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Supreme Court

New South Wales

Case Name:	Hakea Holdings Pty Limited v Denham Constructions Pty Ltd; BaptistCare NSW & ACT v Denham Constructions Pty Ltd
Medium Neutral Citation:	[2016] NSWSC 1120
Hearing Date(s):	9 and 10 August 2016
Decision Date:	16 August 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	Ball J
Decision:	See paragraphs 66 to 69 of this judgment.
Catchwords:	BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – whether order preventing enforcement of an adjudication determination should be continued on the ground that the beneficiary of the determination is insolvent or at substantial risk of becoming insolvent
Legislation Cited:	Building and Construction Industry Security of Payment Act 1999 (NSW) Industrial Relations Act 1996 (NSW) Payroll Tax Act 2007 (NSW) Taxation Administration Act 1953 (Cth) Workers Compensation Act 1987 (NSW)
Cases Cited:	Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2006] NSWCA 238 Brodyn Pty Ltd t/as Time Cost & Quality v Davenport [2004] NSWCA 394; (2004) 61 NSWLR 421 Denham Constructions Pty Ltd v Islamic Republic of Pakistan [2016] ACTSC 215 RJ Neller Building Pty Ltd v Ainsworth [2008] QCA 397 Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2) [2013] SASCFC 124

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Veolia Water Solutions v Kruger Engineering Australia Pty Ltd (No 3) [2007] NSWSC 459

Category: Procedural and other rulings

Parties:
Hakea Holdings Pty Ltd ACN 116 147 436 (Plaintiff 2016/104627)
BaptistCare NSW & ACT ACN 000 049 525 (Plaintiff 2016/161700)
Denham Constructions Pty Ltd ACN 086 503 568 (First Defendant 2016/104627 & 2016/161700)
Australian Solutions Centre Pty Ltd ACN 085 917 219 (Second Defendant 2016/104627)
Deputy Commissioner of Taxation (Second Defendant 2016/161700)
Edward Smithies (Third Defendant 2016/104627)
5G Capital SPV27 Pty Ltd ACN 604 038 722 (Third Defendant 2016/161700)
SPV28 Pty Ltd ACN 605 190 083 (Fourth Defendant 2016/161700)
Australian Prestressing Services Pty Limited ACN 082 408 124 (Fifth Defendant 2016/161700)

Representation:
Counsel:
IG Roberts SC with L Shipway (Plaintiff 2016/104627)
Ms J Wright (Plaintiff 2016/161700)
BF Katekar with SS Ahmed ((First Defendant 2016/104627 & 2016/161700)
JC Giles SC with T Cleary (Second Defendant 2016/161700)
Submitting Appearance (Third Defendant 2016/104627)
Ms J Gatland (Third and Fourth Defendants 2016/161700)
Submitting Appearance (Fifth Defendant 2016/161700)
Submitting Appearance (Sixth Defendant 2016/161700)

Solicitors:
Kennedys (Plaintiff 2016/104627)
Colin Biggers & Paisley (Plaintiff 2016/161700)
KWS Legal (First Defendant 2016/104627 & 2016/161700)
ATO Legal Services (Second Defendant 2016/161700)
Moisson Lawyers (Third and Fourth Defendants 2016/161700)

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File Number(s): 2016/104627 and 2016/161700

Publication Restriction: Nil

JUDGMENT

Introduction

1 Before the court are two applications to continue orders the effect of which is to prevent Denham Constructions Pty Ltd (***Denham***) from obtaining the benefit of adjudication determinations in its favour under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the *SOP Act***). One application is brought by Hakea Holdings Pty Ltd in respect of an adjudication determination made on 18 March 2016 in the sum of $1,138,045.33. The other is brought by BaptistCare NSW & ACT in respect of a judgment obtained in the District Court of New South Wales on 27 May 2016 for $475,322.32 relying on an adjudication certificate issued on 26 May 2016 for that amount.

2 The application by Hakea is made in proceedings (***the Hakea Proceedings***) in which Hakea has brought a claim for damages said to be in excess of $6,000,000 for breach of a contract entered into in October or November 2012 between Denham as contractor and Hakea as principal for the design and construction of an aged care facility at Hamlyn Terrace for $17.7 million (***the Hakea Contract***). The adjudication determination obtained by Denham for $1,138,045.33 arises from a payment claim made in respect of that contract.

3 The application by BaptistCare is made in what were originally interpleader proceedings (***the BaptistCare Proceedings***) arising from the fact that both the Deputy Commissioner of Taxation (***DCT***) and Denham's secured creditors, 5G Capital SPV27 Pty Ltd and SPV28 Pty Ltd (together, the **5G Companies**), both claim an entitlement to the $475,322.32. The DCT relies on a notice issued on 7 March 2016 to BaptistCare under s 260-5 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (***the TAA 1953***) requiring BaptistCare to pay to the DCT any amount that BaptistCare owed or would owe to Denham up to the sum of $1,724,260.87. The 5G Companies' entitlement is said to arise from the fact that they are first and second ranking secured creditors of Denham in respect of all present and after acquired property, including Denham's judgment against BaptistCare.

