[2008] QSC 128

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No 6243 of 2007

HERVEY BAY (JV) PTY LTD	Applicant
and	
CIVIL MINING AND CONSTRUCTION PTY LTD	Respondent
and	
WILLIAM TIMOTHY SULLIVAN	Respondent
and	
INSTITUTE OF ARBITRATORS & MEDIATORS AUSTRALIA	Respondent

BRISBANE

..DATE 07/05/2008

JUDGMENT

HIS HONOUR: On 14 April last I gave judgment in this application for judicial review of an adjudicator's decision under The Building and Construction Industry Payments Act 2004. The order which I then made was that the decision dated 30 June 2007 be set aside.

According to section 30 of The Judicial Review Act 1991 the Court is empowered to make orders quashing or setting aside a decision or part of a decision with effect either from the day of the making of the order or, if the Court specifies the day of effect, the day specified by the Court.

In this case no such date was specified and the judgment therefore had the effect of setting aside the decision with effect from 14 April 2008.

As discussed in the reasons, the applicant established the adjudicator had made an error of law which, on the applicant's argument, at least, had resulted in the adjudicated amount being excessive by about $740,000. As also discussed in the reasons, from the evidence and the arguments I was unable to substitute the figure which the adjudicator should have allowed consistently with what I have held to be the proper interpretation of the contract. Accordingly, I left it to the parties to endeavour to agree upon that amount and the matter was adjourned for further consideration whilst they attempted to do so. At their request, the matter has been relisted today. They have been unable to agree on that amount.

The applicant has today sought a further order whereby I would fix that amount. The applicant argued that there was no substantial controversy or there should be no substantial controversy in that respect. However, for the first respondent there were other matters raised which do demonstrate that there is a substantial controversy. It is unnecessary to explore the detail of those arguments but it is sufficient to say this.

In my judgment I held that there was an error by the adjudicator in the interpretation of clause 35(5)(a) of the contract. I held that the first respondent had no entitlement to payment pursuant to that clause. The first respondent submits this morning that it fairly appears from the adjudicator's reasons that there were other grounds for the recovery of almost the same amount, which were put to the adjudicator, further to the argument based upon clause 35(5)(a). Now, those arguments may or may not have merit. It was said that the adjudicator was attracted to them but found it unnecessary to consider them because of his view about clause 35(5)(a). Nevertheless, they are arguments of apparent substance and, clearly then, there is a substantial controversy as to the amount which should have been allowed by the adjudicator. As the applicant's counsel rightly accepts, it would be inconsistent with the purpose of The Payments Act, as I have called it, for the Court upon an application for judicial review of an adjudicator's decision, to embark upon a lengthy factual inquiry as to what should have been allowed as the adjudicated amount. Such a process would seem to be

entirely inconsistent with the well-recognised objectives of this Act. Accordingly, the order sought by the application, which is an order for the substitution of another sum as the adjudicated sum, cannot be granted.

The arguments also helpfully canvassed the alternatives in an endeavour to explore some way in which the matter could be remitted to the adjudicator for further consideration. After all, he has a head start in considering these things and he produced a lengthy and carefully structured decision on this last year. It was suggested in particular that, if the parties agreed, then the time for the completion of the adjudication might be extended and, accordingly, the matter could be remitted to him. The applicant has not yet provided instructions to agree to such an extension of time but, through its counsel, indicates that that course would be of doubtful effect.

The argument is that once the adjudicator has reached his decision then, unless that adjudication is thought to be a nullity, the adjudicator has done his work, he is functus officio, and it is not for the parties to agree on an extension of time for his work to be done.

It is not so clear that the error of law which I identified in my judgment is one that involved a jurisdictional error. It is unnecessary again to explore the depths of that. It is sufficient to say that, were the matter to be remitted upon the premise that the original adjudication was in excess of

jurisdication and was therefore a nullity, it might be open to a party who is dissatisfied with the reconsideration by the adjudicator to argue otherwise and to say, therefore, that the further adjudication or consideration was of no effect. In other words, to proceed down that path would be likely to invite further legal dispute.

Accordingly, it seems to me that what must happen is that the present order will simply remain as the order on this application. The whole of the decision has been set aside. That would appear to provide, then, grounds for recovery of the money paid by the applicant last year consistently with the adjudication. Ultimately this morning, the applicant did seek an order for the repayment of that sum. However, no such order was sought in the originating application or during the hearing and it is clear that the first respondent has not had notice of it.

It is, of course, open then to the applicant to commence proceedings and seek summary judgment and there may or may not be good grounds for opposing that application. But it would appear that in the circumstances I have outlined, that is the way in which the matter must go forward.

The result is that application for further orders made this morning will be refused. The orders made on 14 April 2008 will not be disturbed.

There remains, I think, the question of today's costs. The applicant has already received an order for the payment of its costs of the proceedings as a whole. Subject to any variation, that order would, I think, cover this morning's costs.

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HIS HONOUR: For the first respondent, Ms Hindman submits that today's costs should be each parties' costs in the proceedings, that is, that her client ought not to pay the applicant's costs of today. As she has submitted, the applicant has not obtained the relief which it sought today but, on the other hand, as she fairly concedes nor has her client had complete success. It seems to me that today's hearing did involve arguments which were always going to be required by the outcome from my judgment of 14 April. It is unfortunate that further costs have had to be incurred but I do not think that the applicant was unreasonable in relisting the matter today and seeking to have, by these proceedings, entire controversy relating to this adjudication resolved within them. Accordingly, I think that the interests of justice favour the applicant having today's costs as part of the order for costs of the proceedings as a whole. To avoid any doubt, however, I will further order that the first respondent pay to the applicant its costs of today, to be assessed.
