VEOLIA WATER SOLUTIONS & TECHNOLOGIES (AUSTRALIA) PTY LIMITED v KRUGER ENGINEERING AUSTRALIA PTY LIMITED (SUBJECT TO A DEED OF COMPANY ARRANGEMENT) [No 3]

JUDGMENT : **McDougall J.** Supreme Court, New South Wales, Equity Division, T&C List. 14th May 2007

1 The plaintiff (Veolia) and the first defendant (Kruger) were parties to a subcontract dated 22 March 2003 (the contract). That contract was a "*construction contract*" for the purposes of the *Building and Construction Industry Security of Payment Act* 1999 (the Security of Payment Act). Kruger, which is subject to a deed of company arrangement dated 26 April 2006 (the DoCA), has the benefit of an adjudication determination in the sum of $428,291 in respect of a payment claim given to Veolia on 26 July 2006. It has recovered judgment in respect of that determination pursuant to s 25(1) of the Security of Payment Act. Veolia contends that it has a claim against Kruger, arising out of the contract, for a significantly greater amount. It has lodged a proof of debt with the administrator under the DoCA.

2 By an amended notice of motion filed on 23 February 2007, Veolia claimed orders that:
(1) Execution upon the judgment procured by Kruger be stayed permanently; and
(2) The securities given by Veolia, as the price of the stay to date, be returned to it.

3 By a notice of motion filed in Court on the day of the hearing, Kruger claimed an order that the securities given by Veolia be realised and the proceeds paid to it. Kruger said that this notice of motion was filed to "*crystallise the issues*".

The issues

4 The essential issues, as they were refined in the course of addresses, are:
(1) Whether Veolia is entitled to the return of its securities because the Security of Payment Act ceases to apply when a contractor or subcontractor having rights under it in respect of a construction contract becomes insolvent, or ceases "to be a going concern".
(2) Alternatively, whether Veolia is entitled to the return of its securities because Kruger has become subject to external administration under the *Corporations Act* 2001, and the relevant provisions of the *Corporations Act* (including, in particular, ss 553 and 553C) apply to the exclusion of relevant provisions (including s 25(4)) of the Security of Payment Act.
(3) Whether Veolia would suffer irremediable prejudice if the existing stay were not continued, because any success that it might achieve on its cross-claim would be rendered nugatory.
(4) Whether, in all the circumstances of this case, Veolia's application is an abuse of the process of this Court.

5 The parties' submissions on the first and second issues focussed in particular on the decision of Young CJ in Eq in ***Brodyn Pty Ltd v Dasein Constructions Pty Ltd*** [2004] NSWSC 1230. (The phrase in inverted commas in sub para (1) above is drawn from para [87] of his Honour's reasons.) The parties' submissions on the third issue focussed on the judgment of Einstein J in ***Grosvenor Constructions (NSW) Pty Ltd (in Administration) v Musico & Ors*** [2004] NSWSC 344.

First and second issues: the impact of administration

The DoCA

6 As I have said, the DoCA was made on 26 April 2006. There is no doubt that Veolia's cross-claims under the contract arise out of circumstances occurring before that date.

7 By cl 2.1 of the DoCA, the provisions "*contained in Schedule 8A to the Corporations Act*" were "*deemed to be included as operative parts of this Deed*". Clearly, what was intended, and in my view effected (and the parties did not submit otherwise), was the incorporation of the prescribed provisions set out in schedule 8A to the *Corporations Regulations* (see Regulation 5.3A.06). Thus, by cl 8 of those prescribed provisions, subdivisions A, B, C and E of Division 6 of Part 5.6 of the *Corporations Act* apply to claims made under the deed "as if the references to the liquidator were references to the administrator of this deed."

8 Clauses 2.2 and 2.3 of the deed provided for an "*Administration Fund*". That fund was to include the proceeds of realisation of a number of assets including trade debtors, and a contribution by Kruger's principal, Mr Willi Kruger, of $50,114. There is no doubt that if Veolia pays the judgment debt, that payment would form part of the Administration Fund.

9 By cl 2.6, Kruger agreed to "*continue to trade only for the purposes of creating the Administration Fund*", and warranted "*that it will remain solvent and pay its debts as and when they fall due.*"

10 Clause 5.2 of the deed provided that unless a distribution of 20 cents in the dollar were paid to creditors within two years from the date of the deed, the administrator would be required to convene a meeting of creditors under s 445(1)(a) of the *Corporations Act* for the purpose of considering a resolution terminating the deed.

The decision in Brodyn v Dasein

11 Young CJ in Eq was concerned with an appeal from an administrator's rejection of a proof of debt (s 1321 of the *Corporations Act:* see para [29] of his Honour's reasons). The brief facts were that the defendant, which was subject to a deed of company arrangement, had the benefit of an adjudication determination and judgment in its favour in the amount of $183,493.64. The plaintiff asserted a cross-claim against the defendant in the amount of $461,882.36. It lodged a proof of debt with the defendant's administrator. The administrator rejected that proof of debt. For reasons that are not entirely clear, the proof of debt was quantified, in the hearing before Young CJ in Eq, at $486,371.57. His Honour concluded that the proof of debt should have been accepted in that sum, or

alternatively in the sum of $316,374.65 (para [71]). The plaintiff sought that the proof be admitted for $262,388.65 only (para [72]), and his Honour accepted that it was entitled at least to this.

