O'Donnell Griffin P/L v Roger Davis (1); Theiss Services PL t/a STCV Services for Telecommunications Joint Venture (2)

JUDGMENT : TEMPLEMAN J. SUPREME COURT OF WESTERN AUSTRALIA. 16 AUGUST 2007

1 On 16 August 2007, I heard an application by the plaintiff for an order that the first defendant be restrained from hearing or otherwise determining the second defendant's application for adjudication pursuant to the ***Construction Contracts Act 2004*** (WA). The first defendant, who is an adjudicator appointed under that Act, took no part in the proceedings other than to notify me that he intended to abide the outcome.

2 For reasons which I gave ex tempore, I dismissed the application and ordered the plaintiff to pay the second defendant's costs on an indemnity basis.

3 I was then asked by senior counsel for the second defendant to publish my reasons, there being little authority on the operation of the *Construction Contracts Act*. Regrettably, the proceedings were not recorded. I therefore set out my reasons anew. The substance of those reasons will be the same as those I gave ex tempore, but not the form. I am grateful for the assistance of counsel who have provided me with their notes.

Reasons for decision

4 The plaintiff is an electrical contractor which was engaged to perform the design and construction of certain works required for the south west metropolitan railway project. By a subcontract dated 12 January 2005, the plaintiff engaged the second defendant to perform some of those works as a subcontractor.

5 Disputes arose between the plaintiff and the second defendant as to the second defendant's entitlement to damages to compensate it for the cost of delays in the project for which the second defendant contends it was not responsible.

6 By cl 34.9 of the subcontract, delay damages are payable only when the second defendant has been awarded an extension of time for a compensable cause. The second defendant contends that extensions of time should have been awarded: and that it is being denied payments properly due under the subcontract.

7 The second defendant sought to pursue its claim against the plaintiff under the *Construction Contracts Act*. It did so by referring the dispute to the Institute of Arbitrators & Mediators Australia, Western Australian Chapter (IAMA) by notice dated 7 August 2007. The IAMA is the prescribed appointor for the purposes of the *Construction Contracts Act*.

8 By s 28(1) of the Act, the IAMA was required, within five days after being served with the application, to appoint a registered adjudicator to adjudicate the dispute.

9 By letter dated 9 August 2007, the IAMA notified the parties that pursuant to s 28 of the Act, Mr Roger Davis had been appointed as adjudicator. Unfortunately, the letter incorrectly stated that the second defendant's application had been received on 8 August.

10 On 14 August, the plaintiff's solicitors wrote to the second defendant referring to the IAMA's letter of 9 August and to s 26(1)(c) of the *Construction Contracts Act* which provides that a party seeking to have a payment dispute adjudicated must serve its application on the prescribed appointor within 28 days after the dispute arises.

11 The plaintiff's solicitors noted that the second defendant had stated that the payment dispute arose on 10 July. That being so, as the plaintiff's solicitors pointed out, an application served by the second defendant on 8 August would have been out of time.

12 In these circumstances, the plaintiff's solicitors sought confirmation that the application would be withdrawn, failing which, an application would be made to this court 'for an injunction and a declaration barring the adjudication application from being adjudicated pursuant to the *Construction Contracts Act*'.

13 The second defendant responded immediately to the letter from the plaintiff's solicitors. The second defendant pointed out that it had made its application for adjudication on 7 August, not on 8 August, and was not therefore out of time.

14 By s 27 of the *Construction Contracts Act*, the plaintiff was required to prepare and serve a written response to the second defendant's application within 14 days of receipt of that application; in this case, by 21 August.

15 Under s 25 of the *Construction Contracts Act*, only 'a payment dispute' can be referred to adjudication.

16 By s 6(a) of the Act, a payment dispute arises when the amount claimed in a 'payment claim' is due to be paid but has not been paid in full, has been rejected, or has been wholly or partly disputed.

