

JUDGMENT : Levy SC DCJ : New South Wales. District Court. 15th October 2008

Introduction

1. The substantive proceedings arise out of a building contract and related works that have been the subject of an Adjudication and Determination under the *Building and Construction Industry Security of Payments Act, 1999 (NSW)*. Pursuant to that Determination the Plaintiff / Respondent has obtained a Judgment for the amount of the Determination together with interest.
2. On 1 October 2008 the Defendant / Applicant filed an Amended Notice of Motion seeking an order, inter alia, that execution on the Judgment entered in favour of the Plaintiff / Respondent in the proceedings be stayed.
3. The basis of the application concerned issues raised by a Cross-Claim in which the Defendant / Applicant seeks to rely on relief claimed under the provisions of the *Trade Practices Act, 1974 (Cwth)* involving alleged misleading or deceptive representations by the Plaintiff / Respondent. The other orders sought in the Amended Notice of Motion were not pursued, apart from the issue of costs.

Issues for determination

4. During the course of the opening the parties were requested to define the issues with clarity. Consequently, two issues were settled between the parties as arising for determination in this Notice of Motion. Having reviewed the affidavits and the arguments raised at the hearing I have reformulated the issues as follows:
 - (a) Does the Defendant / Applicant have a prima facie case for a Cross-Claim based on the claimed remedies framed under the *Trade Practices Act 1974 (Cwth)*; and
 - (b) In the circumstances of this case should the Court exercise its discretion to grant a stay of execution of the Judgment founded on the Determination of the Adjudicator in line with the principles stated in *Bittania Pty Ltd - v-Parkline Constructions Pty Ltd* [2008] NSWCA 238.
5. In addition, by its written submissions the Plaintiff / Respondent has argued that the Defendant / Respondent's Cross-Claim should be dismissed with costs.

Facts

6. Between 30 April and 31 July 2008 the Plaintiff commenced landscape works for the Defendant at premises at Castle Hill. The site of the works involved a head contract and other contractors but for the purposes of determining the issues in the current Notice of Motion it is not necessary to explore the facts further in relation to the nature of the inter-relationship between contractors on the site.
7. On 31 July 2008 the Plaintiff issued a third Payment Claim under the *Building and Construction Industry Security of Payments Act, 1999 (NSW)* which sought payment of the amount of \$348,145.00 including GST. There had been two prior payment claims issued and these resulted in the Defendant certifying that some monies were due and payable by the Defendant but these monies were not paid.
8. On 16 September 2008 the Plaintiff's Payment Claim was the subject of an Adjudication pursuant to the Act which resulted in a Determination in the Plaintiff's favour in the amount of \$301,882.67 including GST plus interest and the fees charged by the Adjudicator. That amount was not paid within the 5 day statutory time frame provided for in the Act.
9. On 25 September 2008 the Plaintiff obtained an Adjudication Certificate and Judgment was entered in this Court in the sum of \$315,466.90 which included interest and an adjudication fee. The entire amount of that certificate remains unpaid.
10. On 1 October 2008 the Defendant / Applicant filed a Statement of Cross-Claim in which it seeks relief under a number of provisions of the *Trade Practices Act, 1974*, namely sections 80, 82 and 87. In that Cross-Claim an alternative claim is made for a set-off of an unliquidated amount against the full Judgment sum.
11. The parties have each conceded that there is no evidence of insolvency on the part of either of the parties.

Evidence

12. The Defendant / Applicant read the two affidavits of Mr Ziv Ben-Arie affirmed on 29 September and 1 October 2008 and tendered pages 26 and 27 of the submissions made by the Plaintiff / Respondent and submitted to the Adjudicator.
13. The Plaintiff / Respondent read the affidavit of Ms Victoria Anne La Fontaine sworn on 6 October 2008 together with Exhibit "VAL1" which comprised the Adjudicator's Determination.

