or

(ii) within 10 business days after the payment claim is served,

whichever time expires earlier,

the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

S15(1) This section applies if the respondent:

(a) becomes liable to pay the claimed amount to the claimant under section 14 (4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may:

(i) recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, or

(ii) make an adjudication application under section 17 (1) (b) in relation to the payment claim, and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

(3) A notice referred to in subsection (2) (b) must state that it is made under this Act.

(4) If the claimant commences proceedings under subsection (2) (a) (i) to recover the unpaid portion of the claimed amount from the respondent as a debt:

(a) judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and

(b) the respondent 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.

17 Adjudication applications

(1) A claimant may apply for adjudication of a payment claim (an "adjudication application") if:

(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(3) An adjudication application:

(a) must be in writing, and

(h) may contain such submissions relevant to the application as the claimant chooses to include.

(5) A copy of an adjudication application must be served on the respondent concerned.

(6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable.

S18 Eligibility criteria for adjudicators

(1) A person is eligible to be an adjudicator in relation to a construction contract:

(a) if the person is a natural person, and

(b) if the person has such qualifications, expertise and experience as may be prescribed by the regulations for the purposes of this section.

S19 Appointment of adjudicator

(1) If an authorised nominating authority refers an adjudication application to an adjudicator, the adjudicator may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent.

(2) On accepting an adjudication application, the adjudicator is taken to have been appointed to determine the application.

S20(1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the "adjudication response") at any time within:

(a) 5 business days after receiving a copy of the application, or

- (b) 2 business days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later.
- (2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14 (4) or 17 (2) (b).
- (2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.
- S 21(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.
- (3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:
- (a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or
- (b) within such further time as the claimant and the respondent may agree.
- (4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:
- (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and
- (b) may set deadlines for further submissions and comments by the parties, and
- (c) may call a conference of the parties, and
- (d) may carry out an inspection of any matter to which the claim relates.
- (5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

S22 Adjudicator's determination

- (1) An adjudicator is to determine:
- (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the "adjudicated amount"), and
- (b) the date on which any such amount became or becomes payable, and
- (c) the rate of interest payable on any such amount.
- (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.
- (3) The adjudicator's determination must:
- (a) be in writing, and
- (b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).

S24 Consequences of not paying claimant adjudicated amount

- (1) If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with section 23, the claimant may:
- (a) request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under this section, and
- (b) serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.
- (5) If the claimant has paid the respondent's share of the adjudication fees in relation to the adjudication but has not been reimbursed by the respondent for that amount (the "unpaid share"), the claimant may request the authorised nominating authority to specify the unpaid share in the adjudication certificate. If it is specified in the adjudication certificate, any such unpaid share is to be added to (and becomes part of) the adjudicated amount.

S25 Filing of adjudication certificate as judgment debt

- (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 the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

S32 Effect of Part on civil proceedings

- (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract:
 - (a) may have under the contract, or
 - (b) may have under Part 2 in respect of the contract, or
 - (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
- (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal:
 - (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
 - (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings.

S36 The Commercial Arbitration Act 1984 is amended as set out in Schedule 1.

9 The interim nature of the rights conferred by Pt 3 of the Act has been discussed in a number of decisions of this court, including by Burgin J in *Paynter Dixon Constructions Pty Ltd v J F & C G Tilston Pty Ltd and Anor* (2003) NSWSC 869 and by Einstein J in *Brodyn Pty Ltd v Philip Davenport & Anor* (2003) NSWSC 1019. I respectfully adopt what His Honour said in that case at paragraph 14: "What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. That vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator, in some instances, cannot possibly in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator by s21 and, in particular, by s 21 (4A) denying the parties any legal representation at any conference, which may be called. But primarily it is because the nature and range of issues, legitimate to be raised, particularly in the case of large construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim, quick solution to progress payment disputes, which solution, critically does not determine the parties rights inter se. Those rights may be determined by curial proceedings, the court then having available to it the usual range of relief most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication procedures. That claw back route expressly includes the making of restitution orders."

