

Unconscionable Conduct and the Fast Track Provisions: Developments

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ABOUT THE AUTHOR

Les Einstein is a Sydney barrister. He was admitted to the New South Wales and Western Australia bar in 1987. Prior to this time Les practised for eight years as a solicitor in Sydney, commencing with Blake Dawson Waldron (by its former name) and ending in partnership with Ferrier & Associates.

In both branches of the profession Les has focused exclusively in the areas of equity and commercial law, his practice spanning across all main sectors of the commercial landscape including banking, insurance, trade practices, property, and now building law.

Les was briefed to appear on behalf of the Unions & Asbestos Support Groups in the Special Commission of Inquiry into James Hardie. He has regularly been briefed by the National Australia Bank and has appeared in a number of high profile commercial cases in the Supreme, Federal and High Courts.

Les' recent interest in building law was sparked by his realisation that significant provisions of the *Building and Construction Industry Security of Payment Act 1999* are open to challenge in light of current authority concerning the application of section 109 of the Commonwealth Constitution.

Outside the law Les' interests are reading, gym, jogging, camping, public speaking and spending time with his wife, three children and a Labrador.

Unconscionable Conduct and the Fast Track Provisions: Developments¹

Les Einstein

The Mischief Sought to be Overcome

1. The *Building and Construction Industry Security of Payment Act* 1999 (NSW) (“the SOP Act”) was intended:

... to stamp out the un-Australian practice of not paying contractors for work they undertake on construction.²

2. The concerns of the building industry in this regard were voiced in a Second Reading Speech on 5 December 2002 (emphasis added):

By raising in court defences such as that the work does not have the value claimed or that the claimant has breached the contract by doing defective work some respondents have been able to delay making a progress payment for a long time. Those respondents have forced claimants to incur considerable legal costs. They have effectively defeated the intention of the Act. **To overcome the problem, the Bill clarifies that in court proceedings by a claimant to enforce payment of the debt due under the Act, a respondent will not be able to bring any cross-claim against the claimant and will not be able to raise any defence in relation to matters arising under the construction contract.** A respondent who wants to raise these matters must do so in a payment schedule in response to a payment claim under the Act, or in separate proceedings.³

3. The machinery put in place to achieve that objective can be found in ss15(4)(b), 16(4)(b) and 25(4)(a) of the SOP Act, sometimes called *the fast track provisions*. However the fast track provisions, whilst enacted to avoid injustice in the way described in the Second Reading Speech, have the potential themselves to be an instrument of unconscionable conduct.

4. Their intended effect is to ensure that a claimant builder who has complied with certain statutory preconditions is able to commence recovery

¹ This paper reproduces portions of an article by the same author published in *22 Building and Construction Law* 82

² Hansard Second Reading Speech 22 September 1999 p 1,012

³ Hansard Second Reading Speech 5 December 2002 p 7,815 relating to the Building and Construction Industry Security of Payment Amendment Bill 2002

proceedings in the knowledge that the SOP Act precludes a challenge to those proceedings by way of defence or cross claim. But what is the situation when the desired defence or cross claim seeks to invoke relief under the *Trade Practices Act 1975* (Cth) (“the TPA”) relating to misleading and deceptive conduct on the part of the claimant builder? Until recently, the indication from the cases has been that no such relief can be invoked.

5. A question has now arisen as to whether the fast track provisions are valid in light of current authority concerning the application of section 109 of the Commonwealth constitution. That question has come under the gaze of the New South Wales Court of Appeal in *Bitannia Pty Ltd and Anor v Parkline Constructions Pty Ltd* [2006] NSWCA 238.

6. Against the backdrop of how the New South Wales courts have, in the past, approached the fast track provisions, this paper seeks to assess the ramifications of that decision for the building industry in New South Wales.

The Machinery

7. The machinery put in place needs to be understood within the context of the procedure laid down by the legislation to achieve its objectives.

