



E-alert: Remember the clock keeps ticking when applying to set aside an adjudication decision

By ,

Applying for a declaration that an Adjudication Decision is void is a commonplace response to an adverse Adjudication Decision. What needs to be borne in mind is that the mere filing of such Application will not, without more, stop the successful claimant from enforcing the Adjudication Decision. This was reinforced recently in the New South Wales Supreme Court decision of *Atlas Construction Group Pty Limited v Fitz Jersey Pty Limited*.^[1]

Facts

The parties entered into a contract for a large mixed use development.

Atlas served a Payment Claim which was the subject of an Adjudication Decision (the Adjudicator determined that the claimant was entitled to about \$ 11 million).

Fitz Jersey, believing that the Payment Claim had been delivered outside of the statutory 12 month period provided by section 13(4)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) applied to the Court for a declaration that the Adjudication Decision was void (**Proceeding**).

Crucially (and inexplicably), Fitz Jersey did not seek Atlas' undertaking that it would not seek to enforce the Adjudication Decision nor did it apply to the Court for an order restraining Atlas from taking steps enforce the Adjudication Decision.

Atlas obtained the Adjudication Certificate, filed it in the Court, obtained a garnishee order and obtained the amount of the Adjudication Decision from Fitz Jersey's bank account.

Fitz Jersey then (after the money had been paid) sought relief against the garnishee order.

Decision

Before McDougall J Fitz Jersey argued that it was incumbent upon Atlas (when obtaining the garnishee order) to tell the Court that Fitz Jersey had commenced the Proceeding.

That argument was (perhaps unsurprisingly) not persuasive. At [26] His Honour said:

But an application for what is essentially an administrative decision, to issue a garnishee order, is not to be equated with an ex parte application to a judge seeking injunctive or equivalent relief. The material that is to be put before the court on an application for issue of a garnishee order is specified in the rules. I do not understand why it is incumbent on an applicant for a garnishee order to do more. I am, of course, prepared to accept that there may be circumstances where, notwithstanding the requirements of the rules, it could be seen to have been in bad faith to procure the issue of a garnishee order, so that the court might set it aside accordingly. But the circumstances of this case seem to me to fall well short of any such bad faith.

In absence of an undertaking or an injunction the Court accepted that Atlas was perfectly entitled to proceed as it did

and the Application was dismissed with costs.

Further, His Honour indicated that even if he were to consider the Application as one for an interlocutory injunction, he would refuse the relief sought. From the Judgment it would appear that the fact that Atlas had obtained the money and that there was no evidence to suggest that Atlas could not repay the money if called upon to do so, weighed heavily upon His Honour's mind.

Take home points

Principals need to consider their rights carefully when they receive an adverse Adjudication Decision. Importantly, they need to quickly determine whether they intend to apply to have the Adjudication Decision declared void and, if they are so intending, they need to either obtain the other side's undertaking to not enforce the Adjudication Decision or they need to seek an interlocutory injunction in the Supreme Court[2].

We note that there is some conflict in the authorities as to what evidence needs to be marshalled in order for a principal to be able to forcefully argue that the balance of convenience favours the granting of an injunction[3]. We observe that a mere allegation that a claimant will not be able to repay an Adjudicated Amount (such as occurred in the present case) will certainly not get the principal across the line.

We recommend that you obtain legal advice as a matter of the utmost urgency if you receive an adverse Adjudication Decision.

[1] [2017] NSWSC 72.

[2] Subject to the terms of the Adjudication Decision, a claimant can generally obtain an Adjudication Certificate 5 business days after the Adjudication Decision is received; see sections 29 and 30 of the *Building and Construction Industry Payments Act 2004*(Qld)

[3] *R J Neller Buidling Pty Ltd v Kjerulf David Ainsworth*[2009] 1 Qd R 390 cf *BRB Modular Pty Ltd v AWX Constructions Pty Ltd & Ors* [2015] QSC 222

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