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Relevant legal principles

4 It is common ground that the court has power to grant a stay of a judgment, or an injunction restraining the registration of a judgment, based on an adjudication certificate. As Hodgson JA explained in *Brodyn Pty Ltd t/as Time Cost & Quality v Davenport* [2004] NSWCA 394; (2004) 61 NSWLR 421 at [85]:

> A court in which judgment for recovery of money has been given can stay execution of that judgment. A party against whom there was a substantial judgment could apply for a stay of execution on the grounds that it had a greater claim against the judgment creditor, for which it would shortly obtain judgment, and that, if the judgment money was paid, it would be irrecoverable; and the court could in its discretion grant a stay, on terms if it thought appropriate. I see no reason why a judgment under s.25 of the Act could not be stayed on that kind of basis, although the policy of the Act that progress payments be made would be a discretionary factor weighing against such relief.

See also *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238 at [61].

5 In determining whether to grant a stay or an injunction, the court must balance two competing policies of the SOP Act. One is that contractors should be paid promptly for the work that they have done. The other is that any payment under the Act is not intended to affect the rights of the parties under the relevant construction contract. To give effect to the second of these policies, the SOP Act specifically provides in s 32 that the court or tribunal hearing a dispute under the relevant construction contract may make such orders as it considers appropriate for the restitution of any amount paid as a result of an adjudication determination. That right may prove to be worthless if the contractor is or becomes insolvent.

6 The factors that the court will take into account in balancing the competing policies include the following:

(a) the strength of the applicant's claim: see *Veolia Water Solutions v Kruger Engineering Australia Pty Ltd (No 3)* [2007] NSWSC 459 at [73]; *Romaldi Constructions Pty Ltd v Adelaide Interior Linings Pty Ltd (No 2)* [2013] SASCFC 124 at [95] (where Blue J (with whom Sulan and Stanley JJ agreed) described the factor as "an important criterion"); *RJ Neller Building Pty Ltd v Ainsworth* [2008] QCA 397 at [19], [36] per Keane JA (with whom Fraser JA and Fryberg J agreed);

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(b) the basis of the applicant's claim. Obviously, an important factor is whether the applicant challenges the adjudicator's determination. Another important factor is whether the applicant challenges the debt the subject of the adjudication determination. The absence of a challenge to the debt is a powerful factor against the grant of a stay: *Romaldi* at [110];

(c) the likelihood that the contractor will be unable to repay the amount the subject of the determination. It is accepted in this context that the policy of the Act is generally to place the risk of insolvency on the applicant: *R J Neller* at [40]. However, where there are strong reasons for believing that the applicant will be unable to recover any amount paid, that fact favours granting a stay: *Veolia* at [36]-[39];

(d) the risk that the contractor will become insolvent if a stay is granted: *Romaldi* at [101].

7 In the Hakea Proceedings, Hakea also relies on Denham's failure to provide a subcontractor's statement in accordance with s 127 of the *Industrial Relations Act 1996* (NSW), s 175B of the *Workers Compensation Act 1987* (NSW) and Schedule 2 Part 5 of the *Payroll Tax Act 2007* (NSW). The relevant provisions of each Act are in similar terms. It is sufficient for present purposes to set out the relevant provisions of s 127 of the *Industrial Relations Act*:

> **127 Liability of principal contractor for remuneration payable to employees of subcontractor**
>
> (1) **Application**
>
> This section applies where:
>
> (a) a person (**the principal contractor**) has entered into a contract for the carrying out of work by another person (**the subcontractor**), and
>
> (b) employees of that subcontractor are engaged in carrying out the work (**the relevant employees**), and
>
> (c) the work is carried out in connection with a business undertaking of the principal contractor.
>
> (2) **Liability of principal contractor**
>
> The principal contractor is liable for the payment of any remuneration of the relevant employees that has not been paid for work done in connection with the contract during any period of the contract unless the principal contractor has a written statement given by the subcontractor under this section for that period of the contract.
>
> (3) **Content and form of statement**
>
> The written statement is a statement by the subcontractor that all remuneration payable to relevant employees for work under the contract done during that

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> period has been paid. The regulations may make provision for or with respect to the form of the written statement.
>
> (4) …
>
> (5) **Payments under contract**
>
> The principal contractor may withhold any payment due to the subcontractor under the contract until the subcontractor gives a written statement under this section for any period up to the date of the statement. Any penalty for late payment under the contract does not apply to any payment withheld under this subsection.

8 As I have said, in relation to the BaptistCare Proceedings, the DCT also relies on the operation of s 260-5 of Schedule 1 of the TAA 1953 as a reason for refusing a stay.

BaptistCare's case

9 On 13 March 2015, Denham as contractor and BaptistCare as principal entered into a contract for the design and construction of an aged care facility at Kellyville for $29.65 million (***the BaptistCare Contract***).

10 Clause 40A of that contract relevantly provides:

> Without prejudice to any of the *Principal's* other rights and powers under the *Contract*, the *Principal* may at any time for any reason within its sole discretion upon 5 *Business Days'* written notice to the *Contractor* terminate the *Contract*. Upon receipt of such notice the *Contractor* must remove its *construction plant* from the *site*, otherwise cease the performance of its obligations under the *Contract* and endeavour to mitigate any expense or losses that it or any subcontractor may incur or has incurred in relation to its obligations under the *Contract*. …

The clause goes on to provide that if the termination is not substantially due to, or contributed to, by any act or omission of Denham, then BaptistCare is liable to pay Denham an amount calculated in accordance with the contract.

