

# SUPREME COURT OF QUEENSLAND

CITATION: *Vadasz v Bloomer Constructions (Qld) Pty Ltd* [2009] QSC 261

PARTIES: **MICHAEL CHRISTOPHER VADASZ TRADING AS AUSTRALIAN PILING COMPANY**  
**(ABN 70 564 737 20 5)**  
Plaintiff  
v  
**BLOOMER CONSTRUCTIONS (QLD) PTY LIMITED**  
**(ACN 071 344 100)**  
Defendant

FILE NO/S: BS6628/09 and BS6449/09

DIVISION: Trial Division

PROCEEDING: Applications

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 3 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 2 September 2009

JUDGE: Douglas J

ORDER:

- [1] Dismiss the defendant's application for a stay of the judgment for the plaintiff in the sum of \$415,079.50 obtained pursuant to the *Building and Construction Industry Payments Act 2004*;
- [2] Order that the sum of \$430,498.76 paid into court by the defendant pursuant to the consent order dated 23 June 2009 and any accretions thereon be paid out as to \$65,224.00 to Independent Reinforcing Supplies Pty Ltd and, as to the balance, to the solicitors for the plaintiff, on their undertaking to pay the other two creditors referred to in the proceedings, Wagners Concreting Pty Ltd and Dellit Concreting, within 48 hours of receipt of the funds.
- [3] Order that the defendant pay the plaintiff's costs of and incidental to each application in matter 6628 of 2009;

- [4] Further order that the applicant, Bloomer Constructions (Qld) Pty Ltd, pay the second respondent's, Michael Christopher Vadasz's, costs of and incidental to the application in BS6449 of 2009.
- [5] Further order in matter BS6449 of 2009 that paragraph 1 of the order made by consent before the Chief Justice on 23 June 2009 be dissolved.

**CATCHWORDS:** CONTRACT — BUILDING AND CONSTRUCTION — where plaintiff has recovered adjudication determination and judgment against defendant — where plaintiff is indebted to subcontractors and does not fully reveal his financial circumstances — where defendant asserts cross-claim for damages and defective works — defendant seeks stay and retention of money paid into Court by it — whether refusal of stay will cause irreparable prejudice.

*Building and Construction Industry Payments Act 2004 s 100*

*Bloomer Constructions (Qld) Pty Ltd v O'Sullivan & Anor* [2009] QSC 220, referred.

*Grosvenor Constructions (NSW) Pty Ltd (In administration) v Musico* [2004] NSWSC 344, followed.

*Herscho v Expile Pty Ltd* [2004] NSWCA 468, followed.

*McLaughlin's Family Restaurant v Cordukes Ltd* [2004] NSWCA 447, followed.

*Queensland Bulk Water Supply Authority v McDonald Keen Group Ltd Pty* [2009] QSC 165, followed.

*RJ Neller Building Pty Ltd v Ainsworth* [2008] QCA 397, applied.

*Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2009] QCA 254, applied.

*Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 571, applied.

*Veolia Water Solutions v Kruger Engineering [No 3]* [2007] NSWSC 459, followed.

**COUNSEL:** Mr J B Sweeney for the plaintiff  
Mr M M Stewart SC and Mr G D Beacham for the defendant

**SOLICITORS:** Michael Sing Lawyers for the plaintiff  
Romans and Romans Lawyers for the defendant

- [6] The plaintiff, Mr Vadasz, applies for an order that a sum of money held in Court be paid out to him in satisfaction of a judgment obtained by him under the *Building and Construction Industry Payments Act 2004*. The defendant, Bloomer Constructions (Qld) Pty Ltd has applied for a stay of the judgment and resists any order that the money be paid out to Mr Vadasz, although it would consent to amounts totalling \$171,913.00 being paid out to three creditors of Mr Vadasz.

## **Background**

- [7] The dispute has its origins in a contract between the parties by which Mr Vadasz carried out perimeter piling work for a two story basement to a building in Newstead. A dispute arose which was adjudicated pursuant to the Act resulting, on 22 June 2009, in a judgment for Mr Vadasz of \$415,079.50. On 23 June 2009 he agreed not to take any steps to enforce that judgment pending an application by Bloomer Constructions for judicial review of the determination and on condition that it pay \$430,498.76 into court. The application for judicial review was heard on 10 July 2009 and dismissed on 7 August 2009<sup>1</sup>. No order as to costs has yet been made in that matter.
- [8] Bloomer Constructions foreshadowed an application for a stay on 7 August 2009 in correspondence with Mr Vadasz's then solicitors and also sought evidence from them about Mr Vadasz's financial resources. It was not provided.
- [9] The scheme under the Act permits early but preliminary adjudication of disputes between builders and sub-contractors. The adjudicator's decision is subject to a later determination of the parties' rights in civil proceedings arising under the relevant construction contract; see s 100.
- [10] The jurisdiction to grant a stay of a judgment obtained under the adjudication procedure is recognised although there was some controversy between the parties in this matter as to the test which should be applied in deciding whether or not to grant a stay. I shall deal with that issue later.

