

Pasquale Lucchitti Trading as Palluc Enterprises (1) : Ben Lucchitti Trading as Palluc Enterprises (2) : Paul Lucchitti Trading as Palluc Enterprises (3) : Sam Lucchitti Trading as Palluc Enterprises (4) : Irene Mavis Lucchitti Trading as Palluc Enterprises (5) : Umberto Pallone Trading as Palluc Enterprises (6) : Flora Pallone Trading as Palluc Enterprises (7) : David Alfred Pallone Trading as Palluc Enterprises (8) v Tolco Pty Ltd (1) : John O'Brien (2)

JUDGMENT : Bergin J : New South Wales Supreme Court : 7th November 2003

- 1 This is yet another application in respect of an adjudication under the *Building and Construction Industry Security of Payment Act 1999*. The plaintiffs filed a Summons on 5 November 2003 seeking a declaration that the adjudication determination made by the second defendant, John L O'Brien, on 31 October 2003, is null and void.
- 2 The plaintiffs seek an order that the first defendant, Tolco Pty Ltd, be permanently restrained from taking any steps in relation to the adjudication determination and also seek a declaration that the appointment of John L O'Brien, the second defendant, is null and void. Finally, an order is sought under s 69 of the *Supreme Court Act* quashing the adjudication determination of the second defendant.
- 3 This matter came into the list urgently for the hearing of a notice of motion that seeks an order that until further order the first defendant be restrained from taking any steps to enforce the adjudication made on 31 October and that it also be restrained from issuing an adjudication certificate under *the Act*.
- 4 In support of the notice of motion the plaintiffs rely upon the affidavit of Robert George Webley, who is the solicitor for the plaintiffs. That evidence discloses that the plaintiffs obtained a quotation from the first defendant, to whom I shall refer as the defendant, to carry out roofing work at a partly completed home unit building that the plaintiffs had purchased at 8-10 Kembla Street, Wollongong. That quotation is in evidence in exhibit E1. It is in the following terms:
"Dear Pasquale, we acknowledge receipt of above mentioned enquiry and thank you for the invitation. Tolco wishes to advise our price for the fabrication, erection and completion of steel roof structure at Kembla Street Wollongong is \$39,160". There is then a particularisation of the price which allows for certain matters, including materials, fabrication, site, supply of roll beams, et cetera. That document also states that the prices are subject to GST and that "any savings made in the above areas will be passed on to the client".
- 5 The evidence states that the solicitor, Mr Webley, was informed by one of the plaintiffs, Pasquale Lucchitti, and that he verily believed that the quotation was accepted on or about 14 March 2002 and that the defendant commenced work shortly after. Mr Webley claims that in early November 2002 he was approached by Pasquale, who instructed him that he had just received a bundle of invoices in a plain manilla envelope. Those invoices are in evidence as exhibit E2 through to E35. Examples of those invoices show that the first defendant was claiming that work was done on site at Kembla Street to install a new roof from dates in June, July and August. It is also apparent there were invoices up to about 5 September 2002.
- 6 Correspondence ensued between the plaintiffs and the defendant and on 16 December 2002 a letter was sent to the plaintiffs as a result of correspondence that disputed the claim made for the payment for works allegedly done in addition to those which were in fact contained in the letter or quotation of 14 March 2002. In that letter the defendant claimed that Tolco had tendered on a particular scope of works relating to the steel roof structure which had been detailed in the 14 March 2002 quote. The letter goes on to claim that following acceptance of the quote certain works were additional to the tender, including detailed drawings which were not in the original offer, in the amount of \$7,546, a survey, amounting to \$577.50 and modifications to beams, which were in fact delivered by the plaintiffs, amounting to \$270.
- 7 The letter states further that the site works, which were not in the 14 March document, included such things as modification to trusses, window headers, vertical columns and modifications to a lift well, supply of fabrication items and scaffolding, totalling \$30,956.30. There is then a reference to the original quote, which was the 14 March document, in the amount of \$39,160, less the crane supplied by the plaintiffs, less blast and paint, totalling works completed for an amount of \$64,556.30.
- 8 In a letter, which was not objected to, but has a heading "Without Prejudice", the plaintiffs wrote to Tolco in terms including: *"I spoke with you originally and inspected the site with you. The inspection was of a partially completed roof structure. Our agreement was a total price to complete the works. The price was all inclusive and there was no discussion about drawings or surveys. All of that work was included in our original discussion and quote. There was no mention of any additional drawings or surveys."*
- 9 There was also reference in that letter to initial discussions that the defendant could use anything that was on site, or rip it out and start again, whatever the plaintiffs wanted. It was claimed that was the basis of the defendant's tender, or quote, and that the defendant was always entitled to modify or use whatever the defendant obtained or whatever the plaintiffs had. Specific reference was made to the item in the 16 December letter to the modification to the lift well. It was stated that: *"The item which you say was modification to lift well is actually part of the roof structure which was in the original discussion and tender."* and: *"I accept items 2, 3 and 4, namely all of the window headers are properly extras."*
- 10 Clearly the plaintiffs accepted that there were additional matters known as, in this letter "extras". The letter continued: *"I felt that the extra items (window headers) were offset by the supply of the 250 universal beams and the other input that I provided and that overall that my offer of 11 November 2002 was fair."*

