Glen Eight P/L v Home Building P/L (in liq), Interco P/L, Institute of Arbitrators and Mediators Australia & Timothy Sullivan

JUDGMENT : Campbell J : New South Wales Supreme Court : 6th September 2005

1 This is an application for an interlocutory injunction. The plaintiff is a company which wished to have a residential apartment building constructed at 8 Glen Street Milsons Point. It entered into a contract with the first and second defendants on 13 February 2003 to enable that construction to take place. The first and second defendants were referred to jointly and severally in that contract as being *"The Contractor"*, and the plaintiff was referred to as *"the Principal"*. It was *"The Contractor"* which undertook the obligation to carry out the work.

2 The first defendant has come to be in liquidation. It had an administrator appointed on 8 February 2005, and on 6 April 2005 its creditors resolved that it should be wound up. On 17 March 2005, while the administration was on foot, the first and second defendants sent to the plaintiff a claim for payment under the ***Building and Construction Industry Security of Payment Act 1999*** (**"the Act"**). By that time the first and second defendants had ceased to carry out the building work, and the building work had been taken over by the proprietor. The plaintiff's claim sought an amount of $6.65 million.

3 Through procedures which are accepted for the purpose of today's hearing as being in accordance with the Act an adjudicator was appointed, and submissions were made to him. The adjudicator gave his adjudication determination on 16 August 2005 holding that an amount of the order of $2.914 million was due to the first and second defendants.

4 On 23 August 2005 the present proceedings were commenced. The proceedings challenge the validity of the adjudication determination. On 24 August 2005 an undertaking was given to the Court by the first and second defendants that they would not, prior to 6 September 2005, request the adjudicator to provide an adjudication certificate with respect to the determination.

5 The matter came before the duty judge today, 6 September 2005, and has been referred to me. The first defendant took no active part in that hearing.

6 There are two different bases on which the plaintiff challenges the validity of the adjudication determination. The first of them is that the determination is one which breaches an essential requirement for a determination. The second of them is that effecting any payment pursuant to the adjudication determination would involve an illegality.

7 There are two separate ways in which it is alleged that the adjudication determination fails to comply with an essential requirement of the ***Building and Construction Industry Security of Payment Act***. One of them is that there is alleged to be a breach of natural justice. The other is that it is alleged that there has been a failure to give bona fide consideration to the question.

8 The natural justice allegation arises this way. When the first and second defendants ceased work under the contract, the plaintiff made a variety of payments to subcontractors who had been engaged in the building work. There is no dispute, for today's purposes, that the plaintiff made these payments, or that they were of the order of $5.79 million. The plaintiff had asserted, to the adjudicator, that the fact that it had made those payments resulted in there being no entitlement of the first and second defendants to receive any more money.

9 The conditions of contract contain special condition 29, which includes:

"29.2 Despite any other provision of this contract, the Principal may pay all of the money due to the Contractor to the Subsidiary, and such payment will be in full and final satisfaction of the Principal's obligation to pay money to the Contractor.

29.3 Prior to or in relation to any such payment, the Principal may:

(a) require evidence that all subcontractors have been paid; or.

(b) elect to pay direct to the subcontractors instead of to the Subsidiary (which direct payment will constitute a pro rata discharge of the obligation of the Principal to pay the Contractor under this contract); or.

(c) require such other arrangements that the Principal reasonably specifies to ensure the payment is applied first in payment of all subcontractors and second in payment of any other creditors of the Subsidiary".

10 The adjudicator took a view of clause 29.3, whereby the paragraphs numbered (a), (b) and (c) were alternatives one to the other. It appears that the plaintiff had requested evidence that all subcontractors had been paid, received no satisfaction in answer to its inquiry, so went ahead and paid the subcontractors itself. The adjudicator construed clause 29.3 so that, having exercised the power under paragraph (a) to require evidence that the subcontractors had been paid, the plaintiff thereby elected not to exercise any of the remaining powers under clause 29.3. The construction of clause 29.3, whereby its limbs were mutually exclusive, had not been put to the adjudicator by either party. Nor did he seek submissions from the parties on whether that construction was the correct one. His adopting that construction resulted, so the plaintiff contends, in the adjudicator making a decision of law on a matter which was very important for the conclusion arrived at. It is apparent that the adjudicator did not allow credit for any of the $5.7 million which had been paid to the various subcontractors.

