Emag Constructions P/L v Highrise Concrete Contractors (Aust) P/L [2003] Adj.L.R. 10/29

JUDGMENT Einstein J : Supreme Court of New South Wales **:** 29th October 2003

1 There is before the court a notice of motion filed by the defendant pursuant to Part 20 Rule 10 of the Supreme Court Rules 1970 seeking the following orders:

"1. That pursuant to Part 20 Rule 10 of the *Supreme Court Rules 1970* the judgment delivered by his Honour Justice Einstein dated 8 October 2003 be amended in the following way:
(a) in paragraph 56 on page 21 at bullet point 2, the date "*12*" June 2003 to read as "*11*" June 2003;
(b) in paragraph 56 on page 21 at bullet point 3, the date "*19*" June 2003 to read as "*18*" June 2003;
(c) in paragraph 56 on page 22 at the final point, the date "*12*" June 2003 to read as "*11*" June 2003;
(d) in paragraph 56 on page 23 at bullet point 1, the date "*19*" June 2003 to read as "*18*" June 2003; and
(e) in paragraph 56 on page 23 bullet points 3 and 4 to be deleted."

2 The central proposition for which the defendant contends is that by reason of matters the subject of address as transcribed, the Court misstated or misunderstood the effect of the evidence or, on the defendant's submission, a concession in that regard said to have been made by counsel for the plaintiff. That section of the transcript relied upon by the defendant is particularly page 40 line 55 - page 41 line 5. Pages 40 and 41 are appended to this judgment.

3 The burden of the decision in the revised ex tempore judgment delivered on 26 September 2003, is to be found in paragraph 56 which deals with the matter in 10 bullet points. It is convenient to number those bullet points for convenience of reference:

"*56. Ultimately the matter rests in very small compass:*

- *[1] the Adjudicator in his finding of 16 June 2003 determined that the adjudication application had been properly served on 4 June 2003. The same finding was made in the Determination of 19 June 2003 [paragraph 4 (ii)];*
- *[2] the Court's holding is that this determination was incorrect and that the earliest day when it could be said that notice of the adjudication application was received by Emag was 12 June 2003;*
- *[3] in those terms Emag then had five business days within which to lodge its response. The last such day was 19 June 2003;*
- *[4] the date of service upon Emag of the adjudicator's Notice of Acceptance [11 June 2003] falls away as of no significance because the later of the times to expire as between:*
  (1) 5 business days following a copy of the application being received; and
  (2) 2 business days following notice of the adjudicator's acceptance of the application being received,
  was 19 June 2003;
- *[5] the adjudicator plainly approached the matter upon the basis that by 16 June 2003 Emag was out of time in providing an adjudication response in accordance with section 17 of the Act. He foreshadowed such a finding in his letter of 16 June 2003 when he stated that in the absence of satisfactory evidence being produced to him, there would be a determination based on the documentation received "up to and including 12 June 2003". This analysis could only have been correct if:*
  (1) the adjudication application was served on 4 June 2003; and
  (2) the adjudicator's acceptance of the application had been received by Emag on 10 June 2003;
- *[6] this analysis was twice misconceived. In fact the evidence now establishes that the correct focus ought to have been on the date (12 June 2003) when the adjudication application was received by Emag. That was when time would begin to run. Further the evidence now establishes that the Adjudicator's acceptance was received on 11 June and not on 10 June;*
- *[7] Emag was entitled to provide its relevant response on or before 19 June 2003;*
- *[8] notwithstanding that entitlement the effect of the Adjudicator's communication of 16 June 2003 in the finding that Emag had failed by then to provide an adjudication response in accordance with section 20 (1) of the Act, was to effectively mislead and impede Emag in terms of its proper entitlement up to including 19 June 2003 to provide and adjudication response;*
- *[9] in any event Section 21 (1) of the Act expressly prohibited the adjudicator from determining the adjudication application until after the end of the period within which Emag might lodge an adjudication response. But the adjudicator actually determined the adjudication application on the last of the days upon which that adjudication response might have been lodged; and*
- *[10] this vitiates the validity of the adjudicator's determination.*

4 The submission of the defendant is that a clear error has occurred in that:
(1) the date which appears at the end of bullet point 2 should be 11 June 2003 instead of 12 June 2003;
(2) the date which appears at the end of bullet point 3 should be 18 June 2003 instead of 19 June 2003;
(3) the first date which appears in bullet point 6 should be 11 June 2003 instead of 12 June 2003;
(4) the date which appears at the end of bullet point 7 should be 18 June 2003 instead of 19 June 2003; and
(5) bullet points 9 and 10 should be deleted.

