JUDGMENT : Einstein J : New South Wales Supreme Court Equity Division T&C List. 18th October 2006

The nature of the issues

1 The issues before the Court raise the question of whether or not a respondent to an application under the *Building Construction Industry Security of Payment Act 1999* ["the Act"] against whom a judgment debt following a determination has been entered, may albeit eschewing making an application to have the judgment set aside, seek any and if so what form of declaratory and associated relief challenging the validity of the determination.

The related sets of proceedings

2 The following background to the matters presently before the court are agreed between the parties:

The contractual disputes

i. On 27 January 2004 Hansen Yunken Pty Limited ("Hansen Yunken" or "the builder") entered into a contract with the Plaintiffs ("Jempac" or "the proprietor") for the construction of a 10-level building comprising 87 residential apartments, a ground floor commercial area and three basement car park levels. The contract sum was $25,000,080. The contract provided that payment claims were to be served by Hansen Yunken on the 28th day of each month.

ii. Claims and disputes soon emerged. By 18 June 2004 the parties had entered into a Deed of Settlement and Release to resolve certain disputes relating to claims brought by Hansen Yunken for extension of time (and associated costs) and for additional costs on account of disruptions to its building sequence and activities.

iii. On 3 November 2005 the Superintendent certified Practical Completion of the project.

iv. On 2 January 2006, pursuant to the said Deed of Settlement and Release, the proprietor allegedly became indebted to Hansen Yunken for the sum of $500,000.00. That debt remains outstanding. On 28 March 2006, Hansen Yunken issued a Statutory Demand on the proprietor seeking to enforce payment of that $500,000.00.

v. On 13 April 2006 the proprietor commenced proceedings in the Supreme Court to set aside that Statutory Demand.

The initial claim made pursuant to the Act

vi. On 31 March 2006 Hansen Yunken served on Jempac a Payment Claim (Payment Claim No. 22) for work completed to 28 March 2006 ("the Payment Claim"). The Payment Claim was issued pursuant to both the contract and the *Building Construction Industry Security of Payment* Act 1999 ("the Act"). The Claimant sought payment of $2,268,471.06.

vii. On 18 March 2006, Jempac provided to Hansen Yuncken a Payment Schedule in response to the Payment Claim.

viii. On 3 May 2006 Hansen Yunken lodged an Adjudication Application pursuant to s.17 of the Act in respect of the Payment Claim.

ix. On 11 May 2006 Jempac served its Adjudication Response in accordance with s.20 of the Act.

x. The Nominating Authority appointed Mr Sam Wilson as the Adjudicator. On 23 June 2006 the Adjudicator issued his Determination. The Adjudicator determined that Jempac was to pay Hansen Yunken an amount of $1,343,280.46.

xi. On 3 July 2006, and pursuant to s25(1) of the Act, Hansen Yunken filed a Certificate with respect to the Determination in the Supreme Court. The amount of the Determination thereby became a judgment debt owed by the proprietor to Hansen Yunken.

xii. On 3 August 2006, Hansen Yunken recovered $6,555.62 of that judgment debt through the execution of a garnishee order on the proprietor's bank the Commonwealth Bank of Australia (leaving $1,336,734.80 plus interest owing).

The second set of proceedings

xiii. On 18 August 2006 Jempac commenced proceedings in this Court in which it seeks a bare declaration that, "… the Adjudication Determination of Sam Wilson dated on or about 23 June 2006 purportedly made pursuant to the Act is void".

Other matters

xiv. Notwithstanding the requirements of s.25(4)(b) of the Act, at no time since the filing of that Summons has the proprietor paid into Court as security the unpaid portion of the adjudicated amount pending the final determination of the Summons.

xv. On 25 August 2006, the proprietor's solicitors advised the builder's solicitor by facsimile that the obligation to pay in the disputed amount of the determination pursuant to s25(4) of the Act did not arise because the Summons did not seek Orders to set aside the judgment. That position was reinforced in a subsequent letter from the proprietor's solicitor dated 6 September 2006.

The notice of motion

xvi. By Notice of Motion dated 5 September 2006 the builder seeks Orders that,
a) The second summons be dismissed.

b) In the alternative to Order 1, that the proceedings be permanently stayed.

c) In the alternative to Orders 1 and 2, that the proceedings be stayed pending payment by the proprietor into Court of an amount equivalent to the unpaid portion of the adjudicated amount determined by Mr Sam Wilson on or around 23 June 2006 to be payable to the builder.