17 A 'payment claim' is defined in s 3 of the Act to include a claim made under a construction contract by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under the contract.

18 The second defendant contends that a claim for delay damages is within the definition of 'payment claim', because it arises 'in relation to' the performance of its obligations under the subcontract. That approach, it is submitted, is supported by a number of authorities to the effect that the words 'in relation to' or 'relates to' have a wide connotation and are to be given a broad meaning: see ***Lionsgate Australia Pty Ltd v Macquarie Private Portfolio Management Ltd*** [2007] NSWSC 318 [31], ***Chief Executive Officer of Customs v AMI Toyota Ltd [2000] FCA 1343;*** (2000) 102 FCR 578, 589, ***Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;*** (1998) 194 CLR 355, 387.

19 The second defendant relies also on ***Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd*** [2005] NSWCA 228 and ***Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*** [2005] NSWCA 229, where it was held that delay damages and interest could be claimed under the *Building and Construction Industry Security of Payment Act 1999* (NSW), legislation which is broadly equivalent to the *Construction Contracts Act*.

20 Against that, the plaintiff contends that because the second defendant's entitlement to delay damages arises only when an extension of time has been granted, and that no such extension has been granted in relation to the present dispute, the claim is not 'a payment claim' and the adjudicator therefore has no jurisdiction to entertain it.

21 In these circumstances, rather than responding to the second defendant's application within the 14-day period prescribed by s 27 of the *Construction Contracts Act*, the plaintiff sought to restrain the adjudicator from determining the dispute.

22 On 15 August, the plaintiff issued a writ and a chamber summons. The writ contained an indorsement of claim in the following terms:

> The Plaintiff's claim arises out of a subcontract agreement (the Subcontract) entered into between the Plaintiff and the Second Defendant being part of Package A of the South West Metropolitan Railway Project and the Plaintiff claims:
>
> 1. A permanent injunction restraining the First Defendant from hearing or otherwise determining the Second Defendant's Application for Adjudication pursuant to the **Construction Contracts Act 2004** (the Act) dated 7 August 2007 (the Application).
> 2. A declaration that the claim the subject of the Application is not a payment claim pursuant to the provisions of the Act.
> 3. Further alternatively that such part of the claim the subject of the Application that is a claim for delay damages is not a payment claim pursuant to the provisions of the Act.
> 4. A declaration that by reason of clauses 34 and 41 of the Subcontract s 10 of the Act does not apply to the Application alternatively to such part of the claim the subject of the Application that is a claim for delay damages.
> 5. Such further relief as the Court deems fit.
> 6. An order that the Second Defendant do pay the Plaintiff's costs.

23 By the chamber summons, the plaintiff sought an interlocutory injunction in the terms of par 1 of the indorsement.

24 Order 6 r 1(1) of the *Rules of the Supreme Court 1971* (WA) provides that a writ must be indorsed with a concise statement of the nature of the claim made, and of the relief or remedy required in the action.

25 It is generally accepted that the words 'the nature of the claim' are intended to refer to the cause(s) of action relied upon by the plaintiff.

26 It is well settled that an applicant for an interim or interlocutory injunction must demonstrate that there is a serious question to be tried: see ***Castlemaine Tooheys Ltd v South Australia [1986] HCA 58;*** (1986) 161 CLR 148, 153. It follows, that the writ in the action in which interim or interlocutory injunctive relief is sought, must disclose a cause of action. As Gleeson CJ said in ***Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63;*** (2001) 208 CLR 199:

> *[A] plaintiff seeking an interlocutory injunction must be able to show sufficient colour of right to the final relief, in aid of which interlocutory relief is sought (217).*

And as Gummow and Hayne JJ said:

> *The basic proposition remains that where interlocutory injunctive relief is sought in a Judicature system court, it is necessary to identify the legal (which may be statutory ...) or equitable rights which are to be determined at trial and in respect of which there is sought final relief which may or may not be injunctive in nature (241).*

27 In my view, the plaintiff's writ in the present case does not disclose a cause of action against the first defendant, as adjudicator. There is nothing in par 1 of the indorsement which identifies any legal, statutory or equitable rights asserted by the plaintiff against the first defendant.