12 On that basis, his Honour was required to consider the question, formulated by him in para [76], *"as to whether, in view of the [Security of Payment] Act, there is a set off under s 553C of the Corporations Act as incorporated into administration of a DOCA …"*. His Honour said in para [78] that *"[t]he vital question is whether, in the light of s 25 of the [Security of Payment] Act, one can apply s 553C."* The countervailing submissions, for the plaintiff and the defendant respectively, were set out by his Honour at paras [79] and [80]:

> *"79 Mr Harper and Ms Rana [for the plaintiff] say that because the claim of the plaintiff exceeds the claim of the company the company's claim was automatically extinguished by s 553C. This means that the District Court provisional judgment under s 25 of the [Security of Payment] Act must now be set aside or stayed. This is because it is clearly a provisional judgment which is to be dealt with when the whole of the dispute between the parties has been litigated as has now occurred.*
>
> *80 On the other hand, Mr Fisher [for the defendant] says that the policy of the BCISP Act means that the only entitlement to judicial intervention once a judgment is made under s 25(1) is to commence proceedings to have it set aside under s 25(4). In those proceedings the applicant is not to bring a cross claim or raise any defence in relation to matters arising under the construction contract nor challenge the adjudicators to termination. The applicant also has to pay into court security for the unpaid portion of the adjudicated amount."*

13 His Honour concluded in para [82] that there was *"a conflict of legislative provisions"*: between the relevant provisions of the Security of Payment Act and of the *Corporations Act* applicable to the company in administration because of the incorporation of cl 8 of the Prescribed Conditions.

14 The conflict that his Honour identified was between s 25 of the Security of Payment Act - in particular, s 25(4) – and the relevant provisions, including as I have said ss 553 and 553C, of the *Corporations Act*. That conflict arose from the submission identified in para [79] of his Honour's reasons, that the judgment recovered by the defendant against the plaintiff should be set aside because the plaintiff's claim against the defendant had been admitted to proof (as a result of his Honour's decision) in an amount exceeding the amount of the judgment debt.

15 His Honour thought that this conflict could be resolved in one of two ways:

(1) Through operation of s 109 of *The Constitution:* so that, to the extent of any inconsistency, the provisions of the *Corporations Act* would apply over those of the Security of Payment Act (see para [83]).

(2) By construing the Security of Payment Act *"to operate [only] when the head contractor and the subcontractor are going concerns"* (see para [87]). This followed from his Honour's view that the mischief sought to be addressed by the Security of Payment Act was to ensure cash flow (see para [85]) and that a subcontractor that was not a going concern *"no longer needs cash flow and the mischief to be covered by the [Security of Payment] Act is not present in that situation"* (see again para [87]).

No conflict in this case

16 I do not think that there is any such conflict in this case. Section 25 of the Security of Payment Act provides as follows:

> ***"25 Filing of adjudication certificate as judgment debt***
>
> *(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.*
>
> *(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.*
>
> *(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.*
>
> *(4) If the respondent commences proceedings to have the judgment set aside, the respondent:*
> *(a) is not, in those proceedings, entitled:*
> *(i) to bring any cross-claim against the claimant, or*
> *(ii) to raise any defence in relation to matters arising under the construction contract, or*
> *(iii) to challenge the adjudicator's determination, and*
> *(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings."*

17 The prohibition against cross-claims in sub s (4)(a)(ii) arises where there is an application to set aside a judgment based on an adjudication determination. The prohibition applies only *"in those proceedings"*: ie, in the proceedings to have the judgment set aside with which, as its introductory words show, subs (4) is concerned.

18 In my view, s 25(4) should not be construed beyond its terms. That is to say, I do not think that it can be construed to produce the result that the prohibitions set out in para (a) apply not only where proceedings are commenced to set aside a judgment based on an adjudication determination, but also where the effect of such a judgment, or the rights that it confers, are attacked in some collateral way that does not involve the setting aside of the judgment.

19 Veolia is not in these proceedings seeking an order that the judgment recovered against it by Kruger be set aside. Thus, in my view, s 25(4) has no application.

20 Barrett J reasoned in a similar way, in the context of an application under s 459G of the *Corporations Act* to set aside a statutory demand, in ***Greenaways Australia Pty Ltd v CBC Management Pty Ltd*** [2004] NSWSC 1186. His Honour expressed that conclusion thus at para [11]:

> "*11 Section 25(4) of the* ***Building and Construction Industry Security of Payment Act*** *limits the extent to which a person in the position of the present plaintiff may cross-claim and mount defences against someone in the position of the present defendant. But those constraints apply only in proceedings in which it is sought to have a judgment resulting from filing of an adjudication certificate under the Act set aside. It may be ignored in the present context as there is no suggestion that pursuit of the offsetting claim that the plaintiff considers itself to have involves any attempt to have the District Court judgment set aside.*"

21 Campbell J expressed a similar view in ***Demir Pty Ltd v Graf Plumbing Pty Ltd*** [2004] NSWSC 553. His Honour said at para [20] that the relevant provisions of the *Corporations Act* (relating to statutory demands and alleged offsetting claims) "*set out a regime whereby a statutory demand is set aside* ***whenever*** *there is an offsetting claim as defined*" (his Honour's emphasis). Those provisions were not "*to be construed, or limited, by reference to the intention implicit in*" the Security of Payment Act. His Honour's approach is consistent with the first of the alternative ways in which Young CJ in Eq thought that the conflict that he identified could be resolved (see para [15] above).

