

**COURT OF APPEAL**

**MARGARET WILSON AJA**

**Appeal No 3411 of 2011  
DC No 167 of 2010**

**ANDREW WILLIAM JOHNSON**

**Applicant/Defendant**

**and**

**SPJ NOMINEES PTY LTD  
ACN 063 672 864**

**First Respondent/Plaintiff**

**and**

**CONWAY SAVIS**

**Second Respondent/Plaintiff**

**and**

**ALISON SAVIS**

**Third Respondent/Plaintiff**

**and**

**BLACK WATCH SPORT FISHING  
BOATS PTY LTD**

**Not a party to the appeal/  
Defendant**

**Appeal No 3411 of 2011  
DC No 167 of 2010**

**SPJ NOMINEES PTY LTD  
ACN 063 672 864**

**First Applicant/Plaintiff**

**and**

**CONWAY SAVIS**

**Second Applicant/Plaintiff**

**and**

**ALISON SAVIS**

**Third Applicant/Plaintiff**

**and**

**ANDREW WILLIAM JOHNSON**

**Respondent/Defendant**

**BRISBANE**

**DATE 08/06/2011**

## **JUDGMENT**

**MARGARET WILSON AJA:** This is an application for a stay pending appeal. There is a cross-application seeking orders that the appeal be struck out, dismissing the application for a stay and for security for costs of the appeal.

It is as well to begin by noting the scope of the appeal. The notice of appeal was filed on 20 April 2011. It was filed by Andrew William Johnson, who was the second defendant below. It was an appeal against part of an order made in the District Court at Townsville on 23 March 2011 that the assessment of damages proceed as an undefended matter.

The first defendant below, Black Watch Sport Fishing Boats Pty Ltd, is not a party to the appeal. It agreed to build a vessel for the plaintiffs, who are the respondents to the appeal. Johnson (that is, the appellant) guaranteed the obligations of the company and indemnified the plaintiffs against any losses in consequence of the company's failure to perform.

The plaintiffs (that is, the respondents to the appeal) purported to terminate the contract because of the company's failure to remedy certain defaults, namely its failure to complete construction by the scheduled delivery date and its failure to complete specified items of work by certain dates.

The respondents took possession of the part completed vessel. Between the contract and the termination the respondents paid instalments in excess of \$470,000. They allege that the part completed vessel was valued at \$80,000.

The respondents claimed against the company the amount of the instalments they had paid less the \$80,000 plus certain additional costs, their claim being in all a little short of \$410,000.

They claimed against the company damages for breach of contract or duty. They claimed against the appellant judgment in the amount of the damages and costs awarded against the company in terms of the guarantee and indemnity.

This proceeding was commenced in the Supreme Court in Townsville on 29 January 2010. On 26 March 2010 default judgment was entered against the company for damages to be assessed. The company filed an application on 7 June 2010 to set aside the default judgment. That application came before Justice Cullinane on 11 June 2010. In the meantime default judgment had been entered also against the appellant for damages to be assessed by the District Court. His Honour treated the application as one by both defendants. He dismissed the application. He made orders affecting the company, namely that the assessment against it should proceed in the District Court and an order for costs against it.

There was then a series of directions orders made in the District Court. The first order was made by Judge Durward on 3 August 2010 and the next was also made by him on 8 November 2010.

At about this time it came to light that the company had been deregistered and it was subsequently reinstated to the register by ASIC on 12 November 2010.

On 15 March 2011 the matter again came before Judge Durward. It had been set down for hearing on 18 March 2011, but his Honour vacated that hearing date and ordered a trial review before Judge Baulch on 23 March 2011.

Judge Durward gave various directions, including a direction that the defendants (that is, the company and the present appellant) give the plaintiffs (that is, the respondents) disclosure by providing a list of documents by 18 March 2011 and copies of documents on the list by 23 March 2011. At the end of the directions his Honour ordered, "(10) In the event that the first and/or second defendants fail to do any of the acts, including the payment of costs,

required of it/him by these orders by 4 pm on Friday, the 18 March 2011, the trial will proceed on the 23 March 2011 as an undefended hearing."

The matter came before Judge Baulch on 23 March 2011. There was some argument about the extent of the defendants' compliance with the orders and it was conceded by counsel acting on their behalf that disclosure had been deficient.

I should mention at this stage that the defendants had been self-represented from time to time. On occasion they had directly briefed Mr Radcliff of counsel. When the matter came before Judge Baulch on 23 March 2011, they had solicitors acting for them who instructed Mr Radcliff.

Judge Baulch gave a number of directions, including a direction that the defendants file and serve notice in the approved form of whether they were acting in person or by solicitors, that the plaintiffs file and serve affidavits on which they intended relying within 21 days and then as follows, "(4) That the defendants advise the plaintiffs' solicitors within 14 days of being so served which of the plaintiffs' witnesses the defendants require for cross-examination. (5) That if the defendants fail to so advise the plaintiffs' solicitors within the said period of 14 days then the hearing proceed on an undefended basis without cross-examination of the plaintiffs' witnesses." There was finally a direction with respect to telephone evidence.