10 In this case, in her judgment, the Master quoted the following paragraphs from the judgment of Hodgson JA (with whom Mason P. and Giles JA agreed) in *Brodyn Pty Ltd v Davenport & Anor* (2004) NSWCA 394: "Further, in my opinion an order of the Supreme Court quashing the determination or declaring it to be void could itself support the setting aside of the judgment. In my opinion, if the determination was quashed or declared void, reliance on there being no determination to support the judgment would not be to challenge the adjudicator's adjudication within s.25(4): this wording assumes that there is a determination which is challenged.

Indeed, even in the absence of such an order quashing the determination or declaring it void, the respondent could in my opinion seek to have the judgment set aside on the ground that there never was a determination. If for example a respondent could show that the document that was filed as being an adjudicator's determination was a forgery, that would not be challenging the adjudicator's determination. Similarly, in my opinion, if the respondent could show that for some other reason recognised in law a purported adjudicator's determination did not amount to an adjudicator's determination within the meaning of the Act, that would not be challenging an adjudicator's determination: this, as indicated above, assumes that there is such a determination to be challenged. Conceivably, the availability of that remedy could itself be a ground for refusing relief in the Supreme Court, on the basis that the same matter could more conveniently be relied on in an application to set aside the judgment; but that was not a matter relied on by the primary judge.

Where the adjudicator's determination is void for one of the reasons discussed above, then until it is filed as a judgment, proceedings can appropriately be brought in a court with jurisdiction to grant declarations and injunctions to establish that it is void and to prevent it being filed. However, once it has been filed, the resulting judgment is not void. An application can be made to set aside the judgment; and as noted above in pars.[41] and [42], it is not contrary to s.25(4)(a)(iii) to do so on the basis that there is in truth no adjudicator's determination."

11 Following what was said by Hodgson JA in *Brodyn*, the Master held that the judgment in the Local Court is not void and "therefore the Respondent must seek an order in these current proceedings that the Local Court judgment be set aside", and indeed, such an order is sought in the Amended Summons. The Master did not consider the caveat referred to by Hodgson JA that such an application should in truth properly be made in the Local Court.

12 Concluding that, in any event, there was before her proceedings to have the judgment set aside, the Master concluded that s25 (4) (b) of the Act applied and that Ms Cooper was required to pay into court, as security, the adjudicated amount pending the final determination of the proceedings.

