

JUDGMENT Einstein J Supreme Court New South Wales, Equity Division, T&C List. 2nd April 2007

The proceedings

1 At the heart of these proceedings is an issue concerning s7(2)(a) of the *Building and Construction Security of Payment Act 1999* ["the Act"] which provides:

"This Act does not apply to: a construction contract that forms part of a loan agreement, a contract of guarantee or a contract of insurance under which a recognised financial institution undertakes:

- i to lend money or to repay money lent; or
- ii to guarantee payment of money owing or repayment of money lent ; or
- iii to provide an indemnity with respect to construction work carried out, or related goods and services supplied, under the construction contract.

[It is to be noted that the definition of "construction contract" be found in s 4 is as follows:

"construction contract" means a contract or other arrangement under which one party undertakes to carry out construction work or to supply related goods and services, for another party.]

2 However the instant application for interlocutory relief also raises a question concerning whether or not the scheme of the Act can be outflanked by seeking a declaration that a respondent has no indebtedness to a claimant.

3 As the reasons which follow make plain there was no substance in any parameter of the cases put forward by the plaintiffs. Whilst it was possible to reject the applications out of hand it seemed desirable to take a short time to adequately identify each of the fundamental misconceptions in the cases for injunctive relief pursued.

The parties

4 The plaintiffs are financiers primarily in the business of money lending and were the financiers for the project referred to below.

5 Blueprint Property Developments Pty Ltd ["Blueprint"] is a property developer and the owner of land at 342A Marrickville Road, Marrickville upon which units were being developed.

6 The second and third defendants are subcontractors who performed building work at the development site.

7 There have been two determinations [in each case favourable to the claimant] by adjudicators appointed pursuant to the Act:

- i. the first was an adjudication by Mr Smithies issued on 15 March 2007 in respect of a claim pursued by the second defendant;
- ii. the second was an adjudication by Mr O'Brien on 21 March 2007 in respect of a claim pursued by the third defendant.

8 The plaintiffs have been the respondents to each of the adjudication applications.

9 It is presently unnecessary to deal with the position with respect to the fourth defendant.

Commonality of issues

10 By reason of the commonality of issues concerning whether or not the Act is engaged with respect to them, the plaintiffs have seen fit to join each of the subcontractors to the proceedings. An over-arching declaration is sought that the Act does not apply to the plaintiffs in respect of any of their dealings in relation to the subject project.

The first determination

11 With respect to the determination issued on 15 March 2007, declarations are sought that the plaintiffs have been denied procedural fairness in that the adjudicator is said not to have made a determination in accordance with the provisions of s 22 of the Act. A claim is made that the purported determination is a nullity or alternatively is void at the election of the plaintiffs. Consequential relief is sought restraining the second defendant from taking any steps to enforce the adjudication including the application for an adjudication certificate in any court. The consequential relief extends to seeking an order that pending final determination of the proceedings, any judgment issued by any court be stayed.

12 It is common ground that the plaintiffs have paid into Court the amount of the first determination which is in the order of \$34,824.00.

The second determination

13 Whilst there are some differences in the approach taken by the plaintiffs concerning the second determination, here too the plaintiffs seek to restrain the third defendant from taking any steps to enforce the adjudication including the application for an adjudication certificate in any court. The consequential relief extends to seeking an order that pending final determination of the proceedings, any judgment issued by any court be stayed.

14 The plaintiffs gave an undertaking to the court to pay into Court on or before the close of business on 30 March 2007, the sum of \$354,896.71, being the second adjudication amount together with interest. This payment into Court has been made.

15 At this point in time the Court is determining only an application for interlocutory relief concerning the above-described determinations.

The essential facts

- 16 For present purposes the essential facts are as summarised by the plaintiffs in their overview submissions in the following terms:
- i. The plaintiffs were money lenders who pursuant to Deeds of Loan dated 11 July 2003 and 10 August 2004 agreed to lend money on terms to Blueprint.
 - ii. By October 2005 Blueprint was in distress and was not performing its obligations pursuant to the Deeds of Loan.
 - iii. Under Supplementary Deeds between the plaintiffs and Blueprint dated 10 October 2005 the loans were varied so as, inter alia, to require the plaintiffs to pay monies advanced to Blueprint directly to subcontractors.
 - iv. Under the Supplementary Deeds the plaintiffs were entitled to appoint a project manager, which project manager, upon appointment was agreed to be the agent of Blueprint.