Payment claims

- (a) A person who is or claims to be entitled to a progress payment (“*the claimant*”) may serve a “*payment claim*” on the person who is or may be liable to make the payment under the relevant construction contract: s13(1);
- (b) In the payment claim the claimant must identify the construction work or goods and services to which it relates. The claimant must also indicate the amount claimed to be due and state that the payment claim is made under the SOP Act: s13(2);

Payment schedules

- (c) A person on whom a payment claim has been served (“*the respondent*”) may reply to the payment claim by providing a “*payment schedule*”: s14(1). In it the respondent must indicate the

amount (if any) that he proposes to pay (“*the scheduled amount*”) all and if it is less than the claimed amount, the schedule must indicate why this is so: ss14(2) and (3);

The first of the fast track provisions: s15(4)(b)

- (d) A respondent who does not provide a payment schedule to the claimant within the time required by the SOP Act becomes liable to pay the claimed amount to the claimant on the due date: s14(4). If he fails to make payment, the claimant is entitled to recover such amount as a debt due in any court of competent jurisdiction: s15(2)(a)(i);
- (e) The first of the fast track provisions, s15(4)(b), is activated where a claimant commences such recovery proceedings;
- (f) It provides that “*the respondent is not, in those proceedings, entitled ... to bring any cross-claim against the claimant, or ... to raise any defence in relation to matters arising under the construction contract*”.

The second of the fast track provisions: s16(4)(b)

- (g) If a respondent, having provided a payment schedule indicating a scheduled amount that he proposes to make, fails to pay the whole or any part of it, the claimant is entitled to recover the unpaid portion as a debt due to the claimant in any court of competent jurisdiction: s16;
- (h) The second of the fast track provisions, s16(4)(b), is activated where a claimant commences such recovery proceedings.
- (i) It similarly provides that “*the respondent is not, in those proceedings, entitled ... to bring any cross-claim against the claimant, or ... to raise any defence in relation to matters arising under the construction contract*”.

The third of the fast track provisions: s25(4)

- (j) If, following an adjudication under the SOP Act, an adjudicator determines that the respondent is to pay all or part of the progress payment (“*the adjudicated amount*”) and the respondent fails to do so, the claimant may request the issue an “*adjudication certificate*”: s24(1). Such a certificate may be filed as a judgment

for a debt in any court of competent jurisdiction and is enforceable accordingly: s25(1).

- (k) Relevantly, s25(4) provides that if the respondent commences proceedings to have the judgment set aside, “*the respondent ... is not, in those proceedings, entitled ... to bring any cross-claim against the claimant, or to raise any defence in relation to matters arising under the construction contract ...*”

How the Constitutional Issue Arises

8. The prima facie effect of the fast track provisions is to prohibit a respondent developer from resisting recovery proceedings by pursuing a defence (in relation to matters arising under the construction contract) or a cross claim which would invoke certain remedial provisions of the TPA.

9. This raises a tension between Commonwealth legislation, which enables such relief to be sought, and the fast track provisions, which prima facie precludes the seeking of such relief. This tension may be illustrated by the following case in point:

- (a) Six months following commencement of the construction of a city office block a dispute arises as to the scope of works, the contractor asserting that the scope was widened by oral agreement in the course of implementation of the contract.

- (b) The following telephone conversation takes place between the parties’ principals:

D: There was never an agreement to widen the scope.

C: I’ll prove you wrong. I recorded notes of our conversations on the draft and final plans.

D: When can I have them?

C: They will be copied and delivered in the morning. There are about 5 lever arch folders.

D: No problem, but this is happening at a bad time. I’m going overseas tomorrow for two weeks.

C: Two weeks is too long. We’re talking about a lot of money.

D: That’s the best I can do. Look, you know my word is good. I’ll look through your package the moment I

return. If you have a well founded claim, your company will be paid.

