CATCHWORDS : Practice & procedure – Stay of execution of judgment – Claim by contractor for payment of progress certificates – Cross-claim by principal – Summary judgment application by plaintiff successful – No payment by defendant/judgment debtor – Receivers and managers appointed to plaintiff/judgment creditor – Plaintiff/judgment creditor in administration and then liquidation – Further certificate issued by superintendent arguably varying amount payable to plaintiff/judgment creditor – Whether there was equitable set-off or statutory set-off pursuant to s.553C of the *Corporations Act* 2001 – Whether there should be stay of execution of all or part of the principal component of the judgment and of the interest component of the judgment.

HIS HONOUR Habersberger J : Commercial & Equity Division. Melbourne : Supreme Court of Victoria. 12th April 2006.

The Application

1 This is an application by the defendant, Samary Enterprises Pty Ltd, by summons filed 18 November 2005 for a stay of execution of paragraphs 1 and 2 of my order made on 11 October 2005, pending the hearing and determination of its counterclaim against the plaintiff, Main Roads Corporation Pty Ltd, which at the date of the application had Receivers and Managers appointed and an Administrator appointed, but which is now also in liquidation.

2 The two paragraphs of my order in respect of which the stay was sought were as follows:

"1. There is judgment for the plaintiff against the defendant in the sum of $456,978.98 together with interest thereon in the sum of $48,424.53.

2. The defendant pay the plaintiff's costs of its claim other than paragraphs 12-14 of the statement of claim, and the costs of this application."

3 Rule 66.16 of the Supreme Court (General Civil Procedure) Rules 2005 permits the court to "stay execution of a judgment."

Background

4 On 28 September 2005 I published my reasons for judgment on the plaintiff's application for summary judgment in the sum of $456,978.98, plus interest, said to be owing pursuant to six progress certificates issued by the superintendent under a building contract between the plaintiff as contractor and the defendant as principal.[1]

5 The principal issue in that judgment was whether, notwithstanding that the defendant arguably had set-offs or counterclaims in excess of the plaintiff's claim, the parties had, by their contract, excluded the ordinary right of set-off, other than in accordance with the contract, so that the defendant was bound by the contract to pay the amount of each progress certificate without any deduction.[2] I held that, read as a whole, the contract between the parties made it abundantly clear that apart from the procedure for set-off described in cl.37.2, the principal must pay to the contactor the amount of the progress certificates, which were "on account only" pending the issue by the superintendent of a final certificate under cl.37.4.[3]

6 On 11 October 2005 I gave an ex temporore judgment refusing the defendant's application for a stay of execution of the above judgment which I had ordered be entered against the defendant on that day. My reasons for refusing the stay were that:

(a) I was not satisfied on the material then before me that the defendant had made out its case that the plaintiff company was being handled in such a way that the assets of that company would be unavailable for execution in the event that the counterclaim was successful; and

(b) to stay the execution of the judgment on the basis that the defendant might have a good counterclaim at large would be to undermine the whole contractual arrangement between the plaintiff and the defendant, and that this position was not altered by the defendant's reliance on a draft certificate of payment dated 6 October 2005 which had apparently been prepared by the superintendent.

Subsequent Developments

7 Despite my refusal of the stay the defendant has not paid to the plaintiff any part of the judgment debt. On 23 October 2005 the plaintiff served on the defendant a creditor's statutory demand for payment of debt dated 21 October 2005. On 11 November 2005 the defendant applied to set aside that statutory demand. That application has been adjourned to await the outcome of this application.

8 On 7 November 2005 St George Bank Limited appointed Andrew Hewitt and Gregory John Keith as receivers and managers of the plaintiff and six other related companies. On the following day the plaintiff changed its name to MR Corporation (Aust) Pty Ltd. On 10 November 2005 Glen Anthony Crisp was appointed administrator of the plaintiff.

9 As previously stated, on 18 November 2005 the defendant filed its summons seeking a stay of execution of the judgment debt. That application was supported by an affidavit sworn on 18 November 2005 by Sam Tsambikos, the husband of Mirianthy Tsambikos, the sole director and shareholder of the defendant. Much of that affidavit was devoted to demonstrating the parlous financial position of the "Main Roads" group of companies which were all associated with one Richard Frank Furnari, the managing director of the plaintiff, and with attempting to establish that the affidavit of Mr Furnari sworn on 11 October 2005, on which the plaintiff relied in part in opposing the first stay application, was false or "disingenuous."

