

JUDGMENT – EX TEMPORE : BERGIN J. Equity Division. T&C List. Supreme Court New South Wales. 12th October 2007.

- 1 This is an application brought by way of Notice of Motion by the defendant, Dancorell Constructions Pty Limited, seeking an order that the proceedings be stayed until the plaintiff has paid into Court as security the sum of \$366,091.26, being the unpaid portion of an adjudicated amount the subject of an adjudication certificate dated 27 June 2007, entered in the District Court as a judgment on that day. The application is made pursuant to section 25(4)(b) of the *Building and Construction Industry Security of Payment Act 1999* (the Act), or, alternatively, pursuant to s 67 of the *Civil Procedure Act 2005*.
- 2 The main proceedings brought by the plaintiff, Julianne Tombleson, are proceedings seeking orders in the nature of a writ of certiorari quashing the decision of the second defendant, the adjudicator. Declarations are sought that the determination is void, and there is also an application for an injunction preventing the first defendant from taking any action in order to enforce the adjudication determination (the Determination).
- 3 There is also an application for a declaration that any adjudication certificate purporting to have been issued pursuant to the Determination is void. Finally, there is an application for an injunction preventing the first defendant from taking any action in order to enforce any judgment based upon any adjudication certificate purporting to have been issued pursuant to the Determination.
- 4 The Determination is in evidence and sets out the relationship between the parties, the scope of works and the contract, the payment claims and the various other relevant matters triggering the jurisdiction of the adjudicator to determine the issues between the parties. One of the matters considered by the adjudicator was a claim by the plaintiff that at the time the contract for the building works was entered into, she intended to reside at the premises, thus, ousting the operation of the Act in respect of the building contract. The adjudicator dealt with that claim in paragraph 5.3 and reached the conclusion that he did not accept that the plaintiff intended to reside at the property at the time the contract was made.
- 5 There are some peculiarities to the matter. After the adjudication certificate was issued and payment was not made, a "judgment/order" was issued and entered on 27 June 2007 under seal of the District Court of New South Wales in the following terms: "*The plaintiff has filed an Adjudication Certificate under the Building and Construction Industry (Security of Payment) Act 1999 (NSW) for the amount of \$366,091.26. The defendants have not paid the adjudicated amount and the plaintiff seeks a judgment certificate.*"
- 6 The defendant's solicitors then sought from the District Court a copy of the Judgment as entered and, on 18 September 2007, the Registrar signed a document headed "Judgment/Order" with the seal of the District Court that recorded that the date the "judgment/order" was "given" and "entered" was 27 June 2007. The "Terms of the Judgment/Order" were recorded as follows: "*Verdict and judgment for the plaintiff against the first and second defendants in the sum of \$366,091.26.*"
- 7 The first defendant in respect of whom that judgment was entered is Julianne Tombleson, the plaintiff in these proceedings. The second defendant Nikolina Bartels-King is the third defendant in these present proceedings. It is apparent from the Determination that both the plaintiff and Ms Bartels-King contracted jointly with the builder.
- 8 The first basis upon which the first defendant makes the application for a stay is pursuant to section 25(4) of the Act which provides:

If the respondent commences proceedings to have the judgment set aside, the respondent:

 - (a) *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, or*
 - (iii) *to challenge the adjudicator's determination, and*
 - (b) *is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.*
- 9 As has been said on a number of occasions, this is a section that is relevant to proceedings to set aside a judgment. An applicant commencing proceedings to have a judgment set aside "is required" to pay into the Court as security the unpaid portion of any adjudicated amount; ***Jem Developments Pty Limited v Hansen Yuncken Pty Limited*** [2006] NSWSC 1087; ***Siemens Limited v Tolco Pty Limited*** (unreported) 11 December 2006 at page 6.
- 10 In ***Siemens***, it was held that s 25(4) of the Act did not fetter this Court's broad discretion to resolve a dispute according to the dictates of justice. *Siemens* was a different case to this because: (1) it was a case in which money had been paid into Court and there was an application to have money paid out of Court; and (2) it was an application made to set aside the judgment.
- 11 In the present proceedings the other respondent to the Determination, Ms Bartels-King, has not made application to have the Determination declared void or to have the judgment in the District Court set aside. The plaintiff has joined Ms Bartels-King as the third defendant.
- 12 The plaintiff in these proceedings has not sought to set aside the judgment in the District Court. There is a possible factual issue that the adjudication certificate that was relied upon by the defendant to enter judgment in the District Court may have been a certificate that had a date of 26 June 2008 for the date of payment rather than 26 June 2007. However, as I have said, no application has been made to set aside the District Court judgment. A

bankruptcy notice directed to the plaintiff has issued and is returnable before the Federal Court next Tuesday, 16 October 2007.

