

Judgment : New South Wales Court of Appeal before Handley JA ; Santow JA ; Pearlman AJA. 3rd March 2005

- 1 **HANDLEY JA:** The Court has before it a summons for leave to appeal from a decision of Naughton DCJ on 26 November 2004. The Judge granted an anti-suit injunction under s 46 of the District Court Act 1973 restraining Falgat Constructions Pty Ltd, a builder, from pursuing its statutory remedies under the Building and Construction Industry Security of Payment Act 1999 (the Act). The builder was the plaintiff in District Court proceedings commenced by it on 8 April 2004 claiming \$414,935.69 from the defendant proprietor arising from the construction of residential buildings at 23-25 Chesterfield Parade, Bronte.
- 2 On 2 July 2004 Hughes DCJ ordered the plaintiff to provide \$50,000 security for the costs of the District Court proceedings which he stayed until the security was provided. The plaintiff did not provide such security but filed a summons for leave to appeal. This summons was listed for hearing before this Court today, but the Registry was notified that the claimant would not be proceeding and this morning the Court made an order dismissing it with costs.
- 3 On 13 October the plaintiff builder initiated proceedings under the Act by serving a payment claim under s 13(1) seeking payment of \$232,114.30. This represented a little over half of the plaintiff's claim in the District Court proceedings.
- 4 The parties have taken the necessary steps to prosecute or defend this claim up to the s 19 stage. The nominating authority has referred the builder's adjudication application to an adjudicator who has not yet accepted the appointment. It was common ground that the statutory proceedings remain on foot and could be validly continued should this Court dissolve the injunction granted by the primary judge.
- 5 The injunction was granted in proceedings commenced by notice of motion dated 12 November, which was heard on 25 and 26 November. On 26 November Naughton DCJ ordered;
"That the plaintiff be, and is hereby restrained from proceeding further with its current statutory adjudication application under [the Act] pending the final determination of the within District Court proceeding or until further order of this Court or the Supreme Court".
- 6 On 30 November the plaintiff filed a summons for leave to appeal. Proceedings have been expedited and the parties have been fully heard so that should leave be granted the Court is in a position to finally dispose of these proceedings.
- 7 The primary judge held the District Court had power under s 46 of its Act to grant the anti-suit injunction and there were four grounds for the grant of such an injunction. These were:
 1. The builder's statutory claim was vexatious and oppressive.
 2. The statutory adjudication would frustrate the District Court's task.
 3. The builder had elected to submit the dispute to the jurisdiction of the District Court and should be held to its election.
 4. On the proper construction of the Act, any statutory proceedings should be completed before court proceedings are commenced.
- 8 The judge found, by inference, that the builder's purpose in commencing the statutory proceedings was to harass the defendants and those proceedings would be vexatious and oppressive while the District Court proceedings remained on foot.
- 9 He held that the purpose of the anti-suit injunction sought by the proprietor was to protect the integrity of the proceedings in the District Court and that an adjudication under the Act, even though it only had interim affect, would "frustrate this Court's task".
- 10 The judge held that the plaintiff should be held to an election it made by commencing proceedings in the District Court. Finally he held that, "at least generally", the statutory proceedings should proceed and not follow the institution of court proceedings and that "generally at least", the Act was not intended to allow two concurrent adjudicative procedures to be on foot at the same time.
- 11 All four grounds of the judge's decision depend on the proper construction of the Act. The judge's conclusions necessarily follow if the builder's statutory remedies and its common law remedies are alternative and inconsistent. They do not follow if the builder's statutory remedies for interim relief supplement his contractual rights, subject to a final determination of those rights in court proceedings.