## **Bloomer Constructions' damages claims**

- [11] Bloomer Constructions' submissions to justify a stay referred to a claim it will pursue for rectification of the piling work done by Mr Vadasz, the strength of which is established, it submits, by a report of a structural engineer, a Mr John Reid. At the time of the adjudication it had not obtained quotations for the rectification of those defects but has done so now. Those quotations range between \$203,000.00 and \$225,000.00 plus GST as the cost of rectification of the defects. The adjudicator recognised that some aspects of the piling may require rectification. He was not prepared to adopt the valuation for the work given by Bloomer Constructions on the evidence before him and accordingly adopted a valuation then provided by Mr Vadasz as \$12,800.00. There is no evidence to contradict the current higher valuations of the rectification work before me.
- [12] Consequently, it seems to me reasonable, to proceed on the assumption that Bloomer Constructions has a prima facie case that it should recover another \$225,000.00 plus GST in its civil proceedings. Bloomer Constructions also pointed to other potential aspects of its civil claim including damages for failure to provide a certificate of inspection in respect of the perimeter piling work which they estimate could cost in excess of \$100,000.00 and damages for breach of warranty in respect of the number of rock anchors required for the perimeter piling design, something dealt with by the adjudicator adversely to it on the basis that Mr Vadasz provided a design in accordance with the contract which was subsequently varied by Bloomer Constructions changing the specified depth of excavation.

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<sup>1</sup> See *Bloomer Constructions (Qld) Pty Ltd v O'Sullivan & Anor* [2009] QSC 220.

- [13] Mr Stewart SC for Bloomer Constructions relied on those aspects of its claim in the civil proceedings to argue that it was likely that his client would recover a significant judgment and, if the money in court were paid out, it would not recover its entitlements. He also argued that his client had a strong claim to recover damages from Mr Vadasz in the amount paid into court less the payments it is willing to see made to Mr Vadasz's three subcontractors. The amount in court is \$430,499.76. The amount agreed to be paid to those creditors is \$171,913.00 which leaves the result that \$258,585.76 would remain in court which he submits should be left there for fear that, if it is paid out to Mr Vadasz, it will never be recoverable because of his likely impecuniosity.
- [14] Bloomer Constructions' submissions also drew attention to its offer to have its claim for damages determined by a fast track arbitration with a view to having the issue resolved as quickly as possible but there was no evidence before me about how long that process would take.
- [15] Mr Sweeney for Mr Vadasz submitted that a claim for approximately \$800,000.00 made in the adjudication by his client but not allowed by the adjudicator remained to be determined in the civil proceedings also. He drew attention to the fact that some of the claims argued before the adjudicator have been abandoned in the civil proceedings that have now been instituted on behalf of Bloomer Constructions and to the fact that his client had succeeded before the arbitrator in contesting many of those claims.

#### **Financial position of Mr Vadasz**

- [16] The other principal factual consideration relevant to the determination of the matter, therefore, is the financial position of Mr Vadasz. The available evidence demonstrates that he has not paid the three subcontractors to whom money is owed by him from this contract. He has also informed a lawyer for another company that if he received the sum payable under the adjudication decision the majority of the amount would go to his banks and there would be some money to pay off his suppliers. He has not provided evidence of his financial position. He does own real property in South Australia subject to mortgages to the Commonwealth Bank but there is no evidence of the amount of the mortgages or the value of the land.
- [17] The plaintiff asks me to infer that Mr Vadasz is either insolvent or nearly so because of the absence of evidence from him and to draw the inference that it is very likely that if the money in court is paid out it will be used up in payment of his debts and there will be no assets or other resources available to Bloomer Constructions should it succeed in its claims.
- [18] Mr Sweeney argued that it was incumbent on Bloomer Constructions to establish evidence relating to Mr Vadasz's financial position. He submitted that there was no compelling evidence that the proceedings which would determine the final rights of the parties would result in a balance in favour of Bloomer Constructions. On the evidence payment of the judgment sum would also occasion no financial hardship to that company.
- [19] He argued that there was unexplained delay from 7 August to 28 August in the application for a stay but, by the same token, his client had not applied for payment out of the monies in court until 28 August. Delay did not seem to me to loom large as a disentitling factor in respect of either party.

