General Homes P/L v Jonathon B & Leanne A Caelli, Johanne Tobin & Mediate Today t/a Adjudicate Today

JUDGMENT : BERGIN J. Supreme Court, New South Wales. Equity Division, T&C List. 11th May 2007

1 The plaintiff, General Homes Pty Limited, commenced proceedings by the filing of a Summons on 16 November 2005 seeking a declaration that the Determinations purportedly made by an adjudicator pursuant to the *Building and Construction Industry Security of Payment Act* 1999 (the Act) are void. The plaintiff also sought an order that Jonathon B & Leanne A Caelli t/as JC Electrical (the defendant), be restrained from taking any steps to enter or to enforce judgment in respect of the Determinations. The plaintiff also sought an order in the nature of certiorari quashing the Determinations and an order staying those Determinations.

Procedural background

2 The defendant registered the Adjudication Certificate as a judgment in the Bankstown Local Court on about 11 November 2005 and Garnishee Orders were made consequent upon that judgment. On 2 December 2005 Einstein J made consent orders that particulars be requested by the defendant and answered by the plaintiff by 20 January 2006; that the defendant file points of defence by 10 February 2006; that the plaintiff file and serve its evidence by 30 March 2006; that the defendant file and serve its evidence by 24 March 2006; and re-listed the matter on 24 March 2006.

3 On 17 January 2006 the Bankstown Local Court granted a *"stay of proceedings"* on the plaintiff's ex-parte application and listed the Motion for a stay on 21 February 2006 at Burwood Local Court. On 21 February 2006 that Motion was marked *"not reached"*.

4 On 9 March 2006 the defendant's solicitors wrote to this Court requesting the matter be re-listed in the Technology & Construction List on 10 March 2006 because the plaintiff had failed to respond to the defendant's request for particulars. That letter also claimed that the defendant's position was being prejudiced and that no monies had been paid into Court *"as is a requirement of section 25(4)(b)"* of the Act.

Notice of Motion

5 On 10 March 2006 I granted leave to the defendant to file a Notice of Motion to strike out the plaintiff's claim for failing to prosecute it with due despatch. I directed that the defendant file and serve that Motion by 17 March 2006 together with any affidavits in support; that the plaintiff file any evidence in response by 23 March 2006; and that the Motion be listed for hearing on 24 March 2006.

6 On 15 March 2006 the defendant filed a Notice of Motion in which the following orders were sought:
1. These proceedings be struck out.
2. Stay upon proceedings at Bankstown Local Court in plaint number 1286 of 2005 be lifted.
3. The plaintiff pay the first defendant's costs of this motion and the proceedings.

7 On 24 March 2006 I made Consent Orders in the following terms:
1. The first defendant to serve points of defence by 13 April 2006.
2. The plaintiff to serve evidence upon which it intends to rely by 4 May 2006.
3. The first defendant to file and serve evidence upon which they intend to rely by 25 May 2006.
4. Re-listed for further directions on 26 May 2006.
5. First defendant to file and serve Amended Notice of Motion and any affidavit by 31 March 2006.
6. Plaintiff to file and serve affidavits in reply to Notice of Motion by 13 April 2006.
7. Re-list Notice of Motion before Court on 21 April 2006.

Amended Notice of Motion

8 The defendant filed an Amended Notice of Motion on 31 March 2006 in which the following orders were sought:
1. These proceedings be struck out.
2. Stay upon proceedings at Bankstown Local Court in plaint number 1286 of 2005 be lifted.
3. The amount of $51,007.09 consisting of $49,434.66 adjudication amount plus $1,572.43 interest from 11 November 2005 until 20 March 2006 at the rate of 9% to be paid into Court pending the determination of the proceedings.
4. The plaintiff to pay the first defendant's costs of this Motion and the proceedings.
5. Such further other orders as the Court deems appropriate.

9 On 21 April 2006 I made the following consent orders:
1. Notice of Motion stood over into directions list on 26 May 2006.
2. Any amended pleadings to be filed by first defendant within two weeks (by 5th May 2006).
3. Written submissions by both parties to be exchanged by 19 May 2006.
4. First defendant to file and serve any affidavit within two weeks (by 5th May 2006).