- 11 On 6 May 2003 the plaintiffs' solicitors advised the defendant that notwithstanding the various attempts to arrange meetings, the plaintiffs had heard nothing from the defendant and therefore enclosed a cheque, not for \$39,160 but for \$35,750, made up as the amount of the offer, plus GST. On receipt of that letter the defendant acknowledged receipt of the cheque and credited it to the plaintiffs' outstanding account and once again requested payment of \$31,726.
- 12 On 9 September 2003 the defendant served a progress claim number two for a total amount, including GST, of \$35,327.93. Attached to that claim was a schedule detailing what is referred to firstly as the contract and then further variations. In addition, the payment claim was attached with a statement as required by the Act that it was a payment claim under the *Building and Construction Industry Security of Payment Act 1999*.
- 13 The plaintiffs served a payment schedule in response to the defendant's payment claim on 29 September 2003. It stated: "*Payment schedule, reference: Progress claim number 2 dated 9 September 2003.*
Scheduled amounts: Nil. Reasons, disputed claim as set out in our letters dated 29 September 2003 and 10 September 2003 and Palluc letter dated 20 November 2002, further copies enclosed."
- 14 The letter of 29 September 2003 was a letter in which the solicitors for the plaintiffs disputed the plaintiffs' liability to pay the amount due. It was stated that the amount concerned was not a progress claim and that prior to the December 2002 amendments was not subject to the legislation. It was claimed it was a final payment sought after completion of the work. Amongst other things it raised questions about whether the claim had been made within 12 months as required by the Act, and whether the defendant was entitled to seek adjudication, suggesting that it was not. It stated: "*As advised previously this is not a question of progress payments. Our client disputes the entitlement to the remainder claimed and has now gone ahead to pay the full amount of what it considers was due. In those circumstances it is not able to put forward a payment schedule, the full amount is in dispute as is the fact of whether it is within the legislation.*"
- There was then an invitation to withdraw the defendant's claim.
- 15 Exhibit E149 is a letter dated 10 September 2003 stating that the defendant had already been advised that the remainder of the claim was disputed and that the plaintiffs had paid the undisputed part of the invoice but the remainder was in dispute. It states, "it has been explained on numerous occasions" but did not descend into any further detail.
- 16 The third letter referred to in the payment schedule at Exhibit 40 was a letter from the plaintiffs to Tolco. It stated: "*Just to clarify one issue, I note that no invoices were submitted under the Security of Payment Act 1999, nor do I concede that it applies. I note that even if that legislation did apply the payment schedule I would be submitting would be full payment of the actual contract sum within seven days. This was \$25,760 plus GST adjustment for the two items not ultimately carried out. This is in line with the quote you gave me before the work started.*"
- 17 The defendant made application under the Act for the appointment of an adjudicator. The adjudicator was appointed and submissions were made.
- 18 The respondent's adjudication response, which appears at Exhibit E198, was one and a half pages in length. Paragraphs 1 and 2 of that response stated:
"1. *The parties entered into a lump sum agreement on 14 March 2002. Annexed and marked A is a copy of the agreement. It is not in dispute that there were some deletions from the scope of the works. There is dispute as to its quantification.*
2. *It was a term of the agreement that the contract price would be paid upon completion.*"
- 19 These two paragraphs appeared under the heading "background". There is then a reference in the response that on 9 September 2003 the defendant had served what it described as a progress claim purportedly pursuant to the Act. After recounting the history of the application for adjudication, and the fact that the defendant lodged the adjudication application on 14 October and that the adjudicator had been appointed, the response deals with submissions in relation to the Act.
- 20 The adjudicator received documentation from both sides. It is apparent that his position was about as uncomfortable as mine is in respect of the way in which documentation has been presented. It is obvious that he did not receive a great deal of help with the documents. He said: "*The respondent (that is the plaintiffs in these proceedings) contends that the claim is out of time saying that it was served more than twelve months after completion of the work under the contract. I have had much difficulty in dealing with this issue on the materials provided to me by the claimant which have been most unhelpful.*"
- 21 What had happened was that the defendant had served a document additional to the ones that I have referred to, which has been referred to in submissions before me as the "critical document", which is found at Exhibit E143. Although there is no evidence showing that the plaintiff did not receive this document until the adjudication process, such a claim was made before me. That document refers to work at the site on 10 September. The adjudicator said: "*I have been obliged to accept that the weekly time sheet (that is the critical document to which I have just referred as E143) provided by the claimant for the week ending 15 September 2002 shows some activity on the job, identified as job number 2178 on this sheet and on the earlier dated daily hourly hire sheets by one D Zaffanato - who had been previously employed on the job as evidenced by the daily hourly hire sheets - on 10 September 2002 so that the claim appears to have been served on the last possible date.*"