The plaintiffs' submissions in respect of the first determination

- 17 The gravamen of the plaintiffs' attack upon the first determination is twofold:
- i. it is contended that the adjudicator denied the plaintiffs natural justice;
 - ii. it is contended that the adjudicator did not attend to one of the mandatory matters prescribed by the Act.
- 18 The plaintiffs' short submissions in this regard have been as follows:

Denial of Natural Justice

- i. Both parties addressed the Adjudicator on the question of clause 7(2)(a) of the Act.
- ii. The Adjudicator identified the question of whether the plaintiffs' role as a financier was in issue before him.
- iii. However, it is clear that when it came to reasoning his decision, the adjudicator simply did not turn his mind to that important question.
- iv. In so doing, the plaintiffs have been denied procedural fairness. The case has not been decided upon the basis argued and no notice was given to the plaintiffs that the adjudicator was intending to disregard the provisions of section 7(2)(a).
- v. Either way, there has been a miscarriage in the sense properly described as a denial of procedural fairness.

Failure to Deal with the Essential Matters

- vi. *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport and Another* (2004) 61 NSWLR 421 remains the "ground zero" of the cases in this area.
- vii. At paragraph 53 the Court of Appeal identified the "essential requirements" required for there to be in existence an adjudicator's determination for the purpose of the Act.
- viii. At paragraph 55 the Court said: "*What was intended to be essential was compliance with the basic requirements ... a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation ... and no substantial denial of the measure of natural justice that the Act requires to be given.*"
- ix. An essential requirement of a valid determination is identification of the existence of a construction contract between the parties "*to which the Act applies*".
- x. In this case, the Adjudicator simply has not in any manner addressed or considered the second part of that proposition. He identified a relevant construction contract (arrangement) but failed to determine whether that arrangement is one to which the Act applies.
- vi. Accordingly, the purported determination issued by the adjudicator is not an adjudication determination for the purpose of the Act.

Decision in relation to the challenge to the first determination

- 19 I have reached a very clear view that the defendants' submissions are of substance. They are generally adopted in what follows.

General matters

- i. It is now settled law that the Act excludes the availability of judicial review on the basis of non-jurisdictional error of law: *Brodyn v Davenport* (2004) 61 NSWLR 421 at [51].
- ii. Of the five essential requirements identified by the Court of Appeal in *Brodyn* at [53] only one is relevant – the existence of a construction contract to which the Act applies. In addition, what is required for a valid Adjudication Determination is a bona fide attempt to exercise the Adjudicator's power and no substantial denial of the measure of natural justice afforded by the provisions of the Act: *Brodyn* at [55] and [57].
- iii. A mere failure by the Adjudicator through error to consider a provision of the Act, the contract or a submission does not invalidate the Adjudication Determination: *John Holland v RTA* [2007] NSWCA 19 at [54] and [55]. There Hodgson JA observed that an omission by the Adjudicator to consider a submission could not even conceivably justify a finding that the Adjudicator did not make a bona fide attempt to exercise the relevant power: *John Holland* at [58].
- iv. An Adjudicator is required to make a determination within the parameters of the payment claim, but the determination of the parameters of the payment claim is a matter for the Adjudicator and a reasonable but erroneous decision does not invalidate the Adjudication Determination: *Downer Construction (Australia) Pty Ltd v Energy Australia* [2007] NSWCA 49.
- v. Although taking issue with the adjudicator's finding that there was an "arrangement" for the purposes of the Act between the plaintiffs and the second defendant, the plaintiffs concede that a complaint that the Adjudicator made an error is not enough to vitiate his decision. It is clear that an error by the Adjudicator in determining that an "arrangement" existed [and thus a "construction contract" within the definition in s 4] does not vitiate the Adjudication Determination.
- vi. Accordingly on the present application the plaintiffs must establish a seriously arguable case of an error of the above type and that the balance of convenience favours an injunction.

