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Time Waits for No-One When a Garnishee Order can be Obtained to Enforce an Adjudicator's Determination

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Australia Real Estate and Construction Alert

The Supreme Court is often called upon by an aggrieved party to restrain enforcement of an adjudicator's determination whilst that party seeks to have the determination set aside.

In an *ex tempore* decision in *Atlas Construction Group Pty Limited v Fitz Jersey Pty Limited* [2017] NSWSC 72, his Honour Justice McDougall held that Fitz Jersey Pty Limited (**Fitz Jersey**) was not entitled to an interim injunction requiring AUD11 million received by Atlas Construction Group Pty Ltd (**Atlas**) pursuant to a garnishee order to be paid into court whilst Fitz Jersey pursued its application to set aside an adjudicator's determination.

Facts

The adjudicator issued his determination on 6 January 2017. Section 23 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) provides that a respondent must pay the adjudicated amount to the claimant on or before the relevant date, which is either:

- a. the date occurring five business days after the date on which the adjudicator's determination is served on the respondent concerned; or
- b. if the adjudicator determines a later date under section 22(1)(b) - that later date.

The "relevant date" in this case was 13 January 2017. On that date, Fitz Jersey commenced proceedings in the Supreme Court of New South Wales (**Court**) seeking orders setting aside the determination. A directions hearing was set down for 3 February 2017.

Fitz Jersey did not at any time seek an undertaking from Atlas that it would not seek to enforce its rights under the determination, either until the dispute could be resolved or without giving notice. Nor did Fitz Jersey seek an order restraining Atlas from recovering judgment or enforcing its rights under any such judgment.

As is usual practice for a party seeking to review an adjudicator's determination, Fitz Jersey offered to pay the adjudicated amount into court pending resolution of the proceedings if Atlas was to request such an order at the directions hearing.

On 17 January 2017, Atlas obtained an adjudication certificate and filed it in Court, together with a notice of motion seeking a garnishee order. On 27 January 2017, the Court made a garnishee order and Fitz Jersey's bank subsequently paid the adjudicated amount to Atlas.

While discussing the interim orders to be made during the directions hearing, Atlas' counsel advised Fitz Jersey that "the horse had bolted" as judgment had been obtained and executed.

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In the hearing before McDougall J, Fitz Jersey sought an order either that the amount paid to Atlas under the garnishee order be repaid to Fitz Jersey (so that it may be paid into Court pursuant to s 25(4)(b) of the Act on an action to have the judgment based on the adjudication certificate set aside), or that it be paid directly into Court by Atlas; or in the alternative to those payments, that Atlas swear and file an affidavit setting out what had happened to the money. Atlas resisted that application.

Decision

McDougall J decided that this case required the application of the principle that one who seeks equitable relief should move promptly. As Fitz Jersey had not taken any steps to restrain Atlas from enforcing the determination, or even asked Atlas not to enforce it, in all the circumstances on discretionary grounds Fitz Jersey was not now entitled to the grant of relief that it was seeking.

In making that decision, McDougall J noted that:

1. there was no evidence to suggest that Atlas, if called upon, would not be able to repay the AUD11 million; and
2. when applying for the garnishee order, Atlas was not required to inform the Court that Fitz Jersey had commenced proceedings seeking to set aside the determination. In that regard, McDougall J noted that an application for a garnishee order is not to be equated with an ex parte application to a Judge seeking injunctive or equivalent relief (in which case full and frank disclosure of all relevant matters is required).

Comment

A garnishee order can be a very effective method of enforcing an adjudicator's determination. There are certain procedural steps that must be followed in order to obtain such an order and in this case that process was completed within 21 days of the adjudicator issuing his determination.

If you want to restrain a claimant from obtaining an adjudication certificate and entering it as a judgment, a request for an undertaking to that effect must be made to the claimant promptly. If an undertaking is not received, an application for urgent interlocutory relief from the court will be required. That process must also be commenced without undue delay. As a matter of procedure, that application is usually made at the same time as a party files proceedings seeking orders setting aside the adjudicator's determination.

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