

Judgment : Bergin J : Equity Div. Supreme Court of New South Wales. 2nd July 2003

1. This matter was commenced on 27 June 2003 at which time the plaintiff appeared ex parte and I granted an abridgment of time for the service of the summons and a short return and restrained the first and second defendants from taking any step in relation to an adjudication which had been purportedly commenced under the Building and Construction Industry (Security of Payment) Act 1999 (the Act). That injunction was granted up to and including 5 pm today.
2. The matter was returnable before me this morning and Mr Christie of counsel appeared for the plaintiff and Mr P Davenport, solicitor, appeared for the first defendant. The second defendant is present in court but is not represented, he being the appointed adjudicator.
3. Today the plaintiff would rather have pursued the application for the declarations sought under the summons that the appointment of the second defendant as adjudicator was invalid or null and void, and a declaration that the application made by the first defendant in relation to the adjudication was also null and void.
4. The plaintiff is seeking a permanent restraint on the first and second defendants.
5. It is noted that on the 27th no stay application was made but, as I apprehend Mr Christie's submissions, such an application is made today.
6. The plaintiff and the defendant entered into some negotiations which are the subject of the evidence of Mr Jury, outlined in his affidavit, of 26 June 2003. It was in October 2002 that the plaintiff called for tenders for the supply of electrical services at the Ex—Servicemen's Club in Orange, New South Wales.
7. The first defendant submitted a tender for the proposed work in late October and after further clarification the plaintiff notified the first defendant on 25 November 2002 that its tender had not been accepted.
8. There was apparently a contract entered into with a third party in respect of the work, the subject of the tender. That work was apparently carried out and, on the evidence of Mr Jury, the plaintiff is in the process of finalising payment for that work with the other contractor.
9. There is no issue that the plaintiff did request the first defendant to carry out certain electrical works at the club and on the evidence of the plaintiff that work was to be done on a do and charge basis. That work was carried out.
10. On 30 May 2003 the plaintiff received a payment claim from the first defendant which refers to the work that the first defendant carried out at the club but also refers to work apparently the subject of the tender which was, as I have said, not carried out by the first defendant.
11. On 2 June the plaintiff sent a response to the first defendant's claim, asking the first defendant to complete a particular form. It was said to be a statutory declaration form and the plaintiff requested the first defendant to provide it to the plaintiff by close of business on 3 June.
12. On 5 June the plaintiff sent a further letter to the first defendant asking for the statutory declaration to be returned to the plaintiff in respect of the electrical works carried out by the first defendant at the club.
13. Also on 5 June the plaintiff wrote to the first defendant in respect of the payment claim that had been made and acknowledged that the first defendant was engaged to complete the electrical works which have been referred to as the "temporary electrical works" for certain sheds in late October and early November. The plaintiff informed the first defendant that that was the full extent of the first defendant's engagement on the project and that the first defendant had completed no other works on site at that time. The plaintiff advised that the tender or the offer for the construction electrical works was not accepted and had been awarded to others and thus no construction contract between the plaintiff and the first defendant existed beyond that covering the temporary electrical work.
14. The plaintiff's letter in fact provided a payment schedule in response to the claim, said to be a schedule under the Act in the amount of \$2,027.30 but referring to the letter to which I have just made reference. In other words, the plaintiff accepted that it owed to the first defendant the amount of \$2,000 odd in respect of the temporary electrical work.
15. On 11 June the plaintiff received a letter from the first defendant enclosing a document headed Statutory Declaration and detailing claims in respect of the amount of \$2,260. That material had been requested by the plaintiff and the first defendant claimed that it was details of materials and prices.
16. The statutory declaration claimed that there had been a subcontract entered into on 28 October 2002 and that the period to which the statutory declaration related was to 30 May 2003.
17. The document in evidence does not have the usual form one finds in a statutory declaration, such that it is a declaration in the presence of any other person and I am not sure of the provenance of that document.
18. On 19 June the plaintiff received from Australian Solutions Centre Pty Ltd a notice of intention to apply for an adjudication application. That identified the first defendant as the claimant and the plaintiff as the respondent. It identified the payment claim details as an amount of \$34,463 and referred to the plaintiff's payment schedule dated 5 June.
19. The plaintiff advised the first defendant on 19 June that it confirmed that the amount which it proposed to pay to the first defendant should be increased to \$3,938, including GST, in relation to the temporary electrical works.
20. On 20 June the plaintiff wrote to the manager of the Australian Solutions Centre, advising that it was of the view that Australian Solutions Centre did not have jurisdiction to appoint an adjudicator. On that occasion the plaintiff advised that the amount of \$3,938 was to be dispatched to the first defendant on 23 June, the following Monday, and that there was, as to the balance, no proper claim made by the first defendant under the Act. I shall return to that shortly.
21. The plaintiff forwarded to the first defendant the amount as indicated and there is no issue that that amount has been paid.
22. On 25 June the plaintiff received a notification from the second defendant that he had been appointed as adjudicator under s.28 of the Act. In that notification the adjudicator advised that his fee was to be based on a rate of \$220 per hour plus disbursements at cost and that an invoice would be raised for his fee and would accompany the determination. The parties