C: *OK, but on the day you get back I want this sorted out.*

- (c) Soon after D's departure the next morning, a package of 5 folders arrives at his office from the contractor. Within the fourth volume, C has placed a progress claim pursuant to s13 of the SOP Act requiring payment of \$1.7 million within 10 business days.
- (d) No payment having been received within 10 business days, the contractor commences proceedings in the Supreme Court of New South Wales, pursuant to s15(2)(a)(i), seeking recovery of \$1.7 million. At the same time, the contractor files a notice of motion for summary judgment.
- (e) Upon D's return to Australia and his inspection of the documents he learns of two matters:
- The first is the payment claim, which he asserts was intentionally hidden by C in the bundle of documents sent to D's office;
 - The second is that the documents forwarded do not indicate any agreement to widen the scope of works, but that, on the contrary, D was misled concerning the implementation of the contract in a way that gave rise to the alleged widened scope.
- (f) Having regard to these circumstances, one may justifiably reach a view that the contractor has acted unconscionably in the way he has sought to pursue his rights. But does such a view assist the developer in light of the prevailing authorities?
- (g) Counsel is retained who advises the developer that the antecedent facts would support an application pursuant to s.80 of the TPA for injunctive relief to restrain the contractor from taking action to enforce its asserted rights under the SOP Act. That section relevantly provides that "*where, on the application of ... any ... person, the Court is satisfied that a person has engaged ... [in misleading and deceptive conduct s52] ... the Court may grant an injunction in such terms as the Court determines in contravention of to be appropriate.*"

10. How is the presiding judge to rule on the return date of the summary judgment application? The core of the competing arguments are not difficult to predict:

- (a) Counsel for the respondent (developer) would seek to file a motion for relief pursuant to s80 of the TPA to restrain the claimant (contractor) from taking any action to enforce its asserted rights. Counsel might also seek to file a defence and cross claim together with a substantial affidavit by D deposing, amongst other things, to C's misleading and deceptive conduct;
- (b) The claimant's counsel would object based on a plain reading of s15(4)(b) of the SOP Act, which denies a respondent the entitlement to bring any cross claim or raise any defence in relation to matters arising under the construction contract;
- (c) The presiding judge would permit the filing of all documents and then hear submissions on the issue of whether the respondent has any entitlement to rely upon them;
- (d) The nub of the respondent's submissions would focus upon the unqualified wording of s80(1)(a) of the TPA. On this basis it would be submitted that s15(4)(b) of the SOP Act can have no valid operation because it is inconsistent with s80(1)(a), in that it purports to detract from an unqualified entitlement granted by the federal legislature.
- (e) Counsel for the claimant would make submissions based on the now well established principles giving strong support for the apparent legislative intention that judicial involvement in the machinery established by the SOP Act be kept to an absolute minimum.
- (f) The considerations by the presiding judge need to be considered against the backdrop of how the New South Wales courts have in the past approached the fast track provisions.

Approach by the New South Wales Courts

11. The cases indicate a disposition by the courts to lend high level recognition to the legislature's intention that there should be "*a minimum of opportunity for court involvement.*" *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421 at 441.

Musico and Ors v Davenport and Ors [2003] NSWSC 977

- (a) One of the issues for determination was whether the decision of an adjudicator, made pursuant to s22 of the SOP Act, is susceptible, in principle, to judicial review. Of the scheme of the SOP Act McDougall J said:

[T]he scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss3(4), 32. The procedure contemplates a minimum of opportunity for court involvement: ss3(3), 25(4): at para 55.

Multiplex Constructions Pty Ltd v Luikens and Anor [2003] NSWSC 1140

- (b) The Court was concerned with whether the plaintiff should be granted an order in the nature of certiorari quashing an adjudicator's determination on the grounds of jurisdictional error. In the course of his reasoning Palmer J expressed a view that "*[w]hen an adjudication under the Act is shown to have resulted from jurisdictional error, a weighty circumstance in the exercise of the discretion whether to grant relief under s69(1) Supreme Court Act is the fact that the scheme of the Act requires that a respondent "pay now, argue later": s25*"⁴

⁴ Para 96, cited with approval by Barrett J in *Energy Australia v Downer Construction (Australia) Pty Limited & 2 Ors* [2005] NSWSC 1042 at para 27

***Abacus Funds Management Ltd v Davenport* [2003] NSWSC 935**

- (c) In this case, having referred it to a second reading speech relating to the 2002 amendment to the SOP Act, Gzell J said:

The clear legislative purpose to provide an interim regime for payment of progress claims pending 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: at paras 17 – 18.

