Veolia Water Solutions & Technologies v Kruger Engineering Australia P/L [2006] Adj.L.R. 12/06

JUDGMENT : **McDougall J.** Supreme Court New South Wales, Equity Division, Commercial List. 6th December 2006

1 This interlocutory application raises an important and difficult question of practice under the *Building and Construction Industry Security of Payment Act 1999* (the Act).

2 The plaintiff (Veolia) as head contractor and the defendant (Kruger) as subcontractor are parties to a subcontract made on about 22 March 2003 (the contract). By that contract, Kruger agreed to carry out construction works for Veolia in relation to Sydney Water's Illawarra Waste Water Strategy.

3 There is no doubt that the work to be performed was construction work for the purposes of the Act, and that the contract was a construction contract for the purposes of the Act.

4 It would appear that there were disputes from time to time. It is not necessary to go into the detail of those disputes and it is probably undesirable to do so, having regard to the nature of the issues in these proceedings.

5 On 26 July 2006, Kruger served a payment claim on Veolia, claiming the sum of $482,631.05. I shall refer to that as "the July payment claim".

6 Veolia provided a payment schedule to Kruger on 9 August 2006. It disputed liability for the amount claimed, on a number of bases.

7 The dispute thereby constituted was referred to adjudication on 22 August 2006. Ms Helen Durham accepted appointment as adjudicator. She handed down her determination on 13 September 2006. She determined that the amount owing by Veolia to Kruger was $428,291.

8 Veolia claims in these proceedings that Ms Durham's determination is void. It says that she failed to comply with certain basic and essential requirements of the Act, failed to afford Veolia such measure of natural justice as the Act requires and failed to make an attempt in good faith to exercise the powers given to her by the Act for the purposes for which those powers were given. Details of the grounds of that challenge are set out in paragraphs 12 to 26 of the Technology and Construction List Statement annexed to Veolia's summons in these proceedings.

9 Apparently to preserve its rights under the contract, Kruger served a further payment claim on 24 November 2006. Although I have said that this was done apparently in an attempt to preserve its rights, it is important to note that the amount claimed was, in round terms, $100,000 more than the amount claimed by the July payment claim; precisely $582,519.04.

10 To the extent that the November payment claim (as I shall call the document served on 24 November 2006) replicates the July payment claim, that is a procedure in terms authorised by s13(6) of the Act, in circumstances where the two payment claims were served in respect of different reference dates.

11 However, to the extent that the November payment claim replicates the July one, it would impose on any adjudicator nominated to determine a dispute arising under it an obligation pursuant to s22(4) of the Act to value what might be called the overlapping or concurrent work in the same amount (where applicable) that Ms Durham had valued it, unless satisfied that the value of that work had changed since Ms Durham's determination.

12 In the circumstances of this case, it is unlikely, to the point of near impossibility, that any subsequent adjudicator could be convinced that the value of the relevant work had changed since the date of Ms Durham's determination.

13 In those circumstances, Veolia, by notice of motion filed in court on 1 December 2006, sought, among other relief, an order restraining Kruger from lodging an adjudication application or taking any further step under the Act in respect of the November payment claim, until the issues propounded for determination in these proceedings have been decided by the Court. It did so because it was concerned that any subsequent determination of necessity would proceed in accordance with s22(4), in respect of overlapping work as between the two payment claims, in circumstances where (it wishes to argue), Ms Durham's determination of the value of at least some of those items was infected by reviewable error.

14 Thus, Veolia submitted, it would be exposed to injustice in the event that its challenge succeeded because, notwithstanding that hypothetical success, any hypothetical second adjudicator would be required to decide, and no doubt would have decided, the hypothetical second adjudication on the basis of Ms Durham's determination to the extent that s22(4) so required.

15 It is not entirely certain that the outcome would be as gloomy for Veolia as it submitted. It is at least arguable that if this Court were to determine that Ms Durham's determination is void (ie, ab initio), and were to grant relief accordingly, then any subsequent determination that purported to be founded upon Ms Durham's determination, as mandated by s22(4) of the Act, would likewise be void. That, however, is more a matter of concern to Kruger than to Veolia.

16 The particular difficulty in this case arises because, on Kruger's case, it ceased to perform work or last performed work under the contract on about 12 February 2006. Thus, any further payment claim that it wishes to bring must be served no later than that date. See s 13(4)(b) of the Act. I should note that Veolia's case is that work was last performed in October 2005 at the latest, so that it is not now (and was not on 24 November 2006) open to Kruger to make any further payment claim. I cannot resolve that factual dispute in this interlocutory application.

17 In circumstances where (as Kruger submits) the reference date is, or may be assumed to be, the 25th of each month, that means, in substance, that any further payment claim must be served by 25 January 2007. Except for the matters to which I will in due course refer, that would mean, in substance and as a matter of practicality, that

Kruger's opportunity to seek a further adjudication of its outstanding claims would be denied in the event that this Court overturned Ms Durham's determination, and in the event that Kruger were to be prevented from proceeding on the adjudication of the dispute likely to be constituted based on its November payment claim.

