

**JUDGMENT** : Court of Appeal, Supreme Court, New South Wales before Meagher JA; Giles JA; Santow JA : 24<sup>th</sup> February 2003.

- 1 **MEAGHER JA:** The Court is in a position to give judgment. I ask Santow JA to give the first judgment.
- 2 **SANTOW JA:** This is an application for concurrent leave and if leave is granted, hearing the relevant appeal.
- 3 The claimant began as the defendant in proceedings in the District Court commenced by the opponent as plaintiff in relation to a number of disputes involving commercial and residential building contracts.
- 4 The plaintiff in those proceedings was a subcontractor whilst the defendant was the head contractor. The defendant in those proceedings (by notice of motion returnable 26 April 2002) sought summary judgment be entered against the defendant. It was for a claim for summary judgment brought by it as subcontractor against the defendant as head contractor totalling in excess of \$100,000. It was brought in purported reliance upon the *Building and Construction Industry (Security of Payment) Act 1999*. The motion was unsuccessful. The defendant in those proceedings sought an order for costs for defending the summary judgment application.
- 5 The trial judge declined to make the requested cost order, though the applicant for it had been wholly successful and notwithstanding the ordinary rule that costs follow the event. He instead ordered that each party was to pay its own costs of the motion, apparently on the basis that the relevant legislation, being the *Building and Construction Industry (Security of Payment) Act 1999* was novel legislation. I say "apparently" because a reading of the transcript at page 4 indicates that his Honour first concluded that: *"it is only fair that each side should pay the costs of this motion ... in view of the fact that [the legislation] is largely novel and untested legislation"*.
- 6 However, after counsel addressed on costs some additional reason was advanced, which is not entirely clear to me, but seems to be on the basis that the affidavit proffered in support of the notice of motion for summary judgment was "not sufficient under the *District Court Act*".
- 7 The quantum of costs has not been assessed but the claimant contends that these would be of the order of \$10,000 before assessment.
- 8 Taking first the question of leave to appeal, it is apparent that the amount involved, though no doubt important to the parties, is well below the threshold for an appeal as of right were that monetary limit applicable. It is not, because s101(2(c) of the *Supreme Court Act* imposes the need for leave, being an appeal *"as to costs only which are in the discretion of the Court"*. However that monetary limit may be drawn on by analogy, to test the appropriateness of granting the leave sought. Nor does the case involve any significant point of principle.
- 9 The purpose of the threshold for leave to appeal being imposed is that the Legislature contemplated that relatively small amounts should not come before this Court, save with this Court's leave and in cases warranting appellate intervention. For my part, I do not consider that the present case does warrant the granting of leave.
- 10 In saying so, I recognise the consequence of denying leave to appeal in cases such as this is that the party who might otherwise have succeeded, had leave to appeal been granted, may thereby have to absorb an adverse trial outcome. That might have been corrected upon appeal, had leave been granted. This is such a case. For it is difficult to see how the trial judge, with all the latitude properly to be allowed in the case of a discretionary judgment in a matter of practice and procedure, could yet have made the order for costs that he did.
- 11 While it is true that the legislation was novel legislation, albeit the subject of a dispute between private parties involving no matter invoking the public interest, the plaintiff in the original proceedings chose to proceed by summary judgment. That of itself was not a course consistent with a recognition of the novelty of the legislation, as the Claimant correctly pointed out.
- 12 I propose that leave to appeal not be granted.
- 13 **MEAGHER JA:** I agree.
- 14 **GILES JA:** I also agree.
- 15 **MEAGHER JA:** The order of the Court therefore is that the summons be dismissed with costs.

M J Walsh (Appellant) instructed by JMA Legal (Appellant)  
C J Millard (Respondent) instructed by Taylor & Scott (Respondent)