

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2011 0039

PEARL HILL PTY LTD

Appellant

v

CONCORP CONSTRUCTION GROUP (VIC) PTY LTD

Respondent

JUDGES

TATE JA and HARGRAVE AJA

WHERE HELD

MELBOURNE

DATE OF HEARING

8 April 2011

DATE OF JUDGMENT

8 April 2011

MEDIUM NEUTRAL CITATION

[2011] VSCA 99

JUDGMENT APPEALED FROM

Concorp Construction Group (Vic) Pty Ltd v Pearl Hill Pty Ltd (Unreported, County Court of Victoria, Judge Shelton, 9 March 2011)

APPEAL - Construction contract - Payment claim made under s 14(1) of the *Building and Construction Industry Security of Payment Act 2002* - No payment schedule served - County Court proceedings seeking judgment for payment claim - Summary judgment in favour of plaintiff - Stay of execution sought pending appeal - Whether leave to appeal required - Held: Leave to appeal required as judgment on payment claim does not finally dispose of the rights of the parties.

COSTS - Notice of discontinuance of appeal - Appeal without merit - Indemnity costs ordered - *Supreme Court (General Civil Procedure) Rules 2005* r64.14(4) applied.

Appearances:

For the Appellant

For the Respondent

Counsel

Mr M Y Bearman with

Mr E Konstantinou

Mr J F Richardson

Solicitors

HDL Legal & Consulting Pty
Ltd

Oldham Naidoo Lawyers
Pty Ltd

TATE JA:

1 I invite Hargrave AJA to deliver the first judgment.

HARGRAVE AJA:

2 Yesterday afternoon, the appellant filed a notice of discontinuance of its appeal. As a result, the appeal was wholly discontinued under rr 64.14(1) and (2) from the time of service of that notice on the respondent.¹ In such circumstances, the ordinary rule under r 64.14(3) is that the appellant must pay the respondent's costs unless the Court otherwise orders. Those costs are party-party costs. However, r 64.14(4) gives this Court the power, notwithstanding the discontinuance of an appeal, to order that the appeal be not discontinued or to make such order as to costs or otherwise as it thinks fit. In my opinion, this is an appropriate case for this Court to exercise that power, and to make a special costs order against the appellant. This is because:

- (1) the appeal was incompetent, as leave to appeal was required;
- (2) leave to appeal would have been refused, as the proposed appeal had no prospect of success. Properly advised, the appellant ought to have appreciated this. In reaching that conclusion, I have considered all of the evidence and the written submissions filed by the parties and the oral submissions made on behalf of the appellant.
- (3) Accordingly, it would be unjust to the respondent if an order for indemnity costs was not made in its favour.

3 My reasons for these conclusions follow.

4 The appellant, Pearl Hill Pty Ltd, is the head contractor of a construction project being undertaken on property in Box Hill, Victoria. It engaged the respondent, Concorp Construction Group (Vic) Pty Ltd, to carry out concreting work

¹ *Supreme Court (General Civil Procedure) Rules 2005.*

on its behalf at the Box Hill property. The evidence indicates that the physical

construction work may in fact have been carried out on behalf of the respondent by a related company with the same control and ownership structure, Concorp (Vic) Pty Ltd. For convenience, I will refer to the respondent as 'Concorp Construction' and the related company as 'Concorp (Vic)'.

5 The construction contract was constituted by a written quotation from Concrete Constructions and Pearl Hill's acceptance of that quotation. No formal written contract was signed.

6 Following a dispute between the parties, Pearl Hill did not pay for a substantial amount of the construction work. Claims for progress payments of \$852,158.34 were outstanding. Accordingly, on 23 January 2011, Concorp Construction served a 'payment claim' on Pearl Hill for that amount, relying upon s 14(1) of the *Building and Construction Industry Security of Payment Act 2002* ('the Act'). A previous payment claim, for the same amount, had been served by Concorp (Vic) on 23 December 2010. The amount claimed was not paid, in whole or in part.