- [20] In arguing that his client bore no onus to lead evidence about his financial position he drew my attention in particular to the recent decision of the Court of Appeal in *Specialised Explosives Blasting & Training Pty Ltd v Huddy's Plant Hire Pty Ltd* [2009] QCA 254 at [53]–[54] where Muir JA rejected the proposition that a respondent to a security for costs application wishing to rely on the circumstances that an order for security for costs would frustrate the continuance of the action had a duty to make full disclosure of all relevant financial matters. His Honour said that a litigant under an adversarial system of litigation has no duty to its opponent but has obligations imposed on it by the rules of court and also pointed out that there had been no cross-examination of the deponent of the relevant affidavits in that case, a feature shared with the procedure adopted in this case where Mr Vadasz swore two affidavits but was not cross-examined on them.
- [21] He did say in a draft of one of those affidavits that payment of the adjudicated sum would put his business in a more sound financial position by allowing him to pay immediate creditors of the business. He also said that one of those creditors had brought bankruptcy proceedings against him which were due to be heard on Friday 4 September 2009. The amount of that creditor's claim is \$65,224.00. I could readily infer from that evidence that he may not be in a strong financial position but that appears to relate directly to the non-payment of the adjudicated sum. It was also put, on his behalf, that he has been trading since 1992 and that the only complaints in evidence relate to people unpaid because of the failure of Bloomer Constructions to pay the adjudicated sum to him. It is not clear that he would necessarily be bankrupt now or, perhaps more significantly, that he would be unable to repay Bloomer Constructions at some stage in the future if it were to be decided that it was entitled to a judgment against him; see the discussion by Einstein J in *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 571 at [23].

### **Principles relating to the grant of a stay**

- [22] In that context, Mr Sweeney drew my attention to a number of authorities discussing the principles that should be applied to applications for stays of judgments obtained under the adjudication provisions of the Act.
- [23] They commence with the decision of Einstein J in *Grosvenor Constructions (NSW) Pty Ltd (In administration) v Musico* [2004] NSWSC 344 at [31]–[34] where his Honour emphasised the policy of the Act that successful claimants should be paid and said at [31]:

“For that reason, there is a sound reason for making stays less readily available in relation to debts arising under the Act, in contrast to the position in relation to appeals arising from curial proceedings. For example, in cases such as the present, the Court might require more than a ‘*real risk* that [the respondent] will suffer prejudice or damage, if a stay is not granted’.”

- [24] His Honour went on to say that he accepted that in a case such as the one before him where there was a certainty that the defendant's rights would be otherwise rendered nugatory and that it would suffer irreparable prejudice the proper and principled exercise of the court's discretion is to grant a stay.

- [25] Hodgson JA referred to that passage with approval in *Herscho v Expile Pty Ltd* [2004] NSWCA 468 at [2]–[3]; see also Giles JA in *McLaughlin’s Family Restaurant v Cordukes Ltd* [2004] NSWCA 447 at [9]–[10] and *Veolia Water Solutions v Kruger Engineering [No 3]* [2007] NSWSC 459 where McDougall J said at [72]–[74]:

“[72] The exercise of the discretion to grant a stay requires a balancing of the relevant factors. Two factors of particular significance in this case are:

- (1) On the one hand, the policy of the Security of Payment Act, that successful applicants be paid promptly (recognised by Einstein J in *Grosvenor* at [31]); and
- (2) On the other, the likelihood of irreparable prejudice, where that prejudice would flow from the refusal of the stay because cross-claims would be rendered worthless (recognised by Einstein J in *Grosvenor* at [32]).

[73] In assessing whether the refusal of a stay will cause irreparable prejudice, it is open to the Court to have regard to the strength of the cross-claim, to ascertain whether there is at least a real risk that prejudice will follow if a stay is not granted (see the analysis of Einstein J in *Grosvenor* at [29] and [30], applying by analogy the principles relevant to stay pending appeal). I say “at least” because of the issue reserved, but not answered, by Einstein J in para [31] of his reasons.

[74] As a general rule, I think, the balancing of the two significant factors to which I referred in para [72] above requires the Court to look closely at the strength of the cross-claim asserted by the applicant for a stay. There are at least two reasons why this is so. The first is that there has been an examination, admittedly of an abbreviated and sometimes rough and ready way, of the competing claims. I accept that adjudicators are as prone to error as other human beings; and I accept also that the stresses placed upon them by the extremely tight timetable for which ss 19 to 21 of the Security of Payment Act provide may magnify the possibility of error. Nonetheless, the legislature has said that disputes as to progress payments are to be determined in the first instance through the mechanism provided in the Security of Payment Act. That mechanism allows an examination not only of the payment claim but also of the payment schedule, in which (one might expect) the respondent ordinarily would set out all reasons why, it says, the claimant is not entitled to be paid.”

