

**JUDGMENT : Einstein J :** Supreme Court New South Wales : 28<sup>th</sup> April 2006 :

**The application**

1 There is before the Court an amended notice of motion under cover of which the plaintiff seeks an order for the stay of arbitration proceedings commenced by the defendant. The application is unusual in that the suggested ground for the granting of such relief is that the defendant's conduct is seen to avoid or to circumvent the purpose of the statutory scheme of payment established by the *Building and Construction Industry Security of Payment Act 1999* ["the Act"] in circumstances explained below.

**The material facts**

2 The material facts are in short compass:

1. The plaintiff and the defendant were parties to a construction contract entered into on or about 23 January 2004.
  2. On 14 November 2005 an adjudication certificate was issued by the Institute of Arbitrators and Mediators under section 24 of the Act certifying that an adjudicated amount of \$1,727,618 was payable by the defendant to the plaintiff on 13 October 2005.
  3. On 23 November 2005 the Court entered judgment for the plaintiff in the sum aforesaid in accordance with that adjudication certificate.
  4. Since then the defendant has failed or refused to pay the judgment debt and the plaintiff has been unable to enforce the judgment except for the sum of \$2,900 garnisheed from the defendant's bank account on 15 December 2005 and by reference to an application to record writ referred to below.
  5. On 28 November 2005 the defendant served a notice of dispute on the plaintiff requiring disputes as to the plaintiff's entitlement to payment of the adjudicated amount and certain offsetting claims made by the defendant to be referred to arbitration.
  6. Subsequently, the disputes were referred to arbitration.
  7. On 28 March 2005 the arbitrator directed that the defendant (which is the claimant in the arbitration proceedings) provide its points of claim by 26 April 2006.
  8. A statutory demand was served by the plaintiff. An application was brought by the defendant for the demand to be set aside. The defendant was successful and on 17 March 2006 the plaintiff consented to an order that the statutory demand be set aside.
  9. The application for the statutory demand to be set aside was based upon the claims made in the Notice of Dispute. It was contended that the Notice of Dispute raised genuine offsetting claims for the amount of \$909,535.16 plus GST plus interest. cf *Aldoga* [6-11]]
  10. The plaintiff's actions to enforce the judgement debt have not resulted in payment.
  11. The bank account of the defendant has been fully garnished. The real estate held by the defendant is the subject of mortgages. While the real estate property is of substantial value, secured creditors stand in front of the plaintiff in relation to the proceeds of sale of the properties.
  12. The plaintiff obtained an ex parte order for the examination of the directors of the defendant, with such examination being listed to take place on 22 May 2006.
- 3 In slight amplification of these matters, it is appropriate to refer to the application to record writ, which was lodged with the Land and Property Information Division of the Department of Lands on 24 March 2006. That application to record writ in effect permits the regulatory authority to annotate the title noting that a writ of execution of the property in relation to the land has been lodged and is unsatisfied. This serves to warn prospective purchasers of that circumstance.
- 4 The other matter relevant to the plaintiff's consent to an order that the above described statutory demand be set aside concerns the first instance decisions in *Aldoga Aluminium Pty Ltd v De Silva Starr Pty Ltd* [2005] NSWSC 284, *Greenaways Australia Pty Limited v CBC Management Pty Limited* [2004] NSWSC 1186 and *Demir Pty Limited v Graf Plumbing Pty Limited* [2004] NSWSC 553, all of which have held that it is not possible for provisions of the *Corporations Act*, to be limited by reference to the provisions of the *State Act* and that the question for the Court in an application under section 459G, is simply whether, as a matter of fact, a genuine dispute exists.

**The Court's powers**

- 5 The stay is sought pursuant to the Court's inherent powers and the jurisdiction conferred by section 23 of the *Supreme Court Act* or, alternatively, pursuant to the Court's powers conferred by section 47 of the *Commercial Arbitration Act*:
- (i) The inherent power of the Court to stay an action is exercisable in any situation where the requirements of justice demand it: *Tringali v Stewardson Stubbs & Collett Pty Ltd* (1966) 66 SR (NSW) 335 at 344. Further, s.23 of the *Supreme Court Act* confers on the Court all jurisdiction necessary for the administration of justice in New South Wales.
  - (ii) The inherent power and the jurisdiction conferred by s.23 of the *Supreme Court Act* are to be exercised only as necessary for the administration of justice: *Reid v Howard (No 2)* (1995) 184 CLR 1 at 17. The

circumstances in which it may be appropriate for the Court to exercise its inherent power and the jurisdiction under s.23 is not restricted to defined and closed categories: **Reid v Howard** at 16.

