Josesph Musico v Philip Davenport [2003] Adj.L.R. 08/07

JUDGMENT : Greg James J. Common Law Div. Supreme Court of New South Wales. 7th August 2003

1. Following an extensive argument this morning, which was resumed this afternoon, I have been called upon to consider a complex situation that has arisen in a construction contract claim made against Joseph Musico, the plaintiff in Administrative Law Division proceedings against Philip Davenport and Grosvenor Constructions New South Wales Pty. Limited, administrator appointed, who claimed, as against the plaintiff, by way of progress claims under the Building and Construction Industry Security of Payment Act 1999 as amended by the Building and Construction Industry Security Payment Amendment Act 2002 (the Act), monies said to be due for progress payments under a construction contract.

2. Proceedings had been launched between the parties in the Commercial List before Einstein, J. Those proceedings concerned the entitlement to the payment earlier, claims which it is common ground have been caught up in the later claims for progress payments. Those proceedings had gone only so far as to raise questions of security for costs. Those proceedings have been overtaken by an adjudication obtained under the Act.

3. In the present action, the plaintiff, Joseph Musico, claims that the adjudicator in making that adjudication erred in law on the face of the record or, otherwise, so acted as to give rise to quasi-prerogative relief. These proceedings in the Administrative Law Division, challenged the adjudication. Subsequently the defendants filed the certificate of adjudication in this court and obtained a judgment. They had proposed to move for execution on that judgment claiming an entitlement to be paid the money so adjudicated or to issue a bankruptcy notice. The plaintiff here seeks to stay the judgment to prevent that occurring.

4. The Act provides the adjudication procedure to afford interim relief to a claimant and requiring payment into court before such a judgment can be set aside.

5. It is contended, however, that the operation of the Act, its intent, its purpose, and its object is to bar other proceedings unless the monies adjudicated to be paid have been paid, as a practical effect.

6. The submission is put that it remains open to the parties, subject to the normal law, to have a building arbitration, and one is indeed in process, or a building case, but by virtue of s.25 of the Act, whilst those remain open to the parties the adjudication has given rise to a judgment under which the monies, to which the judgment relates, are required to be paid into court to avoid execution. They could be paid to the claimant, of course, even if on terms. Under s.25, as it stood prior to the amendment in 2002, it was provided for the judgment to be entered if the respondent to the claim had failed to pay the whole or any part of the adjudicated amount to the claimant or failed to give security to pay the whole or any part of the adjudicated amount. That section was omitted in the amending Act to remove the option of giving security and s.25(4) was inserted, which restricted what the respondent might do in the event of commencing proceedings to have the judgment set aside. If the respondent commences proceedings to have the judgment set aside the respondent is not "in those proceedings" to bring a cross-claim, raise any relevant defence, or challenge the determination and is required to pay into court a security for the unpaid adjudicated amount.

7. Whilst it is common ground that an arbitration might be had or other proceedings may be taken, Dr. Doyle, who appears for the defendant/ claimant, has asserted that the only appropriate course under the Act is for the plaintiff to pay the money to his client, the administrator, even though, of course, in law it may be disbursed to creditors, and for the plaintiff to pursue the collateral procedure of arbitration or a building case and if successful seek recovery by way of restitution which might, in the practical result, be fruitless.

8. Section 32 preserves the rights to the civil proceedings and the right to obtain such restitution orders.

9. Section 34, and other sections, have been drawn to my attention by Dr. Doyle as evincing an intent in the Act otherwise to cover the field. This section provides in a familiar form for no contracting out and for contractual provisions inconsistent with the Act to be void. Nonetheless, there is no privative clause excluding quasi-prerogative relief and s.25 limits the restriction on the respondent to those proceedings to set aside the judgment. The section dos not expressly apply to a stay of that judgment, nor to proceedings to quash the adjudication, although it is accepted that if the adjudication is avoided, the judgment cannot stand.

10. Neither party has drawn my attention to s.30, as inserted by the amending Act, as operating to exclude quasi-prerogative relief, although it would appear it would exclude a claim against the adjudicator and the authorised nominating authority in certain circumstances.

11. I need not trouble further for the moment in this judgment with considerations of what is to happen under the various pieces of collateral litigation to these Administrative Law Division proceedings. Suffice it to say events may have entirely overtaken Einstein, J.'s proceedings and for entirely understandable reasons he is unable to persevere with that litigation.

12. The plaintiff, therefore, brings the matter to me to seek interim preservation under Part 28 of the Rules for a stay.

13. The matter has had to proceed as a matter of considerable urgency because of the prospect of the bankruptcy notice, and a possible act of bankruptcy, which could have the effect of preventing the plaintiff from arguing that the determination of the adjudicator was void, should be set aside, was not a determination within the meaning of the term as used in the statute at all.

14. The matter has proceeded on the familiar basis of an enquiry into whether there is an arguable case and as to the balance of convenience. It is clear that the balance of convenience falls in favour of the plaintiff, as far as

any immediate preservation of its right maybe concerned, subject to possible terms and to a timetable providing for an early hearing.

15. It is plain enough that the grounds the plaintiff seeks to invoke can entitle him the relief that the plaintiff seeks and it is conceded that it is arguable those grounds might be made out even though there is a strong argument that the determination, having regard to the purpose and intent of the statute and the role of the adjudicator, is not amenable to being quashed, set aside or declared a nullity, particularly since as it is put, that the statute confers merely interim procedural rights and otherwise does not affect, at least permanently, the rights of the parties.

16. There are real questions here of great importance to the industry, to be determined. Unless I grant the stay they will not be determined in this case, nor the plaintiff's rights to have them determined preserved.

17. I have, therefore, come to the conclusion that I should grant a stay notwithstanding the powerful argument advanced by Dr. Doyle. It will be upon terms. The parties will need to consider what terms are sought and a timetable for the very early resolution of the matter.

18. I have been given information, not entirely consistently, as to what has happened in the Equity Division where different determinations appear to have been made before different judges construing provisions of the Act and the amending Act. Therefore, one of the terms the parties need to consider is whether the matter is to remain in the Administrative Law Division or to go to the Commercial Building and Construction List for resolution there.

19. I note the matter proceeded before me, practically, on the basis of submissions from the bar table. At the conclusion of my judgment, by consent, I gave leave to file in court the draft notice of motion and affidavit of Scott Alexander Dougall sworn 7 August 2003 which I was told contains matter that is common ground setting out the content of what I was told and the context.

20. I direct the praties to bring in short minutes of the necessary orders.