

SUPREME COURT OF QUEENSLAND

CITATION: *Northbuild Construction P/L v Discovery Beach Project P/L*
[2009] QCA 235

PARTIES: **NORTHBUILD CONSTRUCTION PTY LTD**
ACN 011 063 764
(appellant/applicant)
v
DISCOVERY BEACH PROJECT PTY LTD
ACN 100 500 981
(respondent/respondent)

FILE NO/S: Appeal No 7853 of 2007
SC No 11269 of 2006

DIVISION: Court of Appeal

PROCEEDING: Application for Stay of Execution

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 18 August 2009

DELIVERED AT: Brisbane

HEARING DATE: 18 August 2009

JUDGE: Holmes JA

ORDERS: **1. Application for stay dismissed;**
2. Applicant pay respondent's costs of application.

CATCHWORDS: PROCEDURE – COSTS – RECOVERY OF COSTS – where applicant ordered to pay respondent's costs following unsuccessful appeal – where applicant seeks stay of enforcement of costs order – where applicant has an order for costs and an interim award against respondent from an arbitration and anticipates an award in its favour – where applicant contends respondent impecunious and will dissipate any costs paid to it so that applicant will be unable to recover any amount awarded to it – where respondent asserts it is not insolvent and has paid more under an interim award than applicant will receive – whether applicant has discharged evidential onus – whether application for stay should be granted

COUNSEL: C A Wilkins for the applicant
D O'Brien for the respondent

SOLICITORS: Crouch & Lyndon for the applicant
Clayton Utz for the respondent

HOLMES JA: The applicant, Northbuild, was the builder on a north coast hotel project, while Discovery Beach Project Pty Ltd was the developer.

Northbuild was unsuccessful in an appeal concerning a dispute resolution process between the two. It was ordered to pay costs which were assessed in an amount of \$29,234.77. The certificate of the costs assessor was duly filed and, as Rule 740 of the Uniform Civil Procedure Rules required, the Registrar ordered payment of that amount, his order taking effect as a judgment of the Court.

On 6 August, Discovery Beach obtained the issue of an enforcement warrant. Northbuild applies under Rule 800 or, alternatively, in the inherent jurisdiction of this Court for a stay of the enforcement of the Registrar's order.

The basis of that application is essentially Northbuild's contention that it will receive a substantial award against Discovery Beach from an arbitration, but that Discovery Beach's financial position is such that it is likely to dissipate any costs paid to it immediately, leaving Northbuild with no prospect of recovery of any amount awarded to it by the arbitrator.

The arbitrator's award indicates that Northbuild was successful in having findings made by him in its favour. Northbuild contends that it can expect an award in excess of \$1.3 million together with costs as a result. It already has in its favour an order for costs in relation to an interim award, the amount of which is yet to be determined, but in respect of which it contends it is likely to receive something in the order of \$30,000, as I understand it; and it has a recent interim award which will entitle it to something between \$64,000 and \$70,000. The difficulty, though, is that that position is the subject of dispute. Discovery Beach, for its part, asserts that it has already paid Northbuild the sum of some \$1.2 million on account of the matters the subject of the arbitration, as a result of the arbitrator's interim award, and anticipates that the net result will be an award requiring Northbuild to repay Discovery Beach about half that amount.

It is really not possible for me to reach any particular view about the prospects of Northbuild ultimately receiving the amounts for which it contends. There is nothing which would give me any basis for reaching a view as to the likely quantum to arise from the award and, as I say, I find it simply impossible to say with any confidence that Northbuild's contentions that there will be an amount payable to it in excess of the costs orders here is correct.

The second difficulty that Northbuild faces here is in establishing the impecuniosity that it claims on Discovery Beach's part. On Northbuild's application a freezing order was made in respect of the assets of Discovery Beach, although it was permitted to use its means to pay legal costs. In making those permitted payments it has, according to Northbuild, left itself without assets.

To support that assertion Northbuild relies on what it said in its own written submissions in an application before White J and on paragraphs of her Honour's judgment; but how either could constitute evidence of the fact in this application is quite unclear. The difficulty that Northbuild faces, it seems, is that the documents on which it would rely if it could were obtained in the freezing order proceedings and are subject to an implied undertaking that they would be used for that purpose only.

The position, however, is that all that is put before me that, in my view, has any evidentiary value is a concession in written submissions made on behalf of Discovery Beach before White J that the company's accounts for the 2008 financial year show only net assets of \$13,000, disregarding a trade dollar asset accepted to be worth little. That, I think, might properly be regarded as an admission against interest on which I could act.

In the course of the application before White J, another company, Moonbrook, which is controlled by a Discovery Beach director, Mr McCartney, had indicated its intention to support Discovery Beach in its legal proceedings. One of the complaints of Northbuild is

that despite its requests, no undertaking has been forthcoming from Moonbrook to meet any award in Northbuild's favour against Discovery Beach.

But as to the suggestion that it is insolvent and has dissipated its assets in paying legal costs, Discovery Beach relies on an affidavit of Mr McCartney filed in this proceeding. He says this:

"With respect to Northbuild's assertions that DBP is insolvent" - DBP being Discovery Beach Project Pty Ltd - "DBP is meeting all its financial commitments. There are no outstanding demands against DBP by any creditors. DBP has paid all amounts, including costs it has been ordered to pay Northbuild, including interim awards in the sum of \$1,234,488 and \$1 million on account."

I do not think that the evidence supports a conclusion as to Discovery Beach's incapacity or unwillingness to pay any sums which it may prove to owe to Northbuild. In the circumstances, the applicant has not discharged the onus on it and the application for a stay should be dismissed.

MR O'BRIEN: I ask for costs, your Honour.

HOLMES JA: Is there anything you can say against that, Mr Wilkins?

MR WILKINS: No, your Honour.

HOLMES JA: The applicant is to pay the respondent's costs of the application for a stay.