

JUDGMENT : HODGSON JA : New South Wales Court of Appeal. 9th May 2006

- 1 On 21 April 2006, Einstein J ordered payment out, to the first opponent Napoli, of a sum of \$202,254 paid into Court by certain receivers, and stayed that order to 8 May. I have before me a Notice of Motion by the claimant Procorp, to extend the stay until the hearing of an appeal brought from an earlier substantive decision of Einstein J. The history of the matter is briefly as follows.
- 2 On 21 January this year Napoli obtained an Adjudication Certificate under the Building and Construction Industry Security of Payment Act, requiring Procorp to pay Napoli the \$392,607.70, and on 9 February Napoli obtained a judgment for that amount in the District Court. However, it is common ground that by reason of payments previously made, Napoli can enforce that judgment only to the extent of \$202,254.
- 3 On 16 February, Napoli commenced what may be called asset preservation proceedings against Procorp and other parties, and it was pursuant to consent orders in those proceedings that the receivers who had been appointed by Procorp in relation to certain property paid the \$202,254 into Court.
- 4 On 15 March, Procorp commenced proceedings in the Equity Division claiming that the Adjudication Certificate was void; and on 29 March, Einstein J decided those proceedings against Procorp.
- 5 On 21 April, Einstein J dealt with an application brought by Napoli for payment out to it of the money that had been paid into Court by the receivers. Procorp contended that payment out should not occur until the determination of an appeal which it proposed to bring against Einstein J's earlier judgment, on the ground of Napoli's impecuniosity. It seems that the receivers for their part contended that the money had been paid into Court by them by way of a compromised relief in the preservation of assets proceedings, and could not simply be treated as if it was payment into Court by Procorp as security for the amount Procorp was entitled to pursuant to the Adjudication Certificate and the District Court judgment.
- 6 However, as I have indicated, Einstein J made an order for payment out of the money, which was stayed to the 8 May. That decision was given orally and the reasons were published in writing on 1 May. On 8 May, Procorp filed a Notice of Appeal against the adverse decision of its claim that the Adjudication Certificate was void, and also the Notice of Motion which is before me.
- 7 The receivers have been made a respondent to the appeal and to the Notice of Motion. They have not appeared before me today, but I have been given a letter advising that they will not appear but do lend their support to Procorp's motion. The letter also advises that the receivers have filed a Notice of Appeal against Einstein J's decisions.
- 8 When the matter commenced, Mr Doyle for Napoli called on a notice to produce which had been served on Procorp yesterday, and Mr Kalyk, appearing for Procorp, said that his client had not been able to deal with the notice to produce and produce documents today. I indicated to Mr Doyle that in the circumstances I would either proceed today without the documents, or alternatively I would be prepared to adjourn the case until Monday when the documents should be available. Mr Doyle indicated in those circumstances he wished to proceed today. Of course I indicated that if it was adjourned until Monday I would extend the stay until Monday.
- 9 Mr Doyle filed in Court a Notice of Motion seeking security for costs for the appeal. Mr Kalyk said he was not in a position to deal with that Notice of Motion. I indicated I would not hear that Notice of Motion today as a substantive motion, but that I would have regard to it, and have regard to the affidavits filed in support of it, in considering what conditions should be imposed should I be prepared to grant any relief on Procorp's Notice of Motion.
- 10 I read affidavits on both sides. Both sides indicated that in a full hearing of Procorp's motion they would wish to rely on extensive further affidavits and would wish an opportunity to cross-examine deponents of those affidavits. That was not an exercise that I could undertake today, so I am in a position of having to give a decision whether to extend the stay either for a very short period or until the hearing of the appeal, on the basis of something less than a full hearing of Procorp's Notice of Motion.
- 11 I am also dealing with the matter in circumstances where unless I grant Procorp some relief on conditions involving Procorp giving some security for costs, there will be in the future possibly an extensive contested hearing of Napoli's Notice of Motion for security for costs.
- 12 I find myself reluctant to dismiss Procorp's Notice of Motion without an opportunity for Procorp to have a full hearing of it.
- 13 Mr Doyle for Napoli, submitted that this should not be a consideration that weighs with me, because the need to deal with the matter at such short notice, and on inadequate material, is entirely Procorp's fault. It had the substantive decision from which it is appealing since 29 March, and did not file its Notice of Appeal until 8 May. It had its decision on its previous stay application on 21 April, and the fact that it did not have the written judgment until 2 May should not have delayed the bringing of this application until 8 May.
- 14 Mr Doyle also submitted that what Procorp is seeking to do is to re-agitate a matter which was the subject of a two day hearing before Einstein J, that is a two day hearing concerning the question of payment out and stay, without pointing to any error, but rather just by way of seeking to expand material which either was or could have been presented before Einstein J.

