

JUDGMENT : HIS HONOUR: WHELAN J. Supreme Court of Victoria at Melbourne. 23rd October 2006.

- 1 The applicant, Dura Australia Constructions Pty Ltd ("Dura"), and the respondent, SC Land Richmond Pty Ltd ("SC Land"), are parties to a contract made on or about 15 December 2004. The contract is to build some 29 apartments at 8 Lord Street, Richmond. Dura is the builder and SC Land is the proprietor.
- 2 Disputes have arisen between the parties and as a consequence of the matters the subject of those disputes, SC Land has purported to act under clause 44 of the contract and to take over all of the remaining work which is the subject of the contract.
- 3 In response to that step Dura obtained an injunction from Senior Member Davis in VCAT on 21 September 2006, which injunction was then continued on 6 October 2006, and was eventually heard as a contested application by Senior Member Cremean on 12 and 13 October 2006. Dr Cremean delivered his reasons and made orders on 19 October 2006. He discharged the injunctions which had previously been made.
- 4 Dura then applied urgently in the Practice Court on the same day, 19 October 2006, for an injunction pending what was then foreshadowed as an application for leave to appeal on a question of law under s148 of the Victorian Civil and Administrative Appeals Tribunal Act 1998 ("the Act"). I granted an injunction until 4.30pm today, in effect restraining SC Land from excluding Dura from possession of the site. I made it clear, however, that the order was not intended to prevent SC Land from entering upon the site itself or from making such arrangements as it thought fit with a view to retaking possession.
- 5 Dura has now issued an application for leave to appeal under s148 of the Act and that application is returnable before a Master on 8 November 2006.
- 6 It was common ground between the parties on the hearing before me today that I should not deal with the application for leave itself. What Dura does seek from me today is a continuation of the injunction I granted on 19 October pending the hearing 1 of its leave application on 8 November 2006.

The application for leave

- 7 When the application for leave under s.148 of the Act is heard Dura will need to establish, because the order the subject of the application is interlocutory, that the order is wrong or attended with sufficient doubt to justify the granting of leave and that substantial injustice would be done if the decision were allowed to stand. As the decision to be appealed from is the refusal of an interlocutory injunction, and given that it is clear the critical issues on such applications are whether there is a serious question to be tried and whether the balance of convenience favours the grant of leave, the task of an applicant in the position of Dura in identifying a relevant error of law is, as the Court of Appeal has recently observed in *Bradto v State of Victoria* ("*Bradto*"), a formidable one indeed.
- 8 Dura submits in substance that the proposed appeal is arguable and that there is accordingly a serious question to be tried in relation to the injunction I am asked to grant. Dura submits the balance of convenience favours it as the application for leave will be rendered nugatory if the injunction is not granted.

VCAT error of law on serious question to be tried

- 9 Dura submitted that Dr Cremean made errors of law when addressing the issue of whether there was a serious question to be tried. The principal contention in this respect was that he mistakenly considered himself to be bound by the decision in *Porter v Hannah Builders* ("*Porter*"), and that he approached the matter on the basis that *Porter* laid down an invariable rule.
- 10 I am not at all persuaded that any error of law was made by Dr Cremean in this respect. Dr Cremean certainly took the view that *Porter* was applicable to the circumstances before him, but a number of references in his judgment suggest to me that he acknowledged and understood that circumstances might exist where *Porter* would not apply. In particular I refer to paragraph 26. Nevertheless, Dr Cremean did express himself in fairly emphatic terms in relation to *Porter* and it is arguable, I think, that Dr Cremean made an error of law in this part of his decision.

VCAT error of law on balance of convenience

- 11 Dura submitted that on the balance of convenience Dr Cremean did not apply the "lower risk of injustice" approach set out by the Court of Appeal in *Bradto*, and that his findings on balance of convenience were "*against the weight of the evidence*".
- 12 I cannot see any error of law in Dr Cremean's treatment of this issue. He cites *Bradto* and he addresses, in my view, the various matters relevant to the balance of convenience. Perhaps some other judge or tribunal might have reached a different conclusion, and I do not mean to imply that I would have, but that is beside the point.
- 13 A more detailed examination of the relevant material may alter this conclusion, but on what I have been taken to I can detect no error of law in this area.
- 14 This is important. Dura failed to obtain an injunction because Dr Cremean found there was no serious question to be tried and because he found the balance of convenience favoured SC Land and that damages were an adequate remedy. Unless an error of law can be identified in both areas, at present I cannot see that there would be any utility in giving leave to appeal under s.148. Of course a final conclusion in relation to that matter remains to be made.

Serious question to be tried on this injunction

15 As it is arguable that there has been an error of law concerning the application of Porter there is a possible basis for leave to appeal to be granted. Accordingly, I proceed on the basis that for the purposes of this application there is a serious question to be tried. Notwithstanding this conclusion, in my view Dura's position is a weak one as it has been unable to demonstrate to me any error of law in relation to Dr Cremean's treatment of the balance of convenience issue (in which I include the issue of damages being an adequate remedy).

Balance of convenience on this injunction

16 The effect of refusing this injunction may be to remove the practical content of the pending application for leave to appeal. Refusal of the injunction may, as Senior Counsel for Dura suggested, render the application for leave nugatory in practical terms. Nevertheless, in my view the injunction should be refused for the following reasons:

1. The parties had the opportunity at VCAT to undertake a full and thorough interlocutory hearing. The final hearing occupied two days. Dr Cremean reserved his decision for approximately a week. He gave detailed written reasons. The proceeding in which all this occurred was in a specialist list, the Domestic Building List, of the Tribunal given the jurisdiction to hear these matters by statute. This court should be loathe to interfere with such interlocutory decisions in the manner sought here, particularly where, as here, the case as to error of law is not strong.
2. The plaintiff obtained interim orders before VCAT which have (with my interim injunction) prevented SC Land from taking over the works from 21 September 2006 until today. If SC Land is further prevented from taking over the works until leave is sought on 8 November, Dura will have in effect restrained SC Land for eight weeks without ever succeeding in a contested application for an injunction on the substantive issues.
3. The effect of an injunction at this stage of the building work will be to substantially render nugatory what SC Land says is its entitlement to take over the works under clause 44 of the contract.
4. The matters relied upon by Dr Cremean on the balance of convenience as set out in his written decision seem to me to be well founded and to be equally applicable to the issue which is before me now.

17 Accordingly, the application for the injunction is refused. I will dissolve the existing injunction.

For the Applicant Mr M. Sifris S. C. Noble Lawyers with Mr A. Herskope
For the Respondent Dr C. Pannam Q.C. Freehills with Mr A. Laird