Court of Appeal
Supreme Court

New South Wales

Case Name:	TFM Epping Land Pty Ltd v Decon Australia Pty Ltd
Medium Neutral Citation:	[2020] NSWCA 118
Hearing Date(s):	16 June 2020
Date of Orders:	16 June 2020
Decision Date:	19 June 2020
Before:	Bell P; Macfarlan JA; Leeming JA.
Decision:	Leave to appeal refused, with costs.
Catchwords:	BUILDING AND CONSTRUCTION - Building and Construction Industry Security of Payments Act 1999 (NSW) - builder served payment claim - developers failed to serve payment schedule - builder obtained judgment pursuant to Act - developers' appeal from judgment dismissed - proceedings based on construction contract pending in Technology and Construction List - late filing of cross-claim by developers - no explanation for late filing of cross-claim - developers seek further stay of judgment pending determination of main proceedings - developers claimed that they would be wound up if no stay were ordered and the cross-claim would not be adjudicated - primary judge dismissed application for a stay - whether any error of principle - whether principles in a "Grosvenor stay" applicable - Grosvenor Constructions (NSW) Pty Ltd v Musico [2004] NSWSC 344 considered - whether developers had demonstrated basis for stay of execution - leave to appeal refused
Legislation Cited:	Building and Construction Industry Security of Payment Act 1999 (NSW), ss 13, 32

	Civil Procedure Act 2005 (NSW), s 56
Cases Cited:	Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das [2012] NSWCA 164 Bellerive Homes Pty Ltd v FW Projects Pty Ltd [2018] NSWSC 1435 Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421; [2004] NSWCA 394 Decon Australia Pty Ltd v TFM Epping Land Pty Ltd (No 2) [2020] NSWSC 312 Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd (2005) 62 NSWLR 385; [2005] NSWCA 49 Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd (2018) 98 NSWLR 712; [2018] NSWCA 276 Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico [2004] NSWSC 344 House v The King (1936) 55 CLR 499; [1936] HCA 40 In the matter of Pages Sales Pty Ltd [2016] NSWSC 616 In the matter of Tesrol Holdings Pty Ltd [2013] NSWSC 1534 Kalifair Pty Ltd v Digi-Tech (Australia) Pty Ltd (2002) 55 NSWLR 737; [2002] NSWCA 383 Live Board Holdings Ltd v Cody Live Pty Ltd [2017] NSWCA 302 Moutere v Deputy Commissioner of Taxation [2000] NSWSC 379; (2000) 34 ACSR 533 Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) (2019) 99 NSWLR 317; [2019] NSWCA 11 Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2018] NSWCA 33 Style Timber Floor Pty Ltd v Krivosudsky (2019) 100 NSWLR 133; [2019] NSWCA 171 TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 93 The Age Co Ltd v Liu (2013) 82 NSWLR 268; [2013] NSWCA 26 Vanella Pty Ltd atf Capitalist Family Trust v TFM Epping Land Pty Ltd [2020] NSWSC 659 Vanella Pty Ltd atf Capitalist Family Trust v TFM Epping Land Pty Ltd [2019] NSWSC 1379 Veolia Water Solutions & Technologies (Australia) Pty

	Ltd v Kruger Engineering Australia Pty Ltd (No 3) [2007] NSWSC 459
Category:	Principal judgment
Parties:	TFM Epping Land Pty Ltd (First Applicant) Katoomba Residence Investment Pty Ltd (Second Applicant) Decon Australia Pty Ltd (Respondent)
Representation:	Counsel: M Christie SC, D Hume (Applicants) I Roberts SC, D Byrne (Respondent) Solicitors: Dentons Australia (Applicants) Piper Alderman (Respondent)
File Number(s):	2020/163263
Publication Restriction:	Nil
:	
Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity Division – Technology and Construction List
Citation:	[2020] NSWSC 659
Date of Decision:	29 May 2020
Before:	Stevenson J
File Number(s):	2019/165506; 2019/205661

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

TFM Epping Land Pty Ltd and Katoomba Residence Investment Pty Ltd (**the Developers**) are judgment debtors of Decon Australia Pty Ltd (**the Builder**). The judgment debt is founded on the service of a payment claim by the Builder under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**) and the Developers' failure to serve a payment schedule in response. The judgment debt was entered as long ago as 11 October 2019. Following an unsuccessful appeal against the judgment, the Developers sought a stay of its execution. The Developers sought the stay on the basis that they are unable to pay the judgment debt, are insolvent if the judgment is not stayed and have a cross-claim in an amount exceeding the judgment debt. The primary judge refused the application for a stay of execution. The Developers sought leave to appeal, the application for which was heard concurrently with the appeal.

The issues before the Court were:

1. Whether the principles from *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico* [2004] NSWSC 344 and related cases apply either directly or by way of analogy where a judgment debtor cannot pay the judgment ordered;

2. Whether s 32 of the Act has a varied operation depending upon the financial circumstances of the parties; and

3. Whether the primary judge's discretion miscarried in refusing to grant the stay.

The Court held, refusing leave to appeal:

1. Where a judgment debtor under the Act has a countervailing claim against a judgment creditor, there is nothing to suggest that the same principles that apply to the ordering of a stay of execution when the judgment creditor might be unable to repay the amount in the event the claim succeeds should apply when the judgment debtor cannot pay the judgment ordered. The basal

purpose of the Act (namely, to ensure that progress claims are dealt with and paid promptly) tends in the opposite direction: at [72]–[80].

Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico [2004] NSWSC 344; *Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australia Pty Ltd (No 3)* [2007] NSWSC 459; *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation)* (2019) 99 NSWLR 317; [2019] NSWCA 11, considered.

2. Section 32 of the Act speaks only to the legal rights of the parties, not the practical effect upon them. The operation of s 32 cannot depend upon whether a developer is in a liquidity crisis or alternatively has deep reserves of liquid assets: [82]–[86].

3. A stay of execution will generally be less readily available in relation to judgments entered following an adjudication under the Act than in relation to appeals arising from curial proceedings. A court may nonetheless intervene, cautiously, where there is a likelihood of irreparable prejudice and the practical effect is to make permanent that which the legislature intended to be merely interim: [87]–[90].

Bellerive Homes Pty Ltd v FW Projects Pty Ltd [2018] NSWSC 1435, considered.

4. Where a judgment debtor seeks a stay of execution on the basis that it is otherwise insolvent but wishes to sue the creditor, funding of the debtor by a related party is not irrelevant to the exercise of the discretion: at [91]–[99].

5. The Developers had not established that failure to obtain a stay would have the practical effect of stultifying the litigation of a cross-claim which they had brought in Construction List proceedings against the Builder. The funders of the litigation hitherto had not been shown to be unwilling or unable to pay the judgment debt and, in the event that liquidators were appointed, it is to be presumed they would consider the merits of the cross-claim and make a rational decision whether to pursue it: [91]–[102].