1 [2005] VSC 388
2 At [18]
3 At [45]

10 Subsequently, the defendant's summons, which was adjourned from time to time at the request of the parties, was supported by two further affidavits, one by Mr Tsambikos sworn on 6 March 2006 and one by the superintendent under the contract between the parties, Dennis Antony Callander, sworn on 8 March 2006.

11 In his second affidavit, Mr Tsambikos deposed to the fact that on 6 December 2005 the plaintiff company had been placed in liquidation by resolution of its creditors and Mr Crisp appointed liquidator. Mr Tsambikos also deposed that shortly after his first affidavit had been sworn the new contractor had completed the construction of the rising main and that accordingly he had requested the superintendent to issue a certificate as to the contract sum adjustments to replace the draft certificate referred to above. He and Mr Callander both exhibited a copy of a Contract Adjustment Certificate dated 24 November 2005 which had been prepared and issued by Mr Callander following the completion of the construction of the rising main. This was a part of the contractual work allegedly not carried out by the plaintiff. The Contract Adjustment Certificate purported to deduct three amounts totalling $282,711.04 from the certified contract amount of $1,017,233.85 leaving a net amount approved for payment, before GST, of $734,522.81 of which $630,349.30, before GST, had been paid. The three deductions, which had not previously been taken into account in any certificate issued by the superintendent, were for liquidated damages, faulty works and incomplete works.

12 On 30 March 2006 Mr Hewitt, one of the receivers and managers of the plaintiff, swore an affidavit opposing the defendant's application for a stay.

13 The application finally came on for hearing on 31 March 2006. After some argument, I adjourned the hearing to 5 April 2006 to enable the defendant to give notice of the application to the liquidator of the plaintiff. In particular, I was concerned to give the liquidator the opportunity, if he so desired, to make submissions about whether or not leave to proceed under s.471B of the *Corporations Act* 2001 was required and, if it was, whether it should be given. In response to that notification the liquidator advised the solicitors for the defendant by a letter dated 4 April 2006 that he did not intend to be represented at the adjourned hearing "as the receiver and manager is controlling the matter."

14 It is not clear, in my opinion, whether this application falls within the prohibition in s.471B(a) that a person cannot proceed with *"a proceeding in a court against the company or in relation to property of [a company which is] ... being wound up in insolvency."* This application is not made in a proceeding or action against the company in liquidation, but it is made in a proceeding or action *"in relation to property of"* the plaintiff. It is also probably correct to regard the defendant's application as proceeding with the action, even though in a sense seeking a stay of execution is not really proceeding with or advancing or moving forward the action itself. In any event, it seems sensible to me, out of an abundance of caution, to treat the application as one requiring leave.

15 I consider that, pursuant to s.440D of the *Corporations Act* 2001, leave should be given, now for then, to the defendant to issue this application and that, pursuant to s.471B, leave should be given to the defendant to continue with this application, because in fairness to the defendant the issues raised by it require resolution by the Court. Leave of the Court under s.440D is necessary, in my opinion, because at the time the application was issued the plaintiff was in administration but not yet in liquidation. Nevertheless, the real question is whether the defendant is entitled to proceed with this action "in relation to the property of" the plaintiff by continuing with its application for a stay of execution of the judgment against it when the plaintiff is now in liquidation. In my opinion, other creditors of the plaintiff are not prejudiced and the orderly course of the liquidation is not disrupted by the defendant being granted leave, particularly because at this stage the dispute is between the defendant and the receivers and managers of the plaintiff and not the liquidator of the plaintiff. I therefore propose to grant the defendant limited leave to proceed under both sections of the *Corporations Act* 2001.

Should Execution Be Stayed?

16 It seems to me that in deciding whether or not this second application for a stay of execution of the judgment debt should totally or partially succeed, the first matter to consider is the fact that receivers and managers were appointed to the plaintiff on 7 November 2005.

