IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-005417

BETWEEN	REDHILL DEVELOPMENT (NZ) LIMITED First Appellant
AND	SONSRAM DEVELOPMENT HOLDINGS LIMITED Second Appellant
AND	ARJUN SAMI Third Appellant
AND	ROBERT JOHN GREEN First Respondent
AND	HEB CONTRACTORS LIMITED Second Respondent

Hearing: 8 October 2009

Appearances: S C Price and J N Batchelor-Smith for the Appellants
No appearance for the First Respondent
D M Hughes and K A Van Houtte for the Second Respondent

Judgment: 22 October 2009 at 8:30 am

JUDGMENT OF WHITE J
[On application for interim orders pending hearing of appeal]

This judgment was delivered by Justice White
on 22 October 2009 at 8.30am pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors/Counsel:
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Background

[1] The appellants have lodged an appeal to the Court of Appeal against the judgment of Lang J in *Redhill Development (NZ) Ltd & Ors v R J Green & Anor* HC AK CIV 2009-404-3784 5 August 2009, which dismissed an application for judicial review of an adjudicator's determination under the Construction Contracts Act 2002 ("the Act"). The appellants now seek interim orders prohibiting the respondents from taking any further action in respect of the adjudicator's determination pending the outcome of their appeal which is due to be heard in July 2010.

[2] The judgment under appeal sets out the factual background to the dispute between HEB Contractors Ltd ("HEB"), the contractor, Redhill Development (NZ) Ltd ("Redhill"), the property developer, Sonsram Development Ltd ("Sonsram"), Redhill's sole shareholder, and Mr Sami, a director of both Redhill and Sonsram. It is unnecessary for me to repeat it in detail here. For present purposes, it is sufficient to note that the construction contract between Redhill and HEB related to a subdivision that resulted in 261 lots, 61 of which were transferred to Sonsram and 8 to Mr Sami as trustee. The dispute between the parties related to a progress payment claim by HEB for $2,191,816, which was referred to adjudication under the Act.

[3] In a fully reasoned determination under the Act dated 8 June 2009, the adjudicator, Mr Green, who is now the first respondent, rejected Redhill's challenges to the validity of the payment claim and decided that Redhill was liable under ss 22 and 23 of the Act to pay HEB $2,039,307.13, being the amount of the progress payment claim less an admitted overclaim of $507,662 plus GST, interest and costs. The adjudicator also decided that Sonsram and Mr Sami were jointly and severally liable with HEB under the Act for the same amount because of their status as associates of Redhill who had acquired land that was part of the construction site.

[4] In the application for review under the Judicature Amendment Act 1972 (the "judicial review proceedings") Redhill, Sonsram and Mr Sami challenged the adjudicator's determination on the grounds that he had no jurisdiction to determine liability or to extend liability to Sonsram and Mr Sami for the full amount. There

was no challenge to the adjudicator's determination that the payment claim was valid because the determination involved issues of fact not appropriate for review proceedings and because under s 58(2) of the Act, the adjudicator's determination on that issue, involving the parties' rights and obligations, was not enforceable except by separate Court proceedings under s 61(1). In those separate proceedings, the Court would, by virtue of s 61(2), be required to have regard to, but would not be bound by, the adjudicator's determination.

[5] In the judgment of this Court dated 5 August 2009, Lang J rejected the challenge to the adjudicator's jurisdiction and the orders made against Sonsram and Mr Sami and dismissed the judicial review proceedings. The decision is based on an analysis of the purposes and relevant provisions of the Act, Parliament's intentions and the practical consequences for HEB in deciding otherwise. The Judge considered that it was not appropriate in judicial review proceedings to determine whether the adjudicator should have made any adjustment to the amount of the liability of Sonsram and Mr Sami to reflect the number of sections they acquired. The Judge noted that this did not mean that Sonsram and Mr Sami were devoid of any means of redress as they had the right under s 52 of the Act, which they had in fact already exercised, to apply to the District Court for a review of the adjudicator's determination. The Judge also noted that the argument by Sonsram and Mr Sami for an adjustment might well have some force.

