

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2019 0133

ASEA 1 PTY LTD (ACN 632 241 724)

Applicant

v

RUDYARD PTY LTD (ACN 605 072 115)

Respondent

JUDGES: KAYE and McLEISH JJA
WHERE HELD: MELBOURNE
DATE OF HEARING: 12 May 2020
DATE OF JUDGMENT: 13 May 2020
MEDIUM NEUTRAL CITATION: [2020] VSCA 122
JUDGMENT APPEALED FROM: [2019] VCC 1995 (Judge Woodward)

PRACTICE AND PROCEDURE - Application for a stay of execution of judgment - No material risk that appeal rendered nugatory in absence of a stay - Refusal of a stay would not result in discontinuance of appeal - Respondent entitled to benefit of judgment - Application for a stay refused - *Supreme Court (General Civil Procedure) Rules 2015* rr 64.39 and 66.16.

PRACTICE AND PROCEDURE - Costs - Application by respondent for security for costs - Real risk that costs order would not be satisfied - Security for costs would not result in discontinuance - Applicant ordered to provide security for costs in the amount of \$35,000 - *Supreme Court (General Civil Procedure) Rules 2015* r 64.38(2) - *Australian Dream Homes Pty Ltd v Stojanovski* [2016] VSCA 38, *Timbercorp Finance Pty Ltd (in liq) v Tomes* [2015] VSCA 322, *Jafari v 23 Developments Pty Ltd* [2019] VSCA 16 referred to.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant	Mr H Foxcroft QC with Mr A Blair	Welner Lawyers
For the Respondent	Dr M Wolff	Noble Lawyers Pty Ltd

KAYE JA
McLEISH JA:

1 The respondent ('Rudyard') brought a proceeding by Originating Motion in the County Court against the applicant ('ASEA'), by which it applied, by summons, for judgment under s 16(2) of the *Building and Construction Industry Security of Payment Act 2002* ('the Security of Payment Act'). The claim by Rudyard arose out of works performed by it pursuant to a contract with ASEA dated 10 April 2019 for a proposed 28 residential apartment development in Plenty Road, Preston. The judge, who heard the claim, gave judgment in favour of Rudyard in the sum of \$343,750 (including GST) together with interest at the rate of 20 per cent per annum from 23 July 2019.¹ ASEA has sought leave to appeal against the whole of the decision.

2 The Court has before it two applications, namely:

- (1) An application by ASEA for a stay of the order made by the judge.
- (2) An application by Rudyard that ASEA give security for Rudyard's costs relative to the application for leave to appeal in the amount of \$75,000.

Background

3 The claim by Rudyard was based on three payment claims it had made on ASEA, pursuant to s 14 of the Security of Payment Act, totalling \$343,750 (including GST), dated 24 April, 25 May and 29 June 2019 respectively. ASEA opposed judgment on three principal bases. First, it contended, the payment claims had not been properly served on ASEA. Secondly, it was contended that the payment claims each failed to identify the construction work or related goods or services to which the progress payment related, as required by s 14(2)(c) of the Security of Payment Act. Thirdly, ASEA contended that the payment claims purported to include charges for future work to be performed under the contract, and thus were not valid claims under the Act.

¹ *Rudyard Pty Ltd v ASEA 1 Pty Ltd* [2019] VCC 1995 (Judge Woodward).

4 The judge rejected the first two grounds, relied on by ASEA, in respect of each of the three payment claims. He upheld the third ground, relied on by ASEA, in respect of the first two payment claims, but not in respect of the third payment claim. His Honour further concluded that the third payment claim operated, not only in respect of the specific amount claimed in it (namely, \$98,450 (including GST)), but also in respect of the amounts that had been previously claimed in the first two payment claims. Accordingly, he concluded that there should be judgment for Rudyard in the total amount of the three claims, amounting to \$343,750 (including GST).

5 In its notice of application for leave to appeal, ASEA relies on three principal grounds, which may be summarised as follows:

- (a) The judge erred by concluding that the total amount claimed over the course of the project was the quantum of the third payment claim, notwithstanding that the 'claimed amount' in that claim was expressed as a different and lesser amount (\$98,450).
- (b) The judge erred by concluding that the third payment claim was valid by erroneously imputing knowledge of third persons to the applicant in order to determine whether a reasonable person in the applicant's position would understand the content of the payment claim.
- (c) The judge erred by misapplying available evidence to conclude that the payment claim included sufficient information to allow a reasonable person in the applicant's position to understand the payment claim.