17 The receivers and managers were appointed to the plaintiff, pursuant to a fixed and floating charge taken by St George Bank Limited ("the Bank") over the assets of the plaintiff on 3 December 2004. Mr Dixon of counsel, who appeared for the plaintiff, pointed out that by this stage over $366,500 was owing by the defendant in respect of the first two unpaid progress certificates. However, the further affidavit of Mr Hewitt sworn on 4 April 2006, to which he exhibited a copy of the fixed and floating charge dated 3 December 2004, made it clear that the plaintiff "in its own right and as trustee for the Main Roads Hybrid Trust" was only one of five guarantors of the borrower, TPM Holdings (Vic) Pty Ltd and each of the members of the TPM Holdings (Vic) Trust Venture, and that none of the funds of $4.21 million in the two facilities secured by the charge went directly to the plaintiff in December 2004. Mr Hewitt also deposed that he believed that approximately $3.284 million remained outstanding to the Bank.

18 It was common ground that upon appointment, the Bank's charge crystallised and the plaintiff's assets subject to the charge were assigned to the Bank. However, the defendant submitted that there was a general principle that an assignee takes subject to all prior equities. That is, the assignee takes subject to rights in the nature of defences available to the debtor against the assignor. A set-off, but not a counterclaim, is in the nature of a defence to the plaintiff's claim.[4]

[4] *Roxburghe v Cox* (1881) 17 Ch D 520 at 526 per James LJ; *Edward Nelson & Co Ltd v Faber & Co* [1903] 2 KB 367 at 375 per Joyce J

19 Mr Bigmore QC, who appeared with Mr Upjohn of counsel for the defendant, therefore submitted that in these circumstances the Bank, even though it was a secured creditor, was not entitled to take the judgment debt without the equities which attached to it, including the rights of set-off of the defendant both in equity and under statute in respect of, at least, the amounts allowed to the defendant in the superintendent's Contract Adjustment Certificate in respect of the defendant's counterclaim generally. Mr Bigmore referred me to the decision of the Privy Council in ***Government of Newfoundland v Newfoundland Railway Co.***[5] in which it was held that the Newfoundland Government was entitled to set-off a claim for damages arising out of the defendant railway company's failure to complete a **construction contract** against a claim by the company and its assignees to a subsidy which the Government had agreed to pay for each completed portion of the track. In delivering the judgment of the Privy Council, Lord Hobhouse said: *"The two claims under consideration have their origin in the same portion of the same contract, where the obligations which gave rise to them are intertwined in the closest manner. The claim of the Government does not arise from any fresh transaction freely entered into by it after notice of assignment by the company. ...*

Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment." [6]

20 The reasoning in the ***Government of Newfoundland*** case was followed by Mann CJ of this Court in ***Sun Caddies Pty Ltd v Polites*** [7] : In that case the claim and counter-claim arose out of a contract for the sale of a business: the vendor company lodged a liquidated claim for the balance of the purchase money; the purchaser made an unliquidated claim for breach of warranty as to the value of the business. Mann CJ allowed a set-off even though a receiver of the vendor's business had been appointed within a fortnight after the business sale contract was formed.

21 It should be noted that in both of these cases the assignment occurred prior to the claim being made against the assignor. This is important, in my opinion, because it might be said that where, as here, the floating charge crystallised and the assets of the plaintiff were assigned to the Bank some 17 days before the superintendent issued his Contract Adjustment Certificate, the Bank took those assets free of any equity arising from any set-off created by the Certificate. I will return to this issue when considering what if any consequences flow from the issue of that Certificate.

22 What was established by these cases, it seems to me, is that where the obligations which gave rise to the competing claims by each party to the contract are "intertwined in the closest manner" or are "flowing out of and inseparably connected" with each other, the claims of the contracting party against an assignor may be treated as prevailing over the rights of an assignee, including receivers and managers, in the sense that it may be held that there was an equitable set-off. The question therefore is whether the defendant's counterclaim, alternatively any changes resulting from the Contract Adjustment Certificate, come within that test. Again, I will return to this issue when considering the impact of that Certificate.

23 Mr Bigmore also submitted that the defendant had a statutory set-off pursuant to s.553C(1) of the *Corporations Act* 2001which reads as follows:

"Insolvent companies--mutual credit and set-off

(1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:

(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and

(b) the sum due from the one party is to be set off against any sum due from the other party; and

(c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be."

