VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D696/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – Interlocutory injunction – applicable principles.

APPLICANT	Dura (Australia) Constructions Pty Ltd (ACN 004 284 191)
RESPONDENT	SC Land Richmond Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Interlocutory Injunction
DATE OF HEARING	12 & 13 October 2006
DATE OF ORDER	19 October 2006
CITATION	Dura (Australia) Constructions Pty Ltd v SC Land Richmond Pty Ltd (Domestic Building) [2006] VCAT 2120

ORDER

1 The injunction is discharged with effect from 4.00 p.m. this day unless otherwise ordered.
2 Reserve liberty to apply for costs.
3 Refer to a Directions Hearing in due course.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr M. Sifris SC with Mr A. Herskope of Counsel
For the Respondent	Mr D. Levin QC with Mr A. Laird of Counsel

REASONS

1 INTRODUCTION

1 In this matter, on 21 September 2006, Senior Member Davis made orders including the following:

> "1 Until the further hearing of this matter or further order SC Land Richmond Pty Ltd, by its servants and agents, be restrained from acting further on the notice it served on the contractor dated 20 September 2006 by preventing the contractor from continuing works on the site pursuant to the contract.
>
> **2 The application for an interlocutory injunction be adjourned to 6 October 2006 at 10:00 am**.
>
> …
>
> 6 Costs of this day are reserved".

2 On 6 October 2006 (the date specified in the orders of Senior Member Davis) Deputy President Aird made orders including the following:

> "1 Until the further hearing of this matter or further order the Respondent by its servants or agents be restrained from acting further on the notice it served on the Applicant dated 20 September 2006 by preventing the Applicant from continuing works on the site pursuant to the Contract.
>
> **2 The application for an interlocutory injunction be adjourned to 12 October 2006 at 10.00 a.m. at 55 King Street, Melbourne before Senior Member Cremean with 2 days allocated**.
>
> …
>
> 9 Costs of and incidental to the adjournment granted this day be reserved".

3 In accordance with the Deputy President's orders I heard the application for a continuance of the injunction on 12 and 13 October 2006. The Applicant was represented by Mr M. Sifris, SC with Mr A. Herskope of Counsel and the Respondent by Mr D. Levin QC with Mr A. Laird of Counsel.

4 At the conclusion of the hearing, at which I heard full submissions from the parties, I reserved my decision until this day. The parties, by consent, agreed to the continuance of the injunction pending my decision being given.

2 BACKGROUND

5 The background facts, I learn, are not, or are not seriously, in dispute.

6 A contract was made or entered into between the Applicant and the Respondent on or about 15 December 2004. The contract is to build some 29 apartments on a site at 8 Lord Street Richmond. These, I think, are to be known as Hue Boutique Apartments. The Applicant (Dura) is the builder

and the Respondent (S C Land) is the owner of the site. The picture is, in fact, a little more complex than that in that the Applicant has an interest in a unit trust and (it is contended) has a proprietary interest in the site at least to some degree. So, it is both builder and holder of an interest on this basis.

7 The value of the project, I believe, is in excess of $10 million and work on it has proceeded, on one analysis, to a stage of about 80-85%. In other words, the project is nearing completion. It is a very large, costly and complex undertaking.

8 The Applicant is on site and continuing to carry out works. But that is because of the terms of the injunction ordered on 21 September.

9 The day before - that is on 20 September 2006 – the Applicant was locked out of the premises. It returned, following the grant of the injunction and has remained working there since.

3 PARTIES' POSITIONS

10 The Applicant asks me to continue the injunction so as to restrain the Respondent from taking any steps under the cl. 44.4 Notice (that is, the notice issued under cl. 44.4 of the contract purporting to take over the works) pending the hearing and determination of this matter or further or other order.

11 On the other hand, the Respondent asks me to discharge the injunction with immediate effect. The dispute between the parties can then be heard, it is said, in the ordinary course. It is clear to me that, by asking me to discharge the injunction, the Respondent wishes the Applicant to quit the site forthwith.

4 SUBMISSIONS

12 The Applicant submits that there are clearly serious issues to be tried (demonstrated by the substantial material filed) and that the balance of convenience favours the continuance of the injunctive orders. Damages, it is submitted, would not be an adequate remedy.

