

JUDGMENT : Giles JA. Court of Criminal Appeal. New South Wales. 20th December 2004

- 1 This is an application for a stay of enforcement of the judgment of Bishop DCJ given in the District Court on 9 November 2004 pending further order or determination of the appeal.
- 2 The judgment was given in proceedings in which the opponent claimed a little over \$90,000 from the claimant as the amount to which it was entitled following service of a payment claim under the *Building and Construction Industry Security of Payment Act 1999* when the claimant had not filed a payment schedule within the stipulated time. The opponent claimed that pursuant to s 15 of the Act it was entitled to recover the claimed amount.
- 3 The issues in the District Court were two. First, the claimant contended that it was not the contracting party with the opponent. That issue was determined against it and it does not appeal in that respect. Secondly, the claimant contended that the payment claim had been served out of time, in that it was not served with a period of twelve months after the construction work to which the claim related was last carried out, see s 13(4)(b) of the Act. This also was decided against the claimant and is the matter on which the claimant has appealed.
- 4 The contract works reached the stage of practical completion on either 14 or 18 May 2001. There was an issue in the District Court over whether remedial works were thereafter performed by the opponent. That issue was resolved against the claimant, it being accepted that the judge found that rectification work by way of plumbing work was carried out on 23 April 2002. Accordingly, the question was, or at least should have been, whether the remedial work was construction work to which the payment claim related within the meaning of s 13(4)(b).
- 5 His Honour implicitly held that it was, perhaps on a pure construction of the section or perhaps by reason of the view he took of cl 35 and 37 of the conditions of the contract which he described as providing that the contract was not complete until all remedial works were carried out and that progress claims were allowable up to the final claim at the completion of the last specified defects liability period.
- 6 The argument which the claimant wishes to put on appeal was that the remedial works were not construction work to which the payment claim related.
- 7 The payment claim appears to be a claim, amongst other things, for retention money which should have been released in part as at completion and as to the balance on a date given in the payment claim as 17 May 2002. It seems to me that the claimant will not have an easy argument on appeal, at least in part because the point was not appreciated in the same way as it is now in the District Court and the evidence may not lend itself to support of the claimant's argument. For the purposes of the stay application, while I do not think that the claimant's case is without substance I think that it has considerable difficulties. That is a relevant matter in deciding whether or not to grant a stay.
- 8 Two other matters it seems to me are of significance in that decision.
- 9 The first is that there is no evidence that payment of the judgment sum will occasion particular financial hardship to the claimant and there is no evidence that if the appeal succeeds the opponent may be unable to repay the judgment sum together with appropriate interest. It is proper to note that counsel for the claimant eschewed any submission to the effect that the opponent would be unlikely to repay, and on instructions proffered security for the judgment sum if that were necessary for obtaining a stay.
- 10 The second is that the Act is part of a scheme intended to provide for prompt payment of money pursuant to payment claims made in accordance with its provisions, with the parties to the relevant construction contract being left to sort out the final result between them in other proceedings. There is evidence that the claimant proposes to bring proceedings in this Court against the opponent claiming substantial amounts for breach of the relevant contract. In conformity with the policy of the Act, in *Herscho v Expile Pty Limited* [2004] NSWCA 468 Hodgson JA saw merit in earlier observations that there was sound reason for making stays less readily available in cases such as the present and perhaps for looking for more than a real risk of prejudice if a stay was not granted. In my opinion also, there is merit in an approach by which in circumstances such as the present the Court should be reluctant to grant a stay where there is no case of hardship and the final position between the parties can be worked out in the larger proceedings which the claimant is to bring.
- 11 The claimant did say that costs of the proceedings in the District Court were a significant matter: apparently the proceedings were somewhat prolonged and involved unusual expenditure because of the part played in the contractual scene by a third party. Any question of assessment of costs and execution for costs is for the future. There is evidence that the opponent intends to execute upon the judgment as soon as it is able, but there is nothing which shows imminent concern in relation to costs. That it seems to me is a matter for the future, although I do not say that the costs should be regarded in any different light from the judgment sum itself.
- 12 It is enough that, taking into account the matters to which I have referred, it does not seem to me that the claimant has made out a case for a stay of enforcement of the judgment in the District Court.
- 13 I should note that the claimant's notice of motion claims also an order extending the time for filing its notice of appeal. The notice of appeal was filed some seven days out of time. The opponent has foreshadowed opposition to an extension of time, the claimant wishes to supplement its evidence in that respect, and accordingly I have not entered upon any question of extension of time. That is something which can be raised in due course, and so that it may be raised I will direct that the notice of motion be stood over for directions before the Registrar on the first of his directions days next term.

14 The orders I make at the moment are: (1) Dismiss the claim in paragraph 4 of the notice of motion filed on 14 December 2000.

Mr Christie, you seek costs I take it?

CHRISTIE: We seek costs your Honour, in fact can I just say my instructions are to seek indemnity costs for the simple reason that this was not a case where there was any evidence of irreparable harm or irrecoverability of the sum nor was it a case where there was a strongly arguable matter on appeal.

HIS HONOUR: Mr Freeman, there's nothing you can say about costs, putting aside the level of costs, I assume. I don't think it's appropriate for indemnity costs Mr Christie.

CHRISTIE: May it please the Court.

HIS HONOUR: (2) Order that the claimant pay the opponent's costs of the hearing today.

R Freeman – Claimant instructed by Maguire & McInerney, Wollongong

M Christie – Opponent instructed by The Builders' Lawyer, Ultimo