Construction

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INJUNCTIONS TO STOP ADJUDICATORS FROM MAKING DETERMINATIONS MAY BE POSSIBLE ON THE EAST COAST: *VINSON V NEERIM PROPERTIES DEVELOPMENTS PTY LTD*

A recent decision in the Supreme Court of Victoria[1] has provided some further guidance[2] as to the requirements of a valid payment claim, and notice under s18(2) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (BCISPA). It has also served as a reminder that courts can and will order injunctions where applications for adjudication of construction payment claims are held to be an abuse of process.

Background

On 29 November 2014 Ms Vinson entered into three separate contracts (Contracts) with Neerim Properties Developments Pty Ltd (Neerim). The project was the construction of three town-houses on her property in Ashburton, Victoria (Property). The Contracts required works to be completed by 13 August 2015[3].

On 22 January 2016, Neerim issued Vinson a payment claim for variations in the amount of AUS$111,050 (Payment Claim)[4]. However, the Payment Claim did not stipulate a date for payment[5]. Vinson rejected the Payment Claim on 4 February 2016[6]. On 9 February 2016 Neerim's director sent an email to Vinson in which he stated he "reserve[d] the right to exercise [his] rights under the Act"[7].

1 *Vinson v Neerim Properties Developments Pty Ltd* [2016] VSC 321 (9 June 2016) (Vickery J).

2 See also *Commercial & Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd* [2015] VSC 426 (21 August 2015) [81]-[89] (Vickery J) and *Hallmarc Construction v Saville* [2014] VSC 491 (7 October 2014) [21]-[23] (Vickery J).

3 *Supra* 1, [6]-[8],[10].

4 *Ibid*, [9].

5 *Ibid*, [49].

6 *Ibid*, [10].

7 *Ibid*, [46].

On 16 February 2016, Neerim sought adjudication of the resultant dispute by filing an application with Adjudicate Today[8]. Vinson objected to the jurisdiction of the adjudicator[9]. Two adjudicators considered the application, each refused to adjudicate on grounds that the jurisdiction under the BCISPA had not been enlivened[10].

Undeterred, on 1 April 2016, Neerim filed a second adjudication application with a second nominating authority, Able Adjudicators[11]. The second application was also rejected by a third adjudicator for similar reasons[12].

Refusing to take "No" for an answer, on 22 April 2016 Neerim applied to a third nominating authority, ASC Adjudications. ASC did not nominate an adjudicator[13].

On 28 April 2016 Vinson applied to the court for a declaration that the Payment Claim was invalid under the BCISPA and an injunction to prevent Neerim from making any further adjudication applications[14].

The Court could not, on the papers, deal with Vinson's first argument, namely that the domestic building exclusion operated so that the Payment Claim was invalid, as to do so would have required an evaluation of competing evidence which was impossible without oral evidence[15].

Accordingly, the case turned on the second issued raised by Vinson which was whether or not Neerim had served a valid notice under s 18(2) of the BCISPA. It was common ground that as no payment schedule had been issued by Vinson in order for Neerim's adjudication applications to be valid it had to be able to point to a piece of correspondence which complied with the requirements of s 18(2) of the BCISPA[16].

Vinson contended that the 9 February 2016 email from Neerim's director was not sufficient to meet the requirements of BCISPA s 18(2) and therefore ground an adjudication application as it did not give any indication of Neerim's intention to apply for adjudication[17].

The court held that the failure to expressly notify Vinson of Neerim's intention to apply for adjudication of the Payment Claim in the 9 February 2016 email compromised the validity of the various adjudication applications. Vickery J explained that:

"The notice, such that it was, merely reserved the exercise of the company's rights under the Act. This is insufficient, for the purposes of the Act, to amount to a notice that Neerim intended to apply for adjudication of its Payment Claim[18]."

Vickery J noted that the object and purpose of the notice provision in s18(2) is to give respondents the opportunity to provide a payment schedule to the claimants within the prescribed time so that recourse to adjudication may be avoided. In the present circumstances, he concluded that Vinson was given no such opportunity[19]. Accordingly he declared that Neerim's purported s18(2) Notice was invalid and made orders restraining Neerim from making further adjudication applications on the basis of its Payment Claim[20].

