

**JUDGMENT : Campbell J** : New South Wales Supreme Court : 7<sup>th</sup> October 2004

- 1 This is an application to extend an *ex parte* injunction which Palmer J granted yesterday, and which expires later today. The litigation arises under the **Building and Construction Industry Security of Payment Act 1999**. The plaintiff is the proprietor under a building contract, for whom the first defendant carried out some building work. The first defendant has made an adjudication application, relating to what it says is a payment claim made in accordance with the Act. The third defendant is the nominating authority to whom that application was made. The third defendant has nominated the second defendant as the adjudicator, and the second defendant has accepted that nomination.
- 2 The basis upon which the plaintiff challenges the jurisdiction of the adjudicator is that it asserts that there never was a payment claim within the meaning of section 13 of the Act served upon it. Palmer J's orders prevented steps being taken to advance the adjudication process.
- 3 There is affidavit evidence, which was before Palmer J yesterday, where the solicitor for the plaintiff says, on information and belief, two separate things:
  1. "The Plaintiff had never received a payment claim dated 30th June 2004 from the First Defendant", and
  2. "The Plaintiff had never received any payment claim pursuant to the **Building and Construction Industry Security of Payment Act 1999** ("the Act") from the First Defendant".
- 4 Mr Curtin, who appeared today for the first defendant, did not contest that the balance of convenience favoured the continuance of the injunction, or that there was a serious question to be tried. He put his argument to me on the basis that there had been a non-disclosure, yesterday, to Palmer J. The basis for that allegation of non-disclosure is that there is evidence in the affidavit which was placed before his Honour which shows that the first defendant asserts that on 27 August 2004 it faxed, to a number which is admitted to be the facsimile transmission number of the plaintiff, a bundle of documents, which include several documents which could be argued to be a payment claim within the meaning of section 13. Two of those documents were dated 30 June 2004. Mr Curtin's criticism is that it was not stated specifically that the material which the first defendant alleges was faxed on 27 August 2004, had never been received.
- 5 The first defendant does not seek, on today's application, to make any positive case that the material has been received, save that which arises by inference from the facsimile transmission record.
- 6 In my view, it is not shown that there has been any non-disclosure to Palmer J. The facsimile transmission record was in evidence before his Honour. Further, in my view, the two statements which I have identified in the affidavit of the plaintiff's solicitor, are ones which provide a sufficient evidentiary basis, on an application such as that which was made to his Honour yesterday, for the order which his Honour made. I, therefore, decline to hold that there was any relevant non-disclosure to his Honour. It follows that the injunctions will be extended.
- 7 Mr Curtin's fallback position is that, if the injunction is extended, the plaintiff should be required to pay into court, or into a controlled money account under the control of the solicitors of the plaintiff, and the first defendant, an amount equal to the amount which is claimed. Mr Curtin refers me to Gzell J's decision in **Abacus Funds Management Ltd v Davenport** [2003] NSWSC 935, where his Honour, when granting an injunction restraining the taking of steps to enforce a determination under the Act, required a payment into court. That case was, however, a case where an adjudication determination had been made, and the proceedings in court sought to quash that determination. The amount ordered to be paid into court was the amount the adjudicator had already held was due. Section 25(4)(b) of the Act provides that, where an adjudication certificate has been filed in a court and thereby become enforceable as a judgment, then if the respondent commences proceedings to have the judgment set aside, the respondent must pay into court any unpaid part of the adjudicated amount. Once an adjudication determination is made, the steps of obtaining an adjudication certificate and filing it are merely procedural ones, involving the making of no decisions about the merits of the claim. When the factual situation that Gzell J was dealing with was only two merely procedural steps removed from the situation where the Act requires a payment in, it was, with respect, no surprise that his Honour held a payment in to be appropriate.
- 8 In the present case, there has been no adjudication determination. The adjudication process has scarcely begun. It is, it seems to me, distinguishable from the situation in **Abacus Funds Management Ltd v Davenport** [2003] NSWSC 935.
- 9 I was giving consideration, in the course of the argument, to whether there might be a different justification for payment into court of the amount claimed, or payment into a controlled money account of the amount claimed, on the basis that, if the hearing in the Court were to ultimately decide that the adjudication proceedings had been validly commenced, the bringing of the proceedings in Court would have had the effect of delaying the time by which the first defendant could receive its money. I wondered whether, when the Court proceedings would cause this inevitable delay, and given that the concern of the Act is with cash flow rather than the final determination of rights (**Amflo Constructions Pty Limited v Anthony Jefferies** [2003] NSWSC 856 at [25]) it might not be an appropriate term for the granting of an injunction which would inevitably cause delay to require payment in as a means of ensuring that, if the first defendant succeeded, there was no further delay after the Court's decision in the first defendant being able to actually get its hands on the amount to which it was entitled. On reflection I have rejected that idea. Whatever might be the situation in a case where there was evidence that a proprietor was of doubtful solvency, or that there might be difficulties in the enforcement of a judgment for the amount which had been held due under an adjudication determination, in the present case there is no basis for concern established by the evidence about whether the plaintiff could, or would, pay promptly any amount which an adjudication determination held it was obliged to pay.

The injunction is granted on the basis of an undertaking as to damages. I, therefore, do not think it appropriate to impose the term Mr Curtin seeks.

- 10 After discussion with counsel, the following timetable has been agreed, which I now direct:
1. The plaintiff is to file and serve any supplementary evidence on which it seeks to rely by Tuesday 12 October 2004.
  2. The first defendant is to file and serve any evidence on which it seeks to rely by Tuesday 19 October 2004.
  3. The plaintiff is to file any evidence in reply by Friday 22 October 2004.
- 11 I stand the matter over for mention before the Duty Judge on Monday 25 October 2004. I note that if the Duty Judge's list is such that it would be convenient to have a hearing date fixed before the Duty Judge, the parties will seek to have a date for hearing allocated on Monday 25 October 2004, but that if the Duty Judge's commitments do not enable that to happen, the parties will then seek to have the matter referred to the 1 Day Judge list on Friday 29 October 2004.
- 12 I reserve today's costs.
- 13 I order that the orders made on 6 October 2004 and numbered 1 to 5 inclusive each be extended until 5 pm on Friday 29 October 2004.
- 14 These orders may be entered forthwith.

S Kerr – Plaintiff instructed by W G McNally & Co  
G Curtin - First defendant