11 Clause 39.11 of the contract relevantly provides:

> **Insolvency**
>
> If:
>
> (a) …
>
> (b) …
>
> (c) a party is subject to an *Insolvency Event*,
>
> then, where the other party is:
>
> (A) the *Principal,* the *Principal* may, without giving a notice to show cause, exercise the right under subclause 39.4(a); or

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> (B) the *Contractor*, the *Contractor* may, without giving a notice to show cause, exercise the right under subclause 39.9.
>
> The rights and remedies given by this subclause are additional to any other rights and remedies. They may be exercised notwithstanding that there has been no breach of contract.

12 "Insolvency Event" is defined in cl 1 to include where "an application is made, a resolution is passed or an order is made (and which is not stayed within 10 *Business Days* of being made) for the winding-up of the party, including an application relating to dissolution, liquidation, provisional liquidation or bankruptcy".

13 Subclause 39.4(a) permits BaptistCare to "take out of [Denham's] hands the whole or part of the *work* remaining to be completed and suspend payment until it becomes due and payable pursuant to subclause 39.6". Under cl 39.6, when work taken out of Denham's hands has been completed, the Superintendent under the contract is required to assess the costs of completing the works and the costs that would have been payable to Denham if it had completed the works. If the costs of completion are greater than if Denham had completed the works, the difference is payable by Denham. If the costs are less, the difference is payable to Denham.

14 On 4 December 2015, BaptistCare served a notice under cl 40A giving 5 business days' notice of termination of the contract. The notice pointed out that the last business day for the purposes of the notice would be 11 December 2015.

15 On 8 December 2015, Denham wrote to BaptistCare complaining that it had not been given access to the site to remove its construction plant.

16 On 11 December 2015, BaptistCare wrote a letter to Denham in the following terms:

> We note that a search of the records of the Australian Securities & Investment Commission has revealed that ASIC received, on 1 December 2015, a Notification of Filing of Application for Winding up Order lodged by the Commissioner for ACT Revenue.
>
> The definition of "Insolvency Event" in clause 1 of the general conditions of our contract indicates that, where a party is a corporation the making of an application for the winding up of the party constitutes an Insolvency Event. To the extent that the application filed by the Commissioner relates to non-compliance with a statutory demand, a further insolvency event would exist.

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> The filing of the application also falls within paragraph (b)(xiii) of the above definition.
>
> Clause 39.11 of the our [sic] contract states that if your company is subject to an Insolvency Event, BaptistCare, may without giving a notice to show cause, exercise the right referred to in clause 39.4(a) of the general conditions. Accordingly, your company is hereby informed that BaptistCare:
>
> (a) hereby takes out of your company's hands the whole of the work remaining to be completed; and
>
> (b) suspends payment under our contract until it becomes due and payable pursuant to clause 39.6 of the general conditions.

17 On the same day, BaptistCare wrote to Denham purporting to withdraw its notice under cl 40A.

18 On 21 March 2016, Denham issued a notice of dispute in relation to the notice served on 11 December 2015. Clause 42.2 of the contract requires the parties to confer to resolve the dispute or to agree on methods of doing so. So far, the parties have not met or reached an agreement in accordance with that clause.

19 On 30 May 2016, BaptistCare entered into a contract with Lipman Pty Ltd to complete the work taken out of the hands of Denham. That work has not yet been completed. Mr O'Brien, who is a director of epm Projects Pty Ltd, which has acted as the Superintendent on the project since about 25 July 2015, estimates that the difference between the costs incurred and to be incurred in completing the work taken out of the hands of Denham and the amount that would otherwise have been paid to Denham if the work had been completed by it is approximately $5.4 million. As soon as the work is completed, BaptistCare intends to make a claim against Denham for that amount.

20 The principal basis on which Denham challenges BaptistCare's right to take the work out of its hands is that it was precluded from doing so because it had already terminated the contract for convenience. That defence appears to be weak. Clause 40A is expressed to be without prejudice to any other rights BaptistCare has under the contract. The contract was on foot as at the time BaptistCare exercised its right under cl 39.11. It is difficult to see why BaptistCare was not entitled to exercise that right.

Hakea's case

21 Clause 39.2 of the Hakea Contract provides:

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> If the *Contractor* commits a substantial breach of the *Contract*, the *Principal* may, by hand or by registered post, give the *Contractor* a written notice to show cause.
>
> Substantial breaches include, but are not limited to:
>
> (a) failing to:
>
> (i) perform properly the *Contractor's design obligations*;
>
> (ii) provide *security*;
>
> (iii) provide evidence of insurance;
>
> (iv) comply with a *direction* of the *Superintendent* pursuant to subclause 29.3; or
>
> (v) use the materials or standards of *work* required by the *Contract*;
>
> (b) wrongful suspension of *work*;
>
> (c) substantial departure from a *program* without reasonable cause or the *Superintendent's* approval;
>
> (d) where there is no *program*, failing to proceed with due expedition and without delay; and
>
> (e) in respect of clause 38, knowingly providing documentary evidence containing an untrue statement.

22 Under cl 34.7, Denham is obliged to pay liquidated damages in the event that work under the contract does not reach practical completion by the date specified for practical completion at the rate of $2,500 per day.

23 On 1 December 2015, Hakea served a show cause notice on Denham dated 27 November 2015. The notice listed a number of what were said to be substantial breaches of the contract. However, the principal one was the failure to bring the works to practical completion by the date for practical completion, which was 22 September 2015, and the failure to progress the works. The notice required a response from Denham by 10 December 2015.