6. There was no stultification of rights established and it had not been established that it was in the interests of justice to grant a stay of execution of the judgment: [91]–[102].

JUDGMENT

1 **THE COURT:** The applicants, TFM Epping Land Pty Ltd and Katoomba Residence Investment Pty Ltd (**the Developers**), are judgment debtors of their builder, the respondent Decon Australia Pty Ltd (**the Builder**). The judgment is in the amount of $6,355,352.46. It is based on the service of a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**) by the Builder, and the failure by the Developers to serve a payment schedule in response. It was entered as long ago as 11 October 2019: *Vanella Pty Ltd atf Capitalist Family Trust v TFM Epping Land Pty Ltd* [2019] NSWSC 1379, and an appeal from it has been dismissed: *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93. There are pending proceedings in the Technology and Construction List between the same parties relating to the same contract as was the subject of the Builder's payment claim.

2 Last month, the Developers sought a stay of execution of the judgment, an earlier stay pending appeal having expired. They say they cannot pay the judgment debt, that they are insolvent if the judgment is not stayed, and they have a cross-claim in an amount exceeding the judgment debt.

3 Just over three weeks ago, the primary judge (Stevenson J) heard the application for a stay of execution, and dismissed it, for reasons delivered very promptly two days after the hearing: *Vanella Pty Ltd atf Capitalist Family Trust v TFM Epping Land Pty Ltd* [2020] NSWSC 659.

4 The Developers sought leave to appeal. Their application was heard concurrently with the appeal, and with a high level of expedition. Nonetheless, the Court had the benefit of full written submissions, in chief and in reply, from the Developers, and oral submissions from Mr Christie SC occupying the entirety of the morning of 16 June 2020. All that could have been said on behalf of the Developers was said. Shortly after those submissions were completed, the Court, after conferral, ordered that leave to appeal be refused with costs. These are our reasons for making those orders.

Procedural background

5 Not least because of the importance placed by the primary judge on the timing of events in the dispute, it will be necessary to attend to the details of the procedural history, which includes one judgment of this Court and two judgments of the Equity Division.

6 The Developers and the Builder entered into a building contract in late 2016 or early 2017 for the design and construction of a residential development in Epping. The payment claim at the heart of this dispute, which is dated 3 June 2019, records that the contract was for a fixed lump sum of $28,215,000.

7 The primary judge recorded that an interim occupation certificate was issued on 23 August 2018, the strata plan was registered on 11 September 2018 and the Developers have sold 46 of the 98 residential units.

8 The judgment debt arose because the Builder served a payment claim pursuant to s 13 of the Act claiming $6,355,352.46. The primary judge recorded that the claim comprised $3,648,208.39 for contracted works (including recovery of a retention of $1,551,825), $1,512,526.40 for variations and interest of $1,193,617.67 (there may be a minor error in one of those amounts, but if so nothing turns on it). The Developers failed to serve a payment schedule within the time required by the Act. They therefore became liable to pay the Builder the $6,355,352.46 referred to in the payment claim, and the Builder was entitled to enforce the rights conferred upon it by the Act.

9 As is well established, the Act makes provision for payment, if necessary enforceable by judgment, of a builder's or sub-contractor's relevantly uncontested claim for claimed but unpaid moneys in order to ensure continuity of cashflow, whilst not precluding the principal from seeking to reverse the effect of such a judgment in later substantive proceedings (see further at [22]ff below).

10 The Builder commenced two proceedings against the Developers, which may be called (adopting the language of the primary judge) the Construction List proceeding and the SOP proceeding. Another company, Vanella Pty Ltd, was a second plaintiff in the Construction List proceeding, but nothing turns on that for present purposes and we shall not make further reference to it.

The Construction List proceeding

11 The Construction List proceeding was commenced on 27 May 2019. It included claims for the same amounts as the payment claim.

12 On 12 July 2019, and by consent, the Developers were directed to file and serve a response and any cross-claim by 2 August 2019. The Developers filed a response on 13 September 2019. Nothing turns on that delay. However, the primary judge regarded it as significant that the cross-claim was not filed until 18 May 2020 – 9½ months late, and only after the Developers' appeal in the SOP proceeding had been dismissed.

13 His Honour said that nothing of substance occurred in the Construction List proceeding until May 2020. So far as is disclosed by the materials made available in this Court, that was an accurate statement.

The SOP proceeding

14 The SOP proceeding was commenced on 3 July 2019 following the Developers' failure to serve a payment schedule in response to the payment claim. Relying on its rights under the Act, the Builder sought judgment for the $6,355,352.46 and moved for summary judgment. It is unclear why the Builder moved for summary judgment, and indeed Henry J noted at [155] that there was little difference between a summary and final determination of the issues which arise following the failure to provide a payment schedule.

15 A hearing took place on 18 September 2019. In her reasons delivered on 11 October 2019, her Honour rejected the claim that a document relied on by the Developers was a payment schedule: [2019] NSWSC 1379 at [134]. She ordered judgment in the amount of the payment claim on 11 October 2019: *Vanella Pty Ltd atf Capitalist Family Trust v TFM Epping Land Pty Ltd* [2019] NSWSC 1379.

16 The Developers appealed. In the interim, a stay of execution was put in place, on terms which included undertakings given by the Developers concerning their assets: *Decon Australia Pty Ltd v TFM Epping Land Pty Ltd (No 2)* [2020] NSWSC 312. The appeal was heard on 21 April 2020, and dismissed on 14 May 2020: *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93.

17 There was a question arising on the earlier appeal, having regard to the entitlement under the Act to move for final judgment, whether the judgment was final or interlocutory for the purpose of leave. This Court granted leave to the extent necessary and dealt with the Developers' points substantively. The only issues were whether the payment claim was invalid, because the claim was not made under the contract, or had not been made in respect of an available reference date, or had not been validly served (no challenge was made to the finding that no payment schedule had been provided). The Court noted at [17] that two of the three points advanced had not been raised at first instance. All of the Developers' points were rejected by judgment delivered on 14 May 2020.

The cross-claim is filed in the Construction List proceeding

18 Four days after their appeal was dismissed (and the interlocutory stay pending appeal discharged), on 18 May 2020, the Developers filed a cross-claim in the Construction List proceeding, alleging that the Builder was not entitled to the retention or the variation claims, and was additionally liable for defects in an estimated amount of $4,787,810.50 and general damages in an unquantified amount.

19 On the strength of that cross-claim, the Developers sought a stay of execution of the judgment, once again offering undertakings concerning their assets.

