

**Australian Remediation Services P/L v Earth Tech Engineering P/L & The Institute of Arbitrators & Mediators
Australia**

JUDGMENT : McDougall J : New South Wales Supreme Court, 14th April 2005

- 1 The plaintiff and the first defendant are parties to a "remediation deed" made on 17 October 2001. The plaintiff says that the deed has come to an end. The deed relates to remediation work for a site at Rhodes, apparently much contaminated, which the Meriton Group (of which I understand the plaintiff is a part) wishes to redevelop for home unit accommodation.
- 2 The first defendant takes the view the contract is one which is for the performance of construction work, or the supply of related goods and services, or both, for the purposes of the *Building and Construction Industry Security of Payment Act 1999*. It apparently made a payment claim under that Act; and, apparently the plaintiff has taken the view that the claim is not payable.
- 3 The first defendant has now made an adjudication application to the second defendant. The plaintiff seeks orders, on an interlocutory basis:
 - (1) restraining the first defendant from proceeding with that application; and
 - (2) restraining the second defendant from appointing an adjudicator.
- 4 The nature of the plaintiff's case may be gathered from prayers (a) to (e) of its amended summons, as follows:
 - "(a) A declaration that none of the claims made by the First Defendant in its payment claim under s 13(1) of the *Building and Construction Security of Payment Act No 46 of 1999 (NSW) (the Act)* fall within the definitions of construction work and/or related goods and services as defined in ss 5 and 6 of the Act.
 - (b) A declaration that the payment claim submitted by the First Defendant is invalid and of no force and effect, in that it does not, as required by s 13(2)(a) of the Act, identify the construction work (or related goods and services), to which the progress payment relates.
 - (c) A declaration that because of the complexity of the issues involved in this matter, it is inappropriate to be the subject of an adjudication under the Act.
 - (d) A Declaration that because of the vast volume of paper served by the First Defendant in support of its adjudication application, it cannot be expected of the Plaintiff within the statutory time frame to provide an adequate adjudication response, and accordingly there will be a lack of procedural fairness as required by the Act if this adjudication proceeds.
 - (e) A Declaration that as the Second Defendant is also the appointing body under the arbitration clause in the Remediation Deed, the Second Defendant cannot, because of the perception it would give of bias, also act as the nominating authority of an adjudicator."
- 5 In essence, the plaintiff says it is seeking an anti-suit injunction. It relies on the decision of the Court of Appeal in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2005] NSWCA 49 at [24]. It did not explain how what was said there applied, or related, to the relief claimed in these proceedings.
- 6 The plaintiff puts its case in various ways, but underlying the ways in which the case is put is the proposition that the payment claim is beyond the power of an adjudicator under the Act to determine. That is, for various reasons, including (and this is not comprehensive) that the relevant work is not construction work or does not amount to related goods and services; or that the payment claim is inadequate having regard to the requirements of s13 of the Act; or that the claim for a quantum meruit payment is beyond the jurisdiction of an adjudicator.
- 7 The plaintiff has not taken me to the detail of the work that the first defendant undertook to carry out. However, if one makes one's way through the remediation deed, the answer appears to be found in schedule 1, which I set out: "*Remediation Work comprises the following in relation to the Site, each as more fully described in the Remediation Act Plan:*
 - the remediation and improvement of the Site for the use of the various areas as set out on the Site Plan;
 - the use of Direct Thermal Desorption ("DTD") or other suitable processes to reduce all Contaminants to acceptable levels;
 - the construction of the Slurry Wall and Seawall, with the Seawall to be replaced with new materials in all sections where there is unacceptable Contamination, and completed in a similar finish to the existing seawall;
 - the preparation of plans and specifications for remediation work;
 - the obtaining of various approvals, permits and licences from all relevant authorities;
 - the clearing, remediation, excavation, and supervision of the remediation work;
 - stage 1 (being lot 100), Point Park, and lot 103 (as shown on the Site Plan) must be commenced first, with Stage 1 to have reached Practical Completion within 12 months of the Actual Approval Date;
 - Earth Tech must backfill material to 95% standard dry density in accordance with AS1289 5.2.1;
 - backfill material in proposed residential areas must be suitable for unrestricted off-site disposal;
 - Earth Tech must take all necessary measures to ensure that no unacceptable Contamination (including Contamination from parts of the Site designated for parks and roads) is transferable above, on or under the land at any time to any part of the Site designated for unrestricted residential use;
 - maintenance of security of the Site during the remediation work;

· such other activities as contemplated by this deed or agreed from time to time between the parties.”

