

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

PHOENIX INTERNATIONAL GROUP PTY LTD (ACN 109 614 011)	No. 8731 of 2009 Plaintiff
v	
RESOURCES COMBINED NO.2 PTY LTD (ACN 108 925 999)	Defendant
PHOENIX INTERNATIONAL GROUP PTY LTD (ACN 109 614 011)	No. 8732 of 2009 Plaintiff
v	
JETOGLASS PTY LTD (ACN 006 256 239)	Defendant
PHOENIX INTERNATIONAL GROUP PTY LTD (ACN 109 614 011)	No. 8833 of 2009 Plaintiff
v	
GANTLEY PTY LTD (ACN 113 690 574)	Defendant

JUDGE: Vickery J

WHERE HELD: Melbourne

DATE OF HEARING: 8 October 2009

DATE OF JUDGMENT: 8 October 2009

CASE MAY BE CITED AS: Phoenix International Group Pty Ltd v Resources Combined No. 2 Pty Ltd & Ors [No 2]

MEDIUM NEUTRAL CITATION: [2009] VSC 459

BUILDING CONTRACTS - *Building and Construction Industry Security of Payment Act 2002* (Vic.) (in its unamended form) - Application for judgment pursuant to s. 27 - Procedure to be followed - Application for summary judgment - Order 22 *Supreme Court (General Civil Procedure) Rules 2005* applied

PRACTICE AND PROCEDURE - *Building and Construction Industry Security of Payment Act 2002* (Vic.) (in its unamended form) - Application for judgment pursuant to s. 27 - Procedure to be followed - Application for summary judgment - Order 22 *Supreme Court (General Civil Procedure) Rules 2005* applied

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APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr D.B. Sharp

Erhardt & Associates

For the Defendants

Mr M.A. Robins

Kliger Partners Lawyers

HIS HONOUR:

- 1 In this matter a construction company, Phoenix International Group Pty Ltd (“Phoenix”), seeks to enter judgment, pursuant to s 27 of the *Building and Construction Industry Security of Payment Act 2002* in its unamended form (the “Old Act”). Phoenix seeks to do this in respect of three separate building projects which it carried out for three separate corporate entities, all of which were associated with Mr Zigmund Zayler. The three companies which engaged Phoenix were Resources Combined No.2 Pty Ltd (“Resources”), Jetoglass Pty Ltd (“Jetoglass”) and Gantley Pty Ltd (“Gantley”).
- 2 As I explained in *Phoenix International Group Pty Ltd v Resources Combined No.2 Pty Ltd*,<sup>1</sup> the *Building and Construction Industry Security of Payment Act 2002* came into operation in Victoria on 31 January 2003. It has since been amended by Act No.42 of 2006. The first of the amendments came into operation on 26 July 2006. These were relatively minor. The second and more substantial group of amendments commenced on 30 March 2007.
- 3 Accordingly the legislation in its present amended form, which I will call the “New Act”, applies to construction contracts entered into on or after 30 March 2007. For construction contracts entered into on or after 31 January 2003, but prior to 30 March 2007, the legislation is in its unamended form, that is, the Old Act applies save for minor amendments which became operative on 26 July 2006. The amendments to the legislation which have effect from 30 March 2007 include a process for enforcing payment of unpaid adjudicated amounts due to a claimant by a method of fast track entry of judgments in courts of competent jurisdiction.
- 4 In this matter Phoenix entered into a construction contract with the respondent, Resources, on 20 January 2006. Pursuant to the contract, Phoenix was to construct eight townhouses at Black Hill in Ballarat, Victoria for Resources which was the owner of the land. Accordingly, the Old Act applies to the construction contract.

