IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
TECHNOLOGY ENGINEERING AND CONSTRUCTION LIST

Not Restricted

No. 4022 of 2009

GROCON CONSTRUCTORS PTY LTD (ABN 50 006 703 091) Plaintiff

v

PLANIT COCCIARDI JOINT VENTURE (ABN 19 126 558 754) Defendant

AND

PLANIT COCCIARDI JOINT VENTURE (ABN 19 126 558 754) Plaintiff by Counterclaim

v

GROCON CONSTRUCTORS PTY LTD (ABN 50 006 703 091) Defendant by Counterclaim

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JUDGE:	VICKERY J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	24 and 27 JULY 2009
DATE OF JUDGMENT:	27 JULY 2009
CASE MAY BE CITED AS:	GROCON CONSTRUCTORS v PLANIT COCCIARDI JOINT VENTURE
MEDIUM NEUTRAL CITATION:	[2009] VSC 339

INJUNCTION - *Building and Construction Industry Security of Payment Act 2002* – balance of convenience pending hearing of application for judicial review.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M.A. Robins	Nathan Kuperholz
For the Defendant	Mr G. John Digby QC and Mr R. Andrew	LAC Lawyers

HIS HONOUR:

1 In this matter the plaintiff in the proceeding ("Grocon") seeks an interlocutory injunction in the form of the relief set out in its summons filed 16 July 2009.

2 Grocon's summons seeks to restrain the defendant ("PCJV") from seeking to take action in respect of a determination which it describes as a purported determination made by a review adjudicator ("the review determination") pursuant to the *Building and Construction Industry Security of Payment Act 2002* ("the Act"). It also challenges a determination of the adjudicator who determined the matter prior to the review being conducted ("the adjudication determination").

3 In brief compass, the relevant recent history of the proceeding is as follows: On 24 April 2009 PCJV purported to serve a payment claim under the Act for the sum of $544,841. I say "purported" to because unless otherwise determined, it was in fact a payment claim under the Act for the sum of $544,841. The matter came on for hearing before me on 6 May 2009 on the application of Grocon seeking to have it determined that the payment claim made under the Act was in conflict with the proceeding which had already been instituted under the Act namely paragraphs [39] to [47] of the counterclaim in this proceeding and was thereby an abuse of process. I gave leave to PCJV to discontinue its claims made pursuant to the Act in the proceeding, namely paragraphs [39] to [47] of its counterclaim. Grocon on 8 May 2009 then served a payment schedule under the Act. On the 21st of that month PCJV made an adjudication application under the Act and delivered on that occasion supporting submissions. On 28 May Grocon served an adjudication response under the Act. On 11 June of this year PCJV served responding submissions. The determination of the adjudicator appointed under the Act, Mr John O'Brien, was delivered on 18 June of 2009, being the adjudication determination. Mr O'Brien's determination as the adjudicator appointed under the Act was in favour of PCJV. It determined that the whole of the sum claimed, namely $554,841, was properly payable to PCJV. On 23 June of 2009 Mr Kuperholz, solicitor on behalf of Grocon, wrote to LAC Lawyers who are the solicitors appointed to conduct the proceeding on behalf of PCJV, objecting to

Mr O'Brien's determination and requested in that letter a stay of payment. A few days later on 26 June 2009 Grocon served a review adjudication application under the Act together with its supporting submissions. As it was required to do in order to found a valid review, Grocon, pursuant to s.26B(6) of the Act, also deposited the sum of $552,305 into a designated trust account as required under the Act. Then on 30 June 2009 Mr Kuperholz wrote to LAC Lawyers again requesting a stay until after the forthcoming mediation which had been ordered. On 1 July 2009 PCJV served a review adjudication response under the Act. Then on 3 July 2009 Mr Kuperholz again wrote to LAC Lawyers and to Mr Phillip Davenport, the appointed review adjudicator, objecting to certain material in PCJV's response to response submissions. The review determination by Mr Davenport was completed and dated 5 July 2009. The effect of that review determination was to uphold the adjudication determination previously made by Mr O'Brien. On 8 July 2009 Mr Kuperholz wrote a letter to Mr Davenport requesting a breakdown of some 39 hours said to have been occupied by Mr Davenport in the making of his review determination for which Mr Davenport sought to charge the sum of $25,740. On 9 July 2009 Grocon received the review adjudication determination from Mr Davenport which, as I have said, upheld the determination of Mr O'Brien. Then on 10 July 2009 Mr Kuperholz again wrote a letter to LAC Lawyers requesting a stay and also requesting security for any payment by Grocon to PCJV in view of PCJV's alleged impecuniosity. On 13 July 2009 LAC Lawyers wrote a letter to Mr Kuperholz refusing each of Grocon's requests. On 14 July 2009 Mr Kuperholz wrote a letter to LAC Lawyers foreshadowing the present application for an injunction before this Court and drawing attention to ss.28P to 28R of the Act. On 15 July 2009 Mr Kuperholz wrote a letter to LAC Lawyers addressing further potential issues under s.28R of the Act. Then on 16 July 2009 the plaintiff issued a summons seeking the interlocutory relief which is presently before me.