20 It is convenient to note an important difference between the application for a stay of execution that the Developers obtained pending resolution of their earlier appeal to this Court and that which they subsequently sought from Stevenson J. It is one thing to apply for a stay of execution of a judgment when that judgment is itself the subject of an appeal. It is another thing to accept, as the Developers must, that they can no longer directly challenge the judgment obtained in the SOP proceeding, and now can only hope following a final hearing of the claims in the Construction List proceeding to achieve a result which has the practical effect of reversing the presently established entitlement of the Builder to the judgment debt of $6,355,253.46.

21 The principal basis of the stay of execution sought from Stevenson J and now from this Court in the event that leave is granted was and is that the

Developers cannot pay the $6,355,352.46 now due under the judgment, and they have defences to the claims giving rise to the judgment debt and a cross-claim exceeding that judgment debt. This was advanced as an instance of, or analogous to, a "*Grosvenor* stay", by reference to *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico* [2004] NSWSC 344. The Developers' position was encapsulated in their written submissions:

> "The difficulty [the Developers] face is that they cannot pay the amount which Henry J has ordered them to pay: if they are obliged to pay that amount, they are insolvent. And if they are insolvent they should enter liquidation, and at least for practical purposes their claims to final relief reversing the Security of Payment Act judgment will be stultified. The interim right will have become a final one."

The Act

22 In *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* (2019) 99 NSWLR 317; [2019] NSWCA 11 at [72]-[74], Sackville AJA (with whom the other four members of the Court agreed) summarised the Act as follows (omitting citations):

> "The High Court has on two occasions quoted the explanation of the original design of the Security of Payment Act given by the responsible Minister when introducing amending legislation in 2002:
>
> > 'The Act was designed to ensure prompt payment and, for that purpose, the Act set up a unique form of adjudication of disputes over the amount due for payment. Parliament intended that a progress payment, on account, should be made promptly and that any disputes over the amount finally due should be decided separately. The final determination could be by a court or by an agreed alternative dispute resolution procedure. But meanwhile the claimant's entitlement, if in dispute, would be decided on an interim basis by an adjudicator, and that interim entitlement would be paid.'
>
> The Minister went on to say that cash flow was the 'lifeblood of the construction industry' and that the Government was:
>
> > 'determined that, pending final determination of all disputes, contractors and subcontractors should be able to obtain a prompt interim payment on account, as always intended under the Act.'
>
> Section 3(1) of the Security of Payment Act states that the object of the legislation is:
>
> > 'to ensure that any person who undertakes to carry out construction work … under a construction contract is entitled to receive and is able to recover, progress payments in relation to the carrying out of that work…'
>
> The means by which the Act ensures that a person is entitled to receive a progress payment 'is by granting a statutory entitlement to such a payment

regardless of whether the relevant contract makes provision for progress payments' (s 3(2)).

Section 3(3) provides as follows:

> 'The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
>
> (a) the making of a payment claim by the person claiming payment, and
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> (b) the provision of a payment schedule by the person by whom the payment is payable, and
>
> (c) the referral of any disputed claim to an adjudicator for determination, and
>
> (d) the payment of the progress payment so determined.'"

23 In *Style Timber Floor Pty Ltd v Krivosudsky* (2019) 100 NSWLR 133; [2019] NSWCA 171 at [25] it was said:

> "Part 3 specifies how the legislative purpose of achieving a prompt *pro tem* resolution of disputes and payment of monies, all without prejudice to the parties' rights at law, is to be effected. This reflects what Hodgson JA said (with the agreement of Mason P and Giles JA) in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 at [51]:
>
> > 'The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss.3(4), 32.'"

24 In particular, and focussing on the provisions applicable in the present case, if a claimant serves a payment claim and the respondent does not provide a timely payment schedule, then "the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates": s 14(4). If the respondent which is liable to pay the claimed amount under s 14(4) fails to do so, then the claimant is entitled to the rights under s 15(2), one of which is an entitlement to recover the unpaid portion of the claimed amount as a debt in any court of competent jurisdiction (s 15(2)(a)(i)) while the respondent becomes subject to the disabilities in s 15(4)(b), namely, that it is not entitled to bring any cross-claim or to raise any defence in relation to matters arising under the construction contract.

25 Thus the Act provides for a speedy but interim determination and enforcement of disputes arising out of construction contracts through the service of payment claims and payment schedules and adjudications, leading to an entitlement to payment, enforcement of the parties' entitlements by way of judgment, and ultimately if necessary by way of execution, but without affecting the parties' contractual rights as determined in the ordinary way in litigation.

26 It is not uncommon for a developer to be found liable under the Act to pay a large amount to a builder, and for there to be a well-founded concern that, in the event that the litigation produces a different result from the payments made pursuant to the Act, the builder will be unable to repay the money. In such circumstances, a stay of execution of the judgment pursuant to the rights created by the Act may be ordered, often on terms that the developer pay the money which is the subject of the liability under the Act into Court. That is the approach which the Developers sought to invoke.

27 But in the present litigation, the Developers do not suggest that there is any risk that the *Builder* will be unable to repay the judgment debt. Nor is it proposed that the Developers will pay anything into Court. The Developers say that *they* cannot pay, *and for that reason* there should be a stay.

The reasons of the primary judge

28 The primary judge rejected any analogy with a "*Grosvenor* stay".

29 The primary judge framed the question, in accordance with the Developers' submission, as being whether the requirements of justice warranted a stay of execution: at [35]-[36]. His Honour proceeded on the basis that whether what was in effect injunctive relief would be granted turned upon whether there was a serious question to be tried that the Developers would succeed on their cross-claim, and whether the balance of convenience favoured granting relief. His Honour accepted there was a serious question to be tried that the Developers would achieve *some* measure of success, but regarded it as a matter of speculation whether they would recover more than the judgment. He also accepted that, considered in isolation, the balance of convenience leaned in favour of granting a stay: at [40].

30 However, his Honour said at [42] that "there are anterior matters, each of which tends against granting the stay sought". Paragraphs [43]-[59] fall under the heading "Anterior matters", and conclude with a statement to the effect that they were dispositive, notwithstanding certain matters subsequently addressed which tended in favour of a stay.

31 Accordingly, it is important to consider separately the matters which his Honour regarded as dispositive, and those which had non-dispositive weight.

The dispositive "anterior matters"

32 The first "anterior matter" was the Developers' delay. His Honour noted at [43] that, as long ago as 11 October 2018, the Developers had acknowledged the indebtedness, but had contested every step taken by the Builder to enforce it. His Honour said at [45] that:

> "The Developers did not pay the amount in the payment claim, did not serve a payment schedule, resisted summary judgment before Henry J and sought to overturn the Judgment on appeal."

33 Moreover, and contrary to directions for the Developers to file any cross-claim some 9 months earlier, none was filed until after the Developers had failed to resist the Builder's claims in the proceedings brought under the Act, where the same issues arose. The primary judge noted at [49] that the Developers' failure was not explained by evidence before him, and at [51] that the consequence was that, had the cross-claim been pursued earlier, "that would have provided a basis on which they could have sought from Henry J a stay of the Judgment pending prosecution of that cross-claim on the basis now agitated before me".