24 Although the plaintiff is now in liquidation, it seems to me that this provision may not be applicable to the current dispute. The question before me is not what amount is admissible to proof by the liquidator against the company, but whether the defendant has any set-off against the receivers and managers' claim to execution of the judgment debt. As Mr Dixon submitted, there may not be any mutuality between the defendant and the receivers and managers. Nevertheless, the question of the applicability of s 553C does raise serious and difficult issues.

25 I turn then to consider what, if any, consequences flow from the fact that on 24 November 2005 the superintendent issued a Contract Adjustment Certificate.

26 The first point to note about the Contract Adjustment Certificate is that Mr Hewitt has deposed that prior to reading Mr Callander's affidavit he was not aware of the existence of that Certificate, even though it was prepared after his appointment. Mr Hewitt has also deposed that he has been informed by Mr Furnari, and believes, that the plaintiff had not received the Certificate and that Mr Furnari was also unaware of its existence until he read the Callander affidavit. On the other hand, Mr Callander has sworn that he *"served"* the Contract Adjustment Certificate *"on both parties to the contract."*

[5] (1888) 13 App Cas 199
[6] (1888) 13 App Cas 199 at 212 and 213
[7] [1939] VLR 132

27 It is not necessary, in my opinion, to resolve this conflict because it is clear that the plaintiff and its receivers and managers have now received a copy of the Contract Adjustment Certificate. I note, however, that I would not be prepared to place any reliance on any denial by Mr Furnari of receipt of the Certificate which he has not directly sworn to on oath. There was no explanation why Mr Furnari had not himself sworn an affidavit deposing to the relevant matters, rather than Mr Hewitt deposing to them on information and belief.

28 The second point is to record what the Contract Adjustment Certificate actually said. Under the heading "***Contract Adjustment Certificate***" it stated: *"Contract Adjustment as per clause 37.2 of the contract."* After stating the name and address of the defendant it continued: *"Please be advised that the Contractor has been granted Practical Completion and is therefore entitled to the release of 50% of the retention amount held by Samary Enterprises Pty Ltd subject to the following deductions for incomplete defects and works covered by clause 13 of the contract. All figures are exclusive of GST."*

The figures referred to were as follows:

"Contract amount claimed as at 24th November 2005	$780,963.00
Approved variations as at 24th November 2005	$262,353.87
Total amount claimed	$1,043,316.87
Less retention (limit 2.5% at practical completion)	$26,082.92
Nett amount claimed	$1,017,233.85
Less [sic] amounts certified as at 13th May 2005	$1,017,233.85
Less liquidated damages as per clause 34.7 (Practical Completion achieved 13th May 2005)	-$49,050.00
Less adjustments due to Samary Enterprises for faulty works	-$74,283.04
Less adjustments due to Samary Enterprises for incomplete works all as per following page	-$159,378.00
Nett amount approved for payment	$734,522.81"

On the following page, the superintendent gave a breakdown of his calculation of the amounts of $74,283.04 and $159,378.00 under the headings "Costs to Complete Defective and Unsafe Works" and "Cost to Complete Rising Main Works" respectively.

29 In order to understand the relevance of the Contract Adjustment Certificate it is necessary to set out what occurred on 13 May 2005. By a Site Instruction dated 13 May 2005 the superintendent instructed the plaintiff as follows:

"RE: Broadford Lakes Stage 1 for Samary Enterprises Pty Ltd

In accordance with clause 13 of the contract I advise that, despite your company's assurances that the works detailed in the site instruction dated 11th May 2005 would be completed by 10 a.m. on the 13th May 2005, they remain left in a dangerous state. On an inspection this morning the temporary lids have been removed and the safety bunting has also been disturbed and no attempt has been made to make safe and complete the works described.

Accordingly I advise that I will arrange for these works to be completed by another contractor. All costs of rectification will be to your account and a contract variation will be issued once all costs have been finalised. I further advise that you are specifically instructed not to attempt to complete these works."