Current proceedings

[6] The following proceedings relating to the issues between the parties are currently before the courts:

a) the application to the District Court under s 52 of the Act by Sonsram and Mr Sami for review of the adjudicator's determination ("the s 52 review");

b) the appeal to the Court of Appeal against the High Court judgment in the judicial review proceedings ("the appeal");

c) an application to the District Court under s 73 of the Act by HEB for entry of judgment against Redhill, Sonsram and Mr Sami in accordance with the adjudicator's determination and a cross application under s 74 of the Act by Redhill, Sonsram and Mr Sami opposing entry of judgment ("the ss 73 and 74 applications");

d) applications to the High Court by Redhill and Sonsram for orders setting aside statutory demands issued by HEB for the full amount of the adjudicator's determination ("the statutory demand proceedings");

e) a bankruptcy notice and creditor's petition by HEB against Mr Sami ("the bankruptcy proceedings"); and

f) the present application by Redhill, Sonsram and Mr Sami for interim orders prohibiting HEB from taking any further steps in respect of the adjudicator's determination ("the application for interim orders").

[7] The application for interim orders is directed at preventing HEB from proceeding with its application under s 73 of the Act, its statutory demands and the bankruptcy proceedings. If the interim orders are granted in full, it would also make it unnecessary for the appellants to proceed at this stage with the s 52 application, the s 74 application and the applications to the High Court to set aside the statutory demands.

The discretion to grant a stay

[8] It is clear from r 12(1) and (2) of the Court of Appeal (Civil) Rules 2005 ("the Rules") that an appeal does not operate as a stay. An appellant who wishes to prevent the execution of a decision under appeal must therefore persuade either the Court appealed from or the Court of Appeal to exercise its discretion to order a stay under r 12(3)(a) or grant interim orders under r 12(3)(b). A stay or interim order may relate to execution of the whole or part of the decision or to a particular form of execution and be subject to any conditions that the Court thinks fit, including conditions relating to security for costs: r 12(4).

[9] The approach to the exercise of the discretion under r 12(3) is well established and was not in dispute in this case. In *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 at 87, the Court of Appeal said:

> In applications of this kind it is necessary carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful. Often it is possible to secure an intermediable position by conditions or undertakings and each case must be determined on its own circumstances.

[10] The need to preserve the position in case the appeal is successful was recognised as important by the Court of Appeal in *New Zealand Insulators Ltd v ABB Ltd* (2006) 18 PRNZ 459 at [13] where the Court adopted the following statement by Buckley LJ in *Minnesota Mining & Manufacturing Co v Johnson & Johnson Ltd* [1976] RPC 671, CA at 676:

> The object, where it can be fairly achieved, must surely be so to arrange matters that, when the appeal comes to be heard, the appellate court may be able to do justice between the parties, whatever the outcome of the appeal may be. Where an injunction is an appropriate form of remedy for a successful plaintiff, the plaintiff, if he succeeds at first instance in establishing his right to relief, is entitled to that remedy upon the basis of the trial judge's findings of fact and his application of the law. This is, however, subject to the defendant's right of appeal. If the defendant in good faith proposes to appeal, challenging either the trial judge's findings or his law, and has a genuine chance of success on his appeal, the plaintiff's entitlement to his remedy cannot be regarded as certain until the appeal has been disposed of.

[11] The Court of Appeal in *New Zealand Insulators Ltd* also recognised that undertakings from either side may be appropriate to maintain a sensible and just balance pending ultimate determination.

[12] In *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 68 at [9] and in *New Zealand Insulators Ltd* at [11], the Court of Appeal endorsed the following non-comprehensive list of factors as relevant when balancing the competing interests:

a) whether the appeal may be rendered nugatory by the lack of a stay (or interim orders);

b) whether the successful party will be injuriously affected by the stay (or interim orders);

c) the *bona fides* of the applicant as to the prosecution of the appeal;

d) the effect on third parties;

e) the novelty and importance of the questions involved;

f) the public interest in the proceeding; and

g) the overall balance of convenience.