34 His Honour said at [52]-[55] that:

> "Instead, the Developers left matters in these proceedings in abeyance while they brought the appeal in the SOP Proceedings.
>
> The Develops failed in the SOP proceedings. The Builders' rights under the Act were vindicated in those proceedings.
>
> Only now do the Developers bring a Cross Claim.
>
> To grant a stay now, pending the determination of that Cross Claim, would render pointless, and set to nought, all that has occurred in the SOP proceedings; and not for any reason associated with any fault, action or inaction of the Builder; nor for any reason associated with the Builder's financial position."

35 The primary judge then turned to the statutory context, saying that:

> "The scheme and purpose of the Act is to 'ensure a reliable flow of funds to contractors' such as the Builder. The operation of the Act in this case has had the result that the Court has determined that funds should flow from the Developers to the Builder. Through no fault of the Builder, that has not occurred.
>
> The scheme and purpose of the Act is to transfer the risk of a contractor's insolvency to the developer.
>
> It would be inconsistent with the scheme and purpose of the Act for the Developer to now rely upon its own insolvent position to seek a stay of the Judgment obtained by the Builder after contested proceedings under the Act." (footnotes omitted).

36 His Honour concluded that for those reasons, and "notwithstanding ... my conclusions about serious question and balance of convenience set out below", the requirements of justice did not in this case warrant the granting of the stay sought by the Developers: at [59].

Further consideration of serious question and balance of convenience

37 His Honour thereafter addressed serious question and balance of convenience at [60]-[95]. His Honour commenced by noting that while he accepted that there was a serious question to be tried that the Developers would establish that the Builder had *some* liability under the cross-claim, he considered that "on the basis of the evidence before me it is no means clear to what extent the Developers will be successful", or whether that amount would exceed the judgment debt: at [62].

38 His Honour then observed that oral submissions had focussed upon four matters.

39 The first concerned the retention. His Honour noted that the contract provided that the Developers were entitled to retain 50% of the retention until a certificate of practical completion was issued and the balance of retention until a "final certificate" was issued. His Honour said that there was no evidence that the final certificate had issued, and unchallenged evidence from the Developers' Financial Controller that the Developers had not been told that practical completion had been reached. However, his Honour said that work on the project was "evidently complete", since 46 of the 98 units in the development had been sold. His Honour concluded at [70]:

> "That suggests, although of course by no means conclusively, that the Developers' claim, to in effect recover the retention from the Builder, will have difficulties."

40 The second concerned the claimed variations. His Honour observed that, while the Developers' Financial Controller said she was unaware of any variation, there was no evidence from the Developers' sole director (Mr Zhang) nor from the Builder. There was also no evidence of whether the Builder had in fact performed work entitling it to be paid as a variation, and his Honour noted that the Developers did not submit that no work in the nature of a variation had in fact been performed.

41 The third concerned the claimed defects. There was evidence that the Builder had used a product for cladding which the Commissioner of Fair Trading had declared to be a "banned product". The banning order was made 13 days before an interim occupation certificate was issued, leading to the inference that the work done by the Builder had predated the product being banned. There was evidence that the removal of some of the cladding would cost some $1.5 million, although the primary judge stated that the evidence did not reveal whether this represented all of the facade, and that his attention had not been drawn to any evidence that all of the facade had to be replaced: at [82]. The primary judge also noted that the Developers had served an expert report which "simply asserts, without explanation, that costs of investigation and repair of defects in the development will be between $2.4 and $3.7 million": at [84]. His Honour concluded that there was a serious question concerning defects which required attention, but was not satisfied that there was "any basis upon which any conclusion could now confidently be made as to what the costs of repairing those defects might be".

42 The fourth concerned delay. The primary judge reproduced a submission concerning the claim of delay:

> "[The Developers] also claimed substantial damages arising from [the Builder]'s failure to complete the works on time. The effect of the delay was that (i) [the Developers] were unable to sell the units when the market was 'high', and (ii) it was therefore necessary for [the Developers] to refinance their punitive rates. This claim has not been precisely quantified. It will ultimately be in the many millions of dollars."

43 His Honour concluded that there might well be a serious question to be tried as to whether there had been delay in the works which might entitle the Developers to general damages, but that his attention had not been drawn to any evidence that would allow him to come to any conclusion as to what amount the Developers might recover.

44 Finally, on the balance of convenience, his Honour summarised the Developers' case thus:

> "In substance, the Developers' case on the balance of convenience is that, as they cannot pay the amount of the 11 October 2019 judgment, it is likely that the Builder's continuing attempts to enforce the judgment will lead to the Developers being placed in liquidation."

45 His Honour referred to a statutory demand which the Builder had issued, an application to set aside which was to be determined by the Federal Court of Australia on Monday 1 June 2020. His Honour stated that, in the absence of a stay, there appeared to be at least a prospect that the Developers would be forced into liquidation and, if that were that to happen, the cross-claim could not proceed unless the liquidator were funded to, and agreed to, prosecute it. His Honour accepted that that was a matter in favour of a stay being granted, and considered that it was unnecessary to deal with the value of the undertakings offered by the Developers as the price of a stay save to say that his Honour accepted they had some value and, again, taken in isolation, favoured the granting of a stay.

46 However, his Honour did not consider that those six matters outweighed the points earlier relied upon, giving a reference to paragraphs [43]-[59] (the paragraphs under the heading "Anterior matters").

47 The parties included, helpfully, the transcript of the hearings in the Federal Court on 1 and 2 June 2020. The Federal Court was told that this appeal could be heard on 16 June, and adjourned the hearing of the application to set aside the statutory demand to 24 June 2020.

The Developers' submissions in support of leave and on the appeal

48 The Developers acknowledged that they needed to establish *House v The King* (1936) 55 CLR 499; [1936] HCA 40 error, and that there was a threshold

question of the grant of leave, the orders made by the primary judge being interlocutory.

49 In this Court, the Developers maintained that the principles in the *Grosvenor* line of authority apply, either directly or by way of analogy. While acknowledging that the central purpose of the Act was to ensure that builders were not denied cashflow, they added that another purpose was to ensure that the interim rights created by the Act do not by default become final.

50 The Developers contended that there were many instances in which a "*Grosvenor*" jurisdiction had been exercised, whether or not the judgment obtained pursuant to the rights created by the Act followed an adjudication or the failure to serve a payment schedule. In their written submissions they relied on what was said in *Bellerive Homes Pty Ltd v FW Projects Pty Ltd* [2018] NSWSC 1435 at [61]:

> "The question involves a balancing exercise between the policy of the SOP Act (that successful applicants be paid promptly) and the likelihood of irreparable prejudice which would flow from the refusal of the stay if success in the related proceedings would be rendered worthless. The risk needs to be more than 'a real risk of prejudice' if a stay is not granted."