***Lucas Stuart Pty Limited v Council of the City of Sydney* [2005] NSWSC 840**

- (d) In this case the plaintiff builder sought summary judgment on the bases that a valid payment claim had been served upon the defendant local council and no payment schedule had been provided in response thereto. One of the defences raised by the defendant council was based upon alleged misleading and deceptive conduct in contravention of s52 of the TPA. In granting summary judgment in relation to part of the claim, Einstein J gave due recognition to the prevailing authorities, which dealt with the underlying objective of the legislation:

It is unnecessary to repeat the proposition that the Act provides those who carry out construction work ... under a construction contract to access to a “fast track” adjudication procedure whereby the amount of such payments can be determined on an interim basis and enforced immediately without prejudice to the right of the parties to have disputes ultimately determined in accordance with ordinary litigious procedures ... : at para 13.

The statutory framework clearly treats with and treats only with the interim nature of the fast track adjudication proceedings set up to avoid subtle legal niceties without prejudice to those issues becoming the subject of a final hearing in the fullness of time ... : at para 15.

The position on the pleadings has already been referred to. They accept that the payment claim was duly served in accordance with s13 and that no payment schedule was provided by the Council within the time delimited by s14.

It seems to me that in those circumstances [and notwithstanding the pleaded equitable estoppel and Trade Practices Act/Fair Trading Act issues] the Court may comfortably be satisfied that ... the Council has become “liable to pay the claimed amount to the claimant under section 14(4) **as a consequence** of having failed to provide a payment schedule to the claimant within the time allowed by that section”, within the meaning of these words as found in

s15(1)(a). The critical words are “has become liable to pay the claimed amount to the claimant under section 14(4)”. These words create what may be described as a strictly mechanical scheme. Whilst ever the environment concerns the engagement of the fast track interim provisions of the Act [as opposed to the parties retained curial rights to have a final determination of their dispute on a later occasion] there is simply no room for moving outside of this scheme.

In my view the Council can be seen by its stance in the instant proceedings to seek to move outside this strictly mechanical scheme. The Act permits no such thing ... : at paras 20 – 22.

12. From these cases one sees the recognition by the courts of a statutory procedure which tolerates judicial involvement at an absolute minimum. As described in *Lucas* (supra), in the context of the operation of the fast track provisions, the SOP Act creates “... *what may be described as a strictly mechanical scheme*”.⁵

The Application of Section 109

General

13. Moving back to the court room scene, there is little doubt that counsel for the claimant would bring to the court’s attention the bulk of the above mentioned authorities.

14. Turning to the respondent, however, the primary submission would start with s109 of the Australian Constitution. Conflicts between Federal and State laws are governed by that section, which provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

15. The effect of the application of this provision to the fast track provisions is that, to the extent of any inconsistency with the Federal legislation, the former has no legal operation: *Western Australia v Commonwealth* (1995) 183 CLR 373 and 452.

16. Section 80(1) of the TPA relevantly provides (emphasis added):

(1) [W]here, **on the application of** the Commission or **any other person**, the Court is satisfied that a person has engaged, or is

⁵ *Lucas Stuart Pty Limited v Council of the City of Sydney* (supra) at para 21

proposing to engage, in conduct that constitutes or would constitute:

- (a) a contravention of [s52 relating to misleading or deceptive conduct]:

...

the Court may grant an injunction in such terms as the Court determines to be appropriate.

17. The inconsistency between the fast track provisions and s80 is readily apparent. Whereas the TPA grants an entitlement to persons to pursue injunctive relief, prima facie the fast track provisions positively preclude that course, either by way of defence or cross-claim.