13 The Respondent concedes, I think, that there are serious issues to be tried (in relation to the four Notices to Show Cause) "at least in theory", it was said, but submits that the balance of convenience does not point in favour of continuance. It is submitted that there are well-known authorities I should be guided by, in fact, in deciding whether there is, in reality, any serious issue to be tried. Further, it is submitted that, damages are, in any event, an adequate remedy.

14 Each party put their submissions to me forcefully and succinctly. Neither could have said anything else, in my view, in support of its position beyond what was put to me. I am indebted to Counsel for their extensive researches and careful analysis.

5 PRELIMINARY ISSUES

15 It was submitted to me by the Respondent, although not pressed greatly, that the injunction, the continuance of which is sought, could only be ordered by a judicial member of the Tribunal. This was said with reference to s123 of the *Victorian Civil and Administrative Tribunal Act* 1998. Presumably the substance of the point arose from the consideration that if the injunction was continued, it would be, in effect, a permanent injunction because the works would be completed by the time any hearing in the Tribunal was able to be fixed.

16 Be that as it may, I am satisfied that under s123 an "interim injunction" includes an interlocutory injunction. See *Lodat Pty Ltd v Enamby Holdings Pty Ltd* [1999] VCAT RT 2. See also *State of Victoria v Bradto Pty Ltd* [2006] VCAT 99 at [2] per Judge Bowman.

17 Moreover this question is now largely academic following the commencement yesterday (on 18 October 2006) of Part 17 of the *Justice Legislation (Further Amendment) Act* 2006.

18 In the second case, above, *State of Victoria v Bradto Pty Ltd,* at [47], his Honour correctly identified the tests which are to be applied in a case such as the present. His Honour said the Tribunal "must consider whether or not there is a serious question to be tried and … whether the balance of convenience favours the granting of the … relief sought". No issue was taken with this statement on appeal in the Court of Appeal in that case: see *Tymbook Pty Ltd v State of Victoria* [2006] VSCA 89 at [9], [10].

19 I consider, then, I must look, principally, at two issues:

(a) whether there is a serious question to be tried; and, if so,

(b) whether the balance of convenience favours the grant (or, in this case, the continuance of the grant) of the injunction sought.

20 It is clear that there may be a serious question to be tried but that relief should be refused because the balance of convenience does not favour it: see *Symbion Pathology Pty Ltd v Healthscope Pty Ltd* [2006] VSC 191 (a decision of Hargrave J). Equally, it is clear that, where a case is very strong, the balance of convenience, not favouring the grant of an injunction, may be overcome: *University of Western Australia v Gray (No 3)* [2006] FCA 686 at [30] per French J.

6 SERIOUS QUESTION TO BE TRIED

21 In the first place, therefore, the Applicant must persuade me, to the requisite degree, that there is a serious question to be tried.

22 In that regard, I would indicate I am satisfied that there are matters between the parties which are seriously in dispute. In particular, I refer to the various contractual Notices which have been served. There is no doubt, in my mind, that the parties are in dispute with one another about their validity

and effect. The Respondent would contend they are valid, whereas the Applicant would contend the contrary.

23 It is a different question, however, as it seems to me, whether there is a serious issue in dispute between the parties *in law*. The dispute must be a legal dispute: see *Sports and General Press Agency Ltd v Our Dogs Publishing Co Ltd* [1917] 2 KB 125.

24 In my view, there is no serious issue in dispute in law between the parties. I say that because, it seems to me, the Respondent may, rightly or wrongly, terminate the licence of the Applicant to be or remain on site. Once it does so, it seems to me the Applicant becomes a trespasser if it goes or stays on site. But it may maintain an action for damages if it is found, subsequently, to have been wrongfully ejected.

