Bell Partners Accountants and Business Advisors P/L v Kann Finch P/L [

JUDGMENT (Appeal decision of Local Court Magistrate; summary judgment; Building Construction Industry Security of Payment Act 1999 (NSW)) **: Master Harrison :** New South Wales Supreme Court : 8th November 2004

1 By amended summons filed 29 October 2004 the plaintiff seeks firstly, to appeal the decision of Local Court Magistrate Judge Michael Price made on 7 June 2004 pursuant to s 69 of the **Local Court (Civil Claims) Act** 1970 (NSW); secondly, an order setting aside the orders made on 7 June 2004; thirdly, an order that the defendant's motion be dismissed with costs; and fourthly, in the alternative, an order setting aside the orders of Magistrate Judge Price made on 7 June 2004 and remitting the matter the Local Court for determination. The plaintiff is Bell Partners Accountants and Business Advisors Pty Limited (Bell). The defendant is Kann Finch Pty Ltd (Kann). The plaintiff relied on two affidavits of Scott Maurice Freidman sworn 23 August 2004 and 21 October 2004 respectively.

2 At the outset, it may be helpful to make some brief comments concerning the remedy pursued by the plaintiff. Section 69(2) of the **Local Courts (Civil Claims) Act** 1970 (NSW) permits a party who is dissatisfied with a judgment as being erroneous in point of law to appeal to this Court. The onus lies on the plaintiff to demonstrate that there has been an error of law. What is a question of law (as opposed to a question of fact) was considered, inter alia, in ***Allen v Kerr & Anor*** (1995) Aust Torts Reports 81-354; ***Azzopardi v Tasman UEB Industries Ltd*** (1985) 4 NSWLR 139 at 155-156 and two more recent cases, namely **Carr v Neill** [1999] NSWSC 1263 and ***R L & D Investments Pty Ltd v Bisby*** [2002] NSWSC 1082. Section 69(4) of the Act provides that the court may determine an appeal by either (a) setting the judgment or order aside or (b) by varying the terms of the judgment or order or (c) by setting the judgment or order aside and remitting the matter for determination in accordance with the court's directions or (d) by dismissing the appeal.

Grounds of appeal

3 Bell Partners appeal the whole of the decision of Magistrate Judge Price. The grounds of appeal are firstly, that the Magistrate erred by ordering summary judgment where there was no evidence before him as required by Part 10A r 2 of the **Local Court (Civil Claims) Rules** 1988 (NSW) (**LCR**) by a responsible person giving evidence that Bell Partners had no defence to the claim of Kann Finch in the proceedings; secondly, the Magistrate erred by purporting to find that Kann Finch was entitled to a progress payment entitling it to serve on Bell Partners a progress claim pursuant to s 13 of the **Building and Construction Industry Security of Payment Act** 1999 (NSW) (the Act); thirdly, alternatively, the Magistrate erred by purporting to find the progress claim served by Kann Finch were effective progress claims in accordance with the provisions of the Act; fourthly, the Magistrate erred by ordering summary judgment in circumstances where a triable issue existed in the proceedings; and fifthly, the Magistrate erred in purporting to deliver a reserved judgment otherwise than in accordance with the provisions of Part 3 r 8 of the rules.

Local Court proceedings

4 On 22 April 2004 Kann Finch, by notice of motion dated 1 March 2004, sought summary judgment, interest and costs against Bell Partners for services provided within the meaning of the Act.

5 On 7 June 2004 the Magistrate gave reasons for judgment.

" '…. The work, the subject of this decision, is described as "provide design services". In the present instance the work is covered by s 6 definition of related goods and services, specifically 6(1)(b). S 15 precludes judgment in favour of a claimant, the plaintiff, unless the court is satisfied of the existence of circumstances referred to in (1) and (b) the respondent, the defendant, is not in those proceedings entitled (1) to bring any cross-claim against the claimant or (2) to raise any defence in relation to matters arising under the construction contract.'