6 After the delivery of judgment, ASEA made an unsuccessful application to the judge for an order staying execution of the judgment pending appeal. Based on the materials that were put before him in the primary application, the judge considered that the evidence, relating to the financial position of Rudyard, was inconclusive. There was evidence that it does not have real property assets or other assets in the jurisdiction. However, the evidence before his Honour included that Rudyard is an actively trading entity with a staff of approximately six people, that it is actively involved in building and construction projects, and that Rudyard had sufficient funds to make substantial payments to consultants which it engaged in the project. On the other hand, the evidence revealed that ASEA had no assets available to it in

its own name. ASEA did not produce any evidence to the judge to demonstrate that, if a stay were not ordered, it would be prevented from prosecuting the appeal to conclusion. In respect of the merits of the proposed appeal, the judge considered that he 'could not say with confidence that there was no arguable ground of appeal'. The judge noted that the policy of the Security of Payment Act was to secure prompt payment of progress claims to contractors. Accordingly, his Honour refused the application for a stay.

7 In support of the current application for a stay, and in opposition to the application for security for costs, ASEA has filed further material setting out its current financial position. It appears from that material that ASEA owes \$341,833 to creditors other than Rudyard, it has no assets and it is not presently trading. In the financial year ending 30 June 2019, it did not earn any income, and accumulated an operating loss of \$115,044. As at March 2020, it is showing an operating loss for the present financial year. Apart from the judgment debt to Rudyard, none of the debts of ASEA are presently due and payable to its creditor, which is C2 Capital Pty Ltd ('C2'). Mr Peter Terrill, who is the sole director of ASEA, is also the sole director of C2. He has sworn three affidavits in the current applications. In particular, Mr Terrill has deposed that C2 continues to support ASEA financially. He has exhibited an undated deed of guarantee and indemnity signed and executed by ASEA and C2, by which C2 guarantees all of the liabilities of ASEA arising out of the dispute which is the subject of the appeal.

8 After delivery of judgment in the primary proceeding, Rudyard commenced an application to wind up ASEA in insolvency pursuant to s 459P of the *Corporations Act 2001* (Cth). At the hearing of that application on 17 April, Mr Terrill gave an undertaking, through counsel, that he would pay into Court the sum of \$343,000 on behalf of the applicant. That payment was duly made on 7 May. Mr Terrill, in his most recent affidavit, has stated that he undertakes to make a payment into Court in the sum of \$27,063.20, representing the interest ordered by the primary judge in this case. In addition, Mr Terrill has exhibited, to his most recent affidavit, a letter from

the tax accountant for C2, which confirms that C2 has an available cash reserve that is sufficient to meet all financial obligations on behalf of ASEA. Quarterly bank statement analyses, for the period from 4 April 2019 to 1 October 2019 and 27 October 2019 to 24 April 2020, indicate that C2 anticipates an annual turnover for the present financial year ending 30 June 2020 of approximately \$20 million. Mr Terrill has deposed that C2 continues to trade and is presently able to meet all its debts as and when they fall due and payable.

The application for a stay

9 The principal factor, relied on by ASEA in support of the application for a stay, is that, in the absence of such an order, there is a real risk that Rudyard would disperse the proceeds of the judgment to third parties, and would thereby render any subsequent successful appeal by ASEA nugatory. Counsel for ASEA noted that Rudyard has a paid-up capital of \$1,200. Relevant searches on publicly available registers indicate that it is not the registered proprietor of any real property, and that the only identifiable assets it owns, namely two motor vehicles and unspecified present and future stock, remain the subject of security charges. Counsel also noted that, in material filed in the County Court proceedings, the director of Rudyard deposed that he had paid four consultants amounts totalling \$161,500, in respect of the payment claims that were the subject of the proceeding. Thus, there is still outstanding, by Rudyard, an amount of \$182,250 to contractors in respect of the balance of the payment claims. In those circumstances, it is submitted that should a stay of the orders not be allowed, it is likely that the respondent will disperse, from payment of the judgment sum, at least a substantial amount to satisfy the claims on it of third party contractors.

10 Counsel for ASEA further submitted that the grounds of appeal, relied on by ASEA, have reasonable prospects of success. Inquiries made of the Court's Registry have indicated that a hearing, of the application for leave, is likely to take place in mid or late 2020. Further, counsel referred to the amount of \$343,000 paid into Court

by ASEA in the winding up proceeding. He proffered an undertaking to the Court, on behalf of ASEA, that those funds would not be withdrawn, pending the determination of the proposed appeal, in the absence of an order of this Court. Counsel also proffered an undertaking that ASEA would pay an additional sum of \$27,063.20 into Court representing the outstanding interest that has so far accrued in respect of the judgment debt. Counsel submitted that, in those circumstances, the amount paid into Court would secure to the respondent payment of the judgment, in the event that the pending appeal does not succeed.

