[2006] QSC 365

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ROBIN A/J

No BS3651 of 2006

J M KELLY (PROJECT BUILDERS) PTY LTD (ACN 010 280 412) Plaintiff

and

TOGA DEVELOPMENT NO 31 PTY LTD (ACN 103 796 854) Defendant

BRISBANE

..DATE 03/11/2006

ORDER

CATCHWORDS: Building contract - superintendent's certificate of payment requiring payment by contractor (builder) to principal (owner) - interlocutory injunction sought by contractor to prevent principal calling upon "performance undertaking" provided by an insurer as security - certificate alleged to be defective - injunction refused.

HIS HONOUR: This is an application by the plaintiff for an injunction restraining the defendant until trial or earlier order from making any demand on QBE Insurance (Australia) Limited to convert two identified bonds, both dated 16 July 2004, into money. Those bonds are for amounts of $1.25 million or thereabouts each.

They represent a security to the defendant, which engaged the plaintiff to construct a large development at Burleigh Heads, for the due performance of the builder's obligations. There are two of them because half of the security was a longer term arrangement to cover the maintenance period, the other half a shorter term arrangement to last until 14 days after practical completion, a stage which is reasonably close.

The defendant's counsel indicates that its intention is not to convert both bonds into cash in their entirety, but to make a demand in respect of one of them only - and presumably the one with the more limited future - in an amount slightly in excess of $600,000, representing an amount which the superintendent under the building contract has certified ought to be paid by the builder, the plaintiff, to the defendant.

I hope I am correct in understanding that, in substantial part, that sum is attributable to delay on the part of the builder as assessed by the superintendent.

Is that right?

MR INATEY: I don't think it can be put quite as - it's just an amount certified, I think, your Honour.

MR DUNNING: The way I think that it could accurately be stated is without the delay assessed by the certifier, a negative certificate couldn't have issued at that stage.

HIS HONOUR: Do you agree with that, Mr Inatey?

MR INATEY: Would your Honour just excuse me a minute? Again, I don't think we can put it quite as broadly as that.

HIS HONOUR: All right. Well, if you put it your way, this will all be on the record.

MR INATEY: Liquidated damages forms a component part which led to the negative certificate.

HIS HONOUR: That's the idea I was attempting to convey.

MR INATEY: Yes, I don't think it can be said that without it, it would not have happened because there's been an ongoing certification process.

HIS HONOUR: All right.

MR DUNNING: Your Honour, if it assists, Mr Murphy's second affidavit, page 72 has a graph of the deduction for liquidated damages which, I gather, is not factually controversial. And if you go to 43A, you'll see that - I can't give you the exact figures, but there's a big jump from the last assessment of liquidated damages.

HIS HONOUR: Thank you.

MR INATEY: But that's the point: it's an ongoing process.

MR DUNNING: Yes, it's an ongoing process. The point we'd say is without that, you'd have never got to a negative figure.

HIS HONOUR: The certificate of payment certifying that there is payable to the contractor a negative amount of $601,541.09 is certificate 043, dated the 11th of September 2006. It was corrected by certificate 43A to indicate that, rather than "negative $601,541.09" being due and payable to the plaintiff, an actual sum of that amount was payable by the plaintiff to the defendant.

Have I seen that document, 43A? Is it here? It may not be but-----

MR DUNNING: Page 81, your Honour, in the first-----

MR INATEY: Page 83, your Honour-----

MR DUNNING: 83, yes.

MR INATEY: -----is the actual certificate.

HIS HONOUR: I am grateful for the reference to page 83 of the 313-page bundle of documents attached to Mr Murphy's first affidavit which confirms that the certificate calls for the payment just described. It is dated 2nd of October 2006.

These events are happening during the currency of the present claim which began on 3rd of May 2006. There is a 50-page statement of claim blowing out to 134 pages with annexures. The claim seeks declarations giving effect to the plaintiff's view of what payment certificates ought to have been forthcoming. There are differences of considerable magnitude between the parties about the scope of the works originally required and subsequent variations.

Mr Dunning for the plaintiff accepts that it faces a difficult task in persuading the Court to grant an interlocutory injunction of the kind sought.

The leading authority in this area, I would think, is still Wood Hall Limited? - v The Pipeline Authority (1979) 141 CLR 443. Mr Dunning pointed as his best case to Rejan Constructions Pty Ltd v Manningham Medical Centre Pty Ltd (2003) 19 BCL 451, and in particular to what appears at

paragraph 17 and following, in the reasons of Byrne J. What his Honour restrained on an interlocutory basis was the calling up of or the conversion into cash of security equivalent to that with which we're presently concerned by a principal in support of its claims against a builder.

It was not a case like the present of reliance on a payment certificate issued by the superintendent. It is perfectly clear, by reference to a wealth of authority, that such certificates are extremely potent instruments under contractual arrangements of the kind encountered here - a reason for the insistence on strict compliance with the processes for issuing them: Daysea Pty Ltd v Watpac Australia Pty Ltd [2001] QCA 49 [21]-[22].