30 On the same day the superintendent wrote to the plaintiff the following letter:

"RE: Broadford Lakes Stage 1 for Samary Enterprises Pty Ltd

I refer to your request for Practical Completion dated 12th April 2005 and advise as follows

1. *The Principal, Samary Enterprises Pty Ltd has today confirmed that they will agree with your request for the deletion of the balance of the Rising Main works from the contract works. Accordingly I am now preparing the necessary documentation to issue to Main Roads Corporation a certificate of practical completion.*
2. *In accordance with the contract provisions I will prepare a contract summary detailing final contract sum and retentions held and will apply liquidated damages and penalty interest adjustments to arrive at a final contract sum. I will also issue a certificate for the release of 50% of the retention amounts held by Samary Enterprises Pty Ltd.*
3. *The defects works as listed in my correspondence to you on the 22nd March remains as detailed and no attempt has been made to complete these works. You are requested to advise when you intend to complete these works. These works are required to be completed by 27th May 2005."*

31 Finally, also on 13 May 2005 the superintendent issued a Certificate of Practical Completion dated that day. It read as follows: *"In accordance with clause 34.6 of AS 4000 (1997) of the contract between Samary Enterprises Pty Ltd and Main Roads Corporation for the works at Broadford Lakes Estate Reservoir Road Broadford Stage 1 Practical Completion has been reached as at the 13th May 2005. The works are therefore certified as being practically complete for the intended use.*

The defects liability period of 12 months, item 27 of the Part A annexure (clause 35), commences on the 13th May 2005 and provided all agreed defects are completed precipitously and within the 12 month liability period the contractors liability under the contract ceases on the 13th May 2006. The Principal is required to release 50% of the retention sums held on behalf of the contractor within 21 days of the date of this certificate. A certificate for this amount will be forwarded under separate cover to both the Principal and the Contractor."

32 I have already mentioned that the Contract Adjustment Certificate was said to have been issued under cl.37.2 of the contract. That clause reads as follows:

*"**Certificates***

The Superintendent shall within 14 days after receiving such a progress claim, issue to the Principal and the Contractor:

a) a progress certificate evidencing the Superintendent's opinion of the moneys due from the Principal to the Contractor pursuant to the progress claim and reasons for any difference ('progress certificate'); and

b) a certificate evidencing the Superintendent's assessment of retention moneys and moneys due from the Contractor to the Principal pursuant to the Contract.

If the Contractor does not make a progress claim in accordance with Item 28, the Superintendent may issue the progress certificate with details of the calculations and shall issue the certificate in paragraph (b).

If the Superintendent does not issue the progress certificate within 14 days of receiving a progress claim in accordance with subclause 37.1 that progress claim shall be deemed to be the relevant progress certificate.

The Principal shall within 7 days after receiving both such certificates, or within 21 days after the Superintendent receives the progress claim, pay to the Contractor the balance of the progress certificate after deducting retention moneys and setting off such of the certificate in paragraph (b) as the Principal elects to set off. If that setting off produces a negative balance, the Contractor shall pay that balance to the Principal within 7 days of receiving written notice thereof.

Neither a progress certificate nor a payment of moneys shall be evidence that the subject WUC has been carried out satisfactorily. Payment other than final payment shall be payment on account only."

Despite Mr Bigmore's submission that sub-paragraph (b) of the first paragraph of cl 37.2 justified the issuing of the Contract Adjustment Certificate, I do not consider that cl 37.2 has any role to play in respect of that certificate because it was not issued in response to any progress claim by the plaintiff. Indeed, Mr Dixon submitted that this certificate was a nullity, as it was issued without any contractual basis, and should therefore be ignored.

33 Nevertheless, it seems to me that other provisions of the contract are possibly relevant to this issue. These include the following:

*"**Urgent protection***

*If urgent action is necessary to protect WUC, other property or people and the Contractor fails to take the action, in addition to any other remedies of the **Principa**l, the **Superintendent** may take the necessary action. If the action was action which the **Contracto**r should have taken at the Contractor's cost, the **Superintendent** shall certify the cost incurred as moneys due from the Contractor to the Principal.*

*If time permits, the **Superintendent** shall give the Contractor prior written notice of the intention to take action pursuant to this clause. ...*

29. Quality ...

29.3 Defective work

*If the Superintendent becomes aware of work done (including material provided) by the **Contractor** which does not comply with the **Contract,** the Superintendent shall as soon as practicable give the **Contractor** written details thereof. If the subject work has not been rectified, the **Superintendent** may direct the Contractor to do any one or more of the following (including times for commencement and completion):*

a) remove the material from the site;

b) demolish the work;

c) reconstruct, replace or correct the work; and

d) not deliver it to the site.

