

Mohd Farok Abdul Majeed t/a Australasia Pacific Management v Dato Onn Mahmud (1) ; Ryan Park Ltd (2); Donmastry P/L (3); Golden Sovereign Development P/L (4) ; Golden Arrow Ltd (5)

**JUDGMENT BRERETON J** Supreme Court New South Wales Equity Division One Day List, 13 December 2007

- 1 On 25 September 2006 the plaintiff Mohd Farok Abdul Majeed filed a summons, claiming a declaration that the amount of about \$759,000 held in the solicitor's trust account of the then fourth defendant Hunt & Hunt, apparently on behalf of the first defendant Dato Onn Mahmud, was beneficially held for the plaintiff; an order that the first defendant Mr Mahmud, the then second defendant Donmastry Pty Ltd and the then third defendant Golden Sovereign Development Pty Ltd pay the plaintiff the amount of \$1,023,640 plus 10% GST plus interest in relation to management and agency services said to have been rendered by the plaintiff; an order that such judgment be partly satisfied by payment of the \$759,000 from the funds held in trust by Hunt & Hunt; and costs. On 29 September 2006, Mr Majeed, with Hunt & Hunt's consent, discontinued the proceedings against them, and on 2 November 2006, he filed an amended summons, claiming orders that Mr Mahmud and Donmastry pay him \$3,480,000 plus GST; that Ryan Park Limited pay him \$412,420 plus GST; that Golden Sovereign Development Pty Ltd pay him \$420,780 plus GST; and that Golden Arrow Limited pay him \$2,096,510 plus GST.
- 2 On 20 February 2007, Mr Majeed filed a motion for "summary judgment". On 21 February, 8 March and 16 April 2007, Mr Majeed made attempts to obtain orders dispensing with service, or for substituted service, in the registry. The Registrar was not persuaded to make any such order, and on 7 June 2007, Mr Majeed filed a motion for leave to proceed against Mr Mahmud pursuant to (NSW) *Uniform Civil Procedure Rules* 2005, r 11.4.
- 3 The motion came before Nicholas J on 15 June 2007, when his Honour adjourned it to 5 July before the Registrar in order to enable the plaintiff to prepare evidence in support. It then came before Young CJ in Eq on 6 July.
- 4 The evidence before the Chief Judge was to the following effect. Mr Majeed made several visits, in November 2006, to Mr Mahmud's Sydney residence at 26 Carrara Road, Vaucluse, to attempt to serve the summons, but no-one was at home. He flew to Kuala Lumpur and attended at the Hotel Coronade, but Mr Mahmud refused to see him and he left the summons with security guards to be forwarded to Mr Mahmud. He flew to Singapore, also in November 2006, and attended at Mr Mahmud's residence at 1902 Peach Garden to serve the summons, but Mr Mahmud was not in, and he left the summons with Mr Mahmud's maids.
- 5 In mid-November 2006 Mr Majeed received a telephone call from Mr Mahmud's solicitor Ow Yong Thian Soo, who said "Majeed, can you come to Singapore to meet Dato and myself at the Mandarin Hotel and settle the amount owed to you". Mr Majeed flew to Singapore in the third week of November 2006, but Mr Mahmud did not appear for the appointment. He had a conversation with Ow Yong Thian Soo, who said that the first defendant could not attend the meeting but proposed that someone else represent him. The plaintiff declined to meet without the first defendant being present. On 25 November he received another call from Mr Mahmud's solicitor, who said, "Can you reduce your claims", in response to which Mr Majeed proposed a mediation. On 28 November he sent the amended summons by registered post to the Peach Garden address, and obtained an advice of delivery dated 4 December 2006. On the same day he sent a copy of the amended writ of summons to Mr Mahmud's Singapore solicitor, Ow Yong Thian Soo, a partner in Lee & Lee. Advice of delivery dated 4 December 2006 was provided. He also sent a copy of the amended writ of summons by registered post to the first defendant's Malaysian office at Achi Jaaya Properties Sdn Bhd No 267 Jalan Chin 93100 Kuching, Sarawak, and obtained an advice of delivery, although the date is not clear on it.
- 6 His Honour made the following order:  
*Unless the defendants move to set aside this order by 7/8/07, the court orders that the service by post in Malaysia, without the note that the proceedings are to be served outside Australia, is confirmed and as the cause of action arose in NSW, I give leave to plaintiff to proceed to judgment under Part 11, rule 4.*
- 7 On 14 August 2007, leave to proceed having been granted by the Chief Judge, and the defendants not having appeared, the matter was referred by the Registrar to the One Day List, and came before me on 31 August 2007. Mr Majeed appeared in person, as he had on each previous occasion, and there was no appearance for any defendant, as there had been none each previous occasion. Initially, I fixed the matter to be heard before me on Tuesday 18 September, but in view of evidence that Mr Majeed then tendered indicating that the defendants or some of them may be dealing with their property in Australia, and as time was available that day, I acceded to Mr Majeed's application to hear the matter immediately, and made the following orders:
  1. Give judgment that the first defendant pay the plaintiff the sum of \$2,212,615;
  2. Order that the first defendant pay the plaintiff's costs
  3. Order that the proceedings against the other defendants be dismissed.
- 8 I indicated that I would publish reasons subsequently. These are those reasons.
- 9 On the hearing, the evidence, substantially comprised in the plaintiff's further affidavit sworn 4 July 2007, was that in respect of an agreement made in about January 2003 between the plaintiff and the first defendant that the plaintiff would perform various project management, development, property management, construction management, contract management and cost management services to the first defendant, the plaintiff on 29 December 2006 sent to the first defendant by post at his Vaucluse address a payment claim, under the (NSW) *Building and Construction Industry Security of Payment Act* 1999, for \$3,825,780. That claim was as follows:

