Grosvenor Constructions (NSW) P/L (in admin) v Joseph & Rosemary Musico, Luigi & Rose Genua

JUDGMENT : **Einstein J :** New South Wales Supreme Court : 27 April 2004

The Notice of Motion

1 The plaintiff in these proceedings obtained an adjudication certificate pursuant to section 24 of the *Building and Construction Industry Security of Payment Act 1999 (NSW)* ["the Act"] and filed an adjudication certificate as a judgment for debt in accordance with section 25 of the Act. The notice of motion presently before the court seeks an order staying the execution of the judgment debt which was entered in the sum of $486,324.77.

2 The basis put forward for the claim to a stay is that the plaintiff has been placed under external administration on 26 November 2002, the evidence [report to creditors dated 11 December 2002] being to the effect that:
· the unsecured creditors claims amounted to $4,791, 504 at the time that the administrator was appointed;
· the amount available for unsecured creditors was $528,294.

3 The report to creditors identified a deficit of $4,263,210 and identified the return to unsecured creditors as 11 cents in the dollar.

4 It is quite plain that unless the stay of proceedings now sought is granted the defendants, if successful in final proceedings, would suffer irreparable prejudice as payment pursuant to the judgment debt presently on foot could never be recouped. In effect a failure to order the stay would in practice, convert an amount which ought to be an *interim* payment into a *final* payment.

5 As the following history makes plain an additional material factor concerns the fact that at an earlier point in time the defendants provided security, in the nature of an unconditional bank guarantee, for an amount considerably in excess of the amount presently payable by the defendants following the adjudication determination and the entry of judgment. For that reason the plaintiff is fully protected in the event that a stay of the proceedings on the judgment debt be granted.

Background

6 The original proceedings arose from an adjudication pursuant to the Act. An adjudication determination was made on 18 July 2003. By reason of that adjudication ("the first adjudication"), the defendants were ordered to pay the plaintiff the sum of $712,757. The defendants sought orders pursuant **to section 69 *Supreme Court Act* 1970 (NSW) quashing the determination. In** *Musico v Davenport* [2003] NSWSC 977 McDougall J. held that the adjudication determination contained jurisdictional errors and that the adjudicator had failed to afford natural justice to the defendants. McDougall J held that the first adjudication determination ought to be quashed.

7 The plaintiff then sought a stay pending an appeal to the Court of Appeal. McDougall J granted a stay of the operation of the orders quashing the determination (***Musico v Davenport***, 14 November 2003, unreported). By order of the Court of Appeal, that stay continued. Ultimately, the plaintiff elected to discontinue the appeal.

8 On 2 September 2003, the defendants had provided an unconditional bank guarantee (to the Court) in order to secure the sum of $712,757 payable to the plaintiff pursuant to the first adjudication determination, pending resolution of the proceedings ultimately determined by McDougall J (above).

9 Following orders by McDougall J quashing the first adjudication determination, the plaintiff sought a fresh adjudication determination, which was made on 5 December 2003 ("the second adjudication determination"). The second adjudication the subject of the present proceedings covered the same subject matter as the first adjudication. The adjudicated amount is $486,324.77. The unconditional bank guarantee in the sum of $712,757 (referred to above) remains in force to secure the plaintiff's entitlement to that sum.

10 On 19 December 2003, Bergin J ordered that the proceedings on and the execution of the judgment be stayed up to and including 20 February 2004. By consent, the Court has made orders extending the period of the stay.

The underlying Construction dispute

11 The underlying construction dispute between the parties is encapsulated in the plaintiff's payment claim and the defendants' payment schedule. The plaintiff has claimed the contract sum together with variations, less previous amounts paid. The defendants claim that the plaintiff failed to reach practical completion, is not entitled to the balance of the contract sum, and that the defendants are entitled to liquidated damages, together with costs to complete and cost of rectification. The defendants claim that they have no indebtedness to the plaintiff, and that the plaintiff is liable to pay damages to the defendants in the sum of $550,839 plus GST.