22 Young CJ in Eq referred to ***Greenaways*** at paras [90] and following in ***Brodyn v Dasein.*** Having referred to para [11] (and also para [12]) of Barrett J's reasons, Young CJ in Eq said at para [92] that "*[o]nce one removes the influence of the [Security of Payment] Act, there is a clear case where s 553C applies.*" Presumably, it was necessary to remove the influence of the Security of Payment Act only because of the plaintiff's application to have set aside the judgment recovered by the defendant.

23 Mr Christie of counsel, who appeared with Ms Culkoff of counsel for Veolia, submitted that I should follow the decision of Young CJ in Eq unless persuaded that it was "*plainly wrong*". He referred to: the decision of Grove J in ***Valentine v Eid*** (1992) 27 NSWLR 615 at 618-619; the decision of French J in ***Hicks v Minister for Immigration and Multicultural and Indigenous Affairs*** [2003] FCA 757 at paras [72] to [76]; and an article by the Honourable Sir Anthony Mason KBE, **The Use and Abuse of Precedent** (1988) 4 ABR 93. I accept the principle. I do not think that it applies in this case. That is because, as I have said, there is no conflict in this case between the relevant provisions of the two Acts.

24 Nor do I think that there is anything in this reasoning that is inconsistent with the underlying policy of the Security of Payment Act, which is concerned with ensuring that those who undertake to carry out construction work, or to supply related goods and services, under a construction contract should receive prompt payment of progress claims. The effect of the application of s 553C (in a case where the offsetting claim exceeds the amount of the progress claim) is that the progress claim is satisfied by set-off. The person entitled to the progress claim has received the benefit of payment. That is so regardless of whether the progress claim has given rise to an adjudication determination or a judgment debt. Operation of the statutory scheme of set-off under the *Corporations Act* does not impeach the progress claim (or any adjudication determination or judgment founded on it). On the contrary, the effect of the progress claim is accepted, because its amount is brought to account in the process of set-off. It may be that the process of satisfaction through set-off rather than satisfaction through payment has an adverse effect on other creditors. But that is a necessary consequence of the application of the scheme of set-off that the legislature, in s 553C, saw fit to enact.

25 I must say that the factors referred to in the preceding paragraph lead me to question why it is appropriate to set aside a judgment once it has been satisfied by set-off pursuant to s 553C. A judgment may be satisfied by a number of means, including payment, accord and satisfaction and set-off under s 553C. Satisfaction by payment, or by accord and satisfaction, does not impeach the validity of the judgment. Nor, I think, does satisfaction by set-off pursuant to s 553C. But since this point was not argued, it is unnecessary for me to express a concluded view.

26 Thus, like Young CJ in Eq but for somewhat different reasons, and like Barrett and Campbell JJ, I consider that the position is governed by the relevant provisions of the *Corporations Act*.

27 There being no inconsistency, on the facts of this case, between the operation of s 25 of the Security of Payment Act and the operation of the relevant provisions of the *Corporations Act,* it is unnecessary for me to consider the ways in which Young CJ in Eq considered that the inconsistency that he perceived might be resolved.

Impact on securities given by Veolia

28 The plaintiff in ***Brodyn v Dasein*** had given security for the judgment debt. Young CJ in Eq concluded that the debt owed to the defendant (as established by the judgment) was "*extinguished*" by s 553C of the *Corporations Act* (see para [97]). It followed, his Honour said in para [97], that the bank guarantee furnished by the plaintiff was "*security for nothing*" and should be discharged.

29 That result does not follow in this case. The amount (if any) due to Veolia on its cross-claim has not been established. The administrator has not dealt with the proof of debt, and the validity and quantification of the cross-claim have not been determined by any other means.

30 Thus, Veolia's position is different to that of the plaintiff in ***Brodyn v Dasein***. The basis upon which Young CJ in Eq ordered the discharge of the security, does not at present (and may never) exist in this case. There is on the one

side a judgment debt, with securities for its payment. There is on the other a cross-claim, as yet unresolved, for an amount in excess of the amount of those securities. The present unresolved state of affairs provides no basis for granting Veolia the relief that it seeks based on the decision of Young CJ in Eq in ***Brodyn v Dasein***.

31 In its written submissions, Veolia relied on the decision in *Brodyn v Dasein* only in support of its application for return of security. In oral submissions, Veolia appeared to go beyond this, and to suggest that the decision related also to its claim for a permanent stay of the judgment recovered against it by Kruger. However, the decision in *Brodyn v Dasein* says nothing about a stay, permanent or otherwise. In any event, for the reasons that I have given in para [29] above, there is no basis for a permanent stay. At most, Veolia would be entitled to a stay pending a decision on its proof of debt, or pending a determination of its cross-claim by some other means. A stay pending determination of its proof of debt would give effect to the principle recognised in ***Brodyn v Dasein***, to the effect that the right of statutory set-off under s 553C of the *Corporations Act* is not ousted by s 25(4) of the Security of Payment Act. But a stay on this basis would not be permanent; and would not stop effect being given to the judgment through the mechanism of s 553C.

