MASON P; HODGSON JA; IPP JA. Supreme Court New South Wales. 23rd March 2007

Judgment : HODGSON JA:

1 The appeal before this court concerns proceedings in which the appellant Rojo had sought judgment against the respondent Jillcris for $251,537.07, on the basis that Rojo had on 2 December 2005 served on Jillcris a payment claim for that amount under the Building and Construction Industry Security of Payment Act 1999 (SOP Act), and that Jillcris have not served a payment schedule on Rojo within ten working days thereafter as required by s.14 of the SOP Act.

2 At the time of filing the summons, Rojo also filed a Notice of Motion seeking summary judgment. Jillcris filed a defence to the proceedings, and both sides filed affidavits.

3 The matter came before Einstein J for hearing on 18 April 2006. Affidavits were read but there was no cross-examination. Einstein J gave two ex tempore judgments on that day. He commenced the first judgment by saying "There is before the court an application for summary judgment." In the next sentence he said: "The proceedings are able to be determined by a short point of statutory construction and principle."

4 Einstein J then outlined some facts noting a dispute as to whether Rojo's payment claim had been served on 2 December 2005, and also noting that on 19 December 2005 Rojo had given notice to Jillcris of its intention to apply for adjudication of the payment. Einstein J then said that, once Jillcris received this notice, "its anterior failure to provide a payment schedule within the time delimited by s.14 is no longer visited with Rojo's initial right to uncover the unpaid portion of the claimed amount as a debt by curial process."

5 Einstein J proceeded to order that the application for summary judgment be dismissed as plainly misconceived, and to make a costs order and other orders for the future conduct of the proceedings. Later the same day, Rojo applied to reopen, on the basis that the judgment proceeded on a misapprehension, namely that Jillcris had responded to Rojo's notice by serving a payment schedule.

6 Einstein J then gave a further judgment in which he said that, even if the facts alleged by Rojo were established "There remains an entirely disparate basis on which Rojo's summary judgment application must fail." He proceeded to hold in effect that Rojo had made an election which disentitled it to seek a judgment under s.15 of the SOP Act.

7 He made the following orders:

1. I revoke the orders made at approximately 11.30am on 18 April 2006.
2. I order that the notices of motion filed on 20 January 2006 and on 19 April 2006 be dismissed.
3. I order that the plaintiff pay the defendant's costs of the notices of motion.
4. I order that the plaintiff pay the costs of both parties of the external transcription of the hearing of the motions.
5. I order that in the absence of the plaintiff communicating to the Commercial List Judge on or before 10.00 a.m. on 26 April, that the plaintiff wishes to continue the proceedings and/or seeks leave to amend the existing summons, the summons be taken as dismissed as at 10.00 a.m. on 26 April 2006.
6. I order that in the event that a communication is sent to the List Judge prior to 10.00 a.m. on 26 April 2002, the proceedings be listed before the List Judge tor directions on Friday, 28 April 2006 in the Technology and Construction List.

8 Rojo did give the notice referred to in order 5, but did not amend its pleading, and the matter came on for hearing before McDougall J on 22 June 2006. McDougall J carefully reviewed the circumstances in which the matter had been before Einstein J and was dealt with by him. He continued as follows:

> *36 Thus, what came before me today - again, for final hearing - was the issue that had been argued before and dealt with by Einstein J. In those circumstances, it is necessary to consider whether his Honour's reasons and orders, although on the face of them given and made in relation to an application for summary judgment, nonetheless dispose of the relevant issue as between the parties. If they do not, it is necessary to consider whether, notwithstanding that the matter has been argued and decided (albeit, by hypothesis, on a non binding basis) the Court should permit the matter to be reargued. Alternatively, or perhaps as a subset of the last argument, the plaintiff relied on both the power of the Court pursuant to UCPR r 36.16(1) and the inherent power of the Court to allow a matter to be re-opened. In this context, it was common ground between the parties (and the file appears to confirm) that the orders made by Einstein J on 19 April 2006 have not been entered.*
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> *37 It is clear, as a matter of general principle, that interlocutory decisions do not ordinarily give rise to estoppels. However, there are categories of decisions which are not, for all purposes, final (or, put another way, are for some purposes interlocutory) but which, nonetheless, do give rise to estoppels. One clear example is where a question is determined as a separate question in a suit between the parties. When the court decides that question, and enters judgment accordingly, that judgment is final for the purposes of res judicata and is binding on the parties, notwithstanding that it does not finally dispose of the matters in suit.*
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> *38 The relevant principles are discussed in Spencer Bower, Turner and Handley, **The Doctrine of Res Judicata** (3rd Edition, 1996) at a number of places. The need for finality is dealt with in chapter 5 (pages 69 and following). The question of classification of orders as interlocutory or final, for the purposes of the doctrine of res judicata, is dealt with in the same chapter at paragraphs 169 and following. Finally, the category of interlocutory orders that are not final for any purpose, and that do not give rise to any estoppel, is dealt with in paragraph 172.*

