

Article Information

Author: Ted Williams

Service: Projects & Construction

Sector: Infrastructure

To stay the enforcement of a decision under the SOP regime - One must move quickly

In the recent decision of *Atlas Construction Group Pty Limited v Fitz Jersey Pty Limited* [2017] NSWSC 72, the NSW Supreme Court determined that where a respondent to an adjudication decision files for a review of the decision, but fails to formally (or by agreement) stay the enforcement of that decision, the Court is unlikely to interfere. Andrew MacGillivray, Senior Associate discusses the case and lessons learned.

In the recent decision of *Atlas Construction Group Pty Limited v Fitz Jersey Pty Limited* [2017] NSWSC 72, the NSW Supreme Court determined that where a respondent to an adjudication decision files for a review of the decision, but fails to formally (or by agreement) stay the enforcement of that decision, the Court is unlikely to interfere. **Andrew MacGillivray, Senior Associate** discusses the case and lessons learned.

Facts

The parties entered into a contract (**Contract**), where the claimant undertook to design and construct a large mixed uses development. A dispute arose between the parties as to the correct date for practical completion, which ultimately would affect whether the claimant's payment claim was lodged within time pursuant to section 13(4)(b) of the *Building and Construction Industry Security of Payment Act 1999* (NSW).

The parties proceeded to adjudication. The adjudicator decided that the amount owing to the claimant was approximately \$11 million (plus interest).

The respondent filed for a review of that decision and sought a declaration that the decision was void or, relief quashing it. However, critically the respondent failed to seek an undertaking from the claimant that it would not seek to enforce the decision, pending an ultimate decision in respect of its review proceedings, or (at the very least) without giving notice to the respondent of any enforcement.

As a result, and despite the review proceedings, the claimant took steps to enforce the determination (by way of a garnishee order done ex parte) and successfully obtained the \$11 million directly from the respondent's bank account.

Decision

Once the \$11 million had been garnished from the respondent's bank account, the respondent filed for urgent relief against the garnishee order.

The respondent argued that it was compulsory on the claimant to notify the Court, when it sought to enforce the award, that the respondent had commenced review proceedings to challenge the basis of the judgment that the claimant had successfully enforced. However, this argument for the respondent's application for relief was rejected by His Honour McDougall J, and His Honour provided that:

"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."

Ultimately, the Court decided that (in the absence of a stay application or an undertaking) the claimant was within its rights to enforce the adjudication decision, because the respondent:

1. failed to take any steps (after the adjudication decision) to prevent the claimant from enforcing its adjudication award; and
2. had no basis (or failed to articulate a basis) for thinking the claimant would not seek to enforce its successful decision.

Lessons to be learned

If you are on the end of a unsuccessful adjudication decision and you believe that there is a point of review, then you must immediately write to the claimant:

1. informing of your decision to review the decision;
2. specifying the timing for the filing of your review;
3. seek an undertaking from the claimant that no steps will be taken to enforce the decision once review proceedings have been filed; and
4. if no response is received, then an urgent application for a stay of the decision should be considered.

It is important to seek advice before such steps are taken because, it is well recognised that to restrain enforcement of an adjudicator's decision, one must first persuade the Court that there is:

1. evidence of an arguable basis to challenge the decision (on a ground that the Courts recognise as being available); and
2. a reason that if such a challenge is successful, the party seeking a review may not enjoy the fruits of its success because the respondent will be unable to repay the adjudicated amount.