Interim payment - the legislative purpose

12 There are now several judgments of the Court dealing with the fact that a fundamental feature of the Act is to be found in its provision for *interim* payments only:

· In ***Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd*** [2003] NSWSC 365, Nicholas J put the matter as follows at [19]: *"The underlying legislative intention was described by the Minister in his second reading speech (Hansard: 8 September 1999 Legislative Assembly p 107): 'Adjudication therefore provides the claimant with important benefits: **a prompt interim decision on a disputed payment,** and the amount in the decision must be either paid to the claimant, or secured and set aside. Failure to comply with either of those matters allows the claimant not only to sue for the adjudicated amount, but also to suspend work.*

*Therefore, if the dispute is not resolved to the satisfaction of both parties by the adjudication process, it will result in an independently determined amount being securely set aside until final resolution is achieved. The bill does not specifically provide for an appeal from an adjudicator's decision. **The adjudicator's decision is only an interim decision until the final***

***amount due in respect of the payment claim is finally decided in legal proceedings or in a binding dispute resolution process. This is the appeal.*"** (Emphasis added)

- In ***Paynter Dixon Constructions Pty Ltd v JF & CG Tilston Pty Ltd*** [2003] NSWSC 869 at [39], Bergin J said: *"The relevant Parliamentary debate from which there might be gleaned the underlying legislative intention of the Act, referred to by Nicholas J in **Parist** at par [19], referred to a 'prompt interim decision on a disputed payment' as a 'benefit' provided by adjudication. It is understandable that the term 'interim' was used because the adjudication process does not affect rights to bring civil proceedings and **the Act** contemplates that orders for restitution of the adjudicated amount may be made (s. 32). The whole process is one that has to be attended to expeditiously with quite tight timeframes fixed by the Act."*
- In ***Brodyn Pty Ltd t/as Time Cost and Quality v Davenport*** [2003] NSWSC 1019 at [14], Einstein J said: *"What the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle. That vehicle must necessarily give rise to many adjudication determinations which will simply be incorrect. That is because the adjudicator in some instances cannot possibly, in the time available and in which the determination is to be brought down, give the type of care and attention to the dispute capable of being provided upon a full curial hearing. It is also because of the constraints imposed upon the adjudicator by section 21, and in particular by section 21(4A) denying the parties any legal representation at any conference which may be called. But primarily it is because the nature and range of issues legitimate to be raised, particularly in the case of large construction contracts, are such that it often could simply never be expected that the adjudicator would produce the correct decision. What the legislature has provided for is no more or no less than an interim quick solution to progress payment disputes which solution critically does not determine the parties' rights inter se. Those rights may be determined by curial proceedings, the Court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures. That clawback route expressly includes the making of restitution orders."* (Italics in original).

13 As the defendants submit it is thus unsurprising that McDougall J has observed that *"the Act provided for fairly rough justice"* (***Musico v Davenport*** (Supreme Court of New South Wales, 14 November 2003, unreported)).

The Court's power to grant a stay

14 The Court has the power on terms to stay the execution of a judgment or order by virtue of Part 44 rule 5 *Supreme Court Rules*. This power is exercisable whenever the requirements of justice so demand and is also in addition to the Court's inherent powers: see *Ritchie's Supreme Court Practice*, para [44.5.1] and authorities referred to therein. The Court's inherent powers, and its powers pursuant to section 23 *Supreme Court Act*, are well established. The orders sought by the defendants can be made pursuant to such powers. Thus, it has been said that "[t]he power of a court to control and supervise its process to prevent injustice is not restricted to defined and closed categories": *Hamilton v Oades* (1989) 166 CLR 486 at 502.4, per Deane and Gaudron JJ (citing *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 639 and *Tringali v Stewardson Stubbs & Collett* (1966) 66 SR (NSW) 335 at 340, 344). The inherent power of the Court and the jurisdiction conferred by section 23 are to be exercised as necessary for the administration of justice: *Reid v Howard (No. 2)* (1995) 184 CLR 1 at 17.2. See also *Ritchie's Supreme Court Practice* paragraphs [23.1] – [23.4].