Conclusion on the first and second issues

32 Veolia is not at present entitled to the return of the security given by it.

Third issue: stay pending resolution of Veolia's cross-claim

The decision in Grosvenor v Musico

33 The plaintiff (Grosvenor) had obtained an adjudication certificate, and recovered a judgment, in the sum of $486,324.77. It had been put into external administration. The evidence suggested a deficit in excess of $4.2 million and a likely return to unsecured creditors of 11 cents in the dollar. By reason of some matters of history which Einstein J discussed at paras [6] to [10], the defendant (Musico) had given an unconditional bank guarantee in the sum of $712,757 to secure, among other things, payment of the judgment that Grosvenor had recovered. Musico asserted that it had no liability whatsoever to Grosvenor, and that in addition Grosvenor was liable to it in an amount exceeding $550,000 representing liquidated damages, cost to complete and cost of rectification of defects. It sought a stay to prevent Grosvenor from calling on the guarantee until its claim against Grosvenor had been dealt with.

34 Einstein J referred in para [12] to a number of first instance decisions that emphasised the interim nature of adjudication determinations. That is a necessary result of the legislative policy, enshrined in the Act, that progress claims should be paid promptly, and should not be delayed and bedevilled by disputes; and the preservation of final rights to which s 32 of the Security of Payment Act gives effect.

35 Einstein J then referred at paras [18] to [25] to a number of English decisions relating to the *Housing Grants, Construction and Regeneration Act* 1996 (which Act includes provisions creating a statutory right to progress payments). The effect of the decisions cited by Einstein J was that a successful claimant should not be kept out of its money unless there was real doubt as to the claimant's ability to repay in the event that a final determination went against it.

36 At paras [29] to [31], Einstein J referred to decisions staying execution on judgments pending an appeal where there was a risk that the appellant might not recover its money if it succeeded on the appeal. In para [31], his Honour noted that "the analogy with appeals is not a perfect one", because it did not take into account the evident policy of the Act requiring prompt payment of progress claims. Thus, his Honour said, "*there is a sound reason for making stays less readily available in relation to debts arising under the [Security of Payment] Act, in contrast to the position in relation to appeals arising from curial proceedings*." His Honour said that one way in which this might be recognised was by requiring "*more than a "real risk that [the respondent] will suffer prejudice or damage, if a stay is not granted.*"" (The internal quotation comes from the decision of the Court of Appeal in ***Kalifair Pty Ltd and Another v Digi-Tech (Australia) Ltd and Others*** (2002) 55 NSWLR 737 at 741-742 [18]; the emphasis comes from Einstein J.)

37 Thus, his Honour concluded at para [32], "*in a case … where there is a certainty that the defendants' rights will be otherwise rendered nugatory, and that it will suffer irreparable prejudice, the proper and principled exercise of the Court's discretion is to grant a stay*." At para [33], his Honour drew comfort from the fact that the plaintiff's entitlement under the judgment recovered by it was fully secured.

38 At para [35], his Honour observed that "*if no stay is granted, an interim arrangement would be in practice converted into a final order*." He repeated that the effect of refusing the stay would be to render nugatory Musico's rights, and thereby cause "*irreparable prejudice*".

39 I adopt his Honour's statement of the principles as being those that, in general, should be considered when deciding an application such as that before his Honour, or that before me. However, in any particular case, the application of those principles, and the balancing of the various considerations, will require careful attention. For example, each case will require close analysis of the extent or certainty of the risk of prejudice or damage, if a stay is not granted (I refer to the question posed but not answered by his Honour in para [31]).

Kruger's financial position

40 Kruger's financial position was the subject of evidence provided by its administrator, Mr Woodgate, and an expert retained by Veolia, Mr McMahon. Mr Woodgate considered a number of assumptions, which included that Mr Kruger might make an additional contribution to the Administration Fund, ranging between $200,000 and

$231,433. There was no evidence to support this assumption. I think that Kruger's financial position must be considered on the basis that the only contribution from Mr Kruger is the contribution of $50,114 referred to in clause 2.3 of the DoCA (which contribution has been paid).

41 On that basis, I prefer Mr McMahon's assessment of Kruger's position. I note, however, that his assessment incorporates in substance Mr Woodgate's assumptions except for the assumption as to an additional contribution from Mr Kruger.

42 On any view, Kruger will have a deficiency. Mr McMahon estimates that the deficiency is likely to be substantial. On the best case analysis, it is likely to be approximately $343,000. On the worst case analysis, it is likely to be $1.4 million.

43 If Veolia pays the judgment debt, and if its cross-claim is admitted to proof or otherwise vindicated in the sum of $423,626, the return to creditors will be of the order of 16.4 cents in the dollar. Veolia's recovery on its cross-claim will be in accordance with that return. That analysis does not reflect the way that Veolia puts its cross-claim, or its quantification of that cross-claim – matters to which I shall return – but it demonstrates the risk of very significant prejudice to Veolia if it pays the judgment debt and establishes its cross-claim in the amount of $423,626. If Veolia's cross-claim is admitted to proof or otherwise vindicated in some greater amount, the prejudice in monetary terms will be greater, even if the rate of return remains at 16.4 cents in the dollar.

