

DISTRICT COURT OF QUEENSLAND

CITATION: *Phoenix Project Development Pty Ltd v On Hing Pty Ltd*
[2006] QDC 075

PARTIES: **PHOENIX PROJECT DEVELOPMENT PTY LTD ACN
113 770 817**
Applicant

V

ON HING PTY LTD ACN 088 965 860
Respondent

FILE NO/S: BD 4682/05

DIVISION: Civil

PROCEEDING: Application

ORIGINATING
COURT: District Court of Queensland

DELIVERED ON: 11 April 2006

DELIVERED AT: Brisbane

HEARING DATE: 15 March 2006

JUDGE: Alan Wilson SC, DCJ

ORDER: **Application dismissed**

CATCHWORDS: BUILDING CONTRACTS – RESOLUTION OF DISPUTES
– ADJUDICATION – DETERMINATION – whether
decision of adjudicator under *Building and Construction
Industry Payments Act 2004* void or a nullity – Court’s power
to set aside judgment entered after adjudication

Building and Construction Industry Payments Act 2004

Aitkin Transport Pty Ltd v Voysey (1990) 1 Qd R 510
Andrews v Forrest (1996) 17 Qld Lawyer Reps 89
Brodyn Pty Ltd v Davenport & Anor (2004) 61 NSWLR 421
IVI Pty Ltd v Baycrown Pty Ltd [2005] QSC 330
Keighley, Maxsted & Co v Durant (1901) AC 240
Pico Holdings Inc v Wave Vistas Pty Ltd [2003] QCA 204
Siu v Eastern Insurance Co Ltd (1994) 2 AC 199
Taylor v Taylor (1979) 143 CLR 1

COUNSEL: Mr P R Franco for the Applicant
Mr P A Kronberg for the Respondent

SOLICITORS: Joseph Ho Lawyers
MCA Lawyers

- [1] Part 3 of the *Building and Construction Industry Payments Act 2004* (BCIPA) provides a mechanism for the speedy and informal resolution of disputes arising about progress payments under building contracts. Phoenix Project Pty Ltd claimed that it contracted with On Hing Pty Ltd to renovate a bar at Woolloongabba; performed the work, but was not paid in full; and, referred the matter to an adjudicator appointed under Part 3 who determined that On Hing should pay Phoenix \$95,510 plus interest¹.
- [2] On 16 December 2005 Phoenix, using a procedure permitted by BCIPA, s 31, filed the adjudicator's certificate in this Court as a judgment². On Hing applied on 8 February 2006 to set aside the judgment, and for a stay of execution pending the resolution of its complaint about the adjudication, outlined below. Phoenix opposes both forms of relief.
- [3] On Hing contends that the judgment was a nullity because it did not contract with Phoenix but, rather, personally with a Mr Ng (who is the sole director of Phoenix), and the absence of any contractual basis for the claim under Part 3 deprived the adjudicator of jurisdiction.
- [4] BCIPA envisages applications to have judgments entered in this way set aside, but turns its face against attacks on the adjudicator's decision as a basis for that relief. S 31(4) provides:

31 Filing of adjudication certificate as judgment debt

...

(4) If the respondent commences proceedings to have the judgment set aside, the respondent –

(a) is not, in those proceedings, entitled –

...

(iii) to challenge the adjudicator's decision; and

(b) is required to pay in to court as security the unpaid portion of the adjudicated amount pending the final decision in the proceedings.

- [5] The sub-section is to be read in conjunction with s 100, which provides that nothing in Part 3 affects a party's right to bring civil proceedings pursuing rights under a contract, and requires the court, in those proceedings, to make allowance for payments ordered under Part 3. Mr Kronberg, for On Hing, suggested his client could not bring separate proceedings of the kind referred to in s 100 raising the contentions upon which it now relies unless and until it had the judgment set aside, because the new proceedings would involve allegations inconsistent with that

¹ The adjudicator's decision is Exhibit 2

² In the sum of \$102,916.45

judgment. For reasons which will be apparent I do not think it is necessary to decide that matter, but s 100 clearly envisages further disputes and, in sub-section 100(3), allows for adjustments including, where appropriate, restitution. The section is very widely drawn and sub-section 100(3)(b) appears, on its face, to encompass the possibility that a full contest in formal court proceedings may result in a conclusion which differs from the Part 3 adjudication.

- [6] Unsurprisingly, rights to seek payments under Part 3 only attach to parties who are ‘entitled’ to those payments³; and the matters the adjudicator may consider are circumscribed⁴. They include, however, ‘... *the provisions of the construction contract from which the application arose*⁵’. The issue now ventilated by On Hing was, in fact, raised by it before the adjudicator, albeit in a way which he held (correctly, in my view) offended the procedural requirements⁶ of the Act and disentitled it to have the question determined. Nevertheless, he said:

21 In its application the Claimant did in its response to the Respondent’s submissions deal with the merits of that allegation. In the event I am wrong in my view of the legal position I consider as a matter of fact that the contract was between the Claimant and the Respondent in any event. ***The material demonstrates agreement between two parties acting in a representative capacity, each being aware of their representative status. No later conduct detracts from that fact. It is immaterial in those circumstances who drew the cheques and in my view nothing turns upon it in this instance.*** (emphasis added)

