Rojo Building P/L v Jillcris P/L [2006] NSWSC 649

DECISION : See para [55] of judgment

CATCHWORDS : Estoppel - where Court on hearing (including of application for summary judgment) found pleaded cause of action unsustainable, gave reasons and made orders - where plaintiff has not sought to amend summons to allege alternative cause of action - whether parties estopped from contending to the contrary of orders made - whether matter should be reopened pursuant to UCPR 36.16(1) or inherent power of Court

LEGISLATION : Building & Construction Industry Security of Payment Act 1999

CASES CITED : United Australia Limited v Barclays Bank Limited [1941] AC 1

JUDGMENT :McDougall J. Equity Division, T&C List. Supreme Court New South Wales. 22nd June 2006

1 The plaintiff as builder and the defendant as proprietor were parties to a contract made on 24 January 2005 whereby, in substance, the plaintiff agreed to construct residential premises at Bulli for the defendant. The plaintiff claims, among other things, that the contract was a "construction contract" to which the provisions of the *Building and Construction Industry Security of Payment Act* 1999 (the Act) applied, and that the work carried out by it under the contract was "construction work" for the purposes of that Act.

2 The plaintiff claims to have served on the defendant a payment claim pursuant to s 13 of the Act. There is a dispute between the plaintiff and the defendant as to the date of service. Indeed, there is a dispute as to whether the plaintiff was entitled to avail itself of the mechanisms for recovery of progress payments laid down by the Act, but that can be put to one side for the moment.

3 The plaintiff claims that the defendant did not submit a payment schedule in response to its payment claim within the time limited by s 14(4) of the Act. Thus, on the plaintiff's case, it had available to it the options given by s 15(2). The first of those was to recover the unpaid portion of the claimed amount from the defendant as a debt due in a court of competent jurisdiction. The second was to make an adjudication application under s 17(1)(b) of the Act in relation to the payment claim. The plaintiff chose to proceed by way of the second option. It was therefore required to, and did, give the defendant notice of its intention to apply for adjudication, in accordance with s 17(2)(a) of the Act.

4 That notice was contained in a letter from the plaintiff's solicitors to the defendant dated 19 December 2005. It is the plaintiff's case - and the evidence supports this - that the letter was received by the defendant on 22 December 2005. On that basis, the defendant would have five business days thereafter to provide a payment schedule: s 17(2)(b). The defendant had provided a payment schedule on 20 December 2005. On the chronology that I have given, this could not have been in response to the plaintiff's notice under s 17(2)(a). However, after that notice had been received, but on 22 December 2005, the defendant's solicitors wrote to the plaintiff's solicitors and informed them in substance that the defendant had already provided (as, they said, it was entitled to do) a payment schedule. The question of the defendant's entitlement to do so rested not upon s 17(2)(b), but upon the defendant's contention as to the date upon which the payment claim had been served.

5 The following day, 23 December 2005, the plaintiff's solicitors notified the defendant's solicitors that the plaintiff did not propose to proceed along the adjudication path, and that therefore the defendant was not required to provide a payment schedule, as by then (even on the plaintiff's case) it had the opportunity to do: again because of s 17(2)(b).

6 The plaintiff commenced proceedings in this Court to recover the amount of the alleged payment claim: $251,537.07. I do not know why the proceedings were commenced in this Court rather than in what appears to be the appropriate court, having regard to the amount, namely the District Court of New South Wales. But that does not matter for present purposes.

7 With its summons, the plaintiff filed a notice of motion for summary judgment. Presumably, that notice of motion was filed in the belief that s 15(4)(b) of the Act precluded the defendant from bringing any cross-claim and from raising any defence in relation to matters under the construction contract.

8 Undaunted by s 15(4)(b), the defendant filed a defence. That defence raised a number of issues, including an issue as to the date of service and receipt of the payment claim (the significance of receipt, in the context of s 14(4)(b)(ii), is obscure). The defence also asserted that the defendant had contracted as trustee of a trust under which certain individuals were beneficiaries; that those beneficiaries intended to live in the premises that were the subject of the contract; and that accordingly the Act did not apply: s 7(2)(b).

9 When the matter came before the Court for directions on 17 February 2006, Bergin J made orders and gave directions, as agreed by the parties, relating to evidence and the like. Her Honour listed the matter for directions on 17 March 2006 and for hearing on 18 April 2006 for one day.

10 On 17 March, her Honour gave further directions, including the preparation of outlines of contentions of fact and law and issues for trial, so as to enable the hearing to proceed on 18 April 2006.

