

Corbett Court P/L v Quasar Constructions (1) Robert Sundercombe (2) Australian Solutions Centre (3)

JUDGMENT McDougall J New South Wales Supreme Court 25th November 2004

1 The question for decision in these proceedings is whether the *Building and Construction Industry Security of Payment Act 1999* ("the Act") applies to a construction contract made on 1 October 2003 between the plaintiff ("Corbett Court") as owner and the first defendant ("Quasar") as contractor ("the contractor"). The parties accepted that the contract is a construction contract as that expression is defined in s 4 of the Act. But Corbett Court says that the contract forms part of a loan agreement under which National Australia Bank Limited ("the bank"), a "recognised financial institution", undertook to lend money. The agreement that Corbett Court identifies as the loan contract is that comprised in a "tripartite deed" made on 1 October 2003 between Quasar, Corbett Court and the bank ("the deed").

The issues

- 2 As the proceedings were argued, there were two issues for decision:
- (1) Whether the deed is, or evidences, a loan agreement within s 7(2)(a)(i) of the Act: ie, a loan agreement under which the bank undertook to lend money (no other part of s 7(2)(a) was relied upon).
 - (2) If it is, whether the contract "forms part of" that loan agreement.
- 3 Quasar accepted that the bank was a recognised financial institution as defined in s 4 of the Act.
- 4 Corbett Court did not submit that the contract formed part of any other (actual or putative) loan agreement. Specifically, Corbett Court did not tender the "facility agreement" that is referred to in cl 9.4 of the deed, and did not submit that the contract formed part of that facility agreement.

Background

- 5 Quasar carried out construction work for Corbett Court under the contract. From time to time it served payment claims seeking a progress payment for the value of work done. Those payment claims were given to the superintendent under the contract. For the most part, they were assessed by quantity surveyors retained by the bank. The amounts assessed or otherwise certified were paid by the bank, at the direction of Corbett Court, direct to Quasar.
- 6 Quasar and Corbett Court are in dispute over two payment claims, numbered 10 and 11.
- 7 Payment claim 11 was referred to the second defendant, Mr Sundercombe, for adjudication under Div 2 of Pt 3 of the Act. Payment claim number 12 was referred to the fourth defendant, Mr Francis, for the same purpose.
- 8 Messrs Sundercombe and Francis made determinations on the respective claims. Corbett Court claims that they had no jurisdiction to do so (because of s 7(2)(a)) and that their determinations are void.
- 9 Another issue, relating to the dispute resolution provisions of the contract, was not pressed at the hearing.
- 10 Mr Rudge of Senior Counsel, who appeared with Mr Kostopoulos of Counsel for Quasar, accepted that if I found that s 7(2)(a) applied - ie, that the contract formed part of a loan agreement - then the adjudicators had no jurisdiction because the Act would not (on that hypotheses) apply to the contract. He accepted further, and on the same hypothesis, that the purported determinations would be void. Finally, Mr Rudge accepted (on the hypotheses to date) that if the purported determinations were found to be void, the power of the Court to grant relief by way of declaration and injunction would be enlivened (see *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 and *TransGrid v Siemens* [2004] NSWCA 395).

First issue: the relevant contractual provisions

11 Mr Kerr of Counsel, who appeared for Corbett Court, relied on Item 1 and cl A5 of the contract and on recital B, the definition of "building contract" and clause 9.4 of the deed. I interpose that this is only in relation to the first issue; he relied on a number of other provisions in relation to the second issue.

12 I set out the relevant contractual provisions:

"Item 1 – Execution of the contract ...

*If the owner has financed the *works using a lending institution (clause A5)
Name of Lending Institution National Australia Bank
Lending institution's representative ... "*

"Warranties by owner

A5 .1 *The owner warrants that it has the necessary legal authority in relation to the *site, to enter into this contract and the financial resources necessary to perform its obligations. If the owner has financed the *works using a lending institution, that organisation is shown in **item 1 of the Introduction.***

.2 *If the owner has shown an Australian Business Number (ABN) in **item 1 of the Introduction** it warrants that:*

- *the ABN is correct*
- *it will advise the contractor if it is not registered for *GST and*
- *will *promptly advise the contractor if its ABN or registration status changes."*

Recital B:

"The Bank has agreed to provide financial accommodation to the Borrower for the Works."