11 Making a fundamental decision of law, like this one, without either party knowing the adjudicator might adopt that construction, is alleged by the plaintiff to involve a breach of the requirements of natural justice.

12 The second defendant submits that the relevance of clause 29.3 in the procedure through which the plaintiff came to pay the subcontractors direct was referred to in submissions made to the adjudicator, and that all the

adjudicator has done is to take a view of construction of clause 29.3, when it had, in this way, been placed well and truly into the arena of dispute.

13 Even if that is right, in my view, there is a serious question to be tried about whether the particular point which the adjudicator took is one which is so important that it ought in fairness have been put to the parties, under the administrator's power to seek submissions, for their consideration.

14 The second defendant submits that, regardless of whether the question of whether the various subparagraphs of clause 29.3 were exclusive one of the other, was directly put to the parties, the conclusion which the adjudicator reached on that topic in fact lead him nowhere. After the adjudicator had expressed his view about the construction of clause 29.3, he went on to say, in paragraph 125 of his determination:

> "*125 Notwithstanding the application of SC 29.3 to the progress payment to which the Adjudication Application relates, it may well be that the Principal has exercised the option in SC 29.3(B) in relation to past payments. To that extent, if the payments have been properly made by the principal then they are amounts which should be brought to account in determining the adjudicated amount.*"
>
> *126 It is Glen Eight's position that it is entitled to offset $5,790,263.43 payment to Interco and/or Home Building's subcontractors and debts which have been formally assigned to Glen Eight by those subcontractors. I will bring to account payments made to Interco and/or Home Building and I will consider the payments to others on their merits, as and when they arise in the adjudication, to determine whether they have been properly made.*"

15 The plaintiff submits that, notwithstanding the adjudicator foreshadowing that he would bring to account payments on their merits, that he did not do so. It appears clear that the adjudication does not contain any section which deals, seriatim, with particular payments. However, Mr Rudge SC points out that, in paragraphs 136 to 138 the adjudicator reminded himself that the power under clause 29.3 could only entitle the plaintiff to pay amounts which were properly due by the first or second defendant to a subcontractor, and said:

> "*138 It should be noted that the adjudication was not provided with any subcontract documents and this makes it difficult to substantiate that payments have been made pursuant to entitlements arising under those subcontracts.*"

16 This amounts, he submits, to an indication that the adjudicator has decided that there is in fact no substantiation that payments that were made were made pursuant to entitlements arising under the subcontracts. It is not clear that that is so. A further possible difficulty with that submission is that, in paragraph 145, the adjudicator goes on to say: "*I shall consider the payments which Glen Eight claims to have made directly to subcontractors on their merits and shall make my determination based on the Respondent's entitlement or requirement to make each payment*".

- as though this was a topic which still remained to be disposed of, not one which had been disposed of back at paragraph 138.

17 The Court of Appeal in ***Brodyn Pty Ltd t/as Time Cost & Quality v Davenport*** (2004) 61 NSWLR 421 states the requirements for a valid determination under the Act in a way which has been summarised by McDougall J as follows in ***Timwin Construction Pty Limited v Facade Innovations Pty limited & Ors*** [2005] NSWSC 548 at [1]:

> "*(1) Where an adjudicator failed to comply with the basic and essential requirements laid down in the Act for there to be a valid determination;.*
>
> *(2) Where the adjudication determination does not amount to an attempt in good faith to exercise the relevant power, having regard to the subject matter of the legislation;.*
>
> *(3) Where the adjudicator denied natural justice to a party (the content and operation of the doctrine of natural justice must take account of the narrow statutory scheme); or.*
>
> *(4) Where the adjudication determination was procured by fraud in which the adjudicator was complicit.*"

18 If any of those circumstances applied, the Court of Appeal held, a determination would not be a "*determination*" within the meaning of the Act, and would be void. I am satisfied there is a serious question to be tried about whether the view of construction which the adjudicator took of clause 29.3 is one which ultimately lead him into no error.