- 8 It is plain that many of those items are either construction work or related goods and services. Others relate to the ways in which construction work is to be performed, or related goods and services are to be provided.
- 9 The payment claim that was made includes a vast number of items. On the face of them, some may not be - I express no concluded view on this - for construction work or for related goods and services. For example, it may be - again, I express no view - that the claim for insurance premium, or the claim for attending a commission of inquiry, do not come within the ambit of the Act. A decision on those points would require an understanding of the way in which the parties agreed that the defendant should be remunerated, and of the way in which that remuneration was to be calculated.
- 10 However, it seems to me, they are all arguments that can be raised before the adjudicator when one is appointed. The primary point taken by the plaintiff in this regard, basing itself upon English authorities referred to in its outline of submissions, is that an adjudicator under the Act has no power to determine his or her own jurisdiction. That may very well be the effect of the English authorities. However, as I pointed out in my judgment in *Musico & Ors v Davenport & Ors* [2003] NSW SC 977, the English authorities are of relatively little assistance when considering the NSW Act because of the very substantial difference between the insurance legislative scheme and the local legislative scheme. In any event, I think, the answer to that aspect of the plaintiff's claim is found in the decision of the Court of Appeal in *Brodyn Pty Limited v Davenport* [2004] NSWCA 394.
- 11 Before that decision was given, it had been thought (by me, among others - see my judgment in *Musico*) that the decision of an adjudicator might be reviewed where, among other things, it showed what I called jurisdictional error of law on the face of the record. The Court of Appeal has made it clear that that is not so; and that to grant such relief was inconsistent with the scheme of the Act. The Court, speaking through Hodgson JA, set out the relevant requirements at [55] as being:
- (1) Compliance with the basic requirements of the Act;
 - (2) A *bona fide* attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to the power; and
 - (3) No substantial denial of the measure of natural justice that the Act requires to be given.
- 12 It seems to me to be clear, when one takes account of the view of the Court of Appeal, that review on the basis of jurisdictional error of law on the face of the record is not available, that adjudicators must be understood to have power to consider whether claims, or components of claims, comprised in adjudication applications can, or cannot, be awarded under the Act.
- 13 Mr MS Jacobs QC, who appears for the plaintiffs with Mr P Bambagiotti of counsel, submits that the question of jurisdictional entitlement, if I can call it that, could be decided by this Court easily and quickly, and that the plaintiff ought not be put to the trouble and expense of making its response to the adjudication application. I can understand the theoretical desirability of that. However, I think, there are two problems. The first is that, having had a brief look at some of the material relied upon and an outline of the argument, I disagree fundamentally with the proposition that it would be an easy or a quick matter for this Court to determine the detailed arguments. The second is that the legislature has made it quite clear that it is adjudicators under the Act who are the primary organs for the resolution of these disputes. The power of this Court comes in either to enforce the determination (a power shared with other courts) or, in the limited circumstances described in *Brodyn*, to restrain enforcement of the determination. The whole scheme of the Act including, as Palmer J said in *Multiplex Constructions Pty Ltd v Luikens & Anor* [2003] NSWSC 1140, is one of “pay now, argue later”. It is clear from the provisions of s32 of the Act that the time for final adjustment of rights and remedies is later.
- 14 In circumstances where the legislature has enacted the legislation to provide, as s3 of the Act makes clear, a scheme to ensure that any person who undertakes to carry out construction work or supply related goods and services is entitled to recover, and is able to recover, progress payments, I think that this Court should think long and hard before interfering in the implementation, in a particular case, of that statutory scheme.
- 15 The arguments that have been outlined by Mr Jacobs in both oral and written submissions, are all arguments that can be put before the adjudicator. I see no reason why this Court should seek to investigate them, in some factual vacuum, so as to prevent the scheme of the Act being carried out.
- 16 For these reasons the application for interlocutory relief is refused.
- [Mr Christie sought costs]
- 17 I order the plaintiff to pay the first defendant's costs of the application. I am informed the second defendant has filed a submitting appearance.
- 18 Exhibits tendered on this application may be handed out.

P: MS Jacobs SC, PJ Bambagiotti instructed by P: Meriton Apartments Pty Ltd, Sydney
D1: M Christie instructed by D1: Allens Arthur Robinson, Sydney
D2: Submitting