51 They acknowledged that all the decided cases involve stays sought by a principal in respect of a judgment obtained by a contractor based on the apprehended insolvency of the contractor. But they submitted:

> "Although this is not the conventional case, the root principle underpinning the *Grosvenor* line of cases is equally applicable. That root principle is the interests of justice and the proposition that it would subvert the Security of Payment Act – and in particular subvert section 32 of the Act – if the interim right were reasonably likely to become a final one."

52 The Developers placed considerable reliance on s 32 of the Act:

> "**32 Effect of Part on civil proceedings**
>
> (1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract—
>
> (a) may have under the contract, or
>
> (b) may have under Part 2 in respect of the contract, or
>
> (c) may have apart from this Act in respect of anything done or omitted to be done under the contract.
>
> (2) Nothing done under or for the purposes of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

> (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal—
>
> > (a) must allow for any amount paid to a party to the contract under or for the purposes of this Part in any order or award it makes in those proceedings, and
> >
> > (b) may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings."

53 The Developers made three points about s 32.

(1) Because s 32 expressly provides that nothing in Part 3 (which includes ss 14 and 15) affects rights under contract, they said that "[t]hat indicates that the declaration and enforcement of a Part 3 right should not have the effect of stultifying the pursuit of final rights under the contract".

(2) Because s 32 provides that "nothing done under or for the purposes of Pt 3 affects any civil proceedings under a construction contract", the Developers submitted that "that too indicates that the declaration and enforcement of a Part 3 right should not have the effect of stultifying the pursuit of final rights under the contract".

(3) The section "expressly contemplates that Part 3 rights (including those under ss 14 and 15) can be undone in final proceedings".

54 Section 32 was central to the submission developed orally that the primary judge erred in stating that the granting of a stay was inconsistent with the scheme of the Act. The Developers submitted that s 32 permitted a court to "undo" the effect of a judgment under the Act, and preserved all of the parties' rights at common law, relying on what Handley JA had said in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* (2005) 62 NSWLR 385; [2005] NSWCA 49 at [22]:

> "The common law does not permit inconsistent judgments, but this may be sanctioned by statute and this is not the only example of such a statute in this jurisdiction. Compare *Toubia v Schwenke* (2002) 54 NSWLR 46, 50. The power under s 32(3)(b) to make such other orders as it considers appropriate would probably allow the court to set aside or vary any judgment entered under s 25. It is clear that the Act confers statutory rights on a builder to receive an interim or progress payment and enables that right to be determined informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can be determined in the normal manner."

55 Insofar as the refusal of a stay would have the practical effect of stultifying their cross-claim, being a right expressly preserved under s 32, the Developers

submitted that granting a stay was wholly consistent with the statutory purpose of not permitting interim rights to become final rights.

56 In that context, the Developers contended that there was error by the primary judge in regarding the application as inconsistent with the Act. They submitted:

> "It is not 'inconsistent' with the Act for a principal that is insolvent or teetering on the edge of insolvency to seek and obtain a stay of a Security of Payment Act judgment. It is well-established in the *Grosvenor* authorities (which, as indicated, are approved in this Court and elsewhere) that it is *not* inconsistent with the Act for courts to order a stay of a Security of Payment Act judgment if it is necessary in the interests of justice. In particular, it is *not* inconsistent with the Act for courts to order a stay of a Security of Payment Act judgment if, without the stay, the interim right might very well become a final one."

57 Relying upon *Kalifair Pty Ltd v Digi-Tech (Australia) Pty Ltd* (2002) 55 NSWLR 737; [2002] NSWCA 383 at [21]-[25], the Developers submitted that if they were forced into liquidation, that would inevitably prejudice their ability to pursue their final rights against the Builder, and this, so they said, is contrary to s 32 of the Act.

58 The Developers placed considerable emphasis on *Kalifair* in oral submissions. It was said that that appeal proceeded on the basis that the winding up of an appellant was *itself* sufficient prejudice to warrant the grant of a stay. Mr Christie conceded that *Kalifair* was merely analogous to the present case, and that concession was properly made. The issue in *Kalifair* was whether there should be a stay of execution of judgment pending an appeal *from that very judgment.* But there can be no appeal from the judgment which is the subject of the Developers' application (there has already been an appeal, which has been dismissed and there was no suggestion that special leave to appeal had been sought, there being no right of appeal to the High Court). Rather, the Developers contend that the principle in *Kalifair* applies where the rights flowing from the judgment are qualified by s 32, and there has not yet been a determination on the merits of the issues presented in the Builder's Construction List Statement or the Developers' Cross-Claim.

59 Mr Christie's point was that *Kalifair* stood for the proposition that the appointment of a liquidator was of itself irreparable prejudice, sufficient to warrant a stay of execution as a matter of principle.

60 The Developers also invoked what had been said by Sackville AJA, with the agreement of the other members of the Court, in *Seymour Whyte Constructions* at [254]:

> "In the light of these principles, it has generally been accepted that a respondent which can establish that it has a seriously arguable claim arising out of the construction contract may be able to obtain a stay of execution of a judgment obtained under Pt 3 of the Security of Payment Act or equivalent relief (such as an order requiring a claimant to provide security). Such relief ordinarily may be granted only if:
>
> > 'the failure to do so would have the practical effect of making permanent that which ... the legislature intended [by the Security of Payment Act] to be only interim.'" (footnotes omitted)

61 The Developers emphasised the first limb of that formulation, to the effect that they had a seriously arguable claim, which, at least in part, had been recognised by the primary judge. The Court drew attention to the second limb of that formulation, which turns upon establishing that the failure to grant relief would, at least ordinarily, have the practical effect of making the rights created by the Act permanent.

62 This led to the following exchange:

> "BELL P: Paragraph 254 of Sackville J's decision focuses attention on an assessment of the practical effect of failing to grant the stay, namely, that that which is temporary becomes permanent. That which is temporary will only become permanent if (a) the company goes into liquidation, which is not certain, and (b) if it does go into liquidation, the liquidator is not able to pursue the s 32 proceedings.
>
> CHRISTIE: The key word in the passage in Sackville J's judgment for present purposes in the paragraph quoted, the failure to do would have the 'practical effect', his Honour doesn't say the legal effect. His Honour is focussing on the practical effect. That very much does reflect the approach adopted in *Kalifair* which again asks, what is the practical effect of not granting a stay? In *Kalifair* at para 24, p 742, the Court said this, 'The judgment creditor and its solicitors evidently believe that the winding-up of the three appellants would be to their advantage. The Court should therefore infer that there is a real risk that the making of winding-up orders would prevent the prosecution of these appeals.' Again, a very practical approach is being adopted, which very much mirrors what Sackville J had to say."

