

**Judgment : Hodgson JA** : New South Wales Court of Appeal : 8th June 2005

- 1 I am dealing with an application for a stay of an order made by McDougall J on 1 June 2005 for payment out to the first respondent (Timwin) of money paid into court by Timwin. The money was paid into court in these circumstances.
- 2 The appellant (Facade) was a subcontractor in a building project conducted by Timwin. Facade served on Timwin a payment claim under the Building and Construction Industry Security of Payment Act 1999 on 14 March 2005, claiming \$498,664.
- 3 That led to an adjudication procedure under the Act, resulting in an adjudication determination that Facade was entitled to a progress payment of the whole amount claimed. Facade then obtained a judgment for that amount, pursuant to s25 of the Act, in the Supreme Court.
- 4 Timwin commenced separate proceedings in the Supreme Court, seeking a judgment that the adjudication determination was void. In the course of those proceedings, Timwin paid into court a sum of just over \$500,000, representing the result of the adjudication determination, and the court ordered that Facade take no steps to enforce its judgment until further order.
- 5 On 1 June 2005, McDougall J decided that the adjudication determination was void and ordered that the money paid into court by Timwin be paid out to it. That order was stayed until today. The application is for a stay pending determination of an appeal which Facade is bringing from McDougall J's decision.
- 6 I have heard argument on whether there should be a stay based on the bringing of an appeal with reasonable prospects of success. However, it seems to me that there should be at least a temporary stay based on considerations arising from s25 of the Act. That section provides to the effect that if a person in the position of Timwin seeks to have a judgment based on an adjudication certificate set aside, it must pay into court as security the unpaid portion of the adjudicated amount pending the final determination of proceedings to set aside the judgment.
- 7 There have not yet commenced any proceedings which in terms seek to set aside the judgment to which I have referred. The proceedings before McDougall J were separate proceedings. However, the judgment until set aside is a judgment of the Supreme Court, capable of being enforced even if the decision of McDougall J establishes that it has no basis.
- 8 In those circumstances, where the proceedings before McDougall J were, as a matter of substance, directed towards attacking the judgment, it seems to me that the policy behind s25 really requires that the amount paid into court remain in court unless and until that judgment is set aside. It will be open to Timwin to apply to set aside that judgment on the basis that it is based on a void determination. If that application is acceded to, then the effect of s25 would be spent and the money could then be paid out of court.
- 9 A judge dealing with that application may be persuaded that there are discretionary considerations associated with the setting aside of the judgment and the existence of this appeal that might justify postponing the setting aside of the judgment or, alternatively, requiring that some or all of the money be held in court; and I would not in these reasons seek to affect the exercise of any such discretion.
- 10 For those reasons, I do propose to stay the order made by McDougall J until such time as the judgment entered is set aside.
- 11 As I said previously, there has been argument as to whether there should be a further stay pending the determination of the appeal. Both parties have asked that I rule on those submissions and, accordingly, I will do so. However, as I have said before, I do not intend in so doing to bind a judge hearing the application to set aside the judgment as to how that judge's discretion should be exercised at that time.
- 12 Mr Nicholls for Facade submitted that the appeal has a substantial chance of success, that the policy of the Act is to provide for payments to subcontractors in accordance with adjudication determinations, and that the evidence indicates there could be difficulty in obtaining payment from Timwin if the appeal was successful and the money was not retained in court.
- 13 Mr Christie for Timwin submitted that stays in relation to appeals in matters under this Act should not be granted merely because of anticipated difficulty in recovering money paid, much less in enforcing judgments. He referred to the decisions in *Herscho v Expile Pty Limited* [2004] NSWCA 468 and *McLaughlin's Family Restaurant v Cordukes Limited* [2004] NSWCA 447.
- 14 Mr Christie submitted that it was only in exceptional circumstances that security would be ordered for a judgment, and that the circumstances of this case fell far short of the grant of a Mareva injunction. He submitted that the evidence showed that Timwin was a company with substantial assets able to meet the judgment if its basis was re-established.
- 15 My impression is that the appeal is a reasonable appeal, but that its success is far from assured. Apart from considerations associated with the policy of the Act in general and s25 in particular, I do not think a case is made out for a stay simply on the basis that there is a reasonable appeal and there might be problems in enforcing the judgment if the money is not retained in court. I am not inclined to the view that considerations associated with the policy of the Act in general and s25 in particular would justify a stay by reason of the existence of a reasonable

appeal but, in saying that, I do not wish to preclude that matter being further considered on the application to set aside the judgment.

16 The orders I make are these:

1. I order that order three made by McDougall J on 1 June 2005 in proceedings 55035/05 for payment out to Timwin of money paid into court be stayed until the judgment entered in favour of Facade in 11729/05 is set aside.
2. I order that the costs of this motion be costs in the appeal.
3. I order that the appeal be expedited, but not so as to displace matters already fixed for hearing.

Mr. N.A. Nicholls for appellant instructed by Doyles, Sydney for appellant

Mr. M. Christie with V. Culkoff for 1st respondent instructed by David Campbell-Williams, Sydney for 1st respondent