JUDGMENT : REDLICH JA & HARGRAVE AJA: Court of Appeal. Supreme Court Victoria at Melbourne. 18th November 2008

I INTRODUCTION

1 The appellants are companies controlled by Adrian Corsello, a property developer. They were incorporated for the purposes of acquiring and developing properties in Brunswick, Victoria. The respondent is a builder. By a building contract entered into between the parties, the respondent agreed to build 96 apartments at the properties.

2 Towards the end of the project, disputes arose. Notwithstanding the unresolved nature of some of these disputes, a certificate of practical completion was issued by the contract superintendent on 22 February 2008.

3 On 30 May 2008, the respondent made a claim for payment of $588,921.84, comprised of the following amounts. First, the respondent claimed $124,498.10 '*for works done to 28 May 2008 finishing off the job as follows and as described in the table below*'. There followed a summary description of the works which are the subject of this claim. Second, the respondent claimed $304,753.74 in respect of delay costs. The claim included a description as to how those costs were calculated. Third, the respondent made a claim for payment to it of $159,670, being 50 per cent of the retention money which should have been held by the appellants in a joint account pursuant to the terms of the building contract. The building contract provides that 50 per cent of the retention money is to be paid to the builder upon the works reaching practical completion. As stated, that took place on 22 February 2008.

4 The payment claim was made pursuant to the terms of the building contract and, further or alternatively, pursuant to the Building and Construction Industry Security of Payment Act 2002 (Vic).

5 On 3 June 2008, the appellants responded to the payment claim. In summary, the appellants contended in their response that no payment was due to the respondent on three grounds. First, because the claim for delay costs had already been made and rejected by the independent quantity surveyor appointed by the parties to resolve disputes, Steven Foley. Second, because there were numerous defects which still existed in the works. Third, because the respondent had been late in achieving practical completion and that, as a result, the appellants were entitled to liquidated damages under the building contract.

6 Following the rejection of the payment claim, the respondent commenced proceedings in the County Court claiming $588,921.84 as a debt due under either the building contract or the Building and Construction Industry Security of Payment Act 2002. Further, the respondents sought an order that the appellants pay a further amount equal to 50 per cent of the retention sum under the building contract into a bank account in the joint names of the parties, to be held on trust for the respondent.

7 The respondent sought summary judgment in the County Court. The appellants responded with an application that the proceeding be stayed pursuant to s 57 of the Domestic Building Contracts Act 1995 (Vic), alternatively that those aspects of the proceeding which claimed relief other than under the Building and Construction Industry Security of Payment Act 2002 be excluded under r 9.04(b) or that those aspects of the statement of claim be struck out under r 23.02(c). A judge of the County Court dismissed the appellants' summons. An application for leave to appeal in respect of the interlocutory decision of the judge to dismiss their applications for the stay, exclusion or striking out of aspects of the statement of claim was abandoned at the commencement of oral argument.

8 The same County Court judge granted summary judgment to the respondent for the full amount of the payment claim, in the sum of $588,921.84 together with interest in the sum of $14,166.39 to the date of judgment on 10 September 2008. Further, the judge ordered that the appellants pay $159,670 into a joint account pursuant to the obligation under the building contract to establish such an account in respect of retention moneys. This amount comprised 50 per cent of the retention moneys. The other 50 per cent of those moneys formed part of the debt claim in respect of which summary judgment was granted.

9 The appellants have brought an appeal as of right against the summary judgment ordered against them. They seek a stay of execution on part of that judgment until the determination of their appeal. The stay is sought only in respect of that part of the judgment sum which relates to the payment claim for delay costs, in the sum of $304,753.74 plus interest. All grounds of appeal relating to the other aspects of the payment claim and consequent judgment were, quite properly, abandoned at the commencement of oral argument.

10 Further, the appellants seek an order that they have leave to amend their notice of appeal against the summary judgment ordered against them.

