

execution which has not been wholly satisfied prior to reliance being placed upon the clause. His Honour stated:

"If the appellant were correct, the builder desiring to terminate a contract would have to serve the requisite notice as soon as possible after a writ of execution had been issued least that the proprietor should succeed in scraping together enough money to satisfy the writ. This could produce extraordinary consequences. Furthermore, if the appellant were correct, the clause would not cover a case where the proprietor has exhausted his financial resources in satisfying the writ."

A further ground of appeal raised by the proprietor was that the equitable doctrine of relief against forfeiture should result in the builder not being permitted to determine the contract. This equitable doctrine has traditionally been available to the courts in circumstances where a defaulting party is to lose property as a result of the default and, the court considers that in all the circumstances it is an unconscionable result for the defaulting party to lose that property. The application of the doctrine does not relieve the defaulting party from liability in respect of the default but merely restricts the innocent party's exercise of rights which might be available to it.

The court discussed the history of the application of this doctrine. The doctrine has traditionally been applied in circumstances where the defaulting party stands to lose rights in property, such as ownership of land, as a result of forfeiture. In this case the defaulting party, the proprietor, did not stand to lose any rights in property. It merely faced the prospect of having the building contract determined. Accordingly, the doctrine was being relied upon in a new category of case. The court could not consider that it should extend the application of the doctrine to this new category of case and therefore declined to allow the proprietor the relief sought.

The final question which came to be decided by the

Full Court was:

"Is the supply of building work pursuant to the contract for construction of a multi storey office building a contract "for the supply or possible supply of goods or services" within the meaning of the expression in s.52A(1) of *Trade Practices Act 1974*?"

The relevant provisions of section 52A(1) of the *Trade Practices Act 1974* are as follows:

"52A(1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all of the circumstances, unconscionable.

...
(5) A reference in this section to goods or services is the reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption."

In relation to this point His Honour said as follows:

"It is not in question that the building contract in this case necessarily involved the provision of services to the appellant (the proprietor), as well as the supply of goods (which are unidentified). The only issue is whether the services were of the kind ordinarily acquired for personal, domestic or household use or consumption within the meaning of sub-section (5). In my opinion, they were not."

The Full Court in this case was prepared to give effect to the determination clause in the JCC B contract even in circumstances where there was a strong argument that the party determining the contract had not suffered any prejudice. Parties should be aware of this attitude of the courts and cautious when it comes to agreeing to determination clauses.

- Phillip Greenham, Partner, Minter Ellison, Solicitors. Reprinted with permission from the Building Dispute Practitioners' Society's Newsletter.

Joint Venturers Owe Fiduciary Duties

Pacific Coal Pty Ltd v Idemitsu Qld Pty Ltd, Supreme Court of Queensland, 21 February 1992

A mining joint venture agreement created fiduciary relationships between the participants, according to the Supreme Court of Queensland. The case involved an authority to prospect granted over the Ensham coal deposit in Central Queensland. On the expiration of the ATP, the minister refused to renew it and instead granted a new permit to three of the original five joint venturers. The court held that two of the joint venturers had induced the government to take this action in breach of their fiduciary duties.

The court found that the conduct also constituted a breach of certain obligations under the joint venture agree-

ment. These included a requirement on the participants to be just and faithful in their dealings with each other and to act in good faith in the interests of the joint venture. The defendants, in their representations to the government, were also found guilty of misleading and deceptive conduct in breach of section 52 of the Trade Practices Act.

The decision is likely to be appealed.

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