25 These principles, I think, are made clear by Lush J in *Porter v Hannah Builders Pty Ltd* [1969] VR 673. I quote from pp 678-9 of his judgment in that case:

> "The right of a builder to be present on the building site is described by Latham, C.J., in *Cowell v Rosehill Racecourse Pty Ltd*. (1937), 56 C.L.R. 605, at p. 621; [1937] ALR, at p. 278. His Honour said: '… an ordinary building contract enables the building contractor to go upon the land for the purpose of conducting building operations so that he can perform his contract and earn his expected profit. His right continues to exist even if the building owner wrongfully repudiates the contract. But the only remedy of the building contractor for infringement of the right is in damages. If he goes on the land against the will of the owner he may be treated as the trespasser.' In *Hudson on Building Contracts*, 9th ed., p. 524, the matter is dealt with in the following terms: 'In the absence of express provisions to the contrary the contractor in ordinary building or engineering contracts for the execution of work upon the land of another has merely a licence to enter upon the land to carry out the work. Notwithstanding that contractually he may be entitled to exclusive possession of the site for the purpose of carrying out the work, such licence may be revoked by the employer at any time, and thereafter the contractor's right to enter upon the site of the works will be lost. The recovery, however, if not legally justified will render the employer liable to the contractor for damages for breach of contract, but subject to this the contractor has no legal enforceable right to remain in possession of the site against the wishes of the employer.'
>
> Mr. Francis seeks to counter these propositions by saying that in his case the plaintiff attempted to carry out the cancellation of the contract in accordance with the terms of the contract and, therefore, the issue relating to it is within condition 41, and that by the terms of condition 41 he has the right and is under a duty to remain in occupation until the arbitration is concluded.
>
> I think that there are two fatal difficulties in this argument. The first is that the essence of the principle applied in *Cowell's Case* is that the

> licence may be determined and the licensee transformed into a trespasser even if the determination involves a breach of contract. Mr Francis's argument involves the proposition that the licensee does not become a trespasser because the arbitration clause prevents this transformation when there is a dispute as to the contractual propriety of the determination of the licence. But the arbitration clause is only part of the contract which is the very thing that the person cancelling may under this principle ignore. Nothing in the cases which are discussed and applied in *Building and Engineering Constructions (Aust.) Ltd. v. Property Securities No. 1 Pty Ltd*., [1960] V.R. 673, especially at p. 678, appears to me to be contrary to this. And in *Cowell's Case* (56 C.L.R.), at p. 615, the learned Chief Justice said: 'It was not suggested in *Wood v. Leadbitter* (1845), 13 M & W. 838; 153 E.R. 351; [1843-60] All E.R. Rep. 190, that the existence of a contract not to revoke the licence made the licence irrevocable in the sense it could not be effectively (though possibly wrongfully) revoked.'
>
> The other objection is that Mr. Francis's argument involves the making of an order for a stay which either temporarily or permanently, depending on the outcome of the arbitration, compels the authority to accept performance of the contract by the contractor, so that in the result a partial or a complete specific performance is forced upon the unwilling authority by the order of the Court. A building contract is not specifically enforceable (*vide Wilkinson v. Clements* (1872) 8 Ch. App. 96, and *Greenhill v. Isle of Wight Railways* (1871), L.R. 12 Eq. 18) and an arbitration clause in the building contract cannot make it so. The only case cited to me in which a court compelled a building owner to accept the services of a builder is *Foster & Dicksee v. Hastings* (1903), 19 T.L.R. 204, which has been widely criticised and which I think I should not follow.

26 His Honour's ruling in *Porter v Hannah Builders Pty Ltd*, above, has been referred to in many subsequent cases. One, in particular, I refer to, to which I was referred, is *Chermar Productions Pty Ltd v Prestest Pty Ltd* (1989) 7 BCL 46 where Southwell J again quotes from Latham C J in *Cowell v Rosehill Racecourse Pty Ltd* (quoted above by Lush J) and, after setting out passages from the judgment in *Porter v Hannah Builders Pty Ltd*, above, says this (at p 50):

> "It follows that I hold that since the builder's licence has been revoked, whether rightly or wrongly, the builder has become a trespasser".

In that case his Honour granted an injunction in favour of the proprietor and refused one in favour of the contractor even though the contract in that case had been "substantially" performed. His Honour noted that if that injunction were not refused, "the present stalemate may continue with the builder remaining on site persisting in its claim of right to continue with the suspension of the works which [he said] are estimated to take four to six weeks to complete". It may well be, he said, "that that period will have long since passed before the

arbitration even commences". His Honour indicated that any decision of Lush J should be given "great weight".