24 Denham replied on 9 December 2015. It is not easy to understand from the reply precisely what Denham's response to the principal allegation of delay is. The reply does state that Denham "is entitled to have determined extensions of time of 95.5 days namely an extended date for practical completion of 16 May 2016". In support of that assertion, it relies on notices of delay.

25 On 10 December 2015, Hakea responded rejecting Denham's assertions and terminating the contract.

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26 Mr Katekar, who appeared for Denham, submitted that there had not been a substantial breach because on 17 November 2015 Denham had put forward a program for completion of the work by 7 April 2016 and it was only two weeks later that Hakea served its show cause notice. In Mr Katekar's submission, approval of the revised program was not a requirement of the contract and any departure from the program in the two week period could not be a substantial departure.

27 In my opinion, there are at least two difficulties with that submission.

28 First, there are difficulties with Mr Katekar's submission that a revised program did not require Hakea's approval. The logical consequence of that submission is that, upon a request by the Superintendent to provide a revised program, Denham could specify a completion date of its choosing. That would make a nonsense of the contract.

29 Second, a substantial breach includes a wrongful suspension of the work. According to the evidence of Mr James Barry, a project manager with Caverstock Group Pty Ltd, the Superintendent under the Hakea Contract, Denham ceased performing any substantive work on the site, either itself or through subcontractors, in early November 2015. Denham does not take issue with that evidence. If ultimately it is accepted, it would provide strong evidence of a substantial breach by Denham.

30 Hakea commenced proceedings on 6 April 2016 claiming damages for breach of contract. It claims the following damages:

Nature of loss and damage	**Current Amount of Loss and Damages**
Cost of Rectification of Defective Works	$665,834.34
Additional cost to complete the works	$2,469,711.94
Overpayment of the Contract Sum	$1,342,709.90

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Liquidated Damages	$490,000
Additional Ongoing costs including staffing costs	$341,817.00
Loss of Profit	$377,781.25
Interest and Finance Costs	$385,990.19
Total	**$6,073,844.62**

Hakea has filed a substantial amount of evidence, particularly from Mr Barry, to support the quantification of its claim.

31 Two things are apparent from what I have said and from Mr Barry's evidence. First, Hakea appears to have a strong case that it was entitled to terminate the Hakea Contract. Second, although there are likely to be disputes concerning the damages claimed by Hakea, its claim is for substantially more than the amount to which Denham is entitled under the adjudication determination it has obtained. It appears that some of the amount claimed by Hakea relates to amounts that are the subject of the adjudication determination.

Denham's financial position

32 BaptistCare and Hakea served a combined report and Denham served its own report from expert accountants dealing with Denham's solvency. The combined report served by BaptistCare and Hakea was prepared by Ms Tamara Lindsay. The report served by Denham was prepared by Mr Bradley Tonks. In considering these reports, it is relevant to bear in mind that the relevant question is not whether Denham is solvent or insolvent, but rather the likelihood that Hakea and BaptistCare will be able to recover the amounts paid by them if ultimately they succeed in their claims against Denham, although obviously there is a close relationship between the two issues.

33 It is also relevant to observe at the outset that the volume of work undertaken by Denham has decreased sharply over recent years, as shown by the

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following table setting out Denham's financial results for the years ending 30 June 2014, 30 June 2015 and 30 June 2016:

Year ended 30 June	**2014 $'000**	**2015 $'000**	**2016 $'000**
Gross income	86,776	66,818	17,423
Gross profit	14,859	12,574	1,834
Operating expenses	13,908	12,142	1,783
Operating profit	952	431	50

34 Both experts agree that Denham is currently insolvent. However, Mr Tonks expresses the opinion that the problem is temporary and should be overcome in a period of 2 months or so. That conclusion is based on the following table showing Denham's assets and liabilities as at 30 June 2016:

Deficiency Analysis as at 30 June 2016	**Amount ($)**
Debts Due and Payable	
Trade Creditors	4,241,722.20
ATO Liability	606,042.43
Total Debts Due and Payable	**4,847,764.63**
Assets Immediately Available (0-30 days)	
Other Debtors	1,599,383.68
Total Assets Immediately Available	**1,599,383.68**
Net Current Assets Deficiency	**(3,248,380.95)**

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Debts Not Immediately Due and Payable 5G Capital Pty Ltd	5,606,361.96
Total Debts Not Immediately Due and Payable	**5,606,361.96**
Assets Not Immediately Available (30+days) Hakea Holdings Pty Ltd BaptistCare ACT Project BaptistCare Kellyville Project Pakistan High Commission Other Debtors	1,138,045.33 878,322.74 475,322.32 1,027,054.89 6,127,559.85
Total Assets Not Immediately Available	**9,646,305.13**
Total Surplus/(Deficiency)	**791,562.22**

35 It is apparent from the table that as at 30 June 2016, Denham had a substantial deficit of net current assets. The table also suggests that as assets are realised Denham's position should improve and that it has a total surplus of assets over liabilities of $791,562.22. However, as Mr Tonks points out, this analysis depends on a number of assumptions. In my opinion, a number of those assumptions are not made out on the evidence.

