

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2010-404-007674

UNDER the Judicature Amendment Act 1972

IN THE MATTER OF an Adjudicator's Determination pursuant to
the Construction Contracts Act 2002

BETWEEN HOLMES CONSTRUCTION
WELLINGTON LIMITED
Plaintiff

AND DEREK SINCLAIR FIRTH
First Defendant

AND GARY JAMES REES
Second Defendant

Hearing: 5 July 2011

Appearances: D M Hughes and S R Hiebendaal for Plaintiff
R B Hucker and B P Henry for Second Defendant

Judgment: 6 July 2011

JUDGMENT OF WHATA J

This judgment was delivered by Justice Whata on
6 July 2011 at 4.00 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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[1] This is an application —

- (a) to stay my judgment setting aside the decision of Adjudicator Firth, dated 3 May 2011; and
- (b) to extend the adjournment of the bankruptcy proceedings granted by Associate Judge Faire against the applicant;

pending determination of an appeal against my decision.

[2] The background is long-winded and recorded at paragraphs [3]-[23] of my judgment. It is also detailed in two other judgments of this Court and a decision of the Court of Appeal.

[3] For present purposes it is sufficient to note:

- (a) Holmes Construction and Willis Trust Co. Ltd (“Willis”) entered into a contract to construct apartments (“Contract 1”). Holmes construction also entered into a second contract with Mr Rees in consideration of Holmes at Mr Rees’ request agreeing to split payment of the contract sum. This is Contract 2.
- (b) Holmes Construction issued bankruptcy notice on 5 July 2006 against Mr Rees for a payment owing under Contract 2 as settled by an adjudication known as the Green Adjudication under the Construction Contracts Act 2002.
- (c) A petition followed (after various failed proceedings by Mr Rees in respect of both the debt and the notice) on 29 July 2009.
- (d) Mr Rees sought adjudication under the Construction Contracts Act 2002 relating to allegedly negligent works performed under Contract 1, and on or about 7 May 2010, Adjudicator Firth found that Holmes

Construction was liable to Mr Rees for a sum at least equivalent to the judgment sum obtained under the Green Adjudication.

- (e) I set that adjudication aside on the basis that Adjudicator Firth acted outside his jurisdiction when making a finding on liability under Contract 1 in favour of Mr Rees who was not a party to that contract.
- (f) Associate Judge Faire (as he then was) had previously adjourned the bankruptcy proceedings pending the outcome of the judicial review.
- (g) Mr Rees now appeals my decision and seeks to stay my judgment and to maintain the adjourned status of the bankruptcy proceedings pending the outcome of the appeal.

Legal principles

[4] From submissions, the legal principles are broadly agreed.

[5] The relevant factors were recently affirmed by the Court of Appeal in *Keung v GBR Investments Ltd*:¹

[11] The stay application is brought under r 12(3) of the Court of Appeal (Civil) Rules 2005. In determining whether or not to grant a stay, the Court must weigh the factors “in the balance” between the successful litigant’s rights to the fruits of a judgment and “the need to preserve the position in case the appeal is successful”. Factors to be taken into account in this balancing exercise include:

- (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;

¹ *Keung v GBR Investments Ltd* [2010] NZCA 396 at [11].

- (f) The public interest in the proceeding; and
- (g) The overall balance of convenience. (Footnotes omitted)

That list does not include the apparent strength of the appeal but that has been treated as an additional factor.

[6] The following statement, referred to in the second defendant's submission also provides overarching guidance:²

The object where it can be fairly achieved, must surely be so to arrange matters that, when the appeal comes to be heard, the appellate court may be able to do justice between the parties, whatever the outcome of the appeal may be. Where an injunction is an appropriate form of remedy for a successful plaintiff, the plaintiff, if he succeeds at first instance in establishing his right to relief, is entitled to that remedy upon the basis that the trial judge findings of fact in his application of the law. This is, however, subject to the defendant's right of appeal. If the defendant in good faith proposes to appeal, challenging either the trial judge's findings or his law, and has a genuine chance of success on his appeal, the plaintiff's entitlement to his remedy cannot be regarded as certain until the appeal has been disposed of.

[7] I approach the applications on that basis.

Appeal rendered nugatory?

[8] The central point of the appeal, I am informed, is whether the decision of Adjudicator Firth was amendable to review in the way undertaken by me. The second defendant, Mr Rees, maintains that an inquiry into questions of contractual interpretation, including the relationship between Contracts 1 and 2, were matters properly within the powers of the adjudicator to assess. They were not reviewable in the ordinary sense.