- (iii) The general supervisory power of the Court with respect to the justice system in New South Wales is not limited to proceedings before the Court: **Gill v Walton** (1991) 25 NSWLR 190 at 209F – 210E.
- (iv) It has been held that the supervisory jurisdiction under s.23 would allow the Court to determine whether an arbitrator's procedural directions, at a stage before the arbitration has run its course, are beyond power: **Commonwealth of Australia v Cockatoo Dockyard Pty Limited** (1995) 36 NSWLR 662 at 675D – 676A, 677C-G, 684B. In that case Kirby P said at 675F-676A: *"In issue here is the scope of the arbitration itself and the ambit of the orders that may properly be made by an arbitrator within that scope. Allowing that a large circle will be drawn within which the arbitrator may make procedural orders, the circle is not without limit. A point will be reached where the edge of the circle will be arrived at and passed. When passed, the Court, upholding the other interests which lie outside the legitimate scope of the arbitration, will retain its powers to intervene.....The rule of law requires that the Court, protective of other competing public and private interests, will define and, where necessary and appropriate, declare the limits beyond which the purported powers in pursuit of private arbitration intrude into competition with other legitimate public and private rights and duties"*.

#### The plaintiff's submissions

6 The plaintiff contends that the following suggested circumstances justify the grant of a stay:

- (i) The legislative scheme established by the *Building and Construction Industry Security of Payment Act* was described by Palmer J as "pay now, argue later" in **Multiplex Constructions Pty Limited v Luikens** [2003] NSWSC 1140 at [96] – a statement which has been widely adopted in subsequent decisions on the Act as accurately expressing the effect of the scheme.
- (ii) S.23 of the Act requires the adjudicated amount to be paid within five business days after the adjudication determination is served on the respondent. S.24 provides that if the respondent fails to do so, the claimant may obtain an adjudication certificate which, under s.25, the claimant may file as a judgment for a debt in any court of competent jurisdiction and enforce accordingly.
- (iii) S.25(4) severely limits the matters that the respondent may raise in any proceedings to have the judgment set aside and requires that the respondent pay into court as security the unpaid portion of the adjudicated amount pending final determination of the proceedings. S.32 underlines the interim nature of the payment required to be made under the Act and preserves the right of the parties to obtain a final determination of their rights and liabilities in curial or arbitral proceedings. Under s.32(3), the court or tribunal must allow for any amount paid to a party under the Act in making any order or award and may make orders for restitution of any amounts paid.
- (iv) Despite the interim nature of payments made under the Act, the policy of the Act that successful claimants should be paid has been said to provide a sound reason for making a stay of execution of judgment less readily available in relation to debts arising under the Act than in other cases: **Grosvenor Constructions (NSW) Pty Limited v Musico** [2004] NSWSC 344 at [31] per Einstein J. His Honour's view was endorsed by Hodgson JA in **Herscho v Expile Pty Limited** [2004] NSWCA 468 at [3].
- (v) The injustice to the claimant of granting a stay of execution of a judgment obtained in connection with a debt under the Act, in circumstances short of actual or imminent insolvency, were described by Einstein J in **Taylor Projects Group Pty Limited v Brick Dept Pty Limited** [2005] NSWSC 571 at [52] as including that the claimant would be "deprived of the very funds the Act contemplated would be made available to it to pay its own employees and suppliers".
- (vi) In this case, the defendant has not applied to set the judgment aside pursuant to s.25 of the Act, nor has it applied to have execution of the judgment stayed.
- (vii) Instead, the defendant has sought to achieve the same result by wilfully disobeyed the Court's order that it pay the judgment debt to the claimant and by seeking to circumvent the operation of the Act by pressing ahead with the arbitration, in which it seeks to challenge the plaintiff's entitlement to payment while denying to the plaintiff access to the funds to which the plaintiff is presently entitled, both pursuant to the Act and pursuant to the judgment.
- (viii) The injustice to the plaintiff is twofold. First, it is being deprived of the funds to which it has a statutory entitlement to be paid and which the Act contemplates and specifically provides should be available for it to pay its employees and suppliers in connection with work done for the defendant, regardless of the fact that the plaintiff's ultimate entitlement to retain those moneys is the subject of dispute. Secondly, the injustice is compounded because the plaintiff will be put to the time, trouble and considerable expense of defending the arbitration proceedings while being deprived of those funds and while being forced to expend further costs on attempting to enforce the judgment. An additional and presently unquantifiable risk is whether the defendant will have the capacity to meet an order for costs against it, if it is unsuccessful in the arbitration. On the limited information presently available to the plaintiff in relation to the defendant's financial circumstances, there is insufficient evidence to mount an application for the arbitration to be stayed pending provision of adequate security for costs.
- (ix) It would be oppressive to allow the arbitration to proceed in those circumstances.