Notation:

1. *The first defendant will seek a transfer to a Commercial List Duty Judge on 26 May 2006 for the purpose of determining the Notice of Motion or any interlocutory application filed by 5th May 2006.*

10 The defendant filed a Defence on 10 May 2006 generally denying that the plaintiff was entitled to the relief sought in the Summons.

Administrators appointed

11 On 24 May 2006 administrators were appointed to the plaintiff pursuant to a resolution of the sole director in accordance with section 436A of the *Corporations Act* 2001. On 25 May 2006 the administrators wrote to the defendant's solicitors in the following terms:

I refer to the above proceedings which I understand are due to be heard by the Supreme Court on 26 May 2006.

I advise that Blair Pleash and I were appointed Administrators of the Company on 24 May 2006, pursuant to a resolution of the Sole Director in accordance with Section 436A of the Corporations Act 2001.

I refer to Section 440D of the Corporations Act 2001, Stay of Proceedings, which prescribes that "During the administration of a company, a proceeding in a court against a company or in relation to any of its property cannot be begun or proceed (sic) with, except:

a) with the administrator's written consent; or

b) with leave of the Court and in accordance with such terms (if any) as the Court imposes.

In this regard I request that you provide details of the action to my office as soon as possible.

I advise that I do not intend to be represented at the aforementioned hearing.

I will request that this correspondence be attached to the matter's file.

12 On 25 May 2006 the Administrators wrote to the Registrar of this Court advising of their appointment, enclosing a copy of their letter to the defendant's solicitors and requesting that the letters be placed on the file.

26 May 2006

13 On 26 May 2006, when the defendant's Notice of Motion was listed for directions, Ms Frazer appeared for the defendant and there was no appearance for the plaintiff or the Administrators. In written submissions addressed orally, although not transcribed, Ms Frazer submitted that the defendant did not need leave to proceed against the plaintiff, notwithstanding the appointment of the Administrators. It was submitted that the requirement in s 440B of the *Corporations Act* 2001 for the consent of the administrator or the leave of the Court before a "proceeding in a court against the company" in administration can be proceeded with did not apply because the Amended Notice of Motion was not a "proceeding against the company".

14 I made the following orders:

1. To the extent that leave is necessary, I grant leave to the first defendant to proceed with the Amended Notice of Motion filed on 31 March 2006.
2. I order that the first defendant serve all its evidence on the administrator together with the Motion by no later than 2 June 2006.
3. The Motion is listed on 9 June 2006.
4. I grant liberty to restore the matter to the List on 1 day's notice.
5. The first defendant is to pursue discussions with the administrator for the purposes of reaching an agreement as to the administrator's intentions in respect of the Summons.
6. On 9 June 2006 I require the administrator to be present to advise the Court of the plaintiff's intention in respect of the Summons.
7. Costs of today are reserved.

9 June 2006

15 On 9 June 2006 Mr Duke appeared for the Administrators and sought an adjournment of the Motion until after the second meeting of creditors on 20 June 2006. The defendant opposed the adjournment. Mr Duke also advised that the Administrators had been appointed on 24 May 2006 and that it would be desirable for the creditors to decide the Company's fate. Mr Duke indicated to the Court that there was a possible Deed of Company Arrangement to be entered into but did not have instructions on how the Deed might deal with the adjudicated/determined amounts. Mr Duke also advised that there were "no funds to be paid into Court".

16 The defendant's Amended Notice of Motion filed on 31 March 2006 was listed for hearing on 21 June 2006 and subsequently changed to 22 June 2006.

22 June 2006

17 The only transcript of the matter on 22 June 2006 when Mr S Duke appeared for the plaintiff and Ms M Fraser appeared for the defendants is as follows:

Mr Duke advised his instructions are not to consent but not to resist any of the orders sought in the defendant's amended notice of motion filed 31 March 2006.

Mr Duke advised a further matter first raised by Ms Fraser in submissions served on his client on Tuesday, Ms Fraser now seeks to add an additional order to further amend the notice of motion that the first defendant had an equitable floating charge over the assets of the plaintiff securing the unpaid portion of the adjudicated amount in the sum of $47,911 arising by operation of law on 16 November 2005. He resists that.