5 In my view there is no substance in the submission and for the following reasons:

- At the time when the matter was being argued no decision had yet been given on the important question of service. The whole of the transcribed argument necessarily took place in that environment and has to be read accordingly.
- Whilst the judgment was not explicit in this regard, the implicit assumption underpinning the ultimate holding that the earliest day when it could be said that notice of the adjudication application was received by the plaintiff, was that in the usual course of events a letter posted would have been received on the day following the day on which it was posted [cf the last sentence of paragraph 17 of the judgment]. Precisely the same approach was taken in terms of the posting of the adjudication application by Mr Dwyer to the plaintiff on, but not before, 11 June 2003 [see the judgment paragraph 18 and the second and third paragraphs of the affidavit of Mr Dwyer and paragraph 3 of the affidavit of Mr Ghosn]. The court determines, and here determined, the proceedings on the basis of the evidence before the court and in this case, by reference to the important question of the proper approach to be taken to service. The approach actually taken makes plain that it was only on 12 June 2003 that the plaintiff was served with notice of the Adjudication Application. During argument it remained a possibility that the court may hold that service of the Adjudication Application upon the plaintiff's solicitors would suffice. That possibility was dispelled in the reasons for judgment.
- Another and completely disparate reason given in the judgment is to be found in bullet point 8 where the holding was that in any event, the effect of the Adjudicator's communication of 16 June 2003 in the finding that the plaintiff had failed by then to provide an adjudication response in accordance with section 20 (1) of the Act, was to effectively mislead and impede the plaintiff in terms of its proper entitlement "*up to and including 19 June 2003,* to provide an adjudication response". The very same finding would have been pervasive even had the plaintiff only had a proper entitlement up to and including 18 June 2003 in which to provide that response. The holding in terms of misleading and impeding the plaintiff remains the same. Once the adjudicator had made plain, as he did in his letter of 16 June 2003, that his approach (in the absence of satisfactory evidence being produced to him) would be a determination based only on the documentation received up to and including 12 June 2003, the die was cast. Hence the very same ultimate decision that the adjudicator's decision was vitiated would have been made in any event.

6 For those reasons it does not seem to me that the slip rule can be invoked. In my view there was no slip. In any event the suggested slip does not deal with the independent and disparate ground for decision set out in bullet point 8.

7 It is necessary, albeit it briefly, to add the following matters:

- Insofar as the judgment above deals with the disparate reason given in the judgment to be found in bullet point 8, Mr Christie of counsel, who appeared for the defendant on the motion, made quite plain, as I understood him, that there was no dissent with that proposition. In short, although the slip rule was sought to be invoked in relation to the date question, there was no submission to the Court that, save for the particular sections of the judgment sought on the application pursued by the motion to be struck out, any order would otherwise follow but that the adjudicator's determination was vitiated for error.
- During the course of argument in relation to the motion Mr Sirtes of counsel, who appears for the plaintiff, upon enquiry, made plain that he did not accept that the concession which Mr Christie submitted had clearly been made by the plaintiff and was said to be apparent from the transcript, was in fact made during the course of the hearing proper. In that regard it is material to make the point that the argument before the Court involving a number of different dates and different possibilities, ran the distance of a careful examination from time to time of the date of service of the adjudicator's notification of his acceptance of his appointment and of the date of service of the adjudication application proper. Indeed, during the course of address this morning by Mr Christie, he accepted that a very close reading of page 40 of the transcript, line 45 through to line 52, indicates that the subject matter of Mr Sirtes' there comments appears to have been directed to the service of *the adjudicator's notification of acceptance* and not to the issue of when *the adjudication application* came into the plaintiff's actual possession.

