Supreme Court

New South Wales

Case Name:	Vannella Pty Ltd Atf Capitalist Family Trust v TFM Epping Land Pty Ltd and Katoomba Residence Investment Pty Ltd;; Decon Australia Pty Ltd v TFM Epping Land Pty Ltd and Katoomba Residence Investment Pty Ltd
Medium Neutral Citation:	[2020] NSWSC 659
Hearing Date(s):	27 May 2020
Date of Orders:	29 May 2020
Decision Date:	29 May 2020
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	Application for stay refused
Catchwords:	BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payments Act – where builder served payment claim and developer did not serve a payment schedule – where builder obtained summary judgment – where developer unsuccessfully appealed from that judgment – where developer now brings a cross claim in main proceedings – where developer sought a "Grosvenor stay" – where stay brought on basis of developer's parlous financial position rather than builder's financial position – whether stay sought truly a "Grosvenor stay" – whether any stay should be granted
Legislation Cited:	Building and Construction Industry Security of Payment Act 1999 (NSW) Corporations Act 2001 (Cth) Supreme Court Act 1970 (NSW)

Cases Cited:	Decon Australia Pty Limited v TFM Epping Land Pty Limited (No 2) [2020] NSWSC 312 Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico & Ors [2004] NSWSC 344 Hakea Holdings Pty Limited v Denham Constructions Pty Limited [2016] NSWSC 1120 Kolback Securities Ltd v Epoch Mining NL (1987) 8 NSWLR 533 TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 93 Vannella Pty Limited atf Capitalist Family Trust v TFM Epping Land Pty Ltd; Decon Australia Pty Limited v TFM Epping Land Pty Ltd; Vannella Pty Limited v TFM Epping Land Pty Ltd [2019] NSWSC 1379
Texts Cited:	P W Young, C Croft and M Smith, On Equity (2009, Thomson Reuters)
Category:	Consequential orders (other than Costs)
Parties:	Vannella Pty Ltd Atf the Capitalist Family Trust (First Plaintiff) Decon Australia Pty Limited (Second Plaintiff) TFM Epping Land Pty Ltd (First Defendant) Katoomba Residence Investment Pty Ltd (Second Defendant) Dr Yi Hao (Eric) Zhang (Third Defendant)
Representation:	Counsel: I G Roberts SC with D Byrne (Plaintiffs/Respondents) M Christie SC with D Hume (Defendants/Applicants) Solicitors: Piper Alderman (Plaintiffs/Respondents) Dentons (Defendants/Applicants)
File Number(s):	2019/165506; 2019/205661

JUDGMENT

1 In 2016, TFM Epping Land Pty Ltd and Katoomba Residence Investment Pty Ltd (“the Developers”) owned a property in Epping.

2 By a contract made on either 2 December 2016 or 1 March 2017, Decon Australia Pty Ltd (“the Builder”) agreed with the Developers to design and

construct a residential development, to be known as "the Juniper Development", on the Epping property.

3 The development is now complete and comprises 98 residential units.

4 An interim occupation certificate was issued on 23 August 2018. The strata plan registered in 11 September 2018. The Developers have sold 46 of the 98 units.

5 The Developers seek a stay of a judgment entered against them by Henry J, on 11 October 2019 in the sum of $6,355,352.46 ("the Judgment").[1] The Judgment was given in proceedings separate to these. Those proceedings were brought by the Builder against the Developer under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the Act"). I will call those proceedings the "SOP Proceedings".

Decision

6 I decline to grant the stay.

These proceedings

7 On 27 May 2019 the Builder and a related company, Vannella Pty Ltd, commenced these proceedings against the Developers. Vannella contends that it was a project manager in relation the project. Its separate involvement in these proceedings is not presently relevant. I will refer simply to the Builder.

8 On 12 July 2019 the Court made directions for the filing by the Builder of a Technology and Construction List Statement and for the filing by the Developers of a Response and any Cross Claim.

9 The Builder filed a List Statement on 21 August 2019. The Developers filed a List Response on 13 September 2019.

10 Otherwise, until this month, nothing of substance has occurred in these proceedings.

[1] Vannella Pty Ltd atf Capitalist Family Trust v TFM Epping Land Pty Ltd; Decon Australia Pty Ltd v TFM Epping Land Pty Ltd; Vannella Pty Limited v TFM Epping Land Pty Ltd [2019] NSWSC 1379 at [218].

