IN THE COURT OF APPEAL OF NEW ZEALAND

CA169/05

	BETWEEN	SALEM LIMITED Appellant
	AND	TOP END HOMES LIMITED Respondent

Court: Hammond, Chambers and Robertson JJ

Counsel: B P Rooney for Appellant
R M Bell for Respondent

Judgment: 27 September 2005
(on the papers)

JUDGMENT OF THE COURT

A The application for stay of execution of judgment is dismissed.

B Costs reserved, with counsel to file memorandums in the event that the parties cannot reach agreement.

REASONS

(Given by Chambers J)

Stay pending appeal

[1] On 19 July this year, Venning J, pursuant to a summary judgment application, gave judgment for Top End Homes Limited against Salem Limited in the sum of $297,617.59: HC WHA CIV2005-488-332. Salem has appealed against

that decision and, pending appeal, has sought a stay of execution of the judgment. Top End opposes that application.

Applicable principles on a stay application

[2] Salem's application has been brought under r 12 of the Court of Appeal (Civil) Rules 2005. The substance of that rule is unchanged from its equivalent (r 9) in the Court of Appeal (Civil) Rules 1997. Cases on r 9 (and, indeed, its predecessor, r 35 of the Court of Appeal Rules 1955) remain relevant. The principles are helpfully set out in *McGechan on Procedure* at [CA 9.01]. We need not repeat them; we shall refer to the principles relevant to this case in the next section of these reasons.

[3] This particular case involves a judgment entered in respect of a progress payment claim under s 20 of the Construction Contracts Act 2002. While the stay jurisdiction remains available in respect of judgments given under that Act, clearly the courts will need to be circumspect about exercising it; unless exercised carefully, the stay jurisdiction could significantly undermine the purpose and underlying principles of the Construction Contracts Act. The purpose of that Act, as stated in s 3, is:

> (a) to facilitate regular and timely payments between the parties to a construction contract; and
>
> (b) to provide for the speedy resolution of disputes arising under a construction contract; and
>
> (c) to provide remedies for the recovery of payments under a construction contract.

Application of principles in this case

[4] We have no doubt that Salem's application must be dismissed. These are the reasons.

[5] It is axiomatic that an appellant should not be granted a stay if the court can readily determine that the appeal is not seriously arguable. Often such an assessment

will be difficult, in which event this factor will be accorded limited weight in the overall determination of the interests of justice. But the assessment of appeal prospects is not difficult in this case. There are two grounds of appeal, and each is relatively simple. Mr Bell, in his submissions on behalf of Top End, described the grounds of appeal as "flimsy". We agree. Mr Rooney, in his submissions on behalf of Salem, carefully avoided discussing the merits of the appeal – and we can understand why.

[6] The first ground of appeal is that there was no contract between Salem and Top End. Rather, so Salem *now* says in its amended points of appeal, the contract was between it and Dean McGonagle. This means, Mr Rooney submits, that Top End's payment claim under s 20 of the Construction Contracts Act was a nullity, as the maker of that claim, Top End, was not a party to the contract. It is true that, when Mr McGonagle and Minjae Kim, the sole director of Salem, first met in 2004, Mr McGonagle was trading on his own account as a builder. In May 2004, Mr McGonagle provided Salem with a quote for the building work. It would appear that a contract was formed between Salem and Mr McGonagle, as Salem did pay two deposits to Mr McGonagle in June 2004. In that same month, however, Mr McGonagle incorporated a company, Top End Homes Limited, of which he became a director. It seems clear that he and Mr Kim then agreed that the new company would become the contractor. A written contract was entered into on 7 July 2004. There can be no doubt about the parties to that contract. In no fewer than three places in the agreement, the parties are said to be Top End Homes Limited and Salem Limited. In terms of legal analysis, the earlier contract was discharged by agreement, being replaced by a new contract between Salem and Top End. Payments previously made by Salem to Mr McGonagle were credited as payments under the new contract.

[7] We note that Salem, in its statement of defence, admitted that it had contracted with Top End with respect to construction work at Salem's premises at the former Money Factory at Awaroa River Road, Whangarei. In affidavits filed in the High Court, Mr Kim accepted that the contract was between Top End and Salem. Even in his affidavit filed in support of the current application, Mr Kim accepts that he signed the written contract between his company and Top End. There is nothing

in the affidavit to suggest he was mistaken in signing it. Nor is mistake pleaded in an amended statement of defence, filed after judgment had been entered. Further, it cannot be overlooked that Top End made a number of monthly progress claims prior to the disputed one, all of which Salem paid. It seems impossible now to argue that the earlier arrangement was not discharged and replaced by a new contract between Salem and Top End.

