

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 129/2022  
[2023] NZSC 22

BETWEEN SRG GLOBAL REMEDIATION  
SERVICES (NZ) LIMITED  
Applicant

AND BODY CORPORATE 197281  
First Respondent

MAYNARD MARKS LIMITED  
Second Respondent

HOBANZ PROJECT ASSIST LIMITED  
Third Respondent

HELLABY RESOURCE SERVICES  
LIMITED  
Fourth Respondent

Court: Ellen France, Williams and Kós JJ

Counsel: C L Bryant and N P Gillies for Applicant  
R J Hollyman KC and N G Lawrence for First Respondent

Judgment: 20 March 2023

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**JUDGMENT OF THE COURT**

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- A The application for leave to appeal by SRG Global Remediation Services (NZ) Ltd (SRG) is dismissed.**
- B The application for leave to appeal by Body Corporate 197281 (the Body Corporate) is dismissed.**
- C There is no order as to costs in relation to the applications for leave.**
- D The application for a stay under r 30(5) of the Supreme Court Rules 2004 by the Body Corporate is dismissed.**

**E The Body Corporate must pay SRG costs of \$2,500 in relation to the stay application.**

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**REASONS**

**Introduction**

[1] SRG Global Remediation Services (NZ) Ltd (SRG) and Body Corporate 197281 (the Body Corporate) are involved in proceedings relating to a construction contract to which the Construction Contracts Act 2002 applies. Both have filed applications for leave to appeal to this Court from a judgment of the Court of Appeal addressing aspects of the proceedings.<sup>1</sup> The Body Corporate also seeks a stay pending determination by this Court.

**Background**

[2] The facts are set out in detail in the judgments of the High Court<sup>2</sup> and the Court of Appeal.<sup>3</sup> It is sufficient to highlight some features of the arrangements between the parties and to briefly summarise the course of the proceedings to date. In doing so, we refer to SRG as the other party to the contract with the Body Corporate although the original contracting party was a company called TBS Remcon Ltd.<sup>4</sup>

[3] Under the construction contract (which incorporated the general conditions of contract under NZS 3910:2013),<sup>5</sup> SRG carried out remediation work on the Body Corporate's water-damaged apartment building. The Body Corporate received over \$10.2 million from the Ministry of Business, Innovation and Employment under the Government's financial assistance package scheme towards the cost of the

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<sup>1</sup> *SRG Global Remediation Services (NZ) Ltd v Body Corporate 197281* [2022] NZCA 518 (French, Courtney and Dobson JJ) [CA judgment]. We treat the applications as two separate leave applications although only one Court file has been created.

<sup>2</sup> *Hellaby Resource Services Ltd v Body Corporate 197281* [2021] NZHC 554 (Associate Judge Gardiner) [HC judgment] at [6]–[22].

<sup>3</sup> CA judgment, above n 1, at [8]–[24].

<sup>4</sup> TBS was sold by its parent company (Hellaby Resource Services Ltd) in late 2018 and the debt owed by the Body Corporate was the subject of a deed of assignment. A question arose about the effectiveness of the assignment but is not in issue now.

<sup>5</sup> New Zealand Standard: Conditions of contract for building and civil engineering construction. A copy of the relevant terms can be found as an appendix to the HC judgment, above n 2.

remediation work. This included a \$2 million sum paid in December 2018. The Body Corporate confirmed to the Ministry these funds would be used to pay suppliers including SRG but as at the date of the Court of Appeal judgment had withheld the funds.

[4] By September 2018, the Body Corporate had paid SRG over \$32 million for the work. However, the Body Corporate resisted making full payment for the work for various reasons primarily because, it said, the workmanship was defective. The debt was not paid after demand for payment was made. SRG then sought summary judgment in the High Court. In response, the Body Corporate filed a statement of defence and a counterclaim against SRG and other parties. The counterclaim pleads various causes of action averring, amongst other matters, that the repair work was carried out improperly and is incomplete. As at the date of the Court of Appeal judgment, the cost of the further remedial work the Body Corporate says needs to be undertaken is estimated to be in the region of \$5.2 million.<sup>6</sup> That exceeds SRG's claim which, as at the date of the High Court judgment, was just over \$2.8 million. SRG, in turn, sought a stay of the counterclaim on the basis it had to be pursued separately, through arbitration.

#### *The High Court judgment*

[5] The High Court found that the Body Corporate had no arguable defence and granted summary judgment but enforcement of the judgment was stayed. SRG's argument based on the effect of the arbitration agreement was rejected.

#### *The Court of Appeal judgment*

[6] The Court of Appeal dealt first with the Body Corporate's cross-appeal from the High Court decision to grant summary judgment. In upholding the decision to grant summary judgment, the Court said that accepting the Body Corporate's arguments would "seriously undermine" the scheme of the Construction Contracts Act and its "pay now, argue later" policy.<sup>7</sup> (There was particular focus on s 79 of the Act which provides that in proceedings for recovery of debt under the specified

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<sup>6</sup> The cost of that work was not able to be calculated accurately without further invasive testing.

<sup>7</sup> CA judgment, above n 1, at [57].

provisions of the Act, the court must not give effect to a counterclaim.) The same reasoning was applied in rejecting the argument the High Court erred in declining to exercise the residual discretion to withhold the entry of judgment. The Court also said that the application for summary judgment was not being used in an oppressive or unjust manner.