HFW perspective

In his concluding remarks, Vickery J noted that "[t]his is another case where a standard form of notice, in this case a 18(2) notice, would be of assistance in the administration of the BCISPA to avert the problem that has arisen[21]." Although the introduction of a further layer of formality presents its own problems, His Honour's suggestion would, in this instance, appear sensible given what transpired[22].

However, the judgement may have more far reaching consequences than the mere suggestion of an additional form in the regulations. In essence, Vickery J granted injunctive relief on the grounds of a lack of jurisdiction. He held that Neerim's application was, and always would be, insufficient to enliven the BCISPA's jurisdiction. Vinson's quick thinking and action in corresponding with the nominating authorities prevented that from taking place. By doing so, and by pursuing the issue into the court, she has highlighted a step in the adjudication process which, until now, has received little judicial attention, namely the nominating authority or potential adjudicator to decide on the validity, or otherwise, of the application.

The East Coast adjudication model requires the adjudicator to serve a notice accepting the nomination. Implicit in that obligation is a requirement that the adjudicator

8 *Ibid*, [11]. [14].
9 *Ibid*, [15].
10 *Ibid*, [16], [19].
11 *Ibid*, [20].
12 *Ibid*, [23].
13 *Ibid*, [24]-[25].
14 *Ibid*, [2].
15 *Ibid*, [26]-[42].
16 *Ibid*, [43], [51].
17 *Ibid*, [44].
18 *Ibid*, [52].
19 *Ibid*, [53].
20 *Ibid*, [55].
21 *Ibid*, [57].
22 See also, *BGC Construction Pty Ltd v Citygate Properties Pty Ltd* [2016] WASC 88 (18 March 2016) [140] (Tottle J) where the court made similar remarks in relation to the West Coast model of adjudication.

form a view about the application's compliance with the formal requirements of the BCISPA. If the adjudicator comes to the conclusion that the application does not comply, as was the case here, then the adjudicator ought not serve the notice accepting the nomination. In coming to that view the adjudicator is essentially making a finding about whether or not there are the requisite jurisdictional facts to enliven the jurisdiction[23]. Put another way, if one of the adjudicators had accepted jurisdiction and made a determination it would have been infected with jurisdictional error and liable to be quashed by a writ of certiorari. Although the BCISPA does not require, in terms, a determination to be made about jurisdiction this case highlights that it is, nonetheless, a necessary step in the process.

What this means for you

It follows that well advised recipients of defective adjudication applications ought to move quickly to point out those deficiencies to the potential adjudicator, or nominating authority, as the case may be and, if necessary, take action to obtain a declaration and injunction (as was the case here) to prevent the process from commencing. That the court should make that ultimate finding (rather than the adjudicator him or herself) is consistent with existing authority in the Supreme Court of Victoria[24]. The current case highlights that there is an opportunity to ask for the court to make that decision earlier in the process rather than after the respondent has gone to the trouble and expense of preparing an adjudication response.

Of course, no such step can be taken under the West Coast model of adjudication where the adjudicator is expressly empowered to dismiss the application without making a determination on the merits if he or she determines that the jurisdiction has not been enlivened[25]. Moreover, there is a review process in the State Administrative Tribunal for such decisions to ensure that they are properly made[26]. No such procedure exists under the East Coast model so that applying for an injunction and declaration, as happened in this case, is possible under that model of adjudication.

23 See *Delmere Holdings Pty Ltd v Green* [2015] WASC 148 (24 April 2015) [95]-[102] (Kenneth Martin J).

24 *Sugar Australia Pty Ltd v Southern Ocean Pty Ltd* [2013] VSC 535 (15 October 2013) [113] (Vickery J). See also *Chase oyster Bar Pty Ltd v Hamo industries Pty ltd* (2010) 78 NSWLR 393 [98] (Basten JA).

25 *Construction Contracts Act 2004* (WA) s 31(2). See, *O'Donnell Griffin Pty Ltd v Davis* [2007] WASC 215 (7 September 2007) [31]; *Enerflex Process v Kempe Engineering Services (Australia) Pty Ltd* [2013] WASC 406 (15 November 2013) [12].

26 Construction Contracts Act 2004 (WA) s 46.


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