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<sup>1</sup> [2009] VSC 425

- 5 In relation to Jetoglass, Phoenix entered into a construction contract with that company on 6 December 2005. Pursuant to the contract, Phoenix was to construct two townhouses in Beaumaris, Victoria for Jetoglass, which again was the owner of the land. Accordingly, the Old Act applies to that construction contract.
- 6 In the Gantley matter, Phoenix entered into a third construction contract with that company, on 2 October 2006. Pursuant to that contract, Phoenix was to construct 20 apartments in Hawthorn, Victoria for the company, which again was the owner of the land. Accordingly, the Old Act applies to that construction contract.
- 7 In May and July 2009, Phoenix served payment claims on Resources, Jetoglass and Gantley pursuant to the Old Act, in respect of construction work done under the construction contracts in all three matters. In response to the payment claims, each of the respondents served payment schedules under the Old Act disputing the whole of the claims pressed by Phoenix. Pursuant to the Old Act, Philip Davenport was appointed to act as the adjudicator in respect of the three disputed payment claims, and adjudications in relation to the payment claims were conducted by Mr Davenport.
- 8 Resources, Jetoglass and Gantley (who I shall compendiously refer to as the “Zayler Companies”), delivered submissions in the adjudications which contended that the payment claims in each case were contrary to the Old Act and invalid, and that, in each case, the sums claimed were not due to Phoenix.
- 9 By adjudication determinations each dated 24 August 2009, the adjudicator determined that the sums claimed by Phoenix, pursuant to its payment claims in each matter, were due and payable to it. The adjudicator made the following determinations: in relation to the Resources matter, the adjudicator awarded an amount of \$582,844.50 including GST in favour of Phoenix, and apportioned his fee of \$7,733 rendering Resources liable for 50 per cent of that fee amounting to \$3,866.50; in the Jetoglass matter, the adjudicator awarded an amount of \$59,924 including GST in favour of Phoenix, and apportioned his fee resulting in an amount

payable by Jetoglass in respect of that fee in the sum of \$2,238.50; and in the Gantley matter, the adjudicator awarded an amount of \$1,263,804 including GST in favour of Phoenix, and again apportioned his fee rendering the respondent, Gantley, liable for an amount of \$9,768 in respect of that fee.

10 It is common ground that none of the Zayler Companies have paid any of the amounts awarded by the adjudicator in favour of Phoenix or any part of those sums, nor has any of those companies provided security for payment of the whole or any part of the adjudicated amounts to Phoenix.

11 On 25 September 2009, I made orders in order to minimise costs for the parties and to facilitate the applications of Phoenix for the entry of judgment in each matter. I made orders that:

- The requirements of Rules 5.03 Sub-rule 1 and 8.02 be dispensed with.
- The plaintiff be authorised to commence a proceeding by originating motion in Form 5C. The originating motion already filed by the plaintiff stand as the originating motion in Form 5C and the proceeding continue as if it had been commenced by an originating motion in Form 5C.
- In each case, Resources Combined No.2 Pty Ltd, Jetoglass Pty Ltd and Gantley Pty Ltd be added as defendants to the respective proceedings.
- Any affidavit filed in the proceeding stand as an affidavit filed in support of the originating motion in Form 5C.
- The plaintiff, if it had not already done so, forthwith, serve a copy of its originating motion, which it had filed in the proceeding, on the defendant together with the affidavit filed in the proceeding in support of the application for entry of judgment and the exhibits thereto.
- The plaintiff within seven days file and serve a summons in Form 45A, making the application for the entry of judgment returnable before an

Associate Judge.

- The plaintiff, within seven days file and serve any further affidavit upon which it seeks to rely in making its application for the entry of judgment.

12 On 30 September 2009, Phoenix filed summonses in each of the proceedings seeking the entry of judgment in each matter founded upon s 27 of the Old Act. The summonses were made returnable before Associate Justice Daly on 2 October 2009. The summonses were referred to me in the Practice Court on 2 October 2009 and were then adjourned to 9 October 2009 for determination.

