

JUDGMENT : Barrett J : Supreme Court of New South Wales : 24 February 2004

- 1 On 18 February 2004, I heard an application by the plaintiff in these proceedings for the grant of leave under s.440D of the **Corporations Act** 2001 (Cth), the defendant being a company subject to voluntary administration under Part 5.3A of that Act.
- 2 The substantive proceedings were commenced in the Technology and Construction List by summons filed in court on the evening of 18 December 2003. On that occasion, I made certain orders ex parte until the following day. When the matter came back before me on 19 December 2003, orders were made by consent of the parties to stabilise the position until 6 February 2004, the date to which the summons was then stood over. Part 5.3A administration supervened on 31 December 2003 when Mr Mr Hutchinson and Mr Gibbons were appointed administrators of the defendant by a secured creditor, Westpac Banking Corporation.
- 3 The application for leave under s.440D does not relate to the plaintiff's claims in the summons. As originally advanced, it related to a claim in a notice of motion filed on 11 February 2004 and returnable on 18 February 2004 for an order for summary judgment in favour of the plaintiff pursuant to Part 13 rule 2 of the **Supreme Court Rules** "in respect of part of the plaintiff's claim for the sum of \$1,826,385.00". That formulation presented an immediate difficulty for the plaintiff in that the summons did not, in terms, claim judgment for the sum of \$1,826,385.00 or, for that matter, any other sum. In that sense, the summons formed no kind of foundation for the summary judgment sought. The orders and relief claimed in the summons were confined to the following:
 - "1. *The Defendant be restrained from presenting for payment a cheque drawn by Westpac Banking Corporation on 18 December 2003 in the sum of approximately \$1,826,325.00 ('the cheque') issued by its branch at Concord following upon a demand made by the Defendant under a Bank Guarantee dated 24 February 2003 ('the Guarantee').*
 2. *The Defendant be restrained from making any further demand or call upon Westpac Banking Corporation under the Guarantee.*
 3. *The Defendant be restrained from appropriating, transferring, encumbering, disposing of or dealing in any other way with the proceeds of the cheque.*
 4. *Damages.*
 5. *Costs.*
 6. *Such further and other orders as this honourable Court may make."*
- 4 When the application for leave under s.440D of the **Corporations Act** came on for hearing, the plaintiff sought leave to amend the summons by renumbering paragraphs 4, 5 and 6 as 5, 6 and 7 and inserting a new paragraph 4 as follows:
 - "4. *The Defendant pay the Plaintiff the sum of \$1,826,385.00 from account number 032 000 289 461 with Westpac Banking Corporation Limited [sic]."*
- 5 By the end of the hearing, the plaintiff had, in an informal but sufficiently articulated way, altered and expanded its application for leave to amend the summons. The amendment in respect of which leave was eventually sought affected two areas of the summons. First, it was proposed that a different version of the foreshadowed paragraph 4 be introduced, that different version being:
 - "4. *Upon the plaintiff's undertaking to provide to the defendant a bankers undertaking in the form and upon the same terms as the bankers undertaking dated 24 February 2003 appearing as exhibit SF12 to the affidavit of Sydney Fischer dated 11 February 2004, the defendant pay to the plaintiff the sum of \$1,826,385.00 from account number 032 000 289 461 with Westpac Banking Corporation Limited [sic]."*

Second, the plaintiff sought to add to the statement of plaintiff's contentions called for by the form of summons in Practice Note 100 so that it would read as follows (the added material being underlined):

 - "1. *The Plaintiff ('Arpic') is and at all material times was a company duly incorporated and capable of suing by its corporate name and style.*
 2. *The Defendant ('Austin') is and at all material times was a company duly incorporated and capable of suing by its corporate name and style.*
 3. *On 18 February 2003, Jan Luikens, acting as an Adjudicator, appointed under the said Act, made a Determination, the effect of which required Arpic to pay to Austin or provide security for payment of an amount of \$1,826,385.00.*
 4. *On 24 February 2003, Arpic provided to Austin a Bank Guarantee securing the amount of the Determination pursuant to Section 23 of the Act.*
 - 4A. *The said bank guarantee was secured by a cash deposit of \$1,925,000 to an interest bearing term deposit account of the plaintiff with Westpac Banking Corporation No 032-003-308588.*
 5. *There are disputes between Arpic and Austin, the subject of an Arbitration listed for hearing in May 2004.*
 6. *Unlawfully and in contravention of Section 23(4) of the Act, on 18 December 2003, Austin made a demand upon the Bank Guarantee to Westpac Banking Corporation Limited [sic] and received payment of \$1,826,385.00.*
 - 6A. *The said payment was made by Westpac Banking Corporation from the proceeds of the said interest bearing term deposit account referred to in paragraph 4A.*

7. In the premises, Arpic is entitled to the repayment of the sum of \$1,826,385.00 and to damages at law and in equity."

