

Judgment of the court before Hodgson JA; Tobias JA; Basten JA, Court of Appeal, Supreme Court of New South Wales.
18th September 2006

- 1 This matter involved an appeal from a judgment of Gibson DCJ in the District Court. Her Honour gave judgment on 31 March 2006 in favour of the Respondent, requiring by an order made on 21 March 2006, the Appellant to pay a sum of money in excess of \$500,000.
- 2 The Appellant filed a notice of appeal and sought a stay of the judgment below. On 3 April 2006 that application came before the Court. On that hearing, counsel for the Appellant handed up terms of an agreement between the parties pursuant to which the Appellant agreed to pay the amount of the judgment debt to the Respondent subject to certain conditions.
- 3 Pursuant to that agreement, the Appellant did not pursue its application for a stay. It did, however, seek expedition, which was granted.
- 4 On 3 April 2006 the Court noted the terms of the agreement by which the appellants agreed to pay the respondent the "judgment sum", subject to certain conditions which were set out in paragraph 1 of short minutes of order. Mr Sibtain, counsel for the Respondent, indicated that he had authority to give and did give the undertaking set out in paragraph 3 of the same document, being an undertaking given by a Mr Con Constantine, a person associated with the Respondent. The undertaking was to the following effect:
"1.3 Mr Con Constantine undertakes to the Court that if:
 - (a) the appellants pay the judgment sum;*
 - (b) the appellants are successful in the appeal and the Court sets aside the order of Gibson DCJ for payment of the judgment sum; and*
 - (c) the respondent does not repay the judgment sum (and, if the decision and orders of the Court of Appeal so require, any costs paid by the appellants to the respondent pursuant to any order of Gibson DCJ (the costs sum)) to the appellants within 28 days of the order setting aside referred to in 3(b) above or such shorter time as the Court may order;**or if the respondent goes into administration of any kind or is wound up before the determination of the appeal and as a result the appeal cannot or does not proceed to determination he will repay to the appellants on demand and without set-off or deduction of any kind the judgment sum and the costs sum (if applicable) plus interest on any said sum accruing daily from the date it was paid by the appellants to the respondent to date of payment by him at the rate prescribed from time to time in respect of unpaid judgments of the Supreme Court of New South Wales."*
- 5 On 28 August 2006 the Court handed down judgment allowing the appeal and setting aside the judgment in the District Court. No order was sought at the hearing of the appeal requiring restitution of the judgment sum, which had by then been paid: accordingly, no such order was made. However, pursuant to leave granted when the judgment was handed down, by submissions dated 4 September 2006, the Appellants seek the following order:
The respondent shall pay to the appellants on 11 September 2006 the sum of \$600,726.07 ("the repayment sum") being the sum of:
 - (a) \$581,026.46 paid to the respondent by the appellants in satisfaction of the judgment hereby set aside together with interest to the dates of payment of that sum ("the judgment sum"); and
 - (b) \$19,699.61 being interest on the judgment sum at the rate of 9% per annum from the dates of payment by the appellants to the respondent of the judgment sum to 11 September 2006,together with interest at the rate 9% per annum on any amount of the repayment sum unpaid as at 11 September 2006 until such amount is paid.
- 6 The power of the Court to make an order for restitution, with interest, has been adverted to in a number of cases, including, recently, *Ambulance Service of New South Wales v Worley (No. 2)* [2006] NSWCA 236 at [25]-[34]. There is undoubtedly power to make such an order: the question is whether this Court should now make such an order it not having been sought, presumably through inadvertence, at the hearing of the appeal.
- 7 For reasons which are not explained, the agreement pursuant to which the application for a stay was abandoned, did not include any condition that the Respondent repay the judgment sum if the appeal was upheld. However, it may be inferred from the fact that the undertaking to the Court given by Mr Constantine did not require him to make any payment until a period of 28 days had elapsed from the date of the judgment of the Court, within which the Respondent did not repay the judgment sum, that the Respondent had 28 days to make repayment. Given the terms of that agreement, and on the understanding that Mr Constantine was a person able to control the Respondent, no reason is shown why this Court should order restitution to be made at a date within 28 days of the judgment.
- 8 The order sought requires that the Respondent repay the judgment sum "on 11 September 2006", which is the fourteenth day after the date of judgment. An order in those terms should not be made, to the extent that it would be inconsistent with the apparent agreement made between the parties.
- 9 There is an argument that no order should be made. Neither the Respondent nor the Court should be vexed, after delivery of judgment, with requests for orders, the need for which should reasonably have been anticipated at

the hearing, and clearly had been anticipated (perhaps belatedly) because the application for leave to seek a further order was made immediately judgment was delivered. On the other hand, if the order is an appropriate one and would, in the circumstances of the case, have been made as a matter of course if it had been sought at an appropriate time, the justice of the case requires that it should now be made in appropriate terms.

10 In the event, the Appellant should have its order, in terms consistent with the agreement, but should bear its own costs of the application. Accordingly, the orders of the Court made on 28 August 2006 will be varied as follows:

(1) Vary order 5 to read: *“Subject to order 10, the Respondent pay the Appellants’ costs of the appeal.”*

(2) Add two further orders in the following terms:

“(9) Order that the Respondent, on or before 25 September 2006, repay to the Appellants the sum of \$581,026.46 paid by the Appellants to the Respondent, together with interest thereon calculated at the rate of 9% from the date of payment by the Appellants to the day of repayment by the Respondent;

(10) Each party to bear its own costs of this application.”

Mr R. Margo SC/Mr J.J. Young - First and Second Appellants instructed by Joe Ryan Solicitor, Bondi Junction
Mr M. Rudge SC/Mr D.R. Sibtrain – Respondent instructed by Gadens Lawyers, Sydney
Mr I. Mescher – Intervenor instructed by Crown Solicitor's Office, Sydney - Intervenor