13 The Zayler Companies resisted Phoenix's applications for judgment on the primary ground that the determination made by the adjudicator in each case is and was a nullity and invalid in law. The companies contended that there are a number of substantive triable issues and arguable defences in this regard. The companies claimed that they are entitled to relief following judicial review of the determinations of the adjudicator, pursuant to Rule 56 of the *Supreme Court (General Civil Procedure) Rules 2005*, alternatively injunctive and declaratory relief.

14 The grounds on which the Zayler Companies seek to set aside the determinations of the adjudicator are reflected in the grounds outlined by Mr Zayler in his affidavit filed in opposition to the application for entry of judgment in relation to the Resources matter, which with minor adaptations are common to the Jetoglass and Gantley matters. By way of outline the grounds relied upon by the Zayler companies are as follows:

- (a) Contrary to s 14(3) of the Old Act the payment claim did not sufficiently identify the construction work or related goods or services to which the purported progress payment claim related.
- (b) Phoenix was not entitled to make the payment claim for two reasons:
  - (i) Phoenix was not entitled to make any progress payment claim under the relevant provisions in the contract, being cl 11.8 and Item 23-

Table B, and accordingly the purported payment claim is invalid; and

- (ii) the progress payment claim was served after termination of the contract, which termination discharged both Resources and Phoenix from any further performance of obligations under the contract.
- (c) The payment claim was, in substance, a final claim for which there is no provision under the Old Act as it applied to the contract.
- (d) If Phoenix was entitled to make a progress claim under the contract after the termination of the contract on 23 February 2009, which is expressly denied, then at best that entitlement was confined to a single progress claim. Phoenix made such a claim on 26 May 2009 under the Act, in the form of a payment claim. Accordingly, the payment claim served in July contravened s 14(2) of the Old Act and was invalid at law.
- (e) The determination against Resources was a nullity of no effect and ought to be set aside or quashed in that:
  - (i) it failed to comply with the basic and essential elements of the Old Act for a valid determination. It was not a bona fide attempt to exercise the power granted under the Act, and or there was substantial denial of the measure of natural justice required under the Act; or alternatively
  - (ii) it was tainted by jurisdictional error or errors of law on the face of the record, and or demonstrated an absence of procedural fairness entitling Resources to relief in the nature of certiorari quashing the application.

15 It was then noted that if given leave to defend these proceedings, Resources intended to issue proceedings under Rule 56 and to have such proceedings judicially managed and ultimately heard together with these proceedings. The grounds summarised by Mr Zayler were then expanded upon in his affidavit, filed in relation to each of these three matters.

16 Section 27 of the Old Act is in the following form:

**27. Consequences of not complying with adjudicator's determination**

- (1) This section applies, if, on or before the relevant date, a respondent fails to do one or other of the following-
  - a) to pay the whole or any part of the adjudicated amount to a claimant;
  - b) to give security for payment of the whole or any part of the adjudicated amount to a claimant.
- (2) In those circumstances, the claimant-
  - a) may recover from the respondent, as a debt due to the claimant, in any court of competent jurisdiction-
    - (i) the unpaid, or unsecured, portion of the adjudicated amount; and
    - (ii) interest at the rate of the time being fixed under section 2 of the **Penalty Interest Rates Act 1983** on the adjudicated amount calculated from the relevant date until judgment is entered in respect of the debt; and
  - b) may serve notice on the respondent of the claimant's intention-
    - (i) to suspend carrying out construction work under the construction contract; or
    - (ii) to suspend supplying related goods and services under the construction contract.
- (3) A notice referred to in sub-section (2)(b) must state that it is made under the Act.
- (4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in sub-section (1).
- (5) Nothing in this section affects the operation of any Act requiring the payment of interest in respect of a judgment debt.
- (6) In this section, "**relevant date**" means-
  - a) the date occurring 4 business days after the date in which the relevant determination is made under section 23; or
  - b) if the adjudicator determines a later date under section 23(1)(b), that later date.

