SUPREME COURT OF QUEENSLAND

CITATION:	*Epoca Constructions P/L v Watkins Group P/L* [2003] QCA 381
PARTIES:	**EPOCA CONSTRUCTIONS PTY LTD** ACN 009 855 332 (plaintiff/respondent) **v** **WATKINS GROUP PTY LTD** ACN 074 771 350 (defendant/appellant)
FILE NO/S:	Appeal No 11795 of 2002 DC No 3631 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2003
JUDGES:	McMurdo P and Mackenzie and Helman JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDERS:	**1. The appeal is dismissed with costs** **2. The application for leave is refused with costs**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS - CIVIL JURISDICTION – PRACTICE – OTHER MATTERS – summary judgment – whether parts of amended defence and counter-claim can be struck out PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF THE COURT – STAYING PROCEEDINGS – whether trial judge's refusal to stay pending counter-claim is correct *District Court of Queensland Act* 1967 (Qld), s 118(3) *Westpac Banking Corporation v Klef Pty Ltd* [1998] QCA 311; Appeal No 8204 of 1998, 16 October 1998, applied
COUNSEL:	A J H Morris QC, with D Atkinson, for appellant P E Hack SC for the respondent

SOLICITORS: Quinn Box and Muller for the appellant
Ebsworth & Ebsworth for the respondent

[1] **McMURDO P:** I agree with Helman J that the appeal should be dismissed for the reasons given by him.

[2] The application for leave to appeal from the primary judge's order refusing a stay is an appeal from an interlocutory order; it will ordinarily be refused unless it appears the decision sought to be appealed from is attended with sufficient doubt to warrant it being reconsidered and also that, supposing the decision be wrong, substantial injustice would result: *Westpac Banking Corporation v Klef Pty Ltd*.[1] Although a stay is commonly granted in circumstances such as here, for the reasons given by Helman J the applicant has not demonstrated that this Court should interfere with the primary judge's exercise of discretion in refusing the stay and the resulting interlocutory order.

[3] I agree with the orders proposed by Helman J.

[4] **MACKENZIE J:** I agree with the orders proposed by Helman J for the reasons given by him.

[5] **HELMAN J:** This is an appeal against orders made by a judge of the District Court on 13 December 2002 on an application for summary judgment and other orders filed on 29 November 2002 to be heard on 13 December 2002. (The order as perfected records the wrong date for the order: the application was decided on 13 December 2002, as the transcript of his Honour's reasons shows, but the order is shown as being made on 12 December 2002.) His Honour ordered that the respondent recover $61,862.92 together with interest on that sum, that paragraph 19(c) of the appellant's amended defence and paragraphs 3 and 4 of its counter-claim in the proceeding be struck out, that the appellant have leave to re-plead those paragraphs, that an application for stay of execution of the judgment be refused, and that the appellant pay to the respondent its costs of the application.

[6] In the notice of appeal the appellant's challenge was expressed to be to the whole of the judgment and all of the orders of the District Court but, as the argument unfolded, it was confined to the first order and to the refusal of the stay of execution of the judgment. Mr Morris Q.C., on behalf of the appellant, conceded at the outset that his client's pleading had been deficient – and so the orders striking out parts of it were not in issue. Mr Morris also accepted that to succeed in a challenge to his Honour's refusal to stay execution of the judgment until trial of the counter-claim the leave of this court would be required since what is there in issue is interlocutory relief: see s. 118(3) of the *District Court of Queensland Act* 1967.

[7] The dispute between the parties arose out of a sub-contract entered into between them in October 2001. On 18 October 2001 the appellant and a company called Western Metals Copper Limited entered into a written contract under which the appellant agreed to perform plant drainage works for, and to supply pavements to, Western Metals Copper at its Mount Gordon mine site. The work was to begin on 22 October 2001 and to be completed eight weeks later. The appellant engaged only one sub-contractor, the respondent, to carry out part of the work it had undertaken to do, predominantly concreting. According to Mr Phillip Watkins

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1 [1998] QCA 311; Appeal No 8204 of 1998, 16 October 1998, [11].