63 Ultimately, we understood Mr Christie to accept that he bore the onus of demonstrating such a practical effect. He did so by contending that the appointment of a liquidator would be the probable consequence of the refusal of a stay, and that a liquidator might not pursue the cross-claim, and would certainly not do so unless funded.

64 Mr Christie was confronted with difficulties in the Developers' evidence, including the following.

(1) The most up to date financial statements, which were dated March 2020, were not audited, and were special purpose financial statements of the Developers, excluding any reference to the position of their holding company.

(2) Those financial statements also omitted any reference to an asset comprising the rights sought to be vindicated by the cross-claim. If, as the Developers contended, there was a valuable asset worth many millions of dollars, there was a healthy surplus of assets over liabilities, although there was still a deficiency of current assets compared with the judgment debt.

(3) There was no evidence of the preparedness or otherwise of the sole director, or the holding company, to fund the Developers in order to pay the judgment debt.

(4) There was no evidence of those standing behind the Developers to fund a liquidator to litigate the cross-claim.

65 The Developers' written submissions attacked what they said might be an implied criticism of their failure to file and prosecute their cross-claim months ago. In their written submissions, they contended that there was in fact no criticism, that the course taken was consistent with *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421; [2004] NSWCA 394 and *Goodwin Street Developments Pty Ltd v DSD Builders Pty Ltd* (2018) 98 NSWLR 712; [2018] NSWCA 276, and that "it is most difficult to see how [the Developers] *could* be criticised for waiting until after their unsuccessful appeal". They say that it was prudent not to plead out a cross-claim until after the appeal from the Security of Payments Act judgment was determined, and that they had the benefit of a stay pending appeal.

66 It was pointed out that the portion of his Honour's judgment dealing with unexplained delay was a significant aspect of his rejection of the application for a stay. In response it was contended that that there should be no criticism of the delay in bringing the cross-claim, in circumstances where the Developers' primary objective had been to set aside the judgment in the SOP proceeding, and where, once that appeal had failed, they had moved promptly. However, Mr Christie accepted, very properly, that it had been erroneous not to comply with the Court's direction to file any cross-claim by 2 August 2019, and that

there had been a non-compliance with s 56 of the *Civil Procedure Act 2005* (NSW).

67 The Developers confirmed that there was no evidence explaining the delay in filing the cross-claim until shortly after they had lost their appeal.

68 It is not necessary to summarise the Builder's written submissions.

Consideration

69 We start with the threshold question of leave, the decision of the primary judge to dismiss an application for a stay being interlocutory, and concerning a point of practice and procedure. Generally it is appropriate only to grant leave to appeal in cases that involve issues of principle, or questions of public importance, or where it is reasonably clear that an error has been made, going beyond what is merely arguable, that occasions an injustice: *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 at [32]-[38]; *The Age Co Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13].

70 It was not said that there was any reasonably clear error occasioning injustice. The only point of principle or public importance was said to be the applicability of a "*Grosvenor* stay" to the present case. The applicability of an established point of principle to the facts of a given case is very different from a case which raises a point of principle that is contested or uncertain or still evolving. Further, the primary judge rejected the Developers' submission based on the application of *Grosvenor* to the facts of this case. His Honour was correct to take that course.

71 The primary judge was asked to give a highly expeditious determination, in light of the proceedings commenced by the Developers in the Federal Court. His Honour evidently regarded it as self-evident that the application before him for a stay was inconsistent with the regime established by the Act. We agree. In light of the Developers' submissions, it is as well to explain more fully why that is so.

Grosvenor has nothing to do with the Developers' application

72 *Grosvenor* concerned a stay of execution of the judgment debt created pursuant to the Act in circumstances where there was a countervailing claim against the builder and the *builder* might be unable to repay the amount in the event the claim succeeded. The reasoning in *Grosvenor* has not been accepted without qualification. In particular, it was the subject of what Payne JA stated (in *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd* [2018] NSWCA 33 at [31]) was an "important qualification" in McDougall J's judgment in *Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australia Pty Ltd (No 3)* [2007] NSWSC 459 (**Veolia**). McDougall J gave a careful account of the principles applicable in the exercise of a discretion in this category of case at [72]-[75]:

> "72. The exercise of the discretion to grant a stay requires a balancing of the relevant factors. Two factors of particular significance in this case are:
>
> (1) On the one hand, the policy of the *Security of Payment Act*, that successful applicants be paid promptly (recognised by Einstein J in *Grosvenor* at para [31]); and
>
> (2) On the other, the likelihood of irreparable prejudice, where that prejudice would flow from the refusal of the stay because cross-claims would be rendered worthless (recognised by Einstein J in *Grosvenor* at para [32]).
>
> 73. In assessing whether the refusal of a stay will cause irreparable prejudice, it is open to the Court to have regard to the strength of the cross-claim, to ascertain whether there is at least a real risk that prejudice will follow if a stay is not granted (see the analysis of Einstein J in *Grosvenor* at paras [29] and [30], applying by analogy the principles relevant to stay pending appeal). I say 'at least' because of the issue reserved, but not answered, by Einstein J in para [31] of his reasons.
>
> 74. As a general rule, I think, the balancing of the two significant factors to which I referred in para [72] above requires the Court to look closely at the strength of the cross-claim asserted by the applicant for a stay. There are at least two reasons why this is so. The first is that there has been an examination, admittedly of an abbreviated and sometimes rough and ready way, of the competing claims. I accept that adjudicators are as prone to error as other human beings; and I accept also that the stresses placed upon them by the extremely tight timetable for which ss 19 to 21 of the *Security of Payment Act* provide may magnify the possibility of error. Nonetheless, the legislature has said that disputes as to progress payments are to be determined in the first instance through the mechanism provided in the *Security of Payment Act*. That mechanism allows an examination not only of the payment claim but also of the payment schedule, in which (one might expect) the respondent ordinarily would set out all reasons why, it says, the claimant is not entitled to be paid.

> 75. The second reason flows from the plain legislative intention that progress claims should be dealt with, and paid, promptly. In my view, any court faced with, and required to give effect to, that clear legislative policy should be careful before exercising a discretion in a way that would intercept the effectuation of that policy in a particular case. Thus, I agree with Einstein J that the Court would ordinarily do so (in cases such as the present) only where the failure to do so would have the practical effect of making permanent that which, clearly enough, the legislature intended to be only interim."

73 Those paragraphs were cited, with evident approval, in *Seymour Whyte Constructions* at [69], and part of the last sentence of paragraph [75] was quoted in the passage from *Seymour Whyte Constructions* which we have extracted at [60] above.

74 There is nothing in that analysis to suggest that the same principles should apply when a *judgment debtor* cannot pay a judgment ordered pursuant to the rights created by the Act, whether following an adjudication or the failure to supply a payment schedule.

