

DIGITAL CITY v QX AUSTRALIA
[2004] NSWSC 933
Supreme Court of New South Wales – 7 October 2004

FACTS

Digital City Pty Ltd ('Digital'), the proprietor under a construction contract, engaged QX Australia Pty Ltd ('QX') to carry out some building work. QX allegedly served a Payment Claim in accordance with the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('the Act'). Digital asserted that it never received a Payment Claim within the meaning of section 13 of the Act. QX, however, asserted that on 27 August 2004 it faxed, to Digital's transmission number, a bundle of documents, which included several documents which could be argued to be a Payment Claim within the meaning of section 13 of the Act. QX served an Adjudication Application on Digital under the Act. Digital then applied for an interlocutory injunction to halt the adjudication process, on the grounds that the adjudicator did not have jurisdiction to make his adjudication determination.

QX submitted that if the injunction was to be granted, Digital should be required to pay into court an amount equal to the amount which is claimed in the Payment Claim. In this regard, QX relied upon the decision of Gzell J in *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 935, where his Honour, when granting an injunction restraining the taking of steps to enforce a determination under the Act, require a payment into court. Further, QX submitted that an amount should be paid into court on that basis that, if the Court were to ultimately decide that the adjudication proceedings had been validly commenced, the bringing of proceedings in Court would have had the effect of delaying the time by which QX could receive its money.

ISSUE

Whether an interlocutory injunction should be granted against the advancing of the adjudication process, on the grounds that the adjudicator has no jurisdiction and whether payment into Court should be ordered.

FINDING

The Court held that the interlocutory injunction be granted given the evidence before the court. The Court distinguished *Abacus*, holding that it was a case where an adjudication determination had been made, and the proceedings were to quash that determination. The amount ordered to be paid into court was the amount the adjudicator had already held was due. As there had been no adjudication determination no amount was required to be paid into court. The Court also rejected QX's further submission.

QUOTE

Campbell J, Ex Tempore, stated at paragraph 9: "I wondered whether, when the Court proceedings would cause this inevitable delay, and given that the concern of the Act is with cash flow rather than the final determination of rights (*Amflo Constructions Pty Limited v Anthony Jefferies* [2003] NSWSC 856 at [25]) it might not be an appropriate term for the granting of an injunction which would inevitably cause delay to require payment in as a means of ensuring that, if the first defendant succeeded, there was no further delay after the Court's decision in the first defendant being able to actually get its hands on the amount to which it was entitled. On reflection I have rejected that idea. Whatever might be the situation in a case where there was evidence that a proprietor was of doubtful solvency, or that there might be difficulties in the enforcement of a judgment for the amount which had been held due under an adjudication determination, in the present case there is no basis for concern established by the evidence about whether the plaintiff could, or would, pay promptly any amount which an adjudication determination held it was obliged to pay."

IMPACT

An interlocutory injunction may be granted where there is a dispute as to the validity or service of a Payment Claim and a payment into Court may not be required for a substantial applicant. Injunctions based on such disputes should be applied for urgently.

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NSW
Jim Doyle
P: 02 9283 5388
E: jdoyle@doyles-solicitors.com.au

QLD
Frank Nardone
P: 07 3221 2970
E: fnardone@doylescl.com.au

VIC
Elisa Hesling
P: 03 9620 0322
E: ehesling@doyles-solicitors.com.au



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P: 02 9283 5388
E: jdoyle@doyles-solicitors.com.au

QLD
Frank Nardone
P: 07 3221 2970
E: fnardone@doylescl.com.au

VIC
Elisa Hesling
P: 03 9620 0322
E: ehesling@doyles-solicitors.com.au

www.doyleslawyers.com