[13] The apparent strength of the appeal is not one of the listed factors. It was, however, recognised as relevant by Buckley LJ in *Minnesota Mining & Manufacturing Co* in the passage adopted by the Court of Appeal in *New Zealand Insulators Ltd* where reference is made to the defendant (appellant) having "a genuine chance of success on his appeal". The merits of the appeal also seem to have been recognised as potentially relevant by the Court of Appeal in *New Zealand Insulators Ltd* at [17] when it was said:

> Nor is it in dispute that this is a bona fide case with substantive issues which are properly arguable on appeal.

In *Body Corporate No 188529 v North Shore CC (No 6)* HC AK CIV 2004-404-3230 11 February 2009, Heath J added as an additional factor whether there is an arguable point on appeal and, if so, its likely strength.

[14] In considering a stay or interim orders, the recognition of a meritorious appeal, i.e. one involving issues that are properly or genuinely arguable, does not involve the Court, assessing the chances of success or embarking on a premature determination of the appeal: *New Zealand Insulators Ltd* at [21]. In a case involving a genuinely arguable appeal, the proper starting point is to suspend the rights of the successful party in order to avoid rendering the appeal nugatory: *New Zealand Insulators* at [19].

[15] At the same time the Court of Appeal has indicated that the fact that an appeal may be rendered nugatory by the lack of a stay or interim orders is not, in and of itself, necessarily determinative: *Siemer v Stiassny & Anor* CA 150/06, 25 September 2006 at [14] and *Cousins v Heslop* (2007) 18 PRNZ 677 at [10].

[16] Different approaches to the relevant factors in different cases serve to confirm that the Court is exercising a discretion under r 12(3) which rquires the various relevant factors to be taken into account and weighed for the purpose of securing justice between the parties in the circumstances of the particular case.

Submissions of parties

[17] It was submitted for the appellants that the interim orders were necessary to preserve their positions because otherwise HEB would be able to proceed to enforce the adjudicator's determination and obtain orders for the liquidation of Redhill and Sonsram and the bankruptcy of Mr Sami before the Court of Appeal hearing in July 2010. It was suggested that, if this occurred, the liquidator of the companies and the Official Assignee would be unlikely to pursue the appeal thus rendering the appeal, which involved important and novel questions under the Act, nugatory. The interim orders would also avoid the need for the parties to pursue other, expensive proceedings.

[18] It was submitted for HEB that the interim orders were not necessary because the appellants had already taken other steps to protect their positions pending the appeal and that HEB would be prejudiced if it were prevented from pursuing the other proceedings in order to be in a position to enforce the adjudicator's determination in the event that the appeal is unsuccessful.

[19] In the course of argument it became apparent that it would be helpful to have a matrix setting out the various other proceedings, their current status, and indicating the effect on those proceedings of decisions to grant or decline the interim orders. Counsel for the parties were able to agree on a matrix, which has been of considerable practical assistance in determining the application for interim orders.

The circumstances of the present case

[20] In the present case there are a number of particular circumstances that are relevant to the exercise of the Court's discretion under r 12(3)(b).

[21] First, the dispute over HEB's progress payment claim arises under an Act designed to achieve timely payment and speedy resolution of construction contract disputes: s 3 of the Act, *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 907 at [9] – [17], and *Laywood v Holmes Construction Wellington Ltd* [2009] 2 NZLR 243 at [11] and [12] (CA). The Act implements a "pay now, argue later" approach.

[22] Secondly, HEB's progress payment claim was served on Redhill on 23 May 2008. Its validity was upheld by the adjudicator on 8 June 2009 and the judicial review proceeding challenges the adjudicator's jurisdiction to impose liability on Redhill, Sonsram and Mr Sami were dismissed on 5 August 2009. Unless the parties are able to obtain an urgent fixture in the Court of Appeal, the appeal in the judicial review proceedings will not be determined until after the currently anticipated hearing in that Court in July 2010.