18 In those circumstances, I think, Veolia has made out a prima facie case for some form of relief. I say that whilst acknowledging the force of the submissions put by Mr Nicholls of counsel for Kruger, that his client, on its case, has a statutory right to bring a payment claim (see s13(1)) and to do so notwithstanding that it may include an amount that has been the subject of the previous claim (see s13(6)).

19 The Court has stressed on many occasions the importance of the scheme set up by the Act. It has recognised that the legislature intended to impose what in ***Musico v Davenport*** [2003] NSWSC 977 I called a somewhat rough and ready scheme of interim determination of rights. It has recognised on a number of occasions that the court should be slow to intervene in the working out of the statutory scheme or to interfere with the exercise of statutory rights.

20 All that may be accepted. However, it must also be accepted that the legislature intended that the rights given by the scheme embodied in the Act would be for the benefit and burden of all parties to a construction contract. Among other things, that is why the legislature, at least by implication, provided that parties to an adjudication application were entitled to some measure of natural justice.

21 In the context of the present case, I think there would be a potentially very serious, and probably irremediable, prejudice to Veolia if an adjudication were permitted to proceed on the basis of the November payment claim in circumstances where, as to at least part of the payment claim, the outcome would be dictated by what Ms Durham has already determined, and where it has a bona fide challenge on foot to that determination.

22 In that context, it is necessary to take into account that not all of Veolia's challenges to the payment claim, as advanced in its payment schedule, related to matters of valuation. Some of them related to matters of entitlement. In those circumstances, for the reasons that I gave in ***Rothnere v Quasar*** [2004] NSWSC 1151 and affirmed in ***John Goss Projects v Leighton Contractors*** [2006] NSWSC 798, it is, in my view, the case that any hypothetical second adjudicator would not be bound by Ms Durham's determination insofar as she determined the payment claim on the basis of entitlement rather than valuation.

23 But not all Veolia's challenges to the payment claim raised questions of principle, or entitlement. At least some of them raised what, on any view, are questions of valuation and no more.

24 In those circumstances, it seemed to me the question was how to mould relief in such a way as to protect Kruger's statutory rights whilst, at the same time, averting possible detriment to Veolia of the kind to which I have referred.

25 At one stage, the prospect was canvassed in argument that injunctive relief might be moulded so that Kruger could take no step other than referring the dispute for adjudication, but doing so on the basis that it and Veolia would agree, and the authorised nominating authority would concur, that the authorised nominating authority would not refer the dispute to an adjudicator until this Court had determined the substantive issues in the proceedings.

26 An outcome along those lines would seem to me not to interfere with any crucial timeline set out in the Act. In that context it may be noted that s19, which deals with the appointment of adjudicators, does not in terms specify any time within which an application is to be referred, or within which the adjudicator is to accept.

27 A timeline may be inferred from s26(1)(a), but that is a section which gives rights to a claimant and, by hypothesis, if Kruger had agreed to the course that I have outlined, in practice it would not be enlivened. If some solution along the lines that I outlined could be negotiated, then the strict timelines set down by ss 20 to22 of the Act would not apply, because that process is put into operation by notification of acceptance of the adjudication application.

28 However, on reflection, it seemed to me that such a scheme could only work with the consent of the parties, and if one were to find an authorised nominating authority that would go along with it. In that context, Veolia relied on an affidavit from its solicitor, Mr David Campbell-Williams, who is an experienced adjudicator and who also has experience as an officer of an authorised nominating authority.

29 He gave evidence that on one occasion, one authorised nominating authority had, in substance and with his involvement, acted in the way that I have outlined. It does not follow that another authorised nominating authority would likewise agree so to act; and there are obvious problems in having the dispute referred to an authorised nominating authority that might have the intervention of a person who is also the plaintiff's solicitor, necessary to secure the success of the project to which I have referred.

30 In short, it seemed to me on reflection, a grant of relief along those lines would be so complex and so conditional that, without clear evidence that everyone involved, including the authorised nominating authority, would accept it, the Court should not impose it on the parties.

31 I then raised with the parties the possibility that the matter be heard in vacation, bearing in mind that I will be sitting as the vacation judge for the last two weeks in January. Kruger was willing to accept that possibility. Veolia was not, in the sense that neither Mr Christie of counsel, nor Miss Culkoff of counsel who appeared with him, were then available.

32 However, I think, it is open to me to grant relief on terms; and as I indicated in the course of argument, if I were to grant relief, then I would do so on terms that Veolia accept a date for final hearing in the vacation, and that it take whatever steps may be necessary to enable that hearing to occur. If all those things then happen, then I will be faced with the burden of hearing and deciding the case, but that is something that I am prepared to assume.

33 In any event, as it seems to me, there is no reason why Kruger could not, between now and 25 January, make a further payment claim or payment claims. To the extent that any injunctive relief would prevent it from proceeding with its claim for the amount by which the November claim exceeded the July payment claim, there would be potential injustice. But that could be averted if it were to make yet another payment claim dealing with that.