75 Mr Christie invoked what was said about avoiding the position whereby a cross-claim would become "worthless". But the reasoning underlying the *Grosvenor* line of authority is inapt to extend to the present facts. McDougall J was referring to a principal's cross-claim becoming worthless because a cross-defendant, which had received a payment pursuant to rights obtained under the Act, would be unable to meet the judgment following a curial determination of the cross-claim. That bears no comparison to what is propounded by the Developers, namely, that because they will become insolvent, their cross-claim may never be litigated.

76 It is also to be borne in mind that there has been no suggestion of any solvency risk on the part of the Builder, another factor which strongly distinguishes the present proceedings from *Grosvenor* and other decisions which have applied it.

77 Nor is there anything supportive of the Developers' position in terms of principle. To the contrary, the principles and policy underlying the Act point in the opposite direction.

78 The basal purpose of the Act is to create a speedy determination *pro tem* to ensure that progress claims are dealt with and paid promptly. An essential aspect of that regime is that the rights created under it are enforceable as if

there had been a final determination by a court, save only for the fact that they do not create a res judicata or any issue estoppels.

79 The Act creates liabilities which may be claimed as a debt in a court of competent jurisdiction if they are not promptly paid. The Act provides that if there is a hearing in the court in which the debts created by the Act are sued for, the party which has not paid is severely limited in what can be advanced by way of defence or cross-claim. The evident and intended statutory consequence is that in some cases the statutory entitlement will lead to a judgment debt.

80 There is nothing in the Act to suggest that a judgment thereby obtained is somehow any less enforceable – in the sense that the ordinary options available to a judgment creditor by way of execution are diminished or unavailable – than any other judgment. To the contrary, all of the provisions are directed to permitting progress claims to be paid, including if necessary by execution of the judgment.

81 To this there is the possible exception of s 32, and the general proposition that the Court will intervene, albeit cautiously, in order to prevent the interim rights created by the Act from being made permanent. We deal with each of these points below.

The effect of s 32 of the Act

82 True it is, as the Developers submitted, that s 32 of the Act alters the quality of a judgment obtained pursuant to the regime established by the Act in important ways. In particular, s 32 makes it clear that the judgment gives rise to no res judicata or issue estoppels. But we do not agree that s 32 itself applies at the level of *practical effect* on which the Developers' submissions turned, and in the sense described in *Seymour Whyte Constructions* and *Veolia* (see [60] and [72] above).

83 The Developers said that s 32 confirmed that a judgment obtained pursuant to the regime established by the Act would not detract from a party's rights at law. They went on to submit that the practical effect of execution of the judgment would be to stultify the Developers' ability to vindicate their contractual rights, and thus the failure to grant a stay was contrary to s 32.

84 But s 32 speaks only to the *legal rights* of the parties. It does not speak to the practical effect upon them. It cannot be the case that the operation of s 32 depends upon whether, say, a developer is in a liquidity crisis or alternatively has deep reserves of liquid assets; that would be to introduce uncertainty and contestability and to mean that the qualifications in s 32 had a varied operation depending upon the financial circumstances of the parties (which might not be known to each other).

85 Putting the matter another way, if as the Developers fear, a liquidator is appointed to them, the Developers will still enjoy precisely the same rights to prosecute their cross-claim as they presently enjoy. True it is that the decision to pursue the cross-claim will become that of the liquidator, rather than that of the Developers' sole director, but s 32 is only expressed not to affect the rights of *parties*.

86 In short, s 32 does not mean that the primary judge was wrong to regard the application as inconsistent with the Act. To the contrary, the focus on the Act of ensuring the progress payments are paid tells against a stay of execution by a developer who has failed to pay a progress claim or raise a payment schedule and thereby become (a) liable to the pay the debt created by s 14 of the Act and (b) liable for the judgment which is readily obtainable under s 15 of the Act.

When may a stay of execution may be ordered on the application of the judgment debtor?

87 None of the foregoing detracts from the principles applied by the primary judge that permit a stay of execution to be granted, no differently from the fact that a stay of execution may in an appropriate case be granted in respect of any other judgment. We respectfully agree with N Adams J, in a sentence immediately preceding a passage from her judgment in *Bellerive Homes Pty Ltd v FW Projects Pty Ltd* reproduced in the Developers' written submissions:

> "A stay will generally be less readily available in relation to judgments entered following an adjudication under the SOP Act than in relation to appeals arising from curial proceedings."

88 That must, with respect, be so. It is a consequence of the legislative purpose of giving cashflow to builders and subcontractors in advance of a final hearing in

a court, which is absent in, say, a judgment arising on a debt owed to a bank or following an action for personal injury.

89 As McDougall J said in *Veolia* at [75], a court may nonetheless intervene where there is the likelihood of irreparable prejudice. In such a case a Court will be cautious, in light of the policy of the statute, but it may do so where the practical effect is to make permanent that which the legislature intended to be merely interim.

90 True it is that in such a case the Court will have regard to the practical effect upon the parties. But the onus must rest on the party who seeks relief which will prevent the ordinary operation of the processes authorised by the Act, and it is to be borne in mind that a Court will be cautious when intervening, not least because to do so detracts from the primary purpose of the Act in enabling a builder to be paid.

The practical effect of failing to obtain a stay of execution

91 The Developers acknowledged that their financial position showed a surplus of assets over liabilities, if one included provision for the cross-claim, but maintained that they were unable to pay their debts as they fell due because of a deficiency of liquid assets, unless there was a stay of execution. But here the evidentiary gap was identified during the hearing:

> "MACFARLAN JA: But, Mr Christie, without properly audited accounts or other evidence, one doesn't know what arrangements there are between the companies and the holding company or other companies in the group, does one?
>
> CHRISTIE: That is correct, your Honour.
>
> MACFARLAN JA: How is insolvency established if that's the state of the evidence?
>
> CHRISTIE: Because I think it's accepted by both parties that my client is insolvent absent the stay which we're seeking. Decon has served a statutory demand. It's understood that that's not a debt collecting exercise."

92 But the Builder made it plain in its written submissions that it did not accept that the Developers could not, having regard to the support they were apparently receiving from their owner, pay their debts as they fell due. The Builder submitted in writing that the evidence established that the Developers were subsidiaries of Tasman Development Holdings Pty Ltd, that there was no evidence of that company's financial position, that the Developers had been

represented by senior and junior counsel in repeated applications despite admissions that they were insolvent, that they were evidently not self-funded, and concluded:

> "In such circumstances, it is more than open for the Court to conclude that the litigation is being run for the benefit of ... others."

93 In response to this, the Developers put that the fact that a related party might be funding the litigation was not a relevant consideration ("We would respectfully submit that the mere fact that a related party may be financing the litigation is not a relevant consideration, with great respect"). We disagree.