36 First, the evidence is that Denham owes the DCT $1,790,242.83 as at 4 August 2016, not the $606,042.43 included in Denham's accounts. A large component of the amount claimed relates to PAYG instalments. The DCT has issued two certificates under s 8AAZJ of the TAA 1953 certifying that the DCT is owed amounts that total that amount. Those certificates are *prima facie* evidence of the facts stated in them. Denham takes issue with the amount

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claimed by the DCT on the basis that approximately $1.1 million of the amount claimed is owed by a separate company, PC760 Pty Ltd, which was responsible for the employment of Denham's staff from 1 April 2015 onwards, paid their wages and issued them group certificates. However, no detail is given of the basis of the dispute. In my opinion, the certificates given by the DCT must be accepted for the purposes of assessing Denham's ability to repay the amounts the subject of the adjudication determinations.

37 Second, the table states that Denham has current assets of $1,599,383.68 (made up of debtors) and non-current assets of $6,127,559.85 (again made up of debtors). It is apparent from Mr Tonks' report that those totals and their classification as current or non-current depend on evidence given by Mr Steven McGrath, the sole director of Denham, in an affidavit affirmed on 15 July 2016, concerning Denham's debtors. The affidavit includes a table setting out Mr McGrath's comments on each debtor. It is not necessary to set that table out in full. However, the table includes the following items:

Project	**Invoice No**	**Date of Invoice**	**Current Claim**	**Terms**	**Director's expectation as to recovery and payment timing**
Presbyterian Churc	DCPCP30 Claim 31	01/2016	$882,950.37	21 days (in accordanc	Subject to an adjudication

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h				e with invoic e)	not yet releas ed and likely to be part of a global settle ment with Presb yteria n Churc h in the amou nt of $500, 000 to be paid by end of Augus t
Presb yteria n	DCPC P30 Claim	01/2 016	$566,2 12.90	21 days (in	Subje ct to an

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Church	30			accordance with invoice)	adjudication not yet released and likely to be part of a global settlement with Presbyterian Church in the amount of $500,000 to be paid by end of August.
Bupa	940-dc	04/2	$237,9	60	End

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	Care Service	Progress Claim for works semi-final	016	37.77	days (as per terms of contract)	of August Expectation of delayed payment based on previous experience with Bupa Care
	Pepperfield Holdings	990-01 Progress Claim 1	05/2016	$1,348,450.00	60 days (as per terms of contract)	End of July Project on track with no issues identified, agreed

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					terms being utilised
Life Care	970-26B Progress claim for works completed and certified	05/2016	$148,433.68	35 days (as per terms of contract)	End of July Agreed terms being utilised. Some delay issues – 3 weeks behind program due to inclement weather.
Life Care	970-26 Progress claim	30/05/2016	$320,156.10	35 days (as per terms	Mid August

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	for works completed and certified			of contract)	
Pepperfield Holdings	990-02 Progress Claim 2	06/2016	$676,940.00	60 days (as per terms of contract)	End of August Project on track with no issues identified, agreed terms being utilised
Pepperfield Holdings	990-06 Admin of Accounting and draw	06/2016	$27,390.00	45 days	Mid August Invoice calls for payment

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	downs for project (invoice relates to services provided outside the contract but not on the basis of any variation)				within 21 days but the expectation for payment is based on orally agreed terms of trade in relation to work of this nature.
Pepperfield Holdings	990-05 Project Management Services Sundry	06/2016	$36,300.00	45 days	Mid August invoice calls for paym

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	Review (invoice relates to services provided outside the contract but not on the basis of any variation)				ent within 21 days but the expectation for payment is based on orally agreed terms of trade in relation to work of this nature.
Pepperfield Holdings	990-04 (Invoice relates to service	06/2016	$1,704,169.94	45 days	Mid August Invoice calls for

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	s provided outside the contract but not on the basis of any variation)				payment within 21 days but the expectation for payment is based on orally agreed terms of trade in relation to work of this nature.
5G Capital for Nullaburra	001-CRC Progress claim	06/2016	$102,500.00	30 days	End of July Project on

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	Project	for design development				track with no issues identified, agreed terms being utilised.
Baptist Care NSW & ACT	920-780 Progress Claim for termination costs pursuant to Clause 40A of the contract Demobilisation costs	29/06/2016	$800,800.00	21 Days (as per terms of invoice)		Expectation to be paid by mid August subject to Baptist Care raising a dispute in relation to this claim

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	Work committed to but not delivered				
Life Care	970-27 Progress claim for works completed and certified	30/06/2016	$209,352.74	35 days (as per terms of contract)	Mid August
Pepperfield Holdings	990-03 Progress Claim 3	07/2016 (invoice issued in early July relates to work performed in June	$511,500.00	60 days (as per terms of contract)	End of August Project on track with no issues identified, agreed terms

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		)			being utilised

38 It is apparent, however, that these items are not recoverable in accordance with Mr McGrath's comments.

39 The table suggests that Denham expected to recover a total of $1 million from the Presbyterian Church "as part of a global settlement" of claim 30 and claim 31, which Mr McGrath expected to be paid by the end of August. However, in an affidavit affirmed on 8 August 2016, Mr McGrath says that the proposed settlement has fallen through, that Denham is currently seeking to enforce a debt owed to it by the Presbyterian Church in the District Court for an amount of $285,813.03 and that it is preparing other payment claims against the Presbyterian Church. It is apparent from this evidence that Denham will not receive $1 million from the Presbyterian Church by the end of August. At most, it will receive $285,813.03.