11 In response, counsel for Rudyard submitted that ASEA has failed to demonstrate the existence of any special or exceptional circumstances justifying the grant of a stay. In particular, ASEA has not established that Rudyard was not in a financial position to repay the judgment sum, if the substantive appeal were to succeed. Counsel further submitted that the present application by ASEA for a stay is based on essentially the same facts and evidence as the application that was heard and rejected by the trial judge. In those circumstances, it was submitted, the current application for a stay should be dismissed on the basis of the principle of res judicata, estoppel and abuse of process. Further, counsel submitted, a grant of a stay to ASEA would be inimical to the underlying policy of the Security of Payment Act, which was described by Vickery J in *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd*,² as being that the recipient of a payment claim should 'pay now and argue later'.

Principles regarding grant of a stay

12 The application by ASEA, for a stay of the judgment, is made under rr 64.39 and 66.16 of the *Supreme Court (General Civil Procedure) Rules 2015* ('the Rules'). The principles that apply to such an application are well established. Ordinarily, a successful party in a proceeding is entitled to the benefit of the judgment. Accordingly, the onus is on the applicant for a stay to establish that such a stay

² (2009) 26 VR 112, 121 [44] ('*Hickory Developments*').

should be granted.³

13 In Victoria, the power to order a stay should only be exercised where the applicant for the stay has demonstrated the existence of special or exceptional circumstances.⁴ In an appropriate case, special circumstances may exist where it is demonstrated that there is a real risk that an appeal, if successful, would be rendered nugatory in the absence of the grant of a stay.⁵ In such a case, the Court will be required to balance, on the one hand, the prospect that an appeal may be rendered nugatory in the absence of a stay, against the principle that the successful party in the proceeding should be entitled to the fruits of the judgment.⁶

14 It is also accepted that a stay should not be granted unless the applicant for the stay has demonstrated that it has at least an arguable ground of appeal. In that respect, the Court in *Maher* stated:

The prospect that the appeal may be rendered nugatory must be balanced against the principle that the successful party is entitled to the fruits of the judgment. A stay should not be granted unless there is at least an arguable ground of appeal, although otherwise speculation as to the ultimate prospects of success is usually inappropriate.⁷

15 Ordinarily, an application for a stay is made at an early stage in the appeal process. For that reason, the Court does not embark on a detailed assessment of the prospects of the proposed grounds of appeal. Rather, the Court undertakes a preliminary assessment in order to determine whether the applicant has at least an arguable proposed ground of appeal.⁸

³ *Cross Country Realty Victoria Pty Ltd v Ubertas 350 William Street Pty Ltd* [2015] VSCA 347, [81] (Kyrou and McLeish JJA) ('*Cross Country*'); *Maher v Commonwealth Bank of Australia* [2008] VSCA 122, [20] (Dodds-Streton JA, with whom Redlich JA agreed) ('*Maher*').

⁴ *Cross Country* [2015] VSCA 347, [82]; *Maher* [2008] VSCA 122, [22]; *Cellante v G Kallis Industries Pty Ltd* [1991] 2 VR 653, 657 (Young CJ, with whom Brooking JA agreed) ('*Cellante*').

⁵ *Cross Country* [2015] VSCA 347, [82]; *Maher* [2008] VSCA 122, [25]; *Cellante* [1991] 2 VR 653, 657.

⁶ *Cross Country* [2015] VSCA 347, [87]; *Maher* [2008] VSCA 122, [27].

⁷ *Maher* [2008] VSCA 122, [27].

⁸ *Ribbera v Eagle Fuels Pty Ltd* [2014] VSCA 173, [13] (Garde AJA, with whom Neave JA agreed).

Analysis and conclusion on application for a stay

16 As we indicated to counsel during oral submissions, for the purpose of the application, we are prepared to accept that the proposed grounds of appeal, sought to be relied on by ASEA, are arguable.

17 However, on the material relied on by ASEA, we are not persuaded that there is a material risk that an appeal, if successful, would be rendered nugatory in the absence of the grant to ASEA of a stay of the judgment. As we have discussed, the onus is on ASEA to establish the circumstances which would justify the grant of a stay. The primary judge had evidence before him which indicated that Rudyard is an actively trading entity with a work force, and that it is actively involved in building and construction projects. In those circumstances, the materials relied on by ASEA are insufficient to establish that there is a real risk that its appeal, if successful, would be rendered nugatory if a stay were not granted to it.