(director, shareholder, and manager of the appellant) in his affidavit filed on 12 December 2002, the work carried out by the respondent 'did not go well': by 21 January 2002 it had completed only about sixty-five per cent of the work it had undertaken to do. Western Metals Copper terminated the head contract because the work the appellant had undertaken had not been completed and was well behind schedule. According to Mr Watkins delays in completing the work were all the fault of the respondent. Then, Mr Watkins swore, the appellant engaged Nustar Engineering Group Pty Ltd (consultants for project management, civil design, and contracting) to assess what the appellant was owed under the head contract and what the respondent was owed under the sub-contract. On 4 June 2002 Mr Morris Boyd, engineer of Nustar Engineering Group, arrived at a figure of $420,573 for the work done by the respondent and which Western Metals Copper accepted had been completed. By then the respondent had been paid $309,221.98, leaving a difference of $111,351.02. That was the sum sought by way of summary judgment, and the sum accepted by his Honour. The pleadings, however, indicate a sum greater by $2, as I shall explain. No reference to that discrepancy was made at the hearing of the appeal and I shall not consider it further.

[8] The relevant pleadings before his Honour were the respondent's statement of claim filed on 29 August 2002 and an amended defence and counter-claim filed on 12 November 2002. The respondent claimed $246,687.56 made up of $224,261.42 ($467,995.20 plus $43,130 as variations approved and $52,666 as variations in dispute less $30,307.80 work not done or claimed and $309,221.98 paid) plus goods and services tax of $22,426.14.

[9] In paragraph 15 of the statement of claim the respondent alleged that $128,465.42 excluding goods and services tax remained due and payable by the appellant to the respondent in respect of the works the appellant had certified as being complete. A table in that paragraph showed that the $128,465.42 was arrived at by deducting from a figure for the value of works allegedly certified as complete, $437,687.40, payments of $159,221.98 and $150,000 (the $309,221.98 to which I have referred). Pleading to the respondent's paragraph 15, the appellant admitted in paragraph 12(a) of its amended defence that it had certified certain works as being complete, alleged in paragraph 12(b) that it had paid the respondent such moneys as were outstanding under the sub-contract, and denied in paragraph 12(c) that a sum of $437,687.40 was ever outstanding to the respondent under the sub-contract because the respondent had not pleaded or established that the pre-conditions for such a debt – namely approval of the work by the principal and receipt of the moneys by the appellant – had ever been met. In paragraph 12(d) the appellant alleged that the proper amount to which the respondent was entitled (being work carried out by the respondent approved by Western Metals Copper and for which money had been received by the appellant) was $377,445 as set out in a schedule. The appellant pleaded further, in paragraph 12(e), that it had satisfied its obligations under the sub-contract because: first, it had paid $309,221.98 to the respondent; and secondly 'the balance [was] extinguished by the [appellant's] set off and/or counter-claim as set out hereunder'.

[10] In paragraph 22 of the statement of claim the respondent alleged that on 4 June 2002 the appellant had certified various extra sums as payable to the respondent for 'Variation Works'. The sum of those amounts was $43,130. In paragraph 18 of its amended defence the appellant admitted the allegations in paragraph 22 of the statement of claim.

[11] It followed that the appellant had admitted on the pleadings the respondent's entitlement to $111,353.02: $420,575 (the $377,445 and the $43,130) less the payment of the $309,221.98, subject to the qualification expressed in paragraph 12(e).

[12] Details of the set-off relied on by the appellant were given in paragraph 19(c) of the defence. It was $55,112 made up of various sums for which the appellant alleges the respondent is responsible to it. They arose from allegations of charges for fuel supplied by the appellant to the respondent and for the use by the respondent of a crane and polywelders and other plant and equipment, of negligent damage to a polypipe welder owned by Western Metals Copper, and of costs incurred by the appellant by reason of the respondent's delays and failure to clean up the site.