The appeal to this Court is against order number 5, which I have just quoted. The grounds of appeal are that Judge Baulch erred in finding there was insufficient compliance with the orders of Judge Durward made on 11 March 2011, that the order complained of involved a denial of natural justice, and that the Judge should have ordered the assessment to proceed and to be determined on the usual basis, including consideration of the appellant's claims that the respondents had failed to mitigate, had caused damage to the vessel by deconstructing it so as to reduce its value and were not entitled to the value of the damages as a consequence of the failure to mitigate and the deconstruction, and finally, that the order that the assessment

proceed and be determined as an undefended matter was a procedural step inherently inconsistent with allowing the applicant to cross-examine the respondents' witnesses.

This Court has an unfettered discretion to grant a stay pending the determination of an appeal. Essentially, it is a question of whether it is an appropriate case in which to do so.

One very relevant factor is that this is an appeal against a procedural order. Appellate Courts are often reluctant to intervene in relation to procedural matters, although they will do so where the justice of the case so requires.

Counsel for the appellant submitted that because the assessment had been set down for hearing on 14 June 2011, if the stay were refused the appeal would be nugatory. Counsel for the respondents submitted that this was not so because, regardless of whether there were a stay of the order as against the present appellant, the assessment as against the company would go ahead on 14 June 2011. I will return to this aspect shortly.

Another relevant factor in considering whether to grant a stay is whether the appellant has a good arguable case on the appeal. I am concerned that the meaning of "the hearing proceed on an undefended basis without cross-examination of the plaintiffs' witnesses" is not clear, and that there may well be some merit in the appellant's arguments that for the matter to proceed on that basis would involve a denial of natural justice.

Usually, if a matter is undefended, there is no evidence by the defendant, there is no cross-examination by the defendant, and there are no submissions made by the defendant. However, that may not be what Judge Durward intended. Of course, this is an appeal against an order of Judge Baulch, but in giving reasons for his order his Honour said that the matter was to proceed as an undefended hearing in accordance with paragraph 10 of the order of Judge Durward.

There was then further debate between his Honour and counsel as to the meaning of that order, and his Honour said that he took it that the defendants could be represented and could cross-examine witnesses but could not produce material to contradict them.

Counsel for the appellant made further submissions to his Honour about the lack of clarity in the order and his Honour said that it seemed to him it would preclude the calling of, for example, valuation evidence "and that sort of thing."

The matter is further complicated by the order of Judge Baulch that, if the defendants failed to advise the plaintiff's solicitors in a timely fashion of the witnesses they required for cross-examination, then the hearing was to proceed on an undefended basis without cross-examination of the plaintiffs' witnesses. There is evidence before this Court from Mr Turnbull, which has not been disputed, that notice of witnesses required for cross-examination was not in fact given in a timely fashion.

It is necessary that directions for the conduct of a proceeding be clear so that all parties know the parameters within which a hearing is to be conducted and what are their rights of cross-examination, of calling evidence, and of making submissions. It is very strongly arguable, I think, that the orders made by both Judge Durward and Judge Baulch were insufficiently clear.

In these circumstances it seems to me that the appellant does have reasonable prospects of succeeding in this appeal.

I return to the question of the hearing which has been set down for 14 June. Counsel for the appellant urged me to stay the order not just as it affects the appellant, Mr Johnson, but to stay it completely, that is, as it affects the company also. Counsel for the respondents did not seriously argue that I do not have power to do this. He submitted, however, that I should not do so because of the history of non-compliance and delay on the part of both the appellant and the company.

Counsel for the appellant informed the Court that he had instructions from the company to seek to be joined on the appeal and the application if that would overcome the perceived difficulty. Counsel for the respondents submitted that I should not entertain such an application because a deliberate decision had been made as to who would be the appellant. In this respect I agree with counsel for the respondents.

In the course of argument I raised with counsel whether the appellant would be bound by an assessment of damages made as against the company. The appellant provided both a guarantee of the performance of the obligations of the company, and an indemnity against any loss or damage the respondents might suffer in consequence of any failure by the company to perform its obligations under the agreement. The scope of the obligation to indemnify was not explored in submissions. Counsel for the respondents submitted that the appellant would be estopped from disputing any assessment made because he was the controlling mind of the company and a "privy." He then went on to submit that this was really a matter for another day.

Whether or not the appellant would be bound by the result of an assessment as against the company, I think any stay should simply be a stay of the order, and that it would necessarily affect the order as against both the appellant and the company.

I am minded to grant a stay but, as I foreshadowed in submissions, I think it should be conditional upon the giving of security for costs. There has been a history of reprehensible delay on the part of the appellant. There is evidence that he transferred property to his wife. He allowed a judgment by default to be entered against him. On the other hand, a costs order made was satisfied.

The respondents who ask for security for costs relied on an affidavit of Mr Turnbull in which he estimated the respondents' costs of the appeal to be in the order of \$15,000. There was no response to that affidavit. In all of the circumstances I have decided to order as follows:

Upon the appellant providing security in the sum of \$10,000 in such form as may be agreed by the parties or, in default of agreement, as determined by the Registrar, such security to be provided on or before 4 p.m. on Friday, 10 June 2011,

- 1) The order made by Judge Baulch in the District Court at Townsville on 23 March 2011 that the assessment of damages proceed as an undefended matter be stayed pending the determination of the appeal or earlier order.
- 2) Insofar as the respondents made an application for the appeal to be dismissed that application be dismissed.
- 3) The costs of and incidental to the application and cross-application before the Court today be reserved to the hearing of the appeal.
- 4) The time within which the respondents file and serve their outline of submissions with respect to the appeal be extended to 29 June 2011.