28 Nor, in my view, does the indorsement disclose any cause of action against the second defendant. I accept that a declaration can be sought in respect to a right: see ***Newport Association Football Club Ltd v Football Association of Wales Ltd*** [1995] 2 All ER 87, 94. However, the plaintiff's indorsement does not assert any right, or the threatened infringement of any right.

29 As I have noted above, the plaintiff's principal contention is that the second defendant's claim is not a payment claim within the meaning of the *Construction Contracts Act*, with the result that the adjudicator has no jurisdiction to determine it.

30 In my view, it is not appropriate for me to express any view in this application as to the soundness or otherwise of the plaintiff's contention. Whether or not the adjudicator has jurisdiction is, in the first instance, a matter for him. As the authors of *Building and Construction Contracts in Australia* say:

> *[A] nominee/arbitrator is entitled to consider a question going to his jurisdiction to the point of investigating and satisfying himself that there is a dispute and that it is worthwhile proceeding further [14.362/1].*

31 I consider that approach to be particularly apposite in the present case, for two reasons. First, s 31(2)(a)(iv) of the *Construction Contracts Act* imposes on the adjudicator an obligation to dismiss an application without making a determination of its merits if satisfied that it is not possible to fairly make a determination because of the complexity of the matter.

In other words, an adjudicator who was faced with a complex question of jurisdiction which he or she felt unable to resolve on the papers would be obliged to dismiss the application.

32 I wish to emphasise that I should not be taken as suggesting to the adjudicator that he adopt that course in the present case. It is entirely a matter for him to decide.

33 Secondly, even if an adjudicator determined an application when, as a matter of law, no jurisdiction existed, the party against whom the determination was made would remain entitled to institute proceedings pursuant to s 45 of the *Construction Contracts Act*, to reclaim moneys it had been required to pay. I shall refer to that provision in more detail below.

34 In my view, by seeking the relief against the adjudicator as it has, the plaintiff must be attempting to invoke some supervisory jurisdiction vested in this court, over inferior courts or tribunals. However, the indorsement does not assert the existence of any such jurisdiction: and in my view, none exists.

35 I respectfully adopt the following passage from the speech of Lord Diplock in ***Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd*** [1981] AC 909 that:

[T]he general supervisory jurisdiction of the High Court over the proceedings of inferior courts and tribunals extended only to 'bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction'. These bodies would include arbitrators appointed to conduct a statutory arbitration to whose jurisdiction parties to a particular kind of dispute are compelled to refer it for determination, but they do not include arbitrators appointed pursuant to private arbitration agreement(s) (978).

36 The adjudication regime established under the *Construction Contracts Act* is not compulsory. In any event, if the court did have some supervisory jurisdiction over an adjudicator appointed under the *Construction Contracts Act*, then, as I have noted above, that jurisdiction would only be exercised in order to protect some legal or equitable right possessed by the plaintiff. And by reason of s 45 of the Act, even an erroneous adjudication would not deprive the plaintiff of its contractual rights.

37 I therefore conclude that because the indorsement on the writ does not disclose any cause of action against the adjudicator, the plaintiff has failed to establish that there is a serious question to be tried as against him.

38 On that ground, the application should be dismissed.

Failure to comply with O 59 r 9

39 Order 59 r 9 of the *Rules of the Supreme Court* provides that:

(1) No order shall be made on an application in chambers unless the application was filed with a memorandum stating -

(a) that the parties have conferred to try to resolve the matters giving rise to the application; and

(b) the matters that remain in issue between the parties.

(2) The Court may waive the operation of paragraph (1) in a case of urgency or for other good reason.