Separate Proceedings

11 In the meantime, on 3 June 2019, the Builder served on the Developers a payment claim pursuant to s 13 of the Act claiming $6,355,352.46.

12 That claim was made up as follows:

$3,648,208.39	Contract works including retention of $1,551,825
$1,512,526.40	Variations
$1,193,617.67	Interest
$6,355,352.46	Total

13 The Developers did not serve a payment schedule within the time required by s 14(4)(b) of the Act. They thereby became liable to pay the Builder the $6,355,352.46 referred to in the payment claim.

14 On 3 July 2019 the Builder commenced the SOP Proceedings seeking judgment for the $6,355,352.46 and, in those proceedings moved for summary judgment.

15 On 11 October 2019, Henry J awarded the Judgment for reasons her Honour gave that day.[2]

16 The Developers appealed.

17 On 21 February 2020 the Developers sought a stay of the Judgment pending the appeal. On 27 March 2020 Henry J granted such a stay on terms including the giving to the Court by the Developers of undertakings concerning their assets.[3]

18 On 14 May 2020 the Developers' appeal was dismissed.[4]

These proceedings

19 Four days after their appeal was dismissed, on 18 May 2020, the Developers did two things in these proceedings.

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[2] Ibid.

[3] Decon Australia Pty Limited v TFM Epping Land Pty Limited (No 2) [2020] NSWSC 312.

[4] TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 93.

The cross claim

20 First, they filed a Cross Claim Cross Summons and Technology and Construction List Cross Claim Statement.

21 In argument before me Mr Christie SC, who appeared with Mr Hume for the Developers, focussed on the claims propounded in the Cross Claim to the effect that the Builder:

(1) was not entitled to the retention of $1,551,825 claimed in the payment claim;

(2) was not entitled to the variation claim of $1,512,526.40 claimed in the payment claim;

(3) was liable for defects, particularly in relation to cladding, in an estimated amount of $4,787,810.50; and

(4) was liable to pay general damages for delay in an amount yet to be quantified but which "will ultimately be in the many millions of dollars".

The stay application

22 Second, the Developers filed a notice of motion seeking a stay of the Judgment until determination in these proceedings.

23 The Developers offer undertakings to the Court concerning their assets to the same effect as those given to Henry J as a condition of the stay her Honour granted pending the appeal in the SOP Proceedings.[5]

24 The stay is sought on the basis that the Developers cannot pay the $6,355,352.46 now due under the Judgment.

25 In their written submissions, Mr Christie and Mr Hume said that if the Builder "obtains full satisfaction of the judgment out of the pockets of [the Developers], it could very well push [the Developers] into insolvency and, ultimately, liquidation".

26 In oral submissions, Mr Christie went further and said the Developers "simply cannot pay" the judgment.

27 The financial statements of each of the Developers showed that their liabilities exceed their assets and that they have significant accumulated losses.

28 Mr Christie accepted that, absent a stay, the Developers are insolvent.

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[5] See [17] above.

29 In their written submissions, Mr Christie and Mr Hume characterised the Developers' claim for a stay as an application for a "Grosvenor stay".

30 Mr Christie and Mr Hume were referring to a stay of the kind made by Einstein J in *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico & Ors.*[6] That is, a stay restraining a party entitled a judgment by reason of the Act (whether following the making of an adjudication determination in its favour or,[7] as here, following failure to serve a payment schedule)[8] from enforcing the judgment by reason of *that party's* financial position.

31 But here, there is no question about the Builder's financial position. There is no suggestion that were the Developers now to pay the Builder the $6,355,352.46 but succeed at trial to recover that amount in their Cross Claim, the Builder would not be good for the money.

32 Here it is the Developers' own parlous financial situation that is said to provide the basis for the stay sought.

33 Neither Mr Christie, nor Mr Roberts SC, who appeared with Mr Byrne for the Builder, could point to any decision where a stay of a judgment granted under the Act had been stayed on this basis. I know of no such decision.

34 Ultimately, Mr Christie accepted that the Developers were not seeking a "Grosvenor stay".

35 Nonetheless, Mr Christie relied on the undoubted power of the Court to grant a stay "whenever the requirements of justice so demand" in order to "control and supervise its process"[9].

36 The question is whether the requirements of justice warrant such a stay in this case.

37 In answering that question, the factors that have been held to be relevant to whether a "Grosvenor stay" would be granted (ie where a contractor's financial position is in question[10]) will be of limited assistance.