[9] If Mr Rees is correct, the finding of Adjudicator Firth that liability under Contract 1 can be used to set off liability under Contract 2 is relevant to the High Court's jurisdiction under ss 26(1) and (2) of the Insolvency Act 1967.³ That jurisdiction provides:

² Refer paragraph 7 of the Second Defendant's submissions, *New Zealand Insulators Ltd v ABB Ltd* (2006) 18 PRNZ 459 [13].

³ Section 37(c) of the Insolvency Act 2006 similarly provides that the Court may refuse to adjudicate the debtor bankrupt if – "it is just and equitable that the Court does not make an order for adjudication".

Court's power on creditor's petition

(1) The Court, on being satisfied that the allegations stated in a creditor's petition are true, may, in its discretion, adjudge the debtor bankrupt.

(2) If the Court is not satisfied that the allegations stated in the creditor's petition have been proved, or is satisfied that the debtor is able to pay his debts or that it is just and equitable not to make an order of adjudication or that for other sufficient cause no order ought to be made, the Court may dismiss the petition.

[10] Conversely, if I do not grant the stay, the High Court may disregard Adjudicator Firth's ruling. The immediate effect of this, Mr Rees contends, is that there is nothing to prevent the bankruptcy as Mr Rees has no money.⁴

[11] Holmes Construction says that Mr Rees is in any event liable for costs under the earlier judgments against him. As he has no money, bankruptcy on those costs is inevitable. However, Holmes Construction does not want to have to go to the additional cost of issuing fresh bankruptcy proceedings. It will also lose the benefit of the relation back period established by the original act of bankruptcy in 2006 or 2009.⁵

[12] In a technical sense, the appeal is not rendered nugatory by failing to grant a stay. The substantive matter in issue, namely liability under Contract 1 is not resolved or extinguished by the bankruptcy (if it goes that far). The persons responsible for managing Mr Rees' bankruptcy can pursue the appeal if he/she considers the appeal to be sufficiently meritorious.⁶

[13] Mr Rees says that it would, however, destroy his chances of staving off bankruptcy. That is likely to be correct, even though a residual discretion remains, and the appeal itself may be relevant.

[14] I prefer to approach this aspect with a view to the substantive outcome. Mr Rees' longstanding battle to avoid bankruptcy is substantially affected if I do not

⁴ Refer affidavit of Mr Rees sworn 5 July 2011.

⁵ This point is disputed, in the sense that Mr Rees says that the original act of bankruptcy was 2009 when the petition was lodged. Holmes Construction says it was 2006, with the bankruptcy notice.

⁶ See *Keung*, supra at [19]; Schedule 1, Insolvency Act 2006.

grant a stay and his ability to pursue the appeal is likely to be rendered nugatory. I proceed on that basis.

Bona fides

[15] Mr Rees has diligently pursued his appeal rights, with a fixture allocated for August. I do not doubt that he is genuine in his appeal, given its purpose to avoid bankruptcy.

Injuriously affected

[16] I consider that the plaintiff is injuriously affected if I grant a stay. The appellant has a right to seek enforcement of a judgment debt. While the gap to the appeal may only be six to ten weeks away, Holmes Construction obtained judgment against Mr Rees more than five years ago. Holmes Construction has diligently pursued the insolvency proceedings and Mr Rees has equally used all available procedures to avoid them. Mr Rees has failed on all of them except in relation to Adjudicator Firth's decision (which I considered to be outside his jurisdiction). Mr Rees has related costs judgments against him also. Holmes Construction, quite rightly in my view, can say that it has had enough and seeks recovery of all or part of the judgment debt and the costs or have Mr Rees adjudicated bankrupt. It is trite that justice delayed is justice denied. This logically must apply to insolvency proceedings which are the final vehicle for ventilating a creditor's remedy for an unpaid debt, namely recourse to the debtor's assets via the management of the bankruptcy.

[17] A delay spanning several years caused by Mr Rees' failed litigation is, in my view, injurious to Holmes Construction, exacerbated by yet still further delay, even if for a relatively short period. I weigh this into the mix.

[18] A second factor is relevant under this heading. Mr Rees is indebted to Holmes Construction for costs. There is no room for dispute about this. Holmes Construction does not wish to incur the cost of commencing separate bankruptcy proceedings. If it does, Holmes Construction will also lose the benefit of the relation

back period (ranging between two and five years depending on the assumed date of the act of bankruptcy).