8 Mr Christie further, during the course of the motion, submitted that the finding in paragraph 18 of the judgment was incorrect, ought not to have been made and should be set aside. The application concerns the holding which is implicit at the end of paragraph 18 but which becomes explicit in the second bullet point in paragraph 56

9 In my view, that submission and application should be rejected. Firstly, the notice of motion does not include any such application at all. Secondly, there are of course authorities dealing with the Court's clear jurisdiction under Part 40 rule 9 to entertain a motion to set aside or vary a judgment provided that the motion is filed before entry of the judgment. As was pointed out in ***Smith v New South Wales Bar Association*** (1992) 176 CLR 256 at 265, *"It has long been the common law that a Court may review, correct or alter its judgment at any time until its order has been perfected."*

10 In ***Autodesk v Dyason No 2*** (1993) 176 CLR 300 at 302-303 Mason CJ identified various circumstances in which, on the authorities, the Court has exercised jurisdiction to reopen a judgment which has apparently miscarried. One of the circumstances identified was *Smith* in which the New South Wales Court of Appeal reconsidered orders previously made in view of an argument that the Court had mistakenly assumed that particular evidence had not been given at earlier hearings. Another example given was ***Pittalis v Sherefettin*** (1986) QB 868 in which a judge recalled orders the day after the day they were made upon determining that he had erred in a material matter

in his approach to the case. The guiding principle as stated by Mason CJ at 302 is as follows: *"These examples indicate that the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue where a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law."*

11 Those being the principles, in my view, the Court, even had the matter been the subject of a contested motion, would have dismissed an application in that regard.

12 For those reasons the notice of motion filed on 17 October 2003 is dismissed.

13 Those are the orders appropriate to be made in the proceedings.

14 I turn then to the question of costs. The defendant accepts that it is appropriate for an order to be made that the defendant pay the plaintiff's costs save only in respect to one matter. The defendant's contention is that the plaintiff should be ordered to pay the defendant's costs relating to the expert evidence of Ajoy Ghosh in the proceedings. The circumstances in relation to that expert evidence are set out in the affidavit of Mr Confos and it is not necessary to do otherwise than to make the point that a notice to admit facts was filed and served by the defendant on 7 August 2003 which sought an admission of the following: *"That the attached facsimile sent by Wal Lorimer on behalf of the defendant dated 2 June 2003 was received by Graham Perkins on 2 June 2003."*

15 There was then a notice disputing facts filed on 19 August 2003 by the defendant which stated: *"The plaintiff disputes the following facts specified in the notice to admit facts filed 7 August 2003:*

1. That the facsimile attached to the notice to admit facts sent by Wal Lorimer on behalf of the defendant dated 2 June 2003 was received by Graham Perkins on 2 June 2003."

16 Reference was made to the facsimile in the revised form of the judgment dated 26 September 2003 and it is unnecessary to repeat what was there said.

17 To my mind the defendant is clearly entitled to the reasonable costs of and relating to the preparation of the expert evidence of Mr Ghosh in the light of that exchange of notice to admit and notice disputing facts and in the light of the identified statement pursuant to an order made on 8 August 2003 of issues "whether the facsimile from the defendant to the plaintiff's solicitors dated 2 June 2003 was sent to and received by the plaintiff's solicitors".

18 Mr Sirtes has, in the course of his submissions, queried why it was that the defendant did not simply tender a copy of a facsimile report in order to prove, from the sending machine, that the facsimile was actually sent. The short answer to that is to be found apparently in the evidence that that facsimile was sent from a computer and there was no such facsimile record sheet able to be produced.

19 The only other matter to which I need to refer is that I was somewhat alarmed to hear from the Bar table that the amount apparently to be claimed by the defendant in terms of these costs relating to this expert evidence of Mr Ghosh was in the order of $10,000, seemingly a very high amount. The question of what is the proper approach to the assessment of such costs is within the domain of a costs assessor and there are appellate procedures from such a decision so that it is unnecessary for the Court to now deal at all with that matter save to make the, I would imagine, reasonably obvious point, that very scrupulous care indeed should, I would have thought, be taken by the costs assessor in working out what is the appropriate amount to be allowed for that exercise.

Mr G Sirtes (Plaintiff) instructed by Gray & Perkins
Mr M Christie (Defendant) instructed by Deacons