The application for leave

3 Midway through the hearing of the motion pursued by the builder, the proprietor sought and obtained leave to amend the summons in the second set of proceedings so as to seek the following additional orders:

i. an order that the second set of proceedings be consolidated with the initial proceedings;

ii. leave to amend the summons to seek in addition, a stay of the judgment and restitution.

The critical issue

4 The proprietor has made no secret of the fact that its purpose is to outflank s 25 (4) of the Act so as to avoid the requirement [were it to seek to have the judgment set aside] to pay into Court as security, the unpaid portion of the adjudicated amount pending the final determination of proceedings in that regard.

The submissions of the builder

5 The builder put forward two arguments:

The construction argument

i. The first was to contend that properly construed, s 25 (4) required to be given a purposive reading: the proposition was that the words "proceedings to have the judgment set aside" should not be read in a narrow fashion but should be read as encompassing any proceedings that had the substantial effect of challenging, undermining or limiting the enforcement of a judgment.

The abuse of process argument

ii. The second was to contend that the seeking of a bare declaration which would leave on foot a valid judgment of the Court, would constitute an abuse of process and would be impermissible under s 63 of the *Supreme Court Act*.

6 But for the application for the grant of the leave to amend earlier referred to, my tentative view may well have been to accede to the abuse of process argument. This for the reason that s 63 of the *Supreme Court Act* emphasises the critical need for the avoidance of multiplicity of legal proceedings, as well as focusing upon the need for relief to be given as far as possible determining all matters in controversy between the parties. However in my view the grant of the leave to amend, with the consequential possibility that the two sets of proceedings may be consolidated and importantly, with the relief now to be sought to include a stay of the judgment and restitution, overcomes these difficulties.

7 Dealing with the construction argument, it becomes necessary to appreciate that in ***Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd*** [2005] NSWSC 1152, Barrett J made a number of observations underpinned by the terms of s 32 of the Act which reads inter alia as follows:

32 Effect of Part on civil proceedings …

(2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

(3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal: ...

(b) may make such orders as it considers appropriate for the restitution of any amount so paid and such other orders as it considers appropriate, having regard to its decision in those proceedings."

8 Barrett J made the following observations:

*"**[37]** Matters of the present kind seem often to be approached on the footing that the s 25 result (filing of an adjudication certificate as a judgment for debt) must be resisted virtually at all costs. The limits imposed by s 25(4) upon attempts to have such a judgment set aside are referred to in that connection. But it seems sometimes to be not sufficiently appreciated that, although a judgment in debt may result from the adjudication process, there is no curtailing of contractual and other rights arising in relation to the performance of the relevant work. This is made clear by s 32. Thus, if the principal has a claim for defective work or can show that work charged for was not done or that there has been some other breach of contract or other actionable wrong by the contractor, the principal is free to pursue that claim in the ordinary way; and this is so regardless of the findings of the adjudicator. The principal might, if thought fit, institute proceedings seeking not only to advance the claim in question but also, perhaps, to obtain, by reference to a right of set-off, a stay of the judgment that s 25 has had the effect of creating. **The s 25(4) limitations do not apply to an application for a stay, as distinct from an application to have a udgment set aside.***

***[38]** It was pointed out in **Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd** (2005) 62 NSWLR 385 by Handley JA (with whom Santow JA and Pearlman AJA agreed) that a judgment entered under s 25 is, by reason of s 32(3)(b), effectively a provisional judgment, both in what it grants and what it refuses. His Honour added (at [21]): A builder can pursue a claim in the courts although it was rejected by the adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid.*

As Handley JA observed, the specific statutory context is one in which inconsistent judgments are contemplated and allowed." [emphasis added]

9 In ***R v Young*** (1999) NSWCCA 166 Spigelman CJ [at 686-687] had occasion to treat in some detail with the proper approach to the construction of the words actually used by Parliament and to the circumstances in which it is sometimes necessary to give the words actually used by Parliament an effect as if they contained additional words.