[19] While I view this as a lesser injury, given that Holmes Construction could have pursued bankruptcy on the costs earlier, it is nevertheless an injury that needs to be factored into consideration.

[20] I am told that there are no other creditors and that Mr Rees is not actively engaged in commercial enterprise. The effect on third parties appears therefore to be small. There remains the public interest, however, in ensuring that an impecunious debtor does not incur still more debt when he or she cannot and should not be doing so.

Novelty

[21] The appeal is multi-faceted, with matters of some detail included in the notice of appeal. It is unnecessary for me to assess the individual merits, as the core dispute (as noted above) raises a novel two-pronged issue, namely the scope of the jurisdiction of this Court to review an adjudicator's decision, and the jurisdiction of an adjudicator to assess the effect of a contract at the behest of a person who is not a "party" to that contract.

[22] I accept that there is little, if any, appellate consideration of these issues.

Public interest

[23] The resolutions of questions of jurisdiction engage some public interest. But the primary dispute is essentially a private matter of limited, if any, genuine public interest.

Balance

[24] Whatever the outcome of the appeal, Mr Rees will be relying on the discretion of the High Court under the Insolvency Act 1967 or 2006 to decline to

make him bankrupt. The judgment debt is irreversible. The money is owed. He will be relying on Adjudicator Firth's finding that his liability to Holmes Construction should be set off against Holmes Construction's liability to Willis for weathertight defects. But the substantive background is that Willis and Mr Rees received payment for the affected units without any regard to the defects. They have had their profit (whatever it was). There is no prospect of them paying for the defects. By contrast Holmes Construction is out of pocket to the extent of (at least) \$1.4 million and has accepted responsibility to the unit owners for the defects. Whatever the merits of the appeal, Homes Construction stands to lose what it is owed by Willis and Rees, and whatever payment it has to make on the units.

[25] It is also relevant to the overall balance that, by whatever means, Mr Rees has been able to fund over the span of five years, with able counsel:

- (a) Judicial review of Adjudicator Green's decision;
- (b) Application to set aside the bankruptcy notice;
- (c) Appeal to the High Court against entry of judgment;
- (d) Appeal to the Court of Appeal against the High Court decision;
- (e) Application for leave to the Supreme Court;
- (f) The Firth Adjudication process;
- (g) Defence of the judicial review of the Firth Adjudication;
- (h) An appeal to the Court of Appeal on the judicial review; and
- (i) Seek stay (with two experienced counsel present) on my judgment;

while at the same time refusing or unable to pay any of the judgment debt or the costs owing to Holmes Construction.

[26] I set all of this against the short delay to an appeal that involves novel questions.

Outcome

[27] In my view the proper balance is for the stay to be granted and for the bankruptcy proceedings to be adjourned, but on the basis that Mr Rees pay Homes Construction the outstanding costs owing on the various proceedings in the sum of \$33,356.49 within 14 days.⁷ Mr Rees should be allowed to ventilate an action that may avert full bankruptcy (even if at least temporarily). But he is a sophisticated user of the judicial system, at substantial cost to Holmes Construction; including costs which are proven yet remain unpaid. It is both fair and just that Holmes Construction have its longstanding and long awaited remedy under the High Court's insolvency jurisdiction, or at least get its undisputed costs. I note also that these costs could plainly ground a bankruptcy notice, so proceeding with the appeal is delaying the inevitable unless they are paid.

[28] I appreciate that Mr Rees wants the benefit of knowing whether he can avoid bankruptcy on the main debt in advance of paying the costs. But Holmes Construction should not have to go without its costs on the basis that Mr Rees wants to reserve his position to his personal advantage. Mr Rees, or his financial backers, will need to assess the prospects of success on the appeal. If they are confident of such success, then payment ought not to be an issue.

[29] I have had regard to the indication via counsel that Mr Rees is not himself in a position to make a payment in the order of \$33,000. In the same breath though I was told that if the \$33,000 could avert bankruptcy altogether, then they are costs that might be payable. As I say, that is an election to be made by Mr Rees or his financial backers. But if I am to deprive Holmes Construction of its route to the insolvency jurisdiction, then they ought to have the costs that they have legitimately incurred and are owed before I do so.

⁷ As to jurisdiction to impose financial conditions, refer *Dorbu v Barfoot and Thompson Ltd* [2010] NZCA 216, [22].

[30] Order accordingly.

Whata J