SUPREME COURT OF QUEENSLAND

CITATION:	*Securcorp Limited v Civil Mining & Construction P/L* [2009] QSC 249
PARTIES:	**SECURCORP LIMITED** (applicant) **v** **CIVIL MINING & CONSTRUCTION PTY LIMITED** (respondent)
FILE NO/S:	BS 7475 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2009
JUDGE:	McMurdo J
ORDER:	**Upon the undertaking by the respondent through its counsel that it will not serve any further payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld) arising out of the project known as the Riverview Estate subdivision it will be ordered that:** **1. The Originating Application is dismissed.** **2. There will be no order as to costs.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where the *Building and Construction Industry Payments Act* 2004 (Qld) sets out a regime for making a payment claim under a construction contract – where the respondent undertook not to serve any further payment claim – where the applicant seeks a declaration that it is not liable to pay the respondent for building work – where there is extensive evidence on behalf of the applicant that there is no basis for a claim by the respondent – where the lack of evidence to the contrary is due to the respondent's being directed to file material only in the event that the adjudicator ruled in its favour, which did not occur – whether it should be declared that the applicant is not liable to pay the respondent for building work undertaken

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – OTHER CONDUCT – where the applicant failed to obtain any relief sought in the proceedings – where the applicant argued that it was necessary to bring the proceedings to avoid judgment being entered against it – where the applicant should have waited for the adjudicator's decision before commencing proceedings – where the respondent did not offer an undertaking not to make a further payment claim until late in the hearing – where the respondent's initial claim has been held by an adjudicator to have been wrongly made – whether costs should be awarded

Building and Construction Industry Payments Act 2004 (Qld)

Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd & Anor [2005] NSWSC 362, cited

BMD Major Projects Pty Ltd v Wagstaff Piling Pty Ltd & Anor, unreported, Philippides J, 7 June 2005, cited

Bucklands Convalescent Hospital v Taylor Projects Group [2007] NSWSC 1514, cited

Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69, considered

Energetech Australia Pty Ltd v Sides Engineering Pty Ltd [2005] NSWSC 1143; (2005) 226 ALR 362, cited

Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd [2009] NSWSC 416, cited

COUNSEL: R M Derrington SC for the applicant
M Hindman for the respondent

SOLICITORS: Tucker & Cowen for the applicant
Clayton Utz for the respondent

[1] The respondent, which I will call CMC, is a contractor involved in the construction of roads and other works in a project described as Riverview Estate in Emerald. The principal of the project is a company called Five G Pty Ltd. Its financier is the applicant, which I will call Securcorp.

[2] These proceedings arise from a payment claim which CMC served on Securcorp under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the Act"). Securcorp seeks declarations that it is not liable to CMC and, more specifically, that there is no "construction contract" (as that term is defined in the Act) between them. It presses for that relief although an adjudicator has recently determined that there is no construction contract between them so that CMC's payment claim was invalid.

[3] It is necessary to describe the events by which the litigation has reached this point. On about 3 April 2009 CMC served a payment claim against Five G Pty Ltd. The claim was the subject of an adjudication and CMC was allowed the sum of $3,426,648.02. It obtained an adjudication certificate which it filed in this court,

and obtained an enforcement warrant which is lodged against the title of the land on which the development is taking place. On 24 June 2009, CMC served its payment claim on Securcorp. It claimed payment for the same work the subject of its claim against Five G Pty Ltd. This claim sought the payment of $4,046,259.38 and asserted that there was a construction contract between the parties because, in terms of the definition of "construction contract" in Sch 2 to the Act, there was an "arrangement" under which CMC had undertaken to carry out work for Securcorp. On 8 July 2009, Securcorp delivered a payment schedule, saying that no amount was owing by it to CMC as there was no construction contract between them.

[4] Securcorp then filed this Originating Application by which it sought the following relief:

> 1. A declaration that the Applicant is not liable to pay to the Respondent any monetary or other consideration for the building work undertaken by the Respondent at Lot 2 on SP197530 and known as Lot 2 Rifle Range Road, Emerald, in respect of a development named the Riverview Estate Subdivision.
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> 2. A declaration that the Applicant is not a party to a construction contract, within the meaning of that term in the *Building and Construction Industry Payments Act 2004*, with the Respondent.

On the same day, solicitors for Securcorp wrote to solicitors for CMC seeking an undertaking not to proceed with an adjudication, which CMC refused to provide. The solicitors for Securcorp continued to call for that undertaking, arguing that it was appropriate that the court, rather than the adjudicator, determine the question of whether there was a construction contract between the parties. No undertaking was forthcoming and on 22 July 2009, this case came before a judge in the Applications List who made orders for the filing of any further material on behalf of the applicant and adjourned it to 6 August 2009.

[5] On 23 July 2009 CMC made an adjudication application. This was accompanied by a statutory declaration by its managing director, which referred to telephone conversations with a representative of Securcorp going to CMC's case that Securcorp had said that it would pay CMC. The solicitors for Securcorp then wrote to CMC's solicitors requesting that the parties agree to extend the time within which the adjudicator was to decide the matter. CMC did not so agree. Under s 25(3) of the Act, such an agreement would have permitted but not bound the adjudicator to postpone his decision.

[6] On 30 July 2009 Securcorp delivered an adjudication response, contending that the adjudicator had no jurisdiction in relation to the matter because there was no construction contract. To make good that contention, Securcorp saw fit to prepare and put before the adjudicator extensive evidence, which is replicated in affidavits it filed in these proceeindgs.

[7] On 31 July 2009, CMC offered not to enforce any adjudication without notice, if Securcorp gave the usual undertaking as to damages and also paid the adjudicated amount into court. That was rejected by Securcorp.