- 6 The plaintiff's application for leave to amend the summons was opposed and there was debate before me as to whether that application could itself be pursued without a grant of leave under s.440D. The matter was ultimately dealt with on the footing that the application for s.440D leave should be regarded as seeking such leave not only to pursue the summary judgment application but also in respect of the application for leave to amend should it be determined that s.440D applied to that application. On that basis, there are two questions for decision at this point: first, whether s.440D applies to the application for leave to amend the summons in the way eventually formulated by the plaintiff; and, second, whether leave under s.440D should be granted in respect of the application for summary judgment and, if needed, in respect of the application for leave to amend the summons.
- 7 This description of the somewhat untidy procedural position that unfolded before me will be better understood in the light of a brief description of the nature of and background to the substantive dispute.
- 8 The defendant is a building contractor. In November 2001, the defendant and the plaintiff entered into a contract under which the defendant was to carry out for the plaintiff certain works involving the construction of a residential flat development at Dee Why. The defendant in due course took possession of the site and commenced work. On 31 December 2002, the defendant lodged progress claim No 13 under the contract. On 8 January 2003, the defendant served a payment claim under the **Building and Construction Industry Security of Payment Act 1999** (which I shall call "the **BCI Act**"). On 16 January 2003, there was issued a certificate which was a payment schedule under the **BCI Act**. Thereafter, an adjudication under the **BCI Act** was made by Mr Luikens, an appointee of the Institute of Arbitrators and Mediators Australia. His determination dated 18 February 2003 stated an adjudicated amount of \$2,761,312 inclusive of GST. As the plaintiff had already paid \$934,927 in respect of progress claim No 13, a balance of \$1,826,385 was regarded as payable pursuant to the determination. The due date for payment determined by Mr Luikens was 21 January 2003.
- 9 I pause at this point to say something about the **BCI Act**, noting that it is common ground that, because the relevant payment claim was served on 8 January 2003, Part 3 of Schedule 2 to the Act as now in force causes the provisions governing the present case to be those that were in force before the commencement of the **Building and Construction Industry Security of Payment Amendment Act 2002** on 3 March 2003. Under the provisions thus made applicable, it was the function of an adjudicator such as Mr Luikens to determine the amount of the relevant progress payment (if any) to be paid by the party liable to make such a payment and the date on which the payment was to be made. Where, as in the present case, the adjudicator determined that an amount was to be paid, s.23 became relevant:

"23 Respondent's obligations following adjudicator's determination

- (1) If an adjudicator determines an adjudication application by determining that the respondent must pay an adjudicated amount to the claimant, the respondent:
- (a) must pay that amount to the claimant, or
 - (b) must give security for payment of that amount to the claimant pending the final determination of the matters in dispute between them.
- (2) The security given by a respondent may be in any of the following forms:
- (a) an unconditional promise by a recognised financial institution to pay to the claimant, on demand, the adjudicated amount, or
 - (b) payment of the adjudicated amount into a designated trust account, or
 - (c) such other form as may be agreed between the claimant and the respondent.
- (3) If the respondent is a public authority, the security may be in the form of a certificate by the authority to the effect that sufficient money will be legally available for payment of any amount up to the adjudicated amount if and when any such amount becomes payable.
- (4) Except with the consent of the parties, it is unlawful for the claimant to enforce any security given under this section until at least 2 business days after any matters in dispute between them in connection with the progress payment to which the security relates have been finally determined.
- (5) For the purposes of subsection (4), a determination becomes final:
- (a) in the case of a determination from which there is no right of appeal or review, when the determination is made, or
 - (b) in the case of a determination from which there is a right of appeal or review, when the right of appeal or review expires or (if the determination becomes subject to appeal or review proceedings) when those proceedings have been finally disposed of."

