

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA487/2021
[2022] NZCA 654**

BETWEEN	SRG GLOBAL REMEDIATION SERVICES (NZ) LIMITED Appellant
AND	BODY CORPORATE 197281 First Respondent
AND	MAYNARD MARKS LIMITED Second Respondent
AND	HOBANZ PROJECT ASSIST LIMITED Third Respondent
AND	HELLABY RESOURCE SERVICES LIMITED Fourth Respondent

Court: French and Dobson JJ

Counsel: C L Bryant and N P Gillies for Appellant
R J Hollyman KC, N G Lawrence and W J Revell for First
Respondent

Judgment: 21 December 2022 at 10.30 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for a stay of this Court’s judgment that reversed the stay on enforcement of the summary judgment is granted in part on the terms set out at [28] of this judgment.**
- B There is no order as to costs.**
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REASONS OF THE COURT

(Given by Dobson J)

Introduction

[1] On 2 November 2022 this Court issued its judgment on appeals and cross-appeals brought by parties to this litigation.¹ The judgment dismissed the first respondent's (the Body Corporate's) cross-appeal against a grant of summary judgment in favour of the appellant (SRG) for the certified quantum of works undertaken to remediate the Body Corporate's apartment building in Auckland. The judgment also allowed SRG's appeal against the High Court order staying the summary judgment in its favour pending resolution of High Court proceedings brought by the Body Corporate against SRG and other parties for alleged deficiencies in the remedial works. Those proceedings have a fixture in the High Court starting in July 2023.

[2] The Body Corporate has sought leave from the Supreme Court to appeal that part of this Court's judgment that reversed the stay on enforcement of the summary judgment against it. SRG has for its part sought leave on a separate finding that upheld the High Court's judgment that dismissed SRG's protest to the High Court assuming jurisdiction to determine the Body Corporate's claims on account of a contractual provision that ostensibly required such claims to be arbitrated.

[3] This judgment deals with the Body Corporate's application for stay of that part of the judgment that removed the stay on execution of the summary judgment until the Body Corporate's claims against SRG have been determined. The application is opposed by SRG and the fourth respondent (Hellaby Resource Services Ltd).²

[4] Such applications are to be determined pursuant to r 30 of the Supreme Court Rules 2004. That rule provides:

¹ *SRG Global Remediation Services (NZ) Ltd v Body Corporate 197281* [2022] NZCA 518 [CA substantive judgment].

² Following a conference call, it was agreed that Hellaby would not make submissions in its own right but would confer with SRG about the content of SRG's submissions.

30 Stay of proceedings and execution

- (1) Neither an application for leave to appeal nor the giving of leave operates as a stay of the proceeding in which the decision was given or as a stay of execution of that decision.
- (2) Pending the determination of the application or the appeal, the court appealed from or the Supreme Court may, on application,—
 - (a) order a stay of the proceeding in which the decision was given or a stay of the execution of the decision; or
 - (b) grant any interim relief.
- (3) A determination under subclause (2) may—
 - (a) relate to execution of the whole or part of the decision or to a particular form of execution:
 - (b) be subject to any conditions for the giving of security the court appealed from or the Supreme Court thinks fit.
- (4) If the court appealed from refuses to make an order under subclause (2), the Supreme Court may, on application, make an order under that subclause.
- (5) If the court appealed from makes an order under subclause (2), the Supreme Court may, on application, vary or rescind the order.
- (6) The Supreme Court may at any time vary or rescind an order made by it under this rule.

The Body Corporate's submissions

[5] The Body Corporate argues that its appeal will be rendered nugatory if a stay is not granted, in the sense that there would be no point in having the Supreme Court determine whether a stay of the summary judgment ought to have been continued, given the current expectation that SRG will take steps to enforce the summary judgment unless the stay remains in place. Without explicitly saying so, it is implicit that if required to satisfy the judgment, the Body Corporate would then not have the resources to pursue its claims against SRG for defective workmanship and overcharging.

[6] The Body Corporate also argues that its entitlement to a stay in the circumstances of its unresolved claims against SRG raises a novel issue of wider commercial interest. Further, that the usual reasons for allowing a contractor to enforce payment of amounts certified under a construction contract do not apply in

this case, as the contract has been concluded and the contractor has assigned to a non-involved third party the benefit of the amount owing under the contract. Arguably, those financial arrangements mean that SRG and its assignee (Hellaby) cannot claim prejudice at being kept out of their money, in the sense that usually arises for a contractor managing the cash flow stresses involved in funding a substantial construction contract.

[7] The Body Corporate raises a concern that SRG's position is different from that of a contractor seeking money under the Construction Contracts Act 2002 (CCA) in that it no longer has any direct pecuniary interest. The Body Corporate suggests a credit risk arises in having to pursue any repayment from a Hellaby related entity in Australia.

[8] The Body Corporate's submissions express confidence that the wider interest in the issue and the arguability of an exception in the present circumstances to s 79 of the CCA (that in essence requires a principal to "pay now and argue later" in disputes with a contractor) mean that leave is likely to be granted by the Supreme Court.