- 13 The Master, in her reasons, did not expressly deal with the question whether there should also be a stay of these proceedings until the amount to be paid by s25 (4)(b) is actually paid and, indeed, there is, I think some uncertainty as to the effect of the orders the Master did in fact make. The actual form of the first order, which she made, was "I make an order in accordance with paragraph 2 of the Second Defendant's Notice of Motion dated 25 February 2005". Paragraph 2 of the Second Defendant's Notice of Motion followed paragraph 1 in which the order sought was "pursuant to FCR Pt 13 r5 (1)(c) that the proceedings be dismissed (an order which I was informed from the bar table was not pressed before the Master). Order 2 as sought then read:
- "2. Alternatively, that the proceedings be stayed until the First Respondent pays into the court as security the sum of \$9,834.41 being 'the unpaid portion of the adjudicated amount', within the meaning of s25 (4) of the Building and Construction Industry Security of Payment Act 1999, pending the final determination of these proceedings."*
- 14 If by making an order in accordance with paragraph 2 of the Notice of Motion, the Master intended to order a stay of proceedings until the sum of \$9,834.41 is paid into court, there seems to be an inconsistency with order 2, which seems to contemplate the question of whether or not there should be a stay was referred to the Registrar.
- 15 The Notice of Appeal from the Master as amended at the hearing before me, by consent, relied upon the following grounds:
- "1. The Master erred in finding that the Plaintiff was a 'respondent' as defined in s4 of the BCISP Act 1999.*
- 2. The Master erred in holding that the proceedings the Plaintiff has brought by way of summons in this court are 'proceedings pursuant to s25(4) of the BCISP Act 1999 to have the judgment set aside'.*
- 3. The Master accordingly erred in finding that the Plaintiff was obliged to pay into this court as security the 'unpaid portion of the adjudicated amount' pursuant to s25(4)(b) of the BCISP Act 1999 and that the proceedings were stayed until that payment was made;*
- Particulars:*
- (i) the Master had no power to order that the 'adjudicated amount' be paid into this court as security pending the final determination of these proceedings;*
- 4. The Master erred in not deciding whether this court retained a discretion to so otherwise order.*
- 16 As to the first ground, no submission was addressed in support of it and there seems to me no basis upon which it could be concluded that Ms Cooper was not a respondent as defined in the Act, namely, a person on whom a payment claim was served. No issue was raised as to this.
- 17 In relation to the second ground, as I have indicated, the summons before this court expressly seeks an order that the judgment be set aside. Whether or not it is appropriate for Ms Cooper to seek that relief in this court is, I think, beside the point as it is in fact the relief which she seeks. It might well be otherwise if she merely contented herself with seeking a declaration that the adjudication was void.
- 18 In my opinion, Ms Cooper, having chosen to seek an order in this court that the judgment be set aside, there is no warrant for concluding otherwise than that she has commenced "proceedings to have the judgment set aside within s25 (4)". If the legislature had wanted to restrict the operation of s25 (4) to proceedings within the Local Court, itself, it could easily have said so. As matter of construction, in my view, the phrase 'commences proceedings to have the judgment set aside', should be given its natural meaning and should not be restricted as suggested by Ms Cooper.
- 19 In the result, in my opinion, the Master correctly concluded that the obligation imposed upon Ms Cooper to pay the judgment debt in the Local Court continues and, there being no stay in operation, the judgment presently may be enforced in the usual way with the qualification that any payment of the judgment now made by, or recovered from, Ms Cooper is to be paid into court and is to be held, pending the outcome of these proceedings.
- 20 It does not necessarily follow, however, that there should be a stay of these proceedings until payment is made. Although there is confusion, to which I have referred, arising out of order 1 made by the Master, on the face of it, it seems that she did not necessarily think that a stay should be granted and certainly s25 (4) of the Act does not, as it could have, provide that there should be a stay of the proceedings to have the judgment set aside. Indeed, given the limited circumstances in which it might be contemplated that a judgment would be set aside, namely, as pointed out by Hodgson JA in the passages quoted above, that the adjudication was void, there seems no reason in logic why there should be a stay.
- 21 In the result, I am not persuaded that it is appropriate to order a stay pending payment of the judgment debt and, to that extent, Ms Cooper is entitled to succeed in her appeal. Although not expressly sought in terms, Home Productions, in my opinion, is entitled to a declaration that by virtue of the operation of s25 (4) of the Act, Ms Cooper is required to pay into the Local Court at Parramatta the sum of \$9,834.41, pending the final determination of these proceedings.
- 22 As to costs, in the result, both parties have been partially successful. Ms Cooper has failed in her argument that s25 (4) of the Act has no application to the situation and Home Productions has failed in its argument that it is entitled to a stay of these proceedings pending payment into the Local Court of the judgment debt. In those circumstances, I think it appropriate that the costs of the proceedings, both before the Master and before me, be costs in the summons.
- 23 Before parting with the matter, it is, I think, appropriate to observe that, in my opinion, there is little or no utility in these proceedings. In my opinion, they arise out of the misconstruction of what the Tribunal said in relation to the

adjudication in its reason for decision on the jurisdiction issue. In my opinion, there can be no doubt, in light of the terms of the statute and the decisions upon it, that the Tribunal has full power to determine all issues between the parties and that it should be given the opportunity to do so, unless the parties can otherwise resolve their differences. The operation of s32 of the Act, particularly s3, will ensure that Ms Cooper receives appropriate credit for any amount paid by her into the Local Court at Parramatta. In the context of a dispute involving relatively small amounts of money, it is difficult to see the benefit which Ms Cooper would derive from a declaration or order invalidating the adjudication. However, that is a matter for her and her advisors.

- 24 I make the following declaration and orders.
1. I set aside the orders made by the Master.
 2. I declare that pursuant to s25 (4) of the Building and Construction Industry Security of Payment Act, the Plaintiff is required to pay into the Local Court at Parramatta the sum of \$9,834.41 as security, pending the final determination of these proceedings
 3. I order that the costs of the proceedings before the Master and the costs of the proceedings before me, be costs in the Summons.

Ms L Byrne – Appellant instructed by Friend & Co Lawyers -Stephen Friend
Mr M B J Lee – Respondent instructed by Turner Freeman Solicitors - Tanya Segelov-Respondent