

**JUDGMENT : Palmer J** : New South Wales Supreme Court : 22<sup>nd</sup> April 2005

- 1 The Plaintiff seeks an injunction restraining any further step being taken in an adjudication under the *Building and Construction Industry Security of Payment Act 1999*.
- 2 The basis of the application is that there is a dispute as to whether a payment claim was served by the First Defendant within the time prescribed under s.13(4) of the Act and whether a payment schedule served by the Plaintiff was served within the time prescribed by s.14(4) of the Act. If the payment claim is found to have been served outside the time prescribed by s.13(4) then, of course, the subject matter of that payment claim may not be agitated in the present adjudication. If the payment schedule is found to have been served within the time prescribed by s.14(4) then the First Defendant was not entitled to apply, as it did, for an adjudication under s.17(1)(b).
- 3 The Plaintiff says that if either of the contested facts is found in its favour an essential foundation for the validity of the adjudication will be lacking; it submits that the Court should now entertain an application for an interim order restraining any further step in the adjudication until final determination in this Court of the question whether or not the adjudication will be valid.
- 4 I think that the Plaintiff's application should be declined. It has been made clear by McDougall J in ***Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd*** [2005] NSWSC 362 and in the authorities to which his Honour there refers that the existence of a fact necessary for the validity of an adjudication is a matter within the competence of the adjudicator to determine. If an adjudicator erroneously finds a fact essential to jurisdiction and an adjudication certificate issues accordingly, it is always open to a party adversely affected to seek to set aside any judgment sought to be entered under s.25(1) of the Act on the ground that the adjudication was, in truth, a nullity because an essential ingredient of jurisdiction was absent: ***Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394, at para 42 per Hodgson JA, with whom the other members of the Court agreed.
- 5 In the present case the adjudicator may find that the payment claim was served outside the prescribed time or that the payment schedule was served within the prescribed time. In either case, the Plaintiff would have no complaint about jurisdiction. If the adjudicator found either fact adversely to the Plaintiff, the Plaintiff still has the chance to set aside any judgment entered under s.25(1) in the way I have explained.
- 6 In these circumstances, it seems to me to be contrary to authority and contrary to the policy of the Act to entertain this application. I respectfully adopt what was said by McDougall J in ***Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd*** (supra) at para.13: "... the legislature has made it quite clear that it is adjudicators under the Act who are the primary organs for the resolution of these disputes. The power of this Court comes in either to enforce the determination (a power shared with other courts) or, in the limited circumstances described in *Brodyn*, to restrain enforcement of the determination. The whole scheme of the Act, as Palmer J said in *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140, is one of 'pay now, argue later'. It is clear from the provisions of s.32 of the Act that the time for final adjustment of rights and remedies is later.  
*In circumstances where the legislature has enacted the legislation to provide, as s.3 of the Act makes clear, a scheme to ensure that any person who undertakes to carry out construction work or supply related goods and services is entitled to recover, and is able to recover, progress payments, I think that this Court should think long and hard before interfering in the implementation, in a particular case, of that statutory scheme.*"
- 7 The application is, therefore, dismissed. I order that the Plaintiff pay the First Defendant's costs of the application.

I. Roche – Plaintiff instructed by Hancock Alldis & Roskov  
E. Olsson - First Defendant  
Philip Davenport - Second Defendant