were also advised that payment terms would be strictly seven days from the date the invoice was issued. The adjudicator advised that the fee would be claimed in accordance with s.29 of the Act.

23. Today Mr Davenport has advised the court that he is not in a position to take instructions from the principal of his client because that person is presently overseas. However, Mr Davenport indicated that his client would wish to file evidence in relation to the question of whether there is or was in existence a contract between the plaintiff and the first defendant within the meaning of the Act, that is, whether there was a "construction contract".
24. Under the Act, a construction contract is defined to mean a contract or other arrangement under which one party undertakes to carry out construction work or to supply related goods and services for another party. Related goods and services is defined in s.6 of the Act as services of the following kind:
 - "(1) the provision of labour to carry out construction work,*
 - (ii) architectural, design, surveying or quantity surveying services in relation to construction work,*
 - (iii) building, engineering, interior or exterior decoration or landscaping advisory services in relation to construction work."*
25. Construction work is defined in s 5 of the Act and includes:
 - "(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming or to form part of land (whether permanent or not),*
 - (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air— conditioning, ventilation, power supply, drainage or coast protection"*
26. It is the plaintiff's claim that the amount, other than the amount for the temporary electrical works, is not an amount payable under a contract that falls within the definition of construction contract, as there were no services being a provision of labour to carry out construction work.
27. This matter is the one upon which the first defendant wishes to file evidence for the purposes of establishing that the work for which fees were rendered in respect of the amount other than for temporary electrical services work, falls within the definition under the Act and thus entitles the first defendant to make the claim that it did.
28. The relevant section dealing with the claim is s.13 of the Act. Sub—section 2 provides that a payment claim must identify the construction work or related goods and services to which the proffered payment relates. It is that aspect that the plaintiff attacks. The plaintiff's case is that the payment claim made or purportedly made by the first defendant does not fall within sub-s.2 of s.13 of the Act and is thus not a valid payment claim.
29. The consequence of that, if it be right, is that the adjudication can only be referred or occur if a payment claim has been validly made, thus the importance of the first defendant's evidence in respect of whether there is a construction contract as between the first defendant and the plaintiff.
30. The plaintiff sees the force in Mr Davenport's application to put on evidence, but submits that in the meantime the adjudication should not proceed.
31. I asked the second defendant whether he wished to say anything today, as he is not represented and as I have indicated, he is in court. He has indicated to the court that if he is not restrained by the court he will proceed with the adjudication.
32. Mr Davenport concedes that there is a serious issue to be tried between the parties as to whether a valid payment claim has been made under the Act which entitles the adjudication to occur. Mr Davenport submitted that notwithstanding that the balance of convenience favours the adjudication continuing.
33. Mr Davenport raised a number of points. He submitted that if the adjudication is found to be null and void in due course, then the plaintiff will not be disadvantaged. That submission rests on the premise that the plaintiff has, in fact, lost its entitlement to make any submissions to the adjudicator by reason of the expiration of the time within which it is entitled to make a response under s.20, it having not sought a stay of the proceedings when it obtained its restraining order against the first and second defendants.
34. The plaintiff, on the other hand, submits that it does not want to take any step in the adjudication process and submitted that consistent with the authorities referred to in the helpful outline Mr Christie provided, it had an obligation to raise this jurisdictional point as early as it did and understands that its position may be adversely affected if Mr Davenport's point is correct that the plaintiff is not entitled to make any response.
35. That argument of the first defendant seems to me to be in the plaintiff's favour on a balance of convenience argument, so that the jurisdictional question should be decided prior to the adjudicator making his decision.
36. Another point raised by Mr Davenport was the risk of the adjudicator not being able to recoup his fees because there is a time frame within which the adjudicator is required to make his determination. He drew my attention to sub-s.4 of s.29 which provides that an adjudicator is not entitled to be paid any fees or expenses in connection with an adjudication if he or she "fails" to make a decision on the application within the time allowed by s.21 sub-s.3.
37. Section 21 sub-s.3 provides that the adjudicator is to determine the application as expeditiously as possible and in any case within ten business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application or within such further time as the claimant and the respondent may agree.
38. It appears that it is approximately four business days since notification, on one view of the evidence, and if time continued to run then it may be that there would be a risk. On the other hand, the term "fails" within sub-s.4 of s.29 would need to be read in the light of the circumstances of this case. "Fails" seems to me to suggest a default in the adjudicator or some lack of compliance with his or her obligations. If an adjudication is stayed and an adjudicator is restrained, prima facie, it seems to me that the term "fails" may not be applicable.
39. In any event the plaintiff has indicated that it would agree that any undertaking as to damages covers the adjudicator's fees if they are not otherwise recoverable, as I understand Mr Christie's submission. It therefore does not seem to me to be a risk that favours the defendant on the balance of convenience argument.
40. Mr Davenport has also submitted that this legislation is important legislation and the courts should not intervene to restrain the process when it is obvious that the Act provides a regime intended to favour the prompt resolution of disputes between

