JUDGMENT : Einstein J : New South Wales Supreme Court : 5th May 2006 ex tempore

1 These proceedings were determined by a judgment delivered on 28 April 2006 by Rein AJ. It is unnecessary to repeat the reasons for dismissing the summons given in that judgment.

Matters before the Court

2 The proceedings are presently before the Court following a direction given on the occasion when reasons for judgment were given. There are two areas for the Court's determination:

- the first is costs, in which regard the first defendant seeks orders that the plaintiff pay the first defendant's costs of these proceedings from 8 March 2006 up to 12 April 2006 on a party/party basis and from 13 April 2006 until today on an indemnity basis.
- the second involves an application made by the first defendant to have paid out to it, moneys paid into Court. The plaintiff has applied for an adjournment of the hearing of this issue.

Background history

3 It is necessary to travel through some history in order to deal with these two matters.

4 As long ago as 29 July 2005, the first defendant served a payment claim under the *Building and Construction Security of Payments Act 1999* [NSW] ["the Act"]. An adjudicator's determination issued on 14 September 2005 in the sum of $150,312.09. The adjudicator's certificate in accordance with that determination was filed as a judgment for a debt in the sum of $140,704 in the District Court of NSW on 28 October 2005 and judgment was certified on 8 November 2005.

The statutory demand

5 On 15 November 2005 the first defendant served a statutory demand on the plaintiff. On 8 December 2005 the plaintiff commenced proceedings no. 6200 of 2005 in the Supreme Court seeking to set aside the first defendant's statutory demand which had been based upon the District Court judgment. No ground had been stated in that application to the effect that the adjudication determination and/or the District Court judgment were void or should be set aside.

6 It is common ground that the present proceedings were commenced approximately two days prior to what I understand to have been the second return date of the application to set aside the statutory demand [and were served on what I understand to be one day before that return date].

7 The evidence adduced in the present proceedings was identical to the evidence adduced by the plaintiff in its proceedings seeking to set aside the statutory demand.

Commencement of these proceedings

8 The present proceedings were commenced by the filing of the summons on 9 March 2006. At the time the proceedings were commenced, the plaintiff sought the following orders:

(1) A declaration that the purported adjudication and the determination and certificate issued by the second defendant pursuant to the purported adjudication were void and of no effect.

(2) An order that the purported adjudication and determination and certificate be quashed.

(3) An order that the file in the District Court proceedings be called up into the Supreme Court and that the judgment therein entered on 28 October 2005 be quashed.

Order (3) not pressed

9 The hearing of these proceedings was fixed on 18 April 2006 to be heard on 21 April 2006. By letter dated 12 April 2006 from the plaintiff's solicitors to the first defendant's solicitors, the plaintiff's solicitors advised that they would not be pressing for order (3) in the summons.

The adjournment application

10 When the matter was called today Mr Rogers, of counsel, appearing for the plaintiff, submitted that it was appropriate for the matter to be stood over for fourteen days for the purpose of his client preparing materials necessary to support an application resisting the payment out to the first defendant of the funds which had been paid into Court by way of the unpaid portion of the adjudication demand pending the final determination of the Supreme Court proceedings - see judgment at paragraph 7.

11 Mr Rogers has tendered and the Court marks as Exhibit P1, a letter from his instructing solicitors to the first defendant's solicitors of 2 May 2006 advising of the plaintiff's instructions not to oppose any order for costs agreed or assessed and intent to apply for orders that the deposited funds not be released.

12 The grammar leaves a deal to be desired but indicates an instruction as follows: "[We] will be applying for orders that the deposited funds not be released and expect to provide full reasons for that within the next fourteen days." It is difficult to follow from those words whether or not the plaintiff was indicating that it would provide full reasons for orders which it would later seek within fourteen days.

13 In any event, the letter concluded by indicating that there was enclosed by way of service, a notice to produce returnable for 5 May 2006. That notice to produce sought production of the following documents or things:

"Bank statements, bank books, cheque butts, loan statements and bank records of any bank account in the name of the company or held jointly with any other entity or person from 1 June 2003 to date.

Tax returns, information used to compile such returns, statements of earnings and group certificates from 1 June 2003 to date (including information which is under the control of the company such as in the hands of a third person such as an accountant).

All company balances from 1 June 2003 to date."

The application to set aside the notice to produce

14 The first defendant has applied to set aside this notice to produce. The plaintiff has, as I have already indicated, sought an adjournment for a fourteen day period for the purpose of opposing any payment out of the funds presently in Court.

Costs

15 The propounded basis for the first defendant's application that the plaintiff pay a portion of the first defendant's costs on an indemnity basis is not of substance.

16 Mr Abadee of counsel, for the first defendant, has submitted that a close examination of the correspondence passing between his instructing solicitors and the solicitors for the plaintiff in relation to these proceedings, the basis for the proceedings and the precise timing of the occasion when these proceedings were commenced, permits the Court to infer that the plaintiff had an ulterior purpose in commencing and prosecuting these proceedings namely: to delay or forestall the occasion when the plaintiff's own application to set aside the statutory demand would require to be treated with.