The authorities collected by counsel do not include the Court of Appeal's decision in Re Concrete Constructions Group Pty Ltd [1997] 1 Queensland Reports 6, which was decided upon contractual provisions not relevantly distinguishable from those presently applicable.

What is emphasised in the joint judgment of McPherson JA and Helman J is the provisional nature of certificates in building contracts (see page 12). What matters, as their Honours say, is:

> "the day when a final certificate issues in which the ultimate indebtedness by one party to the other is ascertained and fixed. Before that stage is reached, it is generally correct to say that no payment is capable of finally determining the rights of the parties with respect to matters in dispute between them."

On the following page their Honours, in declining to imply in a contract some term entitling the principal to deduct liquidated damages from money due to the contractor said:

> "In a contract which, like this, contains extensive and detailed provisions regulating the rights of the parties, the process of implying terms is not something to be undertaken except where the need or the contest compels it. That is especially so in a matter like progress payments, which are ordinarily critical to the survival of the contractor and so to the completion of the project. If not paid as it goes on a substantial project like this the contractor will soon be forced to stop work. His express right to payment certified by the superintendent should not be qualified by discovering hidden meanings extricated from half expressed reservations in other parts of the document."

What is unusual about this case is that the payment is not one to be made to the contractor but one to be made by it. As it happens, the closeness of practical completion spares us from having to contemplate that the project might be left in limbo. The contractual provisions here are carefully expressed so that in terms they contemplate in clause 42.1 payments by the principal to the contractor or by the contractor to the principal within the 14 days allowed in the circumstances which have happened of a payment certificate following the superintendent's receipt of some claim for payment for consideration.

It may be noted, because Mr Inatey for the defendant has specifically drawn the Court's attention to it, that by clause 42.9 interest at 18 per cent per annum, unless some other rate is specified, is payable on certified amounts which should

have been paid but are not. That consideration may affect the amount for which demand may be made on QBE.

There is a dispute mechanism in clause 47 which is there for general purposes and for the particular purpose of having disputes regarding certificates resolved.

The defendant, in support of its entitlement to give and follow up the notice it has given of intention to convert QBE'S "performance undertaking" to cash, relies on clause 42.11 "where within the time provided by the contract the party fails to pay the other party an amount due and payable under the contract the other party may, subject to clause 5.5, have recourse to retention moneys, if any, and if those moneys are insufficient then to security under the contract and any deficiency remaining may be recovered by the other party as a debt due and payable."

Clause 5.5 is:

> **"Recourse to Retention Moneys and Conversion of Security**
>
> A party may have recourse to retention moneys and/or cash security and/or may convert into money security that does not consist of money where -
>
> (a) the party has become entitled to exercise a right under the Contract in respect of the retention moneys and/or security; and
>
> (b) the party has given the other party notice in writing for the period stated in the Annexure, or if no period is stated, five days of the party's intention to have recourse to the retention moneys and/or cash security and/or to convert the security; and

> (c) the period stated in the Annexure or if no period is stated, five days has or have elapsed since the notice was given."

The argument mounted by the plaintiff depends on its establishing that the certificate requiring payment by it is vitiated in some way. I refer to certificate 43 and certificate 43A. No assertion of fraud or illegality was made, but the superintendent is said to have gone badly wrong, and to have failed to act independently.

I do not see how it is possible to construe the contractual arrangements so as to differentiate between claims of one side of the contract and claims of the other, notwithstanding the explanation advanced for the importance of certificates being honoured in Concrete Construction.

Mr Dunning presented a history of the parties' relations over the last year or so in an attempt to persuade the Court that things rather suddenly started to go wrong at the time of payment certificate 23. It was dated the 11th of November 2005 and certified that a sum in excess of $5.6 million was payable to the plaintiff.

On the last day for payment, certificate of payment 23A was issued. It reduced the amount payable to a sum of less than $4.4 million. That unsurprisingly was a shock to the plaintiff. The certificate was issued by Suters Architects under a covering letter of 25 November 2005 - although I am looking at a document which has a fax imprint of 25th November

2002. (The fax may be three years out of date, is that right? Have a look at page 95. I have had great faith in those fax machine imprints). The covering letter refers to "correcting errors" in five different respects.

The new certificate not only corrected errors, if that is what it did: it introduced new ones in the "contract summary" at the end by failing to include, after the original net building work sum, the "current projected net building work sum (including variations) value to date", whereas certificate 23 had offered the prospect of the builder's receiving more than $59-million exclusive of GST.

The new summary appeared to limit what the plaintiff had to hope for to the original contract price - but one aspect of a scenario in which the plaintiff has become suspicious of Suters from the point of view of their playing an independent role in administration of the contract as contemplated by clause 23, which imposes on the defendant an obligation to ensure that there is a superintendent which, at all times:

(a) acts honestly and fairly,
(b) acts within the time prescribed under the contract, or where no time is prescribed within a reasonable time, and
(c) arrives at a reasonable measure or value of work, quantities or time.