40 Mr McGrath gives evidence that Denham is owed $237,937.77 by Bupa Care Services. Denham has sent Bupa Care an invoice for that amount. The invoice describes the amount as "Progress claim for works semi-final". It is apparent, however, that the amount claimed is retention money. Under cl 5.6 of the contract between Denham and Bupa Care, Bupa Care's entitlement to retain the retention moneys ceases 10 business days after the issue of a final certificate. However, there is no evidence that the final certificate has been issued. In addition, there is evidence of a conversation between Mr Neal, BaptistCare's solicitor and Mr Templeman, Bupa Care's solicitor, in which Mr Templeman stated that practical completion of the project had not been achieved and that he was instructed that no amounts are due and payable by Bupa Care to Denham. Mr Templeman also said that Bupa Care had been served with a garnishee order by the ATO and that consequently any payment by it will be made directly to the ATO. The only conclusion that can be reached on the basis of this evidence is that at some time in the future, Denham may be entitled to $237,937.77, but if and when it is that amount will be paid to the ATO.

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41 Mr McGrath gives evidence that Denham is entitled to be paid amounts totalling $4,304,749.94 by Pepperfield Holdings in respect of the construction of the Pepperfield Lifestyle Resort at Bowral. Mr McGrath says that of that amount $1,348,450 was payable by the end of July 2016 and the balance is due in August 2016. He describes the project as being "on track with no issues identified". Mr McGrath is a director of Pepperfield Holdings and the company controlled by him has a 50 percent interest in it. There is no evidence that that payment has been made and the only inference available is that it has not. The site manager for the project is Mr Nicholas Cordingley. On 5 August 2016, he swore an affidavit to the effect that the last work he saw completed on the Pepperfield site was completed just before Christmas 2015. He says that at that time the following work had been done:

(a) 5 slabs on Ground had been completed;

(b) 3 duplex frames and trusses had been completed;

(c) 2 more duplex frames and trusses had been partially completed; and

(d) The earthworks required for the road pavement subbase to be applied had been completed.

42 There is no reason to doubt the evidence of Mr Cordingley. Mr McGrath says that since the start of 2016 there have been 25 days of rain and 35 days of recovery for inclement weather which has delayed progress. But that does not explain why no work has been done since Christmas 2015. Mr McGrath also says that the amounts claimed include work done outside the contract by Denham including accounting work and other project management expenses. However, there is no evidence of what that work was or its value. It is implausible that Denham would have only recently made a claim for work done at the end of 2015, particularly given its financial position. As result, based on the available evidence, it is unlikely that any amount will be received by Denham in respect of this Pepperfield project in the foreseeable future.

43 Mr McGrath gives evidence that Denham expected to receive $148,433.68 from RSL Life Care by the end of July 2016 in respect of a progress claim for works completed and certified and further amounts from RSL Life Care totalling $529,508.84 by mid-August. There is no evidence that the payment due at the end of July has been made. In fact, in an affidavit affirmed on 4 August 2016,

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Mr McGrath explains that, due to Denham's financial position, it has been forced to withdraw from the balance of the RSL Life Care project and that, as a result, it entered into a deed with RSL Life Care by which it agreed to settle its three outstanding invoices for a total of $515,765.83, which will be paid when a final occupation certificate is issued. Mr McGrath says that the final occupation certificate for the project is expected within the next 6 to 8 weeks.

44 It is, however, difficult to accept Mr McGrath's evidence. The evidence is that RSL Life Care and Denham entered into a deed dated 26 July 2016. By cl 3.1 the parties agreed to terminate the contract with effect from the date of the deed. Clause 3.2 provides:

> The parties agree that the amount paid as at the date of this deed by the Principal to the Contractor in relation to the Contract is the total amount payable by the Principal to the Contractor in relation to the Contract.

45 Clause 5 of the deed provides:

> Payment
>
> The Contractor must pay the Deed Amount to the Principal on the date that is the earlier of:
>
> (a) the date that is the earlier of:
>
> (i) five Business Days after the date that the Contractor receives a copy from, or on behalf of, the Principal of any Interim Occupation Certificate; and
>
> (ii) five Business Days after the date that the Contractor receives a copy from, or on behalf of, the Principal of any Final Occupation Certificate; and
>
> (b) 1 June 2017.

The "Deed Amount" is defined to be the sum of $515,765.83.

46 It is apparent from this clause that Denham must pay RSL Life Care the sum of $515,765.83 by no later than 1 June 2017. Denham is entitled to nothing under the deed.

47 Mr Katekar submitted that before the deed was executed, RSL Life Care agreed to pay Denham's subcontractors directly and to that extent Denham's liabilities were reduced. However, there is no evidence that that happened. That submission is not consistent with the evidence given by Mr McGrath. Moreover, the evidence is that Denham engages subcontractors through project companies. Consequently, any payment directly by RSL Life Care to

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subcontractors would go to reduce the liability of the relevant project company, not Denham's liabilities. Consequently, the position appears to be that far from receiving an amount from RSL Life Care, Denham will have to pay RSL Life Care an amount of $515,765.83 by no later than 1 June 2017.

48 Mr McGrath's table shows an amount payable by 5G Capital of $102,500 in respect of a progress claim for design and development which was due by the end of July. There is no evidence that that amount has been paid nor any evidence that it will be paid in the near future, despite the fact that Mr Massie, the sole director and secretary of 5G Capital, swore an affidavit in the proceedings. In my opinion, the inference that should be drawn is that Denham will not receive that amount.