Her Honour advised she can make the orders in the Notice of Motion. Ms Fraser advised she is happy with that, the declaration was sought in effect in substitution for order 3 because on the last occasion Mr Duke told the Court the company had no funds which could be paid into Court.

Her Honour advised she would make order 3.

Her Honour: I make the orders in paragraph 1 to 4 of the first defendant's amended notice of motion filed on 31 March 2006.

18 There is an administrative notation on the file, "*Finalised*", but that was not part of the orders that were made on 22 June 2006.

Slip rule

19 On 23 June 2006 the solicitors for the Administrators wrote to the solicitors for the defendant in respect of the apparent anomaly between order 1 and order 3 made on 22 June 2006 and suggested that the orders should be adjusted under the slip rule. The defendant's solicitors apparently did not respond to this letter until August 2006 but, in any event, no approach was made to the Court in that regard.

Deed of Company Arrangement

20 A Deed of Company Arrangement dated 27 September 2006 (the Deed) was entered into between the Administrators, the plaintiff company and certain excluded creditors. Clause 6 of the Deed provides for the Fund ($110,000) to be distributed, after payment of the Administrators fees, to pay claims of creditors in full or proportionately. "Creditor" is defined to mean any person "whose claim against the Company would have been a provable debt if the Company had been wound up and any person … having any debt or claim, present or future, actual or contingent, liquidated or unliquidated, secured or unsecured in part or in whole, arising at law or in equity, arising out of contract, statute or tort, due or which may become due by the Company as a result of anything done or omitted to be done by or on behalf of the Company on or before" 24 May 2006. Clause 8.1.10 of the Deed provides the Administrators power, inter alia, to "bring, prosecute and defend in the name and on behalf of the Company" or in their name "any actions, suits or proceedings".

21 The Deed also provides relevantly:

13.1 This Deed may be pleaded by the Company against any Creditor in bar of any debt or claim that is admissible under this Deed and a Creditor (whether the Creditor's debt or claim is not admitted or established under this Deed) must not, before the termination of this Deed: …

13.1.3. take any further steps (including any step by way of legal or equitable execution) in any proceedings pending against or in relation to the Company as at [24 May 2006]; …

14. DISCHARGE OF DEBTS

The Creditors must accept their entitlements under this Deed, in full satisfaction and complete discharge of all debts or claims which they have or claim to have against the Company as at the date referred to in Item 3 of the Schedule (provided that any Creditor's right to claim under insurance held by the Company shall not be prejudiced hereby and that no Creditor is entitled to claim interest from the Company beyond the date referred to in Item 3 of the Schedule) and each Creditor will, if called upon to do so, execute and deliver to the Deed Administrators such forms of release of any such claim as the Deed Administrators require.

15. CLAIMS EXTINGUISHED

Upon the Company making all payments, if any, by way of clear funds, to the Deed Administrators as required under Clause 4 of this Deed, then all debts, claims, or liabilities to Creditors arising as a result of anything done, or omitted to be done, by or on behalf of the Company before the date referred to in Item 3 of the Schedule ***are forever extinguished****, expecting for the claims of Subordinated Creditors.*

Further correspondence

22 Correspondence apparently ensued between August and October 2006 between the Administrators' solicitors and the defendant's solicitors. The defendant's solicitors claimed that the plaintiff was in contempt of order 3 made on 22 June 2006. In October 2006 the Administrators' solicitors wrote to the defendant's solicitors in terms that included the following:

> We disagree with your implication that our client is in contempt of orders made by her Honour Justice Bergin on 22 June 2006 ("the orders"). The obligation to pay funds into Court under order 3 continued until "*the proceedings were determined*". Order 1 dismissed the proceedings, thereby determining those proceedings. We fail to see how our client can be in contempt of an order that no longer imposes any obligation on the relevant party.
>
> Since the date of the orders the Company has entered into a Deed of Company Arrangement. Section 444E of the *Corporations Act 2001* prevents your client from commencing or continuing any proceedings against the Company or taking any steps to enforce any judgments or orders against the Company without leave of the Court.
>
> The leave granted by her Honour Bergin J related only to the hearing of your client's Notice of Motion and did not extend to the enforcement of the Orders. Nor did it extend to taking any steps to enforce the judgment awarded by the Local Court against the Company in favour of your client.
>
> In any event, as you have previously been advised, the financial circumstances of the Company mean that any payment made into Court and distributed to your client (or another creditor) may be considered a preference.