I do not think it is necessary to resolve the differences which I thought I had detected between the parties as to whether the superintendent is to be regarded as an outside third party, or as one for whose performance the defendant bears some responsibility.

There was presented to the Court in the form of a graph a summary of the history of the contract from the time of certificate 23.

(I might interpolate the reliance by Mr Dunning on Suters' letter of 29 December 2005, exhibited to the affidavit of Mr Klein, principal of the defendant, which gives their version of the history of the certificate of payment 23A as the adjudicated outcome of the defendant's notice of dispute. As Mr Dunning says, particularly when regard is had to the times indicated in the contractual arrangements for dispute resolution processes, the most astounding alacrity was shown in the defendant's notice of dispute being dealt with).

The graph I mentioned indicates that from that time, although, according to Mr Murphy's affidavit, well in excess of 20 million dollars was spent by the plaintiff in construction, virtually nothing has been certified as payable to the plaintiff, at least on a comparative basis.

There have been subsequent payment certificates issued in favour of the plaintiff. By and large those have been paid. There have been some complications attributable to events such

as notice of charge being given by subcontractors so that from the plaintiff's point of view, moneys may be outstanding under the last certificate, whose number may be 49. Although the plaintiff has not been paid in full, Mr Klein deposes that he has given instructions that it be paid in full. Intervening certificates have been. Reference was made by Mr Dunning to the possibility the defendant had of setting off payments against its entitlement under 43/43A. Mr Inatey's submission is that certified amounts ought to be approached and paid independently without reference to any others.

It appears to me there may well be substance in the plaintiff's complaints about certificate 23A as regards the superintendent's independence, bona fides and the like.

I make the same observation regarding a determination made by the superintendent and adhered to in the context of a dispute in the identification of what are called "separable portions" of the overall development. Those "separable portions" had their own dates for completion which have been extended during the life of the overall contract. Liquidated damages become payable by the plaintiff for delay which is judged to be its responsibility.

The plaintiff contends that Suters have wrongly, in dividing separable portion A into two subcomponents, subsumed in it the whole or virtually the whole of separable portion B which is the principal structure in the development - leaving, as I read the plans, no separable portion B at all.

Generally speaking, separable portion A corresponds with the commercial aspects of the development, which, from my own observations, seem to be in operation at least in part. The difficulty perceived may be related to the provision of parking for customers, which it rather seems was part of "separable portion B" - so that there might be delay in on-site parking being available for customers.

It would be inappropriate to make any findings adverse in any way to Suters, who have had no opportunity to present evidence or submissions.

I am much less able to form even a preliminary view in relation to the remaining area of complaint about certificate 43 which concerns the way in which GST was applied. I accept that the tax legislation may provide its own answer to the GST implications of liquidated damages, in particular here, liquidated damages to which our principal is entitled.

It is also, unless the tax legislation precludes it, open to contracting parties to make their own arrangements about the GST implications of liquidated damages. The parties here have done that. I accept that there is genuine dispute as to whether Suters have correctly done the GST calculations which in the result, as I understand it, favour the defendant from the point of view of inflating the amount certified as payable to it.

I am unable to reach any provisional view in this regard. As to the other aspects whatever provisional views I have can really have no greater effect than establishing that there are issues for trial here. The same may be said of other events pointed to as concerning or sinister by Mr Murphy. For example, an intimation at a meeting about a year ago by the defendant to him, that things were going to get difficult from that point on as, indeed, they have done. The possibility of there being innocent explanations cannot be excluded.

In the end, I agree with Mr Inatey that it is only if something can definitely be shown to be wrong about a certificate of payment that the Court ought to depart from the well established approach, namely, that pending the ultimate adjudication of matters bearing upon payments between contracting parties such as the plaintiff and the defendant the certificates ought to be accorded the effect which the contractual arrangements give them. That means that, provisional as they may be, payments have to be made. The result is that the plaintiff's application fails.

Mr Dunning, from the outset, has indicated that his client which through Mr Murphy expresses a concern that its business reputation and future may be blighted if it becomes known that a performance undertaking has been called up, would want to make special arrangements: these are proposed by Mr Dunning to protect his client against suffering that feared embarrassment and, of course, involve payment.

Mr Inatey has informed the Court that his client will not seek to convert a bond by payment before 4 p.m. next Tuesday.

I will dismiss the application with costs. I think that the Judges acknowledge that things which appear to be unfair are likely to happen from time to time under building contracts, given what might be called the sanctity of payment certificates. It seems to be part of life in the trade, as exemplified further in matters such as Daysea and the unreported decision of Justice Dowsett relied on by the respondent, Grahame Allen Earthmoving Pty Ltd v Woodwark Bay Development Ltd, BC8802422, a summary judgment application. I think it follows from that, that courageous applications of the present kind are going to have costs implications, and the usual cost implications if, as nearly always happens, they fail.

So, the application is dismissed with costs.