If: a) the Contractor fails to comply with such a direction; and

*b) that failure has not been made good within 8 days after the Contractor receives written notice from the **Superintendent** that the **Principal** intends to have the subject work rectified by others,*

*the **Principal** may have that work so rectified and the Superintendent shall certify the cost incurred as moneys due from the **Contractor** to the **Principal.** ...*

29.5 Timing

*The **Superintendent** may give a **direction** pursuant to this clause at any time before the expiry of the last **defects liability period**. ……*

34 Time and progress

34.1 Progress

*The **Contractor** shall ensure that WUC reaches **practical completion** by the **date for practical completion**. ….*

34.6 Practical completion

*The **Contractor** shall give the **Superintendent** at least 14 days written notice of the date upon which the Contractor anticipates that **practical completion** will be reached.*

*When **the Contractor** is of the opinion that **practical completion** has been reached, the **Contractor** shall in writing request the **Superintendent t**o issue a **certificate of practical completion**. Within 14 days after receiving the request,*

*the **Superintendent** shall give the **Contractor** and the **Principal** either a **certificate of practical completion** evidencing the **date of practical completion** or written reasons for not doing so.*

*If the S**uperintendent** is of the opinion that practical completion has been reached, the **Superintendent** may issue a **certificate of practical completion** even though no request has been made.*

34.7 Liquidated damages
*If **WUC** does not reach **practical completion** by the **date for practical completion**, the **Superintendent** shall certify, as due and payable to the **Principal,** liquidated damages in Item 24 for every day after the **date for practical completion** to and including the earliest of the **date of practical completion** or termination of the **Contract** or **the Principal** taking **WUC** out of the hands of the **Contractor.***

*If an EOT is directed after the Contractor has paid or the Principal has set off liquidated damages, the **Principal** shall forthwith repay to the Contractor such of those liquidated damages as represent the days the subject of the EOT.*
...

36 Variations
36.1 Directing variations
*The **Contractor** shall not vary **WUC** except as directed in writing.*

*The **Superintendent,** before the **date of practical completion**, may direct the **Contractor** to vary **WUC** by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the **Contract:***
a) increase, decrease or omit any part;
b) change the character or quality;
c) change the levels, lines, positions or dimensions;
d) carry out additional work;
e) demolish or remove material or work no longer required by the Principal. ……

36.4 Pricing
*The **Superintendent** shall, as soon as possible, price each **variation** using the following order of precedence:*
a) prior agreement;
b) applicable rates or prices in the Contract;
*c) rates or prices in a priced **bill of quantities, schedule of rates** or schedule of prices, even though not **Contract** documents, to the extent that it is reasonable to use them; and*
d) reasonable rates or prices, which shall include a reasonable amount for profit and overheads,

and any deductions shall include a reasonable amount for profit but not overheads.

That price shall be added to or deducted from the contract sum."

34 Thus, it seems to me that the Contact Adjustment Certificate was arguably justified on one or more of the following bases:
(a) under cl.13 as a certificate of "the cost incurred as moneys due from the Contractor to the Principal" for urgent protection work;
(b) under cl.29.3 as a certificate of "the cost incurred as moneys due from the Contractor to the Principal" for rectification of defective work;
(c) under cl.34.6 and 34.7 as a certificate of the amount of liquidated damages "due and payable to the Principal"; and
(d) under cl.36.1 and 36.4 as the superintendent's pricing of the variation to the contract resulting from the omission of part of the work, namely the construction of the rising main.

This would mean that the Contract Adjustment Certificate supersedes the progress certificates on which the judgment was based. If the defendant had already paid the progress certificates or the judgment debt, then, depending on how much had been paid, the plaintiff might be obliged to repay some amount to the defendant. Certainly, that is what cl.34.7 of the contract contemplates in respect of liquidated damages and I see no reason not to apply the same approach to the other deductions.