- 12 It is necessary to refer to the provisions of the Act which are relevant for present purposes. Section 3 defines the object of the Act:
 - (1) The object of this Act is to ensure that any person who undertakes to carry out construction work ... under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work ...
 - (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.
- 13 Subsection 2 makes it clear that the statutory entitlement to a payment under the Act is available whether or not the construction contract makes provision for progress payments and subs 4 makes it clear that the Act does not limit any other entitlement that the claimant may have under a construction contract, or any other remedy for recovering any such entitlement. This would indicate that the remedies provided by the Act supplement those provided by the general law.
- 14 Section 8 confers the right on a builder to make a claim for what is described as a progress payment. Section 13(1) entitles a builder to make a payment claim on the proprietor. Section 13(4) prevents such a claim being made more than 12 months after construction work to which the claim relates was last carried out. Section 14(4) makes the proprietor described as the respondent liable to pay the claimed amount unless it provides a payment schedule within ten business days of receiving the payment claim. Under s 14(3) this must indicate why the payment it proposes to make, which may be nil, is less than the claimed amount and if the respondent is withholding payment, the reasons for doing so.
- 15 In the event of a dispute, the claimant may apply for an adjudication of the claim. If, as happened in this case, the respondent provides a payment schedule but makes no payment s 17(1)(3) enables the builder to make an adjudication application within ten days of receipt of the payment schedule. An adjudication application must be made through an authorised nominating authority in accordance with s 17(3)(b).
- 16 Under s 19(1) the nominating authority must appoint an adjudicator and refer the adjudication application to him. If the adjudicator accepts the application he must cause notice of that acceptance to be served on the parties. A respondent may lodge a response with the adjudicator within the strict time limits referred to in s 20(1) but only if it has previously provided a payment schedule within time. Under s 20(2A) it cannot include reasons for withholding payment in its adjudication response unless they were included in the payment schedule.
- 17 Section 21(3) requires the adjudicator to determine the application within ten business days, or such further time as may be agreed. Section 21(2) requires him to ignore any response by the respondent which was out of time and he may only consider the matters specified in s 22(2). Under s 22(1) the adjudicator is to determine the amount of the progress claim to be paid to the claimant.
- 18 Section 23 requires a respondent to pay an adjudicated amount within five days after service of the determination or such later time as may be fixed by the adjudicator. If payment is not made, the claimant is entitled under s 24 to request the authorised nominating authority to provide an adjudication certificate and under s 25 this may be filed as a judgment for debt in any court of competent jurisdiction.
- 19 The respondent may commence proceedings to have the judgment set aside, but s 25(4) prevents him raising any cross claim or defence under the construction contract or challenging the adjudication determination on the merits. He must also pay the adjudicated amount into court. If the proceedings to have the judgment set aside fail one would expect that the money in court would normally be paid out to the builder.
- 20 The critical section for present purposes is s 32 which provides:
- (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.
- 21 Subsection 1 provides that Part 3 of the Act (ss 13-32), does not affect the rights of any party under a construction contract. Subsection 2 is particularly important because it relevantly provides that nothing done under, or for the purposes of Part 3, affects any civil proceedings arising under a construction contract. Finally, subs 3(b) makes a judgment entered under s 25 on an adjudication certificate provisional only, both in what it grants and in what it refuses. A builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid.