The proper approach to the construction of s7 of the Act

- 20 Section 7(2) of the Act has already been set out.
- 21 To fall within the 'recognised financial institution' exception the plaintiffs had to establish two things. First, that they were each recognized financial institutions. Clause 3 of the Regulation defines this as a body regulated by APRA. The plaintiffs failed to do that before the Adjudicator and lead no evidence of it on this application.
- 22 As McDougall J held in *Consolidated Constructions Pty Ltd v Ettamogah Pub (Rouse Hill) Pty Ltd* [2004] NSWSC 110 at [48], the consequence is that there is no evidentiary basis to enable the Court to conclude that there was an argument of the relevant strength. I accept that for that reason alone, the present application must fail.
- 23 The plaintiffs' contrary contention suggested this as a de minimus proposition and sought for the Court to take judicial notice of the fact that the plaintiffs would fall within the class of recognised financial institutions. These are proceedings of moment and the second and third defendants are entitled to take a point such as this on the instant applications. That having been said, the defendants' other submissions dealing with the substance of the legal position naturally hold an entirely different status for present purposes.
- 24 Further the plaintiffs must now, establish a serious case that the "arrangement" and thus "construction contract" found by the Adjudicator formed part of a loan agreement. Clearly the plaintiffs cannot challenge the Adjudicator's finding of an arrangement. Hence the plaintiffs endeavour to show that the Adjudicator did not bona fide address the question of whether the Act was not engaged by reason of S.7(2)(a).
- 25 There is authority to the effect that for the purposes of section 7(2)(a) of the Act, a construction contract will not form part of a loan agreement unless "the former is included in, or incorporated into, the latter": *Ettamogah Pub* at [21].
- 26 Critically the plaintiffs' submissions focus exclusively on the terms of certain financial instruments. However and as counsel for the second and third defendants has contended, the plaintiffs do not address relevant question of whether the arrangement as found by the Adjudicator was included or incorporated into the loan agreement.
- 27 I accept that even if the Court was to take a much broader view of the words "forms part of" than is established by authority, on no conceivable view did the arrangement found by the Adjudicator form part of the finance instruments.
- 28 That is so because the Adjudicator expressly found that the arrangement *did not* arise from the finance instruments but, as a finding of fact on contested evidence arose from statements made [written and oral] and from actions taken on behalf of the plaintiffs. These are detailed at length in pages 7 to 11 of the Adjudication Determination.
- 29 The Adjudicator *expressly found* that the role of the plaintiffs had changed from financiers to a director role in the completion of the work to which the Act applied. He had the benefit of a statutory declaration as to the events which he found gave rise to the arrangement.
- 30 The second and third defendants have correctly submitted that it is not open to the plaintiffs to challenge those findings. No evidence is led to demonstrate a serious case that the evidence was false.
- 31 It is not arguable that the construction contract which the Adjudicator found to arise from the conversations, letters and acts, "formed part of" the loan agreement. They were subsequent to and wholly outside it.

No seriously arguable denial of natural justice

- 32 The plaintiffs' other contention is that the first Adjudication Determination is void because the Adjudicator denied the plaintiffs the measure of natural justice afforded by the Act, in that he is said to have failed to address their submissions on s 7. Here again the submissions advanced by the second and third defendants are of substance and are adopted in what follows.
- 33 It is clearly established that a mere failure by the Adjudicator through error to consider a provision of the Act, the contract or a submission does not invalidate the Adjudication Determination: *John Holland Pty Ltd v Roads and Traffic Authority* [2007] NSWCA 19 at [54] and [55].
- 34 It is plain that the Adjudicator did bona fide attempt to address the requirement of the Act that he consider the submissions, including those as to s 7. He specifically identifies the issue at the foot of page 5 of the Adjudication Determination. Thereafter he considers the facts relevant to that issue and concludes at the foot of page 8 that the involvement was well beyond that of a financier, and on page 9 that the facts establish a new arrangement to which the Act applies.
- 35 As the second and third defendants have submitted, the precision, of reasons furnished by this Court is not to be expected of an Adjudicator who is not even necessarily legally trained and who is required to produce his/her adjudications in a measure of days.
- 36 The Adjudicator considered the submissions on s 7(2) and nonetheless found in the facts, a construction contract to which the Act applied and thus addressed *the only* essential jurisdictional matter now in contest. He identified the question which arose concerning the inapplicability of the Act to a construction contract that formed part of a loan agreement. He went further and treated with actions of the plaintiff which suggested an involvement well beyond a financier. He is shown to have clearly addressed the s 7(2) issue.
- 37 In the result the plaintiffs have not demonstrated a seriously arguable denial of natural justice.