11 The respondent has made a cross-application for security for costs.

II STAY

12 We will first consider the application for a stay of execution on the summary judgment.

13 In considering whether a stay of execution should be granted pending appeal, this Court acts on the principle that a stay should only be granted in special or exceptional circumstances.[1] Of course, the class of cases which will constitute special or exceptional circumstances is not closed.

[1] For example, ***Cellante v G Kallis Industries Pty Ltd*** [1991] 2 VR 653.

14 There are two matters which are commonly considered as relevant to the determination of whether special or exceptional circumstances have been established. First, the prospects of success on appeal are relevant. However, consideration of the prospects of success should not constitute a full rehearsal of the arguments to be advanced on appeal. At the stage of considering whether a stay should be granted, the Court assesses the prospects of success 'in a fairly rough and ready way'.[2] Second, special circumstances will usually exist where there is a real risk that, in the absence of a stay, the appeal will be rendered nugatory if it succeeds. For example, the successful party will be unable to recover back from the respondent the amount of the judgment which has been paid.[3]

15 To determine whether the appeal has any merit sufficient to justify the granting of a stay, it is necessary to consider the basis upon which the judge granted summary judgment. The power to grant summary judgment is one which '*should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried*.'[4] The judge correctly stated this test.

16 The judge considered there was no real question to be tried because of the operation of cl 42.1 of the building contract. In this regard, it is relevant to note that this clause forms part of Australian Standard Contract AS 2124 – 1992, which is in common use throughout Australia. Relevantly, cl 42.1 provides:

> At the times for payment claims ... and upon issue of a certificate of Practical Completion ..., the Contractor shall deliver to the Superintendent claims for payment *supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require* ...
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> Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal ...
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> ...
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> Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate ...*or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim*. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.[5]

17 There was no issue before the judge that the respondent had made a payment claim for the amounts claimed in the proceeding. Nor was there any issue that, on the evidence before the judge, the Superintendent did not issue a payment certificate within 14 days of receipt of the payment claim or at all, as required by cl 42.1. Accordingly, 28 days having elapsed, the judge determined that the appellants were indebted to the respondent for the amount of the payment claim.

18 In reaching this conclusion, the judge applied the decision of Gillard J in ***Novawest Contracting Pty Ltd v Taras Nominees Pty Ltd.***[6] In that case, Gillard J held that cl 42.1 required payment in respect of a payment certificate issued by the Superintendent without any deduction on account of claims for set-off alleged by the Principal. By parity of reasoning, the judge decided that, in the absence of a payment certificate being issued, the amount of the respondent's payment claim must be paid in full without deduction after the expiration of 28 days.

19 In his reasons for judgment, the judge referred to the provision in cl 42.1 that a payment claim must be '*supported by evidence of the amount due to the Contractor*'. The judge referred to these words in the context of a submission made on behalf of the appellants that the decision of Gillard J in ***Novawest*** should not be followed because it enables a contractor to put forward a '*grossly exorbitant claim*'. In this context, the judge said that it may be necessary to imply a term that the claim was made bona fide but that no such consideration arose in this case.[7]

20 It was not submitted to the judge that the payment claim in this case did not comply with cl 42.1 because it was not supported by evidence of the amount due to the contractor or such information as the Superintendent may reasonably require. No reference was made to relevant authorities such as ***Brewarrina Shire Council v Beckhaus Civil Pty Ltd,***[8] a decision of the New South Wales Court of Appeal, ***Aquatec- Maxcon Pty Ltd v Minson Nacap Pty Ltd,***[9] or ***Sopov v Kane Constructions Pty Ltd,***[10] decisions of the Court of Appeal in this state.