11 The matter came on before Einstein J on 18 April 2006. Clearly, having regard to the procedural history that I have narrated, the parties assumed that the matter was fixed for final hearing before his Honour on that day. Counsel for each party (Mr Drummond for the plaintiff and Mr Southwick for the defendant) have confirmed that understanding today. However, at least at some stage of the proceedings, Einstein J fixed upon the notice of motion for summary judgment. It is a little unclear as to how this came about. To the extent that it is legitimate to have regard to the transcript (rather than to his Honour's reasons for judgment) the transcript reveals that his Honour understood that the plaintiff was "moving for summary judgment on a summons ... filed on 20 January" (T 1.50): an impression or understanding confirmed by Mr Drummond (T 2.1). However, his Honour referred to the defence and to "a notice of motion of 20 January" (T 2.10): the latter being a reference to the notice of motion for summary judgment to which his Honour had already referred.

12 So far as the transcript shows, the matter proceeded in an orthodox fashion thereafter. The parties identified the evidence on which they relied. His Honour ruled on objections to that evidence. It does not appear from the transcript that either party sought to cross-examine the witnesses of the other. It does appear that, in the course of dealing with objections, his Honour in at least some cases rejected evidence of a hearsay nature (see, by way of example only, T 12.30 and following).

13 His Honour then heard submissions from Mr Drummond, who, as I have said, appeared for the plaintiff. In the course of those submissions, his Honour isolated what he perceived as being the crucial issue: namely, that the plaintiff, having chosen to proceed one way when it gave notice under s 17(2)(a), was now seeking to move in another way. Having heard from Mr Drummond, and apparently not needing to hear from Mr Southwick, his Honour gave reasons ex tempore. It will be necessary to return to the detail of those reasons.

14 Having given reasons, his Honour asked the parties to address on the fate of the plaintiff's claim. He said at T 27.30 that it did not seem to him "that the proceedings likely can stand in the light of my holding". He said at T 27.45 that "likely - I may be wrong, but perhaps the proceedings simply as they are pursued would have to be dismissed as well. It may well be the case that final relief is - your client, of course, isn't bound by this holding on this application - ". There was an interruption. His Honour then continued at T 28, saying that "arguably a new summons would have to be issued squarely dealing with the sorts of things which are dealt with when you talk about final relief. ... I don't know what sort of claims your client might wish to make at general law. They're not made in this pleading, are they?"

15 In the result, his Honour ordered that the notice of motion be dismissed, made orders for costs, and ordered "that in the absence of the plaintiff communicating ... 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 am on Thursday, 20 April 2006". (The order for dismissal of the notice of motion was made in substitution for an order that the summons be dismissed.)

16 Later that day, the transcript shows, Mr Drummond made an application to Einstein J to re-open the matter on the basis that the judgment given earlier that day had proceeded on the basis of a misapprehension of fact. It appears that the plaintiff was concerned that Einstein J had either decided, or proceeded on the assumption, that the defendant's payment schedule of 20 December 2005 was sent in response to the plaintiff's s 17(2)(a) notification sent on 19 December 2005. It is easy to see how his Honour might have come to that conclusion, because the defendant's evidence was that the plaintiff's notice was received "on or about 19 December 2005".

17 Mr Drummond put to his Honour that there was evidence that could have been led to show that, as I have said, the s 17(2)(a) notice was not received until 22 December 2005, so that the payment schedule could not have been sent in response to it.

18 There was debate about that and other matters. His Honour was physically given the material that would (so the plaintiff submitted) show that the s 17(2)(a) notice was not received until 22 December 2005. He did not mark it as an exhibit.

19 At this stage I interpose to note that the evidence led by the plaintiff today makes it clear that the documents seen by his Honour, but not marked as exhibits, did show that, as I have said now several times, the defendant received the s 17(2)(a) notice on 22 December 2005.

20 His Honour, however, concluded that it was not necessary to deal with the evidentiary dispute (Mr Southwick having submitted that the evidence should not be received because he had not had an opportunity to take instructions on it). His Honour then dealt with the application to re-open on a basis which, I think, assumed that the evidence would be as the plaintiff wished to show it was. In other words, his Honour dealt with the application on the assumption that the payment schedule was not responsive (in terms of time or otherwise) to the s 17(2)(a) notice.

21 At this stage, it is necessary to pay close attention to his Honour's reasons: both those given initially and those given on the application to re-open. Those reasons may be found at [2006]NSWSC 309.