40 In the present case, no such memorandum as is required by O 59 r 9 was filed with the chamber summons.

41 At the commencement of the hearing, counsel for the plaintiff handed up a memorandum of conferral in which it was said that the parties had conferred to try to resolve the matters giving rise to the application. The steps taken in purported compliance with O 59 r 9 were then set out. The first step was a telephone call by the plaintiff's solicitor to the second defendant's receptionist, requesting that the second defendant's commercial and contract manager return the call to discuss conferral about the plaintiff's application. However, this approach was not made until after the proceedings had been commenced and the chamber summons issued.

42 Subsequently, the plaintiff's solicitor conferred by telephone with the second defendant's solicitor who said:

She had read the plaintiff's outline of submissions and was of the view that the plaintiff's application was misconceived and that Counsel had been instructed to oppose the application.

43 When I received the papers on the morning of 15 August, I noted the absence of an O 59 r 9 memorandum and the absence of any prayer in the chamber summons for waiver of compliance with that rule. I therefore instructed my associate to contact the plaintiff's solicitors to inform them that I would require an explanation about the lack of conferral. I assume it was this approach which prompted the plaintiff's belated attempt to confer, later that afternoon.

44 The importance of O 59 r 9 cannot be overstated. Even in cases where the prospect of resolution appears to be hopeless, conferral between their respective solicitors or counsel is often successful, if not in resolving the dispute, at least in narrowing the issues, to the benefit of all concerned.

45 The plaintiff's solicitors are a large firm, heavily engaged in litigation in this court. They should be well aware of the requirements of O 59 r 9, which has now been the subject of numerous judgments. I can see no excuse for their failure to comply with O 59 r 9, and none has been proffered.

46 The plaintiff claims that the matter is urgent. However, in my view, the urgency is largely of the plaintiff's own making. It will be recalled that the plaintiff did nothing in response to the second defendant's application for adjudication, having been informed, wrongly, that the application was one day out of time. A telephone call to the second defendant or its solicitors would have identified the error immediately and would have enabled the plaintiff to consider its position much sooner than it did.

47 In all the circumstances, I see no reason to waive compliance with O 59 r 9 so on that ground also, I would dismiss the application.

Damages would be an adequate remedy

48 If I am wrong down to this point, I would decline to grant an injunction against the adjudicator, because in my view, damages would be an adequate remedy.

49 I have referred above to s 45 of the *Construction Contracts Act*. It provides as follows:

(1) This Part does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person or a court or other body in relation to a dispute or other matter arising under the contract.

(2) If other such proceedings are instituted in relation to a payment dispute that is being adjudicated under this Part, the adjudication is to proceed despite those proceedings unless all of the parties, in writing, require the appointed adjudicator to discontinue the adjudication.

(3) Evidence of anything said or done in an adjudication is not admissible before an arbitrator or other person or a court or other body, except for the purposes of an application made under section 29(3) or an appeal made under section 46.

(4) An arbitrator or other person or a court or other body dealing with a matter arising under a construction contract -

(a) must, in making any award, judgment or order, allow for any amount that has been or is to be paid to a party under a determination of a payment dispute arising under the contract; and

(b) may make orders for the restitution of any amount so paid, and any other appropriate orders as to such a determination.

(The reference in s 45(3) to 'an appeal' made under s 46 must be taken to be a reference to a review under that section.)

50 In my view, the effect of s 45(3) is that nothing said or done by an adjudicator is in the least binding on the parties. Although the outcome of the determination must be taken into account by an arbitrator or a court in subsequent proceedings, I consider that s 45(3) makes the adjudicator's reasons for reaching his or her conclusion inadmissible in those proceedings. That is because the production of reasons by the adjudicator is something 'said or done' in the adjudication.

51 That being so, any determination by an adjudicator must be regarded as provisional, pending the reconsideration of the dispute anew, in conventional arbitration or litigation.