- 10 Having received Mr Luikens' determination, the plaintiff decided to take the course described in ss.23(1)(b) and 23(2)(a). To that end, it delivered to the defendant on 24 February 2003 an undertaking given by Westpac Banking Corporation which read in part as follows:

"BANKER'S UNDERTAKING

To: Austin Australia Pty Limited ABN 22 000 363 020 of 383 Pacific Highway, Artarmon NSW 2064 (the 'Favouree')

At the request of: ARPIC PTY LIMITED ACN 000 184 967 (the 'Customer')

and in consideration of the Favouree accepting this Undertaking as Security for the payment of the unpaid balance between the adjudicated amount of \$2,761,312.00 (including GST) and the amount already paid on progress drawdown report No. 13 of \$934,927.00 (inclusive of GST) as a result of an adjudication under the Building and Construction Industry Security of Payment Act 1999 and in relation to a building contract dated 28 November 2001 between Austin Australia Pty Limited ABN 22 000 363 020 and Arpic Pty Limited ACN 000 184 967 for a development at 910 Pittwater Road, Dee Why, WESTPAC BANKING CORPORATION (the 'Bank') unconditionally undertakes to pay on demand any amount or amounts which may from time to time be demanded in writing purporting to be signed by or on behalf of the Favouree, up to a maximum aggregate sum of \$1,826,385.00 (the 'Amount').

Payment of the Amount or any part thereof will be made by the Bank to the Favouree without reference to the Customer and regardless of any notice from the Customer to the Bank not to pay any amount."

- 11 Mr Stratford, the plaintiff's financial controller, deposes that the banker's undertaking "was secured by" a cash deposit of \$1,925,000 made by the plaintiff into an interest bearing term deposit account with Westpac. In other words, the plaintiff lodged that deposit with Westpac to obtain the issue of the undertaking and on the footing that Westpac could resort to the deposit if called upon to pay pursuant to the understanding. The difference between the sum of \$1,826,385 the subject of the banker's undertaking and the sum of \$1,925,000 just mentioned, being \$98,615, represents approximately one year's interest.
- 12 Disputes between the plaintiff and the defendant under the building contract became the subject of a reference to arbitration. The arbitration is expected to occur over two weeks in May-June 2004. It is the plaintiff's contention that these disputes include disputes concerning progress claim No 13. The defendant appears to be claiming some \$1.6 million against the plaintiff in the arbitration, while the plaintiff is pursuing claims against the defendant of some \$1.05 million and has foreshadowed an additional claim of the order of \$9 million.
- 13 On the afternoon of 18 December 2003, Mr Fischer, a director of the plaintiff, was informed by an employee that an officer of Westpac had telephoned to say that the defendant had made demand under the undertaking and that Westpac had honoured the demand by making payment to the defendant of the total amount the subject of the undertaking. Thereafter, the plaintiff received \$98,615 from Westpac which had, as agreed, resorted to the interest bearing term deposit lodged by the plaintiff to reimburse itself for the payment made to the defendant under the undertaking.
- 14 Upon learning of the action taken by the defendant to obtain payment under the banker's undertaking, the plaintiff acted promptly in obtaining ex parte orders against the defendant on the evening of 18 December 2003. Those orders were, as I have said, replaced by an agreed interlocutory regime the following day. Pursuant to that regime, the defendant submitted to an order that it pay the sum of \$1,826,325 into a designated account of the defendant with Westpac (account No. 289461, BSB 032 000) and directed Westpac not to dispose of or deal with those funds (or interest) except upon production of an order of the court allowing the defendant to draw upon the account. There was also an order that, until further order, the defendant not deal with the moneys in the account. Westpac was given notice of these orders.
- 15 The present position is thus one in which the sum of \$1,826,325 in question is represented by a credit balance in favour of the defendant upon a discrete account with Westpac and the defendant is for the time being restrained from resorting to that credit balance. Westpac, although not at this stage a party to the proceedings, made submissions through Mr Simpkins SC upon the hearing of the application for leave under s.440D. He made it clear that Westpac considers the defendant to be indebted to it on accounts other than the account the subject of the orders of 19 December 2003 and that Westpac has under consideration the question whether it may (and, if so, should) exercise its banker's right of set-off or to combine accounts, thereby applying the credit balance on the account the subject of the orders of 19 December 2003 against the debit balance on one or more other accounts.
- 16 The background thus sketched is sufficient to allow me to approach the first of the questions for decision, namely, whether s.440D of the **Corporations Act** operates in relation to the plaintiff's application for leave to amend the summons in the ways described in paragraph [4] above. Section 440D is in the following terms:

"Stay of proceedings

- (1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except
 - (a) with the administrator's written consent; or
 - (b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.
- (2) Subsection (1) does not apply to:
 - (a) a criminal proceeding; or
 - (b) a prescribed proceeding."

