

Supreme Court Declines to Exercise Jurisdiction to Stay Adjudication

(Proceeding No 4730 of 2005; QSC — *Philippides J 07/06/2005*)

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Philippides J of the Supreme Court of Queensland, in the exercise of the Court's discretion, declined to grant declaratory and injunctive relief on the basis that an adjudicator had already been appointed by the nominating authority.

The applicant applied for declarations and an injunction in relation to a Payment Claim and an Adjudication Application purportedly made under the *Building and Construction Industry Payments Act 2004* (Qld) ('the Act') on the basis that the court had jurisdiction to declare whether or not an adjudication application had been validly made, and should bring to an end what the applicant submitted was a fatally flawed adjudication process.

Specifically, the applicant asked the court to construe various provisions of the Act and to declare that a Payment Claim of May 2005 was not valid (s 17 of the Act) and that an Adjudication Application also of May 2005 was not valid (s 21 of the Act). The applicant also asked the court to restrain the second respondent from adjudicating the claim: *Paynter Dixon Constructions Pty Ltd v JF and CG Tilston Pty Ltd* [2003] NSWSC 869 at [1].

Facts

The applicant, who was the main contractor appointed by a government instrumentality for a transport infrastructure project in Central Queensland, entered into negotiations with the first respondent, a piling contractor to carry out certain piling work.

In March 2005, the piling contractor sent a written tender offer to the applicant, to carry out the work for a specific price. There were also some discussions between the applicant and another contractor in respect of the piling work which did not bear fruit, and the applicant's officer offered the first respondent the piling works for the tendered price.

There appeared from the material to have then been a disagreement in relation to the absorption of certain costs and there was subsequently a dispute between the parties as to whether the negotiations reached a stage where a contract was concluded. The applicant contended that no contract was in fact concluded. The respondent contended that the contract was concluded, albeit that some terms had not been finalised.

In May of 2005 the applicant wrote to the first respondent, stating that the applicant had cancelled the order for piling works for the project with the first respondent. It was said that the decision was based on information provided to the applicant, that the first respondent required a further seven weeks for the manufacture of certain items at the agreed additional cost to the applicant of \$14,000 for price increases.

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The first respondent then wrote later that month to the applicant enclosing an invoice for what was described as 'overhead costs and loss of opportunity and profit'. That claim amounted to some \$275,000. That claim was said to arise from the cancellation of the contract with the first respondent. This invoice contained the notice necessary to invoke the provisions of the Act.

The matter had therefore reached the stage where a payment claim, purportedly made under the Act, had been provided to the applicant. The applicant had responded by providing a payment schedule to the first respondent indicating that nothing was payable to the first respondent and raising the assertion that no contract was concluded and that the payment claim was invalid.

An adjudicator had been appointed pursuant to the Act upon the nominating authority referring the adjudicating application to the adjudicator.

The Issues in Dispute

No Construction Contract

The title to the Act says it is an Act to 'imply terms in construction contracts, to provide for adjudication of payment disputes under construction contracts, and for other purposes'.

The object of the Act is 'to ensure that a person is entitled to receive...progress payments if the person undertakes to carry out construction work under a construction contract or undertakes to supply related goods and services under a construction contract (s 7)'.

In *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 at [51]-[52] the Court of Appeal identified the first essential requirement laid down in the NSW equivalent of the Act for a valid determination by an adjudicator was the existence of a construction contract between the claimant and the respondent to which the Act applies.

Counsel for the applicant, in arguing that no contract had been concluded, placed some emphasis on the first respondent's letter enclosing its invoice and in particular, the statement therein that: 'At no stage prior to 5 May 2005, had negotiations been completed'.

Invalid Payment Claim

An additional matter was raised by the applicant which concerned the payment claim made by the first respondent. The applicant contended that even if it could be said that there was a construction contract for the purposes of the Act, that the payment claim did not comply with s 17 of the Act and was invalid.