44 It might be noted that if the return to creditors is of the order of 16.4 cents in the dollar, the DoCA may be terminated and the company may go into liquidation (see clause 5.2, referred to in para [10] above). That outcome would not diminish the prejudice to Veolia to which I have referred.

45 If Veolia pays the judgment debt and its cross-claim fails completely, Kruger will return about 24 cents in the dollar to creditors. On this basis, of course, there would be no prejudice to Veolia.

Break up of the cross-claim

46 As I have said, the accounting evidence proceeded on the basis that the cross-claim was for some $423,626. However, Veolia's case in this Court was that its cross-claim should be quantified at $859,230.

47 Veolia broke its claim down to three elements (I omit some of the detail):

(1)	Works under the contract said to be defective or incomplete:	$186,997
(2)	Liquidated damages claimed by Veolia against Kruger:	$388,922
(3)	Liquidated damages claimed by the principal against Veolia:	$205,200

48 The total of these claims was $781,119, to which GST in the sum of $78,111 was added to produce the total of $859,230, to which I have referred.

49 One might question how it is that Veolia could recover against Kruger both items of liquidated damages. Presumably, the liquidated damages specified in the contract between Veolia and Kruger were intended, by way of genuine pre-estimate of loss, to compensate Veolia in the event that Kruger failed to bring the works under that contract to practical completion by the specified date. Ordinarily, one would expect the loss for which those liquidated damages were intended to be a genuine pre-estimate to include any amount that Veolia might be obliged to pay its principal by reason of a delay in achieving practical completion under the head contract. If the liquidated damages claimed by the principal against Veolia related to delay caused by Kruger's alleged failure to complete its works in time, then to recover both heads of damages would appear, at first blush, to involve double dipping; and a question as to penalty might arise in relation to the relevant provision of the contract between Veolia and Kruger. If the liquidated damages claimed by the principal related to some other delay then, again at first blush, it is very difficult to see how Veolia could recover them from Kruger.

50 Veolia relied on clause P35.10 of the contract. The effect of that clause is that Kruger may be liable to Veolia for both liquidated damages under the contract (the subject of clause P35.9) and liquidated damages payable by Veolia to the principal where it is Kruger's delay that results in Veolia's liability to the principal. The parties did not put submissions to me on the operation of clauses P35.9 and P35.10 (Veolia referred to clause P35.10 in a note that Mr Christie sent me, with the consent of Mr Nicholls, counsel for Kruger, after I had reserved my decision). In those circumstances, I do not think it appropriate to undertake an analysis of the two provisions, or to consider whether my "first blush" impressions recorded in the previous paragraph should stand or be set aside.

51 Veolia's case before me was that its claim against Kruger for liquidated damages under the contract between them did not depend on the principal's levying liquidated damages against Veolia under the head contract. Clauses P35.9 and P35.10 of the contract may support that proposition, although (given that I am not determining the amount of Veolia's cross-claim) I express no concluded view.

52 If there is double dipping in the claim for damages, then it would follow that the cross-claim should be reduced by $205,200. If, however, clause P35.10 has the effect that Veolia is entitled to recover both liquidated damages under the contract and indemnity for any liquidated damages under the head contract, and if clause P35.9 is not a penalty, then there is no "in principle" basis to reduce the amount of the claim.

53 Mr Nicholls attacked both the quantification of the claim for alleged defective and incomplete works, and the quantification of the claim for liquidated damages (by which I mean Veolia's claim against Kruger). He submitted

that Veolia's evidence was unsatisfactory to the point that I should not be satisfied that it had any real prospects of success.

History of Veolia's claims

54 Veolia's cross-claim was advanced by a proof of debt provided to a previous administrator of Kruger, apparently under a different DoCA, on 14 March 2006. That proof of debt asserted a claim totalling $423,626. Of that claim, $146,126 was said to be for works known to be incomplete and defective and $277,500 was said to be for "*contingent*" claims for "the risk of potential defects not yet identified … and liquidated damages". The amount claimed for liquidated damages was not specified, let alone particularised or substantiated.

55 On 14 September 2006, Veolia submitted a proof of debt to Mr Woodgate, the administrator under the current DoCA. The amount claimed was $463,834. That was said to represent the cost to complete the works that Kruger was required to perform, but had not performed or had performed defectively, under the contract, less the remaining amount that would have been paid to Kruger had it fulfilled all its obligations under that contract. Some $250,000 of that claim related to the repair of corrosion damage in certain concrete tanks. That corrosion was asserted to have been the consequence of *"incorrect design/installed [sic] by Kruger"*. Veolia subsequently conceded that the responsibility for that damage could not be attributed to Kruger. Thus, the claim under the second proof of debt should be reduced to $213,834.

56 The second proof of debt included no amount on account of liquidated damages; indeed, I think, it did not even refer to that subject.

