ABACUS V DAVENPORT & ORS [2003] NSWSC 977

NSW Supreme Court (Final Hearing)

FACTS

The plaintiff ("Abacus") engaged the second defendant ("Renascent") to carry out refurbishment of Abacus' premises.

Renascent served on Abacus a payment claim made pursuant to Section 13 of the Building and Construction Industry Security of Payment Act 1999 ("the Act"). A payment schedule was issued.

However, the third Defendant was dissatisfied with the Plaintiff's response to the payment schedule and applied to the Adjudicator for a further determination.

ISSUE

Whether and on what grounds prerogative relief is available against the determination of an adjudicator under the Act.

FINDING

While following Musico and noting Einstein J's approval of the judgment in Musico, Justice McDougall held that ".. there was no jurisdictional error and thus no basis on which to quash the determination. The interim injunction of Gzell J was set aside.

Prerogative relief would in principle lie against the determination of an adjudicator under the Act in cases where there is a jurisdictional error on the face of the record, a denial of natural justice (at para 16).

The adjudicator was required to do was undertake for himself the task that the architect (supervisor) had purported to undertake. An adjudicator is not required simply and only to "apply his rubber stamp and initials to the results of the architect's labours" (at para 39).

It was not only open to but also incumbent upon the adjudicator to consider for himself the entitlement to delay "An adjudicator under the Act is entitled, in the course of making his or her determination, to make mistakes of law as long as those mistakes do not cause the adjudicator either to exercise a jurisdiction that he or she does not possess, or to decline to exercise jurisdiction that he or she does possess" (at para 32). While there may be other circumstances that might ground an application for relief, an adjudicator determination under the Act is not bound by the terms of any progress certificate issued.