- [7] Neither BCIPA nor the *Uniform Civil Procedure Rules* provide an apparent mechanism for seeking the precise relief On Hing pursues in this application, but it is apparent this Court has an inherent, discretionary jurisdiction to interfere to prevent injustice in cases involving things like default judgments⁷, and s 31(4) contains an acknowledgment that relief of that kind is not extinguished, and remains available.
- [8] The notion that Phoenix was never the proper claimant goes to the heart of the contract which is the basis for the adjudicator’s jurisdiction under BCIPA Part 3 and, at first blush, On Hing’s submissions suggest a pre-condition for the jurisdiction may not have been met⁸.
- [9] There are, however, a number of factors relevant to the way the discretion to go behind the judgment should be exercised. First, the evidence of the parties, both before the adjudicator and in more detailed affidavits in this application, shows On Hing paid invoices rendered in Phoenix’s name and, in solicitor’s correspondence, did not initially dispute the identity of the other contracting party.
- [10] Second, On Hing also initially submitted to the adjudication process by filing a payment schedule⁹ which did not dispute jurisdiction although, as the adjudicator

³ BCIPA, ss 12, 17

⁴ *ibid*, s 26(2)

⁵ *ibid*, s 26(2)(c)

⁶ *ibid*, s 24(4)

⁷ *Taylor v Taylor* (1979) 143 CLR 1 per Mason J, at 16 and Aickin J at 22; *Andrews v Forrest* (1996) 17 Qld Lawyer Reps 89, per Dodds DCJ at 90

⁸ see, eg, *Brodyn Pty Ltd v Davenport & Anor* (2004) 61 NSWLR 421

⁹ BCIPA, s 18

noted, in light of BCIPA s 24(4), it should have done so¹⁰. Third, the evidence before the adjudicator persuaded him that this question of fact ought to be determined in Phoenix's favour. There is authority, involving similar legislation in New South Wales, to suggest that the legislature intended these matters to be finally determined by adjudication, and to limit the opportunity for parties to attempt, later and elsewhere, to raise separate, or new 'triable' issues¹¹.

- [11] Fourth, there have been significant, unexplained delays since the adjudicator gave his Reasons on 2 December 2005 and that factor, combined with the way On Hing conducted itself in the adjudication, entitles the respondent to contend that considerations of justice and fairness weigh against acceding to this belated application.
- [12] Fifth, the affidavit evidence before me, although untested by cross-examination, is persuasive (as it persuaded the experienced adjudicator) that On Hing knew it had entered in to a contractual, business relationship with Phoenix or, if it did not, its ignorance of that fact was wilful, or the product of disinterest.
- [13] Sixth, Phoenix is in any event able to rely upon authority that an undisclosed principal can sue upon a contract even though its involvement is not readily apparent (save, of course, in cases where the identity of the contracting parties is obviously a critical element¹²). The basis for this unusual principle was explained by Lord Lindley in *Keighley, Maxsted & Co v Durant*¹³. It relies upon the existence of a principal, and authority in the agent; and its continued efficacy has recently been acknowledged here¹⁴. The evidence of Mr Ng, that he always intended to contract on behalf of Phoenix, is uncontroverted. The decision of the Full Court in *Aitkin Transport Pty Ltd v Voysey*¹⁵, upon which the applicant sought to rely, does not derogate from the principle.
- [14] These matters tell strongly against the relief On Hing seeks. That conclusion does not sit uncomfortably with the apparent intention of the legislature, manifested in Part 3 that these matters are to be resolved simply and expeditiously. This belated challenge relies on claims, and evidence, which have already been comprehensively considered and explained in the adjudicator's Reasons in which he concluded that Phoenix's claim for a progress payment was '*fair and reasonable*'. I am not persuaded this is a case in which the Court's inherent jurisdiction is attracted.
- [15] Strictly speaking it is, then, unnecessary to deal with On Hing's application for a stay of the judgment but, even if a different conclusion had been reached, this is not a case in which a stay would be warranted. The legislation clearly intends that progress payments and the like will be made with a minimum of delay and court involvement, and adjusted later if necessary; there is no suggestion that hardship has been caused to On Hing by its payment into Court; there is a probable risk of hardship, however, to Phoenix, since it requires the money to pay subcontractors;

¹⁰ Adjudicator's Reasons: Ex 2, p 6, para 19

¹¹ *Brodyn* (supra) per Hodgson JA at 440-1, 449-450.

¹² *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* (1968) 2 QB 545 per Lord Denning MR at 552; *Siu v Eastern Insurance Co Ltd* (1994) 2 AC 199, at 207;

¹³ (1901) AC 240, at 256

¹⁴ *Pico Holdings Inc v Wave Vistas Pty Ltd* [2003] QCA 204 per Mullins J at [69]-[70]; *IVI Pty Ltd v Baycrown Pty Ltd* [2005] QSC 330 per Philippedes J

¹⁵ (1990) 1 Qd R 510

there is no evidence of any risk if the money is paid to Phoenix; and, even on the most generous view of the evidence presented by On Hing, its case could never be described as a strong one.

[16] The application is dismissed. I will hear further submissions about costs.