17 In essence that submission, as I understand it, is that the real purpose for commencement of these proceedings was to permit the plaintiff to submit to the Court dealing with the statutory demand issue, that indeed there was a *bona fide* dispute which would be being determined by the Supreme Court Technology and Construction List.

18 In the event the statutory demand proceedings were stood over until next week.

19 Having looked carefully at the manner in which the proceedings were litigated before Rein AJ and at the correspondence, it does not seem to me that the first defendant has made good any of the conventional bases upon which a party is entitled to indemnity costs.

Discretion to order indemnity costs

20 Circumstances entitling a party to indemnity costs vary markedly but the discretion to exercise indemnity costs is a principled one. The communications from the first defendant's solicitors to the plaintiff's solicitors suggesting that the proceedings had no success and the offers to the plaintiff to withdraw were all sent, it seems to me, very close to the occasion when the proceedings were heard.

21 The discretion to order indemnity costs is also enlivened on occasion, when delinquency in relation to the conduct of the litigation, as well as the bringing of the litigation can be clearly established. My own view is that there is no such delinquency established in this particular litigation. [cf: *Darryll* ***Cullen v ZLB Behring LLC*** [2006] NSWSC 359 at 8-10]

22 For that reason, when costs orders are made, they will simply be orders that the plaintiff pay the first defendant's costs on a party/party basis as agreed or assessed.

The adjournment application and the payment out issue

23 Turning next then to deal with the application for the adjournment, it is clearly established that as between a claimant and a respondent, a determination in favour of a claimant [and the subsequent entry of judgment against a respondent] does not determine the final legal rights of the parties. The scheme of the Act is reasonably well understood by now. The scheme involves an interim approach aimed at ensuring a fast track determination of the rights of a claimant in situations where, quite commonly, the claimant will be in particular need to receive progress payments.

24 Once the Court has rejected claims to set aside a determination or to prevent the claimant being entitled to either obtain or to enforce a judgment, it is particularly important for the Court, sensitive to the statutory scheme, to ensure that the claimant not be held out from its success pursuant to the scheme, otherwise than for good cause.

25 There is no doubt but that where a respondent is able to satisfy the Court that on the evidence, payment by it of moneys which a determination requires to be paid to the claimant, would mean that the claimant will not be in a position to repay those moneys should it ultimately fail when the party's legal rights inter se are finally adjudicated, or that the risk is very high, the Court will intervene - cf ***Grosvenor Constructions (NSW) Pty Limited (in admin) v Musico*** [2004] NSWSC 344 and ***Herscho v Expile Pty Limited*** [2004] NSWCA 468 at 3 and 7.

26 In his submissions in support of the application for the adjournment today, Mr Rogers relied upon what he indicated to be his instructions to the effect that the plaintiff had a substantial claim to damages against the first defendant and his instructions that his client believed the first defendant not to be a substantial organization.

27 The plaintiff has sought leave to rely upon the affidavit of Mr Sunwoo which is before the Court and which is made on 4 May 2006.

28 Insofar as Mr Sunwoo seeks to give evidence as to the basis of the damages claims against the first defendant based upon late completion of work, reimbursement for materials charged but not supplied and reimbursement for excessive insurance premiums, all that the affidavit essentially amounts to is an indication of that which will, I presume, likely inform the proceedings which will ultimately determine the parties' final legal rights.

29 The fast track character of the legislation to which I have referred is intended to give to the parties an entitlement in the fullness of time to have their final legal rights determined. Aside from the Court comprehending affidavit evidence as to the basis for and amounts to be claimed in such proceedings by a proprietor, those matters in the affidavit have little or no materiality.

30 The only other matter in the affidavit is the bald statement by the deponent [in paragraph 5(ii)] that he opposes the payment out of Court for the reason that: *"I believe the defendant is not a substantial organization and that if the moneys are distributed to the defendant the plaintiff is unlikely, if the moneys are so paid out, to recover its damages if successful in any proceedings."*

31 In my view, for reasons which follow, the Court should not grant the adjournment which is today sought.

Speed of the essence in making the application

32 It is common ground that the fast track procedures set in place by the legislation have been the subject of detailed curial determination over the past few years. Where a plaintiff, having sought remedial relief from the Supreme Court, has been required to pay moneys by way of the unpaid portion of the adjudicated demand into Court pending the final determination of the proceedings, such a plaintiff is taken to be entirely cognizant of the possibility that the proceedings may fail.

33 Speed is of the essence in the preparation by such a party of such application as may be requisite where, in the event that it fails in the litigation, it proposes to ask for an order that the moneys paid into Court be withheld on the basis that the defendant would, if unsuccessful upon the determination of the parties' final legal rights, be unable to repay these funds.