- 15 There is a lot of force in both those submissions, but I think there are considerations pointing the other way and supporting a course which would possibly give rise to a regime that could stay in place until the hearing of an expedited appeal, or alternatively, if Napoli seeks it, could be in place merely until perhaps Monday week when a full hearing of both applications could be undertaken.
- 16 It seems to me that there are technicalities that could be the subject of time consuming and expensive debate concerning whether the money paid into Court by the receivers was simply available to be applied for the benefit of Napoli as a result of their success in the substantive proceedings. There does not appear to be evidence as to the amount actually owing to Procorp under the security pursuant to which the receivers were appointed, although as I understand it, that security was for a maximum amount of \$1.9 million. There may possibly be third party claims to that money. It seems to me that if that money remains in Court and Procorp gives satisfactory security against any possibility that the whole of that money is not available to satisfy any liability of Procorp to Napoli, then that would have the advantage of making unnecessary the pursuit to the appeal by the liquidators.
- 17 In all the circumstances of this case, I would take the view also that any indulgence to Procorp by way of extending the stay, should only be on condition that Procorp provide \$40,000 security for costs for the appeal and also give an undertaking as to damages which is appropriately secured.
- 18 So what I propose to do is to make orders that have that effect, coupled with orders expediting the proceedings, and giving directions that are appropriate to ensure an early hearing of the proceedings. But as I have indicated, if Napoli seeks it, I will stand both Notices of Motion over to Monday week when there could be a full hearing of them. I have to express the hope that that would not happen, because one would think that the costs and time of that hearing would be unlikely to outweigh the benefits that might come from it.
- 19 Over the luncheon adjournment, Mr Doyle has obtained instructions to the effect that his client wishes the earliest possible full hearing of both Notices of Motion. In those circumstances, I do propose to in substance continue the stay until the Notices of Motion have been disposed of. Since that continuance should only be for a relatively limited period, I would not propose that there be all the conditions which I mentioned in what I said just before the luncheon adjournment. I would not propose to make it any condition that there be an additional amount provided for security for costs. I would propose to make it a condition that there be an undertaking as to damages, but I would not require that that undertaking be secured. However, I would make it a condition that either there be a secured indemnity in respect of any shortfall of the \$202,254 by reason of any third party claims by the receivers or some other party, or alternatively the provision of an unequivocal disclaimer by the receivers of any suggestion of such claims. So I will try to formulate the orders now.
- 20 I stand over both Notices of Motion to Monday 22 May for hearing if a judge is able to embark on the hearing. I direct that Procorp serve on Napoli any expert's report to be relied on, a schedule setting out the other evidence to be relied on and any additional evidence-in-chief to be relied on, at or before 4pm on Friday 12 May.
- 21 I direct that notices to produce already served be treated as returnable before me on Monday 15 May at 10.15. I direct that Napoli's evidence be served at or before 4pm on Wednesday 17 May and that any evidence in reply be served at or before 12 noon on Friday. Notice of any deponents required for cross-examination to be given by 4pm on Friday 19 May. Napoli's additional evidence and a schedule of the evidence to be relied on to be served by 4pm on Wednesday 17 May.
- 22 On Procorp by its counsel giving the usual undertaking as to damages, I stay Einstein J's order for payment out of \$202,254 until the determination of Procorp's Notice of Motion on the following condition, namely that within 14 days Procorp provide either (1) an indemnity to Napoli to protect Napoli against loss through any third party claims to the \$202,254 paid into Court, such indemnity to be secured to the satisfaction of Napoli or the Registrar, or (2) an unequivocal acknowledgement by the receivers that the receivers put forward no claim to that money on behalf of themselves or on behalf of any other party.
- 23 I will add that, if that condition is not satisfied within 14 days, then the stay automatically comes to an end.
- 24 Costs of today I will make Napoli's costs in the Procorp's application. In other words if Napoli succeeds in the application they can get today's costs. If Procorp succeeds they cannot get today's costs.
- 25 I make the orders that I propose. The costs of today will be Napoli's costs in Procorp's motion.

Mr. Kalyk for claimant instructed by McManus Lawyers for claimant

Mr. Doyle (s) for opponent instructed by Doyles Construction Lawyers for opponent