

**Rail Infrastructure Corporation v Anthony Veghelyi & Salem Power Engineering Services P/L**

**JUDGMENT : Campbell J :** New South Wales Supreme Court. 11<sup>th</sup> May 2004

- 1 This is a matter in which the plaintiff seeks an ex parte injunction to restraint the second defendant from seeking to enforce a purported determination of an adjudicator under the **Building and Construction Industry (Security of Payment) Act 1999**. The adjudication in question is one which issued on 16 April 2004. The plaintiff alleges that there are various types of jurisdictional error involved in the making of that adjudication. One such alleged type of jurisdictional error is that it allows claims for delay. Another is that it allows certain claims, in circumstances where the entitlement to a progress payment had not arisen under s 8 of the relevant Act. Another is that there has been a denial of natural justice by the adjudicator.
- 2 It is not appropriate on an ex parte injunction application to go into the merits of these claims. Suffice to say that it seems to me there is a serious question to be tried concerning them.
- 3 An adjudication determination having issued at the time it did, an entitlement will accrue in the second defendant, either tomorrow or the day after, to apply for an adjudication certificate, and once that certificate is obtained file it in a court, and obtain a court judgment for the amount of the adjudication certificate. Section 25(4)(a)(iii) appears, on one reading of it, to disentitle the plaintiff in the present proceedings from challenging the adjudicator's determination if a judgment has been entered. There is an arguable question about whether there is a difference of view between the decision of Gzell J in **Brodyn Pty Limited v Davenport** [2004] NSWSC 254 and the decision of McDougall J in **ACA v Sullivan; Austruck v ACA** [2004] NSWSC 304 about whether, once a judgment has been obtained, it is the effect of s 25(4)(a)(iii) that the judgment cannot be impugned on the basis of jurisdictional error in the certificate which led to the entry of the judgment. I say nothing beyond that it appears that it is an arguable reading of those two judgments that there is a difference of view between their Honours on that topic.
- 4 If it were the case that entry of a judgment prevented jurisdictional error from being asserted, then the practical purpose of running the present proceedings could be defeated by the entry of such a judgment.
- 5 The second defendant has been asked to give an undertaking that it will not seek to enter judgment in accordance with the adjudication, and has emphatically declined to give that undertaking.
- 6 In these circumstances, it seems to me appropriate to issue an ex parte injunction for a very short period.
- 7 I should stress that nothing has been put to me on the balance of convenience concerning the situation of the second defendant. The Court simply does not know what effect this order will have on the second defendant. I would, therefore, regard any question of whether the ex parte injunction should be extended as very much an open question, to be reconsidered in light of whatever material the second defendant puts before the Court relevant to the balance of convenience.
- 8 I shall make provision for the matter to be returnable this coming Friday in the Construction List. However, if the state of business in that list is such that it cannot conveniently be dealt with there on that day, it may well be that the Judge administering the Construction List decides to return the matter to me as Duty Judge to consider any further interlocutory injunction in the case.
- 9 Upon the plaintiff, by its counsel, giving the Court the usual undertaking as to damages, I make Order 2 in the draft orders initialled by me and dated today's date.

F Corsaro SC – Plaintiff Exparte instructed by PricewaterhouseCoopers Legal