[23] Thirdly, the appellants have already taken steps to protect their positions pending the appeal by:

a) in the case of Sonsram and Mr Sami, applying for the s 52 review in the District Court of the adjudicator's determination which I was told might be given an urgent fixture to enable it to be heard and determined before the end of this year;

b) in the case of Redhill, Sonsram and Mr Sami, making the cross-application under s 74 in the District Court opposing HEB's s 73 application for the entry of judgment based on the adjudicator's determination which counsel for HEB advised would not be pursued against Sonsram and Mr Sami pending the outcome of the s 52 review (judgment was entered by consent against Redhill in the District Court

on 3 September 2009 with Redhill reserving its right to appeal the judgment); and

c) in the case of Redhill and Sonsram, the High Court applications, which were filed on 20 August 2009, to set aside the statutory demands and which it is anticipated might be heard later this year or early next year and, if not granted, would be followed by liquidation proceedings some time next year.

[24] Fourthly, in the case of Sonsram and Mr Sami, the liability of Sonsram and Mr Sami will depend in the first instance on the final outcome of the s 52 review which will in turn depend on the outcome of the appeal to the Court of Appeal in the judicial review proceeding in respect of the issues of law and any subsequent appeal from the District Court to the High Court in respect of the issues of fact. The positions of Sonsram and Mr Sami are, therefore, effectively protected by the s 52 review. The question is whether the s 52 review should proceed before the appeal to the Court of Appeal. Interim orders preventing HEB from taking any further steps in respect of the adjudicator's determination would mean that Sonsram and Mr Sami could decide that the s 52 review did not need to be pursued until the outcome of the appeal to the Court of Appeal is known. While a decision not to pursue the s 52 review might be seen as avoiding potentially unnecessary duplication of judicial resources, it might also ultimately prejudice the position of HEB as a result of further significant delay in being able to enforce the adjudicator's determination in the event that the appeal to the Court of Appeal is unsuccessful and the risk that the six month and two year periods under s 292 of the Companies Act 1993 and the two year period under s 194(b) of the Insolvency Act 2006 in respect of insolvent transactions might have expired.

[25] Fifthly, although security for costs has been provided for the appeal, none of the appellants is apparently in a position to provide any further security in respect of any part of the currently outstanding progress payment. The sections in the subdivision have all been on sold and no charging orders were registered as contemplated by the adjudication: see Lang J at [15] and affidavit of Mr Robert Pulman, the Managing Director of HEB at paragraphs 39 to 45. It is accepted that

both Redhill and Sonsram are insolvent in any event and that if Mr Sami was required to meet the payment claim he would become bankrupt.

[26] Sixthly, HEB has questioned the circumstances of the on sales by Redhill, Sonsram and Mr Sami and seeks to ascertain whether steps were taken which might be set aside in a liquidation of the companies under s 292 of the Companies Act. HEB accepts that these issues will not be resolved in the current proceedings, but points out that if the companies go into liquidation there may be further disclosure and inquiries, the liquidators will have the opportunity of deciding whether to pursue the appeal and there would be a further opportunity to seek a stay.

The application of the relevant factors

[27] The question whether it is necessary to grant the interim orders now in order to preserve the positions of the appellants in case their appeal is successful needs to be considered in the light of the further steps which HEB might take if there are no interim orders.

[28] As already noted, Sonsram and Mr Sami by their s 52 review have effectively taken steps to protect their positions pending the outcome of the appeal to the Court of Appeal. Until the question of their liability is ultimately determined either by a successful outcome in the Court of Appeal or by an unsuccessful outcome in the Court of Appeal and final determination by the District Court and the High Court of their s 52 review, it is unlikely that Sonsram would be put into liquidation or Mr Sami into bankruptcy. This case may be distinguished from *Laywood v Holmes Construction Wellington Ltd* [2009] 2 NZLR 243 where there was no s 52 review of the adjudicator's determination or separate appeal to the Court of Appeal against the High Court dismissal of the application for judicial review. In the present case, the interim orders are, therefore, not necessary to preserve the positions of Sonsram and Mr Sami. Without the interim orders, the appeals by Sonsram and Mr Sami will not be rendered nugatory. They will be able to continue to pursue both the appeal and the s 52 review.

[29] The question whether Sonsram and Mr Sami pursue both the appeal and the s 52 review is for them to decide. They could ask the District Court to adjourn the s 52 review until after the outcome of the appeal, but HEB is likely to oppose that course because of the potential prejudice to it if it is not able to proceed expeditiously in the event that the appeal to the Court of Appeal is unsuccessful. It will be for the District Court to decide in the first instance whether to grant an adjournment of the s 52 review. It is not for this Court to determine that question in advance. If the District Court decides to proceed with the s 52 review, there may be an element of duplication of judicial resources, but that does not mean that the appeal by Sonsram and Mr Sami would be rendered nugatory.

