# INTERLOCUTORY INJUNCTIONS IN A CONSTRUCTION CONTEXT IN WA

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Two recent decisions handed down by the Western Australian Supreme Court shed some light on the issue of interlocutory injunctions in a construction context.

## CROUCH DEVELOPMENTS

In the first case, the plaintiff, builder Crouch Developments Pty Ltd, applied for an interim injunction to restrain the defendant owner (D & M (Australia) Pty Ltd) from acting upon or giving effect to either a notice of default or notice of termination that had been given by the owner to the builder.[1]

### Background

Crouch Developments Pty Ltd had a contract with D & M (Australia) Pty Ltd for the construction of 27 units on land in a suburb of Perth. Starting from the grant of the building licence in May 2006, the period for completion of the units was 52 weeks. Accordingly, had the contract been performed by both sides, the units should have been complete by May 2007. However, completion was delayed and disputes arose as to the causes of the delay and which party ought to bear the responsibility for them.

Clause 13 of their contract made provision for termination by the owner in certain defined circumstances, including where the builder failed to proceed with the construction with due diligence and in a competent manner.

The builder claimed a number of problems arose relating to the importation of items from China and the use of labourers and tradesmen who had been brought from China to work on the project. The general thrust of the builder's case was that these matters were the owner's responsibility and therefore the delay was not the builder's responsibility.

There was also a dispute in relation to the adequacy and timeliness of the work performed by a plumber engaged by the builder as a subcontractor. As a result of this dispute, by a notice dated 11 April 2008, the owner gave notice of default to the builder alleging failure to proceed with the construction of the units with due diligence and in a competent manner. By a notice dated 29 April 2008, the owner purported to terminate the contract by reason of a failure of the builder to rectify the default alleged in the first notice.

The builder argued that severe consequences would flow from the termination if injunctive relief was not granted. These included the builder's exposure to liabilities under warranty for the work done to date, damage to reputation and also, an apprehension that there may be some difficulty in securing payment of the balance of the monies due under the contract.

The owner gave evidence that it had engaged a number of different tradespersons to carry out the work remaining to be done under the contract so as to progress the construction of the units towards practical completion, which was anticipated to take place by around the end of May 2008.

### Judgment

Chief Justice Martin focused on the requirement that the builder (as the plaintiff/applicant) make out a prima facie case, which did not mean that the builder must show that it is more probable than not that at trial the builder would succeed; rather, it would be sufficient for the plaintiff to show a sufficient likelihood of success to justify the preservation of the status quo pending trial. How strong that probability needs to be depended on:

• the nature of the rights asserted; and

• the practical consequences likely to flow from the order the builder was seeking.

The first practical consequence considered by Chief Justice Martin was whether the grant or refusal of the interlocutory injunction would, in effect, dispose of the action finally in favour of whichever party succeeded on the application. The application concerned a contract in respect of which the work required to complete the units could be carried out in a matter of weeks and before of the court could finally determine which of the competing contentions of the parties was correct. As a result, the grant of the interlocutory relief sought would effectively constitute the grant of final relief.

Also of material consideration was that, although the relief sought was expressed in negative terms, in effect what was being sought was a mandatory injunction, that is, a positive injunction requiring the parties to continue to perform their respective obligations under the contract. In effect, the interlocutory relief sought would amount to the specific performance of a building contract.

Chief Justice Martin stated that, 'generally speaking, neither specific performance nor interlocutory injunctions having the effect of specific performance will be granted in respect of building contracts in other than exceptional circumstances'. His Honour referred to a number of authorities in support of this statement. In essence, the reasoning was that such orders might require the court to give an indefinite series of rulings to enforce the orders whenever there was a breach and a consequent application by the aggrieved party and the only means available to enforce the court's orders—punishment for contempt—was so powerful that it would often be unsuitable as an instrument for adjudicating upon a dispute that might arise over whether the building works were being carried out in accordance with the order (i.e. in accordance with the building contract). In addition, enforcement was likely to be expensive in terms of cost to the parties and the resources of the judicial system.

Chief Justice Martin therefore found that, in a case in which the relief sought would effectively amount to the specific performance of a building contract and would effectively amount to the grant of final relief, he would only be justified in granting the relief if the builder had made out a very strong case; a case which the court could have a high degree of confidence would ultimately succeed at trial.

Chief Justice Martin dismissed the application, holding that, although there was a serious question to be tried, the plaintiff had not demonstrated the strength of a case that would be required for the court to grant the relief. His Honour held that there was no reason the builder should not be confined to the damages to which he would be entitled if he could establish, in due course, that the owner had no entitlement to terminate.

## ABLE DEMOLITIONS

### Background

The plaintiff contractor, Able Demolitions & Excavations Pty Ltd applied to the WA Supreme Court for interlocutory injunctive relief relating to the purported termination of a contract for demolition work.[2]

The defendant company, BHP Billiton Direct Reduced Iron Pty Ltd (BHPBI), owned a direct

... these decisions confirm that neither specific performance nor interlocutory injunctions having the effect of specific performance will be granted in respect of building contracts other than in exceptional circumstances ... However, ... a contractor may be more inclined to try to obtain an interlocutory injunction restraining a principal from acting upon a purported termination of a building contract.

