JUDGMENT : BRERETON J. Supreme Court New South Wales. Equity Division. 2nd April 2007.

1 The substantive proceedings were instituted by the plaintiff Biseja by summons filed on 29 May 2006, claiming the removal of several caveats that the defendant NSI had lodged in respect of lots in a strata development of which Biseja was the proprietor and NSI the builder. Although that aspect of the proceedings has been resolved, by its amended summons Biseja claims damages from NSI for defective or incomplete building work for which NSI was responsible on Biseja's projects at Swansea and North Entrance. By a cross-claim filed on 24 July 2006, NSI claims declarations that it is entitled to three lots in the strata development, and orders for their transfer to NSI. This entitlement is said to arise from a project management agreement in respect of the North Entrance Stage Two project, NSI contending that it is entitled to a lump sum fee (which is uncontroversial) for the building works, plus an additional 10% for profit and project management, with the option of acquitting that 10% project management fee by a transfer of three lots, for which purpose it has selected Lots 79, 80 and 81.

2 On 8 September 2006, on Biseja's application, I ordered that the proceedings on NSI's cross-claim be determined separately and before the proceedings on Biseja's claim (which is now a technical building case). The hearing of the cross-claim was expedited, and fixed for four days commencing on 4 December 2006. However, at the end of the second day of that hearing, Biseja called for the production of certain documents on a Notice to Produce, and on 6 December, NSI produced numerous documents, which had not previously been disclosed, despite considerable earlier disputation as to the adequacy of its disclosure. NSI more or less conceded that an adjournment of the hearing was inevitable, and the matter was stood over, part-heard, to resume later this week for two days commencing on 4 April 2007, with NSI being ordered to pay the costs of, incidental to and thrown away by the adjournment. It is now common ground that the final hearing will not be completed in the time available this week, and in those circumstances it is unlikely that it can be completed before about September.

3 Meanwhile, NSI had, on 1 May 2006, made a payment claim for an interim payment in respect of the project management fee under the (NSW) *Building & Construction Industry Security of Payment Act* 1999. Biseja not having served a payment schedule, NSI made an adjudication application on 9 June 2006. On 7 July 2006, an adjudicator determined that NSI was entitled to a payment of $1,774,494. The determination was served on 12 July 2006. Biseja unsuccessfully applied to the court to have the adjudication declared void [***Biseja Pty Limited v NSI Group Pty Limited*** [2006] NSWSC 835], and an interlocutory injunction, which had restrained NSI from taking steps to enforce the adjudicator's award, was thereupon dissolved. NSI had the adjudication certificate registered as a judgment on 1 August 2006, and had a writ of execution issued on 8 September 2006, which was recorded in respect of lots in the development that remained in Biseja's name on 13 December 2006. By August 2007, the total amount of the judgment debt, with interest, will amount to about $1.98 million.

4 On 7 December 2006, in conjunction with the adjournment of the hearing of the cross-claim until next week, the parties negotiated an agreement for a stay, and I made orders by consent as follows:

1. Upon:

(a) the first cross defendant and the second cross defendants, severally giving the usual undertaking as to damages, and

(b) the first cross defendant by 4:00 pm today lodging the Certificate of Title to the properties referred to in Folio Identifier 101/SP76449 and Folio Identifier 103/SP76449 with the Registrar,

Execution of the judgment entered by the cross claimant in this court on 1 August 2006 of the Adjudication of Robert Hunt, Adjudicator, dated 7 June 2006 in the Adjudication Application Reference No ADJ10266 (sub nom NSI Group Pty Ltd v Biseja Pty Ltd) in the sum of $1,774,494.00 plus interest thereon, be stayed until further order.

2. Any party have liberty to apply on three day's notice.

5 In the course of the negotiations that led to that consent order, counsel for Biseja had provided to counsel for NSI a list of five units, the titles to three of which had already been deposited with the court as security pending determination of the application to have the adjudication declared void, and the titles to the other two of which Biseja undertook to lodge [see para (b) above], together with estimates of their approximate worth, totalling $2.025 million. The five titles remain in court.

6 In the course of an application before me on 30 January 2007, in which Biseja sought and obtained a direction for the removal of the recording of the writ of execution from the title to various other of the lots in the development, it emerged that Biseja had sold unit 104 (not one of those in respect of which the title was in court) to its solicitor for $275,000 (when its asking price had been $315,000), less a rebate for prompt completion of $60,000 – so that the ultimate selling price was $215,000, some $100,000 less than the asking price. The explanation proffered for the rebate is that as the solicitor was accepting the unit in satisfaction of his costs, it was thought appropriate that it be transferred to him at cost.

