

IN THE COURT OF APPEAL OF NEW ZEALAND

CA328/2011
[2011] NZCA 359

BETWEEN GARY JAMES REES
 Appellant

AND DEREK SINCLAIR FIRTH
 First Respondent

AND HOLMES CONSTRUCTION
 WELLINGTON LIMITED
 Second Respondent

Hearing: 28 July 2011 by telephone hearing

Court: O'Regan P, Glazebrook and Arnold JJ

Counsel: R B Hucker for Appellant
 D M Hughes and S R Hiebendaal for Respondent

Judgment: 29 July 2011 at 2:30 PM

JUDGMENT OF THE COURT

- A The conditional stay granted by the High Court on 6 July 2011 is quashed.**
- B The appellant's application for an unconditional stay is granted, pending the determination of the appeal.**
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REASONS OF THE COURT

(Given by Arnold J)

[1] The appellant, Mr Rees, has appealed against a decision of Whata J dated 3 May 2011 in which the Judge set aside a determination made by the First Respondent, Mr Firth, as arbitrator. The effect of Mr Firth's determination was that Mr Rees was not indebted to the Second Respondent, Holmes Construction Ltd (Holmes), under a construction contract.

[2] Mr Rees applied to Whata J for a stay of the setting aside judgment and also sought to extend the adjournment of bankruptcy proceedings that had been brought by Holmes against him until the present appeal was determined. Whata J granted the stay and further adjourned the bankruptcy proceedings, but on the basis that Mr Rees pay Holmes \$33,356.49 within 14 days. This figure represented costs that Mr Rees had been ordered to pay Holmes in various proceedings but which he has not yet paid apparently because he does not have the funds to do so.

[3] Mr Rees has now applied for a stay of that part of Whata J's judgment relating to the payment of \$33,356.49 or for the grant of an unconditional stay pending determination of the appeal. This is against the background that Mr Rees has satisfied the obligation to pay security for costs in this Court and the appeal is set down for hearing on 10 August 2011. Holmes opposes Mr Rees' application.

[4] We consider that an unconditional stay should be granted for three reasons:

- (a) First, the fixture for the hearing of the appeal is less than two weeks away. There is no suggestion that anything will change significantly in the meantime.
- (b) Second, it is plain that Holmes wishes to have Mr Rees declared bankrupt before the fixture, with the effect that the appeal is unlikely to proceed. That seems to us to be an unsatisfactory outcome given that, on the face of it, the appeal appears to be arguable, each side having had a determination in its favour.
- (c) Third, if the appeal does succeed, it seems likely that Mr Rees will be able to meet his costs obligation to Holmes by way of costs awards in

his favour in this Court and the High Court. If the appeal is unsuccessful, Holmes will have some protection for its costs in this Court given that Mr Rees has paid security.

[5] Accordingly, we quash the conditional stay granted by Whata J and grant an unconditional stay pending the determination of the appeal.

Solicitors:
Hucker & Associates, Auckland for Appellant
Kensington Swan, Auckland for Respondent