18 Further, as counsel for ASEA properly conceded, it is not demonstrated that, if ASEA were required to pay the judgment sum before the hearing of the appeal, ASEA's right to appeal would be frustrated due to an incapacity of ASEA to meet the judgment debt.⁹ The materials, now put before the Court, demonstrate that C2, as the financial 'backer' of ASEA, has paid the judgment debt into Court. Accordingly ASEA, while itself lacking assets, has sufficient financial support available to it to enable it to meet the judgment debt. In those circumstances, the refusal of the stay to ASEA would not frustrate its right to prosecute the appeal.

19 On the other hand, as the successful party in the proceeding, Rudyard is entitled to the benefit of the judgment. That principle has particular application in the present case. As the well-known dictum of Vickery J in *Hickory Developments* makes plain, the underlying principle of the Security of Payment Act is to ensure prompt payment to builders and contractors. While, in the present appeal, the issue is whether the payment claims complied with the provisions of the Security of

⁹ Cf *Cross Country* [2015] VSCA 347, [84].

Payment Act, so as to enable Rudyard to avail itself of the benefit of the provisions of it, nevertheless the underlying policy of the Act is relevant in a case such as this in which the challenge to the payment claims is based on matters of technicality rather than substance. In such a case, the underlying purpose of the Security of Payment Act adds weight to the principle that, as the successful party in the proceeding below, Rudyard is entitled to the benefit of the judgment in its favour.

20 For those reasons, we are not persuaded to grant ASEA a stay on execution of the judgment.

21 In reaching that conclusion, it has not been necessary for us to consider, or express our conclusions, on the point, raised on behalf of Rudyard, that the principles of res judicata or estoppel would, in any event, preclude ASEA from seeking a stay in the present application. Without expressing any concluded views on that matter, we note that counsel for Rudyard did not refer us to any authority that supports the proposition that the principles of res judicata or issue estoppel apply to an application which essentially involved a matter of practice, and which did not involve the final resolution of any rights or controversy between the parties.¹⁰ Although counsel did not specifically refer to the principles of abuse of process, it might be observed that those principles would be unlikely to apply in the particular circumstances of this case. It appears that the initial application for a stay was made as a matter of urgency to the primary judge, in circumstances in which Rudyard was threatening to commence winding up proceedings against ASEA. The factual circumstances that affected the parties have relevantly altered since the determination of that application, so that the present application has been made in materially different circumstances than those in which the application, before the trial judge, was heard.

¹⁰ Cf *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685, 692 (Kirby P, Hope and McHugh JJA).

The application for security for costs

22 In support of the application for security for costs, counsel for Rudyard noted that on 10 December 2019 Rudyard issued a creditor's statutory demand to ASEA demanding payment of the judgment sum. ASEA, having unsuccessfully sought to have the demand set aside, failed to pay the amount due, with the result that it is deemed to be insolvent. An application to wind up ASEA in insolvency was filed on 13 February. Counsel noted that ASEA has no known assets, it is not trading, and it has a paid-up share capital of \$1,200. Counsel submitted that to permit ASEA, which is the recipient of the payment claims under the Security of Payment Act, the liberty to conduct an appeal while impecunious, would defeat the purpose of the Act, as described by Vickery J in *Hickory Developments*. Counsel noted that Rudyard acted promptly in applying for security for costs.

23 In response, counsel for ASEA submitted that ASEA has sufficient financial support to meet any orders for costs made against it in the application for leave to appeal. In that respect, counsel noted that C2 has provided a deed of guarantee and indemnity in respect of the liabilities owed by ASEA arising out of the present proceeding, and that Mr Terrill has now paid into Court the judgment sum, and that C2 is a company of substance with an annual turnover in excess of \$20 million.

Principles regarding security for costs

24 The application for security for costs is made under r 64.38(2) of the Rules. That rule confers a broad discretion on the Court, which is to be exercised in light of the facts and circumstances of the individual case.¹¹ In *Australian Dream Homes Pty Ltd v Stojanovski*, the Court described the rationale for the making of such an order in the following terms:

The basis for making an order for security for the costs of an appeal lies in identifying a risk, which is unacceptable in all the circumstances, that the respondent to the appeal may be put to the expense of defending the judgment or decision in its favour without the benefit of expecting that, in the usual course, if it is successful in doing so, the unsuccessful appellant will be

¹¹ *Botsman v Bolitho* [2018] VSCA 111, [36] (Whelan and Niall JJA).