- 22 The common law does not permit inconsistent judgments, but this may be sanctioned by statute and this is not the only example of such a statute in this jurisdiction. Compare *Toubia v Schwenke* (2002) 54 NSWLR 46, 50. The power under s 32(3)(b) to make such other orders as it considers appropriate would probably allow the court to set aside or vary any judgment entered under s 25. It is clear that the Act confers statutory rights on a builder to receive an interim or progress payment and enables that right to be determined informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can be determined in the normal manner.
- 23 Mr Sirtes who appeared for the opponent referred to the duplication of proceedings and the additional cost and work that this will impose on the parties where, as in this case, statutory proceedings are commenced while court proceedings are pending.
- 24 I leave to one side, as irrelevant in this case, the possibility of statutory proceedings being commenced shortly before a trial is due to start where the statutory procedures would interfere with the orderly preparation and presentation of the parties' cases in the Court. In such a case there may well be ample justification for an anti-suit injunction to stop the statutory proceedings. That is not the present situation.
- 25 The duplication of proceedings and the additional work and expense that this involves will occur if the statutory proceedings are completed before court proceedings are commenced. There is no basis for thinking that concurrent proceedings, as in this case, will cause any more expense and extra work than consecutive proceedings which are clearly open to a builder.
- 26 Turning now to the four grounds on which the judge based the injunction. The first was that the statutory claim was vexatious and oppressive, having regard to the concurrent proceedings in the District Court, although they had been stayed. If, as I have concluded, the statutory rights are adjudicated on an interim basis and supplement the rights of the parties under the general law which can be finally determined by a court there is no basis for holding that the builder's statutory claim was vexatious and oppressive. The consecutive prosecution of statutory and common law claims is clearly contemplated by the Act. In my judgment the concurrent prosecution of such claims, subject to a possible exception where common law proceedings are close to trial, is equally available to a person in the position of the claimant.
- 27 The second ground found by the primary judge was that the statutory adjudication would frustrate the District Court's task. I see no basis for this. The Act contemplates that a court of competent jurisdiction will undertake the task of final adjudication on the merits as determined in those proceedings and will make any necessary adjustments to account for interim payments under the Act and any judgment entered under s 25. Statutory proceedings could frustrate the District Court's task if they were commenced or carried on close to a trial, but as I have said, that is not this case.
- 28 The next ground found by the primary judge was that the builder had made an election by commencing proceedings in the District Court and should be held to its election. This necessarily depends upon the view that the builder's rights under the statute are alternative and inconsistent with his rights at common law. There is no basis for this in the Act. The statutory provisions, which I have summarised, indicate that the rights, more strictly the remedies, conferred by the statute are in addition to those available at common law. Thus the basis for finding that a person in the position of this builder has to make an election does not exist. On any view, the builder can exhaust his statutory rights before proceeding at common law in a court of competent jurisdiction. If a person in the position of a builder can do that, he is entitled to pursue the rights concurrently provided this does not interfere with a fair trial of the court proceedings.
- 29 Finally, the judge said that, on the proper construction of the Act, any statutory proceedings should be completed before court proceedings are commenced. There is no express provision to this effect and the general provisions I have summarised do not require it.
- 30 The Act contemplates that proceedings in a court of competent jurisdiction will be completed after the statutory proceedings have been completed. This is because s 32 provides that the court is to allow for any interim payments and order appropriate restitution. However there is nothing in the Act which prevents the proceedings being concurrent. The District Court proceedings have not proceeded any distance, the opponent having filed its application for security for costs before filing a defence or cross claim.
- 31 There was some discussion before the primary judge of the possibility of the builder being put to an election to discontinue either its District Court proceedings or its statutory proceedings. In the end counsel for the proprietor did not press for the builder to be put to an election and he pressed for the injunction. There is no summons for leave to cross appeal and no notice of contention and the suggestion that the builder should be put to an election at this stage has not been pursued. The judge found that the builder had made a final election by commencing District Court proceedings and should be held to that election, which excluded any right to reverse that election later.
- 32 I conclude therefore that the grounds found by the judge for the grant of this injunction cannot be supported. I would therefore propose the following orders:
1. Leave to appeal granted subject to the notice of appeal being filed within 14 days if not already filed.
 2. Appeal allowed.
 3. The injunction granted by Naughton DCJ on 26 November 2004 is dissolved.
 4. The notice of motion of 12 November 2004 is dismissed with costs.

5. The opponent is to pay the claimant's costs of the proceedings in this Court and is to have a certificate under the Suits' Fund if qualified.

33 **SANTOW JA:** I agree.

34 **PEARLMAN AJA:** I agree.

J J Graves SC/F Clark (Claimant) instructed by Julie A Orsini (Claimant)
G Sirtes (Opponent) instructed Stephen Wawn & Associates (Opponent)