18. The High Court in *Truth About Motorways Limited v Macquarie Infrastructure Investment Management Limited* 169 ALR 616 (at [13] – [15]) rejected any approach to s80 which give the words “any other person” a restricted scope:

It has been established for more than 20 years that s80 means what it says. In *Phelps v Western Mining Corp Ltd*⁶ the Full Court of the Federal Court rejected an argument that the words ‘any other person’ in s80 should be read down as meaning that only persons who are affected by a contravention of Pt V could seek relief under s80. Deane J said:⁷

As a matter of ordinary language, the phrase ‘any other person’ connotes any other person whatsoever. The context in which the phrase appears in s80 ... does not, upon analysis, suggest, let alone justify, the conclusion that the Legislature intended that the phrase be modified by the engrafting of speculative qualifications such as ‘who is a consumer’ or ‘who is a competitor’ or ‘who has an interest of a type which would give him standing to institute common law civil proceedings if the conduct complained of were tortious’.

Bowen CJ pointed out⁸ that what was at issue was a question of standing, not a question as to the considerations which might, in a particular case, bear upon whether it was appropriate to grant any, and if so what, relief. He adverted to the problems, as to relief, that could arise in the case of a suit commenced by an officious bystander, but declined to accept, in relation to legislation protective of the public interest, that the solution to those problems was to be found in giving a narrow and artificial interpretation to the statutory provisions conferring jurisdiction and standing.

⁶ (1978) 20 ALR 183

⁷ (1978) 20 ALR 183 at 189

⁸ (1978) 20 ALR 183 at 187-8

The word ‘any’ does not lend itself to a restrictive interpretation.

19. These last quoted words are significant. They exemplify an understanding that the legislature’s intention was to lend unqualified freedom to any person to make application for relief under s80. Yet denying a respondent an entitlement to apply for s80 relief is precisely what the fast track provisions purport to do.

20. Although a number of tests for inconsistency have been suggested over the years, the two that dominate the judicial landscape are the direct inconsistency test and the covering of the field test: *Miller v Miller* [1978] 141 CLR 269 at 275.

Direct inconsistency

21. The principles governing the application of s109 in direct inconsistency cases have been variously stated:

(a) In *Wallis v Downard-Pickford (North Queensland) Pty Ltd* (1994) 179 CLR 317 the issue was whether Queensland legislation, which purported to limit a carrier’s liability under a contract of carriage, was directly inconsistent with s74(1) of the TPA, which had the effect of installing into contracts for the supply of services a warranty that the services would be rendered with due care and skill. At 396 – 7 Toohey and Gaudron JJ observed:

The consequence is that there is a conflict between the two statutes, a conflict which amounts to a direct inconsistency in the sense that the Queensland Act detracts from the full operation of a right granted by the Trade Practices Act. The limitation is therefore, to that extent, invalid by reason of s109 of the Constitution.

(b) In *Clyde Engineering Company Limited v Cowburn* [1926] 37 CLR 466 the Court was concerned with inconsistent entitlements to a worker flowing from the concurrent application of a federal award and a New South Wales statute. In finding that there was an obvious inconsistency attracting the operation of s109, Knox CJ and Gavan Duffy J observed at 478:

Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which

might be waived or abandoned without disobeying the statute which conferred it.

- (c) Endorsing the principles based upon inconsistent results Isaacs J said at 490:

If one enactment makes or acts upon as lawful, that which the other makes unlawful, or if one enactment makes unlawful that which the other makes or acts upon as lawful, the two are to that extent inconsistent.

Covering the field

- 22.** Reference has already been made to the enunciation by Dixon J [at 630.5] in *Victoria v Commonwealth* (1937) 58 CLR 618 concerning the application of the direct inconsistency test:

When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.

- 23.** Immediately following this passage his Honour enunciated the second test:⁹

Moreover, it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same subject or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent.

- 24.** An earlier enunciation fell from the judgment of Isaacs J in *Clyde Engineering Company Limited v Cowburn* [1926] 37 CLR 466 at 489:

If however a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field.