"9.4 Payments under Building Contract

The Builder and the Borrower acknowledge that:

- (a) at the Borrower's direction, the Bank may make progress payments due to the Builder under the Building Contract out of funds which would otherwise be available to the Borrower under the Facility Agreement; and
- (b) As between the Borrower and the Builder, the provisions of the Building Contract apply mutatis mutandis to any such payments as if they had been made by the Borrower; and
- (c) as between the Borrower and the Bank, the provisions of the Facility Agreement apply mutatis mutandis to any such payments as if they had been made to the Borrower under the Facility Agreement."

Submissions

- 13 Mr Kerr submitted that the deed was a loan agreement. He said that s 7(2)(a) should be construed to mean, relevantly, that a loan agreement was an agreement under which a recognised financial institution undertook to lend money so that, if such an undertaking were found in an agreement, it would be a loan agreement.
- 14 Mr Kerr next submitted that the terms of the deed showed that it was a loan agreement. He referred specifically to cl 9.4, read in the light of recital B and of the interconnection between the deed and the contract shown by the other provisions to which I have referred.
- 15 Mr Rudge submitted that the bank did not undertake to make payments of any kind, let alone to lend money, under the deed. He submitted that clause 9.4 was at most permissive, and that Quasar neither acquired rights against the bank, nor gave up rights against Corbett Court, under the deed.

Decision

- 16 In my judgment, the submissions for Quasar should be accepted. The deed is not an agreement under which the bank undertakes to lend money. It is, at its highest, an agreement that:
 - (1) Provides that a particular application of money (payment by the bank direct to Quasar) will be a loan under an independent agreement (the facility agreement) to which Quasar is not a party; and
 - (2) Regulates the consequences of payments so made.
- 17 In s 7(2)(a)(i), the reference to a recognised financial institution that undertakes to lend money must comprehend:
 - (1) That there is a loan agreement; and
 - (2) That under that agreement, the recognised financial institution undertakes such an obligation.
- 18 It is clear from cl 9.4 that any obligation on the bank to lend money is an obligation arising under the facility agreement referred to therein. It is equally clear that cl 9.4 imposes no such obligation on the bank, and that the bank undertakes no such obligation by it.
- 19 There is nothing in the deed that imposes any obligation on the bank to lend. What the deed does (relevantly to this issue) is regulate, in certain ways, the consequences where the bank lends money under the facility agreement by paying the amount of a certified claim direct to Quasar at the request of Corbett Court. There is nothing in the deed that imposes any obligation on the bank to do so, and nothing that gives Quasar any right to require the bank to do so. Nor is there anything in the deed that creates rights or obligations between Quasar and the bank under the facility agreement.
- 20 It may be that the provisions of cl 9.4(c), read in conjunction with the facility agreement, could have the effect of bringing into existence a loan agreement, or an agreement incorporating terms that might be found in a loan agreement, between Quasar and the bank. But the facility agreement was not proved and this proposition was not put as a submission; nor, absent proof of the terms of the facility agreement, could such a proposition be analysed.
- 21 I therefore conclude that the deed is not a loan agreement for the purposes of the Act.

Conclusion and order

- 22 It follows that Corbett Court's claim for relief must fail. I therefore do not propose to consider the second issue. The parties' competing contentions are set out in their written submissions (which will remain with the papers) and were amplified in oral argument (which has been recorded). I will, however, draw specific attention to the formal submission made by Quasar that, judgment having been entered, it is now too late to grant relief (see para 55 of its written submissions). As Quasar accepted, that submission is answered against it, at this level, by the decision of the Court of Appeal in *Brodyn Pty Ltd v Davenport* (supra).
- 23 At the request of the parties, I will do no more than stand these proceedings over until tomorrow, Friday 26 November 2004, at 10 am for orders and for the hearing of any applications for consequential or other relief. The time may be varied having regard to the commitments of both counsel and myself.
- 24 That means, among other things, that the orders made by Nicholas J on 18 November 2004 will remain in place until final orders are made tomorrow.
- 25 The matter is stood over to Friday 26 November 2004 at 10 am.

S A Kerr (Plaintiff) instructed by Caldwell Martin Cox
M G Rudge SC/A Kostopoulos (Defendant 1) instructed by Wright Stell