[13] Two further claims were made by the appellant against the respondent in its pleading: $175,000 as damages for loss of profits over seven months, and $62,203.82 for administrative costs occasioned as a result of a failure by the respondent 'to submit written quotations for approval prior to commencement of variations and supportive documentation for variation work allegedly done'. As the appellant's case was pleaded before his Honour those two claims were by way of counter-claim only and no claim was made to set them off against the respondent's claim against the appellant. The appellant's formulation of those counter-claims was in paragraphs 2 to 4 inclusive of its counter-claim:

> 2. The defendant says that, in breach of the subcontract, the plaintiff failed to:
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> (a) complete the work the subject of the subcontract on or before 22 December 2001; and
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> (b) submit quotations to the defendant for approval prior to commencement of variations and supporting documentation for variation work allegedly done.
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> 3. In consequence of the breach set out in paragraph 2(a), the head contract between the principal and the defendant was terminated, and the principal did not engage the defendant to carry out other work between February and September 2002 so that the defendant suffered loss and damage in the sum of $175,000 being loss of profits for seven months (calculated by reference to a margin of 20% and gross revenue from contracts with the principal over two years in the sum of $3,000,000.00).
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> 4. Further, in consequence of the plaintiff's failure to submit written quotations for approval prior to commencement of variations and supportive documentation for variation work allegedly done pursuant to the Subcontract Agreement, the defendant incurred costs of $62,203.82 and has suffered loss and damage to that extent.

[14] His Honour concluded that the set-off had not been properly pleaded - as was, his Honour recorded, accepted by the appellant's counsel - but that there was sufficient in the pleading and in Mr Watkins's affidavit to show that the appellant had real prospects of establishing it. His Honour, in calculating the figure he did for judgment against the appellant, then reduced the $111,351.02 claimed by $55,112, reaching a figure of $56,239.02 to which he added ten per cent for goods and services tax, thus arriving at $61,862.92. His Honour concluded that the claim to

the $175,000 was not clearly pleaded, lacking detail and clarity. The counter-claim to the $62,203.82 also lacked clarity, his Honour concluded, because the work carried out by Nustar Engineering Group related, it appeared, only in part to the sums owing by the appellant to the respondent. His Honour said that, for the purpose of the application before him, the appellant had not satisfied him that that aspect of the appellant's claim should be the subject of a set-off.

[15] It may be accepted, as Mr Morris submitted, that the striking out of paragraphs 3 and 4 of the counter-claim did not preclude the appellant's seeking to resist the entry of judgment against it on the ground that it had demonstrated that it had claims to damages that could support equitable set-offs sufficient to justify the withholding of judgment. There are, I think however, substantial obstacles in the way of the appellant's persuading us that it should succeed on this appeal. In the first place the appellant did not formulate its claims to the $175,000 and the $62,203.82 as set-offs, but as counter-claims. It seems that some attempt to do so can be gleaned from paragraph 12(e) of the amended defence and counter-claim and from the appellant's written submissions to his Honour, a copy of which was supplied to us during the hearing of the appeal. But the fact remains that those claims were before his Honour in the appellant's pleading as counter-claims and there is nothing before us to indicate that any application was made to his Honour to reformulate them in the pleading as set-offs. Secondly, there were admitted deficiencies in the counter-claims as they were formulated, and, that being so, it is difficult to see how his Honour was to assign a money value to them: by what process of reasoning was his Honour to conclude that they could produce a sum equal to or greater than the $61,862.92 – or for that matter any sum? Thirdly, the counter-claims in any event seem somewhat tenuous. Success in the claim to the $175,000 would depend upon a finding in favour of the appellant that it was likely that it would have been awarded a contract by Western Metals Copper and that that contract would have produced a profit; and the claim to the $62,203.82 would rest upon a successful disentangling of that part of the work undertaken by Nustar Engineering Group which related to the sub-contract from that which related to the head contract. Those considerations – the third of which, though relevant, is of course not as weighty as the other two - lead me to conclude that the appellant's appeal against his Honour's first order should be dismissed.

[16] The second and third considerations I have referred tend to lead me to conclude that the appellant should not have leave to appeal against his Honour's refusal of the stay of execution. Furthermore, we were not supplied with any transcript of the making of, or argument on, the application for the stay, or of his Honour's reasons for refusing it. The granting or refusal of a stay is a discretionary matter, and it would appear to me that there is insufficient in what is before us to justify our concluding that his Honour erred in some way.

[17] The appeal should be dismissed and the application for leave refused, with costs in each case.