27 The decision in *Porter v Hannah Builders Pty Ltd*, above, was also applied by Hunt J in *Hughes Bros Pty Ltd v Telede Pty Ltd* (1989) 7 BCL 204 where (at p. 206) his Honour notes that Mahon J in *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZ LR 309 disagreed with the decision of Megarry J in *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 where his Lordship had held there was an implied obligation on a proprietor not to revoke, in breach of contract, the licence of the contractor to remain on site. Mahon J (at pp 318-9) disagreed with Megarry J largely over the question whether the implication of such a term could be justified on the tests for implication, in particular, whether such a covenant was needed to give business efficacy to the contract, or whether the contract was effective without it, and whether such a term was so obvious that it "went without saying". Mahon J's concerns would seem to be justified in light of the criteria laid down by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at 376. Hunt J in *Hughes Bros Pty Ltd v Telede Pty Ltd* added this: "It is, his Honour said (and I agree) difficult to accept that either the builder or the proprietor would ever have agreed, [in the case before him] at the time of the formulation of the contract, to any express term carrying with it such extraordinary circumstances".

28 I was urged, however, by the Applicant to see the ruling in *Porter v Hannah Builders Pty Ltd* as, in effect, overtaken by events. I was referred also to the decision of Smith J in *Robert Salzer Constructions Pty Ltd v Elmbee* Pty *Ltd*, unreported SC Vic, 29 June 1990 (but see (1990) 10 Aust Cons L R 64). His Honour in that case indicated that as a matter of general principle the remedy of injunction, restraining the proprietor, should be available "in appropriate cases".

29 The difference between that case and this one, however, appears in this consideration. In that case Smith J noted that there was nothing on the evidence to suggest it was unreasonable to expect the parties to continue working together, which would be the effect of the injunction. However, in this case, on the materials I have, there are very direct allegations of a serious breakdown in relations between the persons involved – Mr Khor and Mr Hue. Given the alleged state of their relations, in contradistinction to the case before his Honour, I consider it would be unreasonable to expect the parties to continue working together. That is clearly suggested on the materials and I think his Honour's statement about "general principle" needs to be seen in light of the facts of the case before him which are different to those before me.

30 Factors suggesting events have overtaken the ruling in *Porter v Hannah Builders Pty Ltd*, above, include passage of the *Domestic Building Contracts and Tribunal Act* 1995 s53(1) enabling orders to be made which are "fair" to resolve a domestic building dispute and s97 of the *Victorian*

Civil and Administrative Tribunal Act 1998 obliging this Tribunal in all proceedings to act "fairly" and according to the substantial merits of the case. It was said that these developments meant there was a serious question now as to whether *Porter v Hannah Builders Pty Ltd* should still be regarded as stating good law.

31 Obviously both such Acts (the former now being known as the *Domestic Building Contracts Act* 1995) have been passed since the decision in *Porter v Hannah Builders Pty Ltd*. In a sense they do advance the powers of this Tribunal in domestic building disputes. But neither Act, nor either provision in my view, can be regarded as statutorily reversing, *sub silentio*, Lush J's decision. Neither says anything about that decision either expressly or, in my view, implicitly.

32 Moreover, I would observe that s53 of the 1995 Act does not enable the Tribunal, in domestic building cases, simply to ignore the law on a matter and do what is fair. Parliament having made detailed provision otherwise in the Act cannot have intended such cases to be decided without reference at all to law in my view. See *Greenhill Homes Pty Ltd v Domestic Building Tribunal* [1998] VSC 34 where at [9] Byrne J said of the proprietors in that case seeking an order for damages under s53(2)(b)(ii) that: "Their entitlement to this relief must, of course, depend upon their satisfying the Tribunal that they have *a legal right* to this remedy" (emphasis added). He also said (at [22]) that "the power of the Tribunal to order payment of a sum by way of damages under s53(2)(b) of the Act arises where there has been found some *legal* obligation to pay them" (again, emphasis added). In my view s53 operates, and was intended to operate, on the basis of applicable legal rules and principles. It does not allow the Tribunal, in domestic building matters, simply to ignore authority. Nor does it, properly construed, in my view, allow the Tribunal to say that authority now does not exist or is different or has been altered.

