

JUDGMENT : Bergin J : Supreme Court New South Wales : Equity Div T&C List : 21st APRIL 2004

- 1 This is an application made by way of motion filed on 31 March 2004 by Austin Australia Pty Ltd, in liquidation (Austin), the second defendant in these proceedings seeking the setting aside of orders made by Windeyer J on 23 December 2003. On that occasion Windeyer J, upon the plaintiff by its counsel giving the usual undertaking as to damages, ordered that Austin be restrained from presenting for payment or demanding payment of a sum of \$183,000, or any part of it, from Westpac Banking Corporation pursuant to guarantees issued by that bank to Austin for the purposes of providing security in accordance with a subcontract between the parties dated 24 May 2000 (the contract).
- 2 The main proceedings were commenced in 2001. The plaintiff, De Martin & Gasparini Pty Ltd, sued Energy Australia and Austin in relation to a dispute arising out of the construction of the city central zone substation in Black Wattle Place, Darling Harbour. Austin was the main contractor engaged by Energy Australia and had the right to engage subcontractors and did so, engaging the plaintiff. The plaintiff carried out the subcontract works and there is no issue between the parties that the subcontract work was completed some time in 2001.
- 3 In the Amended Summons the plaintiff made claims against Austin that it had failed to provide adequate access and caused delays, that it had failed to do what was required of it disrupting the program, that it was liable for the contract representative's failure to extend the date for practical completion, that it failed to provide temporary site services, that it wrongfully deducted liquidated damages and failed to pay and undervalued a number of variations in the scope of works.
- 4 Austin holds guarantees provided under the contract pursuant to clause 5, Security, Retention Moneys and Performance Undertakings. Recourse to the guarantees, is permitted when a party has become "entitled to exercise a right under the subcontract in respect of the retention moneys and/or security" (cl. 5.5).
- 5 In May 2003 the plaintiff became entitled to lodge a final payment claim under the contract. On that date it served a payment claim under the **Building & Construction Industry Security of Payment Act 1999** (the Act) in the amount of \$1,698,671.53. On 20 May 2003 Austin responded to that payment claim by serving a payment schedule under the Act. That payment schedule refers to the plaintiff's payment claim and states: *This letter, together with the enclosed documents, constitute a payment schedule pursuant to section 14 (1) of the Act. The payment schedule relates to your final payment claim dated 6 May 2003. For the purposes of the Act the amount of payment Austin Australia Pty Ltd (Austin) proposes to make is \$0.00 (the scheduled amount).*
- 6 That letter advised that for the purposes of the schedule, Austin adopted the assessments made by the main contractor's representative in his final payment certificate comprising four documents; the first, a payment certificate, the second, a variations status schedule, the third, a response to the plaintiff's final payment claim and submissions, and the fourth, an annexure of supporting material. The letter then stated that the reasons that the scheduled amount was less than the amount claimed were identified in the enclosed main contractor's representative's final payment certificate and: *In addition to the above we note that the main contractor's representative has certified that an amount of \$138,232.61 is due from DMG to Austin. We advise that pursuant to clause 42.10 of the subcontract conditions we elect to set-off the whole amount certified as due to us. As noted above the main contractor's representative has certified a nil amount to you. Accordingly you are required to pay \$138,232.61 to Austin within 14 days of receiving this letter.*
- 7 The letter then claimed that the plaintiff's claim for the release of all securities was rejected, that the plaintiff had no entitlement to the security, that the main contractor's representative had not certified a balance owing to the plaintiff and that, in any event, 14 days had not passed since the issue of the final certificate.
- 8 On the same day, 20 May 2003, Austin served what was described as a final payment certificate under the hand of the main contractor's representative. That final payment certificate was served pursuant to cl. 42.8 of the subcontract and enclosed exactly the same documents, the payment certificate, the variation status schedule, the response and the annexure referred to in the other letter of 20 May 2003. This letter advised that the sum of the certificate is "negative \$138,232.61.