[8] On the same day Securcorp filed an interlocutory application returnable on 6 August. It applied to join the adjudicator as a respondent to the originating application and it sought interlocutory injunctions restraining the first respondent from seeking an adjudication certificate and/or filing it and restraining the adjudicator from further proceeding upon the adjudication. When the matter came before me on 6 August, I made orders by consent which assumed that the adjudicator would proceed to make his determination and he was not joined. It was ordered that in the event that the adjudicator decided in favour of CMC, then CMC would file affidavit material upon which it intended to rely in these proceedings by 24 August 2009. The originating application was adjourned to 25 August 2009. That implied that if the adjudicator decided against CMC, it need not file anything because the present proceedings would be unnecessary. CMC then undertook to the court that in the event that the adjudicator decided in its favour, it would not take any steps pursuant to s 30 of the Act to obtain an adjudication certificate or file such a certificate without first giving Securcorp five clear business days' notice of its intention to do so. As counsel for CMC points out, that undertaking offered effectively no more time for Securcorp to apply for an injunction than the five business days allowed by s 29 before an adjudication certificate can be obtained under s 30.

[9] On 11 August 2009 the adjudicator made his decision. He decided that there was no construction contract between CMC and Securcorp and therefore no amount was payable. CMC has confirmed in correspondence that it will not challenge that decision.

[10] Securcorp presses for the relief claimed in its Originating Application. It is convenient to discuss first the second of those orders. Its concern was that CMC might make another payment claim under the Act. There was some discussion in the arguments as to whether the adjudicator's decision would create an issue estoppel, the issue being the existence or otherwise of a construction contract. It is far from clear that the decision would create an issue estoppel. According to the judgment of Macfarlan JA in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd*,[1] an issue estoppel could arise from an adjudication decision. But that case was concerned with a second payment claim which was said to have been made inconsistently with the New South Wales equivalents of s 17(5) and s 27(2) of the Act, and the result in that case could be attributed to the operation of those provisions, without the operation of an estoppel, as Allsop P in that case held.

[11] Late in this hearing, CMC by its counsel gave an undertaking to the court not to serve any further payment claim under the Act arising out of this project. On that undertaking, it was rightly conceded for Securcorp that there was no need for a declaration in terms of paragraph 2 of the Originating Application.

[12] Securcorp presses for a declaration in terms of paragraph 1. This goes wider than an alleged entitlement to a progress payment under the Act. If there is no construction contract between the parties, nevertheless, at least in theory, Securcorp might be liable to pay CMC for work undertaken in this project. It is the prospect of a claim other than a claim for a progress payment under the Act which causes Securcorp to seek this declaration. No question of an estoppel arises in this respect.

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1 [2009] NSWCA 69 at [68].

[13] It is argued for Securcorp that it should not be exposed to the prospect of a claim of whatever nature if it can be determined now that no such claim could succeed. That would provide a basis for granting this declaration if the absence of any basis for a claim by CMC is presently established. It is argued for Securcorp that it is so established, because there is extensive evidence on its behalf to that effect, and there is no contradictory evidence. But the explanation for the absence of evidence for CMC is that it was directed to file material only in the event that the adjudicator ruled in its favour. It would be unfair to finally determine the rights of the parties without hearing the case which CMC would wish to advance, presumably consistently with the statutory declaration which was provided to the adjudicator. And there may be other evidence, supporting a cause of action under, for example, the *Trade Practices Act* 1974 (Cth), which CMC would wish to advance but was irrelevant for the adjudication. Accordingly, the application for the relief in paragraph 1 of the Originating Application should be dismissed.

[14] What remains is the question of costs. Each party seeks its costs, and Securcorp seeks them on the indemnity basis. The starting point is that Securcorp has failed to obtain any of the relief which it sought in these proceedings. But it is argued that it was necessary to bring these proceedings in order to avoid the potential for a judgment to be entered against it for a sum in excess of $4,000,000. Yet by bringing these proceedings, and prosecuting them as it did, it put itself in no better a position to restrain the filing of an adjudication certificate than if it had waited for the adjudicator's decision before commencing the proceedings. And had it done so, the adjudicator's decision would have made these proceedings unnecessary.

[15] In my view Securcorp should have waited for the adjudicator's decision. That is not said with the benefit of hindsight, but according to what many judgments have considered to be the appropriate course when asked to intervene in a pending adjudication: see, e.g., *BMD Major Projects Pty Ltd v Wagstaff Piling Pty Ltd & Anor*;[2] *Australian Remediation Services Pty Ltd v Earth Tech Engineering Pty Ltd & Anor*;[3] *Energetech Australia Pty Ltd v Sides Engineering Pty Ltd*;[4] *Bucklands Convalescent Hospital v Taylor Projects Group*;[5] *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd*.[6] And in the present case, ultimately Securcorp did not move for an injunction to restrain the adjudication, which was the only explanation for bringing these proceedings when it did. In these circumstances, and given the ultimate outcome, Securcorp should not have its costs.

[16] On the other hand I am not persuaded that CMC should have its costs. It was only at the eleventh hour that it offered an undertaking not to make a further payment claim. So whilst the proceedings were brought prematurely, they would have had some purpose absent that undertaking. Moreover, although I offer no opinion on the correctness of the adjudicator's decision, it is nevertheless relevant to consider that these proceedings have their origin in a claim made by CMC which an adjudicator has held to have been wrongly made. In that circumstance it might be unjust to require Securcorp to pay the costs. The outcome is that there will be no order for costs.

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2 Unreported, Philippides J, 7 June 2005.
3 [2005] NSWSC 362.
4 [2005] NSWSC 1143; (2005) 226 ALR 362.
5 [2007] NSWSC 1514.
6 [2009] NSWSC 416.