- 22 That was the adjudicator's finding in respect of the submission put in para 3 of the response. The adjudicator then dealt with the payment schedule, the notice of intention to lodge the adjudication application and finally came to the adjudication response. The adjudicator said that under s 20 (2)(b) of the Act the respondent, that is the plaintiffs in these proceedings, could not include in the adjudication response: *"Any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant."*
- 23 The adjudicator then determined that the claim was a valid claim as defined by the Act and, inter alia, that there was work done on the job on 10 September 2002 and that the claimant was entitled to make a progress claim under the Act and to seek adjudication. He also determined that the letter of 20 November 2002 from the respondent to the claimant and the letter of 10 September from the solicitors did not add anything to the respondent's case.
- 24 The controversial section of the determination is the following: *"As to the matters raised in the adjudication response, I find as follows:*
I can not have regard to paragraphs 1 and 2 as these reasons are not included in the payment schedule."
- 25 Mr Weinberger, counsel for the plaintiffs in these proceedings, submits that is a jurisdictional error committed by the adjudicator. He submitted that the correspondence to which I have referred, which was attached to the payment schedule and forming part of it, clearly raised the matters referred to in paras 1 and 2. That is, that the lump sum agreement was relied upon and that there was dispute as to its quantification.
- 26 Mr Muddle, counsel for the defendant, submitted that one has to be careful in reviewing that correspondence because what is being put in the correspondence was not dealing with the question that was really raised before the adjudicator and that is the variation claim to the contract. What was put simply at the bottom of the 29 September letter was a disputation of entitlement to the remainder claimed, that is the variations, and nothing further. Mr Muddle submitted that no claim was made in that letter, simply a bald assertion that there was a disputation about the remainder claimed.
- 27 It is a little curious that the adjudicator found himself in the circumstances where he said he could not have regard to those submissions because in para 2.9 he said this: *"It is clear that during the course of construction there occurred changes to the work and that there arose a dispute over the additional work and cost."*
- 28 That is clearly a recitation of part of what the plaintiffs were claiming in para 1 of the response which the adjudicator said that he would not have regard to. The adjudicator then went on: *"This is evidenced in the first instance by a letter produced by the claimant addressed to the respondent dated 16 December 2002 in which the claimant asserts that it had completed work to the value of \$64 odd thousand. Bearing in mind that this letter was composed long after the work was completed I take that amount to be the correct total, although it is not mirrored in the claim. The difference is not explained. Obviously the respondent disagreed with the claimant on the amount payable and refused to pay the amount claimed. It appears that the respondent instead paid three amounts to the claimant as evidenced by the card transactions document provided by the claimant."*
- 29 It is clear that the adjudicator was very much alive to the issue that the plaintiffs disputed the matters claimed by the defendant, albeit that he had said that he would not have regard to paras 1 and 2. In paragraph 2.9 the adjudicator said: *"The plaintiff had not taken issue with the quantum of the claim or the value of the work other than to maintain that the whole of the amount unpaid was disputed."*
The adjudicator also noted that nowhere did the plaintiffs identify what amount has been paid and accordingly he had had to assess the amount paid and the balance payable from the confusing material put forward by the claimant.
- 30 Mr Weinberger submits that the adjudicator also fell into error in failing to identify the terms of the contract and, secondly, that he failed to value the contract. In other words, he did not comply with his duty under the Act or misunderstood it to the extent that those failures were jurisdictional errors.
- 31 There was also a claim that there was denial of natural justice. The question before me is whether there is a serious issue to be tried in respect of these matters and Mr Muddle has submitted there is no serious issue to be tried.
- 32 Mr Muddle submitted that what this adjudicator did was to look at the terms of the contract to decide that there were claims made pursuant to a variation and when one looks at a document in evidence, E80, before the adjudicator there was evidence which included a claim that the plaintiff had "verbally requested" the defendant to carry out further works in relation to the structure. That was the claim that he was looking at and that was the claim that he had to decide on the documents before him. He considered those matters. He did not fail to consider them. What the plaintiffs' claim here is that he decided against them inappropriately. If that was an error it is not a jurisdictional error.
- 33 The portions of the determination to which I have referred in my view indicate that this adjudicator was struggling to do his duty pursuant to the Act, notwithstanding the difficulties in which he found himself. He did his best in the circumstances of the material before him and he said that he was obliged to accept that "critical" weekly time sheet. Mr Weinberger candidly conceded that no issue was taken with that time sheet before the adjudicator but submitted that was because of a prohibition upon that process pursuant to s 22(2)(c)&(d).