52 This approach is, I think, consistent with the intention of Parliament as appears from the second reading speech relating to the Construction Contracts Bill in the Legislative Assembly on 3 March 2004.

The rapid adjudication process allows an experienced and independent adjudicator to review the claim and, when satisfied that some payment is due, make a binding determination for money to be paid. The rapid adjudication process is a trade-off between speed and efficiency on the one hand and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes. The process is kept simple and therefore cheap and accessible, even for small claims.

In most cases the parties will be satisfied by an independent determination and will get on with the job. If a party is not satisfied it retains its full right to go to court or use any other dispute resolution mechanism available under the contract. In the meantime the determination stands, and any payments ordered must be made on account pending an award under the more formal and precise process.

53 There is no suggestion in the present case that the second defendant would be unable to repay to the plaintiff any moneys it received under an erroneous determination by the adjudicator, if, in subsequent proceedings, the second defendant was ordered to repay.

54 This approach is supported also, I think, by s 46 of the *Construction Contracts Act* which provides:

(1) A person who is aggrieved by a decision made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision.

(2) If, on a review, a decision made under section 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make a determination under section 31(2)(b) within 14 days after the date on which the decision under section 31(2)(a) was reversed or any extension of that time consented to by the parties.

(3) Except as provided by subsection (1) a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

55 It is to be noted that a decision made under s 31(2)(a) is a dismissal of an application without making a determination of its merits. There is no right to a review or appeal by any person who is aggrieved by a

determination. That is undoubtedly because, having regard to s 45, there is no need to make provision for a review or appeal from a determination. The aggrieved person's rights are preserved by s 45.

The balance of convenience

56 If I am wrong down to this point, I would decline to grant an injunction as sought by the plaintiff on the ground that the balance of convenience favours the second defendant.

57 In reaching that conclusion, I take into account the fact that if the adjudicator considers he has no jurisdiction, or if he considers the matter too complex to enable him to fairly make a determination, he will dismiss the application in any event. I take into account also the fact that any determination by the adjudicator would be provisional only, in the sense to which I have referred above: and I take into account the policy of the *Construction Contracts Act*, as set out in the second reading speech.

58 In my view, the plaintiff's application is an attempt to undermine the policy of the Act, not to give effect to it. For those reasons, I consider that the balance of convenience falls in favour of permitting the adjudication process to proceed.

Costs

59 Having dismissed the application, and having heard argument on costs, I ordered the plaintiff to pay the second defendant's costs forthwith, such costs to be taxed on an indemnity basis.

60 I made that order on the basis of the submission made by senior counsel for the second defendant, who cited the well-known passage in ***Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*** (1988) 81 ALR 397, 401. The passage, which is set out in Seaman on Civil Procedure, is as follows:

[W]henever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he or she had no chance of success, the action must be presumed to have been commenced or continued for some ulterior motive or because of some wilful disregard of known facts or the clearly established law, and in those circumstances an award of solicitor and client or 'indemnity costs' should be considered [66.1.16A].

61 In the same paragraph, Seaman cites ***FAI General Insurance Co Ltd v Burns*** (1996) 9 ANZ Ins Cas 61-384 for the proposition that:

Indemnity costs may be awarded against a party whose conduct unacceptably departs from the standards of litigation in a commercial court in a way which prevents the court from conducting the litigation in an expeditious way (77,221).

62 In the present case, senior counsel for the second defendant expressly disavowed any suggestion that the plaintiff had some ulterior motive in making this application. However, I considered that the wholly unacceptable failure of the plaintiff to comply with O 59 r 9, its pursuit of relief against the first defendant, when no cause of action exists, when damages are clearly an adequate remedy and where the balance of convenience clearly favours the defendant, warranted the imposition of indemnity costs.

Plaintiff : Mr P G McGowan instructed by DLA Phillips Fox
First Defendant : No appearance
Second Defendant : Mr M H Zilko SC & Mr S J Davis instructed by Jackson McDonald