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[6] [2004] NSWSC 344.
[7] See ss 22 to 25 of the Act.
[8] See ss 14(4) and 15(2)(a)(i) of the Act.
[9] Grosvenor at [14]; see also s 66(4) of the Supreme Court Act 1970 (NSW) which provides that an interlocutory injunction may be granted "in any case in which it appears to the Court to be just or convenient to do so".

38 Mr Christie and Mr Hume directed their written submissions to the questions of whether there is a serious question to be tried that the Developers will recover on their Cross Claim more than the amount of the Judgment and whether the balance of convenience favours granting a stay.

39 I deal with those questions below.

40 For the reasons I there set out, I accept that there is a serious question to be tried that the Developers will achieve some measure of success in the Cross Claim, although I think it is a matter of speculation whether the Developers will recover more than the Judgment amount. I also accept that, taken in isolation, the balance of convenience leans in favour of granting a stay.

41 The requirements for establishment of a serious question to be tried and balance of convenience are guidelines.[11] The general power to grant or refuse an interlocutory injunction is not constrained by these requirements. Rather the Court "must consider what course is best calculated to achieve justice between the parties in the circumstances of the case" bearing in mind the consequences to both parties if an injunction is either granted or refused.[12]

42 In this case, there are anterior matters, each of which tends against granting the stay sought.

Anterior matters

43 First, as long ago as 11 October 2018, the Developers acknowledged that the "total outstanding amount" to the builder was some $5.7 million. Henry J noted that in her judgment of 11 October 2019.[13]

44 Nonetheless, despite that acknowledgment, the Developers have since then taken every step available to them to resist paying anything to the Builder on account of that acknowledged debt.

45 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.

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[10] E.g. see Ball J in Hakea Holdings Pty Limited v Denham Constructions Pty Ltd [2016] NSWSC 1120 at [4]-[6].
[11] E.g. P W Young, C Croft and M Smith, On Equity (2009, Thomson Reuters) at [16.340].
[12] Kolback Securities Ltd v Epoch Mining NL (1987) 8 NSWLR 533 at 535 (McLelland J).
[13] Vannella v TFM Epping Land, supra note 1 at [191].

46 Further, although subject to a direction to do so last year,[14] the Developers did not seek to bring a Cross Claim in these proceedings until they had failed to resist the Builder's claims in the SOP Proceedings.

47 The issues at play these proceedings in September 2019 were the same as those now sought to be agitated by the Developers in their 18 May 2020 Cross Claim.

48 In its 21 August 2019 List Statement, the Builder made the same claim as it made in its 3 June 2019 payment claim (for return of the retention, variations and interest). In its Response of 13 September 2019, the Developers agitated the matters now the subject of its Cross Claim, including variations, defective workmanship and the delay damages.

49 There is no explanation before me as to why the Developers did not file a Cross Claim along with the Response and why it is only now that the Developers have done so.

50 The inference that I would draw is that those then advising the Developers[15] either did not turn their minds to that possibility, or deferred pursuing a stay in the hope that the Developers would achieve success in the SOP Proceedings.

51 Had the Developers more diligently brought a Cross Claim in these proceedings, 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.

52 Instead, the Developers left matters in these proceedings in abeyance while they brought the appeal in the SOP Proceedings.

53 The Develops failed in the SOP proceedings. The Builders' rights under the Act were vindicated in those proceedings.

54 Only now do the Developers bring a Cross Claim.

55 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

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[14] See [8].

[15] Mr Christie and Mr Hume, and their instructors, were not then involved in the proceedings.

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.

56 The scheme and purpose of the Act is to "ensure a reliable flow of funds to contractors"[16] 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.

57 The scheme and purpose of the Act is to transfer the risk of a contractor's insolvency to the developer.[17]

58 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.

59 For these reasons, and notwithstanding the my conclusions about serious question and balance of convenience set out below, my conclusion is that the requirement of justice do not in this case warrant the granting of the stay sought by the Developers.

Serious question

60 Mr Christie and Mr Hume submitted that "there is well more than a serious question to be tried that [the Developers] have final claims exceeding the payment claim amount".

61 That overstates matters.

62 I accept that there is a serious question to be tried that the developers will establish that the Builder has some liability under the Cross Claim. However, on the basis of the evidence before me it is no means clear to what extent the Develops will be successful. And it is a matter of speculation whether the amount that the Developers will recover will exceed the amount of the Judgment.