This Court is not of the view that the matters raised by the respondent to this motion give rise to a triable issue and given the statutory scheme within the legislation, the defence is without merit; or, to use the words more accurately, is hopeless.

*Specifically, the Court would find that there has been compliance with the specific requirements of the particular legislation, that is, the **Building and Construction Industry Security and Payment Act** (1999), so far as payment claims be concerned and a want of any issue of Payment Schedules by the recipient.*

IN THOSE CIRCUMSTANCES, THE MOTION IS GRANTED THAT THE APPLICANT, THAT IS, THE PLAINTIFF, MAY PROCEED TO SUMMARY JUDGMENT IN ACCORDANCE WITH THE ACT."

Summary judgment

6 Relevantly, Part 10A r 2 of the **LCR** provides:

"Summary judgment

(1) Where, on application by the plaintiff in relation to any claim for relief or any part of any claim for relief of the plaintiff:

(a) there is evidence of the facts on which the claim or part is based, and

(b) there is evidence given by the plaintiff or by some responsible person that, in the belief of the person giving the evidence, the defendant has no defence to the claim or part, or no defence except as to the amount of any damages claimed,

the court may, at any time, give such judgment for the plaintiff on that claim or part as the nature of the case requires."

7 The test for summary judgment is not in doubt. The Magistrate referred to the correct test. The plaintiff submitted that the Magistrate erred in law as there was no affidavit evidence given by Kann or a responsible person of Kann, that in their belief there was no defence to the claim.

8 Both parties referred to ***Long Leys Co Pty Ltd v Silkdale Pty Ltd*** (1991) NSWCA, 19 December 1991. Essentially the case before the Magistrate was a legal one and involved the interpretation of s 13 of the Act. Bell did not put on any evidence. Under the Act there are limited avenues for Bell to challenge the rights of Kann to recover the amounts due under the payment claims.

9 In ***Long Leys***, Sheller JA (with whom Priestley and Meagher JJA agreed) when considering a similar **SCR** in relation to summary judgment stated: *"However, on an application for summary judgment where the defendant appears, the Court is bound to consider the pleading, all the evidence admitted and submissions put to it. If having done so it concludes that the defendant has no defence I do not think that it is powerless or, as has been suggested in some of the cases, without jurisdiction to make an order for summary judgment for reason only that the plaintiff's affidavit does not comply with the rule.*

In the present case we are told that at least one day was spent in argument before the Master and one day before Sully J. The arguments ranged at large upon the question of whether the appellant had any defence and if so what it was. It would be quite extraordinary if the Court, having listened to every argument that the wit of ingenious counsel could advance to show that there was an arguable defence and having come to the conclusion that there was none, must refuse the application for summary judgment because of a failure to comply with Pt132(1)(b). As Vaughan Williams LJ pointed out in ***Symon and Co v Palmer's Stores*** *(1903) Ltd at 264 provisions such as those contained in Pt132 are salutary provisions for the purpose of preventing a defendant, who knows perfectly well that he owes the sum claimed, postponing the time of payment, and putting the plaintiff to further expense in a litigation which ought never to have taken place. To refuse an application for summary judgment because of the form of the affidavit in a case where the existence of an arguable defence has been fully investigated and there is found to be none uses the rule to defeat the purpose that it is intended to achieve."*

10 Part 1 r 5 of the **LCR** allows the Court, if it thinks fit, to dispense with compliance with the rules either before or after the occasion for compliance arises. It was within the Magistrate's power to dispense with the requirements. In this case, like in **Long Leys**, the Magistrate fully investigated the existence of an arguable defence and found there was none. There is no error of law.

Building and Construction Industry Security of Payment Act 1999 (NSW)

11 The submissions put before the Magistrate were before this Court. Kann submitted that 5 payment claims dated 19 September 2003 were issued to Bell in compliance with the Act and because Bell did not serve a payment schedule in response as required by s 14 of the Act, it became liable to pay the amount claimed.

