

JUDGMENT (ex tempore) : BRERETON J. Supreme Court, New South Wales, Equity Division. 30th January 2007

- 1 On 7 December 2006, I ordered, by consent, in proceedings which are currently part heard before me, that upon the first cross defendant Biseja and the second cross defendant Mr Downie giving the usual undertaking as to damages, and Biseja that day lodging certificates of title to two properties (being Folio Identifiers 101/SP76449 and 103/SP76449) with the Registrar, execution of a judgment entered on 1 August 2006 in favour of the cross claimant NSI against Biseja in the sum of \$1,774,494, in accordance with an adjudication under the (NSW) *Building and Construction Industry Security of Payment Act 1999*, be stayed until further order, and I reserved liberty to apply to any party on three days notice. There were already in court three other certificates of title to properties in the same development.
- 2 On the day that that consent order was made, but prior to it being made, NSI signed applications for the recording on all remaining unencumbered titles in Strata Plan 76449 and Strata Plan 70843 – as well as on three further titles which had been subject of a new mortgage – of a writ for levy of property which had issued in execution of the judgment on 8 September 2006, and which it had already caused to be registered, on 5 October 2006, on three lots - 79, 80 and 81 - in Strata Plan 76449. When the consent order was made, Biseja was unaware at least of the registration or intended registration of the writ on the additional titles on which it was registered on 7 December 2006.
- 3 Prior to 7 December 2006, Biseja had exchanged contracts for the sale of Lot 104 in Strata Plan 76449 for a price of \$275,000, albeit subject to a rebate for prompt settlement. That sale settled on 24 November 2006. However, when the incoming mortgagee, the ANZ Bank, came to lodge the transfer and mortgage for registration, it discovered that the writ had been registered, which prevented registration of the transfer and mortgage.
- 4 The effect of registration of a writ for levy of property on a title under the (NSW) *Real Property Act 1900* is two fold. First, it permits the Sheriff to sell the land under the writ and to give an effective transfer pursuant to the sale. Secondly, it has the effect of preventing dealings with the land while the writ remains registered for a period of three months from the date on which the writ is recorded on the title. However, it ceases to have that effect after three months [*Real Property Act*, s 105A(6)].
- 5 Biseja applies for an order, pursuant to (NSW) *Civil Procedure Act 2005*, s 135(2)(b), in aid of the stay granted on 7 December, requiring the Registrar-General to cancel the recording of the writs. The fundamental basis of its application is that the consent order of 7 December reflected an agreement of the parties that the two titles referred to in the consent order, in respect of which the certificates of title were lodged in the court that day, together with the three titles already lodged, would secure the judgment debt in return for a stay of the proceedings. NSI disputes that the agreement should be so construed, and submits that its proper construction is that the five titles were accepted as security, in addition to what NSI had already done by way of having the writs recorded on the titles.
- 6 I reject NSI's submission in that respect for two reasons. First, if it were accepted, in the context that the writ had been recorded in respect of the properties the titles for which had been or were to be deposited in court, then the exercise of depositing titles was a futility, since the recording of the writ prevented dealings with them in the interim in any event. Secondly, it is clear on the evidence before me that Biseja was quite unaware on 7 December that all its remaining unencumbered properties were about to become the subject of recordings of the writ. It defies commonsense that Biseja would agree to lodge two additional titles in return for a stay in circumstances where it was imminently to be deprived of its ability to deal with its remaining unencumbered titles. Accordingly, I accept Biseja's construction of the agreement encompassed in the consent orders of 7 December, namely that its effect was that NSI accepted the five titles – three previously lodged and two lodged that day – as security for the judgment, and in return for that security consented to a stay.
- 7 An additional reason for removing the recordings is that the purpose of recording a writ is to permit execution to be levied, and not to obtain a de facto Mareva order over all a judgment debtor's real property. As execution has been stayed, the recording of the writ is not serving a proper purpose. This view is much fortified by the circumstance that as a result of *Real Property Act*, s 105A(6), there is no longer any prohibition on the registration of dealings on the three titles in respect of which the writ was recorded on 5 October 2006 – since three months from that date has elapsed – and as from 7 March 2007 there will no longer be any prohibition on the registration of dealings in respect of the other titles, since on that date three months from the date of recording, 7 December 2006, will have elapsed; yet the stay of execution will continue, at least until the further hearing of these proceedings, which is not to resume until April 2007. In those circumstances, there is no utility in the writ remaining recorded on title, and to give full effect to the stay the recordings should be removed.
- 8 If, despite the five titles already deposited, there are legitimate fears about Biseja entering into adverse dealings to the prejudice of its ability to satisfy the judgment based on the adjudication certificate, then NSI's remedy is to apply, if so advised, for an asset preservation order.
- 9 I order, pursuant to *Civil Procedure Act*, s 135(2)(b), that the Registrar-General cancel all recordings of writ number 14191/06 issued by this Court in proceedings 14191/2006 on 8 September 2006, including, without limiting the generality of the foregoing, the recordings made pursuant to dealings: AC613948 in respect of Folio Identifier 79/SP76449; AC613949 in respect of Folio Identifier 80/SP76449; AC613950 in respect of Folio Identifier 81/SP76449 and AC794743 in respect of Folio Identifier 104/SP76449.

- 10 I grant liberty to the parties to apply in the event of any difficulty arising in the implementation of these orders.
- 11 I direct that these orders be entered forthwith.
- 12 I order that the cross claimant pay the cross defendant's costs of the application.
- 13 I direct that the Exhibits AX16 and 17 be returned.

Mr M S Willmott SC w Mr M W Sneddon (plaintiff) instructed by L Capolupo & Co
Mr G A Moore w Mr F P Hicks (defendant) instructed by William Cotsis & Associates