The approach towards the grant of a stay where a claimant is insolvent

15 The present is apparently the first occasion upon which this Court has had to consider the circumstances (if any) in which the Court should grant a stay of the execution or operation of orders or judgments arising from the filing of an adjudication certificate, in circumstances where any moneys paid would in practice be irrecoverable because of the claimant's insolvency or liquidation.

16 To my mind the submissions of the defendants in relation to this matter are of substance and they are generally adopted in what follows.

The English decisions

17 The present is clearly a case where the grant of stay would "prevent injustice" (***Hamilton v Oades*** (1989) 166 CLR 486 at 502.4). As the defendants have submitted the English authorities are instructive in this respect.

18 The relevant legislation in the United Kingdom is the *Housing Grants, Construction and Regeneration Act* 1996. It is true, as McDougall J observed in ***Musico v Davenport*** [2003] NSWSC 977 at [51], that *"care needs to be taken in seeking to apply decisions on a different legislative scheme"*. However, both the Act and the UK legislation share one fundamental feature – they both provide for *interim* payments following adjudications. Thus, in ***Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd*** [2004] BLR 65 at 68 [8], May LJ (with whom Hale and Hooper LJJ agreed), after explaining the history and nature of the UK Act, cited with approval the statements by Dyson J (as he then was) in ***Macob Civil Engineering Ltd v Morrison Construction Limited*** (1999) 64 Con. LR 1 at [14]: *"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional **interim basis**, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see s108(3) of the Act and paragraph 23(2) of Part 1 of the Scheme."* (Emphasis added)

And further: *"But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an **intervening provisional stage** in the dispute resolution process."* (Emphasis added)

19 May LJ also referred (at 68 [9]) to the policy of the UK Act as being "*aptly described by Ward LJ in RJT* ***Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd*** *[2002] 1 WLR 2344 as '****pay now, argue later"'.***

20 The English Courts have had to deal with the precise issue for determination in the present case: in what circumstances (if any) should the Court grant a stay of a judgment following from an adjudication determination, where the claimant is insolvent and would be unable to repay the amount paid if on the final hearing the claimant were to fail and the Court were to order restitution?

21 In ***Herschel Engineering Ltd v Breen Property Ltd*** [2000] BLR 272 Dyson J (as he then was), dealing with the analogous UK legislation, held that if it were the case that the successful claimant in the adjudication were insolvent, his Lordship would have granted a stay. At 277 [23], Dyson J put the matter as follows: *"The only remaining issue is whether I should grant a stay of execution pending the final determination of the county court proceedings. I have decided not to grant a stay for the following reasons. If the claimant's appeal on 24 May is successful, then the judgment in the full amount claimed will be restored. On that basis, the defendant would have suffered no real prejudice as a result of being required to pay that amount now, rather than in a few weeks' time. If it is unsuccessful in its appeal, the parties will be faced with a contested multi-track case. It seems likely that it will take about two days to try. No-one has been able to indicate when the hearing is likely to take place. Judging by the delays that have occurred so far, it is possible, if not probably, that the trial will not take place until the early autumn. On that basis, I see no reason why for several months the claimant should be kept out of the money that the adjudicator decided it should receive. To keep the claimant out of this money for several months would be contrary to the plain intent of the 1996 Act. I should add that there is no evidence that, if the defendant is successful in defending the county court proceedings, the claimant will be unable to repay the sum awarded by the adjudicator.* ***Had the position been otherwise, and there was a real doubt as to the claimant's ability to repay if it loses in the county court, I would probably have granted a stay of execution pending the final determination of the county court proceedings.*** (Emphasis added)