4 It may be noted that a mediation was scheduled for 24 July 2009 which had to be vacated by reason of these proceedings. It is common ground that the plaintiff's application should be determined on conventional grounds for the grant or a

withholding of an injunction. Firstly, is there a serious issue to be tried, and secondly, where does the balance of convenience fairly lie?

5 As to the first principal issue, that is whether there is or are serious issues to be tried in this proceeding, the plaintiff has foreshadowed making an application for judicial review in accordance with Rule 56, *Supreme Court General/Civil Procedure Rules 2005* for certiorari, addressed to both the adjudication determination of Mr O'Brien, and secondly, the review determination of Mr Davenport. It seeks certiorari on two principal bases. First, there is jurisdictional error present in each of those determinations, and secondly, that there has been a denial of procedural fairness evident in the manner in which those proceedings were conducted before the respective adjudicators.

6 In *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*,[1] I determined, at least in obiter, that unlike the position in New South Wales, certiorari was available to impugn the decision of an adjudicator under the Act. It would also follow, if I am correct in that position adopted in obiter, as I've said, in *Hickory*, that certiorari would also be available to impugn the decision of an adjudication review conducted by an adjudicator appointed under the Act. However, Mr Digby QC, who appeared with Mr Andrew for PCJV, contended, amongst other things, that contrary to my view expressed in *Hickory*, certiorari was not available in Victoria to impugn the decisions of adjudicators made under the Act. I putting this submission he invited me to follow the Court of Appeal in New South Wales in *Brodyn v Davenport*.[2]

7 One of the matters that I did take into account in arriving at my preliminary view that certiorari was not excluded from the Victorian Act were provisions in the Victorian Constitution [3] which preserve the inherent jurisdiction of this Court in the absence of the appropriate procedures in parliament being undertaken. Nevertheless, it is a matter which was raised by PCJV in this proceeding, and it may well be that my

1 (2009) VSC 156.
2 (2004) 61 NSWLR 421.
3 The *Constitution Act 1975*.

determination in *Hickory* was incorrect. My approach in *Hickory*, it may be noted, was taken in the absence of argument. Full argument ought to be addressed on the matter, as it is anticipated will occur in this case.

8 Secondly, it was argued by PCJV that even if certiorari is available, there were no grounds established by Grocon in this proceeding which would found relief in the nature of certiorari. Principally, it was argued that Grocon's further submissions, which were helpfully delivered late in the day on 24 July 2009, and which set out 16 grounds of challenge, were each in the nature of grounds of appeal, rather than grounds in support of judicial review. The difference was explained by Gillard J in *Mrs X v Secretary Department of Human Services*,[4] where his Honour summarised the relevant principles.

9 The plaintiff, Grocon, argued in the course of the hearing on Friday 24 July 2009 a number of possible grounds of judicial review which it contended were open. At my request, because these grounds had not been developed in written submissions which had been exchanged between the parties, Mr Robins, who appeared for the plaintiff, Grocon, filed and served his outline of proposed grounds of judicial review late on Friday evening. This was of considerable assistance to the Court and to the defendant in fully considering the arguments which he had delivered orally during the course of the day.

10 The grounds of review contended for by Grocon in challenging Mr O'Brien's decision consisted of ten separate but overlapping grounds. There were six additional grounds which sought to impugn the decision of the review adjudicator, Mr Davenport. Each of these challenges were summarised in the document delivered late on Friday evening by Mr Robins. The defendant, PCJV, addressed each of these grounds in a detailed submission delivered his morning entitled, "Defendant's Further Reply Submissions".

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4 (2003) VSC 140.

11 In respect of each of the grounds contended for by Mr Robins and his client, Grocon, the defendant, PCJV, was able to address significant argument in response. I do not intend in this judgment, which is of an interlocutory nature, for reasons which will become apparent, to address in detail or at all any of these arguments, save to say that in my opinion, a serious issue to be tried has been raised in relation to each of the matters contended for, that is that each of the matters raised by Mr Robins. Although not determined at this stage to be correct, they do raise, in my view, matters of serious issue between the parties, and are fairly arguable.

