



Resisting a Stay of Enforcement of Judgment under BCIPA

The provisions under BCIPA (Builders and Construction Industry Payments Agency) provide a mechanism for builders to have their disputes adjudicated quickly and efficiently. While an adjudication decision can be registered in the Court and enforced as a judgment, the parties still retain their rights under BCIPA to bring proceedings at a later stage to challenge the adjudication outcome.

Case Study

msl | michael sing lawyers recently acted for the subcontractor, Vadasz, who had the benefit of an adjudication decision made on 5 June, 2009, for the sum of \$415,079.50 (inclusive of GST) plus costs and interest. Vadasz registered the decision in the Court as a judgment.

However, before Vadasz could enforce the judgment, the builder Bloomer Constructions (Qld) Pty Ltd and Vadasz agreed not to take any steps to enforce it, pending an application by Bloomer Constructions for judicial review of the adjudicator's decision. Bloomer Constructions agreed to pay the adjudicated sum (plus costs and interest) into the Court pending the determination. The application for judicial review was heard on 10 July, 2009, and dismissed on 7 August, 2009. Vadasz applied for the adjudicated sum to be paid out of Court. Bloomer Constructions applied for a stay of the judgment until the separate proceedings it had commenced against Vadasz, regarding the contract entered into between the parties, was determined.

Bloomer Constructions' arguments in favour of a stay being granted were:

- It was likely that Bloomer Constructions would recover a significant judgment in separate proceedings it had commenced against Vadasz for specific performance and/or restitutionary relief and if the money in Court were paid out, it would not recover its entitlements under a potential judgment; and
- Bloomer Constructions' concerns regarding Vadasz's financial position suggested it was likely if the money in Court were paid out, it would be used to pay Vadasz's debts and no assets would be available to Bloomer Constructions if it were to succeed in its claims against Vadasz.

The Result

Justice Douglas discussed the principles to be applied to applications for stays of judgments obtained under the adjudication provisions in BCIPA (and its New South Wales equivalent) where it was held that the policy of the Act was to pay the successful claimant. This is unless there was a real risk that the defendant's rights would be negated and they would suffer irreparable prejudice if the stay was not granted.

His Honour considered the Queensland authorities and referred to the Court of Appeal decision that addressed the policy considerations of BCIPA. He stated that its intention was to provide a speedy and effective means of ensuring cashflow to builders from the parties with whom they contract. This reflects the appreciation that an assured cash flow is essential to the commercial survival of builders, and if a payment subject to adjudication is withheld (pending the final resolution of the builder's entitlement to the payment) the builder may be ruined.

On the material before Justice Douglas, there was no evidence to suggest Vadasz had engaged in tactics to delay the final determination of rights. Furthermore there was nothing on the evidence that suggested that Vadasz would be bankrupt or unable to repay Bloomer at some stage in the future, if it was entitled to a judgment against him.

How this affects you

This case highlights that there is an onus placed on an applicant seeking a stay of a judgment under BCIPA to show that the other party is insolvent and unable to repay a judgment against him. It is not enough to draw inferences from correspondence or affidavit material, especially where there has been no cross-examination of affidavit material, to show that a party is insolvent. There must be enough evidence to compel the Court that a party is insolvent and there is a real risk if the stay is not granted. It is also prudent to make any application at the earliest opportunity to avoid any criticisms of delay by the Court.

The Vadasz decision is available at <http://archive.sclqld.org.au/qjudgment/2009/QSC09-261.pdf>.

For assistance with all your insolvency needs, email us at info@mslawyers.com.au or visit our website www.mslawyers.com.au. Alternatively, contact our professional team at our Gold Coast or Brisbane office.



Gold Coast Office

9 Ouyan Street
Bundall QLD 4217
PO Box 9073 GCMC QLD 9726
T +61 7 5597 8888
F +61 7 5597 8899

Brisbane Office

Level 10, 410 Queen Street
Brisbane QLD 4000
PO Box 3246 Brisbane QLD 4001
T +61 7 3229 6099
F +61 7 3226 9001