33 As regards s97 of the *Victorian Civil and Administrative Tribunal Act* 1998 I should add, that provision has usually been seen as one relating to procedural fairness. It is true, however, there are cases which suggest it could have a wider application. See, for example, the decision of Harper J in *Roennfeldt v Woodgrain Timber and Hardware Pty Ltd* [2006] VSC 68. But that case is not directly applicable to this case and it may be respectfully suggested that it takes a reading of s97 far beyond it being merely a procedural provision. Compare *Antipova v Minister for Immigration* [2006] FCA 584. On the issue which was before his Honour in *Roennfeldt* (the position of an unrepresented party and the assistance the Tribunal should give) he does not appear to have had cited to him, the remarks of Hayne J in the High Court in *Minister for Immigration v Jia* (2001) 205 CLR 507 at 562 who (quoting from Lord Greene M R in *Yuill v Yuill* [1945] P 15 at 20) said this: "A judge can have no stake of any kind in the outcome of [a] dispute … The judge must not '[descend] into the arena and … have his vision clouded by the dust of the conflict' ". In any event, as I say, this is

not a matter that directly arises in this case, and the ruling of Harper J is entitled to due and proper respect.

34 I was also referred to remarks of Morris J in *Law v MCI Technologies Pty Ltd* [2006] VCAT 415 especially concerning the notion of "fairness": that is (at [40]) that in the Tribunal being able to make any order it considers fair in a dispute under the *Fair Trading Act* 1999 "the Tribunal is not bound by the principles of the common law or by statutory provisions; although such principles and provisions may provide guidance". This, if it were so, I say with due respect, could mean the Tribunal, under the guise of the "fair thing" to do, could ignore or put to one side well-established authority including even in that of the High Court. I am not of the view that this is what Parliament clearly intended by s97. Irrespective of whether I am bound by his Honour's views when not expressed in the context of a Supreme Court ruling (see *Vic National Parks Assoc v South Grampians* SC [2004] VCAT 20 at [36]), his Honour's decision is not directly applicable to the facts of this case in any event because he is speaking with reference to the fair trading legislation. The fair trading legislation is quite specific and quite different. In my view, the correct approach to be adopted to s97 is that set out by Finkelstein J in *Thambythurai v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 661 at 662 which plainly indicates that s97 (or similar provision) should be read as designed to achieve procedural fairness – not substantively fair outcomes: the view he said he preferred as regards s420(2)(b) of the *Migration Act* 1958 "is that only one obligation is imposed which is an obligation to act in a manner Deane J in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 366-7; 21 ALD 1; 94 ALR 11 referred to as 'acting judicially'". There is, thus, High Court authority on this point as mentioned by Finkelstein J. If the Tribunal was free to do what is "fair" in any case under s97, as to the outcome of proceedings and not merely their procedural conduct, a great many mischiefs might occur and there would be the possibility of justice not being done according to law. Cases could be decided ad hoc according to the whims of the individual member concerned and without reference to the doctrine of binding precedent. Like cases might never be treated alike. As Sir Owen Dixon wrote in *Jesting Pilate* p 159: the conscious judicial innovator in such circumstances would be bound "under the doctrine of precedents by no authority except the error he committed yesterday". I, therefore, reject the view that I can disregard *Porter v Hannah Builders Pty Ltd*, above, because of the enactment of s97 of the 1998 in its reference to the Tribunal having a duty to be "fair". To say that *Porter v Hannah Builders Pty Ltd* should not be followed by referring to s97 is in my view to venture into law reform in the area not only of building law but also of property law.

35 I am obliged, in any event, I consider, to apply binding Supreme Court authority and, no matter what my personal view may be of *Porter v Hannah Builders Pty Ltd*, I am, nonetheless, bound to apply it. It has never been

overruled; on the contrary, it has been applied. Some question has been raised about its current authority but that is not a matter for me to determine. See *Sigma Constructions (Vic) Pty Ltd v Marvell Investments Pty Ltd* [2004] VSCA 242 at [11] per Batt J A. The fact is the case has stood the test of time. The editor of *Hudson on Building Contracts*, 11th ed, at para 12 – 089 regards it as in "all respects …a model of the law … with a careful examination of all relevant authorities". And in any event Lush J applies High Court authority.