57 On 9 November 2006, Veolia wrote to Mr Woodgate. It stated that Veolia *"have recently been advised by the Principal … that they will be applying liquidated damages … to [Veolia] with respect to the work related to the"* contract between them. The letter asserted that *"the scope under Kruger Engineering's Sub-contract is the reason for these LDs being applied."* The letter advised that the second proof of debt would be revised *"as it did not allow for any LDs being applied by the Principal."* That has not occurred.

58 On 29 November 2006, Veolia wrote to Mr Woodgate notifying him that it claimed $388,922 by way of liquidated damages for what were asserted to be 114 days of delay in relation to *"Separable Portion No 2"* of the contract. Veolia has not lodged a revised proof of debt incorporating any claim for liquidated damages. The letter of 29 November 2006 provided a quantification of the amount of $388,922. Neither it nor (so far as the evidence goes) anything else provided to the administrator contained any proof, or substantiation, of the claim.

Defective and incomplete work

59 There was a conflict in the evidence. For Veolia, evidence was given by Mr Arthur Penton, who was Veolia's project manager (according to the letter of 9 November 2006) and contractor's representative (according to the proofs of debt and the letter of 29 November 2006). (I do not mean to suggest that these roles were in some way inconsistent, or that Mr Penton did not hold them both at relevant times.)

60 Mr Penton was cross-examined. I have to say that there were aspects of his evidence that concerned me. He was argumentative. He displayed a distinct propensity not to answer questions, except in a non responsive manner of his own choosing. I formed the distinct impression that he saw his cross-examination as an opportunity, on occasions, to advocate Veolia's case by forcing answers on the cross-examiner.

61 Further, there was a clear inconsistency between the statement in his letter of 9 November 2006, that the principal "*will be applying liquidated damages*" and his oral evidence that as at that date (and indeed, as I understood him, at the time of the hearing) the principal had never made demand on Veolia for the payment of liquidated damages pursuant to the contract between them.

62 Having regard to the limited nature of the issues with which I am required to deal, I think it undesirable that I should express any concluded view on Mr Penton's credibility. Nonetheless, I do take into account, in assessing the merits of Veolia's cross-claim, the matters to which I have referred.

63 In relation to alleged defective and incomplete works, I do not regard those matters as requiring me to conclude that the cross-claim has so little prospect of success that I should disregard it for the purposes of the present application. Mr Penton was, as I have said, the project manager and Veolia's representative. It is apparent from his evidence that he has detailed knowledge both of the head contract and the contract between Veolia and Kruger, and of the works performed (and to be performed) under them. Veolia has asserted consistently (not only in the documents to which I have referred, but also in its payment schedule and adjudication response relating to the adjudication that was the subject of my earlier judgment) that Kruger's performance under the contract was defective and incomplete.

64 Mr Kruger gave evidence in opposition. In particular, he asserted that much of Veolia's claim for defective and incomplete works related to works that increased the scope of work over and above what had been required of Kruger under its subcontract. Mr Kruger said that much of this aspect of the cross-claim should be disregarded for that reason.

65 Mr Kruger was not cross-examined. I cannot resolve the conflict between him and Mr Penton, although I should note that the proposition for which Mr Kruger contends was put to Mr Penton and rejected by him.

66 In the circumstances, I can do no more than conclude that this aspect of the cross-claim is advanced in good faith and should be left for determination in some appropriate way – *prima facie,* one would think, by a decision on Veolia's proof of debt.

The claim for liquidated damages under clause P35.9

67 This aspect of the claim falls into a somewhat different category. As I have said, it was not advanced until 29 November 2006, having been foreshadowed in the letter of 9 November 2006. (In this context, I should make it plain that although the first payment claim did refer to *"liquidated damages"*, there was no separate quantification of that claim, and it appeared to refer not to a claim made by Veolia against Kruger under the contract between them, but to a possible claim that might be made by the principal against Veolia under the head contract.)

68 It is apparent from Mr Penton's evidence that a substantial part of the delay in achieving practical completion was quite beyond the control of, and not in any way attributable to, Kruger. Indeed, it was for that reason that Mr Penton granted to Kruger substantial extensions of time – for a period in excess of two and a half years – for completion of Kruger's works.

69 In that context, Mr Penton was cross-examined as to what was necessary to substantiate the claim for liquidated damages that Veolia now asserts against Kruger. He agreed, in substance, that it would be necessary for the whole of the relevant circumstances, including not only those relating to Kruger's performance under its subcontract but also those relating to performance by other preceding subcontractors, to be examined by a construction programmer. That examination, Mr Penton agreed, would be necessary to identify the real extent of the delay caused by Kruger and the real extent of the delay (if any) caused to Kruger. Without some such analysis, it would not be possible to substantiate the amount claimed.

70 I would add, although this was not put to Mr Penton, that it must follow from this aspect of Mr Penton's evidence that a similar analysis would be required before it could be concluded that any part of any claim for liquidated damages made by the principal against Veolia could be visited on Kruger pursuant to clause P35.10 of the contract.

Kruger's offer of security

71 Kruger has offered to provide a bank guarantee in Veolia's favour, in the sum of $459,737.35, if the stay is lifted to the extent that the amount of the total value of the securities provided by Veolia is paid to it. Westpac Banking Corporation (Westpac) has undertaken to give such a guarantee, on terms which in effect require the equivalent amount to be paid to Westpac through Kruger. Mr Woodgate and Mr Kruger agree to the provision of such a guarantee if the judgment debt is paid. The amount of $459,737.35 for which Kruger offers the bank guarantee is the value of the securities provided by Veolia.

