

Judgment : Handley JA : New South Wales Court of Appeal : 6th May 2005.

- 1 On 23 August 2004 Robison DCJ gave judgment in three District Court actions dismissing those brought by FPM Constructions Pty Ltd (the company) and giving judgment in favour of The Council of the City of Blue Mountains (the Council) in its action for \$750,000 plus pre-judgment interest. On 17 September the company filed a notice of appeal with appointment which was served on the Council on 28 September. On 16 December the trial judge stayed execution on the judgment in favour of the Council and on the following day the appeal was fixed for hearing on 1 and 2 June.
- 2 On 16 March the Council filed and served a notice of motion seeking an order that the company provide security for the Council's costs of the appeal. On 4 April the notice of motion was adjourned by consent to 2 May when it was heard.
- 3 The notice of motion invoked the powers to order security conferred by SCR Pt 51 r 16 and s 1335(1) of the Corporations Act 2001. The cases establish that, for the purposes of this section, an appellant is a plaintiff. It is also clear that the section is not qualified, as is the rule, by any requirement for special circumstances to be found.
- 4 The undisputed evidence establishes that the company is insolvent, and the condition in the section that there is reason to believe that the company will be unable to pay the Council's costs if the appeal fails is satisfied. The Court in its discretion can therefore order the company to provide security for the Council's costs. The company has not traded for some considerable time, and is not currently trading, although it is incurring liabilities, contingent or otherwise, for the costs of the appeal.
- 5 One factor, apart from the admitted insolvency of the company, in favour of making such an order is that it does appear that during 2002 Mr Yazbek transferred his equity in the matrimonial home to his wife in circumstances which indicate that the transfer may have been an alienation of property in fraud of his creditors, actual or potential, or a settlement of his property in favour of his wife which would be voidable on his bankruptcy.
- 6 However a factor pointing in the opposite direction is the Council's delay, largely unexplained, in making this application. The delay extended from 28 September, when the notice of appeal was served, until 16 March, a period of 24 weeks. The notice of motion was filed 13 weeks after the appeal had been fixed for hearing, five weeks after the appellant's written submissions had been served, and only 11 weeks before the hearing. The original red, black, and blue appeal books had already been prepared and served. There has been no delay since the notice of motion was filed but before it could be heard the amended red and black appeal books, and the orange appeal book had also been prepared and filed.
- 7 Delay is an important discretionary ground for refusing an order for security. This is because in the meantime the appellant will have incurred costs in prosecuting and preparing its appeal and in all probability paid substantial amounts to its own solicitors for that purpose. If the appellant and those associated with it are unable to provide security for costs, and the appeal does not proceed, the amounts so paid and liabilities so incurred will have been thrown away and the appellant and those associated with it will have been prejudiced. Delay also reduces the amount for which security can properly be ordered in favour of the respondent. The order will normally be based on the costs which are yet to be incurred in the appeal to the exclusion of those incurred before the application was made.
- 8 The delays have not been satisfactorily explained. Notice of intention to make this application was given at the call-over on 2 December but was then not made for another 3½ months. However what is of critical importance, in my judgment, is that on 17 December the appeal was fixed for hearing on 1 and 2 June without opposition from the Council. The Council could and should have opposed a date being fixed because of its foreshadowed motion for security. If this had been done the Registrar would have put the Council on terms to file its notice of motion without delay and stood the matter over for further call-over early in the new term. Instead the hearing date as fixed required the company to be diligent in prosecuting and preparing its appeal, while it and those associated with it incurred and paid further costs.
- 9 The merits of the appeal are also a most important consideration. The trial judge made credit findings adverse to the company's principal witness, but these are not directly challenged. The appeal raises what appear to be questions of law arising under cl 42 of the contract relating to the certification and payment of progress claims 8 and 9, and under cl 44 relating to termination of the contract pursuant to a notice to show cause from the Council's Superintendent.
- 10 Mr Lee, who appeared for the Council, conceded that the appeal was not vexatious or hopeless and had merit. For the purpose of forming a preliminary view of the company's prospects of success I have read parts of the judgment of Robison DCJ, the whole of the parties' written submissions in the orange book, the judgment of Rolfe J in *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* (1997) 14 BCL 215, *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576, and parts of the judgment of Bryson J in *FPM Constructions Pty Ltd v The Council of the City of Blue Mountains* [2003] NSWSC 201. On this basis I have formed the preliminary opinion that the company's appeal has substantial prospects of success.
- 11 This preliminary view is important in itself, and also because success in the appeal would establish that the Council was responsible for the very impecuniosity of the company on which it relies in the present application. Moreover success would establish the company's entitlement to one or more progress claims which would put it in substantial funds and terminate its condition of impecuniosity.

12 In these circumstances I refuse the Council's application for security for costs and order that its notice of motion of 16 March be dismissed with costs.

G McVay (Opponents/Appellants) instructed by McLachlan Chilton (Opponents/Appellants)

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