- 13 Mr Ash, who appears for the plaintiff in this application, has indicated that the plaintiff gives an undertaking to the Court that she will not attempt to stay the District Court judgment other than by way of final relief in these proceedings. Of course, that is not an application that is presently before this Court. The application the plaintiff has made is for an injunction prohibiting the defendant from taking any action to enforce the District Court judgment. I should clarify the undertaking given by the plaintiff to note that she wishes to maintain what Mr Ash has referred to as her "technical" argument in the bankruptcy proceedings to raise any relevant issue in relation to the narrative form of judgment that was entered on 27 June 2006 in the District Court.
- 14 Mr Drummond, who appears for the defendant, makes a very powerful submission that not one cent has been paid to the builder. Mr Ash candidly submitted that he has no evidence as to why no money has been paid to the builder and indicated that he has nothing to put to the Court in respect of that matter. However, Mr Ash submits that caution should be exercised in respect of the granting of any relief to the defendant because the plaintiff has not sought to set aside the judgment and, thus, the statutory requirement in s25(4) of the Act does not apply. He submitted that the defendant should not be entitled to a stay on another basis when the plaintiff is not bound by the statutory requirement in s 25(4). He submitted that the mere fact of indebtedness should not be a basis upon which the Court would order a stay of the proceedings.
- 15 Mr Ash relied upon the requirement in the *Uniform Civil Procedure Rules 2005* in relation to security for costs in Part 41 and submitted that this is not an appropriate case in which such rules would be triggered. This is an individual plaintiff and, in the circumstances, there is nothing special about this case to require any order under those Rules.
- 16 The other basis upon which Mr Ash submitted that the Court may exercise its discretion to grant a stay is if there is an abuse of process. He submitted that this is not such a case and, therefore, the Court should not exercise its discretion to make an order that the proceedings be stayed until money be paid into Court.
- 17 I am satisfied that s 25(4) is not applicable because the proceedings are not proceedings to set aside a judgment. But let me return to the Summons. There are two applications for injunctions: the first preventing the defendant from taking any action to enforce the Determination; and the second preventing the defendant from taking any action in order to enforce any judgment based upon the Determination.
- 18 A plaintiff against whom a judgment has been entered who brings proceedings seeking to prevent a party from relying on that judgment without seeking to set aside the judgment, knows that s 25(4) of the Act requiring security will not be triggered. However, the Court is not only cautious to ensure justice between the parties, but also to ensure that the legislation under which this application is brought is not circumvented.
- 19 The plaintiff is attempting to prevent the defendant from enforcing the judgment by injunction rather than seeking to set aside the judgment. Pleadings may be analysed to see whether it is an abuse to seek those orders whilst not seeking to set aside judgment. If the Court is satisfied that such an application is for the purpose of getting around or circumventing the provisions of the Act then an order may be made staying the proceedings on the condition that such stay will remain unless money is paid into Court. Such an approach may diminish the drafting of innovative pleadings to ensure that s 25(4) is not triggered to obtain the benefit of proceedings in Court whilst the contractor loses the benefit of the Act.
- 20 Section 67 of the *Civil Procedure Act 2005* provides that subject to the Rules the Court may at any time, and from time to time, by order stay any proceedings before it either permanently or until a specified day. Section 56 of the *Civil Procedure Act 2005* provides that the overriding purpose of that Act and of Rules in their application to civil proceedings is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. I should emphasise the word "just".
- 21 Section 61 provides that the Court may give such directions as it thinks fit for the speedy determination of the real issues between the parties and may take action if those directions are not complied with. Section 61(4) provides relevantly: "That subsection (3) does not limit any other power the Court may have...". Another matter of importance is s 60 of the Act, that provides: "*In any proceedings the practice and procedure of the Court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.*"
- 22 The amount in dispute is approximately \$360,000, well within the jurisdictional limit of the District Court. The costs to be incurred in this litigation must be proportionate to the importance of the subject matter in dispute. It seems to me that the only real issue in this case is: did the plaintiff propose to live in the house? If she did, at what point of time was the intention present? Assuming the plaintiff intended to live in the house, thus making the adjudicator's role superfluous, there is still no explanation why this builder has not been paid.
- 23 The plaintiff has not proffered any undertaking of a bank guarantee or any other undertaking in respect of paying the contractor any amount and, as I have said, the judgment debt has been recognised by the plaintiff because she seeks to stay enforcement whilst she argues about the terms of the Determination.
- 24 Mr Drummond has candidly indicated that there is an issue about possible defects totalling no more than approximately \$50,000. Otherwise, the bills rendered, or the claim's made, for payment for work done were served on the plaintiff in September 2006, over a year ago, and in February 2007, many months ago.

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- 25 I am satisfied that the plaintiff's pleading seeks to avoid the triggering of s 25(4) of the Act. I am also satisfied that to ensure a just resolution of these proceedings I should exercise my discretion in favour of the defendant to stay the proceedings until the plaintiff provides a bank guarantee or pays money into Court in the amount of \$300,000, reducing the amount of \$366,091.26 to take into account an approximate figure for defects.
- 26 I order that these proceedings be stayed until the plaintiff provides a bank guarantee to the first defendant in the amount of \$300,000, or pays money into Court or lodges with the Court a form of bank guarantee agreeable to the first defendant, for that amount.
- 27 I list the matter for directions on 26 October 2007 for the sole purpose of the parties reporting back in respect of the bankruptcy proceedings.
- 28 The first order I make is that the parties are to proceed to Court annexed mediation with a Registrar in Equity. The parties are to attend upon the Registrar forthwith. The parties may obtain a date for the mediation in the next couple of weeks or so. If in fact the mediation is set down shortly, the parties may wish to adjust the return date for directions, by notification to my Associate.
- 29 The plaintiff is to pay the defendant's costs of today.

JS Drummond - applicant/first defendant instructed by Southern Districts Legal
D Ash - respondent/plaintiff instructed by Macedone Christie Willis