36 My personal view, for what it counts, is that *Porter v Hannah Builders Pty Ltd* does represent good law in this State as a matter of principle. I say that because, were it otherwise, an injunction might issue by which a building contract, such as the one in this case, in effect, becomes specifically enforceable. But specific performance of building contracts has always been an area in which the courts have been loath to exercise jurisdiction. For example, in *Hewett v Court* (1983) 57 AL JR 211 at 219 in the High Court Deane J quoted Mellish L J in *Wilkinson v Clements* (1872) 8 Ch App 96 at 112 who said: "Now it is settled that, as a general rule, the Court will not compel the building of houses". Further in *Mayor, Aldermen and Burgesses of Wolverhampton v Emmons* [1901] 1 QB 515 at 524 Romer L J said that there "is no doubt that as a general rule the Court will not enforce specific performance of a building contract". See also per Dixon J in *J C Williamson Ltd v Lukey* (1931) 45 CLR 282 at 299-300: "Probably the true rule is that an injunction should not be granted which compels, in substance, the defendant to perform his side of the agreement when the continuance of the obligation to do so depends upon the future conduct of the plaintiff in observing conditions to be fulfilled by him. If the contract is one the execution of which the Court cannot superintend, it does not seem to be in accordance with principle to bind one party to performance in specie leaving him to a remedy in damages only if the other fails to fulfil the conditions on his side to be observed". How, one might ask, could a court, or this Tribunal, in effect undertake superintendence of the contract between the Applicant and the Respondent? What, possibly, could a court, or this Tribunal, do should there be disputes about construction methods occurring during the period of the injunction?

37 It is true that in *IGA Distribution Pty Ltd v King & Taylor Pty Ltd* [2002] VSC 440 at [194] – [199] some doubts are cast on the proposition by Nettle J (as he then was) that a court will not specifically enforce a building contract but I consider it is correctly pointed out to me by Mr Levin QC that that case was not a case of a building contract at all but was a case which related strictly to an agreement for a lease. I cannot think that his Honour was directing his remarks to the specific performance of building contracts (which raise special issues of concern) despite the generality of some of his observations.

38 No matter what my personal view is, in any event I consider I am bound to apply *Porter v Hannah Builders Pty Ltd*. I am also bound to apply *Cowell v*

Rosehill Racecourse Pty Ltd, the Hight Court authority on which Lush J relied. I am as well bound to apply *Chermar Productions Pty Ltd v Prestest* Pty Ltd. Doing so, it seems to me that there is, in law, no serious question to be tried between the parties.

7 BALANCE OF CONVENIENCE

39 I am of the view therefore that there is no serious question to be tried. However, I am also of the view that the balance of convenience does not lie in favour of granting the continuance of the injunction even if I am wrong, and there is a serious question to be tried.

40 Factors mentioned by the Applicant in support of its position include the construction being a large one, on which perhaps nearly 60 workers are employed, which is very substantially complete. It is pointed out that the Applicant is now back on site – presumably working steadily to get on with the job. There are contractual mechanisms in place to protect the Respondent, moreover. Furthermore, the Respondent would be facing significant difficulties if it was now to turn around and employ another contractor: there would be delays and industrial relations difficulties in addition to many others.

41 I very much doubt that the Applicant can point to difficulties for the Respondent as showing why the balance of convenience lies in favour of the Applicant. This seems to be a reversal of follies. The argument is that it is folly for the Respondent not to have the Applicant back on site and this folly is something which the Applicant can take advantage of in its argument for the balance of convenience lying in its favour. But this, I must indicate, seems, with respect, absurd. A suffering of the Respondent cannot be turned into a benefit for the Applicant. The Applicant should be looking to its own suffering in not being allowed back rather than the Respondent's.

42 I can accept, nonetheless, that there are factors which the Applicant can point to on this question. I am concerned about the welfare of the workers on site and, resultantly, their families. I am also concerned about the financial effects on the Applicant itself if it is not allowed to go back on site. I note, as well, as I have said, the undertaking is a large and expensive one very substantially complete.