⁹ cited with approval by the High Court, unanimously, in *Telstra Corp Ltd v Worthing* (1999) 197 CLR 61 at 76.28

The NSW Court of Appeal Decision in *Bitannia*

The facts

25. So far as they are relevant to the issues with which this paper is concerned, the facts in *Bitannia Pty Ltd and Anor v Parkline Constructions Pty Ltd* [2006] NSWCA 238 may be briefly stated:

- (a) The respondent builder (“Parkline”) served a payment claim under s13 of SOP Act on the appellants (collectively “Bitannia”) who did not respond with a payment schedule within the prescribed period;
- (b) Parkline sought judgment under s15 for the amount of the claim and Bitannia resisted payment on the basis, inter alia, that Parkline had engaged in misleading and deceptive conduct in serving the claim;
- (c) Although the detail of the alleged misleading and deceptive conduct is not relevant, it assists for present purposes to understand the complaint that was being made:
 - On 15 December 2004 Parkline served a payment claim on the architect appointed by Bitannia and on the same day the architect provided a repayment schedule rejecting the payment claim;
 - On 25 December 2004 Parkline purported to resubmit an earlier payment claim and on 6 January 2005 the architect provided a payment schedule dealing with the same;
 - On 15 of February 2005 Parkline provided a further payment claim. This one differed from the earlier payment claims in that it was not sent to the architect but rather to a Mr Brown, who was the general manager of a company which administered the building contract on behalf of Bitannia;
 - Significantly, although the payment claim was directed to Mr Brown, it indicated that it had been copied to the architect, an indication which was incorrect. The effect of Mr Brown’s evidence seemed to be that as all prior payments claims had been sent to the architect, which had

responded with payment schedules, he assumed that on this occasion the architect would also respond.

- However, as the payment claim had not been sent to the architect, there was no payment schedule provided within the time required by the legislation.

26. On one view, the conduct by Parkline may be regarded as unconscionable. By indicating that the payment claim had been copied to the architect, Parkline gave rise to a misconception in the Bitannia camp, a misconception that then enabled it to pursue its recovery proceedings under the SOP Act.

27. The District Court gave judgment in favour of Parkline. Bitannia appealed.

The decision

28. The Court comprised Hodgson, Tobias and Basten JJA, the latter delivering the main judgment.

29. For the purposes of this paper, relevantly the central issue was whether the misleading and deceptive conduct complained of could be raised in a defence and in a cross claim. However, different considerations were applied depending on which was being considered, the defence or the cross-claim. The reason for the distinction is significant. It arises because the fast track provisions utilise a different form of wording in relation to each.

30. Thus the prohibition in s15(4)(b)(i), which relates to cross claims, is absolute. It provides that the respondent is not entitled “*to bring any cross-claim against the claimant*” (emphasis added). In contrast to this wording, the prohibition in s15(4)(b)(ii) – relating to defences – is not absolute. It provides that in relevant enforcement proceedings the respondent is not entitled (emphasis added):

... to raise any defence **in relation to matters arising under the construction contract.**

Raising a TPA point in a defence

31. Basten JA held that the misleading and deceptive conduct involving Parkline’s service of the payment claim could be raised in a

defence. Without intending any disrespect to the finer details of his Honour's reasoning, the route taken in order to reach this point was as follows:

- (a) His Honour recognised that whereas the prohibition in s15(4)(b) in relation to a cross claim is absolute, the prohibition in relation to a defence is restricted to "*matters arising under the construction contract*". His Honour regarded the scope and purpose of the restriction in those words as uncertain: para [78].
- (b) Because the TPA defence sought to be raised by Bitannia related to conduct accompanying service of the payment claim, this was not, in his Honour's view, a defence in relation to "*matters arising under the construction contract*".
- (c) This was so because "*the language [of s15(4)(b)(ii)] should not be construed so broadly as to prohibit a defence based upon conduct undertaken in service of a payment claim for the purpose of creating a statutory right*": para [96].
- (d) The question arose as to whether a misleading and deceptive conduct challenge under the TPA could in fact be raised as a defence. In other words, did reliance upon such provisions depend upon the commencement of original proceedings or the pursuit of a cross claim? In answer to this question Basten JA found that breaches of the TPA could be raised by way of defence: paras [83-104].
- (e) The result was that because the TPA complaint involved misleading and deceptive conduct pertaining only to service, this not being a *matter arising under the construction contract*, s15(4)(b)(ii) did not preclude that matter from being raised as a defence.

