

FAÇADE INNOVATIONS PTY LTD V TIMWIN CONSTRUCTIONS PTY LTD & ORS

Supreme Court of New South Wales Court of Appeal – 8 June 2005

FACTS

Timwin Constructions Pty Ltd ('Timwin') as builder, entered into a subcontract with Façade Innovations Pty Ltd ('Façade') as the subcontractor for construction works. Façade made a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) ('the Act') in the sum of \$498,664, the majority of which was for variation work.

Timwin provided a Payment Schedule proposing to pay nothing and claimed damages for delay and an amount of \$73,615 allegedly over-paid. Façade submitted an Adjudication Application and the Adjudicator determined that Façade was entitled to a progress payment of the whole amount claimed.

Façade then obtained a judgment for that amount, pursuant to section 25 of the Act, in the Supreme Court.

Timwin commenced separate proceedings in the Supreme Court, seeking a judgment that the Adjudication Determination was void on the grounds that the Adjudicator did not exercise his powers in good faith. In the course of the proceedings, Timwin paid into court a sum of just over \$500,000.00, representing the result of the Adjudication Determination, and the Court ordered that Façade take no steps to enforce the judgment until further order. The Supreme Court held that the Adjudication Determination was void and ordered that money to be paid into Court by Timwin be paid out to it.

Façade submitted that there should be a further stay pending an anticipated appeal. Further, that the appeal has a substantial chance of success, that the policy of the Act is to provide for payments to subcontractors in accordance with Adjudication Determinations, and that the evidence indicates there could be difficulty in obtaining payment from Timwin if the appeal was successful and the money was not retained in court.

Timwin submitted that stays in relation to appeals in matters under the Act should not be granted merely because of anticipated difficulty in recovering money paid, much less in enforcing judgments. Further, that it was only in exceptional circumstances that security would be ordered for a judgment, and that the circumstances of this case fell far short of the grant of a Mareva injunction. Furthermore, Timwin was a company with substantial assets able to meet the judgment if the Adjudication Determination was re-established

ISSUE

Whether the stay should be extended.

FINDING

The Court ordered that the money be paid out to Timwin of money paid into Court.

QUOTE

At paragraph 8 Hodgson JA commented:

“... it seems to me that the policy of behind s25 really requires that the amount paid into court remain in court unless and until that judgment is set aside.”

Para [15] “My impression is that the appeal is a reasonable appeal, but that its success is far from assured. Apart from considerations associated with the policy of the Act in general and s25 in particular, I do not think a case is made out for a stay simply on the basis that there is a reasonable appeal and there might be problems in enforcing the judgment if the money is not retained in court. I am not inclined to the view that considerations associated with the policy of the Act in general and s25 in particular would justify a stay by reason of the existence of a reasonable appeal but, in saying that, I do not wish to preclude that matter being further considered on the application to set aside the judgment.”

IMPACT

A stay to maintain a payment into court after a decision that an Adjudicator’s Determination is void, is unlikely to be granted merely by reason of the existence of a reasonable appeal. [2005] NSWCA 197

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