21 In ***Aquatec-Maxcon***, the Court of Appeal followed the decision in *Brewarrina*. It was noted that it was important that there be uniform judicial construction of clauses in standard form contracts used throughout the Commonwealth.[11] It was held that summary judgment should not be granted in that case in reliance upon cl 42.1, because the contractor had arguably not complied with the condition precedent to its operation that the payment

2 ***Jackamarra v Krakouer*** (1998) 195 CLR 516, 522; ***Interactive Network Services Pty Ltd v NPV WA Securities Pty Ltd*** [2006] VSCA 225, [14].
3 ***Maher v Commonwealth Bank of Australia*** [2008] VSCA 122, [24] – [26].
4 ***Fancourt v Mercantile Credits Ltd*** (1983) 154 CLR 87, 99.
5 Emphasis added.
6 [1998] VSC 205.
7 Reasons [50].
8 (2003) 56 NSWLR 576.
9 (2004) 8 VR 16.
10 [2007] VSCA 257, [95] – [98].
11 (2004) 8 VR 16, [29].

claim be supported with evidence of the amount due and with such information as the Superintendent might reasonably require.

22 It is this point which is the subject of the appellants' application for leave to amend their notice of appeal. They wish to contend that the payment claim in this case was not supported by the necessary evidence of the amount due or information which the Superintendent may reasonably require. In our view, whether or not a payment claim is supported by evidence of the amount due or information reasonably required by the Superintendent is a question of fact to be determined in all of the circumstances of the case. This question cannot usually be determined by reading the payment claim in isolation, although there may be cases where that is so. For example, where the payment claim is more detailed than the claim in this case and attaches all of the necessary supporting documentation to evidence the claim. However, the sufficiency or otherwise of the evidence put forward with the payment claim to establish the amount due will often raise an evidential dispute between the parties which is a triable issue.[12]

23 It was submitted on behalf of the appellants that the payment claim in this case was not supported by any evidence and that claims for extensions of time require evidence and information to support them. They are not straightforward claims. It was submitted that a triable issue arises from the face of the payment claim and the lack of any evidence to support it. It was submitted on behalf of the respondent that the proper construction of cl 42.1 has the result that it is only where the Superintendent has requested information or evidence of a particular kind prior to the payment claim being lodged that cl 42.1 contains a condition precedent to its operation. Only then need the payment claim be supported with evidence of the amount due and with such information as the Superintendent might reasonably require. Reliance was placed upon the judgment of Ipp JA in ***Brewarrina***.[13] In our view, the dispute concerning the requirements of the condition precedent arising under cl 42.1 of the building contract should not be determined in the brief consideration of the merits which is required for the purposes of considering whether a stay ought to be granted. The case put forward on behalf of the appellants is in our view arguable.

24 It may be that, on the full hearing of the appeal, the Court allows the point to be taken and the grounds amended. As counsel for the appellants pointed out in their written submissions, the rule that an appellant will not generally be permitted to raise on appeal a point not argued below is not applied with the same rigour where the judgment appealed from was not given at trial.[14] This is especially so where the appeal is from a summary judgment, as here. Accordingly, there are reasonable prospects that the Court will allow the application for leave to amend to raise this point. However, we prefer not to deal with the application at this time, and to leave its determination until the hearing of the appeal. For present purposes, it suffices that, based upon this point alone, it cannot be said that the appellants have no prospects of success on the final hearing of their appeal.

25 Further, the appellants seek to adduce new evidence not placed before the County Court judge. That evidence includes evidence that the Superintendent may have informally issued a payment certificate by an e-mail dated 3 June 2008, well within the 14 day period specified in cl 42.1. Once again, whether or not this new evidence should be admitted is a matter to be determined on the hearing of the appeal. However, in a summary judgment context, it cannot be said that the application to rely upon the fresh evidence is without prospect of success.[15]

26 It remains to be considered whether the appellants have established special or exceptional circumstances justifying a stay. It was submitted on behalf of the appellants that the appeal may be rendered nugatory if no stay is granted because there is a real doubt as to the capacity of the respondent to repay the judgment sum if the appeal succeeds. In this regard, reliance was placed upon the fact that the only evidence available to the appellants of the respondent's assets is that it is a $2 company, the subject of two registered charges and the owner of four properties over which security is held. As to those four properties, one comprises three separate dwellings which are on the market for sale and the other three are car parking spaces outside of the CBD which may have little, if any, value. Although no adverse inference can be drawn from the fact that requests of the respondent to provide detail of its equity in the properties owned by it have been refused, the respondent did not file evidence that addressed the concerns raised by the appellant. In these circumstances, it was submitted that there is a real risk that the appellants will be deprived of the fruits of a successful appeal if a stay of execution is not granted.