7 Further, although indicating in correspondence the possibility of a 'payment schedule' being served under s 15 of the Act, no payment schedule was ever served by Pearl Hill in reply to the payment claim. Accordingly, the amount of the payment claim became due and payable 10 days after it was served.² Further, Concorp Construction became entitled to sue and recover the unpaid portion of the payment claim in a court of competent jurisdiction.³

8 Next, Concorp Construction commenced proceedings in the County Court of Victoria under s 16 of the Act, seeking judgment for the whole of the amount of the payment claim. In that proceeding, Concorp Construction brought a claim for summary judgment. Following the enactment of the *Civil Procedure Act 2010*, the test to be applied as to whether a plaintiff is entitled to summary judgment is that a

² Sections 12(1)(b) and 15(4) of the Act.

³ Section 16(2)(a)(i) of the Act.

defendant's defence has 'no real prospect of success'.⁴

9 Pearl Hill opposed the application for summary judgment on the ground that Concorp Construction was the wrong plaintiff. It was submitted before the County Court, and in this Court, that the evidence established that no construction work had been carried by Concorp Construction, and all construction work had been carried out by Concorp (Vic). On that basis, it was contended that Concorp Construction had no entitlement to serve the payment claim upon which its proceeding, and application for summary judgment, depends. It was submitted on behalf of Pearl Hill that, on a proper construction of the Act, only the person who in fact carries out construction work is entitled to make a payment claim and to rely upon the other provisions of the Act entitling it to payment in respect of such a claim.

10 The trial judge rejected Pearl Hill's contentions. He found that the construction contract was made between Pearl Hill and Concorp Construction,⁵ and that the subsequent documents, in particular invoices issued by Concorp (Vic) for works performed under the contract, while indicating 'sloppy paperwork within the plaintiff's camp', were not sufficient to constitute a novation of the contract rendering Concorp (Vic) the contracting party in place of Concorp Construction. Those findings were obviously correct. Accordingly, although not expressly stating it in his oral reasons, the trial judge accepted that it was and remained Concorp Construction who had undertaken to carry out the construction work for Pearl Hill under the contract. On this basis, the trial judge found that Concorp Construction was entitled to rely upon the payment claim and granted summary judgment in its favour.

11 In the course of his oral reasons, the trial judge considered the structure and purpose of the Act, noting that an 'unduly technical' approach was to be avoided and that a robust approach was to be preferred. The judge was correct in that

⁴ *Civil Procedure Act 2010*, s 61.

⁵ This was conceded by counsel who appeared for Pearl Hill on the summary judgment application.

approach. He expressly referred to the decision of Vickery J in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*,⁶ where his Honour said:

The Act also manifests another central aspiration, that of freedom from excessive legal formality. The provisions demonstrate a pragmatic concern to provide a dispute resolution process which is not bedevilled with unnecessary technicality ... If the Victorian Act became prone to challenges founded on fine legal points, an important object of the Act would be defeated by the twin adversaries of cost and time.⁷

12 Pearl Hill has exercised what it contends is its right of appeal against the summary judgment entered against it. Pending the hearing and determination of its appeal, it seeks a stay of execution. It was submitted on behalf of Concorp Construction that leave to appeal was required. This submission was based upon the following reasoning.

13 First, s 74(2D) of the *County Court Act 1958* provides that an appeal does not lie to this Court from a judgment or order of the County Court 'in an interlocutory application' ... except with leave of this Court.

14 Second, it was submitted that the test for determining whether a judgment or order is final or interlocutory is whether the order, as made, finally disposes of the rights of the parties.⁸ That submission is correct.

15 Third, it was submitted that judgment pursuant to s 16 of the Act is not a 'final order', but is interlocutory only because it does not finally determine the rights of the parties to the relevant construction contract. It was submitted that a judgment on a payment claim provides interim relief only for the claimant, and does not finally determine the rights of the parties under the construction contract. Reliance was placed upon s 47 of the Act, which relevantly provides that the right to obtain judgment for an unpaid payment claim does not affect the rights of the parties under the relevant construction contract, and preserves the rights of the parties to have

⁶ [2009] VSC 156.

⁷ Ibid, [46].

⁸ *Licul v Corney* (1976) 180 CLR 213, 225.

their disputes determined in a court, by arbitration or by other dispute resolution proceedings. Specifically, sub-ss 47(3) and (4) of the Act oblige the Court, tribunal or arbitrator to make allowance for payments made under the Act by reason of the payment claim regime and provide that restitutionary orders may be made for any amount found to have been over-paid.

