Transcript of Proceedings

REVISED COPIES ISSUED
State Reporting Bureau
Date: 10 June, 2005

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

PHILIPPIDES J

BMD MAJOR PROJECTS PTY LTD
(ABN 19 052 965 394) — Applicant

and

WAGSTAFF PILING PTY LTD
(ABN 26 052 146 488) — First Respondent

and

KARYN REARDON — Second Respondent

BRISBANE

..DATE 07/06/2005

ORDER

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HER HONOUR: This is an application for various declarations in relation to a payment claim and an adjudication application made under the Building and Construction Industry Payments Act 2004.

The applicant, who is the main contractor appointed by Queensland Rail for a railway upgrade project in Central Queensland, entered into negotiations with the first respondent, Wagstaff Piling Proprietary Limited to carry out certain piling work.

It appears that on 2 March 2005, Wagstaff sent a written tender offer to the applicant, to carry out the work for a specified price. There were also some discussions between the applicant and another contractor in respect of the piling work, which came to nought and the applicant's officer offered the first respondent the piling works for the tendered price.

There appears from the material, to have then been a dispute in relation to the absorption of certain costs relating to liner material.

There is a dispute between the parties as to whether the negotiations reached a stage where a contract was concluded. The applicant contends that no contract was in fact concluded. The respondent contends that the contract was concluded, albeit that some terms had not been finalised.

On the 5th of May 2005, the applicant wrote to the first respondent, stating that the applicant had cancelled the order for piling works for the project with the first respondent.

It was said that the decision was based on information provided to the applicant, that the first respondent required seven weeks for the manufacture of liners at the agreed additional cost to the applicant, of $14,000 for price increases for liner supply.

The first respondent then wrote on the 9th of May to the applicant, enclosing an invoice for what was described as "overhead costs and loss of opportunity and profit". That claim amounted to some $275,000. That claim was said to arise from the cancellation of the contract with the first respondent.

Counsel for the applicant, in arguing that no contract had been concluded, placed some emphasis on the first respondent's letter of the 9th of May 2005 and in particular, the statement therein that: "At no stage prior to 5 May 2005, had negotiations been completed".

I note that the matter was alluded to in a further letter, dated 3rd June 2005, from the first respondent to the applicant's solicitors, where the first respondent contended that a contract had been concluded and it seems that the first respondent's position is that whilst the essential terms have been concluded, there were some negotiations in relation to

some terms that they have not been completed. Be that as it may, it seems to me that the applicant does have a strong case in relation to that aspect of its submissions, namely that there was no concluded contract, so that no payment claim could be brought, pursuant to the Act.

An additional matter is raised by the applicant and that concerns the payment claim made by the first respondent. The applicant contends that even if it could be said that there was a construction contract for the purposes of the Act, that the payment claim does not comply with section 17 of the Act and is invalid.

In particular, it is said that the payment claim does not identify the matters required by the Act. Additionally the applicant argues that the claim is not one for work to which the Act applies, but for expectation damages and reliance damages arising from a repudiation of a building contract before any work under it was carried out and accordingly, the payment claim is not valid. The applicant contends that the adjudication application is invalid because a claim for damages for wrongful repudiation is not a matter that the adjudicator can determine.

Again, there is much merit in what is contended for. It is arguable that such claims, however, may come within the Act if they are referrable to a contractual provision. It is not entirely clear that that is the case here and no contention to that effect was made on behalf of the first respondent.

However, the first respondent only received the material very late yesterday and it was submitted by it that it had not had an opportunity to ascertain whether the material put forward on behalf of the applicant, reflected the entirety of the contractual documents.

The matter has reached the stage where a payment claim, purportedly made under the Act, has been provided to the applicant. The applicant has responded by providing a payment schedule to the first respondent, indicating that nothing is payable to the first respondent and raising the matters which are raised before this Court, that is the assertion that no contract was concluded and that the payment claim is invalid.

The adjudicator was appointed pursuant to the Act on 6 June 2005, that is yesterday, upon the nominating authority referring the adjudicating application to the adjudicator.

In my view, the appropriate course now is for the adjudicator to proceed to decide the application including the threshold jurisdictional issues raised by the applicant. As I mentioned, the applicant has raised matters which appear to have merit. However, given that the adjudicator has now been appointed and that the adjudicator is required under the Act to give a decision in a very tight timetable and that these matters that are raised can be raised before the adjudicator, I do not consider that it is appropriate that I exercise my discretion to in effect pre-empt the decision of the adjudicator. Of course the applicant's arguments that have

been raised before the Court, may well find favour with the adjudicator.

In those circumstances, I refuse the application. I should add that the Act does not preclude the applicant from pursuing the matter further, should the applicant be dissatisfied with the adjudicator's determination.

As regards the question of costs, the applicant having failed in its application, I consider that costs ought to follow the event and that the applicant should pay the respondent's costs of and incidental to the application. I so order.
