

Procorp Civil P/L v Napoli Excavations & Contracting P/L (No.2) [2006] NSWCA 147

- DECISION:** See pars.18, 19 and 20 of judgment for orders.
- CATCHWORDS:** Practice - appeal - Security for costs - Whether corporation challenging adjudication determination under Building & Construction Industry Security of Payment Act 1999 is in substance a plaintiff - Whether special circumstances need to be shown - Whether special circumstances shown.
- CASES CITED:** Aquatown Pty. Limited v. Holder Stroud Pty. Limited FCA 9/11/95 (Sundberg J).
Strata Consolidated (Australia) Pty. Limited v. Bradshaw [2000] NSWCA 114
Transglobal Capital Pty. Limited v. Yolarno Pty. Limited [2004] NSWCA 136, 60 NSWLR 143
Wollongong City Council v. FPM Construction Pty. Limited [2004] NSWSC 523

Judgment : Hodgson JA: New South Wales Court of Appeal. 13th June 2006

- 1 On 9 May 2006, I dealt with an application for stay made in this appeal by Procorp, in which I briefly outlined the history of the matter to that date: [2006] NSWCA 118. I granted a stay on certain conditions, those conditions were not satisfied, the stay came to an end, and pursuant to Einstein J's orders, \$202,254.00 paid into Court was paid out to Napoli. I am now dealing with Napoli's application for security for costs, and Procorp's application for expedition.
- 2 Part 51 rule 16 of the Supreme Court Rules 1970 provides:
16 Security for costs
 - (1) Where a notice of appeal with appointment has been filed under rule 6, the Court of Appeal may, in special circumstances, order that such security as the Court of Appeal thinks fit be given for the costs of the appeal.
 - (2) Subject to subrule (1), no security for the costs of an appeal to the Court of Appeal shall be required.
 - (3) Subrules (1) and (2) do not affect the powers of the Court under Division 6 of Part 42 of the *Uniform Civil Procedure Rules 2005* (which relates to security for costs).
- 3 Although Registrar Jupp held in *Strata Consolidated (Australia) Pty. Limited v. Bradshaw* [2000] NSWCA 114 that the Court of Appeal could also order security for costs on the basis of Pt.53 r.2 of the Supreme Court Rules and (in the case of a corporation appellant) s.1135 of the Corporations Law, the decision of the Court of Appeal in *Transglobal Capital Pty. Limited v. Yolarno Pty. Limited* [2004] NSWCA 136, 60 NSWLR 143, proceeds on the basis that Pt.51 r.16 wholly governs the ordering of security for costs of an appeal. I will accordingly proceed on that basis. *Transglobal* also states that generally impecuniosity alone will not be sufficient to amount to "special circumstances" under that rule.
- 4 Mr. Doyle for Napoli submitted that the evidence showed good reason to believe that Procorp would not be able to meet the costs if the appeal failed; and Procorp had both failed to produce usual accounting documents required by a Notice to Produce served on it and had led no evidence to explain this or to suggest that it would be able to meet the costs.
- 5 He submitted that further reasons for requiring security for costs were:
 - (1) that Napoli was, by this appeal, pursuing a case in which it was in substance the plaintiff, so that the consideration underlying the policy of provisions concerning security for costs by impecunious corporation plaintiffs applied with full force; and
 - (2) that the appeal had the effect of further extending lengthy and expensive litigation concerning what the Building & Construction Industry Security of Payment Act 1999 intended to be a quick provisional determination, in circumstances where Procorp had taken no steps towards achieving final determination of the rights of the parties as contemplated by s.32 of that Act.
- 6 Mr. Kalyk for Procorp submitted that the financial documents produced by Procorp indicated a surplus of assets over liabilities and also continued trading on a smaller scale; and that the evidence of unresolved claims against Procorp did not suggest otherwise. He also submitted there was evidence of an unresolved claim by Procorp against Napoli of the order of \$200,000.00.
- 7 Mr. Kalyk referred to factors identified in *Wollongong City Council v. FPM Construction Pty. Limited* [2004] NSWSC 523 at [19], and submitted that any impecuniosity of the plaintiff was caused by Napoli's conduct, that the application was oppressive in its tendency to deny Procorp's right to litigate, and that Procorp was in substance not a plaintiff but was rather defending itself against Napoli's claim. On this matter, Mr. Kalyk referred to *Aquatown Pty. Limited v. Holder Stroud Pty. Limited* FCA 9/11/95 (Sundberg J).
- 8 Mr. Kalyk also submitted that Napoli had not led evidence of the expected quantum of costs.
- 9 I note that in *Aquatown*, the corporation was the plaintiff in proceedings seeking to set aside a statutory demand; and Sundberg J held that it was in substance defending itself. I do not think Procorp is in that position in these proceedings, either at first instance or on appeal.
- 10 The clear intention of the Building & Construction Industry Security of Payment Act is that progress claims made under the Act be dealt with quickly and without court proceedings, in circumstances where payments made pursuant to such claims are only provisional and the ultimate rights of the parties can be determined in ordinary court proceedings as contemplated by s.32 of that Act. In those circumstances, in my opinion, a party instituting court proceedings to challenge an adjudicator's determination or a judgment pursuant thereto is fairly regarded as being in substance a plaintiff, rather than merely defending a claim made against it. In that respect, it is unlike a company challenging a statutory demand, which is itself a document directed towards the institution of court proceedings against the company.
- 11 In my opinion, the circumstance that, by this appeal, Procorp is seeking to continue proceedings in which it was in substance as well as in form the plaintiff and thus prima facie subject to security for costs orders under the Corporations Act, is a factor relevant to whether special circumstances are shown.
- 12 It is of course open to a person objecting to the result of an adjudication determination under the Act to apply to the court, although the grounds for relief are limited. However, in my opinion, at least where it is not obvious that one of those limited grounds is made out, it is open to the court to decline, as a matter of discretion, to enter into doubtful questions going to the validity of a determination, especially in cases where it does not appear that the adjudication determination causes any

