Cracks appearing in security of payment legislation

Christopher Kerin of Holding Redlich Lawyers reviews the relationship between security of payment legislation in New South Wales with Commonwealth trade practices legislation as addressed in the case *Bitannia Pty Ltd & Anor v Parline Constructions Pty Ltd* that was recently heard in the NSW Court of appeals.

A regime of state based Security of Payment legislation is now in place in NSW, Victoria, Queensland and Northern Territory. The purpose of this legislation is to ensure that any person who completes construction work is entitled to receive prompt payment for that work. The NSW Court of Appeal recently handed down a decision addressing the relationship between the New South Wales *Building and Construction Industry Security of Payment Act 1999* ('the Act') and the Commonwealth *Trade Practices Act 1974* ('the TPA').

There has been some speculation in legal circles that parts of the Act (as well as parts of the Security of Payment Acts in other states) are rendered invalid by the application of section 109 of the *Australian Constitution* ('the Constitution') on the basis of Commonwealth/State legislative inconsistency such that the Act is rendered inoperable to the extent that it is inconsistent with the TPA. The impact of this case on the operation of the Act has been overstated.

BACKGROUND

Parkline Constructions Pty Ltd ('Parkline') and Bitannia Pty Ltd ('Bitannia') entered into a construction contract ('the Contract') on 19 May 2003. S & S Quirk Pty Ltd ('Quirk') was the architect acting as agent for Bitannia for the administration of the Contract.

On 15 February 2005, Parkline made a payment claim ('the Payment Claim') on Bitannia for the release of 50% of the retention moneys.

The Payment Claim was sent to Michael Brown, the general manager of a company associated with Bitannia. Prior to 15 February 2005, Parkline had submitted all payment claims to Quirk which had responded with payment schedules.

The Payment Claim whilst directed to Michael Brown indicated that it had been copied to Quirk although in truth it had not. Parkline was not provided with a payment schedule within the period required under the Act and Bitannia became liable to pay the full amount of the Payment Claim.

DISTRICT COURT PROCEEDINGS

On 24 May 2005, Parkline commenced proceedings in the District Court seeking judgment in the amount of $525,669.10 based on the failure to provide a payment schedule. Bitannia sought to respond by alleging misleading conduct in contravention of section 52 of the TPA and seeking remedies under the TPA.

Ultimately the District Court gave judgment to Parkline and Bitannia appealed to the Court of Appeal.

COURT OF APPEAL PROCEEDINGS

The issues considered by the Court of Appeal were: whether claimants were required to have made the payment claim in good faith and have a bona fide belief in the substance of the payment claim; whether Bitannia was able to rely, in it's defence, on a contention that misleading and deceptive conduct rendered service ineffective; and if the contention in (b) above can only be raised by way of a cross claim, does section 109 of the Constitution render section 15(4)(b)(i) of the Act invalid to the extent that the Act is inconsistent with the TPA and prevents Bitannia from relying upon the provisions of the TPA.

The Court of Appeal held considered the issue of Good Faith.

Basten JA reviewed the various authorities which might be applicable to the question of "*bona fides as a jurisdictional requirement*"[1] and ultimately concluded that there is "*no separate precondition to the making of a valid payment claim under section 13 ..., requiring, ..., proof that the claimant has made the claim with a bona fide belief in its entitlement to the moneys claimed*"[2].

In concluding the above, Basten JA also considered the application of *Brodyn Pty Ltd v Davenport*[3] in which the Court held that where injustice is created via a judgment under the Act, grounds for a stay of enforcement or the proceedings may exist. Basten JA noted this case might provide some relief from any injustice where the claimant had no bona fide belief in its entitlement but indicated a Court would likely refuse a stay where a respondent sought "*indirectly the very result which the Parliament had prohibited it from obtaining directly*"[4]. Further, Hodgson JA in Bitannia confirmed that a respondent must "*show a strong prima facie case to the effect that the result produced by the Act is unjust, that there is a substantial risk that money paid over would be irrecoverable, and that proceedings for a final resolution of the issues are being expeditiously pursued*"[5].

DEFENCE & CROSS CLAIM:

Section 15(4)(b) of the Act states that if a claimant commences proceedings under section 15(2)(a)(i) of the Act, a respondent is not entitled to bring any cross claim against the claimant or to raise any defence in relation to matters arising under a construction contract.

DEFENCE

Basten JA reviewed various authorities including the Court of Appeal's decision in *Bank of New Zealand v Spedley Securities Ltd (In liq)*[6].

Ultimately, it was concluded that Bitannia could plead in it's defence to a claim, that service of the Payment Claim was ineffective due to misleading and deceptive conduct.

In doing so, Basten JA distinguished the decision of McDougall J in *Barclay Mowlem Construction Ltd v Tesrol Walsh Bay Pty Ltd* [7] indicating that in that case the matters under the TPA could not amount to a defence in that the nature of the TPA claim raised was limited.

CROSS CLAIM

Basten JA then indicated that if his 'defence' analysis was incorrect, it was necessary to address a situation where Bitannia was forced to plead its claim for misleading and deceptive conduct by way of a cross-claim.

Whilst section 15(4)(b)(i) stood in Bitannia's way as it precluded the bringing of any cross-claim against the claimant, section 15(4)(b)(i) was held to be inoperative to the extent that it is inconsistent with the TPA. This result arose due to the application of section 109 of the Constitution "*which invalidates a law of a State in so far as it would vary, detract from, or impair the operation of a law of the Commonwealth*"[8].

CONCLUSIONS

The application of Bitannia is restricted to claimants commencing proceedings pursuant to section 15(2)(a)(i). Any application of the case to an adjudication made under section 15(2)(a)(ii) is likely to be difficult not least due to the opportunity given by section 17(2)(b) to provide a payment schedule following the respondent's initial failure to do so.

The mere existence of an actionable claim under the TPA will not necessarily render section 15(4)(b)(i) of the Act inoperative. There has to be conduct directly relevant to the entitlement to judgment pursuant to section 15(4)(a), that is, no right to relief will exist unless the loss is suffered pursuant to the misleading conduct. However, subject to section 34 of the Act, consideration might be given by potential respondents to the insertion of contractual clauses which might give rise to actionable claims under the TPA.

The principle in Bitannia is not necessarily restricted to the TPA. Conceivably, other Commonwealth legislation may have the same consequence.

The importance of the Bitannia decision is that it will likely give rise to a spate of claims under the TPA by respondents arising from the conduct of claimants. However, such claims will need to overcome the restrictions set out above. \ \ \ \ \

NOTES

1. Bitannia, per Basten JA at para 66
2. Bitannia, per Basten JA at para 75
3. (2004) 61 NSWLR 421
4. Bitannia, per Basten JA at para 118
5. Bitannia, per Hodgson JA at para 5
6. (1992) 27 NSWLR 91
7. [2004] NSWSC 716
8. Bitannia per Basten JA at para 113 citing Dixon J in Stock Motor Ploughs v Forsyth (1932) 48 CLR 128 at p136