The plaintiffs' endeavour to undermine the scheme of the Act

- 38 The plaintiffs sought to advance the proposition that although they did not have a serious case for interlocutory relief *under the Act*, they did have a serious case *at general law* in terms of their proposition that they had no legal obligation to pay any moneys whatever to the second and third defendants.
- 39 The fundamental misconception in relation to this proposition inheres in its failure to recognise that the *only* controversy between the plaintiffs and the second and third defendants of present significance is whether or not the plaintiffs are required to pay the adjudication determination amounts under the Act. If there is no serious question shown in that regard, this is an end to the issue. Interesting questions as to what will occur upon a final hearing of the party's rights may include matters going to agency and all manner of other issues. Those matters do not however presently touch or affect the second and third defendants' legal entitlement established under the Act to *present payment* of amounts the subject of adjudication determinations in respect of which no legitimate challenge [of the type explained by the many authorities treating with the scheme laid down by the Act] comes forward for remediable error.
- 40 I propose however for completeness to consider the balance of convenience question as it is plainly the case that, even had that question been engaged, the plaintiffs would have failed dismally in their attempt to establish that the balance of convenience favours the continuance of a regime by which the funds paid [and to be paid into Court] should be withheld until a final determination of the rights of the parties.

Balance of convenience

- 41 As the defendants have submitted it is now trite law that the Act:
- i. was intended to ensure that disputes are resolved quickly and with minimal opportunity for court involvement: *Brodyn* at [51];
 - ii. reflects an understanding that cashflow is the life blood of the construction industry: *Amflo Constructions Pty Ltd v Jefferies* [2003] NSWSC 856 at [27];
 - iii. requires a respondent to "pay now and argue later": *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140.
- 42 The principles are summarised by Bergin J in *Shell Refining (Australia) Pty Ltd v AJ Mayr Engineering Pty Ltd* [2006] NSWSC 94 at [13] ff.
- 43 These principles overwhelmingly weigh against the grant of an interlocutory injunction. The plaintiffs have not evidenced any fact demonstrating that the balance of convenience favours an injunction. They have the onus.
- 44 Most particularly the plaintiffs have entirely misconceived the proper approach to the onus of proof as to any suggested impecuniosity of a claimant under the Act where balance of convenience comes up for consideration.
- 45 In *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd & Ors* [2005] NSWSC 571 reference was made (at [52]) to the principle to be derived from *Grosvenor Constructions (NSW) Pty Ltd (in admin) v Musico* [2004] NSWSC 344, namely that where there is certainty that the defendants' rights will be otherwise rendered nugatory and that it will suffer irreparable prejudice, because moneys paid [under the Act] would be irrecoverable as a result of the claimant's insolvency or liquidation, then the proper and principled exercise of the Court's discretion was to grant a stay which was "to prevent injustice".
- 46 In the same decision the Court (at [54]) observed that stays in relation to debts under the Act would be *less readily* available than stays in relation to appeals from curial proceedings. Reference was made to the decision of Hodgson JA in *Herscho v Expile Pty Ltd* [2004] NSWCA 468 who had suggested the risk of prejudice must be a very high risk and certainly more than merely a real risk to justify a stay (at [3] and [9]).
- 47 In *Taylor Projects* at [59], the Court observed that: "[t]he principle in Grosvenor is only applicable where the claimant is either actually, or very close to, insolvent. Were it otherwise then the stay itself may drive the claimant into the very insolvency which the interim payment regime of the Act is designed to prevent..." [emphasis added]
- 48 The plaintiffs' submission on the current application has been to eschew any need to call evidence as to the financial position of the second and third defendants and thereby to completely disregard the onus lying upon them, if seeking to pray in aid the defendants' financial positions in terms of the balance of convenience. The simple submission from the plaintiffs was that it was a matter for the second and third defendants to place before the Court any evidence which might suggest that its financial standing [in terms of being in a position to repay the funds paid into Court should it ultimately prove unsuccessful in the final litigation] could not be gainsaid. The submission is woefully misconceived.

