

List B

S ECI 2017 00073

MERNDA JUNCTION SHOPPING CENTRE PTY LTD

Plaintiff

v

CORNONERO PTY LTD & ORS

Defendants

**ORAL JUDGMENT**

JUDGE: JUDD J  
WHERE HELD: Melbourne  
DATE OF HEARING: 22 March 2017  
DATE OF RULING: 22 March 2017

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| <u>APPEARANCES:</u> | <u>Counsel</u>                   | <u>Solicitors</u> |
|---------------------|----------------------------------|-------------------|
| For the Plaintiff   | Mr L Waller with Mr L Connolly   |                   |
| For the Defendant   | Mr R Andrew with Mr N Phillipott |                   |

HIS HONOUR:

- 1 This is an application for an anti-suit injunction to restrain the defendants from advancing the first defendant's claim for a progress payment under the *Building and Construction Industry Security of Payments Act 2002*. The plaintiff, Mernda Junction Shopping Centre Pty Ltd, is also the plaintiff in the main proceeding no 2017/46. Cornonero Pty Ltd is the defendant in the main proceeding and the first defendant in this proceeding. The adjudicator, appointed under the Act, is the second defendant in this proceeding. He, quite properly, was not represented and will abide by any order of the court.
- 2 Mernda and Cornonero were in a contractual relationship for the development and construction of a shopping centre in Plenty Road, Mernda. There arose a dispute between the parties over the operation of the development agreement. The issue concerned payment terms for construction work. The payment terms were unusual because, according to Mernda, no further progress payments are due, even though construction is ongoing. This is because the formula for the calculation of progress payments, is predicated on a 'costs to complete' rather than the value of work actually done.
- 3 The parties were in the course of negotiating a new arrangement for progress payments when Cornonero ceased work. It claims to have done so because its reasonable progress claims were not being paid. Mernda claims to have accepted Cornonero's conduct as a repudiation and terminated.
- 4 By its defence, Cornonero alleges that the progress payments term is void, because it offends s 48 of the Act. It also alleges a variation to the contract, imposing on Mernda duties to act in good faith and to cooperate in reaching agreement on a new payment mechanism. It also pleads an estoppel.
- 5 Resolution of the dispute between the parties was plainly urgent, as a major development site has been shut down. On 9 March 2017 orders were made setting the dispute down for trial on all questions of liability. The trial is to commence on

4 April 2017. The parties cooperated in the formulation of trial orders and directions.

6 On 16 March 2017 Cornonero made an adjudication application under the Act seeking payment under a progress claim for almost \$4 million. An adjudicator was appointed. Time limits for compliance have been described in authorities as draconian. Mernda is required to respond by 4.00 pm on 23 March 2017.

7 While the adjudicator may call for further submissions, he must undertake his adjudication with expedition. I was informed that the decision is usually made on the papers. If the adjudication proceeds as Cornonero expects, the adjudicator might decide the claim within the next week or so.

8 Following the step taken by Cornonero, by making its adjudication application, Mernda commenced this proceeding by Originating Process. By its Summons on Originating Process Mernda seeks an order, until the hearing and determination of the issues for trial, scheduled to commence on 4 April 2017, or further order, that Cornonero and the adjudicator be restrained from taking any further step in relation to the adjudication application.

9 Cornonero submitted that the outcome of any such adjudication does not finally determine rights between the parties, but merely provides interim relief by way of a payment for work actually done. It submitted that the final determination will be made, and rights adjusted in the proceeding for trial.

10 Mernda submitted that the adjudication application was vexatious and oppressive, and had a tendency to interfere with the orderly preparation for and disposition of the trial pending in this court. Having regard to the pleadings in the proceeding for trial, it must be accepted that the adjudicator will be called upon to decide some of the same questions as those for determination in the main proceeding. He must also be satisfied of his jurisdiction. Mernda contends that the adjudicator has no jurisdiction of s 7(2)(c) of the Act. Then, there is the dispute over the applicable formula for calculating progress payments, and Cornonero's contention that it is

void.

- 11 While Cornonero contends that the relevant part of the contract under which progress claims may be made is void, Mernda will no doubt contend to the contrary. This brief summary, of some of the likely areas of controversy before the adjudicator, makes it almost inevitable that any decision made by him will be the subject of a challenge in this court, probably within a very short period of time.
- 12 Mernda points to the steps required to prepare for trial. I have no doubt that it has undertaken a very substantial burden, if it is to be ready by 4 April; as has Cornonero.
- 13 In my opinion, it would be unfairly oppressive to expect Mernda to divert resources to the adjudication process, even though issues overlap. The magnitude of the additional burden for Mernda, if it is required to promptly respond to the adjudication application, is informed by the fact that Cornonero has found it necessary to engage a new firm of specialist solicitors for the purpose of the adjudication. While initially surprising, it was explained on the basis that specialist knowledge and experience was required to deal with the complex issues arising under the Act. Cornonero even engaged new counsel. It described the Act and its operation as complex. I have no doubt that it is.
- 14 These circumstances confirm the unfairness to Mernda, should it be required to rapidly respond, and divert resources, to a collateral proceeding and resist Cornonero's application for a payment.
- 15 Insofar as it is necessary to decide, I am satisfied that there is a serious question to be tried as to whether the adjudicator has jurisdiction at all to adjudicate on the question before him. The balance of convenience favours Mernda, because of the prejudicial diversion of resources that will be inevitable if it is required to deal with the adjudication proceeding.

- 16 Cornonero does not suggest that it will suffer any material prejudice if its claim is not adjudicated in the near future, apart from the obvious loss of the use of an early payment of money. Any such prejudice is ameliorated by an undertaking as to damages. I am also satisfied that should Cornonero prosecute the adjudication application, it is very likely to interfere, in a material way, with the orderly preparation of the case at trial.
- 17 On the last occasion before the court, Cornonero expressed anxiety about the prospect of Mernda calling in bank guarantees. On that occasion I made it plain that the court had given priority to this case, with the co-operation of the parties, and that such collateral claims (calling on bank guarantees) would be viewed as unreasonable pending trial. In the events that occurred, Mernda agreed to provide an extended period of notice if such action was to be taken by it.
- 18 Now Cornonero, having obtained that accommodation, seeks to assert a collateral right to recover money in advance of trial. While it has every right to do so in ordinary circumstances, these are not ordinary circumstances. A trial is imminent, a judge has been allocated to hear all issues of liability, and the parties are in the course of their preparation.
- 19 It is not disputed that the court has jurisdiction to grant the leave sought by Mernda. Accordingly, upon Mernda giving the usual undertaking as to damages, I will order that until the hearing and determination of the questions of liability for determination at trial, commencing on 4 April 2017 in proceeding no 2017/46, or further order, Cornonero and the adjudicator be restrained from taking any further step in relation to Cornonero's adjudication application dated 16 March 2017, made pursuant to s 18 of the *Building and Construction Industry Security of Payment Act 2002*.