39 In the present case, there was no order made for the separate and prior determination of the question - the "short point of statutory construction and principle" - by which apparently Einstein J decided these proceedings. Nonetheless, it is clear, I think, from para [2] of his Honour's reasons, and from the other circumstances that I have recounted, that his Honour regarded the point, on which his Honour's decision was based, as disposing of not just the summary judgment application but of the plaintiff's case as it was then framed. In other words, I think, it is clear that his Honour both intended to decide the merits of the plaintiff's case, as then framed, on a final basis, and thought that he had done so. If he did not intend to do so, or did not think so, then he could not have made the orders that he did (either the first lot of orders or the second lot of orders) including, as they did, an order that the proceedings should stand dismissed, except in certain circumstances.

40 Although the reasons do not make it clear as to why it was that his Honour reserved to the plaintiff the right to seek to continue the proceedings, the transcript does. Nothing in the transcript suggests that his Honour thought that the plaintiff could reagitate the issues (arising under and in relation to the Act) that he had decided. As I have pointed out, the transcript makes it clear that his Honour was reserving to the plaintiff the right, should it choose, to seek to support its claim in respect of the payment "at general law".

41 In those circumstances, I think, although the decision was in one sense interlocutory (because it did not finally dispose of the matter in suit) it was in another sense final (because it was intended to, and in my view did, dispose of the precise point upon which Einstein J decided it). In other words, I think, it is as though his Honour had formulated the issue as a separate question and had determined that. If the plaintiff had no other cause of action available to it to support its claim, then (as clearly his Honour recognised) the proceedings would stand dismissed. If it did, the proceedings would remain alive: but only for the purpose of deciding those other points.

42 I find it impossible to accept that his Honour, in reserving the opportunity to the plaintiff that he did, intended to permit the plaintiff to reagitate, either before himself or before another judge, the very point that he had decided.

43 I therefore conclude that his Honour's decision is relevantly final (in that it is a final decision on a separate point) with the consequence that it estops the parties from asserting to the contrary. Since, in the hearing before me, that is precisely what the plaintiff sought to do (it not having sought to amend its summons) that attempt must fail.

9 McDougall J noted that Rojo sought before him to reopen the question decided by Einstein J, and he rejected that application. He then made the following orders:

55 I make the following orders:

(1) I order that the summons filed on 20 January 2006 be dismissed.

(2) I order the plaintiff to pay the defendant's costs of the proceedings.

10 The matter came before this Court today pursuant to a Notice of Appeal from the decision of Einstein J on 19 April 2006, on grounds asserting that his decision as to the effect of the relevant provisions of the SOP Act was wrong. The Court raised with Mr Drummond, counsel for Rojo, the question whether there was an appeal as of right from the decision of Einstein J, which dismissed two Notices of Motion, one being for summary judgment and the other being to reopen, and made only a conditional order that the summons be taken as dismissed, in circumstances where the condition was not satisfied. The Court also pointed out that, even if leave to appeal from Einstein J's judgment was granted and the appeal was successful, that would still leave in place the final orders made by McDougall J dismissing the proceedings.

11 The Court expressed the view that the appropriate course would have been to appeal from the decision of McDougall J, and incorporate in that appeal a challenge to the decision of Einstein J, in accordance with ***Gerlach v Clifton Bricks Pty Limited*** [2002] HCA 22, (2002) 209 CLR 478. Mr Drummond then applied for an extension of time to appeal from McDougall J's decision, on the ground that it was in error in treating Einstein J's decision as a final determination of an issue in the case.

12 One possible discretionary factor bearing on that application is that, following McDougall J's decision, Jillcris withdrew proceedings it had instituted in the Consumer Trader and Tenancy Tribunal (CTTT) seeking a final resolution of the disputes between the parties concerning the building project. However, it is to be noted that that occurred before expiry of the time for appeal from McDougall J's decision.