22 In ***Baldwins Industrial Services PLC v Barr Limited*** [2003] BLR 176 at 182, the Court said (at [35], [37]):

"[35] In undertaking the balancing exercise that is necessary in deciding whether a stay should be granted and, if so, on what terms, I first consider the question of Baldwins' financial difficulties and the doubts raised as to Barr's position. ***Given Baldwins' current financial position, there is a risk that what would, in other circumstances, be a temporary decision would become binding by reason of Baldwins' financial misfortune. It would work injustice to Barr if it could not recover money if it turned out that the adjudicator had been in error.*** *On the other hand, in circumstances where the Receivers have cast some doubt on Barr's financial position, it would work injustice to Baldwins if a stay were granted without any requirement on Barr to secure the money. I bear in mind also that the grant of a stay risks defeating one of the purposes of HGCRA. . . .*

[37] In all the circumstances I conclude that Baldwins' financial position and the consequent potential injustice to Barr, together with Barr's stated intention to begin proceedings within a month, constitute special circumstances so that Barr is entitled to a stay, on terms. Baldwins have offered to accept that payment be made into an escrow account. Barr are willing to pay the money into court and have offered to undertake to commence proceedings within a month, failing which Barr would consent to the money being paid out of court. That is an appropriate suggestion." (Emphasis added)

23 *Keating on Building Contracts* (First Supplement to the 7th Edition, 2004-eds Furst and Ramsey) (at pages 98-99) differentiates between the automatic stay of proceedings where a successful claimant is placed into liquidation and the situation: *"[W]here the successful claimant in enforcement proceedings is impecunious to the extent that, on the evidence, there are serious concerns that the claimant will not be able to repay sums claimed if the adjudicator's decision is later overturned in arbitral or court proceedings, then the court may, in the exercise of its discretion, stay the proceedings on such terms as it thinks fit, on the basis that '… there are special circumstances which render it inexpedient to enforce the judgment or order…'"*

24 *Keating* cites ***Herschel Engineering Ltd v Breen Property Ltd*** [2002] BLR 272 (considered above) and ***Rainford House Ltd v Cadogan Ltd*** [2001] BLR 416 to support the above proposition. In the latter case, the Court said (at 422) that: *"if there is credible evidence that the claimant is insolvent, in my judgment that is a highly material matter for the court to consider in relation to any application for a stay of execution of the judgment in favour of the claimant."*

25 To my mind the following further comments to be found in *Keating* (p. 99fn) are entirely correct: *"However, it will always be necessary for the Court to give sufficient weight to the competing right of the claimant to have his decision enforced (****Baldwins Industrial Services plc (in administrative receivership) v Barr Ltd*** *[2003] BLR 176) so that a Court is unlikely to grant a stay on limited or flimsy evidence of impecuniosity (****Absolute Rentals Ltd v Gencor Enterprises Ltd*** *[2000] C.I.L.L. 1637)."*

26 It is appropriate to add that in my view the decision in *SL Timber Systems Ltd v Carillon* [2001] ScotCS 167, [McFadyn LJ] to the extent departing from the English decisions above referred to, should not be followed.

Application of the principles

27 The judgments of this Court referred to above indicate that payments made pursuant to adjudication determinations are *interim* payments. As noted above, the passage in the Second Reading speech quoted by Nicholas J in ***Parist Holdings Pty Ltd v WT Partnership Australia*** refers to the determination of *final* rights in future proceedings as constituting "the appeal". Strictly speaking, it is not an appeal, in that any attempt to recoup an adjudicated amount paid would require the commencement of fresh proceedings.

28 Nonetheless, the analogy with a true appeal is instructive. In curial proceedings from which an appeal lies, a successful plaintiff "*is entitled to the benefits of the judgment obtained*": ***Advanced Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd*** (1997) 71 ALJR 814 at 815 per McHugh J (citing ***Alexander & Ors v Cambridge Credit Corporation Ltd (Receivers appointed) & Anor*** (1985) 2 NSWLR 685 at 693). Similarly, a successful claimant under the Act is entitled to the adjudicated amount, notwithstanding that any payment would be of an interim nature.