Submissions

14. Each party prepared outlines of written submissions and supplemented these with oral submissions. I reserved my decision in order to consider whether the Defendant / Applicant was entitled to a stay.
15. Subsequently, without leave and without the consent or knowledge of the opposing side, on 7 October 2008, the solicitor for the Plaintiff / Respondent forwarded to my Associate a facsimile which contained notification of a further authority to be drawn to my attention. No further submissions accompanied that notification. Subsequently, on 8 October 2008 the solicitor for the Applicant / Defendant forwarded a facsimile to my Associate with an accompanying submission in response to the Plaintiff / Applicant's facsimile.

Applicable legislation

16. The Plaintiff / Respondent has the benefit of an Adjudication Certificate made under Section 24 of the *Building and Construction Industry Security of Payments Act, 1999 (NSW)* and filed in accordance with Section 25 of that Act in the sum of \$315,466.90.

17. Section 25 of the Act provides:

“25 Filing of adjudication certificate as Judgment debt

(1) An adjudication certificate may be filed as a Judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.

(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.

(3) If the affidavit indicates that part of the adjudicated amount has been paid, the Judgment is for the unpaid part of that amount only.

(4) If the respondent commences proceedings to have the Judgment set aside, the respondent:

(a) is not, in those proceedings, entitled:

(i) to bring any cross-claim against the claimant, or

(ii) to raise any defence in relation to matters arising under the construction contract, or

(iii) to challenge the adjudicator’s determination, and

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.”

18. Under the terms of Section 25 of the Act the Defendant / Applicant is not precluded from raising a Cross-Claim or indeed other matters arising out of the construction contract between the parties.

19. The Defendant / Applicant seeks to argue that by virtue of Section 51A of the *Trade Practices Act, 1974 (Cwth)* and the overlapping provisions of Sections 52, 53(aa) and Section 87 of that Act that by virtue of misleading or deceptive representations claimed to have been made by the Plaintiff, the Judgment in the Plaintiff’s favour ought to be stayed pending a full hearing of the merits of the substantive issues between the parties.

Does the Defendant have a prima facie case for a cross-claim based on remedies framed under the Trade Practices Act?

20. The Defendant / Applicant asserts that its Cross-Claim is for an amount in excess of the amount of the Determination of the Adjudicator, as appears from the table set out in the Reasons for Determination which is in evidence before me. It is important to note that the amount referred to therein is for an unliquidated sum so that the claimed Cross-Claim for a set-off is for an as yet undetermined amount.

21. For the limited and convenient purpose of confining the scope of evidence and argument on the issues raised in the current Notice of Motion the Plaintiff / Respondent has fairly conceded that on the evidence before the Court the Defendant / Applicant has adduced threshold evidence, which if accepted, is sufficient in the circumstances to enable the misleading or deceptive conduct provisions of the *Trade Practices Act, 1974 (Cwth)* to be invoked to support a Cross-Claim by the Defendant.

22. In view of the concessions made by the Plaintiff / Respondent it is not necessary for me to detail the alleged misleading or deceptive representations other than to record the fact that such allegations have been raised. The concessions render it unnecessary for me to review in detail the inter-relationship between such allegations and the provisions of the *Trade Practices Act, 1974 (Cwth)* as relied upon by the Defendant / Respondent.

23. That concession, made in the true spirit of s.56 of the *Civil Procedure Act, 2005* obviates the need for me to further consider in detail the provisions of Sections 51A and 87 of the *Trade Practices Act, 1974 (Cwth)*.

Should the Court exercise its discretion to grant a stay of execution of the Judgment in the circumstances of this case?

24. The determination of the issue of whether a stay ought to be granted first requires a consideration of the scheme and purpose of the *Building and Construction Industry Security of Payments Act, 1999 (NSW)* (“The Act”)

25. Stated in broad terms, as has been confirmed by ample authority, the legislative intent of the Act is clearly aimed at providing for the prompt payment of contractor’s claims for entitlement to remuneration for work covered by the Act. That object has been described as somewhat draconian and is based on the concept that in a dispute a party served with a Payment Claim must “pay now and argue later”.