17 It is to be noted that, pursuant to s. 27(4), judgment in favour of the claimant is not to be entered *unless the court is satisfied* of the existence of the circumstances referred to in sub-section (1), namely, that the respondent has failed to either to pay the whole or any part of the adjudicated amount to the claimant, or to give security for payment of the whole or any part of the adjudicated amount to a claimant. The

entry of judgment pursuant to s. 27 of the Old Act is not, therefore, merely an administrative process.

18 The Court has inherent jurisdiction to control proceedings before it subject to the legislative, regulatory and common law framework within which it exercises its powers. In the case of entry of judgment under s 27 of the Old Act the Court retains a discretion as to whether or not to enter judgment. The discretion is not excluded by the terms of the Old Act. The discretion is to be exercised judicially and in the interests of justice. No step has been taken by the Legislature pursuant to s 85 of the *Constitution Act 1975*, to limit the inherent jurisdiction of the Supreme Court in this respect.

19 Section 27 of the Old Act does not prescribe machinery to enable the respondent to an application for the entry of judgment against it to resist such an application. Nevertheless the Court may fill the gap, in the exercise of its inherent jurisdiction to control its own process.

20 In this regard, reference is made to the facility provided by Rule 21.01 of the *Supreme Court (General Civil Procedure) Rules 2005* (the "Rules of Court") for the entry of judgment in default of appearance, which provides:

21.01. Default of appearance

- (1) This Rule applies only to a proceeding commenced by writ.
- (2) Where a defendant does not file an appearance within the time limited, the plaintiff may enter or apply for judgment against that defendant in accordance with this Order.
- (3) Judgment shall not be entered or given for the plaintiff unless there is filed-
  - (a) a notice to the Prothonotary requesting the Prothonotary to search for an appearance by the defendant;
  - (b) an affidavit proving service of the writ on the defendant; and
  - (c) where the plaintiff applies for judgment in accordance with Rule 21.04 and the indorsement of claim on the writ does not constitute a statement of claim in accordance with Rule 5.04, a statement of claim.

A predecessor of Rule 21.01 was considered by the Full Court in *Hirsch v Hallal Ltd*,<sup>2</sup> where the Full Court was called upon to consider whether, in spite of there being no appearance entered, the Court retained inherent jurisdiction to order a trial. The Full Court held that, in the proper case, directions as to trial may be made. Justice O'Bryan made the following observations: "I may say", said his Honour,<sup>3</sup>

that in making this order I am exercising the inherent jurisdiction of the court to dispose of the trial of the action by such means as may be proper, where the rules of court do not appear to provide adequate machinery for trial. This appears to be the case here. I am also of the opinion that the relevant order simply provides that the plaintiff may proceed to a summary form of judgment, and not that he must do so.

21 In cases where application is made for the entry of judgment pursuant to s 27 of the Old Act, in my view it is appropriate to approach the matter by applying the closely analogous procedure for entry of a summary judgment pursuant to Order 22 of the Rules of Court. The relevant parts of Order 22, so far as they may be applicable to an application for judgment pursuant to s 27 of the Old Act are:

#### 22.02. Application for judgment

(1) Where the defendant has filed an appearance, the plaintiff may at any time apply to the Court for judgment against that defendant on the ground that the defendant has no defence to the whole or part of a claim included in the writ or statement of claim, or no defence except as to the amount of a claim.

#### 22.03. Affidavit in support

(1) An application for judgment shall be made by summons supported by an affidavit-

- (a) verifying the facts on which the claim or the part of the claim to which the application relates is based; and
- (b) .....

#### 22.04. Defendant to show cause

(1) The defendant may show cause against the application by affidavit or otherwise to the satisfaction of the Court.

(2) An affidavit under paragraph (1) may contain a statement of fact based on

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<sup>2</sup> (1945) VLR 189.

<sup>3</sup> At pp.189 to 190.

information and belief if the grounds are set out.

