Judgment : BELL JA. Court of Appeal, Supreme Court New South Wales. 20th August 2008.

1 By notice of motion filed on 11 August 2008 the applicant claims an order staying the orders made by McDougall J on 30 July 2008 until the determination of the appeal.

2 The applicant and the first respondent were parties to a construction agreement under which the respondent agreed to carry out work on the construction of a home unit complex. It is not in issue that the contract was for construction work within the meaning of s 5 of the *Building and Construction Industry Security of Payment Act* 1999 (the Act).

3 The first respondent served a payment claim on the appellant on or about 19 March 2008 claiming the sum of around $1.5 million. The appellant provided its payment schedule on 3 April 2008 showing the schedule amount as $nil.

4 The first respondent lodged an adjudication application on 17 April 2008. The second respondent, whom I will refer to as "the adjudicator", accepted appointment as adjudicator on 21 April 2008. The appellant lodged an adjudication response on 29 April 2008.

5 The adjudicator determined the adjudication and gave his reasons in writing on 14 May 2008.

6 The appellant commenced proceedings by summons in the Equity Division claiming a declaration that the adjudication was void. On 23 May 2008 the appellant paid the sum of $932,114.49 into Court.

7 The proceedings were determined by McDougall J on 30 July 2008. His Honour dismissed the proceedings and ordered that the sum paid into Court by the appellant be paid to the first respondent. His Honour stayed his order until 5.00pm on 6 August 2008 and he later extended the stay to 5.00pm on 18 August 2008.

8 Mr Einfeld QC, who with Mr Bellamy appeared on behalf of the appellant, outlined the grounds of challenge to his Honour's judgment by reference to (i) the "*variations issue*" and (ii) the "*value of work issue*". The payment claim included claims for variations totalling $1,140,339.22. The payment schedule dealt with the claimed variations by stating, "*this variation was not made in accordance with the contract and is rejected*". In its adjudication response the appellant contended with respect to the claimed variations that each item was not a variation, but part of the design "and construct procedure under the contract" (exhibit A Tab 5B at 67).

9 Section 20(2B) of the Act provides that the respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.

10 The adjudicator commented (at [105]) that the payment schedule provided very little information for each of the variations claims but that it was clear from what was provided in the adjudication application that the claimant understood the brief reasons given for the differences. In particular, the adjudicator stated (at [107]):

"*Whilst it could be argued that the lack of detail in the payment claim and payment schedule may offend notions of procedural fairness or the requirements of the Act, it is my view that there is sufficient detail in both for the parties, who had dealt with the issues before the payment claim was lodged, to understand the payment claim, of the payment schedule and the issues raised. The issues can be identified from the payment claim and the payment schedule.*"

11 Item 120 in the payment claim was singled out in the proceedings before the primary judge as being representative of the approach taken to the variation claims. The adjudicator determined the claim with respect to this item (at [159]-[168]). He dealt with the item on the basis that the only reason stated in the payment schedule for the rejection of the claim was that it had not been made in accordance with the contract. He saw nothing in the terms of the contract to invalidate the claim for the variation or to lead to a conclusion that it should be determined at $nil value (at [164]). The appellant's contention is that in light of the adjudicator's acknowledgment that while the payment schedule provided very little information, it was clear that the parties understood the claim and schedule and the issues raised, it was a denial of procedural fairness to fail to take into account substantial parts of its adjudication response. His Honour rejected this contention, concluding that the adjudicator had determined the ambit of the dispute in a manner that was open and that the determination in this respect was not infected by error which would permit the intervention of the Court: ***John Holland Pty Ltd v Roads & Traffic Authority of New South Wales*** [2007] NSWCA 19; 23 BCL 205 per Hodgson JA (Beazley JA agreeing) at [55] and Basten JA at [71].

12 The value of the works issue was encapsulated by the primary judge as being that the adjudicator failed to comply with an essential requirement of the Act in relation to his valuation of those works because he did not deal "in any appropriate or reasoned way with the disputed question of valuation" (at [6]). His Honour found that it had been open to the adjudicator to reason in the way that he had done. Furthermore, his Honour did not consider this aspect of the adjudicator's determination evidenced any failure to exercise the power given to him or any breach of the essential requirements for validity of an adjudication determination as set out in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394; 61 NSWLR 421 per Hodgson JA (Mason P and Giles JA concurring) at 441 [53].

13 The application was advanced on the basis that the grounds of appeal are "*strongly arguable*" and that there is a strong risk that if the monies are paid out to the respondent it is likely they will not be recovered in the event the appeal is successful.

14 In ***Brodyn*** it was held that relief in the nature of certiorari does not lie to quash the determination of an adjudicator which is not void (at 443 [59]). The appellant's contentions which challenge the validity of the determination as being not made in accord with the requirements of s 22(2) of the Act and, variously, as betraying a want of procedural fairness, impress as not without difficulty: ***John Holland v Roads & Traffic Authority.***

15 I turn to the issue of the risk of prejudice to the appellant. Mr Einfeld relied on the affidavit of Christopher Zaarour, which was sworn on 8 August 2008. Mr Zaarour is a director of the respondent. He deposed to the respondent at the date when the contract was repudiated (the parties were agreed that this was a reference to March 2008) having outstanding liabilities to around 75 subcontractors and suppliers. Since that date the respondent has paid from its own resources the sum of approximately $488,000 to subcontractors and suppliers in connection with the project. There remain outstanding amounts due to subcontractors and suppliers for work performed on the appellant's project of approximately $500,000. Mr Zaarour deposed to it being the intention of the respondent to apply the monies received from the appellant in payment of the subcontractors and suppliers.