26. As is evident from the terms of s.25 of the Act that statutory scheme is not intended to shut out, limit or otherwise undermine the ability of a party against whom a claim for payment has been pressed from later arguing the merits of the claimant’s ultimate entitlements, including any counter-claims. The scheme does however affect the timing at which such arguments may be raised.

27. The Defendant / Applicant, through its counsel, has provided the Court with an undertaking to pay into Court the amount of the Adjudicator’s Determination pending a determination of the Cross-Claim if the stay were to be granted. If a stay were to be granted then the considerations of justice and fairness between the parties requires that such an undertaking would be the subject of an equivalent order under s.25(4)(b) of the Act in any event.

28. It is apparent from the brief hearing of the matters relevant to the motion that the matters sought to be ventilated by the Cross-Claim are complex, will involve detailed evidence and legal argument and will inevitably involve some delay before resolution. This is undoubtedly due to what I anticipate will be the necessary procedural processes concerning particulars, possible discovery, interrogatories, the exchange of expert reports, procedures aimed at narrowing the issues including the possible reference out of some issues. All of this will involve an uncertain amount of time and delay.
29. The question of time and delay for the pursuit of a Cross-Claim is a relevant matter to consider on determining an application for a stay as the objects of the Act ought not be frustrated by the granting of a stay without just cause.
30. There is no doubt that the Court has power to grant a stay in the event that a Determination has been procured by misleading or deceptive conduct in breach of the provisions of the *Trade Practices Act, 1974 (Cwth)*. *Bittania Pty Ltd v Parkline Constructions Pty Ltd* [2008] NSWCA 238; *Katherine Pty Ltd v The CCD Group Pty Ltd* [2008] NSWSC 131.
31. However the claim here is not that the Determination was procured by misleading or deceptive representations but rather, the claim is that the contract was induced by such conduct. The issue of the contract and matters of contractual performance have already been dealt with by the Adjudicator, as has been pointed out by the Plaintiff / Respondent.
32. In the absence of evidence of impecuniosity and prejudice the remarks by Hodgson JA in *Bittania* at [5] do not apply to this case as no evidence has been adduced which tends to show that there is a substantial risk that any money that is paid over as a result of refusal to grant a stay would be irrecoverable.
33. The Plaintiff / Respondent has referred me to *Taylor Projects Group Pty Limited v Brick Department Pty Limited & Ors* [2005] NSWSC 571 and the remarks of Einstein J at [59] – [60]. There is no evidence of insolvency in this case and therefore in my view the authority cited is of no assistance to the determination of the issues in this Notice of Motion.
34. In my view, in the absence of evidence of a resultant or potential prejudice, a stay should not be granted pending the ultimate determination of the wider issues in dispute between the parties.

Further issue raised by the Defendant / Respondent - Should the Cross-Claim be dismissed?

35. The Plaintiff / Respondent has argued that any Cross-Claim seeking the remedy of set-off based on a claim for unliquidated damages, which depends for its success on the acceptance of an argument concerning misleading or deceptive representations and reliance on same, must be the subject of separate proceedings because Section 21(1) of the *Uniform Civil Procedure Act, 2005* only permits the set-off of a debt or liquidated sum whereas the Cross-Claim seeks unliquidated damages and therefore submits that the Cross-Claim should be dismissed.
36. Whilst there may be some force in that submission, it is not the subject of any prayer for relief in the motion before the Court which may explain why the Defendant / Applicant has not responded to that submission. Since procedural fairness requires that such opportunity should be afforded to the affected party if such an order is sought, I leave the issue to be resolved by way of separate motion, or by consent if the parties so choose to do so.

Disposition of the Notice of Motion

37. In my view the motion seeking a stay of execution on the Judgment must be dismissed.

Orders

38. I make the following orders:
 - (a) The Amended Notice of Motion filed on 1 October 2008 be dismissed.
 - (b) The Defendant / Applicant is to pay the Plaintiff / Respondent's cost of the motion.
 - (c) The exhibits may be returned.

Mr B DeBuse (Plaintiff) instructed by HWL Ebsworths Lawyers
Ms V Culkoff (Defendant) instructed by Doyles Construction Lawyers