34 The parameters of the adjournment application are necessary to be carefully understood. There was no indication before the trial judge on the occasion when the judgment was delivered that any such application was foreshadowed. As I understand it, the first occasion when the issue sought to be raised by the plaintiff today was raised, was by the facsimile of 2 May 2006.

Impermissible fishing exercise

35 There is no *automatic* entitlement of a party in the position of the plaintiff in these proceedings to have the benefit of a notice to produce served upon a successful claimant in an impermissible fishing exercise: cf ***Associated Dominions Assurance Society Pty Ltd v John Fairfax and Sons Pty Ltd*** [1952] 72 WN (NSW) 250 at 254 per Owen J. The usual and principled approach to the Court's determination of an application to press for production of documents on a notice to produce [and a contradictor application to set aside the notice to produce], requires the applicant seeking to propound the notice to produce to establish some form of *prima facie case* extending beyond an endeavour to trawl [to discover whether there is a genuine issue to be determined between the parties giving rise to the entitlement to have the documents produced].

36 The instant circumstances are such that all that one has in support of the application for the adjournment is the sentence in the affidavit that a director of the plaintiff believes that the defendant is not a substantial organisation and that if the moneys are distributed to the first defendant the plaintiff is unlikely, if the moneys are so paid out, to recover its damages if successful in any proceedings.

37 Effectively the burden of the submission put to the Court by Mr Rogers, has been that in *any situation* where a respondent to proceedings under the Act, [having invoked the Supreme Court's jurisdiction and having been required to pay moneys into Court pending the hearing of the proceedings], after losing those proceedings so elects, it has an *automatic* right, by notice to produce, to elicit from the successful claimant, details of the successful claimant's financial position in an attempt to establish whether or not there are any grounds for making an application for the funds to be withheld.

38 To my mind, that proposition is simply misconceived. The position is essentially no different to the position which obtains, quite commonly, in terms of claims for interlocutory relief, where prior to being entitled to call a subpoena addressed to a defendant or to call upon a notice to produce, it is necessary for a plaintiff to establish some form of basis outside of a fishing exercise, for the obtaining of relief.

39 The bald statement in the affidavit to which I have referred is not, in my view, of sufficient substance to amount to satisfaction of such a prima facie basis for resisting the payment out.

40 Even if the paragraph were to be allowed, its form is not sufficient to satisfy the Court that there is a prima facie case. It simply carries no weight.

41 The statement in paragraph 5(ii) is one of belief. There is no material such as could inform or does inform the Court as to the basis for the belief. Indeed, the statement in paragraph 5(ii) even offends the principled approach to the entitlement of a party on an interlocutory application to adduce evidence on information and belief because there is no information put forward to support belief: cf *Evidence Act 1995* s75.

42 The Court is, for that reason, justified in rejecting that paragraph out of hand.

43 Alternatively, the Court has a proper foundation in relation to that paragraph sought to be read in aid of the application for the adjournment, to refuse to admit the evidence on the ground that the probative value of the evidence is substantially outweighed by the danger that the evidence might or would:
- substantially prejudice the first defendant; and/or
- would cause or result in a waste of time. [cf *Evidence Act* s.135]

44 For those reasons it is appropriate to reject paragraph 5(ii) and I reject the paragraph.

45 It is important to recognise that the current dispute has been on foot between these parties from at least late July 2005. That is nine months ago. It is important to make clear that a plaintiff, having been a respondent to proceedings under the Act, must, by definition, be cognisant of the significance of moving *swiftly* should it ever determine that it is appropriate to seek an order that funds held before the Court not be paid out.

46 Naturally, the Court accepts that there may on occasions be special circumstances. For example, on a date following the delivery of judgment, a plaintiff may for the first time, become aware of some event or fact indicative *only then* of the possibility or probability that if the moneys in Court are paid out to the claimant, it will not be in a position to repay those moneys, should it ultimately fail when the party's legal rights interse are finally adjudicated [or that that risk is very high]. That would be a circumstance in which the Court may very well accede to a late application to adjourn the occasion for the decision as to whether or not the funds should be paid out.

47 There is no evidence of any such matter presently before the Court, nor any suggestion of any such recency in the exercise.

48 The submissions from the Bar table are no more than submissions and do not have the force of evidence.

49 Earlier today the Court did offer to the plaintiff an opportunity to commence the hearing a little later in the day but Mr Rogers indicated that that offer was not something that should be availed of.

Decision

50 For those reasons the appropriate exercise of the Court's discretion is to dismiss the application for the adjournment and to proceed to make appropriate orders with respect to costs and with respect to the payment out of the moneys that are in Court.

Mr A Rogers (Plaintiff) instructed by Brennan Tipple Partners (Plaintiff)
Mr A Abadee (First Defendant) instructed by Cooper Grace Ward Lawyers (First Defendant)