

**Judgment : Hodgson JA** : New South Wales Court of Appeal : 13<sup>th</sup> December 2004

- 1 I am dealing with an application for a stay in respect of a judgment in the sum of \$145,033.83 given in the District Court on 10 November 2004. The judgment was given pursuant to a claim made under s.15(4) of the Building and Construction Industry Security of Payment Act.
- 2 The appellant seeks a stay on the basis that there are reasonable grounds of appeal, and that if the money is paid there is a real risk that it could not be repaid if the appeal is successful, or if the proceedings that determine the final rights of the parties result in a balance in favour of the appellant.
- 3 I think it is appropriate for this Court to look both at the question of grounds of appeal and the question of risk that the money if paid will not be recoverable. However, in doing so I would say that I think there is merit in what was said by Justice Einstein in **Grosvenor Constructions NSW Pty Limited v Musico** [2004] NSWSC 344 at para [31] to [32] to the effect that, having regard to the policy of the Act, there is sound reason for making stays less readily available in such cases, and perhaps looking for more than “a real risk of prejudice” if a stay is not granted.
- 4 In this case as it has been argued before me, it seems that there are two possible bases of appeal. One is that evidence of accord and satisfaction was rejected, when accord and satisfaction could be a defence to a claim under s.15(4). The other is that evidence was rejected of the assignment of the debt underlying the claim in the payment claims, so that the true creditor was no longer the plaintiff but a third party, and the defendant could have been left in the position of paying the plaintiff and then in addition having to pay the third party to whom the debt had been assigned. Notification of the assignment was given on a later progress claim, that included the amounts in the four payment claims that were the subject of these proceedings.
- 5 Although these are possible grounds of appeal, it seems to me that there will be problems for the appellant being able to succeed on them.
- 6 As regards the first, I have been shown the evidence relied on as accord and satisfaction, and it does seem to me difficult to make from that evidence a contract whereby, in return for payment of a certain amount, the amount due under the fourth payment claim was to be treated as wholly satisfied. The conversations do not refer to this payment claim, but are in much more general terms about amounts becoming due because of the building work.
- 7 As regards the other matter, the possibility of assignment and the effect of s.12 of the Conveyancing Act were raised before the primary judge, as also was the possibility that the payment by the assignee to the builder would need to be credited in any event. However, the defendant was given opportunity to apply to amend the defence to raise these matters, but apparently that was not done, and the evidence suggesting assignment was then excluded; and as a result of this, of course, any evidence the plaintiff might want to have led about that matter was not led either. It seems to me in those circumstances the appellant will face a severe **Sutter v. Gundowda** problem in relying on that matter on appeal.
- 8 I am not saying that the appellant’s case on either point is by any means hopeless, but the matters I have raised do indicate there are substantial difficulties, and I take that into account in deciding what course to take.
- 9 Turning to the question of risk, there is evidence that does suggest some risk that if the money is paid it will not be recovered; but it does not go so far as to suggest that it will not be recovered, or that the risk is a very high risk.
- 10 On the whole, for these reasons, and having regard to the policy of the Act, I do not think a sufficient case is made out for a stay; and for that reason I dismiss the Notice of Motion and I order the claimant to pay the opponent’s costs.

Mr. P. Strasser for claimant instructed by Denes Ebner, Sydney

Mr. M. Southwick for opponent instructed by Edwin Davey, Sydney