

JUDGMENT : Palmer J : Equity Div T&C New South Wales Supreme Court. 30th November 2004.

- 1 The Plaintiff seeks ex parte an order restraining the Defendant from applying for the issue of an adjudication certificate or from filing an adjudication certificate as a judgment for a debt pursuant to s.25(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act") in respect of a determination made on 21 November 2004.
- 2 The basis of the application is that the adjudicator is said to have erred in determining a fundamental requirement of his jurisdiction under s.13(5) of the Act. The Plaintiff asserts that there were, in fact, two payment claims for the same reference date as defined in the Act and that the adjudicator was wrong in concluding that there had been only one such claim within the relevant time.
- 3 I do not need for the purposes of this short judgment to say more than that, in the extremely short time I have had to consider the matter, I have formed the impression that there is a sufficiently arguable case to warrant the issue of an ex parte injunction. However, I feel compelled to make some observations about the manner in which, and particularly the time at which, this application was brought and what should be the Court's attitude to applications brought in this way.
- 4 The adjudication was made on 21 November 2004. Doubtless, the Plaintiff became aware on that day of the reasons of the adjudicator. The point now at issue had been argued before the adjudicator and the Plaintiff and its advisers must have been immediately cognisant of the consequences of the finding which the adjudicator made in respect of the point which is now sought to be agitated.
- 5 No application to the Court was made for an injunction restraining the filing of an adjudication certificate until very late today. In fact, the application was called on at about 4.30 pm at the tail end of a very heavy Duty Judge List. To do Mr Rudge SC and Mr Christie justice, it may have been that they were waiting in Court for a time before the matter was actually called on.
- 6 However, the fact remains that no action was taken by the Plaintiff to bring this application until the very last moment when such action could possibly have been of avail. I am informed that the Defendant will file the adjudication certificate tomorrow morning unless that course of action is restrained this evening.
- 7 The explanation for the Plaintiff's delay, which Mr Rudge has proffered from the bar table and without affidavit evidence, is that the parties have been negotiating to resolve their differences since 21 November, and it was hoped by the Plaintiff that this application would have been unnecessary. I do not doubt that Mr Rudge has accurately stated his instructions as to the reason for delay, but I should say, with some emphasis, that to make an application of this character at such a late stage is entirely unsatisfactory.
- 8 The Act is designed to ensure prompt and timely progress payments under building contracts: s.3; *Musico v Davenport* [2003] NSWSC 977, para.20. It requires the parties in dispute to act on a very tight timetable. Nevertheless, even allowing for such constraints, to bring an application of this character at the very last moment before the permitted time for filing of an adjudication certificate deprives the Court and the other party of any reasonable opportunity to consider the questions in issue with any degree of care and attention. In effect, it puts the Court in an impossible position: it requires the Court to act under the suggestion, almost under a threat, that unless the Court grants the injunction irretrievable consequences will follow immediately. I do not think this sort of application should be encouraged. Indeed, in my opinion, the policy of the Court should be to discourage it.
- 9 An injunction granted by this Court to restrain the filing of an adjudication certificate as a judgment under s.25(1) of the Act is not the only chance which a party has to prevent enforcement of an adjudication determination which is said to be void for non-compliance with an essential requirement of the Act. A party may apply to the court in which a judgment has already been entered pursuant to s.25(1) to have that judgment set aside on the ground that the adjudication founding it was not in law an adjudication at all: *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394, para.42. The dire and irreversible consequences thought to attach to the filing of an adjudication certificate prior to the decision in *Brodyn* should no longer be invoked in an endeavour to induce this Court to intervene where a party, at the last moment, seeks an ex parte injunction to restrain the filing.
- 10 In this case the Plaintiff has waited more than a week since the adjudication was handed down before it has acted. It may, perhaps, be pardoned in the particular circumstances for thinking that it could wait. However, I think that the profession should be made aware that if an ex parte application of this character is made to this Court at such a late stage, the applicant runs the risk that it will be refused out of hand and that it will be left to set aside a judgment entered pursuant to s.25(1) in the appropriate court, if it can.
- 11 For my part, I wish to say that, this warning to the profession having been given, I would refuse out of hand, in the exercise of the Court's discretion, any ex parte application which is brought at such a late stage unless there are compelling reasons for the delay and there are special circumstances warranting intervention by this Court. Generally, I would simply leave the applicant to apply to the appropriate court to set aside the judgment, bearing in mind that such an application will usually be determined in circumstances affording both the court and the opponent a proper opportunity of considering the issues involved: *Brodyn* (supra) at para.42.
- 12 I do not think, however, that I should take that course in relation to this application, since the profession may not have previously appreciated the policy which I think ought to be adopted in such applications and which has largely resulted from the recent decision in *Brodyn*.

- 13 I note the Plaintiff by its Counsel gives the usual undertaking as to damages. I make orders in terms of Short Minutes of Order initialled by me, dated today and placed with the papers. I note the undertaking of the Plaintiff's solicitor to pay the usual filing fees.
- 14 The Notice of Motion will be made returnable on 1 December 2004, tomorrow, at 2:00pm before the Duty Judge.

M.G. Rudge SC, M. Christie – Plaintiff instructed by Colin Biggers & Paisley