12 The first submission to the Magistrate concerned progress payments. Firstly, the object of the Act is set out in s 3. It is:

> *"(1) … to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*
>
> *(2) The means by which this Act ensure that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments."*

13 "Progress payment" and 'Payment claim" are defined in the definitions contained in s 4. They are different. A "payment claim" means a claim referred to in s 13.

The statutory regime

14 The scheme for payment of payment claims under the Act is set out in ss 8, 13, 14(4) and 15. They provide that on and from each reference dated under a construction contract a person who had undertaken to carry out construction work under the construction contract is entitled to a progress payment – s 8.

15 A person referred to in s 8(1) who is or who claims to be entitled to a progress payment may serve a payment claim on the person who under the construction contract concerned is or may be liable to make the payment – s 13. The payment claim can be served up to 12 months after the construction work was carried out – s 13(4).

16 If a claimant serves a payment claim on a respondent and the respondent does not provide a payment schedule to the claimant within the time required by the construction contract or within 10 business days after the payment claim is served, whichever time expires earlier, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claims relates – s 14(4).

17 If a respondent becomes liable to pay the claimed amount to the claimant under s 14(4) as a consequence of having failed to provide a payment schedule within the time allowed by that section and fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates (s 15(1)) then the claimant may recover the unpaid portion of the claimed amount from the respondent as a debt due to the claimant in any court of competent jurisdiction – s 15(2)(a)(i).

18 If a claimant commences proceedings under s 15(2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt the respondent is not in those proceedings entitled to bring any cross-claim against the claimant or to raise any defence in relation to those matters arising under the construction contract – s 15(4).

19 Einstein J stated in ***Isis Projects Pty Ltd v Clarence Street Limited*** [2004] NSWSC 222 at para 33: *"Hence it is clearly necessary in order that a claimant prove that a respondent's liability has accrued under section 15 (1) (a) [to satisfy the precondition to be found in subsection (4) (a)], that the claimant prove that a valid payment claim has been served and also clearly prove what is the due date for the progress payment. There will of course always be a due date for a progress payment under a construction contract because the Act [s 11] provides for such a date as being either:*

- *the date on which the payment becomes due and payable in accordance with the terms of the contract; or*
- *if the contract makes no express provision with respect to the matter, the date occurring 10 business days after a payment claim is made in relation to the payment."*

20 Bell's submission before the Magistrate was that the plaintiff's entitlement to a progress payment could only arise if it issued progress payments in 3 equal intervals in 3 equal amounts of $6,216.00 during construction, but Kann did not issue the progress claims in accordance with the construction contract. According to Bell, Kann is not a person entitled to a progress payment and therefore may not serve a payment claim pursuant to s 13 of the Act.

21 Five tax invoices were in evidence before the Magistrate. They represented three instalments and two extra amounts. There were three reference dates for the first three payment claims as per contract (email dated 21 November 2002). The contract provided that the fee was $18,650.00 to be invoiced over three equal intervals commencing when construction began. If the proposed construction period was six weeks long, three payments of $6,216.00 each at week two, week four and week six were expected. The first three tax invoices were issued on a fortnightly basis (week 2, week 4 and week 6). The works commenced on 10 March 2003. The due dates or reference dates for the progress payments were 24 March 2003, 7 and 21 April 2003. In respect of the extra works, there were some carried out in April 2003. Thus for the extra payments pursuant to s 11, the relevant reference dated would be the end of the month, being 30 April 2003. In respect of the July works, the reference date is 31 July 2003. The passage set out in **Isis** has been complied with. This argument is hopeless.