10 In particular the Chief Justice made the following observations:

> *"**[6]** In order to construe the words actually used by Parliament, it is sometimes necessary to give them an effect as if they contained additional words. This is not, however, to introduce words into the Act. This involves the construction of the words actually used. Judicial statements which appear to have been prepared to countenance omething more than this, should be so understood.*
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> ***[7]** The most frequently cited formulations are:"It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do". (**Thompson v Goold & Co** [1910] AC 409 at 420 per Lord Mersey)and **"...we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself". (Vickers, Sons & Maxim Ltd v Evans** [1910] AC 444 at 445 per Lord Loreburn LC) To similar effect is the following formulation:"Additional words ought not to be read into a statute unless they are required in order to make the provision intelligible". (**Wills v Bowley** [1983] 1 AC 57 at 8B)*
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> ***[8]** The process by which words omitted by inadvertence on the part of the draftsperson may be supplied by the Court, must remain capable of characterisation as a process of construction of the words actually used.*
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> ***[9]** The contemporary approach is as set out by Lord Diplock in **Wentworth Securities v Jones** [1980] AC 74 at 105-107:"My Lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it. **Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd** [1971] AC 850 provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to he exclusion of the courts."*
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> ***[10]** The passage has been adopted and applied in this Court. (See **Kingston v Keprose Pty Ltd** (1987) 11 NSWLR 404 at 422 per McHugh JA (an authority frequently quoted with approval, eg. in Bropho v Western Australia (1990) 171 CLR 1 at 20); **Tokyo Mart Pty Ltd v Campbell** (1988) 15 NSWLR 275 at 283 per Mahoney JA: **Bermingham v Corrective Services Commission of NSW** (1988) 15 NSWLR 292 at 299-300 per Hope JA; 302 per McHugh JA. See also **Saraswati v R** (1991) 172 CLR 1 at 22 per McHugh J and **Newcastle City Council v GIO General Ltd** (1996-97) 191 CLR 85 at 113 per McHugh J).*
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> ***[11]** The three conditions set out by Lord Diplock should not be misunderstood. His Lordship did not say, nor do I take any of their Honours who have adopted the passage to suggest, that whenever the three conditions are satisfied, a court is at liberty to supply the omission of the legislature. Rather, his Lordship was saying that in the absence of any one of the three conditions, the court cannot construe a statute ith the effect that certain words appear in the statute.*
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> ***[12]** As I understand the recent cases, they are not authority for the proposition that a court is entitled, upon satisfaction of the three conditions postulated by Lord Diplock, to perfect the Parliamentary intention by inserting words in a statute. The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based."*

11 Approaching the question of construction in the fashion required by those observations of the Chief Justice and critically treating with the instant context, I reject the proposition that the words to be found in 25 (4): " *commences proceedings to have the judgment set aside*" are appropriate to be read as encompassing any proceedings that have the substantial effect of challenging, undermining or limiting the enforcement of a judgment. Certainly neither the second nor the third of the three conditions stipulated by Lord Diplock in ***Wentworth Securities v Jones*** are presently satisfied. And notwithstanding the many statements by Courts as to the legislative intention of the Act, there seems to me to be a real question as to whether any of those statements travels into the minutiae of attempting to exhaustively deal with the precise mischief which the words *"proceedings to have the judgment set aside"* in S 25(4) was intended to remedy.

12 It is fair to note that Mr Inatey SC appearing for the builder sought to rely upon paragraphs 7 – 10 of the judgment of Hodgson JA in ***Façade Innovations Pty Ltd v Timwin Constructions Pty Ltd*** [2005] NSWCA 197 in support of the construction argument. However I do not see that the references by Hodgson JA given in a judgment concerning an application for a stay [to be granted by the Court of Appeal] of an order at first instance [for the payment out of moneys paid into the Supreme Court pursuant to s 25 (4) following a Supreme Court challenge to a judgment entered in the District Court], can be stretched to suggest that his Honour was in effect upholding the construction argument here advanced. To my mind the particular paragraphs of the judgment of Hodgson JA can only be read as treating with the proper exercise of the Court's discretion where a stay of the orders at first instance was plainly appropriate in order to ensure that the status quo was not altered pending the hearing of the appeal.

Undertaking to the Court

13 The proprietor has indicated that it is prepared to undertake to the Court that pending the final hearing of the proceedings, it will not seek any stay of the judgment presently in place.

Decision

14 For the above reasons the application in the first defendant's notice of motion to dismiss the summons or in the alternative to stay the proceedings [either permanently or pending payment by the plaintiffs into Court of an amount equivalent to the unpaid portion of the adjudicated amount] are rejected as without substance.

Short minutes of order

15 The parties are required to produce short minutes of order on which occasion costs may be argued.

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