[30] In the case of Redhill, if there are no interim orders, HEB would be able to pursue:

a) the hearing of the remaining ss 73 and 74 applications in the District Court in respect of the adjudicator's determination;

b) the hearing of the application to set aside the statutory demands in the High Court; and

c) subject to the outcome of those applications, proceedings for the liquidation of Redhill.

[31] Pursuit of these steps by HEB would not of themselves render the Redhill appeal to the Court of Appeal nugatory. It would only be if Redhill were put into liquidation before the appeal were heard and the liquidator decided not to pursue the appeal that the appeal by Redhill would be rendered nugatory. Bearing in mind the time likely to be involved in the pursuit of these steps by HEB and the possibility of a further application for interim orders at the time of liquidation, it is not correct to say at the present time that the grant of interim orders now to prevent HEB from taking these steps is necessary to preserve the position of Redhill and to ensure that its appeal is not rendered nugatory. In *Laywood* at [61], the Court of Appeal recognised a distinction between an application to set aside a statutory demand on

the one hand and an order to wind up a company on the other. *Laywood* was concerned with the former situation whereas this case is concerned with the latter.

[32] On the basis of this analysis, I have therefore concluded that the interim orders are not currently necessary to preserve the positions of the appellants and ensure that the appeal is not rendered nugatory by permitting the various other proceedings and steps to be pursued.

[33] A decision not to grant the interim orders now will also ensure that HEB's position is not further prejudiced as it will be able to pursue the other proceedings in order to be in a position to enforce the adjudicator's determination without further delay in the event that the appeal to the Court of Appeal is unsuccessful.

[34] For completeness I record my views on the other factors relevant to the exercise of the discretion under r 12(3).

[35] There is no reason to doubt the *bona fides* of the appellants in the prosecution of the appeal. They have provided security for costs and have sought a fixture in the Court of Appeal in July 2010. But for the unavailability of senior counsel for the respondents, the fixture would have been in June 2010.

[36] There was a suggestion in the submissions for the appellants that a refusal of the interim orders might effect third parties, namely Mr Sami's family and employees of Redhill and Sonsram. I do not need to put any particular weight on this factor in view of the decision which I have reached that the interim orders are not necessary to preserve the position of the appellants at this stage.

[37] Although the Act was enacted in 2002 and came into force on 1 April 2003 and while there have been a number of cases on various aspects of the Act, the appeal in this case potentially raises a number of novel and important issues, including the scope of judicial review of adjudicators' determinations under the Act, the jurisdiction of adjudication, and the nature and extent of the liability of "associated persons". The existence of these issues justifies keeping the appeal alive, but does not require the interim orders to do so.

[38] To the extent that the case does give rise to a number of potentially novel and important issues under the Act, it can be said that there is a public interest element in keeping the appeal alive. While there is also a public interest in avoiding unnecessary duplication of proceedings and judicial resources, in the context of the Act and in the circumstances of this case, it is outweighed by the need to ensure that the position of HEB, as the successful litigant, is not further prejudiced pending the determination of the appeal. In my view HEB should be permitted to pursue the other proceedings so that it is in a position to enforce without further delay the adjudicator's determination in the event that the appeal is unsuccessful.

[39] While HEB submitted that the strength of the case on appeal is weak, it did not go so far as to say it was not "genuinely or properly arguable". Eschewing any assessment of the outcome of the appeal, I consider that, at least at this stage in the development of the law under the Act, the appellants should have the opportunity to have their jurisdiction and liability arguments considered by the Court of Appeal.

[40] On the question of the overall balance of convenience, I have therefore decided that in exercising the discretions under rr 12(3) and (4), I should decline to make the interim orders sought by the appellants.

Costs

[41] HEB is entitled to its costs in opposing this application. If the parties are unable to agree on quantum, memoranda may be filed and served by the appellants within 14 days and HEB in reply within 21 days.

D. J. White J