12 Secondly, the issues also raise matters of considerable importance as to the continued administration of the Act.

13 As to the balance of convenience, a number of matters were raised by Grocon as to the alleged impecuniosity of PCJV. I am not in a position to make any finding as to whether or not PCJV is in fact impecunious. I have been provided with no evidence of its financial capacity to repay one way or the other.

14 Nevertheless, as was frankly conceded by counsel for PCJV, that company was a specific purpose company, instituted for the project, the subject of the dispute, and for no other purpose. There is no evidence therefore before the Court of any ongoing income or indeed, any assets of that company. Further, there is no guarantee proffered from any natural person associated with that company to support a repayment of the progress payment which is claimed should it not be entitled ultimately to that progress claim.

15 I am conscious of the matter raised by PCJV in its submission that in the context of an application relating to the Act, the Court should require a high level of likelihood of the respondent being unable to repay any sum paid to it before an injunction order or an order which has that effect being made by the Court. The mere possibility of the inability to repay any such sum claimed is not sufficient to satisfy the balance of convenience, so it is contended.

16 However, in this case I am satisfied that the balance of convenience does favour the plaintiff in this matter, particularly in the light of the orders which I will propose, which will be for a hearing of the proposed judicial review to be conducted very shortly, and principally on the basis of the submissions and materials already before this Court. In these circumstances, in my view, it is appropriate for the status quo to be maintained pending the hearing of the judicial review application and its determination by the Court or other agreement.

17 I note that in the *Hickory* matter, the proceeding was instituted also by an injunctive process. That was followed by an order for a speedy trial. This was conducted over two days in a matter of weeks after the injunction hearing. The judgment in *Hickory* was able to be delivered in eight days after the trial.

18 I propose a similar regime in this case, although of course I'm not in a position to constrain myself by an eight day period, but I would anticipate that a determination by judgment could be delivered within short compass after the hearing and determination of the review application, somewhat similar to the approach taken in *Hickory v Schiavello*.

19 With that in mind, I would propose that there be specific orders in the nature of a timetable for the hearing of the application for judicial review, coupled with orders which will effectively preserve the position until that time. I had raised with the parties in the course of the hearing the possibility of a trial of the judicial review process be conducted commencing on 10 August. Subject to hearing from the parties, I would propose that the trial be conducted on that date, or commencing on that date.

20 Accordingly, I propose that subject to hearing further from the parties, the following orders - and I emphasis that these are put tentatively for the consideration of the parties and I will hear submissions on them. I propose to make the following orders: subject to the plaintiff by its counsel undertaking to abide by any order the Court may make as to damages in case the Court shall hereafter be of the opinion that the

defendant shall have sustained in any, by reason of this order which the plaintiff ought to pay, it is ordered that:

(1) Until the final determination of this proceeding or further order, the defendant by itself, its servants or agents is restrained from seeking to enforce by judgment or otherwise any alleged entitlement arising pursuant to a review adjudication determination made by Phillip Davenport dated 5 July 2009, and I will add to that, or any adjudication determination made by Mr John O'Brien dated 18 June 2009, other than by a final order made in this proceeding.

(2) It is directed that the moneys paid into the designated trust account by the plaintiff pursuant to s.28(b)(6) of the Act be maintained and not otherwise dealt with save as ordered by this Honourable Court or as the parties expressly agree in writing.

(3) That Grocon, by 4 p.m. 29 July 2009 issue, file and serve its application for judicial review of the adjudication decision and the adjudication review decision, the subject of this proceeding and so issue this application in the technology, engineering and construction list.

(4) That the trial of the application for judicial review be listed for hearing in the tech list commencing on 10 August 2009 on an estimate of two days.

(5) That the submissions made in writing and orally in this hearing stand as submissions to be made at the trial in so far as they do not relate to submissions going to the exercise of the balance of convenience and the hearing at the trial be limited to any necessary supplement to the submissions already made in this hearing.

(6) That the costs of this hearing and any costs thrown away by reason of the proposed mediation being abandoned be reserved.

(7) That the order directing that a mediation be conducted be extended to a date to be agreed upon by the parties and the mediator prior to 10 August 2009.

(8) That the summons filed 16 July 2009 be adjourned until 10 August 2009 for further hearing.

(9) And this order be prepared by the solicitors for the plaintiff and signed by a judge.