If the contractor can demonstrate that, without such an injunction, the steps that might be taken by the principal are likely to lead to the contractor becoming insolvent and may not survive to trial, the court will be more inclined to find that the balance of convenience is in favour of granting an injunction restraining the principal from acting upon or giving effect to the purported termination.

reduced iron processing plant at Boodarie near Port Hedland in the north of Western Australia. In January 2007, Able and BHPBI entered into a contract for the demolition of this plant.

Clause 45 of the general conditions of the contract (GCs) dealt with default and allowed BHPBI to issue Able with a show cause notice if Able committed a substantial breach of the contract. Substantial breaches included 'failure to comply with any safety requirements' of the contract. If Able failed to show reasonable cause, BHPBI could, with a written notice, take the work (under the contract) out of the hands of Able and terminate the contract. Upon termination of the contract, Able would be obliged to cease work and comply with directions from BHPBI's representative, including demobilising persons, plant, vehicles and equipment from the site, providing those items to BHPBI required for the work, and handing to BHPBI possession of, and title to, components of the plant that had been severed but not yet removed from the site. If BHPBI's costs in completing the work under the contract were greater than the amount which would have been paid to Able for the work, Able would owe the difference as a debt to BHPBI.

BHPBI and Able had several disagreements about health and safety incidents and BHPBI's access to the site. In April 2008, BHPBI issued a notice requiring Able to suspend all work on the grounds that Able had breached the contract by limiting BHPBI's representatives access to the site. In May 2008, BHPBI issued a show cause notice relating to alleged breaches of health and safety obligations. On 11 June 2008, BHPBI issued a second show cause notice relating to the alleged non–payment of a debt by Able.

## Court proceedings

On 13 June, Able commenced court proceedings seeking a declaration that the April suspension notice and the May show cause notice were invalid. On 18 June, BHPBI issued a notice of termination in relation to the May show cause notice claiming that Able had not shown reasonable cause why BHPBI should not exercise its right to terminate.

In the interlocutory application, Able sought orders that BHPBI:

- be restrained from acting upon or giving effect to its purported termination on 18 June of the contract;
- continue to treat the contract as remaining on foot and binding and give effect to its terms;
- through its representative, provide Able with a direction in writing to recommence work under the contract persuant to clause 35 of the GCs;
- be restrained from exercising its rights under clause 45 of the GCs in reliance on the May show cause notice; and
- be restrained from exercising its rights under clause 45 of the GCs in reliance on the June show cause notice.

Able claimed that the April suspension notice was invalid because it had not been issued in good faith or on reasonable grounds. Able claimed the issue and the continuing operation of the suspension notice breached implied terms that BHPBI would do all that was necessary on its part to enable Able to perform its obligations under the contract, and that BHPBI would not do anything to hamper or delay Able in performing the contract. Able further claimed that both the May and June show cause notices were invalid, and that reliance on these notices would breach the contract's implied terms.

Justice Le Miere granted an injunction restraining BHPBI from terminating the contract. However, his Honour declined to grant any injunction requiring BHPBI to direct Able to recommence.

His Honour held that there were serious questions to be tried on all the matters claimed by Able and BHPBI's counsel did not argue otherwise. To secure the relief, Able also needed to show that it would suffer irreparable injury for which damages would not be an adequate remedy and that the balance of convenience favoured the granting of an injunction.

His Honour held that damages would not be an adequate remedy in place of an injunction because, if BHPBI took steps to terminate the contract, it was likely that Able would become insolvent and might not survive to the trial. Further, the demolition work had been suspended and an injunction restraining BHPBI from acting upon its purported termination would not change that position. In other words, by granting the injunction the parties were not also being forced to work together.

The second order considered by Justice Le Miere was a mandatory injunction compelling BHPBI to perform the contract and to direct Able to resume work. His Honour declined to grant such an order as he was not satisfied that damages were an adequate remedy because of the potential for Able's insolvency. Nonetheless, his Honour noted that an interlocutory mandatory injunction was granted only rarely, and the balance of convenience did not favour granting one. There was a dispute as to whether Able was ready and willing to comply with its health and safety obligations under the contract; to order BHPBI to direct Able to resume work could carry a risk of harm or injury. Further, such an injunction would require the two parties to resume cooperation in circumstances where relations between the parties had broken down and lacked the requisite trust and confidence. Finally, requiring BHPBI to perform the contract would involve constant supervision by the court. The court would effectively be enforcing the performance of contractual provisions by the remedy of contempt, an unsuitable instrument in circumstances where the parties had differing understandings of how the contract should be performed.

## CONCLUSION

These decisions confirm that neither specific performance nor interlocutory injunctions having the effect of specific performance will be granted in respect of building contracts other than in exceptional circumstances.

However, if the contractor can demonstrate that, without such an injunction the steps that might be taken are likely to lead to the contractor becoming insolvent and might not survive to trial, the court will be more inclined to find in favour of granting an injunction restraining the principal from acting upon or giving effect to the purported termination of a building contract by a principal.

## REFERENCES


1. *Crouch Developments Pty Ltd v D & M (Australia) Pty Ltd* [2008] WASC 151, Supreme Court of Western Australia, Chief Justice Martin (23 July 2008).

2. *Able Demolitions & Excavations Pty Ltd v BHP Billiton Direct Reduced Iron Pty Ltd* [2008] WASC 136, Supreme Court of Western Australia, Justice Le Miere (10 July 2008).



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