

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2014 0132

GREGORY PAUL SAVILLE

Applicant

v

HALLMARC CONSTRUCTION PTY LTD
(ACN 071 149 758)

Respondent

JUDGES:

TATE and McLEISH JJA

WHERE HELD:

MELBOURNE

DATE OF HEARING:

10 June 2015

DATE OF JUDGMENT:

10 June 2015

MEDIUM NEUTRAL CITATION:

[2015] VSCA 144

PRACTICE AND PROCEDURE - Application for a stay of costs orders - Whether special or exceptional circumstances apply - *Narain v Euroasia (Pacific) Pty Ltd* [2008] VSCA 195 and *Li v The Herald & Weekly Times Pty Ltd* [2008] VSCA 201 considered - Stay granted.

APPEARANCES:

Counsel

Solicitors

For the Applicant

Mr D J Farrands with
Ms K Dovey

Vic Bar Pro Bono Scheme

For the Respondent

Mr M A Robins QC

Kliger Partners

THE COURT:

1 This is an application by Gregory Paul Saville ('Saville') for a stay, until determination of his appeal, of [3] of the orders made by Vickery J on 7 October 2014 whereby his Honour ordered that Saville pay the costs of Hallmarc Construction Pty Ltd ('Hallmarc') in the proceeding brought by Hallmarc (No S CI 2014 02389), including reserved costs on a standard basis, payment of which was stayed for 28 days from the date the order was made.

2 The application also extends to a stay of [3] and [4] of the orders made by Costs Registrar Deviny on 30 April 2015 whereby the Costs Registrar ordered, respectively, that, 'in the interim', that is, before the taxation of costs is set to resume on 17 June 2015, Saville is to pay Hallmarc's costs in the sum of \$60,000, and that Saville is to pay Hallmarc's costs of 30 April 2015 and costs thrown away in the sum of \$1,500.

3 Saville also applies, in effect, for the setting aside of both [1] of the orders of Costs Registrar Deviny adjourning the taxation of costs to 17 June 2015, and [2] of the Costs Registrar's orders whereby Saville was ordered to file and serve specific objections to Hallmarc's bill of costs on or by 1 June 2015 failing which the taxation was to proceed as unopposed.

4 Saville supports his application by an affidavit he swore on 1 June 2015. Hallmarc opposes the grant of a stay. It relies upon an affidavit of Alan Maxwell Bidychak ('Bidychak') affirmed on 5 June 2015.

5 The appeal brought by Saville against Hallmarc (S APCI 2014 0132) was heard by the Court of Appeal on 7 May 2015 by the Chief Justice, Tate and Kaye JJA. Saville was represented by a barrister acting on a pro-bono basis. Judgment was reserved.

The dispute

6 The proceedings arise out of a dispute between Saville and Hallmarc under the *Building and Construction Industry Security of Payment Act 2002* ('the Act'). In the court below Hallmarc alleged that an adjudication determination under the Act in

favour of Saville was invalid and void for jurisdictional error. The judge found in favour of Hallmarc and on 7 October 2014 ordered, as mentioned, that Saville pay Hallmarc's costs of the proceeding including reserved costs on a standard basis, payment of which was stayed for 28 days. Saville filed a Notice of Appeal on 22 October 2014.

7 On 4 December 2014 Hallmarc commenced proceedings in the court for a taxation of its costs.¹ An initial costs hearing was fixed for 10 February 2015. Saville deposes that this was adjourned by consent to 30 April 2015. He said that he understood this was 'on the basis that the appeal date had yet to be set and was likely to be set in the near future and that adjournment until the outcome was known was appropriate.'² This evidence is contradicted by Bidychak, on behalf of Hallmarc, who says that there was no consent to the first adjournment sought.³ His letter of 9 February 2015 confirms this.⁴

8 Saville says that he sought a further adjournment of the taxation hearing because he was heavily involved in preparation for the appeal, which by then had been set down for 7 May 2015, and because he had an urgent need to travel to China to secure orders for his business to ensure future income.

9 Hallmarc opposed this adjournment and the hearing proceeded on 30 April 2015. Saville was represented by a solicitor. It would appear that a stay of Vickery J's costs order was sought on that day but Costs Registrar Deviny declined to grant a stay on the basis that he did not have the power to do so.⁵

10 At the conclusion of the hearing of the appeal on 7 May, counsel for Saville made an oral application for a stay of the costs orders, although he acknowledged that Saville may need to make such an application by putting material before the Court.

1 Proceeding S CI 2014 02389.

2 Affidavit of Gregory Paul Saville sworn 1 June 2015 ('Saville affidavit'), [28].

3 Affidavit of Alan Maxwell Bidychak affirmed on 5 June 2015 ('Bidychak affidavit'), [10].

4 Bidychak affidavit, exhibit 'AMB-15'.

5 Saville affidavit, [37].

That application was opposed by Hallmarc. The Court refused the application in the absence of a proper application and proper material.

