

Judgment : Hodgson JA : New South Wales Court of Appeal. 15th May 2006.

- 1 I am dealing with an application by the claimant Baseline for an extension of a restraining order, made by Bergin J on 26 April 2006, until the determination of an appeal. I note that, having regard to the amount in issue, it appears that leave to appeal would be required. However I do not propose to determine this notice of motion on the basis that no application has yet been made for leave to appeal.
- 2 I do not have before me any evidence that if a sum of around \$50,000 is paid over there is a high risk or even an appreciable risk that it would not be recoverable.
- 3 However Mr Kalyk has submitted that in this particular case the relief should be granted without that evidence because of the strength of the claimant's case on the appeal. Mr Kalyk has submitted that the primary Judge did not deal with a contention that the adjudicator's finding that the adjudication response contained reasons which were in his view contrary to s.20(2B) of the Act, and his decision then to exclude those reasons from consideration, amounted to a denial of natural justice and vitiated the decision. This contention, he submitted, was not considered by the primary judge, and had it been so considered, that was a matter that should have given Baseline success in the proceedings.
- 4 I think a single Judge hearing an application of this sort should be very reluctant to enter deeply into the merits of the appeal. It seems to me also that the primary Judge appears to have taken the view that a decision by the adjudicator as to the application of s.20(2B) was a matter for the adjudicator to determine; and it seems to me that a decision along those lines could well be correct. It seems to me that the claimant has an arguable appeal, but I do not think it is a case where I can put the matter any higher than that.
- 5 In those circumstances, I do not think a case is made out for extension of the relief previously granted, and for those reasons I dismiss the notice of motion and I order the claimant to pay the opponent's costs of the notice of motion. The exhibits may be returned.

Mr. F. Kalyk for claimant instructed by KQ Lawyers, Bowral for claimant
Mr. F. Hicks for opponent instructed by Kreisson Legal, Sydney for opponent