DOYLES
CONSTRUCTION LAWYERS

# LUCAS STUART PTY LIMITED V COUNCIL OF THE CITY OF SYDNEY [2005] NSWSC 925

Supreme Court of New South Wales – 13 September 2005

## FACTS

Lucas Street Pty Ltd ("Lucas") entered into a construction contract with the Council of the City of Sydney ("the Council") for the reconstruction of the Customs House. Lucas served a Payment Claim under the Building and Construction Industry Security of Payment Act 1999 (NSW) ("the Act") in the sum of $3,952,474 for variations and alleged unpaid contract sum amounts. The Council failed to issue a Payment Schedule under section 14 of the Act within the 10 business days after service of the Payment Claim. Following the service of the Payment Claim, the due date for payment passed and Lucas did not receive any payment from the Council.

Lucas then sought summary judgment for the Payment Claim in the Supreme Court on the basis of section 15(2)(a) of the Act, which provides that "a claimant...may recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction..."

The Council, by way of defence, sought to contend that Lucas engaged in conduct that was misleading and deceptive concerning the service of the Payment Claim and, further, that Lucas should be estopped so as to prevent Lucas from relying on the documents provided forming the Payment Claim as Lucas had allegedly foreshadowed the provision of a number of contractual claims that awaited resolution, rather than a Payment Claim.

The Court found that notwithstanding the claims for estoppel and misleading and deceptive conduct, the proper analysis was that Lucas was entitled to summary judgment for the total amount claimed. The Council then sought to appeal that decision.

## ISSUE

Whether the Council is able to appeal the matter.

## FINDING

The Court refused to grant relief to the Council.

## QUOTE

Palmer J held at paragraphs 5 to 7: *[5] "Mr Feller says the Plaintiff's ability to repay the Defendant at the end of the day is in question because the Plaintiff is subject to a charge over all of its assets securing a very substantial debt and, by virtue of the terms of the guarantee required by Bryson JA, that guarantee will no longer be in force when proceedings are resolved on a final basis. Mr Feller therefore says that the terms of the guarantee, as presently framed, expose the Defendant to a substantial risk of injustice if its case is ultimately upheld in the final proceedings. It is for this reason that Mr Feller now seeks from this Court a stay of the judgment of Einstein J." [6] "Bryson JA was concerned with setting the terms upon which the*


Jim Doyle
1800 888 783
jdoyle@doylesconstructionlawyers.com
www.doylesconstructionlawyers.com

*Court of Appeal would either grant or refuse the stay. It is now said that the terms as fixed by his Honour operate in a certain circumstance to produce injustice.*

*In my opinion, that is a matter which should be taken up again with Bryson JA so that his Honour can have the benefit of further argument and may, if he considers it appropriate, reframe the terms upon which he made the order dissolving the stay. It is not for a judge at first instance to interfere with the terms of a stay which has been granted or refused by the Court of Appeal. So to do would be, in effect, for a judge at first instance to sit in review of the Court of Appeal – that would be completely inappropriate, to say the least." [7] "In those circumstances, I decline to grant the relief sought..."*

**IMPACT**

If a Respondent believes that it may be exposed to a substantial risk of injustice in respect of a guarantee which secures an Adjudicated Amount pending final dispute, a Respondent should make its submissions at first instance.


Jim Doyle
1800 888 783
**jdoyle@doylesconstructionlawyers.com**
**www.doylesconstructionlawyers.com**