[9] The Body Corporate's application is supported by an affidavit from its Chairperson, Melanie Norris. That affidavit confirms that demand has been made by solicitors for SRG shortly after issue of the judgment under appeal for the sum of \$4,393,862.52. Ms Norris describes the financial position of the Body Corporate as "uncertain". She deposes that the management committee of the Body Corporate has "serious concerns about being able to fund ... ongoing legal proceedings if SRG enforces its summary judgment".

[10] As with the Body Corporate's evidence on the appeal, this further affidavit lacks the specific detail that might reasonably be expected from a party seeking to reinstate a stay of a summary judgment, now ordered some 20 months ago.³

³ CA substantive judgment, above n 1, at [96].

Opponent's submissions

[11] In opposing leave, SRG disputes that enforcement of the summary judgment would render the Body Corporate's appeal rights nugatory:⁴ it points to a lack of response from the Body Corporate on the extent of resources available to the Body Corporate to meet the judgment. The Body Corporate received a substantial contribution to the cost of remediation from the Ministry of Business, Innovation and Employment (MBIE), which was intended solely to fund those costs but appears not to have been applied for that purpose. It remains unclear whether the MBIE funding has been retained by the Body Corporate for the intended purpose, or whether part or all of it has been applied for other purposes, particularly to fund the litigation against SRG.

[12] There is also a lack of clarity on the status of an insurance policy held by the Body Corporate, apparently in relation to the risk of repairs being required of the type that ensued.

[13] SRG claims it is prejudiced by being kept out of the benefit of the summary judgment obtained for a significant sum in April 2021. SRG submits that the risk of not being paid is increasing, and that it ought not to be kept out of its money when the credit risk on the Body Corporate is worsening.

[14] SRG further submits it is inconsistent with the purpose and principles of the CCA, and the terms of the directly relevant section of that Act, that it should be prevented from enforcing the summary judgment. It follows from this point that SRG contends the prospects of the Body Corporate obtaining leave, and if it did, the prospects of overturning the decision on a stay, are weak.

[15] SRG also raises the absence of any proposal from the Body Corporate to provide security for later payment of the judgment sum as reinforcing its concern about the extent of credit risk it would be exposed to.

⁴ The Body Corporate's reply submissions claim SRG has conceded that absence of a stay would render the appeal nugatory. The cited paragraph does not bear that meaning.

[16] Relatedly, SRG disputes that the on-payment of the judgment sum to a related company of Hellaby in Australia creates any material risk that the Body Corporate would not be paid if, after the Body Corporate's claims are determined, a final accounting resulted in a net liability that was in the Body Corporate's favour. Hellaby is described as a New Zealand company indirectly owned by an ASX-listed Australian company.

Legal principles

[17] The principles applicable to the determination of an application for a stay under r 12 of the Court of Appeal (Civil) Rules 2005 are well-settled. The Court must weigh the factors "in the balance" between the rights of the successful party to the fruits of its judgment and "the need to preserve the position in case the appeal is successful".⁵ This Court has listed factors to be taken into account as including:⁶

- (a) whether the appeal may be rendered nugatory by the lack of a stay;
- (b) the bona fides of the applicant as to the prosecution of the appeal;
- (c) whether the successful party will be injuriously affected by the stay;
- (d) the effect on third parties;
- (e) the novelty and importance of questions involved;
- (f) the public interest in the proceeding; and
- (g) the overall balance of convenience.

The apparent strength of the appeal has also been treated as an additional factor.

⁵ *Keung v GBR Investment Ltd* [2010] NZCA 396 at [11], citing *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87.

⁶ *Keung v GBR Investment Ltd*, above n 5, at [11], citing with approval *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9].

[18] The above principles have equal application under r 30 of the Supreme Court Rules with one important qualification, which is an additional consideration of the likelihood of the party seeking the stay being able to satisfy the criteria for leave set out in s 13 of the Supreme Court Act 2003.⁷ The equivalent provision in the Senior Courts Act 2016 is s 74, which relevantly provides:

74 Criteria for leave to appeal

- (1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the court to hear and determine the appeal.
- (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—
 - (a) the appeal involves a matter of general importance; or
 - (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
 - (c) the appeal involves a matter of general commercial significance.

...

Analysis

[19] There can be no suggestion that the Body Corporate's rights to pursue its claims against SRG would be directly rendered nugatory by the absence of a stay. The proposed appeal is rather on the tactical issue as to who holds the money to which SRG is entitled pursuant to the summary judgment, until determination of the Body Corporate's claims against SRG (and others) which is likely to affect the accounting between these parties as to the final amount one owes to the other.

[20] The prejudice to the Body Corporate is that if required to pay the extent of the summary judgment, it claims meeting that liability will inhibit or possibly preclude its ability to pursue its claims against SRG. However in contending, in effect, that the Body Corporate does not — or is likely not to — have the resources to fund both pursuit of its proceedings and payment of the present judgment debt, the Body Corporate provides ample justification for SRG's concerns that the risk of

⁷ *GFM v JAM* [2014] NZCA 43, (2014) 29 FRNZ 535 at [9]–[10].

not being paid will increase materially if a stay keeps it out of its money until after the Body Corporate has committed its resources to its claims against them.

