Williams and Keane JJA and Helman J. Court of Appeal. Supreme Court of Queensland. 2nd March 2007

JUDGMENT : WILLIAMS JA:

The Court is primarily concerned with an appeal against a judgment given pursuant to section 19 of the Building and Construction Industries Payment Act 2004. That decision was delivered in the District Court on the 23rd of June 2006. The present appellant, who was the defendant to that decision, sought thereafter a stay pending the hearing of its proceeding bought against the background of section 100 of that Act wherein additional issues could be raised.

The Judge refused that stay but expedited the hearing of the common law proceeding which was number 1832 of 2006 in the District Court. The hearing took place in the latter half of 2006 and on the 14th of December the District Court Judge delivered reasons which resulted in a judgment being pronounced on the 15th of December 2006. That judgment is in terms as follows:

1.   Judgment in the proceedings, except for the plaintiff's claim with respect to defects, for the defendant in the amount of $33,992.81;

2.   Order that the judgment of 23 June 2006 in BD1443 be stayed for ever;

3.   Order that the plaintiff pay the defendant's costs of proceedings to be assessed on the standard basis up to and including 4 August 2006; and

4.   Make no order in respect of the reserved costs in these proceedings.

In consequence the judgment, the subject of the current appeal, was forever stayed and it could not be reviewed in this Court except on a hypothetical basis. The critical judgment determining final rights as between the parties was that delivered on the 15th of December 2006. However, the present appellant wanted to proceed with the appeal on the basis that there was still enforceable against it an order for costs pursuant to the judgment which had been delivered on the 23rd of June 2006.

It appears that there may have been some order after that date that might have related to the costs reserved on that date, but it is clear that the present respondent accepted that the order made on the 15th of December stayed the order for costs made on 23 June as well. That was made clear in a communication of the 13th of February 2007 between counsel for the present respondent and counsel for the present appellant. In that the following passage appears:

"As a consequence as the first judgment is permanently stayed the cost order and order for interest therein are stayed and of no effect."

The respondent has never resiled from that position and informed the Registry on or about 13 February that in the view of the respondent the appeal could not proceed as the judgment had been forever stayed. The matter, however, was listed at the insistence of the legal representatives of the appellant. It is clear now that the appeal has to be dismissed. So much was conceded this morning. The only matter left for consideration is the question of the respondent's costs of the appeal. As I've said, given the attitude of the legal representatives for the appellant the respondent had to prepare for a hearing today and in consequence they are entitled to costs.

In the Court's view it is preferable that costs be fixed and an end put to this litigation rather than making an order for the assessment of costs thrown away in the circumstances I have outlined. Counsel for the respondent intimated that on a quick calculation costs of the order of $16,000 would have been incurred and asked for an order for $12,500 in costs. In the Court's view even that is somewhat high in the circumstances, and the Court has determined that the appellant should pay the respondent's costs fixed in the sum of $10,000.

The orders of the Court will be:

1.   Appeal dismissed;

2.   The appellant pay the respondent's costs fixed in the sum of $10,000.

P W Hackett for the appellant instructed by Morgan Conley Solicitors
L C Alford for the respondent instructed by Clewett Corser & Drummond