7 Valuation evidence since obtained by NSI and tendered on the present application establishes that the total value of the five lots for which the titles are in court is now $1,575,000. On the basis explained by NSI's solicitor Mr Cotsis in his affidavit, it is reasonable to infer, from the application pro-rata of the difference between those valuations and the asking prices, that the total value of the units listed on the schedule of unsold units (the Schedule) is some $24.194 million.

8 Those lots are encumbered by mortgages totalling $16 million. Biseja has additional indebtedness to RAMS, Perpetual Trustee and ANZ, secured on seven lots in strata plan 70843 which are not included in the Schedule,

and the value of which is therefore not included in the above-mentioned figure of $24.194 million. In other words, the additional indebtedness (which might be as much as $6 million) is not secured against the property that secures the $16 million, but against additional property, and there is no reason to suppose that that additional property is worth less than the debts secured on it. *Prima facie*, Biseja has equity in excess of $8 million, before providing for NSI's claim.

9 One of the lots in SP 76449, Lot 114, is unencumbered (save by the fixed and floating charges to which reference shall be made); its listed price is $670,000, but applying Mr Cotsis' formula it is reasonable to hypothesise that it might be worth $495,800.

10 In addition to the mortgages to its financiers, Biseja has also given them fixed and floating charges over its assets and undertaking. There is no reason to suppose that these charges secure liabilities other than or in addition to the $16 million secured by the mortgages, and the dates that they bear suggest that they are collateral security for the same obligations as those secured by the mortgages. However, they at least arguably create equitable encumbrances over the six "unencumbered" lots – being the five in respect of which the titles are in court, and Lot 114.

11 NSI applies to have the stay discharged, on the basis that, contrary to the position as it appeared when the stay was consented to, the five titles in court are insufficient to cover the judgment debt, and the hearing will not be concluded in the period February to April 2007 as had then been contemplated. This gives rise to two issues: the *first* is whether the interlocutory stay granted by consent on 7 December should be reconsidered, and the *second* – which arises only if the first is resolved in the affirmative – is what order should now be made.

12 Although interlocutory relief is never immutable, applications for reconsideration of interlocutory orders are not to be encouraged. Generally speaking, they will be entertained only if there has been a change of circumstances. But as I observed in ***Harrison Partners Construction Pty Ltd v Jevena Pty Ltd*** (2005) 225 ALR 369, [2005] NSWSC 1225, (at [16]):

However, the circumstances and basis on which interlocutory relief is granted means that it is not to be regarded as immutable pending the final hearing, but may be reconsidered when the justice of the case so requires. To warrant reconsidering interlocutory relief will usually require there has been some relevant change of circumstance since it was last granted or considered, which change may bear on the criteria governing the grant of interlocutory relief – typically, whether there was a seriously arguable case for relief, or the balance of convenience. As Bryson J said in ***Elders Rural Finance v Westpac*** *[NSWSC, 24 May 1989], the nature of claims for interim injunctions means that they are usually made on a basis which admits of some debate or reargument, but repeated returns to the court for reconsideration of a claim for an interim injunction cannot be regarded with favour. Nonetheless, there are circumstances where reconsideration may be appropriate. Gibbs CJ, Murphy, Aickin, Wilson and Brennan JJ in* ***Adam P Brown Male Fashions Pty Limited v Phillip Morris Inc*** *(1981) 148 CLR 170, 178 mentioned circumstances where new facts had come into existence or were discovered which rendered the enforcement of an interlocutory order unjust. As Bryson J commented: "Their Honours did not, of course, endeavour to give an exhaustive statement of which reconsideration would be appropriate and it would hardly be possible to do so. However, there ought in my view for this as for other discretionary applications to be some new matter to be raised which could represent a sound and positive ground or otherwise a good reason for embarking upon reconsideration".*

13 Here, NSI relies on the circumstance that, whereas it then appeared that the deposited titles would sufficiently secure the judgment, that is no longer so, and whereas it then appeared that the hearing would be completed at least by April 2007, that too is no longer so.

14 The information about the value of the five lots provided to NSI was not in the form of a valuation, and did not purport to be an expert valuation, but conveyed what Biseja thought was a realisable price at that time. Biseja could be taken to have warranted the accuracy of the values it asserted. The mere fact that they have turned out to be overly optimistic – especially when there has apparently been a soft market – would not of itself be sufficient reason to reopen the question of a stay, any more than would be the fact that NSI did not undertake any more extensive inquiry or investigation of their value at that stage. However, the now apparent disparity between the values then suggested, and those that now appear, is a factor that can weigh in the balance with other factors to justify reopening the issue, particularly as it is reasonable to infer that the interim arrangements of 7 December were made on the assumption that the titles deposited would adequately protect NSI's position, and that assumption has now been falsified.