23 The letter went on to reiterate that the Administrators could not be in contempt of any order and claimed that the defendant was an unsecured creditor of the Company and would be dealt with in the same manner as all other creditors in accordance with the terms of the Deed. The solicitors then concluded by claiming that they trusted that this resolved the matter.

Notice of Motion - 2007

24 Nothing further occurred in the matter until 7 March 2007 when the defendant filed a Notice of Motion returnable on 16 March 2006 seeking the following orders:

1. Leave, to the extent that leave be necessary to file this Notice of Motion.
2. A declaration that by failing, refusing or declining to pay the sum of $51,007.09 into Court, the plaintiff has disobeyed the order of the Court made on 22 June 2006.
3. An order that the sum of 51,007.09 be paid into Court within seven (7) days.
4. An order that the said sum be thereafter paid out to the first defendants; and
5. The plaintiff to pay the first defendant's costs of the Notice of Motion.

25 On 16 March 2007 when the defendant's Motion was returnable I granted leave to file in Court an Amended Notice of Motion and the first defendant's submissions. The Motion was listed for hearing on 30 March 2007. The Amended Notice of Motion sought the following orders:

1. Leave, to the extent that leave be necessary, to file a Notice of Motion.
2. Declaration that on the proper construction of order 3 made on 22 June 2006 the plaintiff was obliged to pay the sum of $51,007.09 into Court notwithstanding the making of order 1.
3. Order that the plaintiff comply with order 3 of the first defendant's Amended Notice of Motion filed on 31 March 2006 within 14 days.
4. Order that the plaintiff pay the first defendant's costs.

30 March 2007

26 The Amended Notice of Motion came on for hearing in the List on Friday 30 March 2007 when Mr E Finnane appeared for the Administrators and Ms Frazer appeared for the defendant. I refused to make the declaration sought in the Amended Notice of Motion and in short ex tempore reasons, which should be read with these reasons, I expressed the views that: (a) it did not seem to me that the proceedings had been "determined": (b) the proceedings had been struck out and were "lying dormant"; (c) the orders that were made on 22 June 2006 were infelicitous; (d) neither party had returned to the Court to adjust the orders; (e) having regard to the delay in raising the matter with the Court and the intervening event of the voluntary administration of the plaintiff I refused to make the declaration and indicated that at that stage I did not intend to take any step to change the orders made on 22 June 2006; (f) that the orders "still stand" and "the proceedings stand struck out as yet not determined and the order for payment into Court is still extant"; and (g) it was a matter for the defendant and the Administrators what steps were next taken.

27 A copy of the Deed of Company Arrangement was provided to the Court and after further debate Mr Finnane sought an order dismissing the proceedings and Ms Fraser sought leave to enforce order 3 made on 22 June 2006. I then reserved my judgment.

Consideration

28 Although leave was granted on 10 March 2006 to file a Motion "to strike out the plaintiff's claim for failing to prosecute the claim with due despatch" the basis of the defendant's application was the plaintiff's failure to comply with the orders made by Einstein J for the provision of particulars. The Amended Motion that was dealt with on 22 June 2006 sought an order that the "proceedings be struck out". The order that was made on 22 June 2006 was: I make the orders in paragraphs 1 to 4 of the first defendant's Amended Notice of motion filed on 31 March 2006. No formal order has been entered or taken out.

29 Part 12 rule 12.7 of the *Uniform Civil procedure Rules* 2005 provides relevantly:

12.7*(1) If a plaintiff does not prosecute the proceedings with due despatch, the court may order that the proceedings be dismissed or make such other order as the court thinks fit.*

30 The defendant did not seek an order that the proceedings be dismissed. It sought an order that the proceedings be struck out.

31 Section 61 of the *Civil Procedure Act* 2005 provides relevantly:

(3) If a party to whom such a direction has been given fails to comply with the direction, the court may, by order, do any one or more of the following:

(a) it may dismiss the proceedings, whether generally, in relation to a particular cause of action or in relation to the whole or part of a particular claim,
(b) it may strike out or limit any claim made by a plaintiff,
(c) it may strike out any defence filed by a defendant, and give judgment accordingly,
(d) it may strike out or amend any document filed by the party, either in whole or in part,
(e) it may strike out, disallow or reject any evidence that the party has adduced or seeks to adduce,
(f) it may direct the party to pay the whole or part of the costs of another party,
(g) it may make such other order or give such other direction as it considers appropriate.