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injustice which is not readily remediable by proceedings under s.32 of the Act. In my opinion, it is also relevant to the question of special circumstances that Procorp is pursuing this remedy of appeal, which will lead to substantial and expensive litigation, when it is not pursuing litigation under s.32 which would lead to a final determination of the rights of the parties, and which will probably have to proceed in any event.

- 13 In addition, I note that, as a result of the circumstances outlined in par.[1], the amount required to be paid in this case has been paid. The result of a successful appeal would not finally determine anyone's rights, but only lead to a provisional reversal of this provisional payment. I am not aware of any injustice caused by the present situation which could not be more satisfactorily resolved by proceedings which would finally determine the rights of the parties.
- 14 In my opinion, the circumstances referred to by Mr. Doyle do give rise to real concern that Procorp will not be able to pay Napoli's costs if its appeal fails, and the material produced by Procorp does nothing to allay that concern. In the absence of proper company accounts, the documents suggesting a surplus of assets over liabilities cannot be given any significant weight.
- 15 In all these circumstances, in my opinion special circumstances justifying the order for security for costs have been shown. Procorp seeks an order for security in excess of \$40,000.00, but has not put on evidence as to anticipated costs. I would be prepared to take judicial notice that the costs of the respondent of an appeal such as this are likely to be of the order of \$20,000.00, but I could not take judicial notice that they would be a sum significantly greater than this, although that could have been proved by evidence.
- 16 Expedition is not opposed, but I do not think a case is made out for bringing this case to hearing sooner than would occur in the ordinary course of events.
- 17 It is now appropriate to deal finally with Procorp's application for stay, Napoli's application for security for costs, and Procorp's application for expedition.
- 18 As regards Procorp's application for stay, some orders were made on this application on 9 May 2006, and in my opinion it is now appropriate to order that it be otherwise dismissed, and to order the Procorp pay Napoli's costs of the application.
- 19 As regards Procorp's application for expedition, I dismiss that application with costs.
- 20 As regards Napoli's application for security for costs, I make the following orders:
1. I order that Procorp provide security for costs in the sum of \$20,000.00, and that if this security is not provided within 14 days, that the appeal be stayed until such security is provided.
 2. I order Procorp to pay Napoli's costs of this application.
 3. The exhibits may be returned.

Mr. Kalyk for claimant instructed by McManus Lawyers
Mr. Doyle (s) for opponent instructed by Doyles Construction Lawyers