19 The way in which the failure of the adjudicator to (as the plaintiff alleges) carry out his foreshadowed consideration of the merits of claims one by one is said to fit within the grounds which ***Brodyn Pty Ltd t/as Time Cost & Quality v Davenport*** (2004) 61 NSWLR 421 lays down as the ones on which a determination can be set aside, is that it demonstrates a failure to give *bona fide* consideration to the correct question. It is not contended that there has been any subjective lack of *bona fides* on the adjudicator's part, rather it is submitted that there is the kind of deficiency in his reasoning process which shows that he has not made an adequate effort to understand and deal with the issues he is required to deal with to discharge his statutory function. It is submitted that when he has himself stated the way in which he should go about discharging that statutory function - namely by considering the merits of the claims one by one - and he has not followed his own prescription, that shows that there has not been a bona fide attempt to exercise the statutory power. I am satisfied that there is a serious question to be tried concerning that matter.

20 The illegality which is contended to arise is one under the ***Home Building Act 1989***. It provides, in section 92, that:

"(1) A person must not do residential building work under a contract unless:

(a) a contract of insurance that complies with this Act is in force in relation to that work in the name of the person who contracted to do the work."

21 It appears that, at the relevant time, the first defendant was not licensed to carry out home building work, but the second defendant had such a license. Further, policies of insurance under the ***Home Building Act 1989*** were taken out, but in the name of the second defendant alone. It is submitted that the person who contracted to do the work is both the first and second defendants, and hence section 92(1)(a) has not been complied with. Further, section 94 provides that: *"If a contract of insurance required by section 92 is not in force, in the name of the person who contracted to do the work, in relation to any residential building work done under a contract ... the contractor who did the work: …*

(b) is not entitled to recover money in respect of that work under any... right of action (including a quantum meruit)."

22 It is submitted that the recovery of money pursuant to an adjudication is recovering money in respect of work, under a right of action, even though that right of action is purely a statutory one, not a contractual one. In my view there is a serious question to be tried about the correctness of that contention.

23 Mr Rudge SC submits that the requirements of the ***Home Building Act 1989*** are adequately met when one of two persons who have jointly and severally contracted to do the work is insured. It may be that that contention will ultimately prevail – a matter about which I express no view – but it is not so clear that it is not fairly arguable.

24 I mention that section 92B ***Home Building Act 1989*** was introduced on 30 May 2003, and complicates the analysis somewhat. That section provides:

"*(1) If the holder of a contractor licence enters into a contract to do residential building work and a contract of insurance that complies with this Act is in force in relation to that work (whether or not the name of the contractor identified under section 92A (a) is the same as the name of the contractor in the contract), the contract of insurance is taken to extend to any residential building work under the contract at the address stated in the certificate of insurance.*

(2) An insurer who pays a claim under a contract of insurance the operation of which has been extended under this section is entitled to recover any money paid from the contractor named in the building contract or the person identified as the contractor under section 92A (a).

25 While the building contract was entered into prior to 30 May 2003, it was amended after that date. There is argument about whether that amendment of the contract is one which involves the entering of a contract to do work, or whether it is merely consequential upon there already being a contract to do work. As well, there is argument about whether, even if section 92B applies in relation to the present contract, that has the effect of preventing section 94 from disentitling the first and second defendants to recover any money. These complications are, in my view, merely aspects of the serious question that there is to be tried concerning whether the first and second defendants are precluded by statute from receiving payment.

26 I turn to the balance of convenience. The first defendant, as I have said, is in liquidation. It had an estimated deficiency of the order of $4.9 million, as at March of 2005. Its ability to pay any dividend to creditors is dependent upon its being able to recover the amount of the payment claim which is now in dispute.