(4) Subsection (3) does not limit any other power the court may have to take action of the kind referred to in that subsection or to take any other action that the court is empowered to take in relation to a failure to comply with a direction given by the court.

32 There is in s 61(a) and (b) the distinction between dismissal of proceedings and the strike out of claims. In ***Samuels v Linzi Dresses Ltd*** [1981] 1 QB 115 the English Court of Appeal reviewed the authorities in relation to what was described as an "*unless*" order, being in the nature of a self-executing order. At 125 Roskill LJ said: "… *There are many decisions of this Court and of course there is the decision of the House of Lords in* ***Birkett v James*** *[1978] A.C. 297, as to the principles which should be applied in striking out claims for want of prosecution. One principle now clearly established is that the Court will not, generally speaking, strike out a claim for want of prosecution where a*

plaintiff is free to issue a fresh writ. In the instant case the defendants would be free, if their counter claim was struck out, to issue a fresh writ covering the matters as raised by the counter claim. There would be no issue of estoppel or res judicata."

33 At 127 Lawton LJ referred to ***Whistler v Hancock*** and ***Wallis v Hepburn*** which referred to matters being "*defunct*" or "*dead*" respectively and continued:
The concept of the action being dead is one which does not fit in, as Roskill L.J. has pointed out, with the modern approach to striking out for want of prosecution.
Further the illogicality of the purported application of this concept to this case is shown by the order which is under consideration of this appeal. Because on the face of that order it is clear that the litigation is not dead; it is very much alive.

34 In ***Torrac Nominees Pty Ltd v Karabay; UWS Macarthur Sports & Recreation Association Inc v Karabay*** [2007] NSWCA 96 the Court of Appeal was dealing with, inter alia, the meaning of the expression "begun" in the context in which litigation was not only begun but also completed before a relevant date. Young CJ in Equity reviewed the authorities in relation to the question of whether an action "*had a scintilla of life in it*" notwithstanding that the record had been endorsed that it had been "completed" after a preliminary dismissal order under the *District Court Rules* had been made. The Chief Judge referred to what Lawton LJ said in ***Samuels v Linzi,*** and after reviewing relevant passages of the authorities at pars [54] to [64], including ***Bailey v Marinoff*** (1971) 125 CLR 529 (per Gibbs J at 544-545) ***FAI General Insurance Co Ltd v Southern Cross Exploration NL*** (1988) 165 CLR 268 (per Gaudron J at 289) and ***Harding v Bourke*** (2000) 48 NSWLR 598, said:

65 I cannot really say that this review has thrown much light on the situation. The reason why it was undertaken is that it seemed to me that if there was a scintilla of life left in the action it might be said that it had been begun but not completed.

66 However, the review indicates that, whilst some of the authorities recognise that a dead action may be reinstated, until some action is taken to do so, the action is "dead" ie completed.

35 In ***Baines v State Bank of New South Wales*** (1985) 2 NSWLR 729 Powell J was considering an order for dismissal of proceedings pursuant to a self-executing order for discovery. An order had been made that in default of compliance with the order for the provision of the list of documents the Statement of Claim would be "*struck out*". The plaintiffs sought an extension of time for the filing of the list of documents and the setting aside of the order that the Statement of Claim be struck out. Although his Honour was not persuaded that the plaintiff had established a case for an extension of time, he observed at 735, "*that unless a formal order has been taken out, or judgment entered, it is open to the Court to review its order and to extend the time for doing the relevant act even after the time originally appointed has expired*". His Honour went on to say that even if a formal order had been taken out "it would seem still to be open to the Court to do so".

36 In ***National Benzole Co Ltd v Gooch*** [1961] 1 WLR 1489 the plaintiffs were granted leave to sign final judgment against the defendant. The defendant appealed and the appeal was dismissed in Chambers. The defendant then gave notice of the appeal from that decision and the appeal was set down for hearing. Subsequently the defendant's solicitors drew up a document in which it was stated that they requested that the appeal "*be dismissed and struck out of the list*". The solicitors for the plaintiff endorsed that document with the words, "We consent". The President of the Court of Appeal subsequently initialled that document. The appeal was struck out and removed from the List, however the order was not drawn up.