94 The judgment debtors seek a stay of execution, on the basis that otherwise they are insolvent, but they wish to sue the judgment creditor and to do so while being funded by others. The consequence is that the judgment creditor is not only denied its rights, but will be obliged to spend further funds against litigants against which it may not ever be able to enforce a costs order. We accept that there may nonetheless be occasions where a stay of execution is appropriate (quite possibly on terms), but reject the submission that funding by a related party is irrelevant to the discretion to deny a judgment creditor any or all of its rights of execution. After all, the Developers invoke a jurisdiction to be exercised having regard to the interests of justice. There is no reason to approach the exercise of that discretion narrowly. It is far from irrelevant to have regard to the fact that third parties are funding and hoping to benefit from the litigation, while seeking to prevent the execution of a judgment debt.

95 Further, the Developers' reliance upon statements that statutory demands are not to be used merely to recover debts was misplaced. There is nothing wrong with a creditor issuing a statutory demand for an undisputed debt which the debtor refuses to pay. As Austin J said in *Moutere v Deputy Commissioner of Taxation* [2000] NSWSC 379; 34 ACSR 533 at [54]:

> "The policy underlying s 459H is that the statutory demand procedure should not be used to coerce a person to pay a disputed amount. A statutory demand is not an instrument of debt collection."

96 The same point was made in *In the matter of Pages Sales Pty Ltd* [2016] NSWSC 616 at [28] and *In the matter of Tesrol Holdings Pty Ltd* [2013] NSWSC 1534 at [64]. In the latter case, Black J said:

> "the proposition that a creditor's statutory demand should not be used to collect a disputed debt necessarily depends upon it being established that the relevant debt is in fact a genuinely disputed debt. ... Conversely, it does not seem to me that there is any impropriety in a creditor relying on the creditor's statutory demand procedure, where a genuine dispute has not been raised, merely because the relevant debtor is not prepared to acknowledge that the debt is owing. There would be little utility in a statutory regime for the service of a creditor's statutory demand if that regime could not be relied upon by a creditor as soon as the relevant debtor advised that the creditor had not established to the debtor's satisfaction that the debt was owing."

97 In order to establish that the *practical effect* of failing to obtain a stay of execution was the winding up of the Developers, it was necessary for the Developers to show that those standing behind them, and who have evidently been prepared to fund proceedings before Henry J, Stevenson J and this Court on two occasions and who are prepared to litigate the cross-claim in the Construction List, are unwilling or unable to permit the Developers to meet the judgment debt. The evidence falls well short of establishing that.

98 As was pointed out during the hearing, in the analogous case of a defence to an application for security for costs that the order of security would stultify the litigation, it is incumbent upon the party opposing the order for security to show that those standing behind it are unable to provide security. In *Live Board Holdings Ltd v Cody Live Pty Ltd* [2017] NSWCA 302 at [90] this Court said:

> "Candour in a case such as this involves the impecunious claimant which seeks to avoid an order for security for costs presenting evidence of those persons who stand to benefit from the litigation and their own capacity to fund it including by meeting any adverse costs orders. The obligation is not satisfied by providing a limited account in an affidavit, and leaving it to the cross-examiner to elicit details (if indeed cross-examination is sought and is permitted). One work states that if it is said that an order will stultify a claim, "the precise financial circumstances of the litigant and of those behind it will need to be set out": J Delany, *Security for Costs* (Law Book Company Ltd 1989, p 118). Although the primary judge erred in statements as to the absence of evidence, there was no error in the conclusion insofar as it was based upon a finding that LBH had failed candidly to identify those standing behind it and their assets."

99 The position is *a fortiori* in the case of seeking a stay of execution of a final judgment, as distinct from opposing an application for security for costs.

100 Next, let it be assumed that liquidators are appointed to the Developers. It is to be presumed that they would consider the merits of the litigation, and in particular the cross-claim, and make a rational decision whether to pursue it. If the claim is strong enough to warrant it being litigated, there is nothing to

suggest that it will not be litigated; indeed, as was pointed out during the hearing, the liquidators would be subject to a duty to prosecute it in the interests of creditors, if funding was available. It has not been shown that the funding to pursue the cross-claim apparently presently available would not equally be available to a liquidator, in which case there would be no practical stultification of the Developers' rights to pursue the cross-claim.

101 Assuming the cross-claim is worth pursuing, there is in any event a ready market of litigation funding which a liquidator could prima facie avail himself or herself of, if the Developers' creditors or shareholders are unwilling to provide funding. Once again there is nothing in the evidence to suggest that winding up or any other form of external management would stultify the Developer's cross-claim.

102 It follows that the Developers have failed to show that the practical effect of the failure to obtain a stay would prevent the litigation of the cross-claim and that the interests of justice require a stay of execution of the judgment. Such a stay, moreover, would be until determination of the Construction List proceeding. That matter is at a very early stage with pleadings apparently not closed. The likely length of the stay sought would greatly be to the prejudice of the Builder.

The significance of delay

103 We should also note that we do not accept the Developers' submissions that there was no express criticism of their delay in filing a cross-claim. The criticism by the primary judge of the Developers' delay is palpable, and occupies [44]-[55] of the dispositive paragraphs of the judgment. That criticism was amply justified.

104 The Developers have been in breach, by many months, of a direction to file and serve any cross-claim. There is no explanation by way of evidence as to why they delayed. If, as the Developers contend, the cross-claim is soundly based, then what has occurred over the year during which the proceedings have been on foot prior to 18 May 2020 when the cross-claim was filed is, to our minds, difficult to reconcile with the obligations imposed by s 56 of the *Civil Procedure Act* to facilitate the just, quick and cheap resolution of the real issues. Those obligations are, by s 56(3) and (4), imposed on both the parties

and their legal representatives. The consequence of the Developers' delay is that there has not even been an exchange of pleadings, let alone an exchange of evidence, on the issues presented on the cross-claim.

105 The Developers sought urgent interlocutory relief staying the execution of a judgment which was obtained in October 2019. They did so on the basis of a cross-claim which was filed more than 9 months after they had been directed to do so. They provided no explanation for their delay. It was entirely appropriate for the primary judge to have regard to these matters.

Conclusion

106 The only question of principle or general importance identified by the Developers is not made out. Further, what has been said above (which goes beyond the reasons given by the primary judge) concerning the failure on the part of the Developers to make out a case that the practical effect of failing to obtain a stay would stultify the litigation of the cross-claim is another reason telling against the grant of leave.

107 The Developers also raised complaints, at the level of detail, concerning some aspects of the assessment of the strength of the cross-claim. None of this was dispositive in the reasons of the primary judge. None alters the position that this is not a case which warrants a grant of leave. In light of the fact that the issues arising on the cross-claim may go to trial in the future, it is inappropriate to enter into their detail.

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