The second adjudication determination

- 49 The position with respect to the second adjudication determination is *a fortiori*. There is simply no relevantly serious case. This [qua the Act] is conceded by counsel for the plaintiffs [transcript 24.16].
- 50 The reason for the concession was clear. Mr O'Brien had dealt in detail with the argument pursued by the respondents under a number of headings. One of those headings reads:
- "If there was such an arrangement, it was made as part of a loan agreement and is exempt under s7 (2) (a).*
- 51 The examination of this question and the findings in relation to the matter was put in the following terms:
- "The Respondents dealt with this at length in their Adjudication Response and I have examined carefully all their arguments and the case law cited whereby it was established that the prime purpose of the section was to prevent claimants having concurrent or alternative claims against both financiers and principals. I note also the words of His*

Honour in the *Ettamogah Pub Case* that “the purpose of section 7, stated broadly, may be seen to ensure that the rights and liabilities created by the Act, and the enforcement mechanisms that it provides, are confined to and operate only between the parties to the construction contract”.

This is all very well but does not assist the first and second respondents in this case. Certainly there is no doubt that prior to the August 2005 Arrangement, the first and second respondents were indeed merely the Project’s financiers. Up until then they would definitely have enjoyed exemption from any claim such as the present one. Their actions however in implementing the Arrangement completely altered their role in the Project.

The Arrangement cannot be, in my opinion, described as one attracting the exemption of section 7(2). Instead, it was a construction contract whereby the first and second respondents undertook completely different role. They managed the project to completion and directly funded the works. In my opinion, that Arrangement did not form part of a loan agreement or meet any of the criteria contained in sub-section 2(a)(i), (ii) & (iii). I determine therefore that the first and second respondents are not exempt by operation of the section and that the Arrangement is not a construction contract caught by section 7(2).” [emphasis added]

- 52 Hence senior counsel for the plaintiffs was driven to concede no arguable case under the Act, and determined to pursue the hopeless submission that the Act did not constitute the only relevant landscape.
- 53 As before this is sufficient to dismiss the challenge to the second adjudication, it being unnecessary to deal with the balance of convenience issues. As before what is described above as the ‘fundamental misconception’ is rejected.
- 54 Had it been necessary to deal with those issues then for precisely the same reasons as have been given in relation to balance of convenience qua the first determination, the plaintiffs would have failed dismally in their attempt to establish that the balance of convenience favoured the continuance of a regime by which the subject funds should be withheld, until a final determination of the rights of the parties.

General matters

- 55 There was no substance in the proposition advanced by the plaintiffs to the effect that if the subject payment claims were the final claims, this was a discretionary factor which should weigh in favour of the plaintiffs.

Conclusion

- 56 The principled exercise of the relevant discretion is clearly to dismiss the application for interlocutory relief and to order that the subject funds be paid out forthwith to the respective second and third defendants.

Order

- 57 The Court orders that the funds paid into Court by the plaintiffs:
- i. with respect to the first adjudication determination be forthwith paid out to the second defendant.
 - ii. with respect to the second adjudication determination be forthwith paid out to the third defendant.
- 58 Costs may be argued.

Mr C.R. Newlinds SC with Mr M. Luitingh (Plaintiffs) instructed by TressCox Lawyers

Mr E.G. Muddle (Second and Third Defendants) instructed by Church & Grace

Mr P. Hegarty (Fourth Defendant) instructed by Thomson Playford