37 The defendant moved the Court for an order that "no order or orders be drawn up or entered in this appeal until further order of the Court of Appeal". The defendant also sought leave to proceed with the appeal notwithstanding a request for the dismissal. Although the motion was dismissed on discretionary grounds, Upjohn LJ in dealing with the question of whether the appeal was still on foot or had come to an end, said at 1492:

I am of the opinion that the appeal remains on foot until a formal order is drawn up and entered. It is clear that this is so in the High Court: the action remains on foot and the court can entertain applications therein even after judgment and until an order is perfected in accordance with R.S.C., Ord.41, r. 1. For example, a judgment or order can be recalled: see ***In re Harrison's Share under a Settlement*** *[[1995] Ch. 260, C.A.; [1954] 3 W.L.R. 156]. In my judgment, the position is the same in this court. That seems to me plain from the cases to which we were referred:* ***In re Samuel*** *[[1945] Ch. 364] and* ***James Lamont & Co. Ltd. v. Hyland Ltd*** *[1950] 1 K.B. 585]. As the relevant passage in the judgment of Tucker L.J. in the latter case has been read by my Lord I will refrain from repeating it. We remain the masters of this appeal and can still entertain applications on it. In my judgment, the fact that the rather unusual words "and "struck out of the list" appear at the end of the document does not add anything. In my view, striking out the list, whether it be in the High Court or in the Court of Appeal, does not thereby bring an action or an appeal to an and: an order is required. Accordingly, in my judgment, we can entertain this application.*

38 In the present case the Administrators did not oppose the making of Order 3 on 22 June 2006. However on 30 March 2007 Mr Finanne submitted that there was no liability on the Administrator to comply with Order 3 because the order only required the payment into Court "pending the determination of the proceedings" and the proceedings had been "determined" by Order 1 striking out the proceedings.

39 Section 25(4)(b) of the Act provides:
(4) If the respondent commences proceedings to have the judgment set aside, the respondent: …

(b) is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

40 As I have already said there was no relief sought in the Summons setting aside the judgment in the Local Court, however a successful challenge to the Determinations would have had the consequence of the judgment being set aside. "*Determine*" means to "*bring to an end*": *The New Oxford Dictionary of English*; *The Macquarie Dictionary Federation Edition*. Although the expression "*final determination*" was not used in paragraph 3 of the Amended Notice of Motion, I am satisfied that the word "*determination*" in Order 3 made on 22 June 2006 means when the proceedings are brought to an end. The strike out of the proceedings is an interlocutory order: ***Hunt v Allied Bakeries Ltd*** [1956] 3 All ER 513 per Lord Evershed at 515; ***Little v Victoria*** [1998] 4 VR 596. A "dismissal" for want of prosecution has also been considered to be interlocutory in nature; ***National Mutual Life Association of Australasia Ltd v Grosvenor Hill (Qld)*** (2001) 183 ALR 700 at [8]-[9]. The orders made on 22 June 2006 did not bring the proceedings to an end.

41 The intention of s 25(4) of the Act is that the money is to remain in Court, "*as security*" until the application to set aside the judgment, or the application to have the Determinations declared void (depending on the circumstances of the particular case), has come to an end. The present proceedings have not yet been "*determined*" and the order made for the payment into Court, as I said in my ex tempore reasons on 30 March 2007, "*still stands*". The Administrators did not submit that there was no power to make Order 3 or that it was a nullity by reason of Order 1 having preceded it. It seems to me that there was jurisdiction to make the order: ***Jackson v Sterling Industries Limited*** (1987) 162 CLR 612 per Mason CJ at 616 and Deane J at 627.

42 As I have said earlier I allowed the parties to make oral applications after I delivered my ex tempore reasons on 30 March 2007. The plaintiff now seeks an order dismissing its proceedings, that is, bringing them to an end. The defendant opposes the order if the effect of the dismissal is to remove any requirement for the Administrators to pay money into Court and seeks leave to enforce Order 3 made on 22 June 2006. The Administrators conceded that the defendant had not waived any rights it may have to enforce the order by reason of it having voted in the administration. The Administrators also accepted that the defendant could enforce the order with leave but made the submission that leave should not be granted.