[7] The Court allowed SRG’s appeal against the decision to stay enforcement of the summary judgment but its appeal against the decision to refuse its stay application was dismissed. In dismissing the latter appeal, the Court of Appeal addressed the requirements for a stay under art 8(1) of sch 1 of the Arbitration Act 1996. Relevantly here, SRG had to show that the arbitration agreement was not “null, void, inoperative or incapable of being performed”. The Court of Appeal upheld the finding of the High Court that the effect of non-compliance with the applicable requirement in cl 13 of NZS 3910:2013 to refer the dispute to the Engineer within the specified time rendered the agreement null, void, inoperative or incapable of performance.

#### *The subsequent stay judgment*

[8] The Court of Appeal subsequently granted the Body Corporate a stay on the Court’s judgment that had reversed the stay on enforcement of the summary judgment.<sup>8</sup> This stay was subject to various conditions, including provision of a form of guarantee for payment of the debt, excluding interest and costs.

#### **The leave applications**

[9] The Body Corporate seeks leave to appeal the Court of Appeal decision overturning the High Court’s decision to stay enforcement of the summary judgment (we call this the enforcement appeal). SRG seeks leave to appeal the Court of Appeal’s decision refusing to stay the counterclaim and refer it to arbitration (we call this the arbitration appeal).

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<sup>8</sup> *SRG Global Remediation Services (NZ) Ltd v Body Corporate 197281* [2022] NZCA 654 (French and Dobson JJ). The stay was to lapse on non-fulfilment of this condition. We understand the condition has not been met.

## **The proposed enforcement appeal**

[10] The Body Corporate wishes to advance several grounds of appeal on the basis they raise matters of general importance and commercial significance and that a substantial miscarriage of justice may otherwise occur.<sup>9</sup> Broadly, the focus is on four areas:

- (a) The relationship between s 79 of the Construction Contracts Act and the power to stay enforcement of a judgment where a substantial miscarriage of justice would be likely to result from enforcement, as provided for under r 17.29 of the High Court Rules 2016.
- (b) Whether the Body Corporate will be able to pursue its counterclaim in the absence of a stay.
- (c) Whether SRG is solvent and able to pay any damages award.
- (d) Various miscellaneous issues concerning the proper approach to overturning the High Court's discretionary decision and an abuse of process.

[11] There may be a question of general importance about the inter-relationship between s 79 and r 17.29. However, as the Body Corporate's arguments have insufficient prospects of success, we are not satisfied the case would be an appropriate vehicle to consider this question.

[12] In determining that the statutory context and the purpose of the Construction Contracts Act pointed away from a stay, the Court of Appeal rejected the Body Corporate's two arguments, namely, that it would be prevented from pursuing its counterclaim if it had to pay and that there was a real risk it would not be able to recover any damages award from SRG.<sup>10</sup> As to the first argument, the Court referred to a number of factors including the fact the Body Corporate "itself

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<sup>9</sup> Senior Courts Act 2016, s 74(2).

<sup>10</sup> It was accepted by the Body Corporate in the Court of Appeal that s 79 did not always preclude granting a stay of a judgment debt based on a payment schedule.

stopped short of saying it would be unable to bring the counterclaim if it had to pay the judgment debt”,<sup>11</sup> and that the Body Corporate had made a “deliberate choice” not to use the assistance payment.<sup>12</sup> On the second argument, again, the Court concluded the “proper evidential basis” for the Body Corporate’s claim of probable insolvency was absent.<sup>13</sup>

[13] Nothing raised by the Body Corporate calls into question the Court of Appeal’s resultant assessment of the facts or of where the balance appropriately lay. The other matters the Body Corporate wishes to raise are specific to the particular case and do not raise any question of general importance or of commercial significance. Nor does anything raised by the Body Corporate give rise to the appearance of a miscarriage of justice in the Court of Appeal’s assessment.<sup>14</sup>

### **The proposed arbitration appeal**

[14] SRG wishes to make a number of arguments about the interpretation of art 8 of sch 1 of the Arbitration Act, and of cl 13 of NZS 3910:2013. SRG says these arguments will be bolstered by consideration of the appropriate legal presumptions for the interpretation of arbitration agreements and as to the standard of review when assessing an interlocutory application to grant a stay under art 8, both of which were not correctly applied by the Court of Appeal. SRG says variously that these grounds raise issues of public importance and of commercial significance, emphasising the widespread use of arbitration and NZS 3910:2013 in the construction industry.

[15] In our view, resolution of these issues on the proposed appeal will turn on a factual inquiry specific to the particular combination of circumstances. No question of public importance or commercial significance arises. Nor do we see any appearance of a miscarriage in the Court of Appeal’s assessment. SRG’s inaction to refer the matter to the Engineer in a timely manner also points against the prospect there has been a miscarriage of justice.

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<sup>11</sup> CA judgment, above n 1, at [96]. See also at [77].

<sup>12</sup> At [97].

<sup>13</sup> At [107].

<sup>14</sup> See *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

### **The Body Corporate's application for stay pending determination of the appeal**

[16] Given our decision to decline leave to appeal, we do not need to address the Body Corporate's application regarding the Court of Appeal's stay decision. That application is dismissed. SRG filed submissions in relation to that application. SRG is entitled to \$2,500 costs on the stay application.

### **Result**

[17] For these reasons, we make the following orders:

- (a) The application for leave to appeal by SRG is dismissed.
- (b) The application for leave to appeal by the Body Corporate is dismissed.
- (c) There is no order as to costs in relation to the applications for leave.
- (d) The application for a stay under r 30(5) of the Supreme Court Rules 2004 by the Body Corporate is dismissed.
- (e) The Body Corporate must pay SRG costs of \$2,500 in relation to the stay application.

Solicitors:  
Hesketh Henry, Auckland for Applicant  
Farry Law Ltd, Auckland for First Respondent