

ABACUS FUNDS MANAGEMENT LTD V DAVENPORT & 2 ORS [2003] NSWSC 935

Supreme Court of New South Wales – 20 October 2003

FACTS

Abacus Funds Management Ltd ('Abacus') engaged a contractor to carry out construction work on its premises. The contractor lodged a progress claim under the Building and Construction Industry Security of Payment Act 1999 ('the Act').

Abacus lodged a payment schedule in accordance with the Act and the matter proceeded to adjudication. Davenport was appointed to determine the adjudication.

The determination was delivered in favour of the contractor and Abacus sought an injunction restraining the contractor to enforce the determination by way of applying for an adjudication certificate under the Act. Abacus submitted that there was an arguable case that there was an error of law on the face of the record, giving rise to a decision quashing the adjudication determination.

ISSUES

Whether judicial review lies against an adjudicator.

Whether there was an arguable case of error of law.

FINDING

Despite the legislative intention demonstrable in the Act, the Court held granted an interlocutory injunction restraining the contractor from seeking and enforcing an adjudication determination or obtaining an adjudication certificate, pending an application for an order quashing the adjudicator's determination for error of law on the face of the determination.

The Court held that section 30(1) of the Act, governing the adjudicator's liability for anything done or omitted in good faith, was not a privative clause (that is, 'final and conclusive') and did not seek to exclude judicial review. On the facts, the Court found that Abacus had raised an arguable case that there was an error of law on the face of the record that may give rise to a decision to quash the determination.

QUOTE

Gzell J at paragraph 18 stated:

"The clear legislative purpose is to provide an interim regime for payment of progress claims pending the final resolution of disputes under construction contracts in the ordinary way, would suggest that a court should be slow to intervene for to do so would thwart that legislative purpose."

Further, at paragraph 21 his Honour stated:

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“Section 30(1) of the Act is not a privative clause. It does not seek to exclude judicial review. It is not of the nature of such provisions as were considered in R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598 and does not fall within the principles discussed in Deputy Commissioner of Taxation v Richard Walter Pty Ltd (1995) 183 CLR 168 and more recently in Plaintiff S157/2002 v Commonwealth (2003) 77 ALJR 454. Indeed, the current provision is less restrictive than it was in the original legislation which provided that no action lay against an adjudicator or any other person with respect to anything done or omitted to be done by the adjudicator in good faith in the exercise of the adjudicator's functions under the Act.”

IMPACT

It is now possible to appeal an adjudicator's determination.

Claimants who expected to obtain speedy relief under the Act may have to contend with an application by the Respondent for judicial review of an adjudicator's decision.

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