

Misleading Conduct trumps SOPA?

OSB GROUP PTY LTD -v- COMPLETE HIRE & SALES PTY LTD [2024] WASC 310

FACTS

The case of *OSB GROUP PTY LTD -v- COMPLETE HIRE & SALES PTY LTD [2024] WASC 310* involved the plaintiff having commenced proceedings to recover the claimed amount as a statutory debt under the *Building and Construction Industry (Security of Payment) Act 2021 (WA)*, seeking a summary judgment against Complete.

Complete contended that there were serious other questions to be tried, including a defence based on the *Australian Consumer Law 2010 (Cth) (ACL)* arising from alleged misleading or deceptive conduct by OSB. OSB allegedly made representations to Complete about the resources required to perform and complete the construction work within the time required by Complete (namely, 61 days).

ISSUE

Whether a respondent to recovery proceedings, brought under the *Building and Construction Industry (Security of Payment) Act 2021(WA) s 27 (3)(b)*, has a defence based on rights under Commonwealth legislation, the *Australian Consumer Law 2010(Cth)*, to recover damages for misleading or deceptive conduct.

FINDING

His honour, Musikanth J, did not consider the matter appropriate for summary judgement and made the following finding (following Basten JA in *Britannia*);

His Honour noted at 72, 75:

“...there is arguably an inconsistency between s 27(3)(b)(i) of the Act and the ACL resulting in the former being 'inoperative' to that extent:

*(a) section 27(3)(b)(i) purports to prohibit Complete from bringing any cross-claim against OSB in these proceedings; and (b) a court would, in my preliminary view substantially for the reasons explained by Basten JA in *Bitannia*, 53 likely refuse a discretionary stay pending determination of any separate proceedings by Complete for relief under the ACL*

...

...having regard to my conclusions..., I do not consider this to be an appropriate matter for summary judgment.”

IMPACT

In recovery proceedings brought under a State security of payment law, a defence appears available based upon misleading or deceptive conduct relating to the contract or its performance.

The case for uniform Commonwealth legislation for security of payment remains overwhelming.

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