22.06. Hearing of application

(1) On the hearing of the application the Court may-

- (a) dismiss the application;
- (b) give such judgment for the plaintiff against the defendant on the claim or the part of the claim to which the application relates as is appropriate having regard to the nature of the relief or remedy claimed unless the defendant satisfies the Court that in respect of that claim or part a question ought to be tried or that there ought for some other reason be a trial of that claim or part;
- (c) .....
- (d) .....

22 In *Abigroup Contractors Pty Ltd v River Street Developments Pty Ltd*<sup>4</sup> Habersberger J considered an application for the entry of judgment by the builder Abigroup Contractors Pty Ltd (“Abigroup”), against the principal under the construction contract, River Street Developments Pty Ltd (“River Street”). Abigroup claimed that, having made a payment claim which was not met with a payment schedule from the principal disputing the claim, it was entitled pursuant to ss. 15(4) and 16(2)(a) of the Old Act to recover from River Street the sum claimed in its payment claim as a debt due to Abigroup. His Honour approached the question as if it was an application for summary judgment made by River Street pursuant to Order 22, and applied the common law tests for summary judgment pursuant to Order 22 in the application before him. His Honour noted<sup>5</sup> *Fancourt v Mercantile Credit Ltd*<sup>6</sup> where the High Court said:

The power to order summary or final judgment is one that should be exercised with great care. It should never be exercised unless it is clear that there is no real question to be tried.

23 Habersberger J in *Abigroup* also cited and applied *Australian Can Co Pty Ltd v Levin Co Pty Ltd*<sup>7</sup>, where the Full Court after a review of the cases relating to summary

<sup>4</sup> [2006] VSC 425, [32]-[34].

<sup>5</sup> *Supra* at [32 to 34]

<sup>6</sup> (1983) 154 CLR 87.

<sup>7</sup> (1947) VLR 332.

judgment stated:

From all this it appears that where there is a real case to be investigated either in fact or law, leave to defend should be given. But in whatever language the discrimen is expressed to determine in what cases liberty to the plaintiff to sign judgment or liberty to the defendant to defend should be given, the length at which or the detail in which or the vigour with which counsel has argued the matter cannot be the determining factor. Whatever the language various courts have used, it seems to us that the substance of the criterion to be applied is that after the matter involved has been explained to the judge there must be a real uncertainty without full argument or further investigation of the facts as to the plaintiff's right to judgment.

24 In *Abigroup*, Habersberger J concluded that there was a real question to be tried and that it was therefore not an appropriate case for summary judgment.<sup>8</sup>

25 Although Mr Sharp, who appeared on behalf of Phoenix in each of the matters, pressed upon me that this was not an application for summary judgment under Order 22, but an application for the entry of judgment. However, the terms of s 27 of the Old Act are not phrased in a way which clearly distinguishes the process from an application for summary judgment. Entry of judgment will not follow as a matter of course for a claimant who has not been paid the adjudicated amount. Section 27(2)(a) provides that once the preconditions in s 27(1) have been satisfied a claimant "*may recover from the respondent as a debt due to the claimant in any court of competent jurisdiction*" the unpaid portion of the adjudicated amount. Further, as I have already pointed out, Pursuant to s. 27(4), judgment in favour of the claimant may not be entered *unless the court is satisfied* of the existence of the circumstances referred to in sub-section (1).

26 The legislature has specifically left the machinery open to the court to which the application is made to determine that procedure. In my opinion the procedure provided under Order 22 of the rules of this Court for the entry of summary judgment is most appropriate as the procedure to apply, being closely analogous to the application made under s 27 of the Old Act for the entry of judgment.

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<sup>8</sup> *Supra* at [81]

27 The respondents in each of the cases have in my opinion demonstrated an arguable case that the determinations of the adjudicator in each case are null and void. It follows that I should refuse the application of Phoenix in each matter for the entry of judgment. Applying the well established principle that "the nature of the summary judgment procedure makes it undesirable, if a court is going to give leave to defend, that it give detailed reasons for doing so", <sup>9</sup> I do not propose to give detailed reasons as to why, in my opinion, the defendants in these cases have raised issues which warrant trials being conducted by way of judicial review.

