

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

- 1 I am dealing with a Notice of Motion brought by the respondent, Holmwood, in which it seeks an order that the appeal be struck out or alternatively stayed permanently and, in the alternative, that there be an order for security for costs. The application arises in the following circumstances.
- 2 Relevantly the first event was the making of a payment claim under the Building and Construction Industry Security of Payments Act by the appellant, Halkat, on 3 June 2005. That was followed up by an adjudication application on 27 June and an adjudication response on 5 July. On 7 July the adjudicator issued an adjudication determination to the effect that Holmwood pay Halkat something over \$116,000.
- 3 Holmwood commenced proceedings in the Supreme Court seeking a declaration that the determination was void, and on 8 November 2005 Brereton J made such a declaration.
- 4 On 29 November 2005, Halkat served a second payment claim on Holmwood, which included the work included in the other payment claim, but also included some additional work in a variation claim.
- 5 On 2 December 2005, Halkat filed a notice of appeal without appointment, commencing the present appeal in this Court against Brereton J's decision. On the same day, Holmwood commenced proceedings in the District Court seeking a final determination of the parties' rights under the building contract.
- 6 I mention here that those proceedings are at present stood over to November this year pending resolution of this appeal.
- 7 On 15 December 2005, Holmwood served a payment schedule in respect of the second of the payment claims. There was an adjudication application made by Halkat in respect of the second payment claim, which was made on 3 January 2006. The adjudication response was provided on 11 January 2006; and there was an adjudication determination in respect of the second payment claim handed down on 1 February 2006 in which it was determined that Holmwood should pay Halkat \$18,784.
- 8 Meanwhile, on 17 January 2006, Halkat put on its notice of appeal with appointment. Although the second payment claim was determined on 1 February 2006, I am told that it was not actually issued to the parties until about 5 April 2006, due to delay in payment of the adjudicator's fees.
- 9 The evidence before me in relation to the application includes correspondence on the question of security for costs. In one letter sent by Holmwood's solicitors to Halkat, it was alleged that there had been a threat by an officer of Halkat that Halkat would be wound up if their proceedings were unsuccessful; but that allegation was denied in a reply, and I am not in a position to make any finding that such a threat was made.
- 10 It appears an arrangement was made about inspection of financial records; but ultimately that was not carried through, because Holmwood sought production of recent financial records and that was not agreed to by Halkat. In the result I do not have evidence before me of Halkat's financial position.
- 11 There is evidence from Holmwood that the costs ordered in its favour in the proceedings before Brereton J have not been paid. There is evidence of an estimation of further costs to be incurred by Holmwood in the appeal at \$57,000.
- 12 On the other hand there is evidence from Halkat that, in the time since the appeal was first lodged, there is an estimate that it has incurred legal fees to date on the appeal of about \$25,000.
- 13 Mr Kalyk, for Holmwood, submits that the appeal is an abuse of process in that Halkat is pursuing inconsistent remedies, in such a way as to impose an entirely unjustified and unreasonable burden on Holmwood. He submitted that following the adverse decision of Brereton J, Halkat could have taken one of two courses, namely either appeal or include the work the subject of the first payment claim in a further payment claim, but it could not do both, or alternatively it was unreasonable and oppressive and an abuse of process to do both.
- 14 Mr Kalyk submitted that the Court should stand against the evil of adjudicator shopping in relation to matters under the Act. On the question of abuse of process Mr Kalyk referred me to the cases of *Ridgeway v. The Queen* (1995) 69 ALJR 484, 184 CLR 19; *Walton v. Gardiner* (1993) 67 ALJR 485, 177 CLR 378; and *Jago v. District Court of NSW* (1989) 168 CLR 3.
- 15 He further submitted that, even in the absence of specific evidence as to the inability of Halkat to meet costs, an appropriate discretionary response to the matters he relies on, if the Court would not dismiss or stay the appeal as an abuse of process, would be to order security for costs.
- 16 As pointed out by Mr Izzo for Halkat, s.13(6) of the Act does explicitly permit inclusion in a subsequent progress claim work that had been included in a previous progress claim. He pointed out that in such event s.22(4) of the Act may have application. Section 22(4) is as follows:
(4) *If in determining an adjudication application, an adjudicator has, in accordance with section 10 determined:*
 - (a) *the value of any construction work carried out under a construction contract or*
 - (b) *the value of any related goods and services supplied under a construction contract,**the adjudicator (or any other adjudicator) is, in any subsequent adjudication application that involves the determination of the value of that work or of those goods and services, to give the work (or the goods and services) the same value as that previously determined unless the claimant or respondent satisfied the adjudicator concerned that the value of the work (or the good and services) ha changed since the previous determination.*

So much is not disputed by Mr Kalyk. However, his submission is to the effect that Halkat should have either appealed or included the same work in a further payment claim, but could not reasonably do both.

- 17 In my opinion the course of action taken by Halkat in this case did not amount to an abuse of process that calls for the remedy of staying or striking out the appeal, particularly having regard to the stage at which the appeal has now reached. Although the figure of costs mentioned on behalf of Halkat seems excessive, undoubtedly substantial costs have already been incurred.
- 18 Prima facie, if Halkat has reasonable grounds to bring an appeal from the judgment of Brereton J, it is entitled to do that; and there is no suggestion in this application that there are not reasonable grounds for the appeal. If the appeal is successful, then that would reinstate Halkat's entitlement to the amount specified in the first adjudication determination.
- 19 There is a limited time to bring in an appeal and, of course, Halkat cannot be certain that the appeal will succeed. There are also time limits in relation to the making of payment claims, so prima facie it is not unreasonable for Halkat to serve a further payment claim which, as well as additional work, includes the work the subject of the first adjudication application, with the aim of obtaining an adjudication determination which does not have defects or possible defects that would call for a Supreme Court challenge, but is also in an amount that Halkat considers satisfactory for the purpose of adjustment of cash flow pending the final determination of the rights of the parties.
- 20 As I have indicated, I do not think that course of action is necessarily an abuse of process, and I do not think it amounted to an abuse of process in this case.
- 21 One matter that does occur to me is that by taking the course it has, Halkat may have put Holmwood to costs in relation to the second payment claim and the adjudication of it which will be thrown away in the event that its appeal against the judgment of Brereton J is successful. I think that it is a matter that may possibly be taken into account by the Court of Appeal in making a costs order on the appeal, should Halkat's appeal happen to be successful.
- 22 For those reasons, I do not think a case is made out for striking out the appeal or permanently staying it. In the absence of evidence that Halkat will be unable to meet costs, I do not think the circumstances provide a sufficient ground for ordering security for costs against Halkat.
- 23 For those reasons in my opinion the notice of motion should be dismissed with costs.

Mr. F. Kalyk for opponent/appellant instructed by Nicholas G. Pappas & Co., Sydney

Mr. M. Izzo for claimant/respondent instructed by KQ Lawyers, Bowral