The certificate dated 20 May 2003 refers to the original works in the amount of \$3.6 million and variations completed with a deduction for previous payments and an amount for GST. On the face of that document one cannot ascertain the reasons for the amount being less than the amount claimed.
- 9 The plaintiff pursued an adjudication under the Act and on 8 July 2003 the adjudicator determined an adjudicated amount of \$311,659.53 in favour of the plaintiff. The adjudicator's determination referred to the "nil" payment schedule served by Austin and also detailed the assertion by Austin of its entitlement to \$138,232.61. It is apparent from the face of the record, that is the adjudicator's determination, that he was taken to the various amounts claimed by way of "set-off", as it had been put in the 20 May letter. Indeed, the adjudicator deals with the amounts said to make up that figure at pages 76 and following of his determination.
- 10 The total in the final payment certificate, as it purports to be, includes two amounts, not for construction work but for delayed payments and staff costs due to a failed Court action. Those two amounts form a large proportion of the amount in the final payment certificate. Mr Corsaro SC, for the plaintiff, submitted it is apparent that those may be costs incurred in respect of a claim made by the plaintiff to attach a debt that was successful at first instance before Simpson J but unsuccessful in the Court of Appeal.

- 11 After the determination the parties entered into an agreement (Ex 1). The plaintiff agreed that Austin could pay the adjudicated amount by way of three instalments. In consideration of the plaintiff's agreement to allow progressive payments, Austin provided security by way of two unconditional bank guarantees for the second and third instalments. The amounts were paid by way of first instalment of \$120,000 which was paid in August 2003, second instalment of \$115,428.51 paid in August 2003 and third instalment of \$116,282.36 paid in September 2003. The security was returned.
- 12 On or about 22 December 2003 it became apparent to the plaintiff that Austin was going to call on the guarantees provided as security under the contract. At that time no notice had been given and it appears that the bank may have been the source of the plaintiff's knowledge. The plaintiff then approached the Duty Judge, Windeyer J, and sought the injunction. There is no issue between the parties that little resistance from Austin occurred on that day and that the injunction was granted until further order.
- 13 Austin's application before me is to discharge the injunction and Mr Kerr, who appears for the applicant Austin, submitted that the evidence establishes that there are new circumstances that entitle the application to be made and warrant the discharge of the injunction. The new circumstance is that Austin served a notice on the plaintiff on the evening of the day on which the injunction was granted. That notice referred back to the letter of 20 May, being the payment schedule, and confirmed that Austin did not receive the payment of \$138,232.61. The payment schedule, which was in fact attached to the letter of notice of 23 December 2003, referred to the main contractor's representative's certificate. However, the document served on 23 December was not the notice with the payment certificate under the contract but the notice with the payment schedule under the Act.
- 14 The letter of 23 December 2003 stated that in accordance with cl. 42.10 and cl. 42.11 Austin had elected to have recourse to the security held by it to set-off the debt "now due and payable" by the plaintiff. It also stated that pursuant to cl. 5.5 the plaintiff was given five day's notice of Austin's intention to convert the security to cash and set-off the \$138,232.61 from the security amount.
- 15 On 19 March 2004 Austin's solicitors, Gadens Lawyers, wrote to the plaintiff stating, in part, that pursuant to cl. 5.5 of the contract Austin intended to have recourse to the bank guarantees and to convert them after five days of receipt of the notice.
- 16 Mr Kerr submitted that the new circumstance is one that is in Austin's favour, that is that under the contract once a final certificate has been issued and there has been no payment the company, Austin, is entitled to have recourse to the securities.
- 17 Both counsel have relied upon parts of cl. 42.1. Emphasis was placed upon that part providing that the main contractor's representative shall set out in the certificate the calculations employed to arrive at the amount and if the amount is more or less than the amount claimed by the subcontractor, the "reasons" for the difference. Pursuant to cl. 42.8, the main contractor's representative is required to certify the amount which in his opinion is finally due, either from or to the main contractor under or arising out of the subcontract or any alleged breach thereof.
- 18 Mr Kerr submitted that cl. 42.11 is a significant clause in this dispute. It provides that where, within the time provided by the subcontract, a party fails to pay the other party an amount due and payable under the subcontract the other party may have recourse to the security. Mr Corsaro SC emphasized the words "amount due and payable under the subcontract" in that clause. He submitted that the amount due and payable, if it be truly an amount due and payable, was taken into account in the adjudication and that the claim was adjusted appropriately by the adjudicator having regard to the claims made before him.
- 19 Mr Corsaro SC also submitted that the "certificate" is not a certificate within the meaning of that term in the subcontract. Emphasis is placed on the two items to which reference has already been made, the costs for the staff and the costs of delay in respect of the failed court case. Mr Corsaro SC submitted that those costs have nothing to do with this contract and are amounts inappropriately included in the final certificate, thus rendering the certificate invalid and giving no proper ground to Austin to call upon the guarantees. Mr Corsaro SC also submitted that there is no amount due and payable under the contract and even if there were, no proper "final certificate" has been served.
- 20 The plaintiff has not amended its claim since Austin has been placed into liquidation. The plaintiff has not pursued any litigious step since administrators were appointed in January 2004, other than to respond to the claims made by Austin in this Motion. However it is not in issue that on the occasion before Windeyer J on 23 December 2003, Mr Corsaro SC indicated that there was an issue about the guarantees and that the plaintiff had requested their return, indeed the correspondence in evidence before me demonstrates that beyond any doubt. I am informed that the plaintiff may well have indicated to Windeyer J that it intended to amend to include a claim for the return or release of all securities. That amendment has not been made, it appears due to the financial status of Austin. In any event, I have heard this motion on the basis that the plaintiff will, within 28 days or sooner, make application for leave to proceed against Austin under the *Corporations Act 2001* and make application for leave to amend to include that claim.
- 21 This application has been fought on the basis that by reason of the service of the final certificate and the non-payment by the plaintiff Austin is entitled to the orders sought in the Motion. Mr Corsaro SC submitted that Austin's application seeks to circumvent the Act. The adjudication process under the Act has been embraced by both parties and the adjudicator has issued a determination in the plaintiff's favour taking into account the amount