28 In the event that leave to issue proceedings for judicial review of the determinations of the adjudicator was granted to the Zayler companies, Phoenix also sought security by way of payment into Court of the amounts in contention from each of the companies. The total amount of security sought in all of the matters was \$1,922,445. Phoenix contended that s 25 of the Old Act should be applied to found the application for the provision of this security. That section provides:

**25. Respondent's obligations following adjudicator's determination**

- (1) If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent-
  - a) Must pay that amount to the claimant; or
  - b) Must give security for payment of that amount to the claimant pending the final determination of the matters in dispute before them.
- (2) The respondent may only give security under sub-section (1)(b), if the respondent has commenced proceedings (including arbitration proceedings or other dispute resolution proceedings) against the claimant in relation to a dispute under the construction contract.
- (3) The security given by a respondent may be in any of the following forms-
  - c) a written unconditional undertaking by a recognised financial institution to pay the claimant, on demand, the adjudicated amount;
  - d) payment of the adjudicated amount into a designated trust account;
  - e) any other form that may be agreed between the claimant and the respondent.
- (4) If the respondent is the Crown or a public authority representing the Crown, the security may be in the form of a written statement by the Department Head of the relevant Government Department or by the public authority to the effect that sufficient money will be legally available for payment of any amount up to the adjudicated amount if and when that amount becomes payable.

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<sup>9</sup> *Ticco Pty Ltd v Complete Family Healthcare Services Pty Ltd* [2005] VSCA 221 at [34] per Hollingworth AJA, with whom Charles JA agreed.

(5) Except with the consent of the parties, it is unlawful for the claimant to enforce any security given under this section until at least 2 business days after any matters in dispute between them in connection with the progress payment to which the security relates have been finally determined.

(6) For the purposes of sub-section (5), a determination becomes final-

a) In the case of a determination from which there is no right of appeal or review, when the determination is made; or

b) In the case of a determination from which there is a right to appeal or review -

(i) When the right of appeal or review expires; or

(ii) If the determination becomes subject to appeal or review proceedings, when those proceedings have been finally disposed of.

29 However in my view s. 25 of the Old Act cannot be invoked in an application for security in a case such as this. Mr Sharp referred me to the observations made by the Hon. Justice Robert McDougall who, in the course of an extra curial speech delivered at the 30th anniversary conference of the Institute of Arbitrators and Mediators Australia in May 2005, made the following observation:<sup>10</sup>

It is correct to say that if interlocutory relief restraining the filing of an adjudication certificate as a judgment is refused and the judgment debtor is left to seek to have the judgment set aside including on *Brodyn* grounds then by s 25(4)(b) the judgment debtor would be required to pay into court as security the unpaid portion of the adjudication amount.

30 I accept that that is the case. However the observation made in his Honour's speech related to the equivalent of s 28(R)(5)(b) of the New Act in Victoria. This makes provision for proceedings to have a judgment entered under the New Act set aside. One of the conditions is the provision of security under s 28(R)(5)(b). Section 28R provides:

28R. Proceedings to recover amount payable under s 28M or 28N

(1) If an authorised nominating authority has provided an adjudication certificate to a person under s 28Q, the person may recover as a debt due to that person, in any court of competent jurisdiction, the unpaid portion of the amount payable under s 28M or 28N.