contractors. Indeed, Mr Davenport made the point that if every time there is a dispute between the parties as to whether the monies are owing an injunction is granted, the working of the system proposed and set up under the legislation would grind to a halt. Spurious claims in respect of jurisdictional arguments would not or should not be entertained.

41. In this case it is different. It is conceded that there is a serious issue to be tried and to elevate this case to what Mr Davenport gently suggested was a "test case" is, in my view, inappropriate. This is a case, on the facts of this case, in which there is no issue that there is a serious issue to be tried.
42. There may be arguments that the plaintiff's provision of the progress claim or response was a step taken under the Act but it seems to me, prima facie, that was a qualified step, with reservation of the plaintiff's rights having regard to the contents of the plaintiff's letter of 5 June 2003. If the plaintiff is right then if the adjudication Continues it will mean that the adjudicator has embarked upon a process that is an invalid or, alternatively, a null and void process.
43. Mr Davenport also relied upon in Workplace Technologies PLC and E Sqared Ltd & Riches, a copy of which was provided to me. It appears to be an unreported decision of Judge David Wilcox QC in the Technology and Construction List in the Queen's Bench Division in the High Court. The references to which Mr Davenport took me included a reference to his Honour saying that it would be difficult to satisfy the threshold test in most adjudication cases. The threshold test that his Honour referred to was that there was a serious question to be tried. That threshold is not in issue as has been conceded by Mr Davenport.
44. I am satisfied that the balance of convenience favours the granting of an injunction and a stay of the adjudication whilst the first defendant has time to file affidavit evidence upon which it seeks to rely in the main proceedings.
45. Upon the plaintiff, through its counsel, giving the usual undertaking as to damages, such undertaking recognising that the adjudicator's fees to date may be included in it if they are not otherwise recoverable, the first and second defendants are restrained from taking any step in relation to adjudication reference No 2003-TASC- 014 until further order. The adjudication under reference No 2003—TASC-014 is stayed until further order.
46. I grant leave to the plaintiff to file any further evidence by Monday 7 July 2003. I direct the first defendant to file any evidence by 4 August 2003. I list the matter before the Registrar at 9.30 am on 5 August 2003.

I grant liberty to the parties to restore the matter to the list on two days' notice.