- 17 The **Corporations Act** employs several different verbal formulations to convey messages generally equivalent with that in s.440D. While that section says that a relevant proceeding "cannot be begun or proceeded with", ss.444E(3) and 471B prefer to impose a disability on a "person" (a person "cannot begin or proceed with ... a proceeding") while the words in s.500(2) are "no ... proceeding shall be proceeded with or commenced". So far as these operative words are concerned, I do not think there is any difference in meaning between the several provisions. There is, in each case, a prohibition that precludes any step properly characterised as commencing (or beginning) or "proceeding with" a "proceeding" of the relevant kind. In the case of s.440D as it applies to the present circumstances, the prohibition is upon any step properly regarded as "proceeding with" the "proceedings"

commenced by the summons filed on 18 December 2003, they being "proceedings in a court against the company or in relation to any of its property".

- 18 The general purpose of amendment under Part 20 of the **Supreme Court Rules** is to enable the real questions in dispute between the parties to be tried. In the present case, the amendments proposed by the plaintiff would add to the existing claims for injunctive relief in respect of moneys in the separate Westpac account of the defendant a claim that those moneys be paid by the defendant to the plaintiff, subject to the plaintiff's furnishing to the defendant a banker's undertaking corresponding with that originally given by the plaintiff and later called upon by the defendant. The amendment would also add to the statement of the plaintiff's contentions in a way intended to give further insight into the way the plaintiff bases its claims. The overall effect is that the plaintiff would advance an additional claim in respect of the asserted wrongs already the subject of the claims in the summons. The statement of the asserted wrongs would remain essentially unchanged (although somewhat amplified by the additions to the statement of plaintiff's particulars pursuant to Practice Note 100) but the entitlements said by the plaintiff to accrue to it by reason of those wrongs would be expanded.
- 19 Mr Nicholls of counsel, who appeared for the plaintiff, submitted that the application for leave to amend did not fall within s.440D because it is merely an interlocutory application made by the party who is not the "aggressor" in the litigation. In making this submission, he relied on the decision of Finn J in **Pasdale Pty Ltd v Concrete Constructions** (1995) 19 ACSR 693 and the proposition that the defendant, being the party who resorted to the bank undertaking (in the plaintiff's view wrongfully), should be regarded as the "aggressor".
- 20 The **Pasdale** case concerned proceedings in which a plaintiff sued a defendant upon causes of action in contract. Three months after the action was initiated, the plaintiff became subject to Part 5.3A administration. The defendant afterwards filed an application seeking security for costs. Before that application was heard, the plaintiff executed a deed of company arrangement, thus ending the administration. Finn J held that the period during which s.440D operated had ended before he heard the motion for security. He proceeded nevertheless to deal with the proposition that the section would have precluded pursuit of that application by the defendant. In concluding that it would not, Finn J said: *"Considered in this light, and bearing in mind the purposive construction enjoined by s 109H of the Corporations Law, the words "a proceeding in a court against the company" are not in my view properly amenable to a construction which would cover a step taken in court by a respondent to an application brought against it by a company in administration. If such were the case the result would be that, while the company in the pursuit of its claim against the respondent could approach the court in the ordinary way for orders of a procedural or interlocutory nature, the respondent would be unable to so act to protect its own interests without first obtaining either the consent or the leave specified by s 440D. In other words the aggressor-applicant could act in an unfettered way while the defender-respondent would be procedurally disadvantaged. Far from holding at bay a claimant on the company or its property (which is a purpose of the moratorium period), such a construction would privilege the company in proceedings which it had itself commenced. While Pt 5.3A does provide a form of preferential treatment for a company in administration, preferential treatment of this character is, in my view, quite unrelated to the object and purpose of that Part."*
- 21 Finn J's observations were confined to the situation where a defendant against whom proceedings have been brought by a company to which s.440D comes to apply seeks to take some interlocutory step in those proceedings. His Honour's obiter conclusion was really that, from the perspective of a company in administration, s.440D operates as a shield but not as a sword. If proceedings are initiated by that company (whether before or after administration), so that it is the "aggressor", a step of an interlocutory kind taken by the defendant is not, on Finn J's approach, a step that involves "proceeding with" the "proceeding" initiated by the company itself.
- 22 Reservations about Finn J's decision were expressed by Santow J in **Simoon Pty Ltd v Renbay Systems Pty Ltd** (1995) ACSR 415 but, in the end, I do not need to pursue the matter. This is because the proceedings with which I am now concerned are proceedings in which the only relief sought is relief against the company in administration (that is, the defendant). Whatever may be the rights and wrongs of the circumstances in which the defendant made demand and received payment under the banker's undertaking, the "aggressor", if such an emotive term has any utility (which I strongly doubt), is, in the context of these proceedings, the plaintiff; and the plaintiff's application for leave to amend, by seeking to expand the claims against the defendant company in administration, represents a means of progressing or furthering the proceedings already on foot against that defendant. Pursuit of that application therefore entails "proceeding with" those existing proceedings.
- 23 The conclusion that the plaintiff's application for leave to amend is caught by s.440D is, to my mind, clear and inescapable. The plaintiff's application for leave under s.440D should therefore be dealt with on the footing that such leave is sought in respect of both the application for leave to amend the summons and the application for summary judgment.
- 24 Having reached that point, I should say something more about the Part 5.3A administration to which the defendant is subject. It commenced, as I have said, on 31 December 2003. The first meeting of creditors was held on 8 January 2004. In the normal course of events, the deadline for the holding of the second meeting of creditors required by s.439A would have fallen towards the end of January 2004 but, on 21 January 2004, the court made an order extending the convening period to 31 March 2004. Mr Hutchison, one of the administrators, gives an account in his affidavit of 16 February 2004 of a number of matters relevant to the administration and the ultimate fate of the defendant. For the present, the administrators are continuing to operate the defendant's business. They consider that this is desirable in order to enhance the chances of a more beneficial outcome for