(2) A proceeding referred to in subs (1) cannot be brought unless the person provided with the adjudication certificate files in the court-

(a) the adjudication certificate; and

<sup>10</sup> The Hon. Justice Robert McDougall; speech delivered at the 30th anniversary conference of the Institute of Arbitrators and Mediators Australia in May 2005 at paragraph [22]

- (b) an affidavit by that person stating that the whole or any part of the amount payable under s 28M or 28N has not been paid at the time the certificate is filed.
- (3) If the affidavit indicates that part of the amount payable under s 28M or 28N has been paid, judgment may be entered for the unpaid portion of that amount only.
- (4) Judgment in favour of a person is not to be entered under this s unless the court is satisfied that the person liable to pay the amount payable under s 28M or 28N has failed to pay the whole or any part of that amount to that first-mentioned person.
- (5) If a person commences proceedings to have the judgment set aside, that person-
  - (a) subject to subs (6), is not, in those proceedings, entitled-
    - (i) to bring any cross-claim against the person who brought the proceedings under subs (1); or
    - (ii) to raise any defence in relation to matters arising under the construction contract; or
    - (iii) to challenge an adjudication determination or a review determination; and
  - (b) is required to pay into the court as security the unpaid portion of the amount payable under s 28M or 28N pending the final determination of those proceedings.
- (6) Subs (5)(a)(iii) does not prevent a person from challenging an adjudication determination or a review determination on the ground that the person making the determination took into account a variation of the construction contract that was not a claimable variation.
- (7) A claimant may not bring proceedings under this section to recover an adjudicated amount under an adjudication determination if the claimant has made an adjudication review application in respect of that determination and that review has not been completed.
- (8) Nothing in this s affects the operation of any Act requiring the payment of interest in respect of a judgment debt.

31 It is clear that s 28R(5)(b) of the New Act has no application to the present matter.

32 In relation to s 25 of the Old Act, insofar as it makes provision for security to be paid by a respondent, the requirement applies only where there is a continuing dispute as to matters arising under the relevant construction contract between the parties in

connection with a progress payment. In those circumstances, the respondent has a choice as to whether it pays the adjudicated amount to the claimant, as required pursuant to s. 25(1)(a), or gives security for payment of that amount to the claimant "pending the final determination of the matters in dispute between them", as required pursuant to s. 25(1)(b). The respondent may only elect to give security in lieu of making payment to the claimant if it has actually commenced proceedings: s. 25(2). The forms of the security are provided for by s. 25(3). Finally, except with the consent of the parties, the claimant is prevented from enforcing any security given under this section until at least 2 business days after any matters in dispute between them "in connection with the progress payment to which the security relates have been finally determined".

33 The facility to provide security in lieu of payment under s. 25 of the Old Act, in my opinion, has no application to a case such as the present where the foundation of the proceeding to be instituted by a party in the position of the respondents in this case, is a challenge to the validity of the adjudicator's determination by judicial review. The liability to provide security under s 25 as it is in the Old Act is founded upon the premise that there is a valid adjudicated amount which has not been paid. If the adjudicator's determination is under challenge, as it is in this case, and it subsequently transpires that there was no valid adjudication determination and consequently no valid adjudicated amount, there would have been no basis to have made the order for the provision of security under s 25 in the first place. In these circumstances where there is a challenge made to the very foundation on which the security may be ordered it would be unjust, in my view, to insist on security being provided as a condition for permitting the affected party from pursuing its challenge.

34 The proper construction of s. 25 of the Old Act supports my conclusion. Section 25 by subsections (1) and (2) gives rise to a mandatory obligation for the respondent to pay a valid adjudicated amount to the claimant. The respondent is relieved of this obligation in the circumstance where it has commenced proceedings of the type

referred to in subsection (2) and it has given security as required by s. 25(1)(b). The giving of security, however, is not a pre-condition to the respondent commencing proceedings. It is an alternative to the making of the payment provided for by s. 25(1)(a).<sup>11</sup>

35 Accordingly, I am of the view that s 25 properly construed in the light of those observations does not have the effect contended for by the applicants in these cases.

36 Further, I am not satisfied on the material before me that there is any basis for the making of an order by way of a Mareva injunction pursuant to Order 37A of the Rules. This is not to say that subsequently there ought not to be an application by way of a Mareva injunction, pursuant to Order 37A, provided that the exceptional circumstances contemplated by that Order are supported by appropriately convincing evidence.