16 Reliance was also placed upon the judgment of Vickery J in *Grocon Constructors v Planit Cocciardi Joint Venture (No 2)*,⁹ where his Honour stated:

110 In undertaking this exercise I take into account that the main purpose of the Act is to ensure that any person who carries out construction work, or provides related goods or services, is able to promptly recover progress payments. To advance that purpose, the Act sets up a unique form of adjudication of disputes over the amount due for a claimed progress payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided in separate proceedings, either by a court or by an agreed dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid.

111 For this reason the Act preserves the right of a claimant or a respondent to commence proceedings under the relevant construction contract, including proceedings in a court, arbitration proceedings or other dispute resolution process: s.47(2). Further, in any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal is required to make allowance for any sum paid pursuant to the Act in any order which is made: s.47(3)(a); and may make appropriate orders for the restitution of any amount paid under the Act on the interim basis provided for: s.47(3)(b). Thus no *res judicata* or issue estoppel is created by reason of an adjudicator's determination.¹⁰

17 It was submitted that these statements by Vickery J should apply equally to a judgment obtained in the absence of a payment schedule, as here.

18 I accept the submissions made on behalf of Concorp Construction. The judgment sought to be appealed from does not finally dispose of the rights of the parties to the construction contract. It provides only interim relief and may be subject to adjustment in subsequent proceedings in a court or tribunal, or in arbitral

⁹ [2009] VSC 426.

¹⁰ *Ibid*, [110] and [111].

or other dispute resolution proceedings pursuant to the contract. Accordingly, the appeal as filed is incompetent. Before leaving that issue, however, I should note that in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*,¹¹ Hodgson JA appeared to accept that an order granting summary judgment for the amount of a payment claim under the equivalent New South Wales legislation 'would appear to finally dispose of the rights of the parties and thus not be interlocutory.'¹² In that case, an application had been made for leave to appeal. The application was treated by a three judge Court of Appeal as the hearing of the appeal. Accordingly, it was unnecessary to decide whether leave to appeal was necessary. In the circumstances, the Court granted leave to appeal and dismissed the appeal. In Queensland, the practice would appear to be that summary judgment based upon a payment claim under the Queensland equivalent of the Act is treated as interlocutory, thus requiring leave.¹³

19 It is accordingly necessary to consider whether leave to appeal should be granted. In that regard, the principles to be applied are not in doubt. The Court must first consider whether the decision sought to be appealed from is attended with sufficient doubt to warrant it being reconsidered on appeal and, if so, whether substantial injustice will be caused to the applicant for leave if the order is allowed to stand.¹⁴

20 The first step in considering whether to allow leave to appeal involves an examination of the prospects of success. That is also the first consideration in considering whether to grant a stay of a judgment which is appealed against as of right. 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

¹¹ (2005) 64 NSWLR 462.

¹² *Ibid*, [5].

¹³ This was the approach adopted in *T & M Buckley Pty Ltd v Fifty-seven Moss Rd Pty Ltd* [2010] QCA 381.

¹⁴ *Niemann v Electronic Industries Ltd* [1978] VR 431, 433.

exceptional circumstances.¹⁵ Although, the class of cases which will constitute special or exceptional circumstances is not closed, there are two matters which are commonly considered as relevant. 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'.¹⁶ 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.¹⁷

21 Accordingly, in this case, the same initial enquiry must be made by this Court, whether leave to appeal is required or not. In my opinion, whether the application is for leave to appeal or for a stay pending determination of an appeal as of right, the application should not be granted if the appeal has no prospect of success. Sometimes, that may be apparent from only brief argument. As appears below, this is such a case. Pearl Hill's contention that it is only the person who in fact carries out construction work who can claim the benefit of the Act has no merit. On a proper construction of the whole of the Act, a person such as Concorp Construction, who undertakes pursuant to a building contract to carry out construction work, is entitled to receive, and is able to recover, progress payments.

22 The submission that it is only the person who in fact carries out the work who is entitled to take advantage of the Act would appear to have been based upon s 1 of the Act, which provides:

The main purpose of this Act is to provide for entitlements to progress payments for persons *who carry out construction work* or who supply related

¹⁵ For example, *Cellante v G Kallis Industries Pty Ltd* [1991] 2 VR 653.