required to pay the respondent's costs of the appeal.¹²

25 In *Timbercorp Finance Pty Ltd (in liq) v Tomes*,¹³ McLeish JA (with whom Santamaria JA agreed) outlined the principal considerations that are relevant in the exercise of the Court's discretion to make an order for security for costs. His Honour stated:

It has regularly been held that the power of the Court to order security for costs in relation to an appeal (including an application for leave to appeal) is unconfined, but that the following matters are relevant to the exercise of the Court's discretion:

- (a) the prospects of success of the application, and any appeal;
- (b) the extent of the risk that a costs order will not be satisfied;
- (c) whether the making of an order for security would be oppressive by stifling a reasonably arguable claim;
- (d) whether any impecuniosity of the applicant/appellant arises out of the conduct complained of;
- (e) whether there are aspects of the public interest which militate against the making of an order for security; and
- (f) whether there are particular discretionary matters peculiar to the circumstances of the case.¹⁴

26 While the prospects of success of the substantive application are a relevant consideration, any consideration of that factor must, essentially, be provisional. In essence, as stated in *Jafari v 23 Developments Pty Ltd* the approach by the Court is of necessity 'broad brush'.¹⁵

Analysis and conclusion of application for security for costs

27 The starting point, for consideration of the application, is that it is accepted that ASEA is not trading, it has no income, and it has no assets. If the proposed appeal

¹² [2016] VSCA 38, [40] (Santamaria and McLeish JJA).

¹³ [2015] VSCA 322.

¹⁴ *Ibid* [16] (citations omitted).

¹⁵ [2019] VSCA 16, [15] (Whelan and Hargrave JJA). See also *Rozenblit v Vainer* [2019] VSCA 164, [46] (McLeish and Niall JJA).

fails, ASEA will not be able to meet any order for costs made against it out of its own assets. In oral submissions, counsel for ASEA correctly accepted that the guarantee, that is referred to in the recent affidavit of Mr Terrill, would not of itself provide security to Rudyard for its costs of the application for leave to appeal. Rudyard is not a party to the guarantee, and therefore may not directly enforce it. The guarantee could only be enforced against C2 at the suit of ASEA. It is most unlikely that ASEA would seek to enforce it, unless a receiver or liquidator was appointed to it.

28 In those circumstances, it has been amply established that there is a material risk that if the application for leave to appeal were to fail, Rudyard would not recover its costs of that application from ASEA. Further, it has not been demonstrated that it would be oppressive to ASEA to be ordered to provide security for Rudyard's costs of the appeal. There is no suggestion that ASEA's impecuniosity was caused by or arose out of the present litigation. Further, it is clear, from the affidavit of Mr Terrill, that ASEA has the financial support of C2. Indeed, it would appear that ASEA would not be able to prosecute the appeal without such support. Accordingly, it has not been suggested that, if the Court were to make an order for security for costs, ASEA would not be in a position to be able to provide such security.

29 For those reasons, we are persuaded that Rudyard is entitled to an order for security of its costs. The remaining question concerns the amount of that security.

30 In that respect, the solicitor for Rudyard, Darren Noble, has sworn an affidavit setting out a detailed estimate of the costs to Rudyard of the appeal, which he calculates to total \$75,089. In response, ASEA has relied on an affidavit of Raymond De La Rue, a legal costs consultant. In that affidavit, Mr De La Rue has noted that the amount calculated by Mr Noble includes costs which do not pertain directly to the appeal, and in particular costs and fees relating to the present application for security for costs. In addition, Mr De La Rue has expressed the view that Mr Noble's estimate of the costs is grossly excessive, and he estimates that the costs of Rudyard are unlikely to exceed \$30,000.

31 In fixing an appropriate amount of security for costs, it is not necessary for the Court to descend to detail, or to examine each item of the work claimed by Mr Noble. Certainly, it is evident that Mr Noble's estimate of costs includes costs which do not directly relate to the application for leave to appeal. It would also appear that a number of the costs are excessive, and relate to items which could not ordinarily be claimed on a taxation. Taking those matters into account, we consider that it is appropriate to require that ASEA provide security for Rudyard's costs of appeal in the sum of \$35,000.

32 For those reasons it will be ordered pursuant to r 64.38(2) of the Rules:

- (1) ASEA provide security for Rudyard's costs of the application for leave to appeal in the sum of \$35,000 by payment into Court to the Senior Master or in any other form satisfactory to the Registrar of the Court of Appeal.
- (2) Subject to Order (3), the application for leave to appeal be stayed pending the provision of security.
- (3) If security is not provided by 12 June 2020, the application for leave to appeal shall be dismissed.