15 The passage of time substantially greater than that originally contemplated as the likely duration of an interlocutory order can also be a circumstance justifying reconsideration of the interlocutory relief [***Harrison v Jevena,*** [19]-[20]]. Thus the circumstance that the stay will now be in force, if not discharged or varied, for perhaps six months longer than had previously been anticipated, during which period the judgment debt will increase by interest, and at a time of an apparently declining real estate market, is a factor which can affect the decision to reconsider the stay.

16 The matters to which I have so far referred might not of themselves have persuaded me to reopen the question of a stay. And it is against re-opening the issue that the reason for the adjournment in December 2006 in the first place was NSI's default in disclosure of documents.

17 However, when the stay was granted, the consent orders reserved liberty to apply on three days notice. There was no contested hearing of the stay application. In those circumstances, it is proper to infer that the stay was

agreed to as a pragmatic short-term solution, reserving the right to make further application in respect of it if so advised at a later stage. When that reservation of liberty to apply in that context is coupled with the other matters to which I have referred, I am persuaded that it is appropriate to reconsider the stay.

18 The policy of the *Building & Construction Industry Security of Payment Act* is to facilitate expeditious recovery on an interim basis by a builder, so that the builder and not the proprietor has the benefit of the adjudicated amount, and the proprietor not the builder bears the risk of insolvency, in the interim pending final resolution of disputed issues between them. That, coupled with the adjudication in favour of NSI, supports the view that a stay is inappropriate. So also does the circumstance that Biseja allowed the adjudication proceedings to go by default, and did not seek a stay at all until 7 December 2006. Prior to 7 December 2006, there was no stay in place; NSI was proceeding to execute on its judgment and, as I have mentioned, had issued a writ of execution, which had been recorded on the titles of Biseja's lots.

19 Pointing in the other direction, however, are the circumstances that there has been a stay in place since 7 December 2006, and that NSI consented to it; that the proceedings in which NSI's entitlement to the adjudicated amount will be finally determined are now before me, part-heard; that it can be said that there is a bona fide and arguable dispute as to whether NSI is entitled to a project management fee at all over and above the cost of the building works (which it has been paid); that NSI's claim is not for a monetary sum, but for specific performance by way of declaration that it is entitled to Lots 79, 80 and 81 and an order for transfer of those lots, so that if NSI succeeds in its claim for specific performance, it would have to give restitution of any monetary sum that it might recover under the adjudication; that though it has been established that it is not an abuse of process to pursue adjudication proceedings as well as to sue for final relief in a court, NSI has invoked the jurisdiction of the court to ascertain and enforce its rights, which could have been completed by the end of 2006 had NSI complied with its obligations in respect of production of documents; that Biseja and its principal Mr Downey have given the usual undertaking as to damages in connection with the stay; that *prima facie* Biseja has assets of $24 million and liabilities secured on them of $16 million (putting to one side both the assets and the associated liabilities not referred to in the Schedule), leaving ample equity to satisfy NSI's judgment and the undertaking as to damages; and that the title to five units worth a total of in excess of $1.5 million are in court as security for NSI's judgment.

20 Biseja has proposed that, if I incline to the view that the question of the stay should be reopened, then it would refinance to provide clear titles to Lots 79, 80 and 81 (which are the lots NSI claims in the proceedings), or alternatively by lodging the title to Lot 114. In my view, in the circumstances of this case, the policy of the Act is amply satisfied if there is security sufficient to cover NSI's judgment debt. Given the history of the litigation to which I have referred, and in particular the role of NSI's default in bringing about the position that the matter could not be finalised last year, I do not consider that a discharge of the stay, leaving NSI at liberty to execute, would be a just outcome. Although Mr Sneddon may well be right in submitting that the security which would best meet NSI's claims in these proceedings is lodgement of the titles to Lots 79, 80 and 81, that course would not necessarily cover the judgment debt, and would involve more practical difficulties and delay (in terms of refinancing, and substituting new titles for those already lodged) than simply depositing the title to the remaining unencumbered lot (Lot 114).

21 It follows that in my view the balance of justice is best achieved by requiring Biseja to deposit the title to Lot 114, the effect of which will be that there will then be titles to unencumbered lots deposited in court as security for NSI's judgment having a total value of about $2 million, which is approximately equivalent to the anticipated judgment debt with interest to August 2007. I appreciate that those lots may be "encumbered" by the fixed and floating charges, so that issues of priority may conceivably arise, although by not taking a mortgage in respect of them the creditors have significantly jeopardised their position. But even so, Biseja appears to have ample equity to satisfy its secured creditors out of other assets.

22 Accordingly, my orders are:

1. Upon Biseja by its counsel undertaking to the court that it will by close of business on 3 April 2007 lodge in the registry, as additional security for the judgment in favour of NSI, the Certificate of Title for Folio Identifier 114/SP76449, order that NSI's notice of motion filed on 21 March 2007 be dismissed.
2. Order that costs of the motion be costs in the proceedings.