29 Further, in the case of a successful plaintiff in curial proceedings, the Court may grant a stay pending the appeal. In ***Kalifair Pty Ltd v Digi-Tech (Australia) Ltd; McLean Technic Pty Ltd v Dig-Tech (Aust) Ltd*** (2002) 55 NSWLR 737 at 741-742 [18] the Court of Appeal said, after referring to the judgment of the Court in ***Alexander v Cambridge Credit Corporation Limited (Receivers appointed)*** (1985) 2 NSWLR 685 at 694, 695 on the exercise of the Court's jurisdiction to grant a stay pending an appeal: "*Thus the relevant principles are analogous to those which govern the grant of interlocutory relief before trial to protect the status quo.* ***The appellant must show*** *that the appeal raises serious issues for the determination of the appellant court, and* ***that there is a real risk that he will suffer prejudice or damage, if a stay is not granted, which will not be redressed by a successful appeal. This requirement will be satisfied if the appeal will be rendered abortive or nugatory unless a stay is granted.*** *If these pre-conditions are established the Court will then consider the balance of convenience.*" (Emphasis added)

30 Thus, it has been observed that "[t]his Court regularly stays execution on judgments pending an appeal where there is a risk that the plaintiff will be unable to repay the money without difficulty or delay if the appeal were to succeed": ***TCN Channel 9 Pty Ltd v Antoniadis [No. 2]*** (1999) 48 NSWLR 381 at 385 [15].

31 Similarly, there is no reason why, in appropriate cases, a stay cannot be ordered in circumstances such as the present. Clearly the analogy with appeals is not a perfect one. Whilst payments under the Act are interim, it nonetheless is the policy of the Act that successful claimants be paid. For that reason, there is a sound reason for making stays less readily available in relation to debts arising under the Act, in contrast to the position in relation to appeals arising from curial proceedings. For example, in cases such as the present, the Court might require more than a "***real risk*** *that [the respondent] will suffer prejudice or damage, if a stay is not granted*" (***Kalifair Pty Ltd v Digi-Tech (Australia) Ltd*** (2002) 55 NSWLR 737, at 741-742 [18] (emphasis added)).

32 However I accept that in a case such as the present, where there is a certainty that the defendants' rights will be otherwise rendered nugatory, and that it will suffer irreparable prejudice, the proper and principled exercise of the Courts discretion is to grant a stay.

33 This is especially so given that the plaintiff's entitlement to the adjudicated amount is apparently fully protected by the unconditional bank guarantee referred to above. (As noted above, the unconditional bank guarantee, which is in the sum of $712,757, secures the plaintiff's entitlement to the adjudicated amount of $486,324.77).

34 There are sound reasons for the above approach, and the approach adopted by the English cases. The fundamental purpose of the Act is to provide for *interim* payment. Both the second reading speech and the authorities are at pains to point out that the result which flows from an order to pay a sum following an adjudication is not a final determination of the parties' rights.

35 In the present case, if no stay is granted, an interim arrangement would be in practice converted into a final order. The effect of not granting a stay would be that the defendants' rights to recoup the adjudicated amount in the "appeal" pursuant to section 32 of the Act would be rendered nugatory, and the defendants would thus suffer irreparable prejudice.

36 The proper exercise of the discretion is clearly to order the stay on terms.

37 The Court has been informed that it is likely that the parties will be in a position to reach a consensus in relation to the terms upon which the stay should be ordered. Apparently there are close discussions on foot dealing with the amount of security which is to remain and with the parties' endeavours to arbitrate the dispute.

38 The appropriate course is to stand the matter down for a period of time so that the parties can endeavour to reach a consensus.

39 In the event that the parties are unable to reach a consensus, the proceedings will be before the Court again. In that event, unless the parties can reach agreement as to the way forward on the basis of curial proceedings, the Court will have to give directions in relation to the terms upon which the stay is to be ordered. There is no doubt that those terms would require that the plaintiff commence final proceedings within a limited period of time. Those terms would also have to deal with the question of how much of the security presently in place, should remain in place for that purpose.

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