49 Mr McGrath states that he expects to receive an amount of $800,800.00 from BaptistCare "by mid-August" subject to BaptistCare raising a dispute in relation to this claim. The amount is said to be the progress claim due to Denham as a result of the termination for convenience by BaptistCare under cl 40A. However, for the reasons I have already given, in my opinion, it is unlikely that BaptistCare has any liability to Denham. It is more likely that Denham has a substantial liability to BaptistCare.

50 Third, the statement of assets and liabilities lists the amount of $5,606,361.96 owing to 5G Capital as a debt not immediately due and payable. In his report, Mr Tonks says that he has assumed that the 5G Companies will not call upon their facilities over the period assessed in his report. That period is "6 Months +". In the present context, the relevant assumption must be that the 5G Companies will not call on their facilities before BaptistCare or Hakea may be entitled to recover the amounts payable by them. It seems clear that without the continued support of the 5G Companies, Denham would not be able to repay those amounts if and when they become due.

51 In my opinion, it is not clear that the 5G Companies will continue to support Denham. All Mr Massie says in his affidavit is that on 11 July 2016 he wrote to Denham to set out the support that the 5G Companies were willing to give. That letter states:

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> We advise that 5G Capital Group intends to continue to provide funds to McGrath Group, including if required, to provide funding to [Denham], as and when requested, subject to and pursuant to the Facilities, and subject to the McGrath Group of Companies continuing to operate as a going concern.

The letter is so qualified that it says little about the support that the 5G Companies are willing to give. In particular, the statement of support is "subject to and pursuant to the facilities". However, the evidence is that Denham is not paying interest under the facilities. Consequently, it must be inferred that the support is liable to be terminated at any time. Moreover, the 5G Companies seek to be paid the amount payable by BaptistCare in priority to the DCT. If the 5G Companies intended to support Denham, they would not insist on that priority.

52 Fourth, it is reasonable to include the debts owing by Hakea and BaptistCare that are the subject of the adjudication determinations in issue in these proceedings as non-current assets, since the issue is whether those amounts if paid would be recoverable. However, it is not reasonable to include the amount of $878,322.32 said to be owing in respect of the BaptistCare ACT project. It is apparent that Denham has obtained an adjudication certificate in respect of that amount in the ACT. BaptistCare has commenced proceedings in the ACT Supreme Court challenging that amount and Denham has consented to an injunction restraining it from enforcing its rights under that certificate until the proceedings are determined. There is no reason to think that that injunction will be dissolved; and it is unclear whether Denham will be successful in the proceedings or not.

53 Fifth, the statement of assets and liabilities lists as an asset not immediately available a debt owed by the Pakistan High Commission of $1,027,054.89. It does not disclose a debt of $503,780.65 owing to the Islamic Republic of Pakistan in respect of the same project.

54 The position is that on 10 April 2013, Denham entered into a contract with the Islamic Republic of Pakistan for the construction of the Chancery Building and associated site works at the High Commission of Pakistan in Canberra for the sum of $7,147,372.

55 Clause Q9.1 of that contract relevantly provides:

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> Where the engagement of the contractor has been terminated under **clause Q1** or **Q2**, and the assessment required under **clause Q8** has been made, the architect must **promptly* prepare a certificate as to the amount payable, including **GST*, by one **party* to the other and issue it to the contractor and to the owner. That certificate is to be calculated using the following procedure.

56 Clause Q10 provides that if the balance calculated by the architect under cl Q9 is a positive figure, the owner must pay the contractor the balance. If the balance is negative, the contractor must pay the owner the balance. Under cl Q10.3 the amount must be paid within 7 calendar days.

57 On 18 May 2016, the architect issued a certificate stating the amount payable as -$503,780.65. No reason was advanced for why Denham was not obliged to pay the amount in accordance with the certificate.

58 Denham also claims that it is entitled to recover from the Islamic Republic of Pakistan the sum of $1,027,054.89 as a result of a payment claim it served on 11 September 2015. Although it is clear that the claim is contested, the Islamic Republic of Pakistan did not serve a payment schedule in response to the payment claim within 10 days with the result that, in accordance with the ACT equivalent of s 15 of the SOP Act, Denham became entitled to commence proceedings to recover the claimed amount as a debt. Denham commenced those proceedings. The Islamic Republic of Pakistan raised a number of defences. However, on 12 August 2016, Mossop AsJ delivered judgment in favour of Denham (*Denham Constructions Pty Ltd v Islamic Republic of Pakistan* [2016] ACTSC 215). The result is that unless that judgment is stayed, Denham is entitled to be paid the sum of $1,027,054.89 which Mr Tonks classified as an asset not immediately available. On the other hand, the Islamic Republic of Pakistan retains a right to recover that amount. The amount claimed by Denham largely relates to extension of time claims that appear to be out of time and already appear to have been resolved. As a result, the Islamic Republic of Pakistan appears to have at least reasonable prospects of recovering any amount it pays.

59 Sixth, the evidence is that, contrary to an assumption made by Mr Tonks, a number of creditors are pressing for payment. In fact, A Murray & Sons Pty Ltd has brought a winding up application that is before the court on 17 August 2016 based on a debt of approximately $129,000. There must be a substantial

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risk that Denham will be wound up because it is currently unable to pay its debts as and when they fall due.