34 It is difficult to see why, assuming (as events to date suggest may be likely) that there will be a dispute over any such further payment claim, that dispute could not proceed to adjudication in the usual way. However, the parties have not addressed in detail whether that would be likely to occur, and I do not rely upon it as a reason for the conclusion to which I have come. I mention it simply to show that, to the extent that granting injunctive relief would involve prejudice, because of the non-concurrent aspects of the November payment claim, there are mechanisms under the Act to overcome that.

35 In the circumstances, I think, the very difficult task of balancing the potential injustice to each party with the rights that the legislature intended to secure to people who agree to carry out construction work, would best be served by making an order restraining Kruger from proceeding further with any adjudication application based on its November payment claim but on the basis that the challenge to Ms Durham's determination is dealt with before what is, on Kruger's case, the last date for it to make a further payment claim.

36 However, as I hope I have made clear, I would not intend by any such order to prevent Kruger from serving such further payment claim as it may be advised is appropriate. I would simply say that if the further payment claim reiterates the matters that were the subject of Ms Durham's adjudication, then it is likely that another vacation judge - not me, I hope - will be troubled by an application of the kind that has been before me yesterday and today.

37 In the course of argument, Mr Christie accepted that his client would accept the condition on which I propose to grant relief in accordance with prayer 4 of the notice of motion . Mr Christie has just confirmed that.

38 I will, therefore, upon Veolia by its counsel giving to the court the usual undertaking as to damages and agreeing to accept a hearing date before me in the vacation, notwithstanding any inconvenience to it, make an order in accordance with prayer 4 of the notice of motion. I will also give such directions as may be necessary (and, if necessary, varying those given by the Court on 13 October 2006) to ensure that the hearing during the vacation proceeds and is dealt with as efficiently as possible.

39 In the circumstances, I think it would be appropriate for the parties to give thought to the precise form of the order that should be made, including the notation of the undertakings to which I have referred. When that is done I will come back to the matter and I will also hear the parties on the question of costs.

COUNSEL ADDRESSED ON COSTS

40 There is a dispute as to the costs of the interlocutory application that I have just, in principle, decided. Veolia says that it should have its costs or that the costs should be costs in the proceedings; Kruger submits that it should have its costs.

41 Any order that gave one party its costs on an unconditional basis at this stage would be capable, in my view, of producing injustice. Although the issue was discrete, if one defines the issue narrowly as being whether or not an adjudication application should proceed on the November payment claim, the real issue relates to the underlying issues in the proceedings (see s22(4)) to which I referred in my earlier reasons.

42 In a sense, therefore, the question of ultimate entitlement to injunctive relief will depend on the outcome of the principal proceedings. If Veolia's challenges succeed, then my decision to grant the injunction will have been, as it were, retrospectively validated. If they fail, it will be seen, retrospectively, that the injunction was unnecessary.

43 In those circumstances, I think, the appropriate starting point, from which any variation should be considered, is that, prima facie, the costs of the application should be costs in the proceedings.

44 There are, however, in my view, circumstances that do warrant consideration. One of those relates to the somewhat peremptory way in which the interlocutory application was brought, in circumstances where the parties did not explore whether there were alternative courses of action.

45 One possible course of action may have been to request an adjudicator to agree not to decide the application until after this Court had given its reasons. Section 21(3)(b) of the Act would provide a legislative justification for such a request, although arguably it would not impose on the adjudicator any obligation to accept the agreed position of the parties.

46 Another course may have been to request the authorised nominating authority not to refer the application to an adjudicator until these proceedings had concluded. I have dealt with that above, and would add only that it is a course that appears to have received the sanction of the Court of Appeal in the two ***Falgat Construction*** cases (***Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*** (2005) NSWCA 49 and ***Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd*** (2006) NSWCA 259). It is perhaps surprising that this course was not

pursued given, as I recounted in my earlier reasons, that Mr Campbell-Williams, the solicitor for Veolia, was aware of its potential availability.

47 Another factor that I think is relevant is that the nature of the debate has changed very substantially from what might have been thought to be in issue when the hearing of the application commenced at 2 p.m. yesterday. It is correct to say that the relief that I have indicated I will grant is that claimed by prayer 4 of the notice of motion. However, the issues and the basis upon which that relief is granted (including acceptance of the condition of an early hearing date) all involved very substantial discussion and analysis.

48 Mr Nicholls relied on the circumstance that his client was subject to a deed of company arrangement and that it was incurring, and would continue to incur, costs. I accept the force of that. It does not, however, give it any entitlement to costs that a proper exercise of the costs discretion would otherwise not provide to it.

49 In my view, the appropriate costs order, reflecting the two matters to which I have referred, is that the costs of the interlocutory application should be the defendant's costs in the proceedings. I will so order in the short minutes of order that the parties should bring in.

M. Christie with V. Culkoff – Plaintiff instructed by Thomson Playford
N. A. Nicholls – Defendant instructed by Wilkinson Building & Construction Lawyers