43 However, the fact that there was only a short period left to complete works was not enough to persuade Southwell J in *Chermar Productions Pty Ltd v Prestest Pty Ltd*, above, to grant the injunction sought by the contractor in that case. I do not consider, therefore, that I should regard it as decisive that the works on site have reached a stage of completion somewhere around perhaps 80-85%.

44 There is moreover this view and it is one referred to both by Southwell J in that case and by Lush J in *Porter v Hannah Builders Pty Ltd*. To hold that the balance of convenience lies in favour of continuing the injunction, in effect, means the building contract is being specifically enforced because, it

would seem, the contract works would be complete by the time of any hearing. Yet, as I have noted, the law does not favour specific performance of building contracts. Aside from that, though, the Respondent would be forced to stand by unwillingly and watch its building finished off by a contractor whom it has lost faith in, as is apparent from the materials, in the disputation which exists between Messrs Khor and Hue. The balance of convenience does not, in my view, dictate that this should be the result. That that is so becomes all the more apparent if, as is alleged, there are defects already in the building works in this expensive construction which may end up being concealed by works continuing. I do not regard this as "fair". In that regard I quote again from the judgment of Hunt J in *Hughes Bros Pty Ltd v Telede Pty Ltd*, above, at p 206, as follows:

> "Where the proprietor seeks to dismiss the builder for what he sees as departures from the contract's specifications, he should not be compelled to stand by whilst his action for breach (or an arbitration, which can take just as long if not longer) is fought and watch the building being completed in a manner which may ultimately be decided to have been in breach of the contract."

45 If the Applicant does have a proprietary interest to any extent in the site (as may be so: see the remarks of the Chief Justice in *Schmidt v 28 Myola* Street *Pty Ltd* [2006] VSC 343 at [24] in particular) I am unable to see how, as a matter of domestic building law, the balance of convenience can dictate that one co-owner (the Respondent) should be forced to allow another co-owner (the Applicant) to remain on site and carry out works against its will. Indeed, on this point, possibly the dispute between the two (to that extent) is of an inter-corporate kind that is outside the scope of the Tribunal's jurisdiction in domestic building.

46 I am of the view, therefore, that even if there is a serious question to be tried, the balance of convenience does not lie in favour of the Applicant in the continuance of the injunction.

8 DAMAGES AN ADEQUATE REMEDY

47 It is clear law, and was so laid down by Lindley L J in *London and Blackwall Railway Co v Cross* (1886) 31 Ch D 354 at 369, that the "very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs, for which damages are the appropriate remedy".

48 If my analysis above is correct then the Applicant is a trespasser and must leave the site. If the Respondent has wrongfully brought this about, the Applicant will have its remedy in damages. The Respondent will have wrongfully repudiated the contract. The general rule with respect to the damages likely to be recovered will be that all those losses caused by the breach will be compensated for by monetary award. See *Robinson v Harman* (1848) 1 Ex 850 at 855 per Parke B. As mentioned by Hunt J in *Hughes Bros Pty Ltd v Telede Pty Ltd*, above, at p 207 "[the] builder has a

claim for damages against the proprietor to recover his lost profits should the termination have been wrongful".

49 In such circumstances it seems to me to be plainly the case that damages *are* an adequate remedy. None of the matters advanced by the Applicant has persuaded me, to any degree, to the contrary effect. To some extent, however, this bears upon the issue of a serious question to be tried. I am of the view that there is no serious question to be tried because, rightly or wrongly, the Applicant is a trespasser in the absence of the injunction being continued and in that situation – to quote Latham C J in *Cowell v Rosehill Racecourse Pty Ltd* (quoted by Lush J) – "the only remedy of the builder contractor for infringement of the right [to go upon land] is in damages." This fortifies me in my view that damages are, indeed, an adequate remedy. I am not satisfied, I should add, that, the Respondent could not meet an award of damages should one be made in due course.

9 CONCLUSION

50 In the circumstances, for these Reasons, I discharge the injunction and I do so with effect from 4.00 p.m. this day unless otherwise ordered.

51 I reserve liberty to apply for costs.

52 I refer the proceeding to a Directions Hearing in due course.

SENIOR MEMBER D. CREMEAN