creditors through the sale of the business as a going concern in the context of a deed of company arrangement, although no deed proposal seems to be in the offing at this point. The administrators' present view is that they are likely to recommend to creditors at the second meeting that the defendant be allowed to pass into liquidation.

25 Mr Hutchison refers in his affidavit to the magnitude of the administrators' task in coming to a complete understanding of the defendant's financial position. That, of course, is an essential step in the discharge of the administrators' responsibility to give an account of relevant considerations to creditors so that they may make at the second meeting an informed decision as to the future of the company. Mr Hutchison deposes that, at 31 December 2003, the defendant was a party to 23 construction contracts in progress and that "numerous other contracts were either pending or in the maintenance period phase". The value of the 23 contracts was \$126,511,760. The contracts were and continue to be in various states of completion. Mr Hutchison's affidavit continues: *"It has been necessary for the Administrators to determine whether it is worthwhile completing each construction contracts. Of concern to the Administrators is the fact that terminating any particular contract immediately crystallises a debt in the administration. These debts may be of significant value (i.e. several million dollars). To ensure the best return to creditors of Austin an assessment of each contract must be carried out. The construction contracts are also complex and involve many parties and issues. In summary, the following issues need to be considered.*

- (a) *Many of the contracts are of dubious profitability. A review of the contracts has been conducted to determine the value, if any, of the contracts to Austin. This has occupied a significant amount of time.*
- (b) *The amount of work required to complete each contract and the potential ongoing liability to the administration of completing each contract.*
- (c) *Whether any of the contracts can be assigned or novated to a third party on commercial terms. Negotiations are ongoing in respect of this.*
- (d) *The rights of subcontractors and any outstanding claims they have, including how they should be paid should they refuse to return to work until all outstanding obligations are satisfied. Negotiations are ongoing in respect of this.*
- (e) *The insurance and liability issues of adopting, varying, assigning or novating contracts.*
- (f) *The cash flow implications of decisions made with respect to contracts.*
- (g) *The terms under which approximately 23 Guarantees and Insurance Bonds have been issued to clients and third parties."*

26 Mr Hutchison refers in his affidavit to difficulties in determining amounts owed to and by the defendant. A significant amount of time continues to be spent in assessing continuing claims from sub-contractors. There are also a number of unresolved retention of title claims against the defendant which is, quite separately, a party to fifteen separate legal actions of which Mr Hutchison is aware. The arbitration between the present parties is one of these. Mr Hutchison describes the matters at issue in that arbitration as "complicated" and says that the administrators will require the help of an expert to form a view about them.