27 While the second defendant is not in liquidation, it is a related company of Interco Contracting Pty Ltd (in liquidation). Interco Contracting Pty Ltd was placed into administration on 3 March 2005, and its administrator reported to creditors on 24 March 2005 that it had an estimated deficiency of over $14 million. It appears that an agreement has been reached that the second defendant has an obligation to pass on to Interco Contracting Pty Ltd (in liq) any amount it might receive under the payment claim.

28 Thus, if payments were to be made under the payment claim, and it were to transpire at a final hearing that the payment was not one which ought to have been made, the plaintiff would suffer an irretrievable prejudice as a consequence of having made the payment. On the other side of the coin, there is a policy underlying the Act that the builders who do work ought usually be paid and that detailed or protracted disputes about whether they should be paid ought be decided once payment has been made.

29 Another factor which I also take into account in the balance of convenience is that the proceedings, while not completely ready for trial, are close to ready.

30 In the present case the plaintiff offers to the Court the usual undertaking as to damages, and also offers to either pay into Court or provide satisfactory security for payment of an appropriate sum of money. It was put in those terms, on the basis that it would be for me to decide what was the appropriate sum. The plaintiff also offers to do what is reasonably possible to obtain a prompt final hearing of the matter.

31 In my view, the appropriate amount which ought be paid into Court, or secured, is the total amount of the adjudication determination, together with a further sum, to provide what amounts to a cover for interest, in the event that the defendants succeed at the trial: ***Australian Remediation Services v Earth Tech Engineering*** [2005] NSWSC 715 at [11].

32 As well, in the adjudication determination the adjudicator decided that each party should pay half his fees. In fact the plaintiff has not paid part of its share of the adjudicator's fees, totalling of the order of $37,000.

33 Section 24(5) of the Act entitles the unpaid amount of adjudicator's fees to be included in the adjudication certificate. The defendants have paid the unpaid portion of the adjudicator's fees. They did this, I am told, because the adjudicator would not issue the determination until he was paid. What section 24(5) covers is the situation where the applicant has paid the respondent's share of the adjudicator's fees and has not been reimbursed - which is precisely this situation. Thus, the adjudication certificate, if it were to issue, would be not only

for the $2,914,000 which has been held to be the adjudicated amount, but also for the unreimbursed fees. Thus, that ought be part of the amount which is secured. Interest is running on the adjudicated amount at 9 percent per annum. Making an estimate of how long it is likely to be until this dispute is decided on a final basis, in my view the appropriate amount for security to be provided is the sum of $3.1 million. If there are unexpected delays in the final determination of the matter, and the plaintiff does not top up the security to provide ongoing cover for interest, the defendants are free to apply to dissolve the injunction.

34 Discussion needs to occur between the parties about the most appropriate method of providing that security. I shall order now, on receiving only the usual undertaking as to damages and an undertaking to proceed with expedition, that the defendants not apply for an adjudication certificate until Monday evening. The matter can be mentioned before me again on Monday to formalise the undertakings for an extension of that injunction until the determination of the suit or further order.

35 Upon the plaintiff by its counsel giving to the Court the usual undertaking as to damages, and undertaking to take steps reasonably open to it to obtain a prompt final hearing of this matter, I order that the first and second defendants and each of them not, prior to 5 pm on Monday 12 September 2005 request the third defendant to provide an adjudication certificate pursuant to section 24 of The ***Building and Construction Industry Security of Payment Act 1999*** in respect of the determination of the fourth defendant dated 6 June 2005 having adjudication reference number 10047.

36 In my view, where a plaintiff has succeeded in obtaining an interlocutory injunction the usual practice of the Court is to make an order that the costs of the interlocutory hearing be the plaintiff's costs in the cause. I see no reason to depart from that practice here. I order that the costs of today's hearing be the plaintiff's costs in the cause.

PR Callaghan SC; DR Sibtain – Plaintiff instructed by Gadens Lawyers – Plaintiff
K Lee, solicitor - First Defendant instructed by Middletons - First Defendant
MG Rudge SC; T Thomas - Second Defendant instructed by Colin Biggers & Paisley – D2 Submitting Appearance –D3 & D4