13 In my opinion, McDougall J was in error in his decision, and by that error Rojo was deprived of an opportunity to have a final determination of its claim to an entitlement under the SOP Act.

14 McDougall J correctly held that interlocutory decisions do not ordinarily give rise to estoppels but can do so, for example when there is an order for separate determination of a question in the proceedings. He was also correct to say that there can be cases where the conduct of interlocutory proceedings and the order made pursuant to them are such that they can be regarded as a determination of a separate question.

15 In this case, however, although some of the statements by Einstein J, both in the transcript and in the judgment, suggest that he was finally determining a separate question, there is no order showing that such a determination had been made.

16 McDougall J expressed the view that the order dismissing the proceedings, unless Rojo notified that it wished to proceed, was one Einstein J could not have made unless he had determined the question on a final basis, particularly in view of suggestions in the transcript that this condition was only introduced against the possibility that Rojo might wish to amend to pursue its rights outside the SOP Act. The difficulty with that approach is that there is nothing in Einstein J's orders, whether read alone or with the judgment, or indeed even with the transcript,

which limits them in this way; and the orders did not on any possible construction prevent Rojo doing what it did, namely giving notice and proceeding with the case without amending the summons.

17 There is a helpful discussion of circumstances in which decisions on fact or law in interlocutory matters, which are not given effect to by an order, may stand as final decisions, in ***Landsal Pty Limited v REI Building Society*** (1993) 41 FCR 421. In my opinion, that discussion confirms that generally, in the absence of an order for separate determination, an interlocutory decision will finally determine an issue only if it gives rise to an order that shows that an issue was finally determined. There was no such order in this case.

18 It is most unfortunate that this situation has arisen. I think this demonstrates how important it is that it be made clear, if there is to be a decision of a separate issue, precisely what that issue is, and that an order be made clearly determining that issue. I am doubtful whether it would have been appropriate to make an order for determination of a separate question in this case, where there are various combinations of factual circumstances that could be found, in relation to each of which there may be arguments as to how the SOP Act operates.

19 In my opinion, the result ordered by Einstein J, namely dismissal of Rojo's application for summary judgment and of the application to reopen in order to challenge that dismissal, was plainly correct, if only because Rojo could not get a judgment of any kind in its favour unless a contested factual issue was found in its favour.

20 In saying that the result before Einstein J was correct, I am neither agreeing nor disagreeing with his view on the statutory construction. However, in my opinion, McDougall J should have embarked on a final hearing, permitting Einstein J's view on statutory construction to be challenged. It seems to me that Rojo's failure to appeal from McDougall J's decision as well as Einstein J's was a mistake made in circumstances where it was clear that Rojo intended to appeal from the result of the proceedings at first instance. This would normally be a sufficient ground for extending time.

21 Mr Southwick for Jillcris has drawn to our attention that proceedings have been commenced for the winding-up of Rojo, which are currently to be heard on 30 April. He has submitted that this introduces an element of prejudice to Jillcris that would justify this Court in not granting an extension of time.

22 In my opinion, the real question is to what extent is Jillcris worse off because the original Notice of Appeal did not include the application to appeal from McDougall J as well as Einstein J; and particularly in circumstances where the application before the CTTT was withdrawn before the time for appeal from McDougall J had expired, I do not think the prejudice is such that the extension of time should not be granted. However, until the matter came on for hearing before this Court today, it seems to me the appeal was on a misconceived basis, so I think Rojo should pay the costs of the appeal. But it should have the extension of time, and the appeal be granted, for the reasons I have given.

23 The orders I would propose are that:
1. The time for appeal from McDougall J's judgment be extended to today.
2. The amendment proposed in the document handed to the court today to the notice of appeal be allowed.
3. The appeal from Einstein J be dismissed.
4. The appeal from McDougall J be allowed.
5. Rojo to pay the costs of the appeal.
6. The costs before McDougall J to be costs in the proceedings.
7. The matter remitted to the Equity Division for hearing.

24 **MASON P:** I agree.

25 **IPP JA:** I agree.

26 **MASON P:** The orders of the court will be as indicated.

Mr. J.S. Drummond for appellant instructed by Hewitts Commercial Lawyers
Mr. M. Southwick for respondent instructed by Surry Partners Lawyers