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[16] Per Basten JA in TFM Epping Land Pty Limited v Decon Australia Pty Limited supra note 4 at [6].
[17] Ibid.

63 For that reason, to the extent that there is a serious question to be tried, it does not outweigh the considerations to which I have referred above.[18]

64 Oral submissions focused on four matters

Retention

65 Included in the amounts claimed in the payment claim was the amount provided for in the contract for retention, $1,551,825. The amount of the Judgment included this.

66 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.

67 Ms Yvonne Liu, the financial controller of the Developers, gave unchallenged evidence that the Developers had not been told that practical completion had been reached. There is no evidence before me that a final certificate was issued.

68 However, the work on the project is evidently complete. The Developers have sold 46 of the 98 units in the development.

69 That does suggest that, whether or not the documents called for by the contract have been issued, the development is for all intents and purposes complete.

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.

Variations

71 Included in the Builder's payment claim was an amount of $1,512,526.40 for variations. That amount is also included in the Judgment sum.

72 Under the contract, any variation required a written direction from the Developers. There is no evidence before me as to whether any such written direction was made.

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[18] At [43]-[59].

73 Ms Liu gave evidence that she is not aware of any such direction. On the other hand, there is no evidence from the then sole director of the Developers, Mr Zhang, that there was no variation, nor is there any evidence adduced on behalf of the Builder that there was such a written direction.

74 Thus, there does appear to be a serious question to be tried as to whether any such written direction was given.

75 That of course begs the question of whether work in the nature of a variation was in fact performed by the Builder and whether, despite the absence of any written direction concerning any such variation, the Builder will make out an entitlement to be paid.

76 Mr Christie and Mr Hume did not suggest in their submissions that no work in the nature of a variation had been in fact performed.

77 Any absence of a written direction to vary work actually performed may not resolve this issue.

Defects

78 The only defect identified, in terms, in the Cross Claim, is allegedly defective cladding. In the cross claim it is alleged that the Builder used a product which, on 10 August 2018 (that is, 13 days before an interim occupation certificate was issued), was declared by the Commissioner of Fair Trading to be a "banned product".

79 The cross claim alleges that on and after 15 August 2018, the Builder used the "banned product" on the external façade of the building and that the Developers have thereby suffered loss including "the liability to remove and replace the external façade".

80 Thus the allegation appears to be that the Developers have the liability to replace all of the cladding on the building.

81 The Developers have adduced evidence from a quantity surveyor, Mr Madden, that the likely cost of replacing 2020 square metres of the façade would be in the order of $1.5 million.

82 However, the evidence does not reveal whether this represents all of the façade. Nor has my attention been drawn to any evidence that all of the façade must be replaced.

83 Otherwise the Cross Claim particularises defects only by reference to three expert reports.

84 That dealing with defects is a report of Mr Topolinsky who simply asserts, without explanation, that costs of investigation and repair of defects in the development will be between $2.4 and $3.7 million.

85 In these circumstances, whilst I accept that there does appear to be a serious question to be tried that there are some defects which require attention, I am not satisfied that there is any basis upon which any conclusion could now confidently be made as to what the costs of repairing those defects might be.

Delay

86 Mr Christie and Mr Hume made these submissions 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."

87 It may well be that there is a serious question to be tried as to whether there has been delay in the works which might entitle the Developers to general damages.

88 However, my attention has not been drawn to any evidence that would allow me to come to any conclusion as to what amount the Developers might recover.

Balance of convenience

89 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.

90 In that regard, the Builder has served on the Developers a notice of statutory demand under s 459E of the *Corporations Act 2001* (Cth), the fate of which is to be determined by the Federal Court of Australia this coming Monday 1 June 2020.

91 Absent a stay, there does appear to be at least a prospect that the developers will be forced into liquidation, whether as a result of the hearing next week in the Federal Court or otherwise.

92 Were that to happen, the Cross Claim could not proceed unless the liquidator were funded to, and agreed to, prosecute it.

93 I accept that, taken in isolation, this is in favour of a stay being granted.

94 In those circumstances, I find it unnecessary to deal with the value of the undertakings offered by the Developers as the price of a stay save to say that I accept they have some value and, again, taken in isolation, favour the granting of a stay.

95 However, I do not consider these matters outweigh those I have outlined above.[19]

Conclusion

96 Overall, I am not persuaded that the requirements of justice warrant a stay of the Judgment.

97 I order that the defendants' notice of motion of 18 May 2020 be dismissed with costs.

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[19] At [43]-[59].