SUPREME COURT OF QUEENSLAND

CITATION:	*Sunshine Coast Regional Council v Earthpro Pty Ltd & Ors* [2014] QSC 271
PARTIES:	**SUNSHINE COAST REGIONAL COUNCIL** ABN 37 876 973 (applicant) **v** **EARTHPRO PTY LTD** ABN 39 077 375 207 (first respondent) **KENNETH SPAIN** (second respondent) **AUSTRALIAN BUILDING AND CONSTRUCTION DISPUTE RESOLUTION SERVICE PTY LTD** ABN 14 165 369 077 (third respondent)
FILE NO:	BS No 9191 of 2014
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED EX TEMPORE ON:	2 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	2 October 2014
JUDGE:	Peter Lyons J
ORDER:	**1. The application is refused.** **2. The applicant pay the first respondent's costs of the application.**
CATCHWORDS:	EQUITY – EQUITBALE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – RELEVANT CONSIDERATIONS – BALANCE OF CONVENIENCE GENERALLY – where an adjudication decision was made by the second respondent under the *Building and Construction Industry Payments Act* 2004 (Qld) in favour of the first respondent and against the applicant – where the applicant has brought proceedings challenging the validity of the adjudication decision – where the applicant seeks an interlocutory injunction restraining the first respondent from taking steps to enforce the adjudication decision pending the determination of the principal proceedings – where the applicant was prepared to pay moneys into court pending the

determination of the principal proceedings – where the applicant submits that if the injunction were not granted there is a risk that it would not be repaid if ultimately successful in the principal proceedings – whether an injunction should be granted

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where an adjudication decision was made by the second respondent under the *Building and Construction Industry Payments Act* 2004 (Qld) in favour of the first respondent and against the applicant – where the applicant has brought proceedings challenging the validity of the adjudication decision – where the applicant seeks an interlocutory injunction restraining the first respondent from taking steps to enforce the adjudication decision pending the determination of the principal proceedings – where the intention of the *Building and Construction Industry Payments Act* 2004 (Qld) is that an adjudication should have effect unless and until an inconsistent decision is made by a court of competent jurisdiction – whether in the circumstances of this case the policy of the Act outweighs considerations regarding the prospects of success or the balance of convenience

Building and Construction Industry Payments Act 2004 (Qld), s 31, s 100

Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46, considered
Beecham Group Limited v Bristol Laboratories Pty Ltd (1968) 118 CLR 618; [1968] HCA 1, applied
R J Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390; [2008] QCA 397, followed
Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd & Anor [2014] QSC 170, considered

COUNSEL: J Baartz, with J Green, for the applicant
T Sullivan QC, with M Hindman, for the first respondent
No appearances for the second and third respondents

SOLICITORS: Corrs Chambers Westgarth for the applicant
Thomson Geer for the first respondent
No appearances for the second and third respondents

[1] On 19 September 2014 an adjudication decision was made in favour of the respondent under the *Building and Construction Industry Payments Act* 2004 (Qld) (*BCIP Act*) for a sum slightly in excess of $1.4 million. The applicant has brought

proceedings challenging the validity of the adjudication decision. It has also sought an interlocutory injunction restraining the respondent (a term I use to refer to the first respondent, the other respondents not being active in the proceedings) from taking steps to enforce the decision by obtaining an adjudication certificate or otherwise seeking to enforce the adjudication decision pending the determination of the principal proceedings.

[2] The applicant is prepared to give the usual undertaking as to damages and, in particular, is prepared to pay into Court a sum in excess of $1.4 million, which would include the amount awarded in the adjudication decision, interest, a portion of the fees, and some further interest over the time it is thought might be required to determine the principal proceedings.

[3] Since the application is for an interlocutory injunction, it was approached by reference to the questions usually considered in relation to such an application. They require some consideration of the strength of the case of the applicant and of its prospects of ultimate success in the proceedings. That is sometimes assessed by asking whether there is a substantial question to be tried, or whether the applicant establishes a prima facie case for relief. The other question typically raised is the balance of convenience. That was explained in *Beecham Group Limited v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 623 as requiring a determination whether:

> The inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by injury which the defendant would suffer if an injunction were granted.

[4] With respect to the first of those questions the applicant identified a number of grounds on which it proposes to attack the validity of the adjudication decision. The respondent stated that it was prepared to concede, for the purposes of the present application, that the applicant has shown "a sufficient prima facie case". However, it made it plain that it did not concede that the applicant's case for ultimate relief could be said to be strong.

[5] In oral submissions the concession was explained by reference to a passage from the judgment of Gummow and Hayne JJ in *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [65]. There the expression "prima facie case" was explained as meaning not that it was more probable than not that the plaintiff would succeed at a trial, but rather as meaning that the plaintiff has shown a sufficient likelihood of success to justify, in the circumstances, the preservation of the status quo pending the trial. It was in that sense that it was accepted for the present proceedings that the applicant had shown a probability of success. The applicant was prepared to proceed on the basis of that concession. That relieves me from the need to analyse the arguments set out in the applicant's written outline in support of the proposition that it has sufficient prospects of success in its case for relief in the principal proceedings as to justify the grant of an injunction.