[21] On the other hand, for SRG there is no longer a cashflow imperative of their need for funding to complete the contract under which the claims by both parties arise. Its motivation is simply one of debt recovery.

[22] The issue of who should hold the extent of the contractor's established entitlement arises in the context of the CCA's purpose and principles, which are on the basis that the contractor gets the money, with the principal being left to bring claims for breaches of contract by the contractor, for later determination. That statutory framework contemplates that the principal will be exposed to the risk of the contractor no longer being able to pay a later determination against it, and that the principal has to fund such claims out of other resources than a retention of monies certified as owing to the contractor.

[23] The Body Corporate's application for leave relies on its argument that the present circumstances justify treating the Body Corporate as an exception to the rule under the CCA. That argument did not find favour with this Court, and whilst it is inappropriate to have regard to any projection of the prospects of a reversal in the Supreme Court, the argument certainly does not appear to have such merit that it can make a difference in the Body Corporate's favour.

[24] The Body Corporate's claim that its application is intended to preserve the status quo begs the question of what the status quo is. Given that removal of the stay was not a substantive ruling against the Body Corporate in the sense of striking out or otherwise barring pursuit of its claims against SRG, the status quo turns on which party should have either the use of the money, or at least security for its later payment, to address concerns about worsening credit risks.

[25] Given the scope for the implication that the Body Corporate cannot fund both the judgment debt and pursuit of its claims, the lack of response to legitimate questions raised as to appropriation of the MBIE contribution to costs of remediation, and the lack of clarification on the terms of any insurance policy that might respond to

remediation costs the Body Corporate has incurred, the case for protecting SRG from a worsening credit risk on the Body Corporate features prominently in the evaluation of what status quo is recognised and how it should be preserved.

[26] On the other hand, the prospect of SRG allowing the judgment monies to be transferred to an Australian affiliate of Hellaby raises the prospect of additional difficulties for the Body Corporate if final determinations result in it being the net creditor in the dispute. That is not to cast aspersions on those Australian entities, and the additional hurdles in enforcing New Zealand judgments in Australia are not to be overstated, but nevertheless it is a factor in preserving both parties' positions, pending final determinations.

Outcome

[27] In our view, a strictly limited form of stay, pending resolution of the Body Corporate's application for leave, and if granted, determination of its Supreme Court appeal, is warranted. The essence of the status quo to be preserved is to remove the credit risk for SRG in respect of its summary judgment sum. It is also to address the Body Corporate's concern that, being on notice of SRG's intention to pay any sums received on to third parties, that the Body Corporate not be confronted with additional hurdles in recovering amounts to which it may subsequently become entitled.

[28] Accordingly, the Body Corporate's application for stay of that part of this Court's judgment that reversed the stay on enforcement of the summary judgment is granted on the following terms:

- (a) That, by Friday 27 January 2023, the Body Corporate is to provide SRG with an irrevocable bond or other form of guarantee for payment of the amount of the summary judgment, excluding interest and costs, issued in favour of SRG by a registered bank, insurance company or other financial entity of good standing in business in New Zealand. The bond or guarantee is to be on terms that SRG can call for payment under it forthwith after determination of the Body Corporate's application for

leave to appeal to the Supreme Court, or determination of that appeal if leave is granted.

- (b) If the Body Corporate does not comply with condition (a), then the stay of the relevant part of the judgment will lapse, leaving SRG free to execute the summary judgment. In the event that it does so, and receives payment from or on behalf of the Body Corporate, then the amount received is to be retained by SRG in a New Zealand bank account, only to be applied for its own purposes on determination of the Body Corporate's application for leave to appeal, or if leave is granted, in accordance with the judgment of the Supreme Court.
- (c) As an alternative to retention of the judgment sum as directed in (b), if payment is made, then SRG may at its option apply the sum received once it has provided a bond or guarantee of the type described in (a) above in favour of the Body Corporate for the extent of the payment received from it, providing for repayment if that is required on determination in the High Court of the Body Corporate's claims against SRG.

[29] We are conscious that SRG has made demand for payment of costs and interest. For the avoidance of doubt, we confirm that our exclusion of the interest and costs in order (a) above should not in any way be interpreted as indicating a view that they are not recoverable. On the contrary, we consider they are recoverable. But in terms of a stay based on preserving the status quo, we consider the exclusion of interest and costs to be the most appropriate outcome.

Costs of this application

[30] Although the Body Corporate has been partially successful with its application, it has sought an indulgence on terms leaving the Court and the opponents of the application less well informed than they reasonably ought to have been. Preservation of a form of status quo is warranted, but it cannot be seen as a victory for the Body Corporate. In all the circumstances, we consider the just outcome is to let the costs of the application lie where they fall. There will therefore be no order for costs.

Solicitors:
Hesketh Henry, Auckland for Appellant
Farry Law Ltd, Auckland for First Respondent