11 In support of his application for a stay, Saville now deposes that his income from all sources is such that he cannot presently meet his daily living expenses.⁶ His financial position is so parlous that were the interim costs order for \$60,000 enforced, and were he forced to proceed to taxation, there would be a high risk of creating an irredeemable adverse change in his position: he does not have the assets to satisfy the judgment (so it appears on the basis of his evidence); he would be at risk of being declared bankrupt and/or of having goods seized; he would be at risk of being evicted from his home, where he also carries on his business; and his business reputation would be adversely affected as well as his ability to continue his trade. As a result of his straitened financial circumstances, he says he is unable to afford the legal representation necessary to file his Notice of Contention in the taxation. He swears that a further business trip to China is required to obtain the necessary approval of the manufacture of his present business orders; it would also provide the best prospects for him meeting any costs order.

12 It was emphasised this morning by Mr Farrands, who appeared for Saville, that Saville's business currently remains afloat, that it is not a failed business, but that any prospects of the business reviving would be dashed by the refusal of a stay.

13 Saville further swears that Hallmarc owes him other monies under the contract, covering what he says is about one year's work,⁷ which considerably exceed the costs he currently owes but that his limited financial resources have precluded him from bringing proceedings to recover those amounts.⁸ A refusal to grant a stay would clearly further inhibit whatever capacity he has to bring those separate proceedings.

14 On the basis of this material Saville submits that special or exceptional

⁶ Saville affidavit, [43]. See also exhibit 'GS-43'.

⁷ Ibid [59].

⁸ Ibid [59].

circumstances apply to displace the usual presumption that Hallmarc should be entitled to the fruits of the costs orders.

15 Saville further asserts that the costs ought to be considered in their totality after the appeal has been determined.

16 By contrast, Hallmarc asserts that there are no special or exceptional circumstances here and that even if Saville were declared bankrupt his trustee in bankruptcy could pursue his additional claim against Hallmarc.⁹ It also emphasises that it will defend any proceeding brought against it, if ever issued by Saville, and will seek to set-off and cross-claim for its own substantial losses incurred in repairing allegedly defective carpentry supplied and installed by Saville.¹⁰

Principles governing a stay

17 The power of the Court to order a stay is to be found in r 66.16 of the *Supreme Court (General Civil Procedure) Rules 2005*, which provides that '[t]he Court may stay execution of a judgment'.¹¹

18 The Court enjoys a 'wide discretion' to grant a stay of execution¹² and, upon an application for such an order, all relevant factors should be considered.¹³ It is well established that '[p]rima facie, a successful party is entitled to the benefit of the judgment obtained below and the presumption that the judgment is correct'.¹⁴

19 Notwithstanding the Court's wide discretion, the onus lies on the applicant to

⁹ Hallmarc's submissions, [8].

¹⁰ Bidychak affidavit, [36].

¹¹ Rule 64.39 also provides that: 'Except so far as the Court of Appeal otherwise orders – (a) an application for leave to appeal or appeal shall not operate as a stay of execution or of proceedings under the decision appealed from; and (b) no intermediate act or step shall be invalidated'.

¹² *Cellante v G Kallis Industries Pty Ltd* [1991] 2 VR 653, 655 ('*Cellante*').

¹³ *Interactive Network Services Pty Ltd v NPV WA Securities Pty Ltd* [2006] VSCA 225 [23] (Neave JA, Maxwell P agreeing); *Maher v Commonwealth Bank of Australia* [2008] VSCA 122 [23] (Dodds-Streton JA, Redlich JA agreeing) ('*Maher*').

¹⁴ *Cellante* [1991] 2 VR 653, 655; *Maher* [2008] VSCA 122 [20].

demonstrate 'special or exceptional circumstances' justifying a stay, for example, to prevent the appeal, if successful, from being rendered nugatory.¹⁵

20 Many of the cases on the principles relating to a stay are concerned with the prejudice arising from the inability of a respondent to repay monies paid pursuant to a judgment, rather than the effect of such a payment on the financial position of the applicant.¹⁶ There is here no live question concerning Hallmarc's capacity to repay. Although similar concerns were at the forefront of the Court's mind in *Federal Commissioner of Taxation v Myer Emporium [No 1]*,¹⁷ Dawson J also observed that:

However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed.¹⁸

21 This Court has held that the prospect of bankruptcy in respect of a judgment debt may constitute special circumstances. So in *Narain v Euroasia (Pacific) Pty Ltd*¹⁹ Ashley JA said:

The foreshadowed making of a bankruptcy order, by its effect upon the ability of an appellant to prosecute an appeal, and by its reputational impact, may have the effect of rendering the appeal nugatory and so constitute special circumstances justifying a stay on execution.²⁰

22 It is significant, in our view, that in *Narain*, Ashley JA referred to bankruptcy as involving reputational damage as well as damage to a litigant's capacity to prosecute a claim.

15 *Cellante* [1991] 2 VR 653, 655; *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 161 CLR 681, 684 (Brennan J).

16 See for example *Cellante* [1991] 2 VR 653, *Neate v Thoroughbred International Marketing Pty Ltd* (2012) 34 VR 318, *Federal Commissioner of Taxation v Myer Emporium [No 1]* (1986) 160 CLR 220.

17 (1986) 160 CLR 220.

18 *Ibid* 223 (citations omitted).

