SECURITY OF PAYMENT AND STAYS OF ENFORCEMENT: CAN YOU BLOCK A CASHFLOW PIPE?

The *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) is intended to promote cashflow in the construction industry by enabling parties who undertake construction work or supply related goods and services to obtain prompt interim payment. The statutory regime is frequently described as embodying a "pay now, argue later" philosophy, under which adjudicated amounts are to be paid promptly, to enable final rights to be determined separately.

However, recent authority confirms that the position is not without qualification. In *Black Label Developments Pty Ltd v McMenemy* [2025] NSWCA 114, the New South Wales Court of Appeal reaffirmed that courts retain a broad discretionary power to stay enforcement of a judgment founded on an adjudication determination.

Background of Black Label

The proceedings arose from a residential building dispute in which a builder obtained an adjudication determination in its favour under the Act. Judgment was subsequently entered against the homeowners for the adjudicated amount of $264,575.99. The homeowners then sought, and obtained, a stay of enforcement of that judgment pending the determination of separate proceedings in which they alleged, among other matters, unconscionable conduct under the Australian Consumer Law.

The stay was granted on certain conditions, including that the judgment sum be paid into Court. On appeal, the builder contended that the grant of a stay was inconsistent with the statutory purpose of the Act, particularly the legislative emphasis on preserving cashflow and allocating the interim risk of insolvency to the party liable to make payment. That argument was rejected by the Court.

The Court's reasoning

The Court of Appeal confirmed that the statutory policy underlying the Act does not operate as an absolute bar to the grant of a stay. Rather, the existence and exercise of the power to stay enforcement continues to depend upon the ordinary principles governing the exercise of judicial discretion. The payment of the judgment sum into Court as quasi-security no doubt alleviated the need to unblock the cashflow pipe.

Importantly, the Court accepted that the policy of maintaining cashflow under the Act remains a relevant consideration, but it is only one consideration. It does not foreclose attention to other matters bearing upon the justice of the case.

The Court considered it significant that the homeowners' separate claims extended beyond matters capable of final determination within the adjudication process. Allegations concerning duress, unconscionable conduct and the circumstances surrounding the underlying contractual arrangements were of a kind that could not be conclusively resolved through adjudication. In those circumstances, the Court was satisfied that it was open to grant a stay pending the determination of those broader issues.

The Court also rejected the proposition that any consideration of the builder's actual need for immediate payment was contrary to the Act. While the statutory regime assumes the importance of cashflow, the practical significance of that consideration may still depend on

the evidence. The absence of evidence demonstrating particular urgency or prejudice to the claimant was capable of being taken into account in the exercise of the discretion.

A further feature of the case was its residential context. The Court recognised that disputes involving homeowners may, in some circumstances, warrant a different evaluative approach from those arising between commercial parties operating at arm's length in a conventional business setting. That observation reflects the practical reality that residential building disputes often involve different considerations, including relative bargaining power, the financial significance of the works to the owners, and the fact that the dispute may concern the family home.

Significance of the Decision

The decision is an important reminder that, although the Act provides a powerful mechanism for obtaining prompt interim payment, it does not guarantee immediate enforcement in every case. A successful adjudication determination remains an interim entitlement only, and the enforcement of a judgment based on such a determination may be affected by the broader factual and legal context.

For claimants, the case underscores that adjudication success may not necessarily translate into immediate recovery where there are substantial and bona fide issues raised in separate proceedings that bear upon the justice of enforcement. Consideration should therefore be given not only to the strength of the payment claim and adjudication application, but also to the surrounding contractual and factual circumstances which may later become relevant on an enforcement application.

For respondents, the decision illustrates that the Court's discretion to grant a stay remains available where there are serious matters falling outside the limited scope of the adjudication regime. That said, the mere existence of a broader dispute will not, of itself, justify a stay. The application will continue to turn on the particular facts, including the nature of the issues raised, the evidentiary foundation for those issues, and the balance of prejudice.

Key Takeaways

Black Label demonstrates that the "pay now, argue later" principle, while central to the Act, is not absolute. The Court's supervisory role remains intact, and the grant of a stay will depend upon the justice of the case viewed as a whole.

In practical terms, the decision highlights three matters of ongoing importance:

First, the statutory policy favouring prompt payment remains influential, but it is not determinative.

Secondly, where there are serious allegations concerning matters such as contract formation, duress, unconscionable conduct or other issues not amenable to final resolution in adjudication, the Court may regard those matters as relevant to whether enforcement should be delayed.

Thirdly, the residential building context may be a material consideration in the Court's assessment of whether a stay should be granted.

Why this matters in practice

The decision is also a timely reminder that parties should seek legal advice on the basis of the full factual and procedural context, not merely the adjudication outcome in isolation. The availability of enforcement options, and the scope for resisting them, may be significantly affected by matters such as the contractual background, the existence of parallel claims, issues going to contract formation or enforceability, and the broader commercial position of the parties. A complete understanding of those matters is often essential to properly advise on what may occur after an adjudication determination has been made.

Conclusion

The Act continues to provide a robust interim payment regime designed to support cashflow in the construction industry. However, Black Label confirms that the regime does not eliminate the Court's discretion to prevent enforcement where the circumstances warrant that course.

Parties seeking to enforce, or resist enforcement of, adjudication determinations should therefore remain mindful that the outcome of an adjudication is only one part of the broader legal landscape. Enforcement strategy, the nature of the underlying dispute, and the existence of broader claims capable of affecting the justice of immediate payment may all be critical.

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