

**JUDGMENT : Gzell J** : Supreme Court New South Wales Equity Div : 3rd MAY 2006

- 1 The Duct Company Pty Ltd, the defendant in the proceedings in this Court, entered a judgment in the District Court by filing an adjudication certificate made under the *Building and Construction Industry Security of Payment Act 1999*. It sought a garnishee order from the District Court requiring the ANZ Bank to pay to it any moneys it owed to Advanced Mechanical Systems Pty Ltd, the plaintiff in the proceedings in this Court.
- 2 While that garnishee order was unsuccessful, it led Advanced Mechanical to file a notice of motion in the District Court seeking a stay of execution of the judgment entered by The Duct Company pending the determination of other proceedings Advanced Mechanical had instituted against The Duct Company in the District Court. That was done on 4 April 2006 when an interim order restraining The Duct Company from seeking to execute on the judgment until 7 April 2006 was made. It was submitted that the representatives of Advanced Mechanical were unaware of that interim relief.
- 3 The matter came before the District Court on 7 April 2006 when it was adjourned to 24 April 2006 for hearing. On the latter date, a programme for the hearing of the notice of motion, including the provision of evidence on each side, was made. No application was made on either occasion for interim relief in the form of a continuation of the stay of the judgment pending the resolution of the matters raised in the notice of motion.
- 4 It was submitted that as the parties were before the District Court and directions were given as to putting on evidence, the inference should be drawn that Advanced Mechanical was entitled to form the view that The Duct Company would take no further action to seek to enforce its judgment or that it would give notice to the District Court or to Advanced Mechanical about any intention on its part to seek any further garnishee orders.
- 5 I do not draw that inference. In my view, it must have been obvious to Advanced Mechanical that if one garnishee order had been sought by The Duct Company in seeking to perfect its judgment, there was every likelihood that it would seek further garnishee orders if it became aware of funds in the hands of a third party that were owed to Advanced Mechanical. In my view the appropriate course was to seek interim relief by way of a stay pending the hearing of the notice of motion.
- 6 What happened was that a further garnishee order was obtained from the District Court by The Duct Company addressed to Multiplex Constructions Pty Ltd. When knowledge of that event and that a sum of \$79,219.68 had been paid by Multiplex came to Advanced Mechanical, the current application was made in this Court for an order of the *mareva* type, preventing The Duct Company, its directors, servants and agents from disposing, removing, or causing or permitting to be disposed or removed, from the state of New South Wales, or otherwise dealing with, all its assets within the State of New South Wales, whether in its own name or not, and whether solely or jointly owned, other than assets over the value of \$100,000.
- 7 An application for such an order was made before me *ex parte* yesterday. I refused to make that order. In the alternative, Advanced Mechanical sought an order that the directors, servants and agents of The Duct Company be restrained from disposing of, or otherwise dealing with, any moneys received by it from Multiplex in answer to the garnishee order. I made an order in those terms limited to 5 pm today.
- 8 Advanced Mechanical seeks today an order that The Duct Company pay the \$79,219.68 to the Registrar of the District Court, that The Duct Company should not, pending determination of the notice of motion filed in the District Court, or any appeal therefrom, take any steps to enforce the judgment it has obtained in the District Court, and otherwise its summons be dismissed.
- 9 Had the appropriate action been taken at the time the matter came back before the District Court on 24 April 2006, there would have been no need for the proceedings in this Court. The judgment that has been secured in the District Court is one under the regime established by the *Building and Construction Industry Security of Payment Act 1999* following a determination and the issue of an adjudication certificate by the appropriate authorities.
- 10 It was submitted that it is inappropriate for me to exercise my discretion against granting the relief sought because that would be taking advantage of a lack of action on the part of Advanced Mechanical and would render nugatory the matters in the District Court.
- 11 There is a suggestion that The Duct Company was, at some stage, insolvent, although that evidence is disputed by The Duct Company, and that is one of the matters for resolution in the District Court.
- 12 I would regard the protection of the *status quo* upon lodging the application for a stay of the District Court judgment as fundamental. That means that the appropriate course was not taken in the proceedings before the District Court, rendering it necessary to seek the aid that has been sought in this Court.
- 13 Balancing against the interests of Advanced Mechanical the entitlement of The Duct Company to execution on its judgment and its utilisation of the ordinary procedures of the District Court to obtain the further garnishee order in the absence of any restraint upon its entitlement to do so, I do not propose to exercise my discretion to grant further relief in this Court in the form of the orders that are sought today, or otherwise.
- 14 I therefore dismiss the notice of motion and I dismiss the summons.
- 15 So far as costs are concerned, Advanced Mechanical submitted there should be no order as to costs on the basis that it was appropriate that the application was brought before this Court. In my view, however, that does not weight the balance against the ordinary order that costs follow the event. I propose to adopt that approach.
- 16 I order the plaintiff to pay the defendant's costs.

**Advanced Mechanical Systems v Duct Co P/L [2006] Adj/L.R. 05/03**

Mr J Young – Plaintiff instructed by Colins Biggers & Paisley Lawyers  
Mr R McKeand SC – Defendant instructed by Vincent CCL Pty Ltd