19 [2008] VSCA 195 [21] ('*Narain*').

20 *Ibid* [21] citing *Orrong Strategies Pty Ltd v Village Roadshow Limited* [2007] VSCA 320; see also *Chen v Chan* (Unreported, Supreme Court of Victoria, Court of Appeal, Maxwell P & Dodds-Streeton JA, 21 December 2007).

23 In *Li v The Herald & Weekly Times Pty Ltd*²¹ the same approach was adopted. Maxwell P and Ashley JA referred to the remarks of Ashley JA in *Narain* and described this ‘as an instance of what Young CJ referred in *Cellante v Kallis Industries Pty Ltd*,²² as “a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed”.’ These cases concern stays of judgments rather than only costs orders. However, the principles are the same. If there is a real risk that execution of the costs order would prevent an appellant from being restored substantially to his former position if the appeal is successful, this may qualify as special or exceptional circumstances justifying a stay of that costs order.

24 On the material presently before the Court, although we accept the submissions of Mr Robins QC, who appeared for Hallmarc, that it could not be concluded that Saville’s financial circumstances have reached the same stage as that pertaining in *Narain* or *Li*, it is nevertheless clear that Saville, and his business, are currently in serious financial difficulty. There is evidence which indicates that, for example, the value of the interest he has in his house is lower than his liability with respect to the mortgage over it.²³ This position is exacerbated by the nature of Saville’s business. The viability of Saville’s business is dependent upon him travelling to China. In turn this requires that funds be readily available. It is clear that significant disruption may be caused to Saville’s business if he were to be rendered bankrupt in the event that a stay was refused. Moreover, he and his business would suffer reputational damage which may not be reversible. The fact that the viability of the business is slender aggravates, in our view, rather than alleviates the situation.

25 In our view, there is a risk that if a stay were not granted the business run by Saville would be so disrupted that it might not recover. That is so despite the ability of Hallmarc to repay the amounts in question, if it is unsuccessful in resisting the

²¹ [2008] VSCA 201 [11]-[14] (*Li*).

²² [1991] 2 VR 653, 657.

²³ Affidavit of Gregory Paul Saville sworn 1 June 2015, [44].

appeal.

26 Hallmarc submits that because Saville's affidavit effectively establishes that he is insolvent, a stay would be futile. However, in our opinion the same evidence suggests that were a stay to be granted, Hallmarc would not be prejudiced. This tends to negate the consideration which normally leads against a stay, namely the disadvantage to the respondent to an appeal in being prevented, by virtue of the stay, from recovering its costs ordered at trial.

27 While this lack of prejudice does not, of course, of itself, constitute special or exceptional circumstances, it indicates that there is little to weigh in the balance against the real risk of irremediable prejudice to Saville.

28 Furthermore, regard must be had to the stage at which this application has come before the Court. The appeal has already been heard and judgment reserved. This should inevitably limit the duration of any stay that is granted. The limited duration of the stay has implications both with respect to the orders made by Vickery J on 7 October 2014 (with respect to the time during which Hallmarc is deprived of the fruits of its success at trial) and for the orders made by Costs Registrar Deviny (with respect to the increased efficiency to be achieved by dealing with all the costs orders, of the trial below and of the appeal, at the same time).

29 Moreover, the appeal raised real issues of substance, in particular, as to whether the determination of the adjudicator was reviewable by the Supreme Court. This requires a close examination of the comments made by Basten JA and by McDougall JA in *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*²⁴ and by Basten JA in *Coordinated Construction Co Pty Ltd and Climatech (Canberra) Pty Ltd*.²⁵ The appeal also demands a focus on the precise nature of the error, if any, made by the adjudicator, and of concepts of agency.

²⁴ (2010) 78 NSWLR 393, [102], [222]–[223] respectively.

²⁵ (2005) 31 BCL 364, [43]–[47].

30 Although the grounds for a stay in this case are not overwhelming, these considerations, in conjunction with our finding that there is a real risk that the disruption to Saville's business might be irreversible if no stay was granted, supports the conclusion that on balance, there are here special or exceptional circumstances that justify a stay.

31 In our opinion, a stay of the costs order made by Vickery J, and the costs orders made by Costs Registrar Deviny, is warranted. We would grant the application for a stay.

32 Moreover, we consider that, given the stage at which these matters are being raised with the Court, it would now be prudent for the taxation of costs to await the determination of the appeal so that the taxation of all the costs orders made could be dealt with in a manner that makes the most efficient use of judicial and administrative resources.²⁶

33 (Discussion re costs.)

34 The orders of the Court will be:

1. Pending the determination of the appeal, or further order, there be a stay on execution of the following orders:
 - (1) Paragraph 3 of the orders of Vickery J made on 7 October 2014; and
 - (2) Paragraphs 3 and 4 of the orders of Costs Registrar Deviny made on 30 April 2015.
2. Paragraphs 1 and 2 of the orders of Costs Registrar Deviny made on 30 April 2015 be set aside.
3. The taxation of costs be adjourned until the determination of the appeal

²⁶ *Civil Procedure Act 2010*, s 9(1)(c) and (d).

or further order.

4. The costs of today's application be costs in the appeal.