27 Alternatively, the appellants submit that they should be granted a stay on the condition that they secure the judgment sum to the satisfaction of the Court. In this regard, Mr Corsello has deposed that the appellants have approximately $4 million in equity in the apartments which have not yet been sold. However, he has also deposed that, in the current economic climate, the appellants are having difficulty in raising any finance in the absence of valuations and there are considerable delays in obtaining valuations at the present time.

28 In considering the Court's discretion to grant or withhold a stay, it is also relevant that the appellants have not provided any explanation for their conduct, in obvious breach of the building contract, in failing to establish an account in the joint names of the parties for the amount of the retention moneys. This conduct does not advantage the appellants and Mr Corsello's position.

12 ***Aquatec-Maxcon*** (2004) 8 VR 16, [28].
13 (2003) 56 NSWLR 576, [42] – [44].
14 ***Doherty v Murphy*** [1996] 2 VR 553, 562.
15 Ibid 562 - 3; ***Wickstead v Browne*** (1992) 30 NSWLR 1, [11].

29 In all the circumstances, balancing the prima facie position that a successful party is entitled to the fruits of a judgment and the risk that a successful appeal will be rendered nugatory, and taking into account the prospects of success on appeal and the conduct of the appellants in failing, for unexplained reasons, to establish a joint account in respect of the retention moneys or pay the amounts now admitted to be due, we would exercise the discretion to grant a stay of execution, but only on the following conditions. First, it is accepted that the stay of execution should be limited to the amount claimed in respect of delay costs of $304,753.74 and interest thereon. Second, the stay should be conditional upon the appellants, within 21 days, providing security for that sum, paying the balance of the judgment sum ($284,168.10 plus interest) to the respondent and complying with paragraph 2 of the judge's order, that the balance of the retention amounts be placed into a joint account in accordance with the building contract.

III SECURITY FOR COSTS

30 We turn to consider the application for security for costs. On the one hand, Mr Corsello deposes that the appellants have $4 million equity in the unsold apartments. On the other hand, Mr Corsello deposes that the appellants are under 'considerable financial strain' and have difficulty in raising finance. In these circumstances, there is reason to believe that the appellants may be unable to pay the respondent's costs if the appeal is unsuccessful. We note that the appellants have been trying for some months now to obtain a valuation of the unsold apartments, without success. Some apartments are in the process of being sold. No undertaking is offered that the remainder, or at least a sufficient number to satisfy the unpaid judgment, will not be sold. Further, the conduct of the appellants in failing to establish the requisite joint account in respect of the retention amounts under the building contract, and their failure to provide any explanation as to why that was not done, is a relevant factor to take into account in determining whether there are special circumstances under r 64.24(2). In all the circumstances, we would order that the appellants provide security for costs in a form acceptable to the respondent, or as ordered by the Court. It seems to us that there is no reason why security over some of the unsold apartments should not be sufficient. We note that Mr Corsello has sworn that the appellants intend to retain between 20 and 25 apartments in any event.

31 As to the amount of security, taking into account the abandonment of grounds of appeal, and the abandonment of the application for leave to appeal in respect of the Domestic Building Contracts Act issue, we would reduce the estimated costs put forward by the solicitor for the respondents from $60,000 to $40,000.

Mr P B Murdoch QC with Mr N Frenkel instructed by MGA Lawyers
Mr G J Digby QC with Mr R Andrew instructed by Noble Lawyers