- 7 The plaintiff further contended as follows:
- (i) If instead of referring the dispute to arbitration the defendant had commenced proceedings in the Court, there is no question that the Court would have power to stay the proceedings, whether in the exercise of its inherent power, the jurisdiction under s.23 of the *Supreme Court Act* or the specific jurisdiction under s.67 of the *Uniform Civil Procedure Act*. The plaintiff submits that it makes no difference that the proceedings in this case are a private arbitration, rather than proceedings within the Court.
  - (ii) An arbitrator's duty is to determine the dispute between the parties in accordance with the terms of his appointment and to give procedural directions appropriate to achieving that objective. It is not part of an arbitrator's jurisdiction to be concerned with policy questions outside the scope of the arbitration, such as whether permitting the arbitration to proceed in circumstances such as the present would be tantamount to sanctioning a deliberate circumvention of the legislative scheme established by the *Building Industry Security of Payment Act* and the wilful disobedience of a judgment of the Court.
  - (iii) It is highly doubtful whether an arbitrator could stay the arbitration in circumstances of the present kind. Once it is accepted that a private arbitration may be subject to the Court's supervisory jurisdiction under S.23 of the *Supreme Court Act*, the only question is whether the circumstances justify the exercise of the Court's power.
  - (iv) Further and alternatively, s.47 of the *Commercial Arbitration Act* "is intended to empower the Court, in cases properly before it, to make interlocutory orders to the extent that it is not elsewhere specifically provided for in other sections of that Act": *Commonwealth of Australia v Cockatoo Dockyard Pty Limited* (1995) 36 NSWLR 662 at 671E. In that case, Kirby P said at 671F that: "In its context, it clearly means that the Court shall have the power expressed where otherwise the court is properly seized of jurisdiction". For example, the Court's power under s.47 has been accepted extends to making orders for security for costs: *Baulderstone Hornibrook Engineering Pty Limited v State Constructions Pty Limited* (1993) 61 SASR 94 followed in *Thalanga Copper Mines Pty Limited v Brandrill Limited* [2004] NSWSC 349 per Hamilton J at [1]. By analogy with the Court's power to stay proceedings brought within the Court until security is provided – cf UCPR r 42.21(1) – where security for costs have been ordered in an arbitration, the power under s.47 would extend to staying the arbitration until security has been provided.
  - (v) The plaintiff submits that s.47 of the *Commercial Arbitration Act* empowers the Court to order a stay of arbitration proceedings in the same circumstances in which the Court would order a stay of those proceedings if they were brought within the Court. The plaintiff submits further that the Court's powers under s.47 of the *Commercial Arbitration Act* are exercisable whenever the court's jurisdiction under section 23 of the *Supreme Court Act* is enlivened.
  - (vi) In the circumstances of this case the arbitration should be stayed to aid in the enforcement of the judgment; prevent circumvention of the policy objectives of the *Building and Construction Industry Security of Payment Act*; enforce compliance with the Act; prevent injustice to the plaintiff; and to give relief from the oppressive consequences of the defendant continuing on its present course of conduct.

#### Dealing with the issue

- 8 The application is clearly misconceived. It flies in the face of section 32 [and in particular with subsection 2] of the Act which provides as follows: "Nothing done under or for the purpose of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection 3."
- 9 Subsections (1) and (3) respectively read as follows:  
**32 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.  
 (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.
- 10 The jurisdiction to stay an arbitration is exercised with considerable caution, particularly so where the arbitration arises pursuant to contractual arrangements between the parties.
- 11 The central proposition put by the plaintiff was that it is oppressive to require the plaintiff to have to contend with the arbitration and incur substantial costs in doing so, whilst it is denied the funds to which it is entitled under the statute and pursuant to the judgment. That is said to be sufficient to enliven the Court's jurisdiction to grant a stay which is available, so it is put, whenever it is necessary to prevent injustice arising from the commencing or continuation of proceedings in this State.
- 12 The proposition for which the plaintiff contended was that the Court having power to enforce its own judgments, a grant of the stay is in effect a de facto/indirect mode of exercising that power.

- 13 The proposition is flawed. The arbitration in no way delays nor frustrates the rights of the plaintiff to pursue conventional enforcement processes in relation to the judgment. The conduct of the arbitration cannot be said to circumvent the Act. The Act expressly preserves the rights of parties under the contract and, apart from the Act, in respect of anything done or omitted to be done under the contract.
- 14 Whilst it is true that the Act:
1. denies to a respondent commencing proceedings to have a judgment set aside, the entitlement:
    - a) to bring any cross-claim against the claimant, or
    - b) to raise any defence in relation to matters arising under the construction contract, or
    - c) to challenge the adjudicator's determination,
  2. requires a respondent, having commenced proceedings to have the judgment set aside, to pay into court as security, the unpaid portion of the adjudicated amount pending the final determination of those proceedings, none of these matters is engaged presently.
- 15 Notwithstanding the plaintiff's central contention that the conduct of the defendant appears to have the effect of outflanking what has been put as "the spirit and intent of the Act", the Court can only determine the present application by a principled exercise of the relevant discretion in terms of the statute in its present form.
- 16 The notice of motion, being misconceived, therefore requires to be dismissed.

**Costs**

- 17 The defendant seeks indemnity costs on the basis that the application had no prospects or no material prospects of success. The principled exercise of the Court's discretion in relation to ordering costs is to simply order in the usual way that the plaintiff pay the defendant's costs of the proceedings on a party-party basis.
- 18 The orders of the Court are as follows:
1. that the proceedings be transferred to the Technology and Construction List.
  2. that the amended notice of motion filed on 11 April 2006 by the plaintiff be dismissed.
  3. that the plaintiff pay the defendant's costs of the motion.
  4. that the proceedings be transferred back to the Common Law Division.

Mr M Orlov (Plaintiff) instructed by Henry Davis York (Plaintiff)  
Mr RI Bellamy (Defendant) instructed by Westlaw Chambers (Defendant)