

**Margaret Anne Cooper v Anthony Veghelvi, Home Productions P/L, Consumer Trader & Tenancy Tribunal**

**JUDGMENT** : Master Harrison : New South Wales Supreme Court : 23<sup>rd</sup> March 2005

- 1 By notice of motion filed 25 February 2005 the second defendant seeks that the proceedings be stayed until the plaintiff pay into court as security the sum of \$9,834.41, being the unpaid portion of the adjudicated amount within the meaning of s 25(4) of the **Building and Construction Industry Security of Payment Act 1999 (NSW) (BCISP Act)** pending the final determination of these proceedings.
- 2 The plaintiff is Margaret Anne Cooper. The first defendant is Anthony Veghelvi. The second defendant is Home Productions Pty Ltd (Home Productions). The Consumer Trader and Tenancy Tribunal is the fifth defendant who has filed a submitting appearance. Home Productions relied on the affidavit of Tanya Segelov sworn 25 February 2005.

**The Local Court proceedings**

- 3 On 7 May 2004 the adjudicator made a determination against the plaintiff in the sum of \$7,636.50 which became payable on 16 April 2004 (the adjudication). No payment was received. On 17 June 2004 Home Productions applied and was granted a certificate of judgment in the Parramatta Local Court (the judgment). On 24 September 2004 the Local Court ordered the plaintiff to pay into court the sum of \$9,834.41 within 30 days and on this condition a stay on judgment until further order (the condition of stay order). No amount has been paid in satisfaction or partial satisfaction of the adjudication or the judgment and the condition of stay order has not been complied with.

**The Consumer Trader and Tenancy Tribunal proceedings**

- 4 On 16 April 2004, Ms Cooper filed an application in the Consumer Trader and Tenancy Tribunal (CTTT) seeking firstly, that the respondent pay the applicant the sum of \$3,950.00 or such other sum as the Tribunal determined pursuant to s 8(1)(a) **Consumer Claims Act 1998**; secondly, an order declaring that \$7,500.00 or such other sum as the Tribunal determines is not due or owing by the applicant to the respondent pursuant to s 8(1)(d) of the **Consumer Claims Act 1998**; and thirdly costs pursuant to s 53 of the **Consumer Trader and Tenancy Tribunal Act 2001**.

- 5 On 13 August 2004 the Tribunal Member held that the Tribunal had jurisdiction to continue to hear the applicant's claim in the absence of any finding of an infringement of s 22(3). This reads:

*"(3) If, at the time when an application was made to the Tribunal in accordance with this Act, no issue arising under the application was the subject of the dispute and proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue."*

- 6 The Tribunal Member also decided: *"Further, for the reasons set out in section 32 of the BCISP Act, and under the reasoning in Brodyn above, the order of the Adjudicator is not a final, but only an interim order. With respect, the estoppel argument does not succeed, as requirement (2) of Lord Guest's summary is not satisfied.*

*Also, the issue of the merchantable quality of the goods supplied, and any delay in supply (both raised in the present application) were not dealt with as an issue in the Adjudicator's proceedings, which suggests requirement (1) was also not satisfied.*

*It may be that the application for "relief from payment" is in effect an attempt to go behind, or set aside the Adjudicator's determination. If so, it will not be heard at any subsequent hearing. The remaining issues are still extant.*

*The Tribunal therefore has jurisdiction, at the least to determine the issues other than the application for relief from payment.*

*The application will therefore be listed before the Tribunal in due course for directions, to proceed the matter to a hearing."*

- 7 By amended summons filed 10 February 2004 the plaintiff seeks a declaration that the adjudication made by the Anthony Veghelvi in favour of Home Productions against the plaintiff pursuant to the **BCISP Act** is null and void and of no effect. The applicant seeks that default judgment entered in the Local Court set aside [para 3(iii)] appeals the part of this decision of the CTTT where it decided that it lacked jurisdiction to hear the plaintiff's claim for relief and payment.

- 8 Section 25 of the **BCISP Act** reads:

*"25 Filing of adjudication certificate as judgment debt*

- (1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.*
- (2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.*
- (3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.*
- (4) If the respondent commences proceedings to have the judgment set aside, the respondent:*
  - (a) is not, in those proceedings, entitled:*
    - (i) to bring any cross-claim against the claimant, or*
    - (ii) to raise any defence in relation to matters arising under the construction contract, or*
    - (iii) to challenge the adjudicator's determination, and*

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.”