¹⁶ *Jackamarra v Krakouer* (1998) 195 CLR 516, 522; *Interactive Network Services Pty Ltd v NPV WA Securities Pty Ltd* [2006] VSCA 225, [14].

¹⁷ *Maher v Commonwealth Bank of Australia* [2008] VSCA 122, [24] - [26].

goods and services under construction contracts.¹⁸

23

In my opinion, s 1 provides the only textual support for Pearl Hill's argument. The remaining provisions of the Act which are relevant all go the other way. They support the conclusion that the construction contractor who undertakes to carry out the construction work under a construction contract, such as Concorp Construction, is entitled to the benefits provided by the Act. Thus:

(1) Section 3(1) of the Act provides:

(1) The object of this Act is to ensure that *any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*¹⁹

(2) Section 9(1) of the Act provides:

(1) On and from each reference date under a construction contract, a person –

- (a) *who has undertaken to carry out construction work under the contract; or*
- (b) *who has undertaken to supply related goods and services under the contract –*

*is entitled to a progress payment under this Act, calculated by reference to that date.*²⁰

(3) Section 11(1)(a) of the Act provides:

(1) Construction work *carried out or undertaken to be carried out under a construction contract is to be valued –*

- (a) *in accordance with the terms of the contract;*²¹

(4) Section 12(1) of the Act provides:

(1) *A progress payment under a construction contract becomes*

¹⁸ Emphasis added.

¹⁹ Emphasis added.

²⁰ Emphasis added.

²¹ Emphasis added.

due and payable –

- (a) on the date on which the payment becomes due and payable *in accordance with the terms of the contract*; or
- (b) if the contract makes no express provision with respect to the matter, on the date occurring 10 business days after a payment claim is made under Part 3 in relation to the payment.²²

(5) Section 14(1) of the Act provides:

- (1) A person referred to in section 9(1) who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

24 Under s 15 of the Act, a recipient of a payment claim may reply by providing a 'payment schedule' to the claimant within a fixed time. In the absence of a payment schedule being served, the amount of the payment claim becomes a debt due to the claimant. By s 16 of the Act, the unpaid amount of such a payment claim is recoverable as a debt in a court of competent jurisdiction.

25 Pearl Hill did not avail itself of the payment schedule procedure. Rather, in an affidavit sworn by its director in opposition to the summary judgment application, the director swore only that Pearl Hill 'has a large claim for defective works performed at this site'. No particulars were given. That claim was insufficient to satisfy the payment schedule requirements, and in any event was not made within the specified time contained in s 15 of the Act.

26 A review of the Act as a whole makes it plain that the construction contractor who enters into the construction contract may make a payment claim for works undertaken pursuant to the obligations contained in the construction contract, whether those works are performed by the contracting party or by another on its behalf. In this case, the evidence indicates only that the works may have been performed by a related company, with the same ownership, control and workforce

²² Emphasis added.

as the contracting party. In these circumstances, the trial judge rightly rejected Pearl Hill's contentions.

27 In my opinion, the trial judge was right to grant summary judgment. I respectfully adopt the words of Finkelstein J in *Protectavale Pty Ltd v K2K Pty Ltd*,²³ that the payment claim regime:²⁴

places the claimant in a privileged position in the sense that he acquires rights that go beyond his contractual rights.²⁵ The premise that underlies the legislation is that cash flow is the lifeblood of the construction industry²⁶ and that the principal under a construction contract should pay now and argue later.²⁷

28 For the above reasons, notwithstanding the filing of a notice of discontinuance, an order for indemnity costs should follow under r 64.14(4).

TATE JA:

29 I agree with Hargrave AJA. The order of the Court will be that, pursuant to r64.14(4), the appellant pay the costs of the appeal, including the costs of the application for a stay of execution pending appeal, on an indemnity basis.

23 [2008] FCA 1248.

24 *Ibid*, [7].

25 *Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42, 50.

26 *Amflo Constructions Pty Ltd v Jefferies* [2003] NSWSC 856, [27].

27 *Multiplex Constructions* [2003] NSWSC 1140, [96].