

**JUDGMENT: Lloyd AJ** : Supreme Court of New South Wales. 25th November 2005

- 1 The question for determination is what should happen to a bank guarantee in the sum of \$162,170 held by the second defendant, National Australia Bank Limited, and now claimed by the first defendant, Piling Contractors (Queensland) Pty Limited.
- 2 The relevant facts may be briefly described. On 30 September 2001 there was an adjudication determination under s 22 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) in which the adjudicator held that the plaintiff was obliged to pay to the first defendant a progress payment in the sum of \$162,170 pursuant to a building contract between them.
- 3 On 5 October 2001 the plaintiff provided a bank guarantee in that sum but unfortunately the name of the first defendant was incorrectly stated. On 16 October 2001 a bank guarantee naming the first defendant correctly was then provided.
- 4 In the meantime, on 10 October 2001 proceedings were commenced in the District Court by the defendant by way of statement of liquidated claim claiming an amount of \$175,593.41, which claim, as I understand it, arises out of the same building contract.
- 5 On 4 October 2002 there was an order made for the transfer of the proceedings from the District Court to the Supreme Court. There has been an official reference under Pt 72 of the *Supreme Court Rules 1970* (NSW) to a referee, Ms Janet Grey. I understand that the reference is presently part heard.
- 6 It seems that the first defendant has taken steps to cash the guarantee, and on 18 October 2005 an interlocutory injunction was granted against the first defendant to restrain it from doing so until further order, or until the determination of these proceedings.
- 7 The *Building and Construction Industry Security of Payment Act* was amended with amendments that came into effect in March 2003. The dispute, however, involves the construction of the Act as it stood at the relevant time.
- 8 The transitional provisions introduced at the time of the amendments state that the amendments do not apply to a payment claim served before the commencement of the amending Act and any such claim is to be dealt with in accordance with the Act as if the amendments had not been made: see Sch 2 – *Savings and transitional provisions*. Moreover s 30 of the *Interpretation Act 1987* (NSW) operates to preserve any right, privilege, obligation or liability acquired or accrued, or incurred under the Act prior to its amendment; neither do the amendments affect any legal proceeding or remedy in respect to any such right, privilege, obligation or liability arising under the Act prior to its amendment.
- 9 For purpose of this judgment I incorporate by reference a number of provisions of the *Building and Construction Industry Security of Payment Act* as originally enacted, namely sub-ss 3(3) and 3(4), ss 23 and 32:

### **3 Object**

- (3) *The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:*
  - (a) *the making of a payment claim by the person claiming payment, and*
  - (b) *the provision of a payment schedule by the person by whom the payment is payable, and*
  - (c) *the referral of any disputed claim to an adjudicator for determination, and*
  - (d) *the setting aside of money as security for payment of the progress payment so determined.*
- (4) *It is intended:*
  - (a) *that this Act does not limit any other entitlement that a person may have under a construction contract, or any other remedy that a person may have for recovering any such other entitlement, and*
  - (b) *in particular, that the setting aside of money as security does not prejudice any claim, counter-claim or defence that may be raised in civil proceedings concerning the work to which a payment claim relates, but merely ensures that money will be available to satisfy those entitlements when they are finally determined.*

### **23 Respondent's obligations following adjudicator's determination**

- (1) *If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent:*
  - (a) *must pay that amount to the claimant, or*
  - (b) *must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them.*
- (2) *The security given by a respondent may be in any of the following forms:*
  - (a) *an unconditional promise by a recognised financial institution to pay to the claimant, on demand, the adjudicated amount, or*
  - (b) *payment of the adjudicated amount into a designated trust account, or*
  - (c) *such other form as may be agreed between the claimant and the respondent.*
- (3) *If the respondent is a public authority, the security may be in the form of a certificate by the authority to the effect that sufficient money will be legally available for payment of any amount up to the adjudicated amount if and when any such amount becomes payable.*
- (4) *Except with the consent of the parties, it is unlawful for the claimant to enforce any security given under this section until at least 2 business days after any matters in dispute between them in connection with the progress payment to which the security relates have been finally determined.*
- (5) *For the purposes of subsection (4), a determination becomes final:*

- (a) *in the case of a determination from which there is no right of appeal or review, when the determination is made, or*
- (b) *in the case of a determination from which there is a right of appeal or review, when the right of appeal or review expires or (if the determination becomes subject to appeal or review proceedings) when those proceedings have been finally disposed of.*