[6] The focus of the case then turned to other matters. Considerable reliance was placed by the respondent on the legislative context in which the present application is brought. It has the benefit of the adjudication decision referred to previously. A consequence of that is that the BCIP Act provides for the registration of an adjudication certificate issued as a consequence of the decision, which might be filed

in a court as a judgment and be enforced accordingly: see s 31 of the BCIP Act. That, of course, is intended to achieve payment of the amount determined to be payable by the adjudication decision. Such a payment is not final because s 100 of the BCIP Act makes provision for the ultimate determination of the entitlement of the parties to the amount paid pursuant to such a certificate or judgment.

[7] That context was relied upon principally by reference to the judgment of the Court of Appeal in *R J Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390 (*R J Neller*). Factually the case was a little different. It, too, was a case where there had been an adjudication decision, but in that case the consequent certificate had been registered in the District Court. There was an application in the District Court for a stay of a warrant of execution, which had issued consequent on the filing of the certificate as a judgment. The stay was refused and the party who was, in effect, the principal to the relevant contract appealed against the refusal of the stay.

[8] In considering whether a stay should be granted, Keane JA, with whose reasons the other members of the Court agreed, had regard to a number of matters. Somewhat analogously with the first question to which I have referred as being relevant to an application for an interlocutory injunction, his Honour considered the prospects of success of the applicant in that case for ultimate relief. The ultimate relief which was sought was the setting aside of the adjudication decision and an award of damages for defective work. His Honour concluded, at [36], that the prospects that the applicant would ultimately succeed were not so strong as to displace what his Honour referred to as the consideration of the evident intention of the BCIP Act that an adjudication should have effect unless and until an inconsistent decision is made by a court of competent jurisdiction. That intention his Honour explained more fully a little later in his reasons: see [39], where his Honour also described the intention of the BCIP Act as being that the process of adjudication under it should provide a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract in cases to which the Act applied.

[9] Having considered the prospects that the applicant would ultimately succeed, his Honour went on to consider whether that success might be rendered nugatory. The question arose because the applicant submitted that the learned primary Judge's discretion miscarried because he failed to take into account the possible inability of the respondent to meet a judgment ultimately in the applicant's favour. Because that was the nature of the argument it was not necessary for his Honour to consider whether there was a real risk that the respondent might not be ultimately able to repay any amount awarded to the applicant.

[10] His Honour held that the learned primary Judge had in fact taken this consideration into account and had not given it insufficient weight. That was because the learned primary Judge regarded such a consideration "as displaced in importance by the policy of the BCIP Act and his view that the intention of the legislature should not be thwarted by the exercise of judicial discretion": see [38]. A little later his Honour concluded that the decision of the learned primary Judge "was clearly correct": see [43]. It was in reaching that conclusion that his Honour identified the intention of the BCIP Act in the second way to which I have made reference.

[11] His Honour expanded on that matter by saying at [40]:

> …the risk that a builder might not be able to refund moneys ultimately found to be due to a (relevant) owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner.

[12] His Honour then stated at [41] that such a risk:

> …would not ordinarily be sufficient of itself to justify a stay of an execution of a warrant based on the registration of a certificate of adjudication.

[13] It is apparent that his Honour recognised this consideration not to be conclusive. His earlier discussion of the prospects of success demonstrated that they might be so strong as to outweigh the significance of the intention or policy of the BCIP Act. His Honour also gave some examples of other cases where the stay might be granted notwithstanding that policy. Nevertheless, it would follow that in exercising the discretion then under consideration his Honour considered the policy of the Act a matter of great significance.

[14] It is true that this is not a case of an application for stay of execution of a judgment. There are, however, in my view, substantial analogies between such a case and the present one. In *R J Neller* the party with the benefit of the adjudication decision had advanced a little further along the path which the present respondent seeks to follow. In those circumstances, the significance of the statutory context must be very similar. I note that in *Wiggins Island Coal Export Terminal Pty Ltd v Sun Engineering (Qld) Pty Ltd & Anor* [2014] QSC 170 Daubney J took a similar view.

[15] The applicant's submissions, apart from a couple of matters I shall mention soon, rose no higher than saying that if the injunction were not granted there was a risk that it would not be repaid if it was ultimately successful in the principal proceedings. It seems to me that in those circumstances the significance of the policy of the Act is such that that risk would not justify the granting of an injunction and accordingly, for that reason, I would not grant it.

[16] However, it is appropriate that I consider the prospects that the applicant would not be repaid if ultimately successful in these proceedings. I was not taken to any evidence provided by the applicant in relation to the respondent's financial position. The applicant's submissions rested primarily on the affidavit material provided on behalf of the respondent. That is by no means surprising. I have made that observation without intending any criticism of the applicant or those responsible for the conduct of its case. It is simply that those associated with the respondent are best able to identify its financial position and that their evidence provides the best basis for assessing the risk that the respondent might not ultimately be in a position to repay money if an injunction is not granted and the applicant ultimately succeeds in the action.

