On Hing Pty Ltd v Phoenix Project Development Pty Ltd [2006] QDC 159

ORDER: Application refused

CATCHWORDS: Stay - Stay of order that monies be paid out of court – Monies paid into court after adjudication under *Building and Construction Industry Payments Act* 2004 – previous refusal of applicant's application to set aside adjudicator's order – whether stay of payment out to respondent should be ordered

LEGISLATION *Building and Construction Industry Payments Act* 2004

CASES *Brodyn Pty Ltd v Davenport* [2004] 61 NSWLR 421 at 449
McLaughlins Family Restaurant v Cordukes Ltd [2004] NSWCCA 447
Phoenix Project Development Pty Ltd v On Hing Pty Ltd [2006] QDC 075

JUDGMENT: Alan Wilson SC, District Court of Queensland, Brisbane. 8th June 2006

[1] This is a further application in a matter previously dealt with in my judgment in *Phoenix Project Development Pty Ltd v On Hing Pty Ltd* [2006] QDC 075. An adjudicator appointed under the *Building and Construction Industry Payments Act* 2004 (BCIPA) ordered in December last year that On Hing pay a progress payment to Phoenix in the sum of $95,510 plus interest and Phoenix, as it was entitled to do, registered that order as a judgment in this court on 16 December 2005. The previous judgment dismissed On Hing's application to set that judgment aside.

[2] On Hing had paid the money into court and, in this application, seeks another order staying payment out to Phoenix until the determination of proceedings it now wishes to bring, here, which dispute Phoenix's right to that payment under the contract between the parties. The matter was touched upon in the previous decision:

> [15] *Strictly speaking it is, then, unnecessary to deal with On Hing's application for a stay of the judgment but, even if a different conclusion had been reached, this is not a case in which a stay would be warranted. The legislation clearly intends that progress payments and the like will be made with a minimum of delay and court involvement, and adjusted later if necessary; there is no suggestion that hardship has been caused to On Hing by its payment into Court; there is a probable risk of hardship, however, to Phoenix since it requires money to pay subcontractors; there is no evidence of any risk if the money is paid to Phoenix; and, even on the most generous view of the evidence presented by On Hing, its case could never be described as a strong one.*

[3] The matters now relied upon by On Hing for a stay were not raised at the earlier hearing. It is asserted, for the first time, that the contract between the parties did not comply with the *Queensland Building Services Authority Act* 1999 (QBSA) because Phoenix was not properly licensed when it entered into the contract; and, the contract itself was not in writing. It is unclear why these matters were not raised at the earlier hearing, although the factual basis for the latter was apparent from evidence available then. Now, an affidavit filed on On Hing's behalf shows a licence search of Phoenix dated 18 April 2006 but the deponent, a Mr Chan, does not say when he first became aware of the issue nor proffer any explanation as to why the search was not performed until that time.

[4] In any event I am not persuaded they avail On Hing now. Sections 42 and 67G of the QBSA address the requirement that a person who carries out building work hold the appropriate licence, and that building contracts be in writing. Similar New South Wales legislation (sections 4 and 10 of the *Home Building Act* (NSW)) were considered by the NSW Court of Appeal in *Brodyn Pty Ltd v Davenport*,[1] and Hodgson J A said:

> [81] *It was submitted for Brodyn that, because Dasein did not have a licence under the Home Building Act, the sub contract was illegal (section 4) and unenforceable (section 10). Accordingly, Dasein was not entitled to any progress payment.*
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> [82] *In my opinion, the civil consequences for an unlicensed contractor for its breach of section 4 are those set out in section 10, and not any wider deprivation of remedies. In my opinion, this is confirmed by the different provisions of section 94, which explicitly precludes, in the event of breach of the insurance provisions, the obtaining of a quantum meruit unless a court considers it just and equitable. In my opinion, the remedy given by the Act is not of the nature of damages or any other remedy in respect of breach of contract nor is it enforcement of the contract; it is a statutory remedy, albeit one that in part makes reference to the terms of a contract, and thus is not effected by section 10 of the Home Building Act.*
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> [83] *Accordingly, in my opinion Dasein's failure to have a licence could not be a ground on which the adjudicator's determination could be considered void, or for otherwise giving relief in respect of the determination.*

[5] The adjudicator's decision concerns, as On Hing concedes, an interim progress payment of the kind plainly referred to in part 3 of the BCIPA. The NSW legislation uses, in section 10(1)(c) words which are arguably of wider import than those which appear in section 42(3) of the QBSA which, in the event building work is carried out by an unlicensed person, disentitle that person to "… *any monetary or other consideration for doing so*". That phrase, for the reasons advanced by Hodgson J A in para [82] in the passage from ***Brodyn Pty Ltd*** set out above, appears not to exclude payments which are of the kind intended under the BCIPA, part 3.

[6] It is, in any event, unclear from the evidence whether breaches of the QBSA actually occurred. Section 42(3) applies not to the time of contractual relations, but the time at which building work was actually performed. Although there are variations in the evidence, the work seems to have commenced in late June or early July 2005, and to have continued until the evening of 17 October 2005. The license shows that a Mr Tam became the licensed nominee of Phoenix on 5 August, and the license itself was granted to Phoenix on 10 August. It is impossible to conclude whether any part of the sum dealt with by the adjudicator ($95,510) relates to building work carried out before 10 August.

[7] It may also be relevant that Mr Tam, a director and shareholder of Phoenix, has himself been a licensed builder since 7 November 2003. Later, he and a Mr Ng formed Phoenix for the purpose of accepting construction work, and section 42(7) provides that an unlicensed person who carries out or undertakes to carry out building work in partnership with the person who is licensed does not contravene that section. Mr Franco of counsel for Phoenix, advanced an interesting argument that this was a form of "corporate partnership" between Mr Tam and Mr Ng but I do not think it is necessary to decide the matter – other

[1] 2004 (61 NSWLR 421 at 449) per Hodgson J A, with whom Mason P and Giles J A agreed.

than to say that because section 42 is a penal provision, it is fair to regard the breach, if it occurred, as primarily nothing more than a technical one.

[8] Finally, the discretionary factors set out in my earlier judgment continue to apply, with the addition of even more delay. The only change is that On Hing has raised fresh matters by way of defence or counter claim but as section 31(4) of BCIPA makes clear, those matters should not generally delay interim payments of the adjudicated amount. Those new matters may, however, be adjudicated in the proceedings On Hing now intends to commence. Those factors, in the context discussed above, enhance the readiness with which it may be concluded a stay is inappropriate. As Giles J A said in *McLaughlins Family Restaurant v Cordukes Ltd* [2004] NSWCA 447 at [10]: "*… the court should be reluctant to grant a stay where there is no case of hardship and the final position between the parties can be worked out in the larger proceedings which the claimant is to bring.* "

[9] The application should be dismissed. I will hear further submissions about the form of any further orders, and about costs.

Mr P A Kronberg for the Applicant instructed by MCA Lawyers
Mr P R Franco for the Respondent instructed by Joseph Ho Lawyers