

JUDGMENT HAMMERSCHLAG J Supreme Court New South Wales Equity Div T&C List 13 November 2007

- 1 On 1 November 2007 I gave judgment in the principal dispute.
- 2 I reached the conclusion that the adjudicator's determination dated 28 May 2007 ("the adjudication") was void because the adjudicator had breached basic and essential requirements of the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("the Act").
- 3 On 29 June 2007 McDougall J had made consent orders under which the plaintiff was to lodge with the Court an unconditional banker's guarantee in the amount of \$407,167.02 and the first defendant was not to proceed to request the issue of an adjudication certificate or file same as a judgment.
- 4 The consent orders were varied on 13 July 2007 by His Honour in chambers. Instead of establishing a banker's guarantee, the plaintiff paid money into Court.
- 5 Two matters remain unresolved.
- 6 The first is whether any declaration that the adjudication is void should be coupled with an order that part of the moneys in Court should be paid to the unsuccessful first defendant. The second is the question of costs.

Relief

- 7 I found that the adjudicator had impermissibly failed to deal with a submission duly made by the plaintiff that the first defendant owed it \$140,000 arising out of the supply by the first defendant of defective tiles. I also found that the adjudicator had impermissibly not dealt with a liquidated damages claim by the plaintiff against the first defendant which, on concessions made by counsel for the first defendant, amounted to \$70,500.
- 8 The adjudicated amount was \$393,114.82. The amount of \$407,167.02 was paid into Court. The difference of \$14,052.20 was interest, based on the fact that the payment date under the adjudication was 30 April 2007.
- 9 The first defendant seeks payment out to it of \$182,614.82, being the adjudicated amount less the sum of \$140,000 and \$70,500, together with interest at Supreme Court rates.
- 10 Mr Christie of counsel, who together with Ms Younan appeared for the first defendant, accepted that voidness of the adjudication having been found, declaratory relief ought to follow.
- 11 However, he put that such relief is discretionary and that there should be attached to its grant condition for payment out to the first defendant of "the unaffected amount" (meaning the amount of the adjudication after deduction of the plaintiff's two claims referred to above), plus an amount for interest.
- 12 He put that to so exercise my discretion would be in conformity with the underlying and fundamental purpose of the Act to ensure that claimants receive payment for construction work without delay: *Shell Refining (Australia) Pty Ltd v A J Mayr Pty Ltd* [2006] NSWSC 154; *Over Fifty Mutual Friendly Society v Smithies* [2007] NSWSC 291.
- 13 In support of the submission he relied on the approach taken by McDougall J in *Emergency Services Superannuation Board v Davenport* [2004] NSWSC 697. His Honour there gave consideration to the grant of relief in the nature of prerogative relief quashing an adjudication determination purportedly made under the Act.
- 14 His Honour pointed out that the grant of such relief is discretionary. He said that if he were to have quashed the determination the claimant would have been deprived of the benefit of the entire determination including a portion of it which His Honour found was not affected by reviewable error.
- 15 His Honour concluded that if orders were to be made they should be made conditional upon a regime to effect payment to the claimant of an amount which was unaffected by the particular challenges to the determination.
- 16 Since *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, however, it has been the law in this State that an adjudication determination which fails to meet the applicable requirements of the Act is void and not voidable. Prerogative relief is not the appropriate remedy, but a declaration as to invalidity is. There is also no notion of partial invalidity: see *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* [2007] NSWCA 19; *Multiplex Constructions Pty Limited v Luikens* [2003] NSWSC 1140; *Lanskey Constructions Pty Ltd v Noxequin* [2005] NSWSC 963.
- 17 In the present case the moneys were paid into Court to secure the first defendant's position in the event that the plaintiff's challenge to the adjudication failed. But the challenge succeeded. There is no longer any statutory underpinning for the first defendant's claim and the machinery of the Act to ensure early payment to it of the moneys claimed has not been successfully invoked by it.
- 18 It is not altogether clear that the grant of declaratory relief when voidness has been found is discretionary (see Meagher Gummow & Lehane's *Equity Doctrine & Remedies* 4th Edition pars 19-155 and following) but even if it is, there is no basis for withholding it here. There is no part of any adjudication in existence to provide a basis upon which to exercise the discretion to order the payment of a money sum to the first defendant.
- 19 The plaintiff's challenge was not to any particular amount determined by the adjudicator on the grounds that the amount was wrong, but nevertheless leaving some other amount unchallenged. Such a challenge would have failed on the authorities: see for example *Downer Construction (Australia) Pty Ltd v Energy Australia* [2007] NSWCA 49 at [87]. It was a challenge to the efficacy of the adjudication itself. The plaintiff succeeded on two bases, but one would have been enough.

- 20 In the absence of a payment schedule from the plaintiff under which an amount claimed by the first defendant was not in dispute, there is not even any "unaffected amount" in the nature of an admission by the plaintiff. The plaintiff's payment schedule resulted in a negative amount.
- 21 Assuming that I have a discretion to attach conditions to the grant of the declaratory relief where there has been a finding of voidness as well as a discretion as to how the moneys in Court should be dealt with consequent upon such a finding, I do not consider that this is an occasion upon which to exercise it other than to order that the moneys in Court be repaid to the plaintiff.

Costs

- 22 I turn to the question of costs. It was put by Mr Christie that it was appropriate for each party to bear its own costs, on the basis that the plaintiff had raised five grounds of attack but had succeeded on only two. It lost on one, it withdrew one, and it sought to raise an issue in relation to certain evidence which I ruled to be irrelevant. In the case of the last point the first defendant incurred costs in anticipation of having to meet evidence ruled inadmissible.
- 23 The general approach taken by the Court is that it is appropriate to award costs of proceedings to the successful party without endeavouring to differentiate between particular issues upon which that party was successful, and upon which it failed, unless there are matters upon which it fails which were clearly the dominant issue in contest, or were clearly separable from the matters on which the party succeeded.
- 24 In this case I do not consider that there is a clear delineation which would warrant dealing with costs piecemeal, or that there should be an order reducing the plaintiff's entitlement with respect to any issue. Most of the issues overlapped and, more importantly, the plaintiff succeeded in having the determination declared void, which was the ultimate result to which all other matters were directed.
- 25 There is no good reason, in my view, why costs should not follow the event.
- 26 In the circumstances the orders of the Court will be as follows:
1. Declaration that the adjudication determination dated 28 May 2007 of the second defendant is void.
 2. The first defendant is to pay the plaintiff's costs of the proceedings.
 3. The amount in Court being \$407,167.02, together with any interest accrued thereon, is to be paid to the plaintiff.

V. Culkoff (Plaintiff) instructed by Joe Ryan Solicitor

M. Christie with H. Younan (First Defendant) instructed by Doyles Construction Lawyers