[17] The respondent has been conducting an earthmoving business for approximately 17 years. It is by no means unusual that it relies on finance to do so. It has an overdraft facility with the Commonwealth Bank with a limit of $550,000, which it uses for cash flow purposes. The bank has provided a very recent letter in which a business banker confirms that the respondent has been a valued customer of the bank for more than 15 years and that it has a sound history of meeting commitments when due, and

maintaining a strong working capital position. While it is but an instant in time, the financial report for the year ended 30 June 2014 would provide some support for this. The report itself is exhibited to an affidavit of the person who for the past 17 years has been the respondent's accountant and business advisor.

[18] He acknowledges that the financial report for that year remains in draft but, nevertheless, in his affidavit relies on its contents. It reveals that current liabilities other than what are, in substance, trade liabilities, are very low. Other than those liabilities, current borrowings are said to be about $10,000. The liabilities recorded in the financial statement would suggest that the overdraft facility had not at that time been drawn on. The affidavit of the director of the respondent states that the respondent has a number of trade accounts with different suppliers, many of which are secured. There is, however, no suggestion that the respondent is in difficulty with its suppliers. Save for proceedings commenced in 2001, and in which no steps have to been taken since February 2003, there are no current proceedings against the respondent nor are there outstanding judgments or Court orders against it.

[19] The respondent employs approximately 47 staff. It has a number of contracts which appear to be substantial. The total amount of work remaining to be performed under those contracts, according to the director's affidavit, exceeds $6 million. According to the respondent's accountant, the respondent's gross contracting income in the last three years has ranged between approximately $9 million and approximately $11 million. In the year ending 30 June 2012, its profit was approximately $1.5 million. I note that the profit figures exclude wages and director's fees. In the year ending 30 June 2013 the profit was approximately $235,000. In the year ending 30 June 2014 the respondent suffered a loss of approximately $620,000.

[20] This has been relied upon by the applicant. Counsel for the respondent submitted, however, that that was affected by the amount which had not been paid but to which the respondent was entitled and which was the subject of the adjudication determination. If that were included then the position, in terms of profit and loss, would have been substantially different. It seems to me to be clear that the loss to which I referred would be substantially altered if ultimately it is found that the respondent is entitled to retain a substantial part of the amount awarded under the adjudication determination.

[21] While the question of the profit and loss of the respondent is by no means irrelevant, it is but a part of the overall picture which must be looked at in considering the risk that the respondent would not be able to repay the amount of the adjudication determination. I note that the balance sheet as at 30 June 2013 indicates the nett asset position of the respondent as being a positive value of almost $1.5 million. The accountant's affidavit suggests that in fact the nett asset position is substantially stronger because plant, equipment and vehicles have been included on the basis of assumed rates of depreciation rather than true market value. While I recognise that the accountant is not a valuer, it nevertheless seems to me that I can take into account his evidence at least as indicating that the nett asset value of the respondent as at 30 June 2014 is likely to have been no less than about $1.5 million. When one has regard to the overall picture presented by this evidence, it does not seem to me that it reveals a substantial risk that, if the injunction is refused and the applicant ultimately establishes that it is entitled to recover the amount of the adjudication decision, that amount would not be repaid.

[22] The applicant referred, as I previously indicated, to some other matters in support of its application. It did so, as I understood it, because they were regarded as questions I have to consider and because it was suggested they might distinguish this case from other cases relied upon by the respondent. They included the fact previously mentioned that the applicant is prepared to pay approximately $1.5 million into Court pending the determination of these proceedings. They also included the fact that the applicant proposes directions which would result in an early determination of the principal proceedings perhaps as early as this year. It was also submitted that there is no reason to think that the respondent would suffer prejudice if the injunction were granted. These matters, it was said, weighed in favour of the grant of the injunction.

[23] It may be accepted that they are factors relevant to the exercise of the discretion and that they do weigh in favour of the applicant's position. It seems to me, however, they would be less significant than the risk – and by that I mean a substantial risk – that someone in the position of the applicant might not be repaid if relief were not granted preventing reliance on an adjudication decision. They therefore seem to me equally to be weighed against the policy of the BCIP Act to which I have already referred. When I bear in mind that policy, and the present entitlement which the provisions of the Act give to the respondent to take steps to enforce the certificate which it would otherwise be entitled to do as a consequence of the adjudication decision, and weigh them against the various matters relied upon by the respondent, I come to the conclusion that the injunction should be refused. I so order.

[24] The successful respondent in today's adjournment application seeks its costs. In many cases where an application for an interlocutory injunction is refused it will be appropriate to reserve the costs. Often that will be because there has been insufficient opportunity to investigate the entitlement of a party which is sought to be protected by the injunction. However, that is not inevitable because sometimes such applications will turn upon questions relating to the balance of convenience, which may be the principal area of dispute, and the unsuccessful party may well be ordered to pay costs.

[25] However, the present case is a little different. That is because one of the most significant considerations in the present case was the relationship between the application for the interlocutory injunction and the underlying policy of the BCIP Act. It seems to me that that makes this case somewhat different from many other cases where an application for interlocutory relief is refused. That was also a discrete issue and its significance was held to favour the position of the respondent. It seems to me, therefore, appropriate to make an order that the applicant pay the respondent's costs of the application.