1.10 PROFESSIONAL CONSULTANCY FEES AND AIRFARES

		Amount Due Aus\$
1.11	Project Management	
	10 Wylde Street, 767-769 George Street	
	26 Carrara Road and others	1,059,950.00
1.12	Development Management of Properties at	
	10 Wylde Street, 767-769 George Street	
	26 Carrara Road and others	410,650.00
1.13	Contract Management	
	10 Wylde Street, 767-769 George Street	
	26 Carrara Road and others	188,770.00
1.14	Cost Management	
	10 Wylde Street, 767-769 George Street	
	26 Carrara Road and others	431,290.00
1.15	Legal Coordination	
	Court cases against the former director (James Nazmi)	
	And the former contractor PACI (Ed Lee)	1,390,620.00
1.16	Airfares/Telephone charges/Hotel	
	2004 110,500.00	
	2005 130,000.00	
	2006 <u>104,000.00</u>	
	344,500.00	344,500.00
	AMOUNT DUE:	Aus\$3,825,780.00

- 10 The plaintiff deposed that the payment claim had not been paid, and that no payment schedule had been received within ten business days of posting of the claim.
- 11 On 1 March 2007 the plaintiff resent, by registered post to the first defendant at his Vaucluse address, the payment claim for \$3,825,780, in the same form. A delivery confirmation acknowledging receipt was tendered. The claim was not paid and no payment schedule was received within ten business days thereafter.
- 12 Section 13 of the Act authorises services of a payment claim, which must identify the construction work or related goods and services to which the progress claim relates. Section 14 provides for service of a payment schedule by the respondent to a payment claim, and provides (by s 14(4)) that if a claimant serves a payment claim on a respondent and the respondent does not provide a payment schedule to the claimant within ten business days after the payment claim is served, the respondent becomes liable to pay the claimed amount to the claimant. Section 15 provides that if the respondent becomes liable to pay the claimed amount under s 14(4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and fails to pay the whole or any part of the claimed amount on or before the due date for the relevant progress payment, the claimant may recover the unpaid portion of the claimed amount from the respondent as a debt due to the claimant in any court of competent jurisdiction (as an alternative to making an adjudication application).
- 13 Section 15(4) provides:  
*If the claimant commences proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt:*  
 (a) *judgment in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in subsection (1), and*  
 (b) *the respondent 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.*
- 14 On the evidence of the plaintiff, I was satisfied that the respondent had become liable under s 14(4) to pay the claimed amount to the claimant, as a consequence of having failed to provide a payment schedule within the time allowed, and had failed to pay the whole or any part of the claimed amount. That this occurred after the

proceedings were instituted is not an objection to its being relied on in the proceedings [UCPR, r 14.17], *a fortiori* where the proceedings were by Summons and the proceedings under the Act were in respect of a liability which was already the subject of the claim in the proceedings.

- 15 However, on the face of the payment claim, I was not satisfied that the amounts claimed for “Legal Coordination”, or for “Airfares/Telephone charges/Hotel”, were in respect of “construction work” or “related goods and services” within the meaning of the Act, and thus properly the subject of a payment claim under the Act. Exclusion of those amounts reduced the claim to \$2,090,660. I allowed interest at 10% from 1 February 2007 to judgment, amounting to \$121,955, and accordingly gave judgment that the first defendant pay the plaintiff the sum of \$2,212,615.
- 16 There was no evidence that showed how any of the other defendants could be liable, and Mr Majeed did not press his claims against them; accordingly, I ordered that the proceedings against the other defendants be dismissed. Should Mr Majeed wish to pursue a claim against the first defendant in respect of matters not within the scope of construction work and related services, the possibility of which I did not intend to exclude, that will have to be done in other proceedings.