22 In para [1] of the reasons, his Honour noted that what was before the Court was an application for summary judgment pursuant to the Act. However, his Honour said at para [2]: "The proceedings are able to be determined by a short point of statutory construction and principle". In other words, at least on the face of things, his Honour was dealing with the merits of the underlying point, although in the context of the summary judgment application brought by the plaintiff.

23 His Honour then set out the relevant facts, and referred to some of the provisions of the Act. He then stated his decision in paras [18] and [19] as follows:

> "*18 It is plain that once Jillcris received the s 17 (2) (a) and (b) notifications, 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 recover the unpaid portion of the claimed amount as a debt by curial process. Rather, Jillcris has been given an alternate statutory opportunity to provide a payment schedule within an entirely different bracket of time: five (5) business days after receiving the Rojo notification of intent to apply for adjudication. Effectively the case presently being pursued by Rojo would deny Jillcris' said alternate statutory opportunity. Indeed, that alternate statutory opportunity had been exercised even prior to Rojo's endeavour to withdraw its notice of intention to apply for adjudication.*
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> *19 The authorities make very plain that the Act sets up a fast-track and interim set of measures to treat with the expeditious determination of disputed progress claims. An overview of the recent case law was given in* ***Procorp Civil Pty Ltd v Napoli Excavations and Contracting Pty Ltd*** *[2006] NSWSC 205 (at [9])."*

24 That having been done, his Honour made the orders to which I have referred, including that the summons should stand dismissed unless the plaintiff notified the Court of its intention to continue the proceedings.

25 At this point two things may be noted. The first is that, although Einstein J commenced by referring to the summary judgment application being before the Court, it is clear that the matter had been set down for a final hearing; and it is clear, from the passages of transcript that I have quoted, that his Honour understood that the summons and the defence were also "*before the Court*".

26 Secondly, the order that his Honour made for conditional dismissal of the proceedings was an order that could only properly be made if he had concluded that, on the issue argued, the plaintiff had no prospect of success; to put it another way, if he had concluded that the plaintiff not only must lose but, in fact, had lost. It is plain from the transcript that when his Honour reserved to the plaintiff the opportunity of seeking to continue, he was not considering the plaintiff's rights under the Act but *"claims [the plaintiff] might wish to make at general law"* (T 28.5).

27 Those considerations lend support to the view that, notwithstanding that his Honour introduced his reasons by referring to the application for summary judgment, he was intending, as para [2] of the reasons made clear, to dispose of the proceedings -

not just the application for summary judgment - on the point on which, in his view, the issue rested and on which the plaintiff failed.

28 The reasons continue (on 19 April 2006) to deal with the application to re-open. As I have said, his Honour dealt with this on the basis that the plaintiff might be able to show that the payment schedule was sent before the s 17(2)(a) notice had been received. It is clear from the transcript that his Honour was not proposing to entertain debate on a disputed point of evidence: see, for example, T 23.45, 35.5. In that context, his Honour referred on each occasion to deciding disputed questions of fact on a summary judgment application. Thus, it is apparent that his Honour understood the mechanism or vehicle of the hearing to be the application for summary judgment.

29 At para [29], having set out the basis on which the application for leave to re-open was made at paras [20]-[28], his Honour set out the relevant principles dealing with applications for leave to re-open. At para [32], his Honour noted that "the judgment is given in respect of an interlocutory application".

30 His Honour then turned to deal with the issue. He did so, as para [33] makes clear, *"even assuming the correctness of the entirety of that which Rojo seeks to establish were the Court to grant leave to re-open"*. He said, however, that there remain *"an entirely disparate basis upon which Rojo's summary judgment application must fail"*. That his Honour was proceeding on the basis of an assumption most favourable to the plaintiff is clear also from para [40] where, having concluded that it was inappropriate to grant the plaintiff leave to re-open, his Honour commented that *"To grant leave ... would simply be otiose"*.

31 The point on which his Honour found that Rojo must fail was that it had made an election to proceed down the adjudication path. This election (his Honour used the terminology of "election") was made by service of the s 17(2)(a) notice. In his Honour's view, once that had been done, it was not open to the plaintiff to seek to do, as on 23 December 2005 it purported to do, and withdraw that notification. His Honour, at para [39], dealt with *"the strictures imposed by the Act and ... the need for formal compliance with the provisions of the Act"*. He said that a claimant could not leave a respondent *"in any form of doubt as to precisely what course is being followed by the claimant";* and vice versa.

32 Thus, as I have said, his Honour refused leave to re-open. Having done that, he referred (at para [41]), by way of emphasis, *"to the undoubted fact that the procedure provided for in the Act does not finally bind the parties in terms of their ultimate curial rights"*.