32 Effect of Part on civil proceedings

- (1) *Subject to section 34, nothing in this Part affects any right that a party to a construction contract:*
    - (a) *may have under the contract, or*
    - (b) *may have under Part 2 in respect of the contract, or*
    - (c) *may have apart from this Act in respect of anything done or omitted to be done under the contract.*
  - (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:*
    - (a) *must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and*
    - (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.*
- 10 It is contended by the plaintiff that the first defendant is not entitled to call upon the guarantee because the matters in dispute between them have not been finally determined, and until the conclusion of the Supreme Court proceedings there will be no final determination.
- 11 The principal argument the first defendant is that for the purpose of s 23 of the Act the determination is final. There has been no appeal or review of the adjudicator's determination, and there are no proceedings in train which subject that determination to appeal or review.
- 12 In considering the matter it is necessary to have regard firstly, to the words of s 23 and, in particular, sub-s (1) which requires that either (a) the adjudicated amount be paid to the claimant, or (b) the respondent to the adjudication must give security for payment of that amount to the claimant, pending the final determination of the matters in dispute between them.
- 13 The words of sub-s 23(1)(b) "*matters in dispute between them*" suggest to me that these may refer to matters outside those referred to in the adjudication. Moreover, in sub-s 23(4) there is reference to enforcement of the security "*after matters in dispute between them*" in connection with the progress payment to which the security relates have been finally determined. These provisions may be read with s 32, and, in particular, sub-ss (1) and (2), by which nothing done under Pt 3 of the Act (which includes s 23), affects any civil proceedings under a construction contract. Finally, the object of the Act described in sub-s 3(4)(b) demonstrate that, it is the intention of the Act merely to ensure that money will be available to satisfy any entitlements that a person may have under a construction contract "*when they are finally determined*".
- 14 Reference may be made to the decision of Court of Appeal in **Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd** (2005) 62 NSWLR 385. In that judgment Handley JA (with whom Santow JA and Pearlman AJA agreed) said (at 389): *Subsection (1) provides that Pt 3 of the Act (ss 13-32), does not affect the rights of any party under a construction contract. Subsection (2) is particularly important because it relevantly provides that nothing done under, or for the purposes of Part 3, affects any civil proceedings arising under a construction contract. Finally, subs (3)(b) makes a judgment entered under s 25 on an adjudication certificate provisional only, both in what it grants and in what it refuses. 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.*
- 15 All this suggests to me that there has been no final determination of the matters in dispute between the parties. As Handley JA stated, an adjudication certificate is provisional only. I am reinforced in this view by the second reading speech of the relevant Minister when the Act was introduced into the Parliament in 1999, Mr lemma (Hansard, 8 September 1999): *Adjudication therefore provides the claimant with important benefits, namely, a prompt interim decision on a disputed payment; the amount in the decision must be either paid to the claimant, or secured and set aside; and failure to do any of the above not only allows the claimant to sue for the adjudicated amount, but also to suspend work. Therefore, if the dispute is not resolved to both parties' satisfaction by the adjudication process, it will result in an independently determined amount being securely set aside until final resolution is achieved.*

*The bill does not specifically provide for an appeal from an adjudicator's decision. The adjudicator's decision is only an interim decision until the amount due in respect of the payment claim is finally decided in legal proceedings or in a binding dispute resolution process. This is the "appeal". Inserting by statute yet a further adjudication appeal process between the adjudicator's interim decision and the final decision would be unnecessarily burdensome and costly for parties to construction contracts. It can also be a source of abuse by a desperate respondent seeking to delay payment. However, recourse to a legal or another dispute resolution process does not suspend the operation of the bill or the adjudicator's decision pending a final decision. The respondent must still pay the amount decided by the adjudicator or provide security for payment. Section 34 states that a provision of any agreement which purports to exclude, modify or restrict the respondent's liability under the bill is void.*

- 16 It follows, in my view, therefore, that the first defendant has no entitlement to the monies held in security until the conclusion of the Supreme Court proceedings. It also follows that the relief claimed in paragraphs 3 and 5 of the summons should be granted.
- 17 As to costs, in my opinion the usual practice as to costs should apply. Nothing that has been put to me suggests that it should not apply. There will be an order that the first defendant pay the plaintiff's costs.
- 18 The formal orders, therefore, are as follows:
1. The first defendant by itself, its servants and agents, be restrained from calling upon the bank guarantee issued by the second defendant in favour of the first defendant dated 16 October 2001 in the amount of \$162,170.00 (the "bank guarantee") until the final determination of the Supreme Court proceedings No. 55019 of 2004 in the Supreme Court of New South Wales, Technology and Construction List (the "Supreme Court proceedings").
  2. The second defendant, by itself, its servants and agents, be restrained from releasing to the first defendant, its servants and agents, funds pursuant to the bank guarantee until final determination of the Supreme Court proceedings.
  3. The first defendant pay the plaintiff's costs.

J B Simpkins SC – Plaintiff instructed by Avendra Singh Strati & Kam Lawyers  
S M Kettle (barrister) - First Defendant instructed by Thompson Cooper Lawyers - First Defendant  
N/A - Second Defendant instructed by Mark Killop - Second Defendant