35 Of course, the situation before me is that the defendant has not overpaid the plaintiff according to the superintendent's Contract Adjustment Certificate because even the defendant accepted that the certificate did not mean that there was nothing owing by it to the plaintiff pending the determination of its counterclaim. The parties agreed that were the Contract Adjustment Certificate to be given full operation, the amount still owing by the defendant to the plaintiff before GST was the sum of $104,173.51, calculated as follows:

Net amount approved for payment	$734,522.81
Less paid (before GST)	$630,349.30
	$104,173.51

I agree with the plaintiff's contention that GST of $10,417.35 should be added, making an amount of $114,590.86 still owing by the defendant to the plaintiff, according to the superintendent's Contract Adjustment Certificate.

36 It is important to understand, in my opinion, that the progress certificates the subject of the judgment debt were payable "on account only." That is, under the contract the relationship between the plaintiff and the defendant

was fluid in terms of who from time to time might be the creditor and who might be the debtor. The debt created by the six unpaid progress certificates was only an interim or provisional position in the sense that under the contract the issue by the superintendent of a further certificate following practical completion or a final certificate following the expiry of the last defects liability period could mean that the roles of the defendant and the plaintiff could be reversed in terms of debtor and creditor. This is not to say that the defendant was not liable to pay the judgment debt. It is simply a recognition that the judgment debt was based on progress certificates payable "on account only" and that this situation could be altered or even reversed following the issue of a further certificate by the superintendent appointed under the contract. It is arguable, in my opinion, that the possibility of this set-off existed prior to the appointment of the receivers and managers, and that this meant that any assignment to the Bank of the plaintiff's assets was subject to this set-off. An alternative way of looking at it, is to say that the contract between the parties was such that the progress certificates issued by the superintendent were always subject to being superseded by a later certificate.

37 Therefore, it seems to me that, as a result of the superintendent issuing his Contract Adjustment Certificate dated 24 November 2005, it would be appropriate to stay execution of part of the principal component of the judgment debt, namely $342,388.12. That sum is calculated by deducting the amount of $114,590.86 from the amount of $456,978.98, which was the principal component of the judgment debt.

38 The next question is whether there should also be a stay in respect of the balance left outstanding, namely $114,590.86, even after giving full credit for the Contract Adjustment Certificate. I have found this to be the most difficult part of the application. On the one hand, I have already held that to stay the execution of the judgment on the basis that the defendant might have a good counterclaim at large would be to undermine the whole contractual arrangement between the plaintiff and the defendant. On the other hand, one perhaps should not ignore that the defendant does have its counterclaim, most of which is arguably *"flowing out of and inseparably connected"* with or closely *"intertwined"* with the plaintiff's claims on which the judgment was based.[8] Further, the superintendent, Mr Callander, has expressed the view in a letter to the defendant's solicitors dated 4 April 2006 that when he comes to issue the final certificate on 13 May 2006, pursuant to cl 37.4 of the contract, there might be the case for *"a further contract adjustment in the favour of Samary Enterprises"* on the basis of the possible incomplete construction of storm water drainage points.

39 Consistent with my previous ruling I do not consider that the question of the counterclaim on its own and the question of a possible change in the figures following a future certificate from the superintendent should be treated as justifying a stay on the balance of the judgment sum. But there are additional circumstances which, in my opinion, tilt the balance in favour of staying execution of the whole of the principal component of the judgment debt.

40 First, it seems reasonably clear that if the defendant is required to pay the further $114,590.86, because there has been no stay in respect of that amount, it will not be able to recover that amount from the plaintiff should the eventual outcome of the defendant's counterclaim be that the plaintiff owes it money, rather than the other way round. I accept Mr Dixon's submission that this in an inherent risk of carrying on business and that the defendant has not utilised provisions in the contract which might have given it some protection from this risk. It was largely for this reason that I refused the first application for a stay. The situation is, however, rather different now. Not only have receivers and managers been appointed to the plaintiff, but it is also in liquidation. Any money paid by the defendant in part satisfaction of the judgment will now go to the Bank pursuant to its security. It is by no means clear to me that, if the defendant were eventually successful in establishing that the Bank took subject to an equity in favour of the defendant, the Bank would be obliged to disgorge that money paid by the defendant. Mr Dixon submitted that it would be entitled to retain those funds, and no undertaking to repay, whatever the strict legal position, was forthcoming from the Bank.