27 In relation to the particular matter of the controversy between the plaintiff and the defendant, Mr Hutchison says: *"I have the following concerns as to any steps being taken in respect of any aspect of the Arpic litigation.*

- (a) *The Administrators are not in a position to prudently give instructions in respect of the Arpic litigation. I have chosen not to expend funds that may otherwise be available to Austin's creditors, in causing myself and my staff to become acquainted with the voluminous material filed in the arbitration and in having Corrs Chambers Westgarth or Senior Counsel perform work and give advice. I would not normally undertake such an assessment in the course of an administration.*
- (b) *The amount of money involved is significant in the circumstances of the administration of Austin. It is my primary concern to preserve Austin's position pending the outcome of the 439A meeting.*
- (c) *The purpose of administration under 5.3A is not to conduct extensive litigation but rather to assess the situation of the company with a view to continuing its business. The Administrators have applied the limited resources available to us in undertaking this assessment."*

It is in this context that I must approach the application for leave to proceed under s.440D.

28 An early decision as to the scope and meaning of s.440D was that of Young J in **Foxcroft v The Ink Group Pty Ltd** (1994) 12 ACLC 1,063 (reported as **Foxcraft v The Ink Group Pty Ltd** at 15 ACSR 203). It is appropriate to quote from his Honour's judgment as follows: *"There is, however, quite a big difference between a company in administration and a company in liquidation. A company in administration is seeking to continue to trade and is, in accordance with s 435A seeking to maximise the chance of it remaining in business. A company in liquidation is one where the liquidator is seeking not to trade but to realise the company's assets as soon as possible for the best price, in order to be able to distribute the net available funds to the creditors and in some circumstances, the members.*

The provisions of Pt 5.3A as exemplified in sections such as 437C 437F 440C and 440D provide that there shall be a complete freeze of proceedings against the company during the administration so that the administrator can have time to assess the situation, and the company's creditors have an opportunity to work out the net position and adopt an attitude under s 439C which will be in their common interest. To allow one creditor or potential creditor to proceed would not only take the administrator's attention from what he needs to do under the division in a relatively short

period of time, but it would also involve costs in running the legal action on behalf of the administrator, as well as perhaps giving the claimant some advantage over the other creditors or potential creditors.

Accordingly, it seems to me that an application under s 440D will rarely be granted. It may be that where the company is insured against the liability the subject of the proceedings, the administrator will ordinarily consent or the court will give conditional leave, but outside this field it is hard to see situations where it would be proper to grant leave, though doubtless there are such situations."