- 9 A respondent is defined in s 4 of the **BCISP Act** to mean a person such as the plaintiff here on whom a payment of claim was served.
- 10 Home Productions submitted that it cannot be contented that payment into court is not required while an application is pending to have judgment set aside. Cooper submitted that the proceedings are not “proceedings to have the judgment set aside” pursuant to s 25(4) of the **BCISP Act** but are collateral proceedings seeking to declare as having no legal effect the adjudication. According to Cooper, if the adjudication determination is null and void and of no legal effect, it follows that the adjudication certificate is a nullity. Cooper says that she merely seeks as consequential relief on the appeal from the Local Court, that the judgment dated 17 June 2004 be set aside. Alternatively, Cooper submitted that there are discretionary reasons why security should not be ordered.
- 11 Both parties referred to **Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor** [2004] NSWCA 394. The relevant facts in **Brodyn** are that on 16 October 2003 the adjudicator made his determination. On 17 October 2003 an adjudication certificate was filed in the District Court so as to give it an effect of a judgment as provided by s 25. On 10 May 2004 Dasein undertook not to enforce the District Court judgment on condition that Brodyn lodged a bank guarantee to pay the sum of \$265,000.00 with the Registrar. Brodyn applied to this court for an order in the nature of certiorari quashing the adjudicator’s decision on the grounds that the payment claim was invalid and that there had been a denial of natural justice.
- 12 In **Brodyn** Hodgson JA (with whom Mason P and Giles JA agreed) stated:
- “41 Further, in my opinion an order of the Supreme Court quashing the determination or declaring it to be void could itself support the setting aside of the judgment. In my opinion, if the determination was quashed or declared void, reliance on there being no determination to support the judgment would not be to challenge the adjudicator’s adjudication within s.25(4): this wording assumes that there is a determination which is challenged.
- “42 Indeed, even in the absence of such an order quashing the determination or declaring it void, the respondent could in my opinion seek to have the judgment set aside on the ground that there never was a determination. If for example a respondent could show that the document that was filed as being an adjudicator’s determination was a forgery, that would not be challenging the adjudicator’s determination. Similarly, in my opinion, if the respondent could show that for some other reason recognised in law a purported adjudicator’s determination did not amount to an adjudicator’s determination within the meaning of the Act, that would not be challenging an adjudicator’s determination: this, as indicated above, assumes that there is such a determination to be challenged. Conceivably, the availability of that remedy could itself be a ground for refusing relief in the Supreme Court, on the basis that the same matter could more conveniently be relied on in an application to set aside the judgment; but that was not a matter relied on by the primary judge. ...
- 61 Where the adjudicator’s determination is void for one of the reasons discussed above, then until it is filed as a judgment, proceedings can appropriately be brought in a court with jurisdiction to grant declarations and injunctions to establish that it is void and to prevent it being filed. However, once it has been filed, the resulting judgment is not void. An application can be made to set aside the judgment; and as noted above in pars.[41] and [42], it is not contrary to s.25(4)(a)(iii) to do so on the basis that there is in truth no adjudicator’s determination.”
- 13 Thus the NSWCA held that a judgment constituted by the filing of the adjudication certificate can be set aside. The issue of whether Dasein was required to pay security into court was not raised in **Brodyn**. This is because Dasein agreed to lodge security with the court prior to the appeal being heard.
- 14 Unfortunately, while Cooper was awaiting a decision from the CTTT on whether the CTTT had jurisdiction, Home Productions obtained an adjudication certificate and a judgment in its favour in the Local Court. That means that Cooper has to date not been afforded an opportunity to have a trial on its merits.
- 15 It is my view that because judgment has already been obtained, that judgment is not void. Therefore the respondent must seek an order in these current proceedings that the Local Court judgment be set aside. It is my view that s 25(4) provides that if the respondent commences proceedings to have the judgment set aside, the respondent is required to pay into the court as security the unpaid portion (that being the whole amount namely \$9,834.41) pending the final determination of those proceedings. It is my view that Cooper is obliged to pay the sum of \$9,834.41 into court as security in accordance with s 25(4).
- 16 This interpretation is consistent with the object expressed in s 3 of the **BCISP Act** which is to ensure that any person who undertakes work regulated by the **BCISP Act** under a contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work irrespective as to what other remedies may be available to the other party to the contract.
- 17 Hence, I make an order in accordance with paragraph 2 of the second defendant’s notice of motion dated 25 February 2005. The proceedings are referred the Registrar to ascertain whether they should be stayed pending lodgement of the security.
- 18 The second defendant has sought costs on an indemnity basis. This is not appropriate in the circumstances. Costs are discretionary. Costs usually follow the event. The plaintiff is to pay the second defendant’s costs as agreed or assessed on a party/party basis.

**The court orders:**

- (1) I make an order in accordance with paragraph 2 of the second defendant's notice of motion dated 25 February 2005.
- (2) The proceedings are referred the Registrar on 13 April 2005 to ascertain whether they should be stayed pending lodgement of the security.
- (3) The plaintiff is to pay the second defendant's costs as agreed or assessed.

Ms L Byrne (Plaintiff)

Mr M B J Lee (Second Defendant)