BITANNIA PTY LTD & ANOR v PARKLINE CONSTRUCTIONS PTY LTD
[2006] NSWCA 238
Court of Appeal of New South Wales – 28 August 2006

FACTS

Parkline Constructions Pty Ltd ("Parkline") entered into a contract with a partnership between Bitannia Pty Ltd and Rossfield Nominees (ACT) Pty Ltd ("Bitannia") for the construction of "The Ettalong Hotel". Parkline had been, in accordance with the contract, submitting Payment Claims under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Act") to Bitannia's architect, who had responded by providing Parkline with Payment Schedules. The final claim by Parkline was sent to Mr Michael Brown, who administered the contract for Bitannia. The Payment Claim indicated that it had been copied to the architect. The claim had not in fact been sent to the architect, and as a consequence, Bitannia failed to respond with a Payment Schedule within the time allowed by section 14 of the Act.

Parkline then proceeded to seek judgment in the District Court for the amount claimed pursuant to section 15 of the Act. Bitannia sought to resist the claim on the basis that Parkline had engaged in misleading and deceptive conduct. The District Court held in favour of Parkline and awarded it the amount claimed. Bitannia appealed the decision of the District Court to the Court of Appeal.

ISSUES

Does section 15(4)(b) of the Act prevent a Respondent from raising misleading or deceptive conduct under the *Trade Practices Act* 1974 (Cth) as a defence in proceedings for summary judgment brought under section 15(2)(a)(i) of the Act?

FINDING

The Court held that raising a contention that service was not effective because it involved misleading and deceptive conduct was not inconsistent with either of 15(4)(b)(i), which prohibits a Respondent from bringing a cross claim, or 15(4)(b)(ii), which prohibits the Respondent from raising any defence in relation to matters arising under the construction contract. The Court held in favour of Bitannia, and set aside the judgment of the District Court.

QUOTE

Hodgson JA held at paragraph [8] and [9] that:

> [8] ... it would not be in accordance that a corporation should be permitted to obtain a judgment against a defendant on a cause of action one essential element of which has been created by that corporation's misleading conduct against that defendant …
>
> [9] That kind of relief under the Trade Practices Act would not be appropriate to be sought in a cross-claim, because a cross-claim in substance accepts that the plaintiff is entitled to a judgment on its claim, and seeks something to be set against that judgment; whereas the relief I have mentioned would altogether deny the plaintiff's entitlement to a judgment, and so would be appropriate to be sought in a defence or possibly in an interlocutory application.

Basten JA held at paragraph [96] that:

> Section 15(4)(b)(ii) precludes a respondent from raising "any defence in relation to matters arising under the construction contract". But in truth, the defence raised did not arise under the contract, nor was it in relation to a matter arising under the contract: rather it was in relation to misleading or deceptive conduct on the part of the claimant

IMPACT

Contractors should ensure that Payment Claims, and their service, are carefully executed and not misleading to ensure that their rights to judgment under the Act are not affected.

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