- 29 To like effect was the approach taken by Austin J in **Brian Rochford Ltd v Textile Clothing & Footwear Union of NSW** (1998) 30 ACSR 38: "In the present case I must have regard to the policy of Pt 5.3A and in particular, the need to give the administrator a chance to develop proposals which would preserve the value of the company as a going concern, given the large discrepancy between that value and the company's value in a liquidation sale. Although the administration in this case has continued for an unusually long time, I must take into account the importance of the administrator having every opportunity to bring mature proposals to the creditors before the deadline of 22 December 1998. I also note the administrator's concern that if he is required to reinstate Ms Petris it may be necessary for him to dismiss someone else, at risk of personal liability, and his concern that if the defendant is allowed to proceed with the present application, there might be other applications from dismissed employees during the administration (though presumably on grounds different from the present application). Considered together, these are weighty considerations which imply that leave ought not to be granted."
- 30 Although it may thus be expected that a grant of leave under s.440D will be exceptional, it is necessary for the particular proceeding and its impact in the context of the administration be examined in order to decide whether it may be one of the rare instances warranting leave. For that purpose, the summary judgment and the amendment applications should be viewed as a whole since their combined effect, if successfully pursued, will be to produce an order that the defendant pay the plaintiff \$1,826,385 upon the plaintiff's giving the defendant a banker's undertaking to pay \$1,826,385 on demand.
- 31 The way in which the plaintiff articulates a claim for such relief is not altogether clear. What is clear, however, is that the plaintiff attaches particular weight to s.23(4) of the **BCI Act** and its statement that, except with the consent of the parties (here, the plaintiff and the defendant), it is "unlawful" for a person in the defendant's position to "enforce" a security given under s.23 until at least two business days after "any matters in dispute between them in connection with the progress payment to which the security relates have been finally determined". The plaintiff's thesis is that the dispute between the plaintiff and the defendant in connection with progress payment No 13 will not be finally determined until an award is made in the arbitration now on foot and that the defendant's action in making demand upon, and receiving payment from, Westpac under the undertaking was action to "enforce" the s.23 security contrary to s.23(4), which action was "unlawful". Assuming that to be so, there would be a question as to the consequences, given that the **BCI Act** itself does not in any way indicate the effect of the illegality it creates. The plaintiff would presumably seek to argue that the statute created by implication a private right of action (cf *Slavin v Germantown Fire Insurance Co* 174 F2d 799 (1949)) entitling it to some form of interest in the moneys now held by the defendant in the separate account, such interest perhaps arising by way of constructive trust of the kind equity imposes in cases of fraud and other circumstances of unconscionability – or perhaps by way of equitable lien or charge upon the particular fund. At all events, the claim would no doubt be one by which a proprietary remedy of a restitutionary kind was asserted on the basis of unjust enrichment.
- 32 For s.440D purposes, I do not consider a claim of that kind to be different, in substance, from a claim in debt or for damages. Its effect, if successful, will be to deplete the existing resources in the hands of the company in administration. But, of course, the resource represented by the credit balance in the separate bank account is subject to the interlocutory regime that prevents resort to it by the defendant pending further order. It is true that Westpac is not constrained by that regime and, unless and until subjected to some order founded on the interest the plaintiff appears to assert, might seek to appropriate the credit balance by way of set-off or combination of accounts. It is a matter for the plaintiff whether it seeks to bolster its present position by asserting an entitlement to some stabilising order against Westpac on the basis of the proprietary right it apparently considers itself to have.
- 33 The plaintiff's claim, based as it is on certain views as to the consequences of doing that which s.23(4) declares to be "unlawful" without indicating what follows, does not seem to me to be a straightforward or simple claim even though, as a matter of general impression, one can see why there would be an expectation that matters should be restored to the state in which they existed before the defendant made demand under the undertaking on 18 December 2003. Converting general impression into articulated legal argument may, in this apparently novel situation, involve some difficulties. At all events, the plaintiff's legal entitlement to a money judgment in its favour in accordance with the summons as the plaintiff wishes to see it amended cannot be said to be self-evident. Any case for summary judgment must accordingly be seen as not strong.
- 34 None of this, it seems to me, brings this case within the exceptional category for s.440D purposes according to the formulations in **Foxcroft** and other cases. Indeed, the interlocutory regime provides a measure of protection for the present plaintiff that was lacking in those cases. The administrators, on Mr Hutchison's evidence, have quite a complex administration on their hands and believe that, from the point of view of creditors' interests, it would be counterproductive to become embroiled in this litigation, particularly as they see that as involving a need to go into the apparently complex details of the arbitration. It is true that the plaintiff will be out of pocket on a

continuing basis for interest if matters remain in their present state. But in that respect the plaintiff's position does not differ from that of a debt claimant. Considerations that applied in *Pioneer Water Tanks (Australia 94) Pty Ltd v Delat Pty Ltd* (1997) 25 ACSR 752, a case on which the plaintiff relied, therefore do not apply here. In that case, a patent owner sued to restrain a course of conduct by the company in administration involving an ongoing series of patent infringements.

- 35 All in all, the general principle laid down in **Foxcroft** and applied in later decisions is relevant to this case. If, as expected, the defendant goes into liquidation at the end of March, a different leave to proceed regime involving different considerations will apply. A different leave regime will also apply if a deed of company arrangement is executed. If the administration ends, the plaintiff will be free to pursue its claims without leave. Pending one of these eventualities, the situation is one in which the administrators should be allowed to continue with their central tasks, undistracted by the plaintiff's applications in respect of which leave is sought.
- 36 The application for leave under s.440D in respect of the plaintiff's application for leave to amend the summons and the summary judgment application is refused.

Mr N A Nicholls – Plaintiff instructed by Colin Biggers & Paisley – Plaintiff
Mr T D Castle – Defendant instructed by Gadens - Defendant
Mr J B Simpkins SC - Westpac Banking Corporation