

JUDGMENT : Palmer J : New South Wales Supreme Court : 13th September 2005

- 1 The Defendant in these proceedings, the Council of the City of Sydney, has today filed in Court a Notice of Motion seeking an order that the judgment of Einstein J delivered on 24 August 2005 be stayed until further order of the Court. I will set out in very summary form the facts and circumstances giving rise to the application because it is unnecessary for me to deal with them in any detail, as will emerge shortly.
- 2 Einstein J directed that judgment be entered for the Plaintiff in the proceedings on 24 August 2005. The judgment relates to a payment claimed by the Plaintiff under the *Building and Construction Industry Security of Payment Act 1999* (NSW). The judgment, which has been entered pursuant to s.15 of the Act, does not preclude the parties from litigating the whole of the dispute at a later time. The Defendant intends to litigate the whole dispute but a final hearing is some distance in the future.
- 3 The Defendant wishes to appeal from the judgment of Einstein J and sought a stay of execution of the judgment from the Court of Appeal. Bryson JA dealt with that application, so I am told, last week. His Honour decided not to grant the stay but on condition that the parent company of the Plaintiff provide a guarantee for the repayment of the judgment debt should the appeal prove to be successful. Bryson JA ordered that upon the filing of the guarantee in terms which he then approved, the stay which had been granted temporarily should be dissolved. The guarantee was, I am told, filed last Friday so there is now no stay of Einstein J's judgment presently in effect.
- 4 Mr Feller SC, who appears with Mr Christie for the Defendant applicant, says that there is a gap in the protection which was required by Bryson JA as a condition of the order dissolving the stay. He says that the guarantee provided by the parent company of the Plaintiff will expire if the Court of Appeal dismisses the Defendant's appeal. That means, says Mr Feller, that the Defendant will have paid a substantial sum to the Plaintiff pursuant to the judgment of Einstein J but that judgment may be, in effect, reversed when the full proceedings between the parties are determined on a final basis in due course.
- 5 Mr Feller says the Plaintiff's ability to repay the Defendant at the end of the day is in question because the Plaintiff is subject to a charge over all of its assets securing a very substantial debt and, by virtue of the terms of the guarantee required by Bryson JA, that guarantee will no longer be in force when proceedings are resolved on a final basis. Mr Feller therefore says that the terms of the guarantee, as presently framed, expose the Defendant to a substantial risk of injustice if its case is ultimately upheld in the final proceedings. It is for this reason that Mr Feller now seeks from this Court a stay of the judgment of Einstein J.
- 6 Bryson JA was concerned with setting the terms upon which the Court of Appeal would either grant or refuse the stay. It is now said that the terms as fixed by his Honour operate in a certain circumstance to produce injustice. In my opinion, that is a matter which should be taken up again with Bryson JA so that his Honour can have the benefit of further argument and may, if he considers it appropriate, reframe the terms upon which he made the order dissolving the stay. It is not for a judge at first instance to interfere with the terms of a stay which has been granted or refused by the Court of Appeal. So to do would be, in effect, for a judge at first instance to sit in review of the Court of Appeal – that would be completely inappropriate, to say the least.
- 7 In those circumstances, I decline to grant the relief sought in the Notice of Motion. It is obvious that the Defendant will have to apply with great expedition to Bryson JA for reconsideration of the matter.
- 8 Mr P. Taylor SC, who appears with Mr Luitingh for the Plaintiff, says that as far as he knows no immediate plans for execution of the judgment are in train. It seems to me that there is no occasion shown for any stay, even on an interim basis, to be granted by this Court.
- 9 The costs of today's Notice of Motion will be paid by the Defendant.

P.T. Taylor SC, M. Luitingh – Plaintiff instructed by TressCox

D.D. Feller SC, M. Christie – Defendant instructed by PricewaterhouseCoopers Legal