now sought to be pressed for the entitlement to the discharge of the injunction. It was submitted that this is really an application to re-do the certification or an interim certificate pursuant to the Act. That is an issue that I do not need to decide today, albeit that it may be raised at another time.

- 22 Mr Corsaro SC submitted that even if the certificate is a valid certificate under the contract, it would be unconscionable to allow Austin to rely on it in the circumstances that occurred last year, in particular in the light of the agreement that the plaintiff entered into with Austin in respect of the payment of the adjudicated amount and the release of the unconditional banker's undertaking. Mr Corsaro SC submitted that his client had acted to its detriment by agreeing to the release of the security after the payment of the three instalments of the adjudicated amount with Austin now in liquidation. It was submitted that if Austin really believed that the plaintiff owed it the amount it now claims, it should have raised this matter at the time of the agreement reached between the parties in 2003.
- 23 Mr Kerr submitted that one must be careful not to confuse the two documents that were served and to keep separate the amount claimed by Austin. It was submitted that the amount claimed by Austin had nothing to do with the Act, that it was a contractual claim separate from the adjudication process and the payment claim and schedule that was served. It was submitted that once that clear division is made it can be seen that these claims travelled in a parallel way and were not subsumed into the adjudicative process. That is a serious issue to be tried.
- 24 I am also satisfied that there is a serious issue to be tried as to the validity of the final payment certificate. Do the two items apparently relied upon in the reasoning of the contractor's representative form part of the amount appropriate for inclusion in the certificate? Those are serious issues to be tried in the claims as between the plaintiff and Austin, one for payment and the other for return of the securities.
- 25 Mr Kerr also submitted that in the circumstance that the plaintiff has not as yet amended its Summons to include this claim, great care should be taken in considering it and regard should be had to the last paragraph of cl. 42.8 of the contract. That last paragraph deals with a time frame after the issue of the final certificate but once again I return to the finding that there is a serious issue to be tried as to the validity of that final certificate.
- 26 Mr Kerr submitted that I should be more inclined to favour the defendant on the balance of convenience argument because of the plaintiff's failure to move to amend its Summons. The balance of convenience has been debated in the circumstances of the company, Austin, going into liquidation. It seems to me that when Windeyer J made his order the circumstances were different. Austin was not in administration until after that and liquidation did not occur until last month. However, I am satisfied that those circumstances favour the plaintiff, rather than Austin. Accordingly, I am satisfied that there is a serious issue to be tried and I am satisfied that the balance of convenience favours the plaintiff.
- 27 I am not satisfied that the second defendant, Austin, the applicant on the motion, has established a proper basis upon which to set aside Windeyer J's order or to discharge the injunction. I dismiss Motion. I order that the applicant pay the respondent's costs. I direct that the plaintiff make application for leave to proceed against Austin and leave to amend to include the claim for the release of the securities. Such application is to be made no later than 21 May 2004.

F Corsaro SC (Respondent/Second Defendant) instructed by Crisp Solicitors
S Kerr, N Bilinsky (Applicant/Plaintiff) instructed by Gadens Solicitors