41 Secondly, the plaintiff is in liquidation and this has given rise to the possible statutory set-off under s.553C of the *Corporations Act* 2001. Even though I am inclined to the view that the section is not applicable to the present situation, it seems to me to be at least arguable that it does apply, and if no stay is granted the defendant will effectively be deprived of the benefit of that provision should it later be held to have been entitled to rely on the statutory set-off. In my opinion, this is a further reason for deciding that there should be a stay of execution of the whole of the principal component of the judgment debt.

42 Finally, there is the question of a stay of the interest component of the judgment debt of $48,424.53. I do not consider it would be appropriate to order any stay of the interest component because this is payable by the defendant as a result of it not paying the progress certificates on time. This default is not affected by any of the above arguments, including in particular the subsequent issue of the Contract Adjustment Certificate. The interest is payable by way of compensation for the plaintiff not receiving the progress payments on account on time. (There is also the question of interest on the judgment debt pursuant to s.101 of the *Supreme Court Act* 1986. I do not propose to make any order in respect of this because it seems to me that until the validity of the Contract Adjustment Certificate is determined, the amount of the judgment debt, at least after 24 November 2005, cannot be finally determined.)

[8] *Government of Newfoundland v Newfoundland Railway* Co (1888) 13 App Cas 199 at 212 and 213.

43 In my opinion, the stay of execution of the principal component of the judgment should be made conditional on the defendant providing satisfactory security, such as by bank guarantee,[9] for the sum of $456,978.98 together with interest thereon at the penalty interest rate from time to time from 11 October 2005. I can think of nothing more likely to bring the law into disrepute than to have the situation that, if the defendant is eventually required to pay all or part of that sum to the plaintiff, it turned out that it was then financially unable to do so. The plaintiff is entitled to be protected from such an unfair outcome of the granting of the stay.

44 There is a further complicating factor in respect of the stay. In the normal course, the stay would be expressed to *be "until the hearing and determination of the defendant's counterclaim or further order."* As the plaintiff is in liquidation, leave will certainly be required to proceed with the counterclaim against the plaintiff, which may be the appropriate course if the liquidator finally rejects the defendant's proof of debt. It therefore seems to me that the standard wording is still appropriate, because if the liquidator rejects the defendant's proof of debt it can apply for leave to proceed with its counterclaim, and if the liquidator and the defendant reach some agreement on the proof of debt based on the counterclaim they can if necessary seek a consent order with respect to the stay.

45 Finally, I note that although the defendant's application was for a stay of execution of paragraphs 1 and 2 of my order made on 11 October 2005, no argument was addressed to the question of a stay of paragraph 2 which dealt with the costs of the plaintiff's successful summary judgment application. I do not consider that there should be any stay of the costs order. In my opinion, the plaintiff is entitled to seek to recover the costs ordered to be paid by the defendant, should it choose to do so.

Orders

46 The orders that I would propose making are as follows:

1. Pursuant to s.440D of the *Corporations Act* 2001, the defendant have leave, now for then, to issue its summons filed on 18 November 2005.
2. Pursuant to s.471B of the *Corporations Act* 2001, the defendant have leave to continue with the application made by the summons filed on 18 November 2005.
3. Pending the hearing and determination of the defendant's counterclaim in this proceeding or further order, there be a stay of execution of that part of the judgment entered on 11 October 2005 in this proceeding for the plaintiff against the defendant represented by the principal sum, namely $456,978.98, on condition that on or before 4.00 p.m. on 26 April 2006 the defendant provide security to the plaintiff in an agreed form, alternatively to the satisfaction of the Prothonotary, for the sum of $456,978.98 together with interest thereon at the penalty interest rate from time to time from 11 October 2005.

47 I will hear counsel further on the question of the wording of the order and on the question of the costs of this application.

Mr J.R. Dixon instructed by Harwood Andrews Lawyers
Mr G. Bigmore QC with Mr I.W. Upjohn instructed by John Matthies & Co

[9] See *Joskovitz v Bonnick* [1964] VR 654 and r.1.14.1(b) of the Supreme Court (General Civil Procedure) Rules 2005.