16 A copy of the first respondent's tax return for the year ended June 2007 records total assets of $833,777, total liabilities of $834,873 and shareholders' funds in the sum of $1,096.

17 Mr Corsaro SC, who with Mr Goldstein appeared on behalf of the first respondent, tendered a bundle of documents, including copies of National Australia Bank statements relating to accounts operated by the respondent in relation to various of its construction projects. Mr Einfeld had not seen the documents. The hearing of the application took rather longer than the estimate given. In the circumstances I reserved judgment and gave leave to Mr Cosaro to prepare a note setting out what he contended the bank statements revealed of the respondent's current moneys on deposit (by reference to the bundle of documents, Exhibit 3). Mr Einfeld was given leave to put in a note outlining the appellant's position with respect to exhibit 3.

18 The respondent submitted that the bank statements establish that as at 26 July 2008 it held the sum of $542,892. I accept that is so. However, as the appellant submitted, it is reasonable to infer that the moneys in each of the accounts identified by project name (or a substantial amount of them) will be dispersed in satisfaction of liabilities to suppliers and subcontractors incurred in connection with the project. The evidence provides support for Mr Zaarour's evidence that the respondent is an active construction company engaged in a number of current projects.

19 The respondent submitted by reference to Exhibit 2 that its cash on hand was $1,030,929 as at 14 August 2008. Exhibit 2 purports to be a draft profit and loss statement for June 2007 - June 2008. Its provenance is unknown. Exhibit 2 cannot be given significant weight.

20 Mr Corsaro relied on Mr Zaarour's affidavit and, in particular, the evidence that the respondent is carrying out construction works on five building projects in the northern Sydney metropolitan area, having a total value in excess of $24.7 million. In addition to work in progress, the respondent has tendered for two additional building construction projects and been advised by that its tender in each case has been successful and of approval by the financiers for each project of its appointment as building contractor. The two projects involve contract works to a value of $24 million. Mr Zaarour states that tenders have been submitted for two further projects having a substantial value.

21 The respondent owns three lots of residential land at Collingwood Park in Queensland. The evidence suggests that the value of these is likely to be in total not less than $500,000. The respondent's overdraft facility is secured against these properties. The limit on the facility is $396,000. The approximate balance drawn by the respondent against the facility at the date of the affidavit was $200,000.

22 The first respondent was incorporated in 2005. However, prior to this Mr Zaarour operated his construction business as a partnership. The first respondent has valuable work in progress and the prospect of continuing work for at least two years. The value of the works that are the subject of current contracts does not determine its financial position. I am mindful that it is a relatively small construction company operating with a modest overdraft facility secured over real estate that is of less value than the sum paid into Court.

23 In ***Brodyn*** Hodgson JA (at 449 [85]) albeit, in a somewhat different context, commented on the policy of the Act, which he had earlier identified as that progress payments be made, as a discretionary factor weighing against the grant of a stay. In ***Herscho v Expile Pty Ltd*** [2004] NSWCA 468 his Honour commented with approval on the remarks of Einstein J in ***Grosvenor Constructions NSW Pty Limited v Musico*** [2004] NSWSC 344 at [31]-[32] that, having regard to the policy of the Act, there is sound reason for making stays less readily available in these cases and looking for more than "a real risk of prejudice" if a stay is not granted (at [3]).

24 Hodgson JA's remarks were echoed by Giles JA in ***McLaughlin's Family Restaurant v Cordukes Ltd*** [2004] NSWCA 447, a case involving an application for a stay of enforcement of a judgment given in the District Court in respect of a payment claim under the Act. In that case counsel for the claimant did not contend that the opponent would be unlikely to repay in the event the claimant were successful on appeal. However his Honour went on to observe (at [10]):

"The second is that the Act is part of a scheme intended to provide for prompt payment of money pursuant to payment claims made in accordance with its provisions, with the parties to the relevant construction contract being left to sort out the final result between them in other proceedings. There is evidence that the claimant proposes to bring proceedings in this Court against the opponent claiming substantial amounts for breach of the relevant contract. In

*conformity with the policy of the Act, in **Herscho v Expile Pty Ltd** Hodgson JA saw merit in earlier observations that there was sound reason for making stays less readily available in cases such as the present and perhaps for looking for more than a real risk of prejudice if a stay was not granted. In my opinion also, there is merit in an approach by which in circumstances such as the present the Court should be reluctant to grant a stay where there is no case of hardship and the final position between the parties can be worked out in the larger proceedings which the claimant is to bring."*

25 In the appellant's written submissions it was put as an alternative to the relief claimed, that the policy of the Act may be appropriately reflected in an order for the release of $500,000, which would allow the first respondent to meet its liability to its sub-contractors. The policy of the Act is captured in the first sentence of the extract from the judgment of Giles JA above. While it cannot be said there is no risk of prejudice to the appellant, having regard to the principles to which I have referred, I am not persuaded this is a sufficient basis for the grant of a stay in the context of these proceedings.

Orders

1. Dismiss the motion;
2. The appellant is to pay the first respondent's costs.

M Einfeld QC / R Bellamy (Applicant) instructed by Goldrick Farrell Mullan
F Corsaro SC / S Goldstein (Respondent) instructed by Walker Hedges & Co