22 Bell's second submission to the Magistrate was that s 13 of the Act provides that a payment claim must identify the construction work or the related goods or services to which the progress payment relates. According to Bell, payment claims 1, 3 and 4 identify the same work performed and it is not possible for the Kann in respect of each payment claim to identify what additional work if any was done by Bell in the periods referred to. Payment claims 3 and 4 are in respect of periods which overlap in contravention of s 13(5). Further Bell submitted that progress claim 4 is also defective because, contrary to s 8(2)(b) it does not identify a reference date which is the end of the month during which the relevant work was carried out. The Magistrate was correct to hold that these submissions were hopeless.

23 Finally Bell submitted that it is arguable that the services identified in progress claim 1 do not come within the definitions of "construction work" or "related goods and services" as those terms are defined by the Act. The Magistrate held that the work was described as provide design systems and this work fell within the definition of related goods and services. The Magistrate was entitled to do so. This work clearly falls within the definition of related goods and services. There is no error of law.

Reserved decision

24 Bell submitted there was no effective determination made and that to deliver a reserved judgment without the parties having been given the opportunity to be present is a denial of natural justice. Whether it is a denial of natural justice depends on the facts and circumstances of each case.

25 At the conclusion of the hearing on 22 April 2004 the Magistrate stated: *"I might take the opportunity of re-reading those written submissions on behalf of both parties. I'll give a decision late this afternoon and I'll get the registrar to notify you both."*

26 The parties were not notified of the date that judgment was to be delivered. Hence the parties were not present in Court when the Magistrate delivered his reasons for decision and judgment.

27 On 7 June 2004 the Local Court wrote to Bell Partners solicitor advising him of the Magistrate's orders. It stated: *"Please note that at the notice of motion hearing 07/06/04 the Court made the following order … :*

MOTION GRANTED. APPLICANT (PLAINTIFF) AT LIBERTY TO PROCEED TO SUMMARY JUDGMENT IN ACCORDANCE WITH THE ACT.

(1) SUMMARY JUDGMENT BE ENTERED FOR THE PLAINTIFF IN THE SUM OF $26,825.70 TOGETHER WITH INTEREST AND COSTS."

28 Relevantly, Part 3 r 8 of the **LCR** provides:
"Reserved decision
(1) Where in any proceedings a Magistrate or Assessor reserves a judgment or decision on any question of fact or law, the Magistrate or Assessor may:
(a) give the judgment or decision:
(i) in court at the proper court in relation to those proceedings,
(ii) in court at any other court at which the Magistrate or Assessor is authorised to hear or dispose of those proceedings, or
(iii) in chambers in accordance with rule 7, or
(b) draw up in writing the judgment or decision, sign it and forward it to the registrar of that proper court."

29 While I agree that it is not desirable that judgments be delivered without giving the parties an opportunity to be present, Part 3 r 8(1)(a)(i) of the **LCR** provides that a Magistrate may give a judgment in court at the proper court in relation to those proceedings. It does not stipulate that the parties should be notified of that date. The Magistrate has complied with Part 3 r 8 of the **LCR**. On 7 June 2004, the day the Magistrate delivered his judgment, the Registrar notified the parties in writing of the decision. There is no denial of natural justice. Even if the Magistrate had not complied with Part 3 r 8(1)(a)(i) of the **LCR** or if I am wrong and there is an error of law there would be no utility in remitting the matter back for him to read his decision to the parties. There has been no error of law.

30 The appeal is dismissed. The decision of the Magistrate Judge Price dated 7 June 2004 is affirmed. The amended summons filed 29 October 2004 is dismissed.

31 Costs are discretionary. Costs usually follow the event. The plaintiff is to pay the defendant's costs as agreed or assessed.

The court orders:

(1) The appeal is dismissed.

(2) The decision of the Magistrate Judge Price dated 7 June 2004 is affirmed.

(3) The amended summons filed 29 October 2004 is dismissed.

(4) The plaintiff is to pay the defendant's costs as agreed or assessed.

Mr M B J Lee (Plaintiff) instructed by Freidman Reeves
Mr J Orsborn (Defendant) instructed by Holding Redlich (Defendant)