33 In my view, those words in para [41] throw light on what it was that his Honour was intending to reserve to the plaintiff by order 5 of the orders that he then made.

34 His Honour revoked the orders made earlier (on 18 April 2006). He ordered that the two notices of motion (for summary judgment and for leave to re-open) be dismissed. He made costs orders. He made the following orders:

> *"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.*
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> *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 [sic: clearly, "2006"], the proceedings be listed before the List Judge for directions on Friday, 28 April 2006 in the Technology and Construction List."*

35 The plaintiff did notify Bergin J that it wished to continue the proceedings. It did not, however, notify her Honour that it sought leave to amend the summons; and it has not sought leave to do so.

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.

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.

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.

44 Having regard to that conclusion, it is not necessary for me to consider the alternative ways in which the plaintiff put its case. However, in case the matter goes further and it be concluded that I am wrong in what I have said, I will do so.

45 Mr Drummond submitted that his client was entitled to have the point that had been dealt with by Einstein J reagitated on the basis of all the evidence that his client could adduce on the point; and, if necessary, on the basis of cross-examination of the defendant's witnesses.

46 If the hearing before Einstein J had been truncated in some way, so that the plaintiff had been deprived of the opportunity to put its case on the facts, that submission would have had much to commend it. However, as I have sought to make clear, the parties prepared for the hearing on the basis that it was to be a final hearing, and had the opportunity to put on such evidence as they wished. That evidence was adduced in the orthodox way. It does not appear that either party sought to cross-examine the witnesses of the other.

47 When the application was made for leave to re-open, his Honour accepted the position as to the further evidence that the plaintiff might lead, in the sense (as I have said more than once) he decided the application on the basis that the plaintiff would succeed in showing what it said it could. He did not formally permit the plaintiff to adduce further evidence. But, as I have said, his reason for doing so was that it would be otiose, because the further evidence could not advance the position.

48 The further evidence that the plaintiff sought to read today consisted of affidavits that proved the matters that the plaintiff asserted before Einstein J and that his Honour assumed. The plaintiff may well have sought to cross-examine the deponents for the defendant, and may well have made good what was in any event apparent: namely, that the defendant's payment schedule was not responsive to the s 17(2)(a) notice. But, in truth, that would not advance the matter one iota beyond the assumed state of facts on which Einstein J decided the case.

49 In circumstances where the matter was thoroughly argued, and where the relevant evidence was either adduced or assumed, I would be loathe indeed to permit a party to reargue the matter in circumstances where it had been carefully considered by one Judge of this Court.

50 Mr Drummond submitted that there were manifest flaws in the reasoning of Einstein J, in particular, insofar as his Honour dealt with the concept of election. He referred to a number of cases, including to the decision of the House of Lords in *United Australia Limited v Barclays Bank Limited* [1941] AC 1. He submitted that a party having the benefit of an election retained that benefit up until the time when judgment was entered; and that Einstein J, in dealing with the matter as he had, had failed to recognise that principle.

51 That point was not fully argued, and I would not propose to decide it without giving the parties an opportunity to argue it. However, I do not propose to give the parties an opportunity to argue it in circumstances where, because of my primary view, I do not think that it arises. In those circumstances, I need do no more than say that the point was available to be argued before Einstein J; and that statutory election identified by his Honour as the basis for the plaintiff's failure is far removed from the general law concept of election between inconsistent remedies identified and discussed by the House of Lords in ***United Australia***.

52 In all the circumstances, including, as I have said, that there was an opportunity for a final hearing, and full debate on the point, I would not, as a matter of discretion, permit the parties to have another bite at the cherry. If the decision of Einstein J is wrong, so be it. But that, in my view, is a matter to be determined by the Court of Appeal in the usual way, and not by another single Judge of this Court upon an attempt to reargue the same point between the same parties.

53 For the same reasons, and to the extent that reliance upon UCPR r 36.16(1) or the inherent power of the Court was a separate ground, I would not permit the matter to be reopened.

54 It follows, as I have said, that in circumstances where the plaintiff has not sought to amend its summons to allege an alternative cause of action entitling it to the relief claimed, and where the cause of action that it does allege has been held to be unsustainable by a Judge of this Court (in circumstances which, in my view, estop the parties from contending to the contrary) the summons must be dismissed.

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.

J S Drummond (Plaintiff) instructed by Hewitts Commercial Lawyers
M H Southwick (Defendant) instructed by Surry Partners