IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
PRACTICE COURT

Not Restricted

S ECI 2016 00003

MILBURN LAKE PTY LTD (trading as Irwin Stockfeeds) (ACN 050 462 381) — Plaintiff

v

ANDRITZ PTY LTD (ACN 000 160 832) — First Defendant

and

SIMON WILSON (in his capacity as adjudicator appointed under section 20(1) of the *Building and Construction Industry Security of Payment Act 2002* (Vic)) — Second Defendant

---

JUDGE:	J FORREST J
WHERE HELD:	Melbourne
DATE OF HEARING:	13 January 2016
DATE OF RULING:	13 January 2016
CASE MAY BE CITED AS:	Milburn Lake Pty Ltd v Andritz Pty Ltd
MEDIUM NEUTRAL CITATION:	[2016] VSC 3

PRACTICE AND PROCEDURE – Injunction – Construction dispute – Payment claims – Enforcement of adjudication determination – *Building and Construction Industry Security of Payment Act 2002* (Vic), Division 2B, s 3, s 28 – Serious question to be tried – Balance of convenience favours granting of injunction.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr N A Andreou	Macpherson & Kelley Lawyers
For the Defendant	Mr L J Connolly	Piper Alderman

HIS HONOUR:

1 The plaintiff, Milburn Lake Pty Ltd (trading as Irwin Stockfeeds) ('**Irwin**'), and the defendant, Andritz Pty Ltd ('**Andritz**'), are in dispute over the construction of a stockfeed mill at Lang Lang.

2 On 29 October 2014, the superintendent of works issued a Certificate of Practical Completion. The mill has operated since that time.

3 Since July 2015, two payment claims have been made by Andritz under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the '**Act**'). Those payment claims have been adjudicated pursuant to Division 2 of the Act.

4 Irwin's application for an injunction relates to the second adjudication determination, made on 4 January 2016 by Simon Wilson, the second defendant, pursuant to s 23 of the Act. That injunction seeks to prevent Andritz from enforcing the determination pursuant to the provisions of the Act and in particular, Division 2B of the Act.

5 It is important in considering this application to understand the purpose of the Act. Section 3 sets out the objects of the Act, as follows:

> The object of this Act is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

6 It can be seen that the Act is based on a philosophy preserving the cash flow of contractors in the construction industry. It provides a mechanism for contractors such as Andritz to obtain progress payments and to use the terminology employed in *Hickory Developments*[1] to 'pay now and argue later'.[2]

7 Critical to this application is the ability of Andritz to obtain an adjudication certificate under s 28Q of the Act. As the law currently stands, the adjudication

---

1 *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* (2009) 26 VR 112.

2 Ibid 121.

certificate, amongst other things, enables Andritz to register a judgment and enforce it against Irwin (see s 28R of the Act), and precludes Andritz from arguing that an error of law on the face of the record (which includes the reasons of Mr Wilson) should result in the determination of Mr Wilson being set aside by judicial review.[3]

8 Irwin contends that Mr Wilson made a series of errors in the course of his determination. It was not in issue that several of those grounds relate to Mr Wilson's construction of the contract and the application of the Act to the claim. It is not necessary to traverse these arguments here. It suffices to say that I am satisfied, for the reasons set out in Irwin's written submissions, that several of those grounds (and particularly grounds 1 to 5) disclose a serious question to be tried.

9 The more difficult issue to resolve is determining where the balance of convenience lies. This is particularly so in the context of the objects of the Act to which I have already referred.

10 In favour of Irwin is the fact that there is no evidence that it would be unable to pay any judgment flowing from its obligations under the contract. In addition, it has a claim, it is said, for defects relating to the operation of the mill. Finally, as I have mentioned, there is prejudice to Irwin if it is unable to argue the full gamut of grounds of judicial review relief.

11 On the other hand, if the injunction is granted, Andritz is precluded from enforcing its rights under the Act. On its best result, if not injuncted, Andritz would recover approximately $600,000 within a short time. Alternatively, if the judgment was sought to be set aside by Irwin, then that sum must be paid into Court (pursuant to s 28R of the Act) and would thus guarantee payment to Andritz; dependent, of course, on the outcome of any dispute about the contractual terms and the work performed by it.

12 The appropriate course to be undertaken by a Court in this position has been considered by a number of trial judges in the Supreme Court of New South Wales in

[3] *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2015] VSC 233.

interpreting cognate provisions of the *Building and Construction Industry Security of Payment Act 1999* (NSW). In particular, McDougal J in *Filadelfia Projects Pty Limited v EntirITy Business Services*[4] said:

> In the ordinary way injunctive relief would be granted on condition that the amount in dispute, including the cost of the adjudication and some allowance for interest, be paid into Court pending a final resolution of the dispute. That is generally done firstly where s 25(4) of the Act applies, simply because that is a requirement of the section. Where (as here) s 25(4) does not apply in terms (and it does not apply in terms because there has been no adjudication certificate, and hence no judgment for a debt) the Court nonetheless, taking into account the clear objects of the Act and its underlying policy, generally orders payment into Court by analogy with s 25(4).[5]

13 Pausing here, this proposition, with respect, seems to be both correct and fundamental: to grant the injunction absolutely, without ordering payment into Court, would frustrate the clear purpose of the Act notwithstanding that all its provisions had not yet been engaged.

14 More recently, in *Nazero Group Pty Limited v Top Quality Construction Pty Limited*,[6] Hammerschlag J said as follows regards the cognate provisions:

> It is open to Top Quality to file the adjudication certificate, in which event Nazero would have little option but to seek to have the judgment set aside to protect its position, in which event, s 25(4)(b) of the Act would mandate payment into Court. Here, by happenstance, the section does not apply because the further step has not yet occurred. Top Quality would have to take that step to enforce its statutory right to payment. The only difference is that these proceedings have intervened. The policy of the Act is not served by removing Top Quality's protection pending determination of Nazero's challenge even though s 25(4)(b) of the Act does not apply in terms.[7]

15 His Honour went on to state:

> I accept as relevant that the challenge has reasonable prospects of success. Nevertheless, in my view and in all the present circumstances, it would be a manifestly unfair use of the Court's process to permit Nazero to mount its challenge without having to pay the money into Court.[8]

16 In my view, these statements of principle should be applied here.

---

4 [2010] NSWSC 473
5 Ibid [11].
6 [2015] NSWSC 232.
7 Ibid [42]. See also *Grocon Constructors v Planit Cocciardi Joint Venture* [2009] VSC 339.
8 Ibid [46].

17 The balance of convenience favours the granting of injunction but only on terms that the money be either paid into Court or into an agreed managed fund. Andritz, therefore, has the security of the money being safely held and Irwin is able to rely upon whatever grounds it wishes in seeking judicial review.