[8] Presumably part of the argument on this ground of appeal is going to hinge on the fact that the 7 July contract has been drawn up on a sheet of paper, the letterhead of which refers to "D & D Builders", the name under which Mr McGonagle previously traded. If that is the argument, it seems to us to have no chance of success. The letterhead is irrelevant, given the explicit nature of the contract and the clear and unequivocal identification of its parties. The old letterhead was presumably used simply because it contained the contact details for Mr McGonagle and, no doubt, his new company.

[9] The second ground of appeal is that the payment claim to which Salem failed to respond, as a consequence of which Top End became entitled to judgment, was not "a payment claim" under the Construction Contracts Act. This is said to be "because it did not meet the requirements of s 20(2)(c) of the Act, in that it did not '*identify the construction work*' to which it related". This is a new point, not argued in the High Court. We have seen the disputed payment claim. In our assessment, this ground of appeal has virtually no chance of success on the facts.

[10] Given our assessment of the weakness of Salem's position, we consider on this ground alone that it would be quite unjust to grant Salem a stay.

[11] Other factors lead us to the same conclusion. The whole thrust of the Act is to ensure that disputes are dealt with promptly and payments made promptly, because of the disastrous effects that non-payment has, not only on the head contractor, but also on its employees, subcontractors, and suppliers: *George Developments Ltd v Canam Construction Ltd* CA244/04 12 April 2005 at [41]-[42]. It is relevant to note, for instance, that employers cannot set up counterclaims, set-offs, or cross-demands as a bar to the recovery of a debt under s 23 of the Act, unless

the employer has a judgment in respect of its claim or there is not in fact any dispute between the parties in relation to the employer's claim: s 79. The fundamental position under the Act is that, if a progress claim is made and the employer does not respond within the period stipulated in the construction contract or, by default, within the time specified in the Act, the amount of the claim becomes payable forthwith. In the present case, there is no dispute that Salem did not respond to Top End's progress claim within the specified period.

[12] Top End has been frank in admitting that Salem's non-payment has caused it cash flow difficulties. Mr Rooney relies on the financial difficulty in which Top End finds itself as a ground in favour of stay. We disagree, at least in the circumstances of this case. To paraphrase Lord Denning MR in *Fakes v Taylor Woodrow Construction Limited* [1973] 1 QB 436 at 442 (CA), it would be indeed "the most unkindest cut of all" if an employer in the first place broke its contract and by doing so made the contractor insolvent, and then in the second place said "owing to your insolvency, which we have brought about, we are now not going to meet the judgment you obtained against us". We acknowledge that Salem has deposited the judgment sum in a solicitor's trust account, but that does not alleviate Top End's current cash flow difficulties.

Costs

[13] We are reserving costs. Obviously Top End is entitled to costs on this application. We note that s 23(2)(a)(ii) entitles a contractor who has not been paid to recover from the employer "the actual and reasonable costs of recovery". We have had no submissions as to how that expression should be interpreted. Arguably, that may mean Top End is entitled to indemnity costs, provided that they are reasonable. We hope that the parties will be able to resolve costs between themselves. If they cannot, memorandums may be filed. Salem must respond to any memorandum filed by Top End within five working days of receiving it.

Two other observations

[14] We make two other observations. First, we have expressed a reasonably firm (if preliminary) view of Salem's chances of success on its appeal. That view may be sufficient to persuade Salem to abandon its appeal. If Salem does determine to continue with the appeal, however, we can advise that none of the present panel will sit on it.

[15] Secondly, the application for stay was filed in this court rather than the High Court. While the rules provide that this court has concurrent originating jurisdiction with the High Court in this area, applications for stay should, save in special circumstances, be filed, at least initially, in the High Court, not this court. This is the current practice, both here (*McGechan on Procedure* at [CA 9.01(3)]) and in the United Kingdom (*Ketchum International plc v Group Public Relations Holdings Limited* [1996] 4 All ER 374 at 381 (CA)). This court is under immense pressure. Stay applications, at least in the first instance, should not tie up three judges, as is inevitable if the originating application is made to this court. Further, filing in this court means that any hearing will generally have to take place in Wellington. We agreed, at Top End's request and with Salem's consent, to deal with this application on the papers, to save the parties costs. Mr Bell, for Top End, advised that Top End's "means are stretched", with the consequence that it wished to avoid the cost of an oral hearing, and, in particular, the cost of sending counsel to Wellington. Had this application been filed in the High Court at Whangarei, where the summary judgment application was heard, where the parties' directors reside, and where Top End's lawyer practises, an oral hearing at little cost could have been swiftly arranged.

Solicitors:
Huny Hwangbo, Queen City Law, Auckland for Appellant
Webb Ross Johnson, Whangarei for Respondent