In particular, it submitted that the payment claim did not identify the matters required by the Act. Additionally the applicant argued that the claim was not one for work to which the Act applies, but for expectation damages and reliance damages arising from a repudiation of a building contract before any work under it was carried out and accordingly, the payment claim was not valid. The applicant contended that the adjudication application was invalid because a claim for damages for wrongful repudiation was not a matter that the adjudicator could determine: *Paynter Dixon Constructions Pty Ltd v JF and CG Tilston Pty Ltd* [2003] NSWSC 869 at [35]; *Quasar Constructions v Demtech* [2004] NSWSC 116 at [32]-[34].

The first respondent simply said that those matters should be left to the adjudicator to determine.

Decision

In relation to the applicant's submission that there was no construction contract, the Court noted that the matter was alluded to in a further letter, in June 2005 from the first respondent to the applicant's solicitors, where the first respondent contended that a contract had been concluded. The Court noted that it seemed that the first respondent's position was that whilst the essential terms had been concluded, there were some negotiations in relation to some terms that they have not been completed. Notwithstanding this, the Court considered that the applicant had a strong case in relation to that aspect of its submissions, namely that there was no concluded contract, so that no payment claim could be brought pursuant to the Act.

As to the applicant's argument that the adjudication application was invalid because a claim for damages for wrongful repudiation was not a matter that the adjudicator could determine, again, the Court considered there to be 'much merit' in what was contended for by the applicant. The Court did state that it was arguable that such claims may come within the Act if they were referable to a contractual provision. It was not however entirely clear that that was the case in this instance and the Court noted that no contention to that effect was made on behalf of the first respondent.

Notwithstanding this, the Court agreed with the first respondent and dismissed the application. The Court expressed the view that the appropriate course was now for the adjudicator to proceed to decide the application including the threshold jurisdictional issues raised by the applicant. The Court noted that the applicant has raised matters which appeared to have merit. However, given that the adjudicator had now been appointed and that the adjudicator is required under the Act to give a decision in a very tight timetable and that the matters raised can be raised before the adjudicator, the Court did not consider that it was appropriate to exercise the court's discretion to 'in effect pre-empt the decision of the adjudicator'. In making this determination the Court observed 'Of course the applicant's arguments that have been raised before the Court, may well find favour with the adjudicator'.

In refusing the application, her Honour, Philippides J, added that the Act did not preclude the applicant from pursuing the matter further should the applicant be dissatisfied with the adjudicator's determination.

Conclusion

It is clear that the State Supreme Courts retain supervisory jurisdiction to grant an injunction to prevent an adjudicator from proceeding without jurisdiction. When making an application pursuant to the court's inherent jurisdiction, the power of the court to grant a remedy is discretionary. A declaration and injunction are equitable remedies and therefore subject to the usual equitable requirement that the remedy be appropriate for the circumstances of the case.

Having said that, the decision to decline the grant of final relief on discretionary grounds is surprising, given that the Court expressed the view that there appeared to be 'merit' or 'strong grounds' or a 'prima facie case' that there was no concluded agreement and that if there was, a claim for damages based on an alleged wrongful repudiation of the contract was not a matter that the adjudicator can determine. It would appear that the Court was influenced by the fact that the adjudicator — having already been appointed by the nominating authority — was required to comply with a strict timetable

for the delivery of the adjudication and that it thereafter remained opened to the applicant to challenge the determination.

If this was the basis for the Court declining to grant relief on discretionary grounds (and no other basis is readily discernible from the reasons) then it would mean that the success of an application to injunct an adjudicator's determination in these circumstances, will presumably be dependent upon having the matter brought before the court in advance of the adjudicator's appointment by the nominating authority. This may be somewhat problematic.

Whereas an arbitrator may in certain circumstances determine issues of arbitrability and jurisdiction, it is difficult to discern the basis under the Act for an adjudicator to make a determination with respect to matters arising out of what may be a patently invalid adjudication application.