- [26] The power to grant a stay was recognised by P Lyons J in *Queensland Bulk Water Supply Authority v McDonald Keen Group Ltd Pty* [2009] QSC 165 at [106]–[107]. What his Honour said at [107] bears repeating:<sup>2</sup>

“[107] In *Grosvenor Constructions*, Einstein J considered that the policy of the Act, which is that successful claimants be paid, was a factor that should be taken into account in deciding whether to grant a stay. However, he also considered that where there is certainty that a party’s right to challenge the outcome recorded in the certificate

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<sup>2</sup> Footnotes omitted.

would otherwise be rendered nugatory, and that that party would suffer irreparable prejudice, the proper and principled exercise of the discretion would be to grant a stay. In that case, those consequences followed from the fact that the party who had the benefit of the judgment was insolvent.”

- [27] Reference must also be made to the decision of the Court of Appeal in *RJ Neller Building Pty Ltd v Ainsworth* [2008] QCA 397 at [39]–[42] where Keane JA carefully addressed the policy considerations affecting the status of payments ordered to be made by an adjudicator under the Act, saying at [39] that its intention is that the process of adjudication should provide a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract where those parties operate in a commercial as opposed to a domestic context. His Honour went on to say:

“This intention reflects on appreciation on the part of the legislature that an assured cash flow is essential to the commercial survival of builders, and that if a payment subject to an adjudication is withheld pending the final resolution of the builder’s entitlement to the payment, the builder may be ruined.”

- [28] His Honour continued as follows:

“[40] The BCIP Act proceeds on the assumption that the interruption of a builder's cash flow may cause the financial failure of the builder before the rights and wrongs of claim and counterclaim between builder and owner can be finally determined by the courts. On that assumption, the BCIP Act seeks to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's financial failure, and inability to repay, could be expected to eventuate. Accordingly, the risk that a builder might not be able to refund moneys ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner.

[41] The mere existence of the very kind of risk on which the provisions of the BCIP Act in favour of the builder are predicated would not ordinarily be sufficient of itself to justify a stay of an execution warrant based on the registration of a certificate of adjudication. There may, of course, be other circumstances, which, together with this risk, justify the staying of a warrant of execution based on the registration of an adjudication certificate. For example, the builder may have engaged in tactics calculated to delay the ultimate determination of the rights and liabilities of the parties so as unfairly to increase the owner's exposure to the risk of the builder's insolvency. Or the builder may have restructured its financial affairs after the making of the building contract so as to increase the risk to the owner of the possible inability of the builder to meet its liabilities to the owner when they are ultimately declared by the courts. In this case there are no such circumstances.”

- [29] The other members of the Court agreed.
- [30] It is impossible for me to conclude on the material before me at present what the likely final result of the civil litigation between the parties will be, whether in favour of Mr Vadasz or Bloomer Constructions. Nor is it possible for me to speculate with any degree of certainty about the financial position of Mr Vadasz at that stage should any judgment end up in favour of Bloomer Constructions. That is the point at which the issue becomes particularly relevant on the approach adopted by Einstein J in *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 571 at [23].
- [31] Where there was no cross-examination of Mr Vadasz about his financial circumstances I am loath to conclude that he would necessarily be insolvent either now or when the civil proceedings have been concluded.
- [32] In those circumstances the considerations highlighted by Keane JA in *RJ Neller Building Pty Ltd v Ainsworth* are important. There is nothing here to suggest that Mr Vadasz has engaged in tactics calculated to delay the ultimate determination of the rights and liabilities of the parties so as to unfairly increase Bloomer Constructions' exposure to the risk of any eventual bankruptcy of him. Nor is there any evidence that he has restructured his financial affairs so as to increase the risk to Bloomer Constructions of his possible inability to meet his liabilities when they are ultimately declared by the courts. He is also, to date, the beneficiary of a favourable result from the adjudication, something regarded as of some importance by Keane JA.

### **Conclusion and orders**

- [33] Mr Stewart SC submitted that I had an unfettered discretion in deciding whether or not to grant a stay but clearly the matters raised by the proper interpretation of the Act and discussed in the authorities to which I have referred must affect how I exercise that discretion.
- [34] Accordingly I would refuse the application for a stay and order that the sum of \$430,498.76 paid into court by the defendant, Bloomer Constructions (Qld) Pty Ltd, pursuant to the consent order dated 23 June 2009 and any accretions thereon be paid out as to \$65,224.00 to Independent Reinforcing Supplies Pty Ltd and, as to the balance, to the solicitors for the plaintiff, on their undertaking to pay the other two creditors referred to in the proceedings, Wagners Concreting Pty Ltd and Dellit Concreting, within 48 hours of receipt of the funds.
- [35] I further order that the defendant pay the plaintiff's costs of and incidental to each application before me in matter 6628 of 2009. Bloomer Constructions (Qld) Pty Ltd also did not resist an order that it as applicant, pay the second respondent's, Michael Christopher Vadasz's, costs of and incidental to the application in BS6449 of 2009. I also further order in matter BS6449 of 2009 that paragraph 1 of the order made by consent before the Chief Justice on 23 June 2009 be dissolved.