60 It follows from what I have said that the statement of assets and liabilities as at 30 June 2016 is likely to understate Denham's liabilities by approximately $2.1 million ($1.1 million owed to the DCT, a $500,000 liability to RSL Life Care and a $500,000 liability to the Islamic Republic of Pakistan). On the other hand, the statement of assets and liabilities is likely to overstate Denham's assets by a large amount. It is difficult to be precise about that amount because I accept that some proportion of the amounts claimed by Denham may ultimately be recoverable. However, if and when those amounts will be recovered is unclear. The total amount of assets that may not be recoverable, or may only be recoverable much later than Denham anticipates, is in the order of $8,525,000 (that is, approximately $700,000 from the Presbyterian Church, $250,000 from Bupa Care, $4,300,000 from Pepperfield Holdings, $500,000 from RSL Life Care, $100,000 from 5G Capital, $800,000 from BaptistCare in respect of the Kellyville project and $875,000 in respect of the BaptistCare ACT project). On the other hand, Denham appears to have a right to receive approximately $1 million from the Islamic Republic of Pakistan immediately, although the Republic appears to have at least reasonable prospects of recovering that amount in subsequent court proceedings. In any event, even assuming that Denham is entitled to be paid the $1 million immediately and to retain it, it will still have a deficiency in current and total net assets.

Conclusion

61 In my opinion, it is appropriate to continue the orders preventing Denham from enforcing the adjudication determination and judgment it has obtained.

62 For the reasons I have given, BaptistCare and Hakea both have strong cases that they do not owe the amounts that are the subject of the adjudication determinations under their respective contracts. In the case of BaptistCare, that arises from the fact that it has an offsetting claim under the contract which is for a sum well in excess of the amount that it owes. In the case of Hakea, it arises both from an offsetting claim and from claims that challenge the liability in respect of which the adjudication determination was made.

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63 On the conclusions I have reached, there is little prospect that BaptistCare or Hakea would be able to recover any amount they pay Denham. Denham's business has declined rapidly over the past three years. Although Mr McGrath says in his affidavit evidence that he intends to re-focus Denham's business to concentrate on one project at a time, there is no reason to believe that Denham's business prospects will improve substantially in the near future. Denham is likely to have a substantial deficiency in current assets to meet its current liabilities indefinitely. There is little prospect in those circumstances that it would be able to repay any amount it owed BaptistCare or Hakea. There is a substantial risk that Denham will be wound up in the near future which will obviously have an effect on the recoverability of any amounts paid by BaptistCare and Hakea. The evidence is that Denham would be insolvent whether or not the amounts currently owed by BaptistCare and Hakea were paid or not. Taken together, those considerations strongly favour a stay and the continuation of any injunction preventing Denham from enforcing the adjudication determination in its favour.

64 In those circumstances, it is not necessary to address Hakea's alternative case based on Denham's failure to provide a subcontractor's statement. However, had it been necessary to decide that issue, I would have concluded that the right to withhold a payment for failure to provide a subcontractor's statement cannot displace a judgment debt, that, absent an injunction, Denham is entitled under the SOP Act to obtain judgment against Hakea based on the adjudication determination and for those reasons the provisions permitting a principal contractor to withhold any payment due under a contract for failing to provide a subcontractor's statement would not provide a defence to Denham's claim or provide a ground for granting a stay or an injunction.

65 That leaves the position of the DCT. It is not suggested that s 260-5 of Schedule 1 of the TAA 1953 operates to prevent the court from granting a stay or an injunction in respect of a judgment amount or an amount due under an adjudication certificate. Rather, it is submitted that the court should exercise its discretion to refuse a stay or an injunction because of the DCT's rights under that section. I do not accept that submission. The section is not concerned to adjust the rights between the payer and payee. Rather, it is concerned with

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putting the DCT in the shoes of the payee so that the DCT has any entitlement to the payment that the payee has. The rights as between payer and payee are to be determined in accordance with the legal principles applicable to their relationship. In this case, those principles indicate that the orders granting a stay and injunctions should continue.

Orders

66 On 29 July 2016, the court made the following orders in the BaptistCare Proceedings:

> 2 The order restraining the First Defendant [Denham] from taking any steps in relation to enforcement of adjudication determination no. 2016-TASC-017 of Rosemarie Risgalla dated 8 March 2016 made under the Building and Construction Industry Security of Payment Act 1999 (NSW) made on 26 May 2016, and extended on 3 June 2016, 17 June 2016 and 24 June 2016 and 1 July 2016, is extended until further order of the Court.
>
> 3 The order made on 3 June 2016 staying the Judgment/Order entered in the Sydney District Court by the First Defendant on 26 May 2016 in proceedings 2016/163105 until 5pm on 17 June 2016 or further order of the Court is extended until further order of the Court and the First Defendant is restrained by the order made on 26 May 2016 from enforcing that Judgment/Order by any action or process.

67 On the same day, the court made the following order in the Hakea Proceedings:

> 2 Without admissions on the part of the first defendant [Denham], the Court extends the operation of the order made on 8 April 2016, that the first defendant be restrained from executing upon any judgment resulting from the filing of its certificate under s24(1)(a) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (***the Stay***), until further order of the Court.

68 It is apparent from the terms of the orders that have been made that they continue until further order of the court. I have concluded that no further order should be made. Consequently, it is not necessary to make any substantive orders to give effect to these reasons for judgment.

69 I will hear the parties in relation to costs if costs cannot be agreed.

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