37 I was referred to the observations of the Full Court in *NAB v Bond Brewing Holdings*,<sup>12</sup> where it was stated, in relation to an injunction requiring a defendant to give security for the plaintiff's claim, commencing with a colourful reference to the

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<sup>11</sup> Cf. the position pursuant to s. 28R of the New Act which provides inter alia for a facility to challenge an adjudication determination or a review determination in the course of seeking to set aside a judgment entered under the section: s. 28R(5). Pursuant to s. 28R(5)(a)(iii) no challenge to an adjudication determination or a review determination is permitted. Further, pursuant to s. 28R(5)(b) the party bringing the challenge must pay into the court as security the unpaid portion of the amount payable pursuant to adjudication determination or a review determination pending the final determination of those proceedings: s. 28R(5)(b). Further, unlike s. 25 of the Old Act, s. 28R of the New Act has been passed by the Legislature in compliance with s. 85 of the Constitution Act 1985: s. 51 of the New Act. The restrictions imposed on the jurisdiction of the Supreme Court by s. 28R are thereby rendered valid. By way of contrast, there is no equivalent expression of intention contained in the Old Act in relation to s 25: s. 51 of the Old Act

<sup>12</sup> (1991) 1 VR 386.

fairy tale of German origin recorded by the Brothers Grimm:<sup>13</sup>

The plaintiff, like the witch in Hansel and Gretel, may want a receiver to cage the defendant and fatten him up so he will be better eating or at least, to prevent him from wasting away.....

But this wide view has not been taken. The court will not, by injunction, require a defendant to give security for the plaintiff's claim (*Lister & Co v Stubbs* (1890) 45 Ch. D 1), nor will it by the appointment of a receiver achieve the same result. Some kind of interim administration of the affairs of a debtor in order to enhance the plaintiff's prospects of ultimately being paid if he obtains a judgment is objectionable in the same way as an injunction which requires the defendant to give security for the plaintiff's claim. Where there is a danger that the defendant will dissipate his assets, a Mareva injunction may be granted and, in a strong enough case of that kind, a receiver may be appointed. It is said in the authorities that the court grants a Mareva injunction in order to prevent its process from being rendered ineffectual. The process exists not for its own sake but for the protection and enforcement of the rights of litigants and, in recognising the Mareva injunction, the court has accepted that an injunction to prevent a defendant from dissipating his assets before judgment is an injunction to protect the right of the plaintiff as a creditor.

38 As I have said, on the material before me there is no prospect whatsoever of granting an order in the nature of a Mareva injunction or a freezing order pursuant to Order 37A of the rules of court. Accordingly, I reject the application made for the provision of security for the sums in contention in each of these three matters.

39 I will make the following orders:

- (1) By 4 pm 16 October 2009 the respondent company in each of the proceedings file and serve its applications for judicial review of the respective determinations of the adjudicator in each case.

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<sup>13</sup> *Supra* at 553 to 554

- (2) The summonses of the applicant in each case for the entry of judgment pursuant to s 27 of the *Building and Construction Industry Security of Payments Act 2002* in its unamended form be adjourned for hearing and determination at the same time as the applications for review to be filed by the respondent companies in each case or further order.
- (3) The proceedings in each case be referred to this Court for directions on 19 October 2009 at 9.30 am.

As to costs, the procedure applied by the Court is closely analogous to a proceeding by way of summary judgment pursuant to Order 22. In those circumstances, if an application for summary judgment is dismissed, which is the effect of what I've done, and the defendant, in effect, is given leave to defend its position, costs may be ordered as costs in the proceeding. The principle is based on the theory that should the defendant ultimately fail, that party would be ordered to pay the plaintiff's costs of the proceeding, which would include the costs of the application for summary judgment and there would be a corresponding result if it is that the plaintiff ultimately fails. I will order therefore, that:

- (4) the costs of this application, including the costs incurred by the parties on 2 October 2009, be costs in the proceeding.

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