43 Section 25(4) of the Act should not be utilised to secure payment of an amount the subject of a determination under the Act if there is no challenge to the determination pursuant to which a judgment has been obtained. However where, as here, there was a challenge an order for such security was appropriate. The orders made on 22 June 2006 were not taken out or entered and no application was made for leave under s 440F of the *Corporations Act* 2001 to enforce Order 3.

44 The Administrators now claim that the Deed of Company Arrangement binds the defendant as a creditor and it must accept its entitlement pursuant to clause 14 of the Deed. The defendant submitted that Order 3 was made after the specified day in the Deed, 24 May 2006, and clause 14 does not preclude it from seeking to enforce that order. On the view that I reached on 30 March 2007, and reiterated in this judgment, Order 3 is extant until the proceedings are finally determined and the Administrators have an obligation to pay the money into Court. If that money had been paid into Court and the Administrator had then, as it has now, sought to have an order dismissing its proceedings an application could have been made by the defendant to have the money paid out to it.

45 The defendant received a Determination in its favour and proceeded appropriately to obtain judgment against the plaintiff. The plaintiff's successful ex parte application for a stay of that judgment and the subsequent vagaries of the Local Court listing practice resulting in the matter not being reached, deprived the defendant of the benefit of the judgment and garnishee orders that it had obtained. The challenge to the Determinations combined with the stay in the Local Court kept the defendant out of its money and the voluntary administration two days before the date for hearing of the Notice of Motion caused further delay and difficulties for the defendant in seeking to recover the amounts awarded to it under the Determinations.

46 The Administrators did not oppose Order 3 on 22 June 2006. The attempt to then suggest that there was no obligation to comply with Order 3 led to further debate and delay. I took that delay into account in relation to the application for a declaration and it is a matter that I have taken into account in respect of these applications. All that was said on behalf of the Administrators on 22 June 2006 was that there was no money to be paid into Court, not that there was no utility in making such an order. Indeed it is obvious from the Deed of Company Arrangement that a fund of money became available. The plaintiff has taken advantage of the situation without raising the matter with the Court, notwithstanding that the solicitors for the Administrators suggested on 23 June 2006 that the parties return to Court.

47 It is true that the amount determined in the defendant's favour was a debt as at the date of the entry of judgment in the Local Court but the plaintiff successfully stayed that judgment. Although Order 2 was made on 22 June 2006 lifting that stay that order was not perfected by the formal entry of the order and thus the stay remained in force. The order for the payment of security postdates the specified date in the Deed, notwithstanding that the Determinations and the judgment predated such date. The Administrators submitted that the judgment debt was the underlying debt warranting the order for security made on 22 June 2006 and that it has "*gone in lieu of the Deed of Company Arrangement*". As at 22 June 2006 that judgement debt was stayed as a result of the plaintiff's application and the proceedings challenging the Determinations were on foot. The order for the payment of

security postdates the specified date in the Deed and I am not satisfied that the defendant is precluded by clause 14 of the Deed to seek to enforce Order 3.

48 I am satisfied that justice dictates that the application for an order dismissing the proceedings should not be made until after the defendant has had the opportunity to enforce Order 3 made on 22 June 2006.

49 I make the following Orders:

1. I grant leave to the defendant to enter order 3 and 4 in the Amended Notice of Motion as made on 22 June 2006;
2. I refuse leave to either party to enter Order 1 made on 22 June 2006;
3. I grant leave to the defendant to enforce Order 3 made on 22 June 2006 including making any application for payment out of monies paid into Court pursuant to that order;
4. The plaintiff's application to dismiss the proceedings is adjourned to allow the defendant to enforce Order 3 made on 22 June 2006;
5. Any application for the entry of order 2 made on 22 June 2006 and/or the enforcement of the judgment in the Local Court and the plaintiff's application for an order for dismissal of these proceedings are listed for directions on 10 August 2007;
6. I grant liberty to restore the matter to the List on 3 day's notice.

E Finnane (plaintiff) instructed by Barclays Legal
M Fraser (first defendant) instructed by Ledlin Partners