- 34 Whatever be the case in respect of that document, in my view the adjudicator clearly strived to do his duty and found, particularly in the last paragraph of 2.2, that he was obliged to accept the critical document as part of the contract and that the work was in fact done. Whether that is right or wrong is another matter but I am looking at what he purported to do and it is clear to me that he had regard to *the Act* as required by s 22; that he had regard to the contract that was the best evidence before him, even though the documents were unhelpful; that he had regard to the payment claim; that he had regard to the payment schedule; and that he also had regard to the submissions. Although he said that he did not have regard to paragraphs 1 and 2 of the response, I am of the view he effectively had regard to the submission put generally that this was a lump sum contract.
- 35 here is also a point raised by Mr Weinberger that a jurisdictional error was made in failing to value the contract. Once again the adjudicator in setting out the progress payment in sections 2.9 and 2.10 of his determination in my view did value the contract. Whether that was right, as I say, is another matter. I am not satisfied on the balance of probabilities that there is a serious issue to be tried on those matters.
- 36 The final matter is the question of a reference date. Under s 8 of *the Act* a right to a progress payment is said to arise in this way:
- “(1) On and from each reference date under a construction contract a person:
- (a) Who has undertaken to carry out construction work under the contract, or,
- (b) Who has undertaken to supply related goods and services under the contract is entitled to a progress payment.”
- 37 S. 8(2) of *the Act* provides that a reference date in relation to a construction contract means a date determined by or in accordance with the terms of the contract and if the contract makes no express provision the last day of the named month in which the construction work was first carried out. There was a point raised by reason of the inclusion of a reference date in the progress claim. I do not regard that point as going anywhere. If the work is done pursuant to a construction contract then on and from the reference date, that being either in the contract or at the end of the month on which the work was done, the progress payment can be claimed.
- 38 The adjudicator considered the point raised as to whether there was a jurisdictional question, that is whether the claim was out of time. He disagreed with the submissions put by the plaintiffs. Assuming that I am wrong in respect of what I have referred to as the adjudicator's consideration of matters contained in paras 1 and 2 of the response, notwithstanding his statement that he had not had regard to them, I am not persuaded that it is a jurisdictional error.
- 39 But even if that is wrong it is to be remembered, in line with what McDougall J said in *Musico v Davenport* [2003] NSWSC 977 at par 52, that the matter is one of discretion. The application before me is for an injunction on an interlocutory basis. That too is a matter of discretion on the balance of convenience.
- 40 Both in my judgment in *Paynter Dixon Constructions Pty Limited v JF & CG Tilston Pty Limited and Anor* [2003] NSWSC 869 and in a recent judgment of Einstein J in *Brodyn Pty Ltd Trading as Time Cost and Quality (ACN 001 998 830) v Philip Davenport and Ors* [2003] NSWSC 1019 emphasis has been placed on the interim nature of the process under this *Act*. It is just that. The intention is to effect a speedy payment of contractors. It does not affect the parties' rights and importantly s 32 in my view looms large in deciding this case. Even if there had been a serious issue to be tried on a balance of convenience I would not be persuaded that I should restrain the defendant in this matter. The amount in issue between the parties (\$30,000) in respect of the contractual dispute suggests that this matter should be litigated in the Local Court.
- 41 I refuse the application for injunctive relief. The plaintiffs are to pay the defendant's costs of the interlocutory application. This matter is adjourned to the directions list at 12 noon on 14 November 2003

DS Weinberger (Plaintiffs) instructed by Robert Webley & Associates
WG Muddle (First Defendant) instructed by Deacons

John O'Brien (In Person)