Analysis

72 The exercise of the discretion to grant a stay requires a balancing of the relevant factors. Two factors of particular significance in this case are:

(1) On the one hand, the policy of the Security of Payment Act, that successful applicants be paid promptly (recognised by Einstein J in ***Grosvenor*** at para [31]); and

(2) On the other, the likelihood of irreparable prejudice, where that prejudice would flow from the refusal of the stay because cross-claims would be rendered worthless (recognised by Einstein J in ***Grosvenor*** at para [32]).

73 In assessing whether the refusal of a stay will cause irreparable prejudice, it is open to the Court to have regard to the strength of the cross-claim, to ascertain whether there is at least a real risk that prejudice will follow if a stay is not granted (see the analysis of Einstein J in *Grosvenor* at paras [29] and [30], applying by analogy the principles relevant to stay pending appeal). I say "at least" because of the issue reserved, but not answered, by Einstein J in para [31] of his reasons.

74 As a general rule, I think, the balancing of the two significant factors to which I referred in para [72] above requires the Court to look closely at the strength of the cross-claim asserted by the applicant for a stay. There are at least two reasons why this is so. The first is that there has been an examination, admittedly of an abbreviated and sometimes rough and ready way, of the competing claims. I accept that adjudicators are as prone to error as other human beings; and I accept also that the stresses placed upon them by the extremely tight timetable for which ss 19 to 21 of the Security of Payment Act provide may magnify the possibility of error. Nonetheless, the legislature has said that disputes as to progress payments are to be determined in the first instance through the mechanism provided in the Security of Payment Act. That mechanism allows an examination not only of the payment claim but also of the payment schedule, in which (one might expect) the respondent ordinarily would set out all reasons why, it says, the claimant is not entitled to be paid.

75 The second reason flows from the plain legislative intention that progress claims should be dealt with, and paid, promptly. In my view, any court faced with, and required to give effect to, that clear legislative policy should be careful before exercising a discretion in a way that would intercept the effectuation of that policy in a particular case. Thus, I agree with Einstein J that the Court would ordinarily do so (in cases such as the present) only where the failure to do so would have the practical effect of making permanent that which, clearly enough, the legislature intended to be only interim.

76 In this context, I am not sure that it is correct to say that the Security of Payment Act has no application to companies in administration. The object of Part 5.3A of the *Corporations Act* is set out in s 435A:

> ***"435A Object of Part***
>
> *The object of this Part, is to provide for the business, property and affairs of an insolvent company to be administered in a way that:*

(a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
(b) if it is not possible for the company or its business to continue in existence – results in a better return for the company's creditors and members than would result from an immediate winding up of the company."

77 Cash flow is of obvious importance to the first aspect of this statutory object; and getting in debts in an orderly manner is of obvious importance to the second. It is at least arguable that the purpose underlying the Security of Payment Act is as relevant to a company in administration, in that it will tend towards achieving the statutory object of administration, as it is to a company that is trading as a going concern.

78 Further, in a case such as the present, the Court should take into account the promptness with which the applicant for a stay has acted: not only in seeking the stay, but also in seeking to give effect to the rights that it seeks to preserve, pending a final hearing, through the mechanism of the stay.

No prejudice in this case

79 In the present case, the effect of Kruger's offer of security in return for payment is that potential prejudice to Veolia will be limited to the extent that there is a real risk that its cross-claim might succeed in an amount in excess of that security – in round figures, in an amount in excess of $460,000. However, in my view, that potential prejudice is in fact illusory.

80 The principal value of Veolia's cross-claim must be its capacity to cancel out, on a dollar for dollar basis through s 553C, the judgment debt presently held by Kruger. To the extent that the cross-claim is made good to a greater amount than the amount of the judgment debt, Veolia will recover whatever distribution is, ultimately, paid. But that result will flow not from the decision to grant or withhold a stay, but from the fact that Kruger is in administration, and that a compromise between it and its creditors is in force. I do not think that Veolia's inability to recover, on an effective dollar for dollar basis through set-off, any amount greater than the judgment debt constitutes prejudice of a kind that is relevant to the discretion to grant or withhold a stay.

Alternative analysis

81 Alternatively, and if the foregoing analysis is incorrect, it would be necessary to consider the elements of the cross-claim as it is currently formulated. For the reasons that I gave concluding in para [66] above, I would conclude that Veolia is entitled to be protected at least to the extent of its claim for defective and incomplete works: $186,997. In saying this, I stress that I am expressing no view whatsoever on the likely outcome of that aspect of the cross-claim; and I have taken into account Mr Kruger's evidence as to why, in his view, it is without foundation. Nonetheless, that is a question for determination by others.

82 In my view, the position is different as to both aspects of the claim for liquidated damages. Having regard to the way that this claim has been formulated, and to the unsatisfactory and shifting nature of Mr Penton's statements in relation to that part of it relating to the claim by the principal (see para [61] above), I do not think that there is a sufficient risk of prejudice to justify overriding the clear policy of the Act as to prompt payment.