32. These were findings with which Hodgson JA [at 12] and Tobias JA [at 17] concurred.

Raising a TPA challenge in a cross claim

33. It is in relation to this issue that the constitutional point involving an inconsistency between State and Commonwealth legislation arises. Because the primary finding was that s15(4)(b)(ii) did not preclude the TPA

matter being raised as a defence, the reasoning by Basten JA concerning this issue is strictly obiter.

34. The findings of Basten JA (in relation to which Hodgson and Tobias JJA did not decide) were these:

- (a) His Honour made plain that this portion of the judgment would have application only if the foregoing analysis was wrong and that there was no right to proceed by way defence: para [105].
- (b) In determining whether there was a relevant inconsistency, the Court's focus is on the existence of a right arising under a Commonwealth law and the direct impairment of its enjoyment, as a result of the operation of a State law: para [115].
- (c) Section 15(4)(b)(i) prevented Britannia from raising, by way of cross-claim, a complaint about Parkline's conduct in serving the payment claim. The effect was to preclude Britannia from relying upon a complaint which might otherwise have been available under the TPA in resistance to Parkline's claim: para [112].
- (d) In such circumstances and assuming the complaint under the TPA could not be raised by way of defence, there was, in his Honour's view, inconsistency between the State law and the TPA, and that accordingly, the State law is inoperative to the extent of the inconsistency: para [119].

Some Thoughts Following the Decision

35. It is perhaps unfortunate that the misleading and deceptive conduct with which their Honours were concerned was limited in the way described, namely, to conduct concerning service of the payment claim. That circumstance rendered the case an inappropriate vehicle for a thorough analysis of the constitutional point.

36. The result is that although the case goes some way to ventilating the issues, it is by no means satisfactory in terms of a resolution of that issue. In the main this is because, of the three judges presiding, it was only Basten JA who was prepared to express a view concerning what is undoubtedly a fundamental issue for the building industry as a whole. Moreover, to the extent that views were expressed on that point, those views were entirely obiter.

37. Nevertheless the case assists the profession in terms of what may be extrapolated from the judgments:

- (a) Because of the limited factual circumstance with which the Court was dealing, Hodgson and Tobias JJA found it unnecessary to deal with the constitutional issue. Nevertheless, the rigorous trailblazing undertaken by Basten JA provides a useful guide for judges and lawyers in the future in relation to the considerations that will come to bear.
- (b) Because the misleading and deceptive conduct was not seen as a “*matter arising under the construction contract*” it was held that it was open to the respondent to raise that matter as a defence. The corollary of the reasoning of Basten JA would appear to give rise to a result that s15(4)(b)(ii) may have no operation so as to preclude a defence which did, in fact, concern a *matter arising under the construction contract* and which sought to invoke a s52 of the TPA.
- (c) The reasoning of Hodgson JA did not go so far. However, it was not inconsistent with such an approach, his Honour having observed that the TPA:
 - ... discloses a legislative intention that persons should have a remedy to protect them from damage from the misleading conduct of a corporation, or to recover from the corporation compensation for such damage; and it would not be in accordance with that intention that a corporation should be permitted to obtain a judgment against a defendant on a cause of action one essential element of which has been created by that corporation’s misleading conduct against that defendant. Subject to discretionary questions, it would in my opinion be appropriate for a court to give effect to that legislative intention by granting an injunction under s80, or by making an order pursuant to s87 dismissing proceedings ... : para [8].
- (d) These observations would be important for the presiding Judge in the hypothetical case in point dealt with at paragraph 9 above. It is to be remembered that in that example the misleading conduct complained of concerned not only conduct relating to service of the payment claim but also relating to the implementation of the construction contract. The latter would fall within the description of a *matter arising under the construction contract*.

38. Whilst ever the fast track provisions have the potential to be used as an instrument of unconscionable conduct, resolution of these issues will remain all important for the building industry as a whole.

39. This having been said, resolution of them must await a case with a factual background that is more appropriate for their proper ventilation.

40. Of course, all of these are matters that will remain somewhat at large until they finally fall under the gaze of the High Court. Yet, to the extent that the facts of *Bitannia* have permitted, that decision, through the judgment of Basten JA, has provided significant headway.

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