83 In reaching this conclusion, I take into account the history of the way in which the claims have from time to time been formulated. I take into account also a concern that Veolia has sought at all times to quantify its claim in an amount that exceeds the amount of the judgment debt. Thus:

(1) The first proof of debt included the vague and unsubstantiated amount of $277,500 for an unidentified and unspecified "*potential defects … and liquidated damages*" (see para [54] above). This claim has not been repeated.
(2) The second proof of debt included an amount of $250,000 for the repair of corrosion damage (see para [55] above). This claim has been dropped.
(3) No quantified claim for liquidated damages was advanced until 29 November 2006, although it had been foreshadowed on 9 November 2006 (see paras [57] and [58] above).
(4) The amount of $205,200 contained in Veolia's latest formulation of its claim, relating to liquidated damages allegedly claimed by the principal (see para [47] above) appears, on Mr Penton's oral evidence, to be at present unjustified (see para [61] above).

84 I take into account also the circumstance that, although the appropriate method for resolution of Veolia's claim is, at least in the first instance, a determination of its proof of debt, it has not given the administrator a proof of debt that includes either element of its claim relating to liquidated damages. Thus, the effect of the stay (which, I stress, is sought to prevent the cross-claim from being rendered worthless) is to keep Kruger out of the money *prima facie* owing to it whilst at the same time denying Kruger's administrator an opportunity to assess the full amount of the cross-claim. Veolia has offered no explanation for its failure to lodge a revised proof of debt with the administrator in the five months that have elapsed since it quantified its claim for liquidated damages.

85 In further written submissions provided by consent after my decision had been reserved, Mr Nicholls and Mr Christie addressed the question of a stay pending assessment of the proof of debt. Mr Nicholls referred to the history that I have outlined above, and to what he said was the weakness of Veolia's cross-claim. Mr Christie submitted that it was inappropriate for the Court, on the hearing of the application for a stay, to go into the merits of the cross-claim.

86 For the reasons that I have given in para [74] above, I think that the Court, when it hears applications such as the present, is entitled to consider the strength of the asserted cross-claim.

87 Mr Christie referred to a letter from Veolia to Mr Woodgate dated 23 April 2007. That letter was written after the hearing of the application for a stay, and, therefore, after I had reserved my decision. That letter was tendered at a subsequent (brief) hearing. It referred to the proof of debt of 14 September 2006, and stated "*that Veolia will submit a revised Proof of Debt … by close of business on Friday 4 May 2007*." *It asserted that the revised proof of debt "will include a detailed assessment of all sums owing to Veolia by Kruger … and will be supported by appropriate documentation.*" Thus, it concluded, "*no determination of the 14 September 2006 Proof should be made until the Amended Proof of Debt is lodged*."

88 I have the uncomfortable feeling that the letter was prompted by observations made, both by Mr Nicholls and by me, in the course of argument. It is otherwise a somewhat curious coincidence that Veolia, having taken no step since 29 November 2006 to revise its proof of debt, should suddenly have decided to do so.

89 The letter provides no substantiation of Veolia's claims relating to liquidated damages. In this context, I take into account Mr Penton's evidence as to what would be required adequately to assess the claim for liquidated damages, and my conclusion as to what would be required to assess the alleged claim by the principal (see paras [69] and [70] above), and the absence of any evidence that these steps have been initiated, let alone completed.

90 In my view, it would not be a principled exercise of the discretion to grant a stay to keep Kruger out of its money in the circumstances to which I have referred, and where the security offered by Kruger more than covers the only aspect of the claim that has so far been made the subject of a proof of debt. Nor do I think that a principled exercise of the discretion requires me to take into account, in deciding the question of a stay in favour of Veolia, its belated interest in submitting a revised proof of debt.

Conclusion on stay

91 Taking into account all the factors to which I have referred, I think that an appropriate exercise of the discretion requires the stay to be refused, but only upon the basis that Kruger provides the security to which I have referred in para [71] above. That result balances in an appropriate way the legislative policy of the Act requiring prompt payment of progress claims against the undoubted interest of Veolia in preserving, in a real and not merely theoretical sense, the value of its cross-claim. The security offered by Kruger will effectively preserve Veolia's undoubted interest in extinguishing the judgment debt through set-off (assuming that it can prove the amount of its set-off). On the particular facts of this case, taking into account the security offered by Kruger, there is no risk that interim rights will be made permanent if the stay is refused.

92 Veolia addressed no submissions to the terms of the bank guarantee proffered by Kruger. However, I will give it an opportunity to be heard on the terms of the guarantee should it wish.

Fourth issue: abuse of process

93 The conclusions to which I have come on the first three issues make it unnecessary to consider this issue.

Conclusion and order

94 Veolia's amended notice of motion should be dismissed with costs, and consequential orders relating to the security proffered by Kruger, the existing stay and payment under Veolia's existing security should be made. However, I will defer making orders until the parties have had an opportunity of considering these reasons and putting such submissions as they wish as to the precise orders that should be made.

95 I order that the further hearing of the amended notice of motion be adjourned to enable the parties to bring in agreed or competing short minutes of order (and, in the latter case, to hear submissions on the competing versions). The parties have leave to approach my associate to fix the adjourned date.

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